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# Federal Register

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WHEN: Tuesday, June 8, 2010
9 a.m.–12:30 p.m.

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

RESERVATIONS: (202) 741–6008

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# Presidential Documents

**Title 3—**

## The President

**Memorandum of May 3, 2010**

## Task Force on Space Industry Workforce and Economic Development

**Memorandum for the Secretary of Defense[,] the Secretary of Commerce[,] the Secretary of Labor[,] the Secretary of Housing and Urban Development[,] the Secretary of Transportation[,] the Secretary of Education[,] the Director of the Office of Management and Budget[,] the Administrator of the Small Business Administration[,] the Administrator of the National Aeronautics and Space Administration[,] the Chair of the Council of Economic Advisers[,] the Director of National Intelligence[,] the Director of the Office of Science and Technology Policy[, and] the Director of the National Economic Council**

My Administration is committed to implementing a bold, new approach to human spaceflight. Supported by a $6 billion increase to the National Aeronautics and Space Administration's (NASA) budget over the next 5 years, this strategy will foster the development of path-breaking technologies, increase the reach and reduce the cost of human and robotic exploration of space, and help create thousands of new jobs.

NASA's budget also includes $429 million next year, and $1.9 billion over the next 5 years, to modernize the Kennedy Space Center and other nearby space launch facilities in Florida. This modernization effort will help spur new commercial business and innovation and provide additional good jobs to the region. While all of the new aspects of my Administration's plan together will create thousands of new jobs in Florida, past decisions to end the Space Shuttle program will still affect families and communities along Florida's "Space Coast."

Building on this significant new investment at the Kennedy Space Center and my increased budget for NASA overall, I am committed to taking additional steps to help local economies like Florida's Space Coast adapt and thrive in the years ahead. The men and women who work in Florida's aerospace industry are some of the most talented and highly trained in the Nation. It is critical that their skills are tapped as we transform and expand the country's space exploration efforts. That is why I am launching a $40 million, multi-agency initiative to help the Space Coast transform their economies and prepare their workers for the opportunities of tomorrow. This effort will build on and complement ongoing local and Federal economic and workforce-development efforts through a Task Force composed of senior-level Administration officials from relevant agencies that will construct an economic development action plan by August 15, 2010.

To these ends, I hereby direct the following:

**Section 1.** *Establishment of the Task Force on Space Industry Workforce and Economic Development.* There is established a Task Force on Space Industry Workforce and Economic Development (Task Force) to develop, in collaboration with local stakeholders, an interagency action plan to facilitate economic development strategies and plans along the Space Coast and to provide training and other opportunities for affected aerospace workers so they are equipped to contribute to new developments in America's space program and related industries. The Secretary of Commerce and the Administrator of NASA shall serve as Co-Chairs of the Task Force.

(a) *Membership of the Task Force.* In addition to the Co-Chairs, the Task Force shall consist of the following members:

(i) the Secretary of Defense;

(ii) the Secretary of Labor;

(iii) the Secretary of Housing and Urban Development;

(iv) the Secretary of Transportation;

(v) the Secretary of Education;

(vi) the Chair of the Council of Economic Advisers;

(vii) the Director of the Office of Management and Budget;

(viii) the Administrator of the Small Business Administration;

(ix) the Director of National Intelligence;

(x) the Director of the Office of Science and Technology Policy;

(xi) the Director of the National Economic Council; and

(xii) the heads of such other executive departments, agencies, and offices as the President may, from time to time, designate.

A member of the Task Force may designate, to perform the Task Force functions of the member, a senior-level official who is a part of the member's department, agency, or office, and who is a full-time officer or employee of the Federal Government.

(b) *Administration.* The Co-Chairs shall convene regular meetings of the Task Force, determine its agenda, and direct its work. At the direction of the Co-Chairs, the Task Force may establish subgroups consisting exclusively of Task Force members or their designees, as appropriate.

**Sec. 2.** *Mission and Functions.* The Task Force shall work with local stakeholders and executive departments and agencies to equip Space Coast and other affected workers to take advantage of new opportunities and expand the region's economic base.

The Task Force will perform the following functions, to the extent permitted by law:

(a) provide leadership and coordination of Federal Government resources to facilitate workforce and economic development opportunities for aerospace communities and workers affected by new developments in America's space exploration program. Such support may include the use of personnel, technical expertise, and available financial resources, and may be used to provide a coordinated Federal response to the needs of individual States, regions, municipalities, and communities adversely affected by space industry changes;

(b) provide recommendations to the President on ways Federal policies and programs can address issues of special importance to aerospace communities and workers; and

(c) help ensure that officials from throughout the executive branch, including officials on existing committees or task forces addressing technological development, research, or aerospace issues, advance the President's agenda for the transformation of America's space exploration program and support the coordination of Federal economic adjustment assistance activities.

**Sec. 3.** *Outreach.* Consistent with the objectives set forth in this memorandum, the Task Force, in accordance with applicable law, in addition to holding regular meetings, shall conduct outreach to representatives of nonprofit organizations; business; labor: State, local, and tribal governments; elected officials; and other interested persons that will assist in bringing to the President's attention concerns, ideas, and policy options for expanding and improving efforts to create jobs and economic growth in affected aerospace communities. The Task Force shall hold inaugural meetings with stakeholders within 60 days of the date of this memorandum.

**Sec. 4.** *Task Force Plan for Space Industry Workforce and Economic Development.* On or before August 15, 2010, the Task Force shall develop and submit to the President a comprehensive plan that:

(a) recommends how best to invest $40 million in transition assistance funding to ensure robust workforce and economic development in those communities within Florida affected by transitions in America's space exploration program;

(b) describes how the plan will build on and complement ongoing economic and workforce development efforts;

(c) explores future workforce and economic development activities that could be undertaken for affected aerospace communities in other States, as appropriate;

(d) identifies areas of collaboration with other public or nongovernmental actors to achieve the objectives of the Task Force; and

(e) details a coordinated implementation strategy by executive departments and agencies to meet the objectives of the Task Force.

**Sec. 5.** *Termination.* The Task Force shall terminate 3 years after the date of this memorandum unless extended by the President.

**Sec. 6.** *General Provisions.* (a) The heads of executive departments and agencies shall assist and provide information to the Task Force, consistent with applicable law, as may be necessary to carry out the functions of the Task Force. Each executive department and agency shall bear its own expense for participating in the Task Force; and

(b) nothing in this memorandum shall be construed to impair or otherwise affect:

(i) authority granted by law to an executive department, agency, or the head thereof; or

(ii) functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(c) This memorandum shall be implemented consistent with applicable law and subject to the availability of appropriations.

(d) This memorandum is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

(e) The Administrator of the National Aeronautics and Space Administration shall publish this memorandum in the *Federal Register*.

THE WHITE HOUSE,
*WASHINGTON, May 3, 2010*

[FR Doc. 2010–10913
Filed 5–5–10; 8:45 am]
Billing code 7510–13–P

# Rules and Regulations

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## FEDERAL RETIREMENT THRIFT INVESTMENT BOARD

### 5 CFR Parts 1600 and 1650

### Employee Contribution Elections and Contribution Allocations; Methods of Withdrawing Funds From the Thrift Savings Plan

**AGENCY:** Federal Retirement Thrift Investment Board.

**ACTION:** Correcting amendments.

**SUMMARY:** This document contains corrections to final regulations, which were published in the **Federal Register** of June 14, 2003 (68 FR 35492) and April 25, 2005 (70 FR 21290). As published, the final regulations contain errors or omissions that may be misleading and need to be clarified.

**DATES:** Effective on May 6, 2010.

**FOR FURTHER INFORMATION CONTACT:** Laurissa Stokes at 202–942–1645.

**SUPPLEMENTARY INFORMATION:** The Agency administers the Thrift Savings Plan (TSP), which was established by the Federal Employees' Retirement System Act of 1986 (FERSA), Public Law 99–335, 100 Stat. 514. The TSP provisions of FERSA are codified, as amended, largely at 5 U.S.C. 8351 and 8401–79. The TSP is a tax-deferred retirement savings plan for Federal civilian employees and members of the uniformed services. The TSP is similar to cash or deferred arrangements established for private-sector employees under section 401(k) of the Internal Revenue Code (26 U.S.C. 401(k)).

The final regulations that are the subject of these corrections were published in the **Federal Register** on June 14, 2003 (68 FR 35492) and April 25, 2005 (70 FR 21290). As published, the final regulations contain errors or omissions that may be misleading and need to be clarified.

Section 1600.11 of 5 CFR contains a cross-reference to section 1600.14 of 5 CFR. Instead it should cross-reference section 1600.12. This final rule corrects the erroneous cross-reference in § 1600.11.

Section 1650.31(b) of 5 CFR contains a typographical error. This final rule amends the word "tradition" to read "traditional."

**Regulatory Flexibility Act**

I certify that this regulation will not have a significant economic impact on a substantial number of small entities. This regulation will affect Federal employees and members of the uniformed services who participate in the Thrift Savings Plan, which is a Federal defined contribution retirement savings plan created under the Federal Employees' Retirement System Act of 1986 (FERSA), Public Law 99–335, 100 Stat. 514, and which is administered by the Agency.

**Paperwork Reduction Act**

I certify that these regulations do not require additional reporting under the criteria of the Paperwork Reduction Act.

**Unfunded Mandates Reform Act of 1995**

Pursuant to the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 602, 632, 653, 1501–1571, the effects of this regulation on state, local, and tribal governments and the private sector have been assessed. This regulation will not compel the expenditure in any one year of $100 million or more by state, local, and tribal governments, in the aggregate, or by the private sector. Therefore, a statement under section 1532 is not required.

**Submission to Congress and the Government Accountability Office**

Pursuant to 5 U.S.C. 810(a)(1)(A), the Agency submitted 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 before publication of this rule in the **Federal Register.** This rule is not a major rule as defined at 5 U.S.C. 804(2).

**List of Subjects**

*5 CFR Part 1600*

Government employees, Pensions, Retirement.

*5 CFR Part 1650*

Alimony, Claims, Government employees, Pensions, Retirement.

**Gregory T. Long,**

*Executive Director, Federal Retirement Thrift Investment Board.*

■ Accordingly, 5 CFR parts 1600 and 1650 are corrected by making the following correcting amendments:

## PART 1600—EMPLOYEE CONTRIBUTION ELECTIONS AND CONTRIBUTION ALLOCATIONS

■ 1. The authority citation for part 1600 continues to read as follows:

**Authority:** 5 U.S.C. 8351, 8432(a), 8432(b), 8432(c), 8432(j), 8474(b)(5) and (c)(1), Thrift Savings Plan Enhancement Act of 2009, section 102.

■ 2. Revise paragraph (a) of § 1600.11 to read as follows:

**§ 1600.11 Types of elections.**

(a) *Contribution elections.* A contribution election must be made pursuant to § 1600.12 and includes the following types of elections:

(1) To make employee contributions;

(2) To change the amount of employee contributions; or

(3) To terminate employee contributions.

* * * * *

## PART 1650—METHODS OF WITHDRAWING FUNDS FROM THE THRIFT SAVINGS PLAN

■ 3. The authority citation for part 1650 continues to read as follows:

**Authority:** 5 U.S.C. 8351, 8433, 8434, 8435, 8474(b)(5), and 8474(c)(1).

■ 4. Revise paragraph (b) of § 1650.31 to read as follows:

**§ 1650.31 Age-based withdrawals.**

* * * * *

(b) An age-based withdrawal is an eligible rollover distribution, so a participant may request that the TSP transfer all or a portion of the withdrawal to a traditional IRA or an eligible employer plan.

* * * * *

[FR Doc. 2010–10700 Filed 5–5–10; 8:45 am]

BILLING CODE 6760–01–P

## NUCLEAR REGULATORY COMMISSION

### 10 CFR Part 72

**RIN 3150–AI75**

**[NRC–2009–0538]**

## List of Approved Spent Fuel Storage Casks: NUHOMS® HD System Revision 1

**AGENCY:** Nuclear Regulatory Commission.

**ACTION:** Direct final rule.

**SUMMARY:** The U.S. Nuclear Regulatory Commission (NRC) is amending its spent fuel storage regulations by revising the Transnuclear, Inc. (TN) NUHOMS® HD System listing within the "List of Approved Spent Fuel Storage Casks" to include Amendment No. 1 to Certificate of Compliance (CoC) Number 1030. Amendment No. 1 will modify the CoC to add Combustion Engineering 16×16 class fuel assemblies as authorized contents, reduce the minimum off-normal ambient temperature from −20°F to −21°F, expand the authorized contents of the NUHOMS® HD System to include pressurized water reactor fuel assemblies with control components, reduce the minimum initial enrichment of fuel assemblies from 1.5 weight percent uranium-235 to 0.2 weight percent uranium-235, clarify the requirements of reconstituted fuel assemblies, add requirements to qualify metal matrix composite neutron absorbers with integral aluminum cladding, delete use of nitrogen for draining the water from the dry shielded canister (DSC) and allow only helium as a cover gas during DSC cavity water removal operations, and make corresponding changes to the technical specifications.

**DATES:** The final rule is effective July 20, 2010, unless significant adverse comments are received by June 7, 2010. A significant adverse comment is a comment where the commenter explains why the rule would be inappropriate, including challenges to the rule's underlying premise or approach, or would be ineffective or unacceptable without a change. If the rule is withdrawn, timely notice will be published in the **Federal Register**.

**ADDRESSES:** You can access publicly available documents related to this document using the following methods:

*Federal e-Rulemaking Portal:* Go to *http://www.regulations.gov* and search for documents filed under Docket ID [NRC–2009–0538]. Address questions about NRC dockets to Carol Gallagher 301–492–3668; e-mail *Carol.Gallagher@nrc.gov.*

*NRC's Public Document Room (PDR):* The public may examine and have copied for a fee publicly available documents at the NRC's PDR, Public File Area O–1F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland.

*NRC's Agencywide Documents Access and Management System (ADAMS):* Publicly available documents created or received at the NRC are available electronically at the NRC's Electronic Reading Room at *http://www.nrc.gov/reading-rm/adams.html.* From this page, the public can gain entry into ADAMS, which provides text and image files of NRC's public documents. If you do not have access to ADAMS or if there are problems in accessing the documents located in ADAMS, contact the NRC's PDR Reference staff at 1–800–397–4209, 301–415–4737, or by e-mail to *pdr.resource@nrc.gov.* An electronic copy of the proposed CoC, technical specifications (TS), and preliminary safety evaluation report (SER) can be found under ADAMS Package Number ML092050827.

CoC No. 1030, the TS, the preliminary SER, and the environmental assessment are available for inspection at the NRC PDR, Public File Area O–1F21, One White Flint North, 11555 Rockville Pike, Rockville, MD. Single copies of these documents may be obtained from Jayne M. McCausland, Office of Federal and State Materials and Environmental Management Programs, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, telephone (301) 415–6219, e-mail *Jayne.McCausland@nrc.gov.*

**FOR FURTHER INFORMATION CONTACT:** Jayne M. McCausland, Office of Federal and State Materials and Environmental Management Programs, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, telephone (301) 415–6219, e-mail *Jayne.McCausland@nrc.gov.*

**SUPPLEMENTARY INFORMATION:**

### Background

Section 218(a) of the Nuclear Waste Policy Act of 1982, as amended (NWPA), requires that "[t]he Secretary [of the U. S. Department of Energy (DOE)] shall establish a demonstration program, in cooperation with the private sector, for the dry storage of spent nuclear fuel at civilian nuclear power reactor sites, with the objective of establishing one or more technologies that the [Nuclear Regulatory] Commission may, by rule, approve for use at the sites of civilian nuclear power reactors without, to the maximum extent practicable, the need for additional site-specific approvals by the Commission." Section 133 of the NWPA states, in part, that "[t]he Commission shall, by rule, establish procedures for the licensing of any technology approved by the Commission under Section 218(a) for use at the site of any civilian nuclear power reactor."

To implement this mandate, the NRC approved dry storage of spent nuclear fuel in NRC-approved casks under a general license by publishing a final rule in 10 CFR Part 72, which added a new Subpart K within 10 CFR Part 72, entitled "General License for Storage of Spent Fuel at Power Reactor Sites" (55 FR 29181; July 18, 1990). This rule also established a new Subpart L within 10 CFR Part 72, entitled "Approval of Spent Fuel Storage Casks," which contains procedures and criteria for obtaining NRC approval of spent fuel storage cask designs. The NRC subsequently issued a final rule on December 11, 2006 (71 FR 71463), that approved the NUHOMS® HD System cask design and added it to the list of NRC-approved cask designs in 10 CFR 72.214 as CoC No. 1030.

### Discussion

On November 1, 2007, and as supplemented on December 15, 2008, February 19, April 30, May 26, and June 10, 2009, TN, the holder of CoC No. 1030, submitted an application to the NRC that requested an amendment to CoC No. 1030. Specifically, TN requested modifications to the cask design to add Combustion Engineering (CE) 16×16 class fuel assemblies as authorized contents (the system is currently authorized to store CE 14×14, Westinghouse (WE) 15×15, and WE 17×17 classes only); reduce the minimum off-normal ambient temperature from −20°F to −21°F; expand the authorized contents of the NUHOMS® HD System to include pressurized water reactor (PWR) fuel assemblies with control components; reduce the minimum initial enrichment of fuel assemblies from 1.5 weight percent uranium-235 to 0.2 weight percent uranium-235; clarify the requirements of reconstituted fuel assemblies, add requirements to qualify metal matrix composite neutron absorbers with integral aluminum cladding; delete use of nitrogen for draining the water from the DSC, and allow only helium as a cover gas during DSC cavity water removal operations; and make corresponding changes to the TS as described in the SER. As documented in the SER, the NRC staff performed a detailed safety evaluation of the proposed CoC amendment request

and found that an acceptable safety margin is maintained. In addition, the NRC staff has determined that there continues to be reasonable assurance that public health and safety will be adequately protected.

This direct final rule revises the NUHOMS® HD System listing in 10 CFR 72.214 by adding Amendment No. 1 to CoC No. 1030. The amendment consists of the changes described above, as set forth in the revised CoC and TS. The particular TS which are changed are identified in the SER.

The amended NUHOMS® HD System cask design, when used under the conditions specified in the CoC, the TS, and NRC regulations, will meet the requirements of Part 72; thus, adequate protection of public health and safety will continue to be ensured. When this direct final rule becomes effective, persons who hold a general license under 10 CFR 72.210 may load spent nuclear fuel into NUHOMS® HD System casks that meet the criteria of Amendment No. 1 to CoC No. 1030 under 10 CFR 72.212.

**Discussion of Amendments by Section**

**Section 72.214 List of approved spent fuel storage casks.**

Certificate No. 1030 is revised by adding the effective date of Amendment Number 1.

**Procedural Background**

This rule is limited to the changes contained in Amendment 1 to CoC No. 1030 and does not include other aspects of the NUHOMS® HD System. The NRC is using the "direct final rule procedure" to issue this amendment because it represents a limited and routine change to an existing CoC that is expected to be noncontroversial. Adequate protection of public health and safety continues to be ensured. The amendment to the rule will become effective on July 20, 2010. However, if the NRC receives significant adverse comments on this direct final rule by June 7, 2010, then the NRC will publish a document that withdraws this action and will subsequently address the comments received in a final rule as a response to the companion proposed rule published elsewhere in this issue of the **Federal Register**. Absent significant modifications to the proposed revisions requiring republication, the NRC will not initiate a second comment period on this action.

A significant adverse comment is a comment where the commenter explains why the rule would be inappropriate, including challenges to the rule's underlying premise or approach, or would be ineffective or unacceptable without a change. A comment is adverse and significant if:

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

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

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

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

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

(3) The comment causes the NRC staff to make a change (other than editorial) to the rule, CoC, or TS.

**Voluntary Consensus Standards**

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

**Agreement State Compatibility**

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

**Plain Language**

The Presidential Memorandum, "Plain Language in Government Writing," published June 10, 1998 (63 FR 31883), directed that the Government's documents be in clear and accessible language. The NRC requests comments on this direct final rule specifically with respect to the clarity and effectiveness of the language used. Comments should be sent to the address listed under the heading **ADDRESSES**, above.

**Finding of No Significant Environmental Impact: Availability**

Under the National Environmental Policy Act of 1969, as amended, and the NRC regulations in Subpart A of 10 CFR Part 51, the NRC has determined that this rule, if adopted, would not be a major Federal action significantly affecting the quality of the human environment and, therefore, an environmental impact statement is not required. The NRC has prepared an environmental assessment and, on the basis of this environmental assessment, has made a finding of no significant impact. This rule will amend the CoC for the NUHOMS® HD System cask design within the list of approved spent fuel storage casks that power reactor licensees can use to store spent fuel at reactor sites under a general license. The amendment will add CE 16x16 class fuel assemblies as authorized contents; reduce the minimum off-normal ambient temperature from −20°F to −21°F; expand the authorized contents of the NUHOMS® HD System to include PWR fuel assemblies with control components; reduce the minimum initial enrichment of fuel assemblies from 1.5 weight percent uranium-235 to 0.2 weight percent uranium-235; clarify the requirements of reconstituted fuel assemblies; add requirements to qualify metal matrix composite neutron absorbers with integral aluminum cladding; delete use of nitrogen for draining the water from the DSC, and allow only helium as a cover gas during DSC cavity water removal operations; and make corresponding changes to the TS as described in the SER.

The environmental assessment and finding of no significant impact on which this determination is based are available for inspection at the NRC Public Document Room, Public File Area O–1F21, One White Flint North, 11555 Rockville Pike, Rockville, MD. Single copies of the environmental assessment and finding of no significant impact are available from Jayne M. McCausland, Office of Federal and State

Materials and Environmental Management Programs, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, telephone (301) 415–6219, e-mail *Jayne.McCausland@nrc.gov.*

**Paperwork Reduction Act Statement**

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

**Public Protection Notification**

The NRC may not conduct or sponsor, and a person is not required to respond to, a request for information or an information collection requirement unless the requesting document displays a currently valid OMB control number.

**Regulatory Analysis**

On July 18, 1990 (55 FR 29181), the NRC issued an amendment to 10 CFR Part 72 to provide for the storage of spent nuclear fuel under a general license in cask designs approved by the NRC. Any nuclear power reactor licensee can use NRC-approved cask designs to store spent nuclear fuel if it notifies the NRC in advance, the spent fuel is stored under the conditions specified in the cask's CoC, and the conditions of the general license are met. A list of NRC-approved cask designs is contained in 10 CFR 72.214. On December 11, 2006 (71 FR 71463), the NRC issued an amendment to Part 72 that approved the NUHOMS® HD System cask design by adding it to the list of NRC-approved cask designs in 10 CFR 72.214. On November 1, 2007, and as supplemented on December 15, 2008, February 19, April 30, May 26, and June 10, 2009, the certificate holder (TN) submitted an application to the NRC to amend CoC No. 1030 to add CE 16x16 class fuel assemblies as authorized contents; reduce the minimum off-normal ambient temperature from −20°F to −21°F; expand the authorized contents of the NUHOMS® HD System to include PWR fuel assemblies with control components; reduce the minimum initial enrichment of fuel assemblies from 1.5 weight percent uranium-235 to 0.2 weight percent uranium-235; clarify the requirements of reconstituted fuel assemblies; add requirements to qualify metal matrix composite neutron absorbers with integral aluminum cladding; delete use of nitrogen for draining the water from the DSC, and allow only helium as a cover gas during DSC cavity water removal operations; and make corresponding changes to the TS as described in the SER.

The alternative to this action is to withhold approval of Amendment No. 1 and to require any Part 72 general licensee, seeking to load fuel into NUHOMS® HD System casks under the changes described in Amendment No. 1, to request an exemption from the requirements of 10 CFR 72.212 and 72.214. Under this alternative, each interested Part 72 licensee would have to prepare, and the NRC would have to review, a separate exemption request, thereby increasing the administrative burden upon the NRC and the costs to each licensee.

Approval of the direct final rule is consistent with previous NRC actions. Further, as documented in the SER and the environmental assessment, the direct final rule will have no adverse effect on public health and safety. This direct final rule has no significant identifiable impact or benefit on other Government agencies. Based on this regulatory analysis, the NRC concludes that the requirements of the direct final rule are commensurate with the NRC's responsibilities for public health and safety and the common defense and security. No other available alternative is believed to be as satisfactory, and thus, this action is recommended.

**Regulatory Flexibility Certification**

Under the Regulatory Flexibility Act of 1980 (5 U.S.C. 605(b)), the NRC certifies that this rule will not, if issued, have a significant economic impact on a substantial number of small entities. This direct final rule affects only nuclear power plant licensees and TN. These entities do not fall within the scope of the definition of "small entities" set forth in the Regulatory Flexibility Act or the size standards established by the NRC (10 CFR 2.810).

**Backfit Analysis**

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

**Congressional Review Act**

Under the Congressional Review Act of 1996, the NRC has determined that this action is not a major rule and has verified this determination with the Office of Information and Regulatory Affairs, Office of Management and Budget.

**List of Subjects in 10 CFR Part 72**

Administrative practice and procedure, Hazardous waste, Nuclear materials, Occupational safety and health, Radiation protection, Reporting and recordkeeping requirements, Security measures, Spent fuel, Whistleblowing.

■ For the reasons set out in the preamble and under the authority of the Atomic Energy Act of 1954, as amended; the Energy Reorganization Act of 1974, as amended; the Nuclear Waste Policy Act of 1982, as amended; and 5 U.S.C. 552 and 553; the NRC is adopting the following amendments to 10 CFR Part 72.

## PART 72—LICENSING REQUIREMENTS FOR THE INDEPENDENT STORAGE OF SPENT NUCLEAR FUEL, HIGH-LEVEL RADIOACTIVE WASTE, AND REACTOR-RELATED GREATER THAN CLASS C WASTE

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

**Authority:** Secs. 51, 53, 57, 62, 63, 65, 69, 81, 161, 182, 183, 184, 186, 187, 189, 68 Stat. 929, 930, 932, 933, 934, 935, 948, 953, 954, 955, as amended, sec. 234, 83 Stat. 444, as amended (42 U.S.C. 2071, 2073, 2077, 2092, 2093, 2095, 2099, 2111, 2201, 2232, 2233, 2234, 2236, 2237, 2238, 2282); sec. 274, Pub. L. 86–373, 73 Stat. 688, as amended (42 U.S.C. 2021); sec. 201, as amended, 202, 206, 88 Stat. 1242, as amended, 1244, 1246 (42 U.S.C. 5841, 5842, 5846); Pub. L. 95–601, sec. 10, 92 Stat. 2951 as amended by Pub. L. 102–486, sec. 7902, 106 Stat. 3123 (42 U.S.C. 5851); sec. 102, Pub. L. 91–190, 83 Stat. 853 (42 U.S.C. 4332); secs. 131, 132, 133, 135, 137, 141, Pub. L. 97–425, 96 Stat. 2229, 2230, 2232, 2241, sec. 148, Pub. L. 100–203, 101 Stat. 1330–235 (42 U.S.C. 10151, 10152, 10153, 10155, 10157, 10161, 10168); sec. 1704, 112 Stat. 2750 (44 U.S.C. 3504 note); sec. 651(e), Pub. L. 109–58, 119 Stat. 806–10 (42 U.S.C. 2014, 2021, 2021b, 2111).

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

■ 2. In § 72.214, Certificate of Compliance 1030 is revised to read as follows:

**§ 72.214 List of approved spent fuel storage casks.**

* * * * *

Certificate Number: 1030.

Initial Certificate Effective Date: January 10, 2007.

Amendment No. 1 Effective Date: July 20, 2010.

SAR Submitted by: Transnuclear, Inc.

SAR Title: Final Safety Analysis Report for the NUHOMS® HD Horizontal Modular Storage System for Irradiated Nuclear Fuel.

Docket Number: 72–1030.

Certificate Expiration Date: January 10, 2027.

Model Number: NUHOMS® HD–32PTH.

* * * * *

Dated at Rockville, Maryland, this 19th day of April, 2010.

For the Nuclear Regulatory Commission.

**R.W. Borchardt,**

*Executive Director for Operations.*

[FR Doc. 2010–10677 Filed 5–5–10; 8:45 am]

**BILLING CODE 7590–01–P**

## DEPARTMENT OF TRANSPORTATION

## Federal Aviation Administration

## 14 CFR Part 71

**[Docket No. FAA–2010–0008; Airspace Docket No. 09–ANM–21]**

## Modification of Jet Route J–3; Spokane, WA

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

**ACTION:** Final rule.

**SUMMARY:** This action modifies Jet Route J–3 by terminating the route at the Spokane, WA, VHF omnidirectional range/tactical air navigation (VORTAC) instead of the Canadian border. This action is necessary for the safety and management of instrument flight rules (IFR) operations within the National Airspace System (NAS).

**DATES:** Effective date 0901 UTC, July 29, 2010. 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:** Ken McElroy, Airspace and Rules Group, Office of System Operations Airspace and AIM, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; telephone: (202) 267–8783.

**History**

On February 4, 2010, the FAA published in the **Federal Register** a notice of proposed rulemaking (NPRM) to modify J–3 Spokane, WA. (75 FR 5703). Interested parties were invited to participate in this rulemaking effort by submitting written comments on this proposal to the FAA. No comments were received in response to the NPRM, therefore, this amendment is the same as that proposed in the NPRM.

**The Rule**

This action amends Title 14 Code of Federal Regulations (14 CFR) part 71 by removing the segment of J–3 that extends from the Spokane VORTAC to Cranbrook, BC. The route terminates at the EDGES fix located on the United States and Canadian border. The FAA has determined that this segment of J–3 is not required since the Jet Route, as currently described, terminates or originates at a point in space on the international border and does not meet or connect to any corresponding airway within Canadian airspace. Additionally, the segment between the Spokane VORTAC and Cranbrook, BC VOR/DME causes confusion because it appears that pilots can file a flight plan all the way to the Cranbrook, BC VOR/DME, however, the computer rejects the flight plans filed to the Cranbrook, BC VOR/DME.

Jet Routes are published in paragraph 2004 of FAA Order 7400.9T, dated August 27, 2009 and effective September 15, 2009, which is incorporated by reference in 14 CFR 71.1. The Jet Route listed in this document would be subsequently published in the Order.

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 Department of Transportation (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 the 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 a Jet Route from Oakland, CA, to Spokane, WA.

**Environmental Review**

The FAA has determined that this action qualifies for categorical exclusion under the National Environmental Policy Act in accordance with FAA Order 1050.1E, "Environmental Impacts: Policies and Procedures," paragraph 311a. This airspace action is not expected to cause any potentially significant environmental impacts, and no extraordinary circumstances exist that warrant preparation of an environmental assessment.

**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 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 FAA Order 7400.9T, Airspace Designations and Reporting Points, dated August 27, 2009 and effective September 15, 2009, is amended as follows:

*Paragraph 2004—Jet Routes*

* * * * *

**J–3 [Modified]**

From Oakland, CA, via Red Bluff, CA; Lakeview, OR; Kimberly, OR; Spokane, WA.

Issued in Washington, DC, April 29, 2010.

**Paul Gallant,**

*Acting Manager, Airspace and Rules Group.*

[FR Doc. 2010–10608 Filed 5–5–10; 8:45 am]

**BILLING CODE 4910–13–P**

## DEPARTMENT OF TRANSPORTATION

## Federal Aviation Administration

## 14 CFR Part 95

**[Docket No. 30722; Amdt. No. 487]**

## IFR Altitudes; Miscellaneous Amendments

**AGENCY:** Federal Aviation Administration, DOT.

**ACTION:** Final rule.

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

**DATES:** *Effective Date:* 0901 UTC, June 3, 2010.

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

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

### The Rule

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

### Conclusion

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

### List of Subjects in 14 CFR Part 95

Airspace, Navigation (air).

Issued in Washington, DC, on April 30, 2010.

**James J. Ballough,**

*Director, Flight Standards Service.*

### Adoption of the Amendment

■ Accordingly, pursuant to the authority delegated to me by the Administrator, part 95 of the Federal Aviation Regulations (14 CFR part 95) is amended as follows effective at 0901 UTC, June 03, 2010.

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

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

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

REVISIONS TO IFR ALTITUDES & CHANGEOVER POINTS

[Amendment 487 final effective date, June 03, 2010]

| From | To | MEA |
|---|---|---|
| **§ 95.1001 Direct Routes-U.S.<br>Color Routes<br>§ 95.510 GREEN Federal Airway G10 is amended to Read in Part** | | |
| Cape Newenham, AK NDB/DME<br>#HF COMMS Requred Below 8000 | ST Paul Island, AK NDB/DME | #4600 |

| From | To | MEA | MAA |
|---|---|---|---|
| **§ 95.3000 Low Altitude RNAV Routes<br>§ 95.3254 RNAV Route T254 is Amended to Delete** | | | |
| Centex, TX VORTAC<br>*2100–MOCA | College Station, TX VORTAC | *3000 | 10000 |
| **Is Amended to Read in Part** | | | |
| College Station, TX VORTAC | EAKES, TX FIX | 3000 | 15000 |
| Eakes, TX FIX | Crepo, TX FIX | 3100 | 15000 |
| Crepo, TX FIX | Lake Charles, LA VORTAC | 2200 | 15000 |

| From | To | MEA |
|---|---|---|
| **§ 95.6001 Victor Routes-U.S.** | | |
| **§ 95.6004 VOR Federal Airway V4 is Amended to Read in Part** | | |
| *Italy, WV FIX | REACH, WV FIX | 4000 |
| *4000–MRA | | |
| Reach, WV FIX | ELKINS, WV VORTAC | 4400 |
| Elkins, WV VORTAC | Kessel, WV VOR/DME | 6400 |
| **§ 95.6005 VOR Federal Airway V5 is Amended to Read in Part** | | |
| Louisville, KY VORTAC | NERVE, KY FIX | *10000 |
| *2700–GNSS MEA | | |
| **§ 95.6006 VOR Federal Airway V6 is Amended to Read in Part** | | |
| Nanci, NY FIX | La Guardia, NY VOR/DME | 2600 |
| **§ 95.6011 VOR Federal Airway V11 is Amended to Read in Part** | | |
| Greene County, MS VORTAC | SOSOE, MS FIX | *4000 |
| *1800–MOCA | | |
| *3000–GNSS MEA | | |
| **§ 95.6013 VOR Federal Airway V13 is Amended to Read in Part** | | |
| Ascot, TX FIX | Solon, TX FIX | *4000 |
| *1500–MOCA | | |
| Cleep, TX FIX | *Legge, TX FIX | 3100 |
| *3000–MRA | | |
| Napoleon, MO VORTAC | LAMONI, IA VORTAC | 2900 |
| **§ 95.6014 VOR Federal Airway V14 is Amended to Read in Part** | | |
| Shalo, TX FIX | Lubbock, TX VORTAC | *5100 |
| *5000–GNSS MEA | | |
| **§ 95.6020 VOR Federal Airway V20 is Amended to Read in Part** | | |
| Mc Allen, TX VOR/DME | Latex, TX FIX | 1700 |
| Latex, TX FIX | Ascot, TX FIX | *4000 |
| *1900–MOCA | | |
| Ascot, TX FIX | Solon, TX FIX | *4000 |
| *1500–MOCA | | |
| Betzy, TX FIX | Palacios, TX VORTAC | 2000 |
| **§ 95.6038 VOR Federal Airway V38 is Amended to Read in Part** | | |
| Sacky, WV FIX | *Julea, WV FIX | 3000 |
| *5000–MRA | | |
| *Julea, WV FIX | Benzo, WV FIX | 3300 |
| *5000–MRA | | |
| Benzo, WV FIX | Elkins, WV VORTAC | 4000 |
| **§ 95.6051 VOR Federal Airway V51 is Amended to Read in Part** | | |
| #ALMA, GA VORTAC | #DUBLIN, GA VORTAC | *3000 |
| *2000–GNSS MEA | | |
| #ALMA R–345 Unusable, Use Dublin R–170 | | |
| **§ 95.6062 VOR Federal Airway V62 is Amended to Read in Part** | | |
| Spade, TX FIX | Lubbock, TX VORTAC | *5700 |
| *4800–MOCA | | |
| *5000–GNSS MEA | | |
| **§ 95.6070 VOR Federal Airway V70 is Amended to Read in Part** | | |
| *Raymo, TX FIX | JIMIE, TX FIX | **4000 |
| *5000–MRA | | |
| **1600–MOCA | | |
| Jimie, TX FIX | Jetty, TX FIX | *4000 |
| *1800–MOCA | | |
| Betzy, TX FIX | Palacios, TX VORTAC | 2000 |

| From | To | MEA |
|---|---|---|
| **§ 95.6071 VOR Federal Airway V71 is Amended to Read in Part** | | |
| *Wrack, LA FIX<br>*4000–MRA<br>**2200–MOCA<br>**2200–GNSS MEA | NATCHEZ, MS VOR/DME | **3500 |
| **§ 95.6077 VOR Federal Airway V77 is Amended to Read in Part** | | |
| Abilene, TX VORTAC<br>*3400–MOCA | Wichita Falls, TX VORTAC | *3900 |
| **§ 95.6088 VOR Federal Airway V88 is Amended to Read in Part** | | |
| Narci, OK FIX<br>*3100–MOCA<br>*4000–GNSS MEA | Wacco, MO FIX | *8000 |
| **§ 95.6099 VOR Federal Airway V99 is Amended to Read in Part** | | |
| La Guardia, NY VOR/DME<br>*1700–MOCA | OUTTE, CT FIX | *4000 |
| Outte, CT FIX<br>*2600–MOCA | Sorry, CT FIX | *4000 |
| **§ 95.6102 VOR Federal Airway V102 is Amended to Read in Part** | | |
| Ralls, TX FIX<br>*4500–MOCA | Guthrie, TX VORTAC | *5000 |
| **§ 95.6106 VOR Federal Airway V106 is Amended to Read in Part** | | |
| Weard, NY FIX<br>*6000–MRA | *Weets, NY FIX | 6000 |
| **§ 95.6123 VOR Federal Airway V123 is Amended to Read in Part** | | |
| Minks, NJ FIX | La Guardia, NY VOR/DME | 2600 |
| **§ 95.6155 VOR Federal Airway V155 is Amended to Read in Part** | | |
| #Lawrenceville, VA VORTAC<br>*5000–MRA<br>**2000–GNSS MEA<br>#R–042 UNUSABLE. | *MANGE, VA FIX | **4000 |
| *Mange, VA FIX<br>*5000–MRA<br>**1800–MOCA<br>**2000–GNSS MEA | Melia, VA FIX | **5000 |
| **§ 95.6157 VOR Federal Airway V157 is Amended to Read in Part** | | |
| #Lawrenceville, VA VORTAC<br>*2000–GNSS MEA<br>#R–042 UNUSABLE. | DALTO, VA FIX | *4000 |
| Minks, NJ FIX | La Guardia, NY VOR/DME | 2600 |
| **§ 95.6159 VOR Federal Airway V159 is Amended to Read in Part** | | |
| Holly Springs, MS VORTAC | Gilmore, AR VOR/DME | 2500 |
| Napoleon, MO VORTAC | St Joseph, MO VORTAC | 2900 |
| **§ 95.6161 VOR Federal Airway V161 is Amended to Read in Part** | | |
| Napoleon, MO VORTAC | Lamoni, IA VORTAC | 2900 |
| **§ 95.6163 VOR Federal Airway V163 is Amended to Read in Part** | | |
| Ascot, TX FIX<br>*1500–MOCA | Solon, TX FIX | *4000 |
| **§ 95.6166 VOR Federal Airway V166 is Amended to Read in Part** | | |
| Clarksburg, WV VOR/DME | Tygar, WV FIX | 3600 |
| Tygar, WV FIX | Ugjob, WV FIX | 4700 |

| From | To | MEA |
|---|---|---|
| Ugjob, WV FIX | Kessel, WV VOR/DME | 6300 |
| **§ 95.6178 VOR Federal Airway V178 is Amended to Read in Part** | | |
| Lexington, KY VORTAC | Trent, KY FIX | 3400 |
| Trent, KY FIX | Slink, WV FIX | *8000 |
| *4200–GNSS MEA | | |
| Slink, WV FIX | Bluefield, WV VORTAC | *6000 |
| *5400–GNSS MEA | | |
| **§ 95.6205 VOR Federal Airway V205 is Amended to Read in Part** | | |
| Weard, NY FIX | *Weets, NY FIX | 6000 |
| *6000–MRA | | MAA–14500 |
| **§ 95.6209 VOR Federal Airway V209 is Amended to Read in Part** | | |
| Semmes, AL VORTAC | Janes, AL FIX | *2300 |
| *1800–MOCA | | |
| *2000–GNSS MEA | | |
| Janes, AL FIX | Kewanee, MS VORTAC | 2300 |
| **§ 95.6212 VOR Federal Airway V212 is Amended to Read in Part** | | |
| Oscer, TX FIX | Lufkin, TX VORTAC | *4000 |
| *2000–MOCA | | |
| **§ 95.6222 VOR Federal Airway V222 is Amended to Read in Part** | | |
| Humble, TX VORTAC | Beaumont, TX VOR/DME | 3100 |
| Maxon, LA FIX | *Wrack, LA FIX | **6000 |
| *4000–MRA | | |
| **1800–MOCA | | |
| **2000–GNSS MEA | | |
| *Wrack, LA FIX | Mc Comb, MS VORTAC | **4000 |
| *4000–MRA | | |
| **2000–MOCA | | |
| **§ 95.6257 VOR Federal Airway V257 is Amended to Read in Part** | | |
| Scaat, MT FIX | Siebe, MT FIX | *13000 |
| *9800–MOCA | | |
| *9800–GNSS MEA | | |
| **§ 95.6268 VOR Federal Airway V268 is Amended to Read in Part** | | |
| Indian Head, PA VORTAC | Hagerstown, MD VOR | *12000 |
| *4600–MOCA | | |
| *4700–GNSS MEA | | |
| Kemar, MD FIX | Westminster, MD VORTAC | *4000 |
| *2600–MOCA | | |
| *2700–GNSS MEA | | |
| **§ 95.6278 VOR Federal Airway V278 is Amended to Read in Part** | | |
| *Nifde, TX FIX | Bowie, TX VORTAC | **4500 |
| *6500–MRA | | |
| **2600–MOCA | | |
| **3300–GNSS MEA | | |
| **§ 95.6369 VOR Federal Airway V369 is Amended to Read in Part** | | |
| Navasota, TX VORTAC | Groesbeck, TX VOR/DME | *2300 |
| *1900–MOCA | | |
| **§ 95.6377 VOR Federal Airway V377 is Amended to Read in Part** | | |
| Hagerstown, MD VOR | HARRISBURG, PA VORTAC | *5000 |
| *3800–MOCA | | |
| *4000–GNSS MEA | | |
| **§ 95.6407 VOR Federal Airway V407 is Amended to Read in Part** | | |
| Jimie, TX FIX | Jetty, TX FIX | *4000 |
| *1800–MOCA | | |

| From | To | MEA |
|---|---|---|
| **§ 95.6427 VOR Federal Airway V427 is Amended to Read in Part** | | |
| Monroe, LA VORTAC<br>*2800–MRA<br>**1900–MOCA | *Pecks, MS FIX | **5000 |
| **§ 95.6433 VOR Federal Airway V433 is Amended to Read in Part** | | |
| Tickl, NY FIX | La Guardia, NY VOR/DME | 2600 |
| La Guardia, NY VOR/DME | Dunbo, NY FIX | 2000 |
| Pawling, NY VOR/DME<br>*10000–MRA | *Cyper, NY FIX | 6100 |
| *Cyper, NY FIX<br>*10000–MRA<br>**6100–GNSS MEA<br>#RKA R–127 UNUSABLE BELOW 10000' | #Rockdale, NY VOR/DME | **10000 |
| **§ 95.6445 VOR Federal Airway V445 is Amended to Read in Part** | | |
| Nanci, NY FIX | La Guardia, NY VOR/DME | 2600 |
| **§ 95.6475 VOR Federal Airway V475 is Amended to Read in Part** | | |
| La Guardia, NY VOR/DME | Dunbo, NY FIX | 2000 |
| **§ 95.6476 VOR Federal Airway V476 is Amended to Read in Part** | | |
| Lynchburg, VA VORTAC | Gordonsville, VA VORTAC | 3300 |
| **§ 95.6487 VOR Federal Airway V487 is Amended to Read in Part** | | |
| La Guardia, NY VOR/DME | Dunbo, NY FIX | 2000 |
| **§ 95.6556 VOR Federal Airway V556 is Amended to Read in Part** | | |
| Keeds, TX FIX | Scholes, TX VORTAC | 3100 |
| **§ 95.6565 VOR Federal Airway V565 is Amended to Read in Part** | | |
| College Station, TX VORTAC<br>*2000–MOCA | Lufkin, TX VORTAC | *4000 |
| **§ 95.6319 Alaska VOR Federal Airway V319 is Amended to Read in Part** | | |
| Wiler, AK FIX<br>*5000–MCA Anchorage, AK VOR/DME, E BND<br>**7000–MOCA<br>**7000–GNSS MEA | *Anchorage, AK VOR/DME | **13000 |
| **§ 95.6322 Alaska VOR Federal Airway V322 is Amended to Read in Part** | | |
| King Salmon, AK VORTAC<br>*5000–MOCA | Konic, AK FIX | *5000 |
| Konic, AK FIX<br>*7700–MOCA<br>*7700–GNSS MEA | Worri, AK FIX | *9000 |
| Mallt, AK FIX | Homer, AK VOR/DME.<br>SW BND<br>NE BND | <br>9000<br>4000 |
| **§ 95.6452 Alaska VOR Federal Airway V452 is Amended to Read in Part** | | |
| Zomby, AK FIX<br>*4000–MOCA<br>*7000–GNSS MEA, E BND<br>*4000–OPPOSITE GNSS MEA, W BND | HORSI, AK FIX | *8000 |
| **§ 95.6453 Alaska VOR Federal Airway V453 is Amended to Read in Part** | | |
| Bethel, AK VORTAC<br>*4900–MOCA<br>*6000–GNSS MEA | UNALAKLEET, AK VOR/DME | *11000 |
| **§ 95.6489 Alaska VOR Federal Airway V489 is Amended to Read in Part** | | |
| Zomby, AK FIX | Horsi, AK FIX | *8000 |

| From | To | MEA |
|---|---|---|
| *4000–MOCA<br>*7000–GNSS MEA, E BND<br>*4000–OPPOSITE GNSS MEA, W BND | | |
| **§ 95.6506 Alaska VOR Federal Airway V506 is Amended to Read in Part** | | |
| Bethel, AK VORTAC | Marsi, AK FIX.<br>W BND<br>E BND | <br>16000<br>2000 |
| Marsi, AK FIX<br>*3200–MOCA<br>*4000–GNSS MEA<br>#MEA GAP. Continuous Navigation Coverage Does Not Exist Below 16000 Between BET 109NM and OME 113NM. | JOHNI, AK FIX | #*16000 |

| From | To | MEA | MAA |
|---|---|---|---|
| **§ 95.7001 Jet Routes**<br>**§ 95.7037 Jet Route J37 is Amended to Delete in Part** | | | |
| Massena, NY VORTAC | U.S. Canadian Border | 18000 | 45000 |
| **§ 95.7055 Jet Route J55 is Amended to Delete in Part** | | | |
| Presque Isle, ME VOR/DME | U.S. Canadian Border | 18000 | 45000 |
| **§ 95.8003 VOR Federal Airway Changeover Points Airway Segment V161 is Amended to Add Changeover Point** | | | |
| Napoleon, MO VORTAC | Lamoni, IA VORTAC | 40 | Napoleon |
| **V278 is Amended to Add Changeover Point** | | | |
| Guthrie, TX VORTAC | Bowie, TX VORTAC | 64 | Guthrie |
| **V4 is Amended to Add Changeover Point** | | | |
| Charleston, WV VORTAC | Elkins, WV VORTAC | 27 | Charleston |
| **V571 is Amended to Add Changeover Point** | | | |
| Humble, TX VORTAC | Navasota, TX VORTAC | 24 | Humble |
| **V574 is Amended to Add Changeover Point** | | | |
| Navasota, TX VORTAC | Humble, TX VORTAC | 18 | Navasota |
| **V77 is Amended to Add Changeover Point** | | | |
| Abilene, TX VORTAC | Wichita Falls, TX VORTAC | 56 | Abilene |
| **Alaska V488 is Amended to Add Changeover Point** | | | |
| Fairbanks, AK VORTAC | Tanana, AK VOR/DME | 69 | Fairbanks |
| **Alaska V531 is Amended to Add Changeover Point** | | | |
| Fairbanks, AK VORTAC<br>Tanana, AK VOR/DME | Tanana, AK VOR/DME<br>Huslia, AK VOR/DME | 69<br>40 | Fairbanks<br>Tanana |

[FR Doc. 2010–10654 Filed 5–5–10; 8:45 am]

BILLING CODE 4910–13–P

**DEPARTMENT OF JUSTICE**

**28 CFR Part 20**

**[Docket No. FBI 118]**

**RIN 1110–AA29**

## FBI Records Management Division National Name Check Program Section User Fees

**AGENCY:** Federal Bureau of Investigation (FBI), Justice.

**ACTION:** Final rule.

**SUMMARY:** This Final Rule sets out the Director of the FBI's authority to establish and collect fees for providing name-based background checks conducted by the National Name Check Program (NNCP) of the Records Management Division (RMD). The rule explains the methodology used to calculate the fees and provides that future fee adjustments will be made by notice published in the **Federal Register.**

**DATES:** This rule is effective June 7, 2010.

**FOR FURTHER INFORMATION CONTACT:** FBI, Records Management Division, National Name Check Program Section, 170 Marcel Drive, Winchester, VA 22602, *Attention:* Michael Cannon.

**SUPPLEMENTARY INFORMATION:**

### I. Background

On September 26, 2008, the FBI published a Notice of Proposed Rulemaking (NPRM) setting forth the FBI's statutory authority to establish and collect fees for named-based NNCP checks and other identification services performed by the RMD. *See* 73 FR 55,794 (2008) (to be codified at 28 CFR part 20). The FBI's user fees are differentiated by the FBI Division providing the service. The user fees for the NNCP checks provided by the RMD are the subject of this rulemaking. Fees for the criminal history record information checks provided by the Criminal Justice Information Services Division (CJIS) were the subject of a separate rulemaking and associated notice published in the **Federal Register** on April 13, 2010 at 75 FR 18751 and 18887. Because the FBI was uncertain which rule would be finalized first, both the CJIS fee NPRM and the NNCP fee NPRM proposed to amend 28 CFR 20.31 by adding an identical paragraph (e). The NNCP fee NPRM also proposed to add a new paragraph (f) regarding the collection of fees for named-based background checks. Because paragraph (e) already has been added to section 20.31 by the CJIS fee final rule, the NNCP final rule has been conformed by adding only the new paragraph (f) to section 20.31.

The NPRM regarding the NNCP checks explained the methodology used to calculate the fees, provided a proposed fee schedule and explained that the fees may include an amount to establish a fund to defray expenses for the automation of fingerprint identification and criminal justice information services and associated costs. The NPRM further advised that the current fees would be published concurrently with this final rule as a notice in the **Federal Register.** This final rule implements the FBI's statutory fee authority. All future fee adjustments will be made by notice published in the **Federal Register.**

### II. Legal Authority to Collect Fees

The FBI has collected fees for the NNCP since 1991, when the authority to establish and collect fees to process name-based CHRI checks, was set out in Public Law (Pub. L.) 101–515. This statutory authority was renewed annually by subsequent appropriations legislation. Under Public Law 101–162, the FBI also was authorized to establish and collect fees for name-based checks and to set the fees at a level to include an amount to defray expenses for the automation of fingerprint identification and associated costs. Congress, in Public Law 101–515, subsequently authorized the FBI to establish and collect these fees on a continuing basis. This authority was further expanded by Public Law 104–99 with insertion of the term "criminal justice information services" so the FBI was authorized to use the collected fees to "defray expenses for the automation of fingerprint identification and criminal justice information services and associated costs." The FBI does not charge a fee for NNCP services performed for criminal justice purposes, as those services are supported by federal appropriations.

### III. Reasons for the Proposed Fee Schedule

While the RMD has automated some portions of the NNCP process, the current fees, which have not changed since 1991, do not reflect the expense of personnel time and other costs involved in the analysis of the pertinent information. The NNCP disseminates information from the FBI's Central Records System (CRS) in response to requests submitted by federal agencies, Congressional committees, the federal judiciary, friendly foreign police and intelligence agencies. The CRS contains the FBI's administrative, personnel, and investigative files. The NNCP was established under Executive Order No. 10450, issued on April 27, 1953, 18 FR 2489, which mandated National Agency checks in the background investigation of prospective Government employees. The FBI performs the primary National Agency check on all U.S. Government employees and provides information to more than 40 federal agencies. The information from the CRS, disseminated under the NNCP, is evaluated by governmental agencies before bestowing privileges such as visas, naturalization or work authorizations under the Immigration and Nationality Act, Public Law 82–414 as amended, and other federal laws.

The CRS consists of administrative, applicant, criminal, personnel, and other files arranged by subject matter relating to an individual, an organization, or other matters. The CRS records are maintained at FBI Headquarters and FBI Field Offices. The CRS can be accessed through the General Indices, which are arranged in alphabetical order by subject, such as the names of individuals and organizations.

In 1995, the FBI implemented the Automated Case Support (ACS) system to access 105 million records from previous automated systems. The ACS consists of three automated applications that support case management functions for all investigative and administrative cases. The Investigative Case Management application is used to open, assign and track leads and close investigative and administrative cases. The Electronic Case File serves as the central electronic repository for the FBI's official text-based documents. The Universal Index (UNI) provides a complete subject and case index to approximately 99 million records in investigative and administrative cases. The UNI lists the names of individuals or entities, with identifying information such as date of birth and social security number.

The processing of an NNCP search begins with the search of a person's name in the UNI to locate all instances of the person's name and identifying information in the main and reference files. A main file concerns the subject of an FBI investigation, and a reference file concerns an individual whose name appears in part of an FBI investigation, such as an associate or witness. Over 60 percent of the initial NNCP electronic checks in UNI yield no identifiable information regarding the person and are termed "No record," and that information is reported to the requesting agency. If the search of UNI yields possibly identifiable information, the

NNCP request requires additional review and an additional manual name search is conducted. If identifiable information is located, the records are retrieved and reviewed for possible derogatory information concerning the subject of the NNCP request. The FBI forwards a summary of the derogatory information to the requesting agency.

By letter, dated August 30, 2007, to all RMD customers using the NNCP for noncriminal justice purposes, the FBI established the proposed fee schedule on an interim basis, effective October 1, 2007. RMD customers were advised of the revised fees prior to the start of FY 2008, thereby avoiding costly and confusing mid-year changes. The FBI will continue to analyze its costs in processing searches in the NNCP and will review related fee charges periodically, as recommended by Office of Management and Budget Circular No. A–25, (OMB Circular A–25) User Charges. Any adjustments to the FBI's fees will be announced by notice in the **Federal Register.**

**IV. Standards and Guidelines Used To Calculate the Fee**

Public Law 101–515 links the user fees charged for processing name checks and fingerprint identification records to the cost of providing these services. Such costs not only include the salaries of employees engaged in providing the services but, in accordance with generally accepted accounting principles, also include such expenses as capital investment, depreciation, automation, and so forth. Congress recognized these additional expenses of processing records by authorizing the FBI to establish user fees at a level to include an amount "to defray expenses for the automation of fingerprint identification and criminal justice information services and associated costs."

In the absence of express statutory authority, federal agencies are authorized to establish fees by the Independent Office Appropriation Act of 1952, 31 U.S.C. 9701, which is implemented by specific guidelines in OMB Circular A–25. Since the FBI has express statutory authority to establish and collect fees under Public Law 101–515, the FBI is not required to follow strictly the mandates of OMB Circular A–25; however, the FBI did look to OMB Circular A–25 for guidance. For example, OMB Circular A–25's definition of "full cost" ("all direct and indirect costs to any part of the Federal Government of providing a good, resource, or service") was used as a model by the FBI in establishing the subject user fees, including direct and indirect personnel costs, physical overhead, and other indirect costs such as material costs, utilities and equipment.

**V. Calculation of the Revised Fee**

The FBI hired a contractor, Grant Thornton LLP., 333 John Carlyle Street, Alexandria, Virginia, 22314, (Grant Thornton) to conduct an independent analysis of pertinent costs and to recommend a revised fee schedule for the NNCP checks conducted by RMD. Referencing OMB Circular A–25; the Statement of Federal Financial Accounting Standards (SFFAS–4): Managerial Cost Accounting Concepts and Standards for the Federal Government; and other relevant financial management directives, Grant Thornton developed a cost accounting methodology and related cost models based upon the concept and principles of activity-based costing (ABC). The cost models identified the total resource costs associated with the services provided to RMD customers, including personnel (*e.g.,* salary and benefits), non-labor (*e.g,* material, equipment, and facility) and overhead (*e.g.,* management and administration) costs, and assigned or allocated these costs to the various service categories using relevant cost drivers. The cost drivers were selected primarily for their strong cause-effect linkages between the resources and the activities and services that consumed them. The unit costs for RMD's NNCP services incorporated in this study were derived from a robust costing network that is based on the principles of ABC, a widely recognized and accepted cost accounting methodology. Grant Thornton generated the revised fee schedule based upon these unit costs.

The methodology focused on developing full cost information for NNCP's activities and services to provide a basis for the fee recommendations. FY 2005 costs were used to develop baseline cost information, and additional estimated costs and adjustments were included to estimate resources for FY 2008 and FY 2009. The projected cost information served as the basis for the fee recommendations.

Grant Thornton developed their cost accounting methodology using the following steps for the non-automation portion of the fee. First, NNCP services and activities performed for name checks were defined. Then operational labor costs, support labor costs and non-labor costs, including appropriate overhead and support costs, were identified and assigned to activities and then to services. Estimated costs, transaction volumes and trends were analyzed to predict appropriate costs and transaction volumes for FY 2008. Finally, using the projected FY 2008 costs and the projected FY 2008 transaction volumes, the projected unit costs for each service were calculated. The recommended user fees were based on these projected unit costs.

As explained above, under Public Law 101–515, the FBI is also authorized to charge an additional amount for the automation of fingerprint identification and criminal justice information services and associated costs. Although NNCP fees have not included this additional amount to date, the FBI considers the service provided by the NNCP as being a criminal justice information service. The costs associated with enhancing the NNCP, including the automation efforts, were identified and included in the name check fee study reflected in the rule. The estimated costs for these automation efforts were based on best available information regarding planned information technology investments. The projected FY 2008 and FY 2009 volumes were then used to calculate the unit costs for this portion of the fee. Once the unit costs were calculated, Grant Thornton generated the revised fee schedule. The FBI then independently reviewed the Grant Thornton recommendations, compared them to current fee calculations and plans for future services, and determined that the revised schedules were both objectively reasonable and in consonance with the underlying legal authorities.

**VI. Revised Fee Schedule**

As noted above, the FBI established the fee schedule on an interim basis, effective October 1, 2007. Fee classes remained essentially the same, with the exception that manual submissions and expedited processing requests were consolidated into a single class. Under the interim fee schedule, the fee was increased only 10 cents for users submitting electronic requests that are limited to batch processing (from $1.40 to $1.50). The fee increases for name checks involving non-electronic submissions and other special services were more substantial because of the higher cost for processing manual submissions and expediting responses ahead of routine transactions. Unit costs are rounded up to the next $0.25.

SUMMARY OF FEE CHANGES

| Service | Previous fee | Interim fee | Total fee increase |
|---|---|---|---|
| Electronic Submission | ..... | ..... | ..... |
| Batch Process Only | $1.40 | $1.50 | $0.10 |
| Batch + File Review | 10.65 | 29.50 | 18.85 |
| Manual Submission | 12.00 | 56.00 | 44.00 |
| Expedited Submission | 22.65 | 56.00 | 33.35 |

The FBI will continue to analyze its costs and will review related fee charges periodically, as recommended by OMB Circular A–25. The final rule advises that future adjustments to the FBI's fees will be announced by notice in the **Federal Register.**

**VII. Administrative Consultations With Interested Federal Agencies**

The FBI has provided information about this rule to the largest three customers by volume of submissions, the United States Citizenship and Immigration Services, the Office of Personnel Management and the Department of State. The FBI will develop standards of performance and timeliness with these three federal customers. As appropriate, the FBI will pursue similar arrangements with its other federal customers.

*Discussion of Comments*

Only one comment on the proposed rule was received. An organization of research universities expressed concern that the rule might limit access to FBI records for research or medical purposes. This rule, however, simply sets out the Director of the FBI's authority to establish and collect fees for providing name-based background checks conducted by the NNCP of the RMD. The rule does not have any impact on procedures of access to research, statistical or human subject information. Therefore, after carefully reviewing the single comment to the NPRM, the FBI has determined that no changes to the rule are necessary.

**VIII. Regulatory Certifications**

*Regulatory Flexibility Act*

When an agency issues a rulemaking proposal, the Regulatory Flexibility Act (RFA) requires the agency to "prepare and make available for public comment an initial regulatory flexibility analysis" which will "describe the impact of the proposed rule on small entities." (5 U.S.C. 603(a)). Section 605 of the RFA allows an agency to certify, in lieu of preparing an analysis, that the proposed rulemaking is not expected to have significant economic impact on a substantial number of small entities. Small entities are defined by the RFA to include small businesses, small organizations, and small governmental jurisdictions.

This rule only concerns federal agencies authorized to request name-based record background checks, and Federal agencies do not fall within the definition of a "small entity." Accordingly, the Director of the FBI hereby certifies that this rule will not have a significant economic impact on a substantial number of small entities.

*Executive Order 12866 (Regulatory Planning and Review)*

This regulation has been drafted and reviewed in accordance with Executive Order 12866, Regulatory Planning and Review, section 1(b), Principles of Regulation. The FBI has determined that this rule is a significant regulatory action under Executive Order 12866, Regulatory Planning and Review, section 3(f) and accordingly this rule has been reviewed by the Office of Management and Budget.

*Executive Order 12988 (Civil Justice Reform)*

This final rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988.

*Executive Order 13132 (Federalism)*

This final rule will not have a substantial direct effect on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. The rule does not alter any of the policy set out at 28 CFR Part 20, or 28 CFR, Parts 901–906. Therefore, in accordance with Executive Order 13132, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

*Unfunded Mandates Reform Act of 1995*

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

*Small Business Regulatory Enforcement Fairness Act of 1996*

This final rule is not a major rule as defined by section 804 of the Small Business Regulatory Enforcement Fairness Act of 1996. This rule will not result in an annual effect on the U.S. economy of $100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of U.S.-based companies to compete with foreign-based companies in domestic and export markets.

**IX. Conclusion**

After careful consideration, the Department does not believe that any change to the rule is necessary based on the comment it received.

**List of Subjects in 28 CFR Part 20**

Classified information, Crime, Intergovernmental relations, Investigations, Law enforcement, Privacy.

■ Accordingly, pursuant to the authority set forth in Public Law 101–515, as amended by Public Law 104–99, set out in the notes to 28 U.S.C. 534, Part 20 of Chapter I of Title 28 of the CFR is amended as follows.

## PART 20—CRIMINAL JUSTICE INFORMATION SYSTEMS

■ 1. The authority citation for Part 20 continues to read as follows:

**Authority:** 28 U.S.C. 534; Pub. L. 92–544, 86 Stat. 1115; 42 U.S.C. 3711, *et seq.,* Pub. L. 99–169, 99 Stat. 1002, 1008–1011, as amended by Pub. L. 99–569, 100 Stat. 3190, 3196; Pub. L. 101–515, as amended by Pub. L. 104–99, set out in the notes to 28 U.S.C. 534.

■ 2. Amend § 20.31 to add paragraph (f) to read as follows:

**§ 20.31 Responsibilities.**

* * * * *

(f) The FBI will collect a fee for providing noncriminal name-based

background checks of the FBI Central Records System through the National Name Check Program pursuant to the authority in Pub. L. 101–515 and in accordance with paragraphs (e)(1), (2) and (3) of this section.

Dated: April 26, 2010.

**Robert S. Mueller, III,**

*Director, Federal Bureau of Investigation.*

[FR Doc. 2010–10628 Filed 5–5–10; 8:45 am]

**BILLING CODE 4410–02–P**

## DEPARTMENT OF HOMELAND SECURITY

### Coast Guard

### 33 CFR Part 100

**[Docket No. USCG–2010–0081]**

**RIN 1625–AA08**

## Special Local Regulations for Marine Events; Chester River, Chestertown, MD; Correction

**ACTION:** Temporary final rule; correction.

**SUMMARY:** In the **Federal Register** published on April 23, 2010, the Coast Guard established special local regulations during the reenactment portion of the "Chestertown Tea Party Festival." The Chestertown Tea Party Festival is a marine event to be held on the waters of the Chester River, Chestertown, MD on May 29, 2010. The special local regulation published with an error in the heading, specifically, the CFR title and part in the heading should have read "33 CFR Part 100," instead of "33 CFR Part 165."

**DATES:** This correction is effective May 6, 2010.

**FOR FURTHER INFORMATION CONTACT:** For information about this correction, contact Kevin d'Eustachio, Office of Regulations and Administrative Law, (202) 372–3854 *kevin.m.deustachio@uscg.mil.* For information about the original regulation, contact Mr. Ronald Houck, Sector Baltimore Waterways Management Division, Coast Guard; telephone (410) 576–2674, e-mail *Ronald.L.Houck@uscg.mil.*

**SUPPLEMENTARY INFORMATION:** In FR doc 2010–9496 appearing on page 21167 in the issue of Friday, April 23, 2010, the following corrections are made:

1. In the document heading on page 21167, correct the CFR citation to read "33 CFR Part 100".

Dated: April 28, 2010.

**S. Venckus,**

*Office of Regulations and Administrative Law (CG–0943), U.S. Coast Guard.*

[FR Doc. 2010–10606 Filed 5–5–10; 8:45 am]

**BILLING CODE 9110–04–P**

## DEPARTMENT OF HOMELAND SECURITY

### Coast Guard

### 33 CFR Part 100

**[Docket No. USCG–2010–0102]**

**RIN 1625–AA08**

## Special Local Regulation for Marine Events; Temporary Change of Dates for Recurring Marine Events in the Fifth Coast Guard District; Correction

**ACTION:** Temporary final rule; correction.

**SUMMARY:** In the **Federal Register** published on April 19, 2010, the Coast Guard temporarily changed the enforcement period of two special local regulations for recurring marine events in the Fifth Coast Guard District, one on April 17–18, 2010, and one on May 29–30, 2010. That publication contained several errors. These errors do not impact the events scheduled for this year, but could cause confusion about future years.

**DATES:** This correction is effective May 6, 2010.

**FOR FURTHER INFORMATION CONTACT:** For information about this correction, contact Kevin d'Eustachio, Office of Regulations and Administrative Law, telephone (202) 372–3854, e-mail *kevin.m.deustachio@uscg.mil.* For information about the original regulation, contact LT Tiffany Duffy, Project Manager, Sector Hampton Roads, Waterways Management Division, United States Coast Guard; telephone (757) 668–5580, e-mail *Tiffany.A.Duffy@uscg.mil.*

**SUPPLEMENTARY INFORMATION:** In FR doc 2010–8861 appearing on page 20294 in the issue of Monday, April 19, 2010, the following corrections are made:

1. In the summary on page 20294, in the first column, remove the words "proposes to temporarily change" and add in their place the words "temporarily changes".

2. On page 20294, in the third column, revise the "**DATES**" section to read as follows:

"**DATES:** This rule is effective in the CFR April 19, 2010, through May 31, 2010. This rule is effective with actual notice for purposes of enforcement from April 7, 2010, through May 31, 2010."

3. On page 20296, in the third column, revise amendatory instruction number 2 to read as follows:

"2. In Sec. 100.501, suspend line No. 31 and 38 in the Table to Sec. 100.501 from April 17, 2010 through June 1, 2010."

4. On page 20296, in the third column revise amendatory instruction number 3 to read as follows:

"3. In Sec. 100.501 add lines No. 58 and 59 in Table to Sec. 100.501 to read as follows:"

Dated: April 28, 2010.

**S. Venckus,**

*Office of Regulations and Administrative Law (CG–0943), U.S. Coast Guard.*

[FR Doc. 2010–10602 Filed 5–5–10; 8:45 am]

**BILLING CODE 9110–04–P**

## DEPARTMENT OF HOMELAND SECURITY

### Coast Guard

### 33 CFR Part 165

**[Docket No. USCG–2010–0277]**

**RIN 1625–AA00**

## Safety Zone; Tri-City Water Follies Hydroplane Races Practice Sessions, Columbia River, Kennewick, WA

**AGENCY:** Coast Guard, DHS.

**ACTION:** Temporary final rule.

**SUMMARY:** The Coast Guard is establishing a temporary safety zone on the Columbia River in Kennewick, Washington for hydroplane race practice sessions being held in preparation for the Tri-City Water Follies Hydroplane Races. The safety zone is necessary to help ensure the safety of the practice session participants as well as the maritime public and will do so by prohibiting all persons and vessels from entering or remaining in the safety zone unless authorized by the Captain of the Port or his designated representative.

**DATES:** This rule is effective from 7 a.m. May 7, 2010 through 5:30 p.m. May 8, 2010.

**ADDRESSES:** Documents indicated in this preamble as being available in the docket are part of docket USCG–2010–0277 and are available online by going to *http://www.regulations.gov,* inserting USCG–2010–0277 in the "Keyword" box, and then clicking "Search." They are also available for inspection or copying at 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.

**FOR FURTHER INFORMATION CONTACT:** If you have questions on this temporary rule, call or e-mail MST1 Jaime Sayers, Waterways Management Division, U.S. Coast Guard Sector Portland; telephone 503–240–9319, e-mail *Jaime.A.Sayers@uscg.mil.* If you have questions on viewing the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

**SUPPLEMENTARY INFORMATION:**

**Regulatory Information**

The Coast Guard is issuing this temporary final rule without prior notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are "impracticable, unnecessary, or contrary to the public interest." Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking (NPRM) with respect to this rule because to do otherwise would be contrary to the public interest because immediate action is necessary to provide for the safety of life and property on navigable waters.

Under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register.** Delaying the effective date would be contrary to public interest because hazards associated with the hydroplane practice sessions could lead to severe injury, fatalities, and/or destruction of public property. Therefore, immediate action is needed to ensure the public's safety.

**Basis and Purpose**

The Tri-City Water Follies Association hosts annual hydroplane races on the Columbia River in Kennewick, Washington. The Association is planning to hold practice sessions prior to the event for race participants. The practice sessions will be conducted daily on May 7 and May 8, 2010 from 7 a.m. through 5:30 p.m. Due to the safety hazards inherent with such events, a safety zone is necessary to help ensure the safety of the practice session participants as well as the maritime public.

**Discussion of Rule**

The safety zone created by this rule encompasses all waters bounded by two lines drawn from shore to shore on the Columbia River, and is approximately 2 miles in length beginning at the Pioneer Memorial Bridge at the point where U.S. Route 395 crosses the Columbia River; the first line running between position 46°14′07″ N, 119°10′42″ W and position 46°13′42″ N, 119°10′51″ W and the second line running between position 46°13′35″ N, 119°07′34″ W and position 46°13′10″ N, 119°07′47″ W.

The safety zone will be in effect daily from 7 a.m. until 5:30 p.m. on May 7, 2010 and May 8, 2010. All persons and vessels will be prohibited from entering or remaining in the safety zone unless authorized by the Captain of the Port or his designated representative.

**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. Although this regulation will restrict access to the area, the effect of this rule will not be significant because: The safety zone will only be in effect for a limited time and maritime traffic will be able to transit the safety zone at designated intervals throughout that time period and as otherwise authorized by the Captain of the Port or his designated representative.

**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 may affect the following entities some of which may be small entities: The owners and operators of vessels intending to operate in the area covered by the safety zone. The rule will not have a significant economic impact on a substantial number of small entities, however, because the safety zone will only be in effect for a limited time and maritime traffic will be able to transit the safety zone at designated intervals throughout that time period and as otherwise authorized by the Captain of the Port or his designated representative.

**Assistance for Small Entities**

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we offer to assist small entities in understanding the rule so that they can 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 (adjusted for inflation) 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 cause 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 023–01 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 this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule is categorically excluded, under figure 2–1, paragraph (34)(g), of the Instruction. This rule involves the establishment of a safety zone.

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

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

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

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

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

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

**Authority:** 33 U.S.C. 1226, 1231; 46 U.S.C. Chapter 701, 3306, 3703; 50 U.S.C. 191, 195; 33 CFR 1.05–1, 6.04–1, 6.04–6, 160.5; Pub. L. 107–295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1.

■ 2. Add § 165.T13–139 to read as follows:

**§ 165.T13–139 Safety Zone; Tri-City Water Follies Hydroplane Races Practice Sessions, Columbia River, Kennewick, WA**

(a) *Location.* The following area is a safety zone: All waters encompassed within the area approximately two miles in length bounded by two lines drawn from shore to shore on the Columbia River; the first line running between position 46° 14′07″ N, 119°10′42″ W and position 46°13′42″ N, 119°10′51″ W and the second line running between position 46°13′35″ N, 119°07′34″ W and position 46°13′10″ N, 119°07′47″ W.

(b) *Regulations.* In accordance with the general regulations in 33 CFR Part 165, Subpart C, no person may enter or remain in the safety zone detailed in paragraph (a) of this section or bring, cause to be brought, or allow to remain in the safety zone detailed in paragraph (a) of this section any vehicle, vessel, or object unless authorized by the Captain of the Port or his designated representative. See 33 CFR Part 165, Subpart C, for additional information and requirements.

(c) *Enforcement Period.* The safety zone detailed in paragraph (a) of this section will be in effect daily from 7 a.m. through 5:30 p.m. on May 7, 2010 and May 8, 2010.

Dated: April 22, 2010.

**F.G. Myer,**

*Captain, U.S. Coast Guard, Captain of the Port, Portland.*

[FR Doc. 2010–10613 Filed 5–5–10; 8:45 am]

**BILLING CODE 9110–04–P**

## DEPARTMENT OF AGRICULTURE

### Forest Service

### 36 CFR Part 251

### Special Uses

**AGENCY:** Forest Service, USDA.

**ACTION:** Correcting amendment.

**SUMMARY:** This document contains corrections to the final rule governing the Forest Service's Special Use Program that was published in the **Federal Register** on March 26, 2010 (75 FR 14495).

**DATES:** Effective on May 6, 2010.

**FOR FURTHER INFORMATION CONTACT:** Julett Denton, Lands Special Uses Program Manager, (202) 205–1256.

**SUPPLEMENTARY INFORMATION:**

This correction adds paragraphs (A), (B), (C), and (D) to § 251.60 (a)(2)(i) which were inadvertently removed from the final rule and which are necessary to reflect properly the Forest Service's authority to revoke or suspend special use authorizations under the Federal Land Policy and Management Act.

**List of Subjects in 36 CFR Part 251**

Administrative practice and procedure, Electric power, National

forests, Public lands—rights-of-way, Reporting and recordkeeping requirements, Water resources.

■ Accordingly, 36 CFR part 251 is corrected to read as follows:

## PART 251—LAND USES

### Subpart B—Special Uses

■ 1. The authority citation for part 251 continues to read as follow:

**Authority:** 7 U.S.C. 1011; 16 U.S.C. 518, 551, 678a; Pub. L. 76–867, 54 Stat. 1197.

■ 2. In § 251.60, revise (a)(2)(i) to read as follows:

**§ 251.60 Termination, revocation, and suspension.**

(a) * * *

(2) *All other special uses*—(i) *Revocation or suspension.* An authorized officer may revoke or suspend a special use authorization for all other special uses, except a permit or an easement issued pursuant to § 251.53(e) or an easement issued under § 251.53(l) of this subpart:

(A) For noncompliance with applicable statutes, regulations, or the terms and conditions of the authorization;

(B) For failure of the holder to exercise the rights or privileges granted;

(C) With the consent of the holder; or

(D) At the discretion of the authorized officer for specific and compelling reasons in the public interest.

* * * * *

Dated: April 28, 2010.

**Thomas L. Tidwell,**

*Chief, Forest Service.*

[FR Doc. 2010–10296 Filed 5–5–10; 8:45 am]

**BILLING CODE 3410–11–P**

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 745

**[EPA–HQ–OPPT–2005–0049; FRL–8823–7]**

**RIN 2070–AJ55**

### Lead; Amendment to the Opt-Out and Recordkeeping Provisions in the Renovation, Repair, and Painting Program

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

**ACTION:** Final rule.

**SUMMARY:** EPA is finalizing several revisions to the Lead Renovation, Repair, and Painting Program (RRP) rule that published in the **Federal Register** on April 22, 2008. The RRP rule established accreditation, training, certification, and recordkeeping requirements as well as work practice standards on persons performing renovations for compensation in most pre-1978 housing and child-occupied facilities. In this document, EPA is eliminating the "opt-out" provision that currently exempts a renovation firm from the training and work practice requirements of the rule where the firm obtains a certification from the owner of a residence he or she occupies that no child under age 6 or pregnant women resides in the home and the home is not a child-occupied facility. EPA is also requiring renovation firms to provide a copy of the records demonstrating compliance with the training and work practice requirements of the RRP rule to the owner and, if different, the occupant of the building being renovated or the operator of the child-occupied facility. In addition, the rule makes minor changes to the certification, accreditation and state authorization requirements.

**DATES:** This final rule is effective July 6, 2010.

**ADDRESSES:** EPA has established a docket for this action under docket identification (ID) number EPA–HQ–OPPT–2005–0049. 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.,* 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 in the electronic docket at *http://www.regulations.gov,* or, if only available in hard copy, at the OPPT Docket. The OPPT Docket is located in the EPA Docket Center (EPA/DC) at Rm. 3334, EPA West Bldg., 1301 Constitution Ave., NW., Washington, DC. The EPA/DC Public Reading Room hours of operation are 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number of the EPA/DC Public Reading Room is (202) 566–1744, and the telephone number for the OPPT Docket is (202) 566–0280. Docket visitors are required to show photographic identification, pass through a metal detector, and sign the EPA visitor log. All visitor bags are processed through an X-ray machine and subject to search. Visitors will be provided an EPA/DC badge that must be visible at all times in the building and returned upon departure.

**FOR FURTHER INFORMATION CONTACT:** *For technical information contact:* Marc Edmonds, National Program Chemicals Division, Office of Pollution Prevention and Toxics, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (202) 566–0758; e-mail address: *edmonds.marc@epa.gov.*

*For general information contact:* The TSCA Hotline, ABVI–Goodwill, 422 South Clinton Ave., Rochester, NY 14620; telephone number: (202) 554–1404; e-mail address: *TSCA-Hotline@epa.gov.*

Hearing- or speech-challenged individuals may access the numbers in this unit through TTY by calling the toll-free Federal Relay Service at 1–800–877–8339.

**SUPPLEMENTARY INFORMATION:**

### I. General Information

*A. Does this action apply to me?*

You may be potentially affected by this action if you operate a training program required to be accredited under 40 CFR 745.225, if you are a firm who must be certified to conduct renovation activities in accordance with 40 CFR 745.89, or if you are an individual who must be certified to conduct renovation activities in accordance with 40 CFR 745.90.

This final rule applies only in States, Territories, and Indian Tribal areas that do not have authorized programs pursuant to 40 CFR 745.324. For further information regarding the authorization status of States, Territories, and Indian Tribes, contact the National Lead Information Center (NLIC) at 1–800–424–LEAD [5323]. Potentially affected categories and entities may include, but are not limited to:

- Building construction (NAICS code 236), *e.g.,* single-family housing construction, multi-family housing construction, residential remodelers.
- Specialty trade contractors (NAICS code 238), *e.g.,* plumbing, heating, and air-conditioning contractors, painting and wall covering contractors, electrical contractors, finish carpentry contractors, drywall and insulation contractors, siding contractors, tile and terrazzo contractors, glass and glazing contractors.
- Real estate (NAICS code 531), *e.g.,* lessors of residential buildings and dwellings, residential property managers.
- Child day care services (NAICS code 624410).
- Elementary and secondary schools (NAICS code 611110), *e.g.,* elementary schools with kindergarten classrooms.

• Other technical and trade schools (NAICS code 611519), *e.g.,* training providers.

• Engineering services (NAICS code 541330) and building inspection services (NAICS code 541350), *e.g.,* dust sampling technicians.

• Lead abatement professionals (NAICS code 562910), *e.g.,* firms and supervisors engaged in lead-based paint activities.

This listing is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. Other types of entities not listed in this unit could also be affected. The North American Industrial Classification System (NAICS) codes have been provided to assist you and others in determining whether this action might apply to certain entities. To determine whether you or your business may be affected by this action, you should carefully examine the applicability provisions in 40 CFR 745.89, 40 CFR 745.225, and 40 CFR 745.226. If you have any questions regarding the applicability of this action to a particular entity, consult the technical person listed under **FOR FURTHER INFORMATION CONTACT**.

## II. Background

### *A. Agency's Authority for Taking This Action*

This final rule is being issued under the authority of the Toxic Substances Control Act (TSCA) sections 402(c)(3), 404, 406, and 407 (15 U.S.C. 2682(c)(3), 2684, 2686, and 2687).

### *B. Introduction*

In the **Federal Register** issue of April 22, 2008, under the authority of sections 402(c)(3), 404, 406, and 407 of TSCA, EPA issued its final RRP rule (Ref. 1). The final RRP rule, codified in 40 CFR part 745, subparts E, L, and Q, addresses lead-based paint hazards created by renovation, repair, and painting activities that disturb painted surfaces in target housing and child-occupied facilities.

Shortly after the RRP rule was published, several petitions were filed challenging the rule. These petitions were consolidated in the Circuit Court of Appeals for the District of Columbia Circuit. On August 24, 2009, EPA signed an agreement with the environmental and children's health advocacy groups in settlement of their petitions. In this agreement EPA committed to propose several changes to the RRP rule, including the changes discussed in this document regarding the opt-out provision and recordkeeping requirements.

The RRP rule establishes requirements for training renovators, other renovation workers, and dust sampling technicians; for certifying renovators, dust sampling technicians, and renovation firms; for accrediting providers of renovation and dust sampling technician training; for renovation work practices; and for recordkeeping. Interested States, Territories, and Indian Tribes may apply for and receive authorization to administer and enforce all of the elements of the new renovation requirements. More information on the RRP rule may be found in the **Federal Register** document announcing the RRP rule or on EPA's website at *http://www.epa.gov/lead/pubs/renovation.htm.*

Many provisions of the RRP rule were derived from the existing lead-based paint activities regulations at 40 CFR part 745, subpart L (Ref. 2). These existing regulations were promulgated in 1996 under TSCA section 402(a), which defines lead-based paint activities in target housing as inspections, risk assessments, and abatements. The 1996 regulations cover lead-based paint activities in target housing and child-occupied facilities, along with limited screening activities called lead hazard screens. These regulations established an accreditation program for training providers and a certification program for individuals and firms performing these activities. Training course accreditation and individual certification was made available in five disciplines: Inspector, risk assessor, project designer, abatement supervisor, and abatement worker. In addition, these lead-based paint activities regulations established work practice standards and recordkeeping requirements for lead-based paint activities in target housing and child-occupied facilities.

The RRP rule created two new training disciplines in the field of lead-based paint: Renovator and dust sampling technician. Persons who successfully complete renovator training from an accredited training provider are certified renovators. Certified renovators are responsible for ensuring that renovations to which they are assigned are performed in compliance with the work practice requirements set out in 40 CFR 745.85. Persons who successfully complete dust sampling technician training from an accredited training provider are certified dust sampling technicians. Certified dust sampling technicians may be called upon to collect dust samples after renovation activities have been completed.

The RRP rule contains a number of work practice requirements that must be followed for every covered renovation in target housing and child-occupied facilities. These requirements pertain to warning signs and work area containment, the restriction or prohibition of certain practices (*e.g.,* high heat gun, torch, power sanding, power planing), waste handling, cleaning, and post-renovation cleaning verification. The firm must ensure compliance with these work practices. Although the certified renovator is not required to be on-site at all times, while the renovation project is ongoing, a certified renovator must nonetheless regularly direct the work being performed by other workers to ensure that the work practices are being followed.

### *C. Opt-Out Provision*

The RRP rule included a provision that exempts a renovation firm from the training and work practice requirements of the rule when the firm obtains a certification from the owner of a residence he or she occupies that no child under age 6 or pregnant women resides in the home and the home is not a child-occupied facility. Unless the target housing meets the definition of a child-occupied facility, if an owner-occupant signed a statement that no child under age 6 and no pregnant woman reside there and an acknowledgment that the renovation firm will not be required to use the lead-safe work practices contained in EPA's RRP rule, the renovation activity is not subject to the training, certification, and work practice requirements of the rule. Conversely, if the owner-occupant does not sign the certification and acknowledg ment for any reason (even if no children under age 6 or no pregnant women reside there), the renovation is subject to the requirements of the RRP rule.

Even though the Agency included the opt-out provision in the final RRP rule, EPA recognized that the opt-out presented concerns for exposure to children under age 6. Nonetheless, EPA explained that it believed it should focus the rule on scenarios with the greatest exposure to children under age 6, that concerns for new homeowners would be mitigated to some extent by the requirements of the "Disclosure Rule", and that older children and adults did not ingest lead-dust at as high a rate as toddlers and therefore high dust lead levels present a much greater risk to a young child than they do for an older child or adult. After promulgation, the rule, and specifically the opt-out provision, was challenged.

As part of a settlement agreement, EPA agreed to propose removing the opt-out provision.

On October 28, 2009, EPA proposed to remove the opt-out provision. For the reasons discussed in this Unit, the Agency has now concluded that it is important to require the RRP work practices and training and certification requirements in target housing even if there is no child under age 6 or pregnant woman residing there. By removing the opt-out provision, the rule will go farther toward protecting children under age 6 and pregnant women, as well as older children and adult occupants of target housing where no child under age 6 or pregnant woman resides. Therefore, the opt-out provision will no longer be available to owner-occupants beginning on the effective date of this final rule.

EPA believes the opt-out provision is not sufficiently protective for children under age 6 and pregnant women, the most vulnerable populations identified in the RRP rule. As pointed out by a number of commenters on the RRP rule, the opt-out provision does not protect families with young children who may purchase recently renovated target housing. Removal of the opt-out will result in fewer homes being purchased with lead hazards created by renovation, repair, and painting activities. Under the RRP rule, the opt-out provision was limited to owner-occupied target housing and did not extend to vacant rental housing because of the concern that future tenants could unknowingly move into a rental unit where dust-lead hazards created by the renovation are present. In the same way, dust-lead hazards created during renovations in an owner-occupied residence conducted prior to a sale will be present for the next occupants. It is common for home owners to hire contractors to perform activities that disturb paint before selling a house, thus increasing the likelihood of lead hazards being present for someone buying a home, which may include a family with a child under age 6 or a pregnant woman. There are other benefits to removing the opt-out provision, including protection for family pets, as lead poisonings resulting from renovations have been documented in both cats and dogs (Refs. 17 and 18).

In the preamble to the RRP rule, EPA explained that it believed the Disclosure Rule, 40 CFR part 745, subpart F (required by section 1018 of Title X of the Residential Lead-Based Paint Hazard Reduction Act of 1992 (Pub. L. 102–550), would help to address these concerns. The Disclosure Rule requires sellers of target housing to disclose known lead-based paint or lead-based paint hazard information to purchasers and provide them with a copy of the lead hazard information pamphlet entitled *Protect Your Family From Lead in Your Home* (Ref. 14). EPA explained the receipt of this information could prompt the family to inquire about potential lead-based paint hazards in the home. In addition, EPA recommended that purchasers take advantage of their statutory opportunity to have a lead-based paint inspection or risk assessment done while in the process of purchasing target housing.

In supporting the proposal to remove the opt-out provision, one commenter disagreed that the Disclosure Rule adequately addresses the risks to subsequent owners of target housing that undergo renovations under the opt-out provision. In particular, this commenter pointed out that there is nothing in the Disclosure Rule to alert homeowners to the fact that RRP work practice requirements were not followed before they purchased the home. Indeed, the Disclosure Rule only requires disclosure of known hazards. It would not require disclosure of renovation activities or that the owner opted out of the RRP rule requirements. The commenter further states that it is unreasonable to assume that a typical homeowner or someone renting a previously owner-occupied dwelling would know the detailed exemptions on the RRP rule.

The Agency continues to believe that the Disclosure Rule provides valuable information to homeowners and that this information may help homeowners become aware of lead hazards. However, EPA's study on the *Characterization of Dust Lead Levels after Renovation, Repair, and Painting Activities* (the "Dust Study", Ref. 11), demonstrated that renovation, repair, and painting activities produce large quantities of lead dust that create dust-lead hazards. The study also showed that the RRP work practices are effective at minimizing exposure to dust hazards that could result from renovation activities. As the commenter pointed out, the Disclosure Rule will not, in many cases, provide the type of renovation specific lead hazard information or provide recipients information that can be said to reliably or effectively result in minimizing exposure to lead-based paint hazards created by renovation activities. Thus, there is little evidence to suggest that the provisions of the Disclosure Rule are effective or reliable at minimizing exposure to lead-based paint hazards created by renovation activities in target housing. In addition, even if the Disclosure Rule reliably disclosed relevant information relating to earlier renovation activities, EPA does not believe this would be an adequate substitute for the work practice standards, which EPA has a record basis to conclude actually result in elimination—rather than simply disclosure—of the hazards created by renovations.

Perhaps in recognition of this shortcoming, one commenter suggested that EPA should revise the Disclosure Rule, as opposed to making changes to the RRP rule. That would not, however, satisfy EPA's obligation under section 402 to put into place standards that take into account reliability, effectiveness, and safety to address lead-based paint hazards created by renovation activities in target housing. Moreover, the Disclosure Rule was jointly promulgated by EPA and the Department of Housing and Urban Development. Thus, changes would involve a joint rulemaking effort and are not wholly within EPA's control. Furthermore, changes to the Disclosure Rule would need to be analyzed in the context of the underlying statute—not just because it might be helpful in the context of actions taken by EPA under a different statutory provision. In short, while this is a suggestion that may be worth pursuing, it does not address the present issue; that of reliably and effectively minimizing exposure to lead-based paint hazards created by renovation activities.

Furthermore, EPA is concerned about the effectiveness of disclosure with respect to populations with the highest risk of exposure to harmful lead levels. Children in minority populations and children whose families are poor have an increased risk of exposure to harmful lead levels (Ref. 3, at e376). Analysis of the National Health and Nutrition Examination Surveys (NHANES) data from 1988 through 2004 shows that the prevalence of blood lead levels equal to or exceeding 10 µg/dL in children aged 1 to 5 years has decreased from 8.6% in 1988–1991 to 1.4% in 1999–2004, which is an 84% decline (Ref. 3, at e377). However, the NHANES data from 1999–2004 indicates that non-Hispanic black children aged 1 to 5 years had higher percentages of blood lead levels equal to or exceeding 10 µg/dL (3.4%) than white children in the same age group (1.2%) (Ref. 3). In addition, among children aged 1 to 5 years over the same period, the geometric mean blood lead level was significantly higher for non-Hispanic blacks (2.8 µg/dL), compared with Mexican Americans (1.9 µg/dL) and non-Hispanic whites (1.7 µg/dL) (Ref. 3, at e377). For children aged 1 to 5 years from families with low

income, the geometric mean blood lead level was 2.4 μg/dL (Ref. 3, at e377). Further, the incidences of blood-lead levels greater than 10 μg/dL and greater than or equal to 5 μg/dL were higher for non-Hispanic blacks (14% and 3.4% respectively) than for Mexican Americans (4.7% and 1.2%, respectively) and non-Hispanic whites (4.4% and 1.2%, respectively) (Ref. 3, at e377). The "analysis indicates that residence in older housing, poverty, age, and being non-Hispanic black are still major risk factors for higher lead levels" (Ref. 3, at e376). EPA is concerned that disclosure may be ineffective with respect to these populations already at higher risk of having elevated blood lead levels because the effectiveness of disclosure depends on the recipient's understanding the significance of the disclosure and having the means and ability to act upon the information.

This also relates to practical issues that have implications for the RRP rule in general, and for high risk, low-income, minority populations in particular. The opt-out is a relatively complicated overlay to the applicability provisions of the rule. EPA believes there are practical benefits to removing the opt-out and simplifying the applicability of the rule—both for renovators and homeowners. The opt-out provision complicates the outreach and education about lead hazards and makes the rule more complicated for renovators to apply and consumers to understand. Furthermore, it not only assumes literacy but also a working knowledge of what the rule would otherwise require and an ability to provide informed consent. Accordingly, EPA believes that populations that already have the highest risk factors for lead exposure may be disproportionately adversely affected by the complexity of a rule that contains the opt-out provision. More generally, EPA believes that the more uniform the application of the rule work practices in target housing is, the more effective and reliable they will be at minimizing exposure to lead-based paint hazards. Contractors who have a single set of work practices that are to be applied in most pre-1978 housing and child-occupied facilities will be more likely to apply them consistently and correctly.

Renovations performed under the opt-out provision are also likely to result in exposures for vulnerable populations in other ways. Visiting children who do not spend enough time in the housing to render it a child-occupied facility may nevertheless be exposed to lead from playing in dust-lead hazards created by renovations. For example, children may spend time in the homes of grandparents, but those homes may be eligible for the opt-out provision of the RRP rule. A homeowner who signs an opt-out statement may not realize that she is pregnant. For example, "A Case Report of Lead Paint Poisoning during Renovation of a Victorian Farmhouse" describes four cases of childhood lead poisoning and two cases of adult lead toxicity resulting from a renovation. One of the adults was a woman who did not realize she was pregnant until after the exposure occurred. (Ref. 16)

Eliminating the opt-out provision will also protect families with young children residing near or adjacent to homes undergoing renovations. Under the RRP rule, an owner occupant can take advantage of the opt-out provision even if a child under age 6 or a pregnant woman lives in an adjacent home. Renovations on the exterior of a residence can spread leaded dust and debris some distance from the renovation activity, which is why, for regulated renovations, EPA requires renovation firms to cover the ground with plastic sheeting or other impermeable material a distance of 10 feet from the renovation and take extra precautions when in certain situations to ensure that dust and debris does not contaminate other buildings or other areas of the property or migrate to adjacent properties. One commenter cited a study that shows housing in urban areas, such as Chicago, tend to be only three to five meters apart, highlighting the likelihood of lead contamination of adjacent prosperities in urban neighborhoods. Similarly, another commenter stated that in urban communities, many if not most of the homes are side by side. There are approximately 2 million owner-occupied, single-family attached homes (*e.g.,* townhomes, semi-detached or duplex homes) built before 1978. Renovations on the exteriors of these homes are likely to contaminate neighboring yards and porches resulting in exposure outside the house as well as inside because dust can be tracked into the home. Many more owner-occupied, single-family detached homes are located in close proximity to each other, and renovations performed under the opt-out provision present a similar risk for these homes. Another factor that EPA did not fully consider in promulgating the original RRP rule, but that weighs heavily against the opt-out provision, is that the risks posed by the opt-out with respect to exterior work will disproportionally affect children that are already at the highest risk for higher blood lead levels—low income, non-Hispanic black children living in older housing in urban areas, which is likely to be comprised of attached, or closely constructed detached, homes.

While the RRP rule focused principally on protecting children under age 6, it is well known that older children and adults can also suffer adverse effects from lead exposure. Adults are susceptible to lead effects at lower blood lead levels than previously understood (e.g., Ref. 13, p. 8–25). Epidemiologic studies have consistently demonstrated associations between lead exposure and enhanced risk of deleterious cardiovascular outcomes, including increased blood pressure and incidence of hypertension. A meta-analysis of numerous studies estimates that a doubling of blood-lead level (e.g., from 5 to 10 μg/dL) is associated with ~1.0 mm Hg increase in systolic blood pressure and ~0.6 mm Hg increase in diastolic pressure. The evidence for an association of lead with cardiovascular morbidity and mortality is limited but supportive. (Ref. 13, p E–10). As evident from the discussions in chapters 5, 6 and 8 of EPA's Air Quality Criteria Document for Lead (Ref. 13), "neurotoxic effects in children and cardiovascular effects in adults are among those best substantiated as occurring at blood lead concentrations as low as 5 to 10 μg/dL (or possibly lower); and these categories are currently clearly of greatest public health concern" (Ref. 13, p. 8–60). With regard to blood lead levels in individual children associated with particular neurological effects, the Criteria Document states "Collectively, the prospective cohort and cross-sectional studies offer evidence that exposure to lead affects the intellectual attainment of preschool and school age children at blood lead levels <10 μg/dL (most clearly in the 5 to 10 μg/dL range, but, less definitively, possibly lower)." (Ref. 13, p. 6–269). Epidemiological studies have consistently demonstrated associations between lead exposure and enhanced risk of deleterious cardiovascular outcomes, including increased blood pressure and incidence of hypertension. As one commenter pointed out, the half-life of lead in bone is approximately 20 years. Thus, women of child-bearing age exposed to lead will retain higher levels of lead in their bodies throughout their child-bearing years. When pregnancy occurs, lead can be transferred to the fetus causing an array of adverse effects. EPA now believes the opt-out provision does not sufficiently account for the importance of the health effects of lead exposure to adults and children age 6 and older by

allowing renovations to be performed without following the RRP rule requirements in housing that qualified for the opt-out. In supporting the final RRP rule, EPA stated that older children and adults do not ingest dust at the same high rate that a toddler does. This is corroborated by a 2007 meta-analysis of studies of children's hand-to-mouth behavior. (Ref. 4). However, as this analysis indicates, this does not mean that hand-to-mouth behavior is not a potential concern for older children. According to the meta-analysis, the average indoor hand-to-mouth behavior ranged from 6.7 to 28.0 contacts/hour, with the lowest value corresponding to the 6 to < 11 year olds and the highest value corresponding to the 3 to < 6 month olds. Average outdoor hand-to-mouth frequency ranged from 2.9 to 14.5 contacts/hour, with the lowest value corresponding to the 6 to <11 year olds and the highest value corresponding to the 6 to < 12 month olds. Although toddlers have a higher incidence of hand-to-mouth behavior than 6 to < 11 year olds, the latter group still averages more than 6 contacts/hour. Further elevated blood lead levels do occur in children older than 6 and adults (Ref. 15). The Dust Study shows that when the RRP requirements are not followed, renovation activities result in dust lead levels that can be orders of magnitude above the hazard standard and that can be orders of magnitude higher than if the RRP requirements are followed. EPA believes the information from this meta-analysis provides corroborating support for EPA's concern for children 6 and older and its decision to eliminate the opt-out provision.

The Agency believes that it should only allow provisions such as the opt-out for situations where the information available to EPA indicates that the RRP rule work practices are not necessary to minimize exposure of occupants to lead paint hazards. Because lead paint dust exposure can cause adverse health effects for populations other than just children under age 6 and renovations can result in lead dust levels many times higher than the hazard standard, EPA believes the work practices should be followed in target housing without regard to the age of the occupants.

Moreover, EPA believes that implementing the regulations without the opt-out provision promotes, to a greater extent, the statutory directive to promulgate regulations covering renovation activities in target housing. Among other things, TSCA section 402(c)(3), directs EPA to promulgate regulations that apply to renovation activities that create lead-based paint hazards in target housing. Section 401(17) of TSCA defines target housing as "any housing constructed prior to 1978, except housing for the elderly or persons with disabilities (unless any child who is less than 6 years of age resides or is expected to reside in such housing for the elderly or persons with disabilities) or any 0-bedroom dwelling." Pursuant to section 403 of TSCA, EPA has identified dust-lead hazards in target housing and child-occupied facilities as surface dust that contains a mass-per-area concentration of lead equal to or exceeding 40 μg/ft $^2$ on floors or 250 μg/ft $^2$ on windowsills. In the RRP rule, EPA found that renovation, repair, and painting activities that disturb lead-based paint create lead-based paint hazards. Thus, renovations in target housing that create lead-based paint hazards should be covered unless there is a record basis to conclude that coverage is unnecessary.

Shortly after promulgating the RRP rule, the RRP rule, and specifically the opt-out provision, was challenged. EPA decided to settle the lawsuit. As part of the settlement, EPA agreed to issue a proposed rule removing the opt-out. In turn, as part of this rulemaking, EPA requested information or data that would shed any light on the reliability, effectiveness, or safety of the opt-out or any variation thereof in relation to EPA's lead hazard standards. EPA did not receive any information in response to its request.

EPA's Dust Study demonstrated and EPA found that renovation, repair, and painting activities produce lead dust above the regulatory hazard standards. In fact many renovation activities create large quantities of lead dust. The Dust Study shows that renovation activities result in lead levels many times greater than the hazard standard when the RRP rule containment and cleanup procedures are not followed. It also demonstrated that work practices other than those restricted or prohibited by the RRP rule can leave behind lead dust well above the hazard standards when the RRP rule requirements are not followed. The Dust Study also showed that alternative practices (broom cleaning, not using containment) were not effective or safe in relation to EPA's lead hazard standards. Under the opt-out, contractors performing renovations would have no obligation to minimize or clean up any dust-lead hazards created by the renovation. Indeed, contractors would not be prevented from using practices that EPA has determined create hazards that cannot be adequately contained or cleaned up even when following the RRP rule requirements. The Agency also took these factors into consideration in its decision to remove the opt-out provision in this final rule.

In development of the proposed rule, EPA considered and requested comment on certain alternative approaches or work practice requirements for owner-occupied target housing that is not a child-occupied facility and where no children younger than 6 or pregnant women reside. EPA also requested comment on possible alternate approaches that would meet EPA's statutory obligation to apply work practice standards in target housing that take into account reliability, effectiveness, and safety.

One alternative for which EPA requested comment would have required the RRP work practices only for exterior renovations. Under this option, unless the target housing meets the definition of a child-occupied facility, if an owner-occupant signed a statement that no child under 6 and no pregnant woman reside there and an acknowledgment that the renovation firm will only be required to use the lead-safe work practices contained in EPA's RRP rule when renovating exteriors then the renovation firm would only be required to follow the RRP work practices when doing exterior renovations, but not when doing interior renovations. This option would have addressed exposures to lead dust from exterior renovations for people living in neighboring homes, particularly attached homes or homes in close physical proximity. Individuals residing in homes in close physical proximity could be exposed during the entire renovation and post-renovation phase, and their exposure would not necessarily be considered by an owner-occupant in choosing not to require lead-safe work practices. However, this option did not address lead hazards created during renovations of the interiors of home which could lead to lead exposure to occupants, and EPA received no comments mitigating this concern or supporting the protectiveness of this option.

EPA requested comment on an alternative option under which the only work practices applicable to housing that is not a child-occupied facility and where no children or pregnant women reside would be the restriction or prohibition on certain work practice found at 40 CFR 745.85(a)(3). These include:

1. Open-flame burning or torching of lead-based paint is prohibited.

2. The use of machines that remove lead-based paint through high speed operation such as sanding, grinding, power planing, needle gun, abrasive blasting, or sandblasting, is prohibited

unless such machines are used with HEPA exhaust control.

3. Operating a heat gun on lead-based paint is permitted only at temperatures below 1,100 degrees Fahrenheit.

All the other work practice requirements in 40 CFR 745.85 would not be required in target housing that is not a child-occupied facility and where no children under age 6 or pregnant women reside. This option would have prohibited or restricted the highest dust generating practices but would not have required the other practices under 40 CFR 745.85. While the prohibited work practices create high amounts of lead dust, the other work practices also create lead dust above the hazard standard. The Dust Study shows that common work practices result in lead levels many times greater than the hazard standard when the RRP rule containment and cleanup procedures are not followed.

EPA requested comment on a third option under which a subset of target housing would not be subject to the RRP work practices but instead would have been subject to dust wipe testing to be performed after the renovation. Under this option, unless the target housing meets the definition of a child-occupied facility, if an owner-occupant signed a statement that no child under 6 and no pregnant woman reside there and an acknowledgment that the renovation activity is only subject to dust wipe testing after the renovation and providing the results to the owner-occupant, then the renovation firm would not be required to conduct the training, certification, and work practice requirements of the rule. The testing results would become part of the record for that house that must be disclosed under the Disclosure Rule (40 CFR part 745, subpart F) required by section 1018 of Title X of the Residential Lead-Based Paint Hazard Reduction Act of 1992 (Pub. L. 102–550). This option would provide information that could protect potential buyers of a home where renovation was completed prior to the sale, because they would be notified of the results of the dust wipe tests before purchase and could take appropriate action (*e.g.,* thorough cleaning and retesting of the home, or selecting a different home) if the lead results were at a level that raised concerns for them. While this alternative may provide helpful information to home owners and occupants, as discussed above it would not address lead-based paint hazards created by renovations because it does not require any of the work practices required by the RRP rule.

After considering these alternatives as well as keeping the opt-out provision, the Agency has decided to eliminate the Opt-out provision and not to adopt any of the alternatives. One concern with the opt-out provision or the alternatives is that they do not adequately address the risks of lead-based paint hazards to children older than five years old or adults. The opt-out and each of these alternatives can also result in exposures to children under the age of 6 and pregnant women to lead-based paint hazards. In the same way as for the opt-out provision itself, EPA also has concerns that populations that are already at a higher risk for elevated blood lead levels may be disproportionately and adversely affected by the alternatives.

Another concern with the opt-out as well as the alternatives is that they can create confusion among both contractors and consumers. Several commenters stated that the opt-out provision or the alternatives could cause confusion that could potentially result in non-compliance by renovation firms. EPA agrees and believes that simplifying the applicability of the work practices will enhance the effectiveness and reliability of the rule.

Based on the data available to EPA (*e.g.,* the Dust Study), the Agency cannot now conclude that the opt-out nor that the alternative approaches are safe, reliable or effective because none of these would sufficiently minimize exposure to lead-based paint hazards. In sum, when the RRP work practices are not used, residents and visitors are exposed to the lead hazards created by the renovation, and therefore these approaches would not protect older children, women of childbearing age, or other adults currently residing in the home and can result in exposure to children under the age of 6 and pregnant women to lead-based paint hazards. Again, although EPA specifically requested information or data that would shed any light on the reliability, effectiveness, or safety of these options in relation to EPA's lead hazard standards, the Agency did not receive any. The Agency took these factors into consideration in deciding not to adopt these alternatives.

*D. Recordkeeping and Reporting*

EPA's stated purposes in promulgating the recordkeeping requirements were two-fold. "The first is to allow EPA or an authorized State to review a renovation firm's compliance with the substantive requirements of the regulation through reviewing the records maintained for all of the renovation jobs the firm has done. The second is to remind a renovation firm what it must do to comply. EPA envisioned that renovation firms would use the recordkeeping requirements and checklist as an aid to make sure that they have done everything that they are required to do for a particular renovation" (Ref. 1, p. 21745). Several commenters on the RRP rule suggested that the recordkeeping requirements could also be used to provide valuable information about the renovation to the owners and occupants of buildings being renovated. EPA responded to these comments by stating that some of the information identified by these commenters was included in the "Renovate Right" pamphlet and that the pamphlet was the best way to get that information to the owners and occupants. With respect to the other items identified by these commenters, EPA stated its belief that the renovation firms were already providing much of this information (Ref. 1, p. 21718).

As part of EPA's preparations to administer the RRP program, EPA has been developing an education and outreach campaign aimed at consumers. In promulgating the RRP rule, EPA recognized the importance of education and outreach to consumers, to teach them about lead-safe work practices and to encourage them to hire certified renovation firms (Ref. 1, p. 21702). EPA's work on the education and outreach campaign has continued to highlight the importance of an informed public to the success of the RRP program at minimizing exposures to lead-based paint hazards that may be created by renovations. As a result, EPA has determined that copies of the records required to be maintained by renovation firms to document compliance with the work practice requirements, if provided to the owners and occupants of the renovated buildings, would serve to reinforce the information provided by the "Renovate Right" pamphlet on the potential hazards of renovations and on the RRP rule requirements. While the "Renovate Right" pamphlet provides valuable information about the requirements of the RRP rule, the records that a firm would give to owners and occupants would provide useful information regarding rule compliance that is not found in the pamphlet. In covering the significant training and work practice provisions of the RRP rule, these records would enable building owners and occupants to better understand what the renovation firm did to comply with the RRP rule and how the RRP rule's provisions affected their specific renovation. Several commenters stated that educating homeowners would help them monitor compliance by the

renovation firm. One commenter stated that the checklist would help the public understand the RRP rule and that a better informed public would choose to have renovation performed by professional remodelers who would provide safe and quality work. Other commenters believe that the distribution of the checklist is needed to address a lack of accountability of renovation firms to owners and occupants. EPA agrees that educating the owners and occupants in this way is likely to improve their ability to assist the EPA in monitoring compliance with the RRP rule and contribute to the effectiveness and reliability of the rule.

After considering public comments, EPA decided to finalize the rule as proposed. This final rule requires that, when the final invoice for the renovation is delivered, or within 30 days of the completion of the renovation, whichever is earlier, the renovation firm provide information demonstrating compliance with the training and work practice requirements of the RRP rule to the owner of the building being renovated and, if different, to the occupants of the renovated housing or the operator of the child-occupied facility. For renovations in common areas of target housing, the renovation firm must provide the occupants of the affected housing units instructions on how to review or obtain this information from the renovation firm at no charge to the occupant. These instructions must be included in the notice provided to each affected unit under 40 CFR 745.84(b)(2)(i) or on the signs posted in the common areas under 40 CFR 745.84(b)(2)(ii). EPA is finalizing similar requirements for renovations in child-occupied facilities. Under this final rule, the renovation firm is required to provide interested parents or guardians of children using the child-occupied facility instructions on how to review or obtain a copy of these records at no cost to the parents or guardians. This could be accomplished by mailing or hand delivering these instructions, or by including them on the signs posted under 40 CFR 745.84(c)(2)(ii).

Under this new requirement, renovation firms must provide training and work practice information to owners and occupants. The information should be provided in a short, easily read checklist or other form. EPA's "Sample Renovation Recordkeeping Checklist" may be used for this purpose, but firms may develop their own forms or checklists so long as they include all of the required information. The specific information that is required to be provided are the training and work practice compliance information required to be maintained by 40 CFR 745.86(b)(7), as well as identifying information on the manufacturer and model of the test kits used, if any, a description of the components that were tested including their locations, and the test kit results. The checklist or form must include documentation that a certified renovator was assigned to the project, that the certified renovator provided on-the-job training for workers used on the project, that the certified renovator performed or directed workers who performed the tasks required by the RRP rule, and that the certified renovator performed the post-renovation cleaning verification. This documentation must include a certification by the certified renovator that the work practices were followed, with narration as applicable. However, EPA is not requiring that the renovation firm automatically provide a copy of the certified renovator's training certificate, which must be maintained in the firm's records pursuant to 40 CFR 745.86(b)(7), as an attachment to the checklist or other form.

One commenter believes that the text of the form should be included in the regulations. EPA disagrees with this comment. The Agency wants to give renovation firms flexibility with regard to the format of the information given to owners and occupants. Renovation firms must list the information specified in the regulations and they can use EPA's sample checklist if they choose. However, the final rule allows firms to use their own version of the checklist as long as it includes the required information.

With respect to the option for dust clearance in lieu of cleaning verification under 40 CFR 745.85(c), the RRP rule requires the renovation firm to provide the associated results from dust wipe sampling to the person who contracted for the renovation. This requirement was promulgated in response to public comments on the applicability of the Lead Disclosure Rule, 40 CFR part 745, subpart F, to dust lead testing reports. These commenters stated that a requirement for the information to be provided to the owner of the property was necessary in order to make sure that the information would be available to be disclosed in the future (Ref. 1, p. 21718). However, in agreeing with these commenters and acknowledging the importance of having the dust sampling reports available to disclose to future purchasers and tenants, EPA neglected to consider the importance of making dust sampling information available to the current occupants of renovated rental target housing or child-occupied facilities. While 40 CFR 745.107 would require renovation-related dust sampling reports to be disclosed to target housing tenants at the next lease renewal, this may be months or years after the renovation was completed. In addition, the Lead Disclosure Rule does not apply to child-occupied facilities in public or commercial buildings, so those tenants may never receive this information.

Therefore, this final rule requires that, if dust clearance is performed in lieu of cleaning verification, the renovation firm provide a copy of the dust wipe sampling report(s) to the owner of the building that was renovated as well as to the occupants, if different. With respect to renovations in common areas of target housing or in child-occupied facilities, EPA is also requiring that these records be made available to the tenants of the affected housing units or the parents and guardians of children under age 6 using the child-occupied facilities. Dust sampling reports may be made available to these groups in the same way as training and work practice records, by providing information on how to review or obtain copies in individual notifications or on posted signs.

*E. Effective Date*

During the development of the proposed rule, EPA considered a delay in the effective date of this final rule. EPA estimated that eliminating the opt-out provision could increase the number of renovators that need to be certified by 50%. A delayed effective date would have allowed more time for additional renovators to get their certification. The Agency asked for comment on whether a 6-month or 1-year delay in the effective date is appropriate. In addition, EPA asked for comment on whether a delay in the effective date of this rule would be confusing for the regulated community or the certified personnel.

Comments regarding the delay were mixed. Several commenters opposing the delay believe that EPA has enough training capacity to train additional renovators that may need certification because of this rule. Several commenters pointed out that delaying the effective date would result in more people being exposed to lead hazards that could be avoided if the RRP rule work practices were in place for renovations previously eligible for the opt-out. Another commenter believes that phasing in the work practice requirements by delaying the effective date of this rule would lead to confusion for the public and renovation firms.

Some commenters were in favor of delaying the effective date. Several commenters said that many contractors were not aware of the requirements and there is not sufficient time for them to understand and comply with the regulations without a delayed effective date. Other commenters stated that EPA should delay the effective date to allow enough time for additional renovators to take the training. One commenter asserts that EPA should delay the effective date rather than create a shortfall of renovators.

Another factor EPA considered with regard to extending the effective date is whether firms specialize in housing that is eligible for the opt-out. The cost estimates for the rule assume that renovation firms are somewhat specialized in terms of whether they work in housing where the RRP rule is applicable. However, there may be many instances where firms working in opt-out housing will already have become certified, and their staff been trained, because they also work in regulated facilities ineligible for the opt-out provision. If firms are less specialized than the analysis assumed, there may be little to no incremental training and certification costs due to the proposed rule. Furthermore, to the extent that some eligible homeowners would have declined to opt out, the work practice costs for removing the opt-out provision will be less than estimated. EPA requested comment in the proposal on the degree to which the same firms and renovators are likely to work both in opt-out housing and in child-occupied facilities and target housing that are ineligible for the opt-out provision.

Several commenters stated that they do not believe firms specialize in housing based on occupancy. One commenter reviewed advertisements and the market place, and did not find renovators that work only in owner-occupied housing without children or pregnant women. According to the commenter, because firms do not appear to specialize in this manner, the additional costs of eliminating the opt-out are only the costs associated with the materials and time for a particular job as contractors would be required to get certification regardless of whether the opt-out provision is removed. EPA agrees with these comments. While the Agency has not done analysis to determine how many firms may specialize based on occupancy, EPA believes it is likely that most firms will not specialize in owner-occupied housing without children or pregnant women. Commenters did not provide information indicating that firms specialize in this way. If that is the case then many of the approximately 110,000 firms and renovators estimated to seek certification because of this rule would need certification regardless of whether the opt-out provision is removed. If the majority of the 110,000 firms and renovators have already been required to get certification then there is less of an argument to extend the effective date of this rule because many fewer firms and renovators will need certification between publication of the rule and the effective date.

Accordingly, the Agency decided not to delay the effective date of this final rule. As such, the rule will become effective 60 days after publication in the **Federal Register**. EPA believes that it is important to eliminate the opt-out exemption without delay in order to avoid further lead exposures in housing previously eligible for the opt-out. Further, based on the number of training courses accredited to date, the Agency believes that there is sufficient training capacity available to train any additional renovators that would need to get certification because of this rule.

*F. State Authorization*

As part of the authorization process, States and Indian Tribes must demonstrate to EPA that they meet the requirements of the RRP rule. A State or Indian Tribe would have to indicate that it meets the requirements of the renovation program in its application for approval or the first report it submits under 40 CFR 745.324(h). The Agency proposed to give States and Indian Tribes 1 year to demonstrate that their programs include any new requirements the EPA may promulgate, such as the requirements in this final rule. EPA received two comments regarding this requirement. One comment, from the Iowa Department of Public Health, explained that Iowa's legislature only meets once a year for 4 months. Depending on when the EPA publishes amendments to the RRP, it could be very difficult for states in similar situations to meet this requirement. The commenter requested that EPA give States and Indian Tribes two years instead of one to demonstrate compliance. EPA believes that the concern raised by the commenter has merit, and not just for Iowa. Therefore, the Agency decided to allow States and Indian Tribes up to two years to demonstrate to EPA that they meet the requirements of the RRP rule in its application for approval or the first report it submits under 40 CFR 745.324(h).

*G. Renovator Certification Requirements*

EPA was made aware by stakeholders that some renovators want to take the training course closer to April 2010 in order to maximize their 5-year certification which is not required until the RRP rule becomes effective on April 22, 2010. Under the RRP rule, the 5-year certification begins when the renovator completes the training. The Agency is concerned that if enough renovators wait until April 2010 to take the training it may cause training courses to fill up resulting in a lack of available courses near the effective date. In order to give renovators incentive to take the course well in advance of the April 2010 effective date, the Agency considered a change to the requirements that would allow renovator certifications issued on or before the effective date of the RRP rule to last until July 1, 2015. The Agency requested comment on whether it should extend the certification for renovators that get their certification by April 22, 2010.

EPA received several comments in favor of extending the renovator certification to July 1, 2015. Several commenters believe this would give renovators incentive to take the training early. One commenter supported the extension so those who took the training in advance of the April 22, 2010 implementation date would not be penalized. Another commenter stated that an extension of the certification would prevent logistical problems like waiting lists for trainings during the final days before the effective date.

The Agency decided to finalize an extension of the 5-year certification for renovators who take the training before April 22, 2010. EPA agrees that renovators who take the training early should not be penalized and therefore will extend those certifications until July 1, 2015.

*H. Principle Instructor Requirements*

As discussed in the preamble to the proposed rule, EPA considered modifying the requirements for training providers. Under the original requirements for the accreditation of training providers, Principle Instructors were required to take a 16-hour lead-paint course taught by EPA or an authorized State, Tribe, or Territory. EPA became aware that 16-hour courses are not available in every state, making it difficult for some instructors to get the required training. To address this problem, EPA considered reducing the hourly requirement to 8 hours. EPA received several comments on the Principal Instructor requirement, mostly

in support of reducing the hourly requirement to 8 hours. One commenter stated that there is no significant benefit to requiring 16 hours instead of 8 hours and that the 8-hour requirement will fit more closely to available training courses. Similarly, another commenter stated that the 16-hour training shares little content with what the Principal Instructors are going to teach in the renovator course. The commenter also explained that there is no 16-hour lead training course in Mississippi which led to difficulties with a local organization's ability to offer the renovator course. One commenter opposed to reducing the hourly requirement stated that 8 hours of lead training is not sufficient for an instructor to know enough about lead paint, lead hazards and federal regulations. Another commenter stated that there is enough training capacity negating the need to reduce the hourly requirement.

EPA agrees that the 8-hour renovator course, instead of a longer abatement course, is more closely related to what Principal Instructors must know in order to teach the renovator training. In addition to the training requirement, Principal Instructors must meet education and work experience requirements in order to teach lead-based paint training courses. The Agency believes that taking this course would be sufficient training for future instructors of the renovator course and therefore has reduced the requirement from 16 to 8 hours. By reducing the required hours, future instructors can take the 8-hour renovator or dust sampling technician trainings instead of a 16-hour or longer abatement course.

## III. References

As indicated under **ADDRESSES**, a docket has been established for this rulemaking under docket ID number EPA–HQ–OPPT–2005–0049. The following is a listing of the documents that are specifically referenced in this document. The docket includes these documents and other information considered by EPA, including documents that are referenced within the documents that are included in the docket, even if the referenced document is not physically located in the docket. For assistance in locating these other documents, please consult the technical contact listed under **FOR FURTHER INFORMATION CONTACT**.


1. EPA. Lead; Renovation, Repair, and Painting Program; Final Rule. **Federal Register** (73 FR 21692, April 22, 2008) (FRL–8355–7). Available on-line at: *http://www.gpoaccess.gov/fr.*
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3. Jones, Robert L., David M. Homa, Pamela A. Meyer, Debra J. Brody, Kathleen L. Caldwell, James L. Pirkle, and Mary Jean Brown. "Trends in Blood Lead Levels and Blood Lead Testing Among U.S. Children Aged 1 to 5 Years, 1988–2004." Pediatrics: Official Journal of the American Academy of Pediatrics. Vol. 123, No. 3, pp. e376–385, March 2009.
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5. EPA. Office of Pollution Prevention and Toxics (OPPT). Economic Analysis for the TSCA Lead Renovation, Repair, and Painting Program Opt-out and Recordkeeping Final Rule for Target Housing and Child-Occupied Facilities. April 2010.
6. U.S. Department of Commerce, Bureau of Economic Analysis. Table 1.1.9. Implicit Price Deflators for Gross Domestic Product. August 17, 2009.
7. EPA. Opt-out and Recordkeeping Final Rule ICR Addendum for the rulemaking entitled Lead: Elimination of the Opt-Out Provision and Other Amendments to the Renovation, Repair, and Painting Program; Proposed Rule. April 2010.
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## IV. Statutory and Executive Order Reviews

EPA has prepared an analysis of the potential costs and benefits associated with this rulemaking. This analysis is contained in the Economic Analysis for the TSCA Lead Renovation, Repair, and Painting Program Opt-out and Recordkeeping Final Rule for Target Housing and Child-Occupied Facilities (Economic Analysis, Ref. 5), which is available in the docket for this action and is briefly summarized here, and in more detail later in this Unit.

| Category | Description |
|---|---|
| Benefits | $866 million—$3,061 million annualized (3% discount rate).<br>$920 million—$3,258 million annualized (7% discount rate).<br>Due to avoided IQ loss in children under age 6 and cardiovascular effects in adults. EPA does not have sufficient information to fully quantify benefits due to avoided health effects to individuals not present in target housing and child-occupied facilities subject to this rule or benefits due to avoided health effects other than IQ loss and cardiovascular effects. |
| Costs | $295 million annualized (3% discount rate).<br>$320 million annualized (7% discount rate). |

*A. Executive Order 12866*

Under Executive Order 12866, entitled "Regulatory Planning and Review" (58 FR 51735, October 4, 1993), it has been determined that this rule is a "significant regulatory action" under section 3(f)(1) of the Executive Order because EPA estimates that it is likely to have an annual effect on the economy of $100 million or more. Accordingly, this action was submitted to the Office

of Management and Budget (OMB) for review under Executive Order 12866 and any changes made based on OMB recommendations have been documented in the public docket for this rulemaking as required by section 6(a)(3)(E) of the Executive Order.

The following is a summary of the Economic Analysis (Ref. 5), which is available in the docket for this action.

1. *Number of facilities and renovations.* This rule applies to 78 million target housing units and child-occupied facilities in pre-1978 facilities. There are approximately 40 million target housing units potentially affected by the removal of the opt-out provision (i.e., owner occupied housing units where no child under age 6 or pregnant woman resides and that do not meet the definition of a child-occupied facility). There are an additional 38 million facilities potentially affected by the requirement that renovators provide owners and occupants with copies of the records required to be maintained by the renovator to document compliance with the training and work practice requirements. Approximately 100,000 of these facilities are child-occupied facilities located in public or commercial buildings, and the remainder are located in target housing (either in rental housing, owner-occupied housing where a child under age 6 or pregnant woman resides, or owner-occupied housing that meets the definition of a child-occupied facility).

The removal of the opt-out provision will affect approximately 7.2 million renovation events per year in the 40 million housing units previously eligible to use the opt-out provision. In the first year, there will be an estimated 5.4 million renovation, repair, and painting events in these housing units where the rule will cause lead-safe work practices to be used. (In the remaining 1.8 million renovation events, test kits for determining whether a surface contains lead-based paint will indicate that lead-based paint is not present.) EPA expects test kits that more accurately determine whether a painted surface qualifies as lead-based paint will become available in late 2010. Once the improved test kits are available, the number of renovation, repair, and painting events using lead-safe work practices due to the rule in housing previously eligible for the opt-out provision is expected to drop to 3.0 million events per year.

The requirement for renovators to provide owners and occupants with records demonstrating compliance with the training and work practice requirements will affect all of the 7.2 million renovation events per year in housing units previously eligible for the opt-out provision. This new recordkeeping requirement will also affect an additional 11.4 million renovation events per year in the 38 million facilities ineligible for the opt-out provision.

EPA's estimates are based on the assumption that owners of housing eligible for the opt-out provision would always choose to exercise that provision. To the extent that some eligible homeowners would decline to opt out, the number of renovation events affected by the removal of the opt-out would be lower than EPA has estimated, as would the costs of this action and the estimated number of people protected by this action, since they would choose to be protected by the requirements of the RRP rule.

2. *Options evaluated.* EPA considered a variety of options for addressing the risks created by renovation, repair, and painting activities disturbing lead-based paint in housing previously eligible for the opt-out provision. The Economic Analysis analyzed several options, including different options for the effective date of the final rule when published; an option phasing out the opt-out provision depending on when the facility was built (pre-1960 or pre-1978); and different options for the work practices (such as containment, cleaning, and cleaning verification) required in housing previously eligible for the opt-out provision.

All options evaluated in the Economic Analysis would also require renovation firms to provide owners and occupants of the buildings with a copy of the records demonstrating compliance with the training and work practice requirements of the RRP rule. This additional recordkeeping requirement would apply to renovation, repair, and painting activities in all 78 million target housing units and child-occupied facilities.

3. *Benefits.* The benefits of the rule result from the prevention of adverse health effects attributable to lead exposure from renovations in pre-1978 buildings. These health effects include impaired cognitive function in children and several illnesses in children and adults, such as increased adverse cardiovascular outcomes (including increased blood pressure, increased incidence of hypertension, cardiovascular morbidity, and mortality) and decreased kidney function.

Removing the opt-out provision will protect children under the age of 6 who visit a friend, relative, or caregiver's house where a renovation would have been performed under the opt-out provision; children who move into such housing when their family purchases it after such a renovation would have been performed; and children who live in a property adjacent to housing where renovation would have been performed under the opt-out provision. Removing the opt-out provision will also protect individuals age 6 and older who live in houses that would have been renovated under the opt-out provision; who move into such housing; and who live in adjacent properties.

EPA has estimated some of the benefits of the rule by performing calculations based on estimates of the number of individuals in each of these situations and the average benefit per individual in similar situations from previous RRP rule analyses with some simple adjustments. The resulting calculations provide a sense of the magnitude of benefits from this action but should not be interpreted as strict upper or lower bound estimates of total benefits. Based on two scenarios for each of the situations described in the previous paragraph, annualized benefits for the rule may range from approximately $870 million to $3.2 billion assuming a discount rate of 3%, and $920 million to $3.3 billion assuming a discount rate of 7%. Within these scenarios, 10% of these benefits are attributable to avoided losses in expected earnings due to IQ drop in children under 6, and 90% to avoided medical costs (or other proxies for willingness to pay) for hypertension, coronary heart disease, stroke, and the resulting incidence of deaths in older individuals. For children under 6, the largest proportion of these benefits derive from moving into recently renovated housing; for older individuals, the largest proportion derives from on-going residence in houses that would have been renovated under the opt-out provision.

EPA did not estimate benefits for those who live near a house renovated under the opt-out provision unless in a contiguous attached home; those who spend time in a friend's or relative's house renovated under the opt-out provision; and for health effects other than IQ loss in children under 6 and blood pressure effects in older individuals.

To the extent that some eligible homeowners would have declined to opt out, the benefits of this action will be lower than estimated, since exposed persons will already be protected by the requirements of the RRP program.

4. *Costs.* Removing the opt-out provision will require firms performing renovation, repair, and painting work for compensation in housing previously eligible for the opt-out provision to

follow the training, certification, and work practice requirements of the RRP rule. This may result in additional costs for these firms. Furthermore, the additional recordkeeping requirements in this rule will increase costs of renovations in all target housing and child-occupied facilities. Costs may be incurred by contractors that work in these buildings, landlords that use their own staff to work in buildings they lease out; and child-occupied facilities that use their own staff to work in buildings they occupy.

The rule is estimated to cost approximately $500 million in the first year. The cost is estimated to drop to approximately $300 million per year starting with the second year, when improved test kits for detecting the presence of lead-based paint are assumed to become available. Over $200 million per year of the cost in subsequent years is due to the work practice requirements in housing previously covered by the opt-out provision. Training for renovators and workers and certification for firms working in housing previously covered by the opt-out provision is estimated to add approximately $50 million per year to the cost. Requiring renovators to provide owners and occupants with copies of the recordkeeping required to document compliance with the RRP rule training and work practice requirements costs approximately $30 million per year, with about two thirds of this incurred in housing that was previously eligible for the opt-out provision.

Note that the costs of this rule as estimated in the Economic Analysis are expressed in 2005 dollars. To express values in terms of current dollars, the Implicit Price Deflator for Gross Domestic Product as determined by the Bureau of Economic Analysis can be consulted for an indication of how nominal prices for goods and services produced in the economy have changed over time. From 2005 to the second quarter of 2009, the implicit price deflator increased from 100 to 109.753, a difference of approximately 10% (Ref. 6).

The cost estimates for training and certification assume that renovation firms are somewhat specialized in terms of whether they work in facilities where the RRP rule is applicable. However, there may be many instances where firms working in opt-out housing will already have become certified, and their staff been trained, because they also work in regulated facilities ineligible for the opt-out provision. If firms are less specialized than the analysis assumed, there may be little to no incremental training and certification costs due to the rule. Furthermore, to the extent that some eligible homeowners would have declined to opt out, the work practice costs for removing the opt-out provision will be less than estimated.

The options EPA analyzed with a phase in or a delayed effective date for removing the opt-out provision have a lower cost in the first 2 years but have identical costs to the final rule beginning in the third year. Options with different work practice requirements for the housing previously eligible for the opt-out provision would cost 1% to 17% less than the final rule. This difference would all be due to lower work practice costs, as the training, certification, and recordkeeping costs would be the same for these options as for this rule.

*B. Paperwork Reduction Act*

The information collection requirements contained in this rule have been submitted for approval to the Office of Management and Budget (OMB) under the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq*. EPA has prepared an Information Collection Request (ICR) document to amend an existing approved ICR. The ICR document, referred to as the Opt-out and Recordkeeping Final Rule ICR Addendum and identified under EPA ICR No. 1715.12 and OMB Control Number 2070–0155, has been placed in the docket for this rule (Ref. 7). The information collection requirements are not enforceable until OMB approves them.

Burden under the PRA means the total time, effort, or financial resources expended by persons to generate, maintain, retain, disclose, or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

The information collection activities contained in this rule are designed to assist the Agency in meeting the core objectives of TSCA section 402. EPA has carefully tailored the recordkeeping requirements so they will permit the Agency to achieve statutory objectives without imposing an undue burden on those firms that choose to be involved in renovation, repair, and painting activities.

The information collection requirements under this rule may affect training providers as well as firms that perform renovation, repair, or painting for compensation. Removing the opt-out provision may cause additional renovators to become trained and firms to become certified, and there are paperwork requirements for both of these activities. Removing the opt-out provision will also create paperwork due to the requirement to maintain records documenting compliance with the training and work practice requirements. This rule also requires renovation firms to provide owners and occupants with these records. Although firms have the option of choosing to engage in the covered activities, once a firm chooses to do so, the information collection activities become mandatory for that firm.

The ICR document provides a detailed presentation of the estimated paperwork burden and costs resulting from this rule. The burden to training providers and firms engaged in renovation, repair, and painting activities is summarized in this unit.

Because this analysis assumes that renovation firms are somewhat specialized in terms of whether they work in facilities where the RRP rule requirements are applicable, removing the opt-out provision is estimated to result in additional renovators becoming trained and additional renovation firms becoming certified. Training additional renovators will increase the paperwork burden for training providers, since they must submit records to EPA (or an authorizing State, Tribe, or Territory) pertaining to each student attending a training course. Approximately 170 training providers are estimated to incur an average burden of about 40 hours each for additional notifications, resulting in an increase in training provider burden averaging 7,000 hours per year as a result of the removal of the opt-out provision.

Removing the opt-out provision is estimated to result in up to 110,000 additional firms becoming certified to engage in renovation, repair, or painting activities. The average certification burden is estimated to be 3.5 hours per firm in the year a firm is initially certified, and 0.5 hours in years that it is re-certified (which occurs every 5 years). Firms must keep records of the work they perform; this recordkeeping is estimated to average approximately 5 hours per year per firm. And under this rule, firms must also provide a copy of the records demonstrating compliance with the training and work practice

requirements of the RRP rule to the owners and occupants of buildings being renovated. This additional recordkeeping requirement is estimated to average approximately 3.3 hours per year per firm. The total annual burden for these 110,000 firms is estimated to average 1,072,000 hours, of which 362,000 hours is due to the recordkeeping requirement to provide owners and occupants with documentation of the training and work practices used.

To the extent that firms working in housing eligible for the opt-out provision will already have incurred the training and certification burdens because they also work in regulated facilities ineligible for the opt-out provision, the training and certification burden for this action will be lower than estimated.

The requirement that firms provide owners and occupants with a copy of the records demonstrating compliance with the training and work practice requirements of the RRP rule also applies to firms working in buildings that were not eligible for the opt-out provision. Under an assumption that firms work in either buildings that are eligible for the opt-out provision or buildings that are ineligible (but not in both types of buildings), EPA estimated that 211,000 firms work in buildings that are not eligible for the opt-out provision. EPA estimated that these 211,000 firms will incur an average annual burden of approximately 2.7 hours per firm due to the new recordkeeping requirements, resulting in a total burden of 568,000 hours per year for these firms. To the extent that firms work in both types of buildings, the number of firms and the total burden in this category would be higher than estimated. But this would be offset by a corresponding decrease in the 110,000 firms and 362,000 burden hours estimated for the firms that were assumed to work only in buildings previously eligible for the opt-out provision.

Total respondent burden for training providers and certified firms from removing the opt-out provision and requiring additional recordkeeping is estimated to average approximately 1,647,000 hours per year during the 3-year period covered by the ICR.

The rule may also result in additional government costs to administer the program (to process the additional training provider notifications and to administer and enforce the program for firms working in housing previously eligible for the opt-out provision). States, Tribes, and Territories are allowed, but are under no obligation, to apply for and receive authorization to administer these requirements. EPA will directly administer programs for States, Tribes, and Territories that do not become authorized. Because the number of States, Tribes, and Territories that will become authorized is not known, administrative costs are estimated assuming that EPA will administer the program everywhere. To the extent that other government entities become authorized, EPA's administrative costs will be lower.

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 codified in chapter I of title 40 of the CFR, after appearing in the preamble of the final rule, 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. When the 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 the final rule.

To comment on the Agency's need for this information, the accuracy of the provided burden estimates, and any suggested methods for minimizing respondent burden, EPA has established a docket for this rule, which includes this ICR, under docket ID number EPA–HQ–OPPT–2005–0049. Submit any comments related to the ICR to EPA and OMB. See **ADDRESSES** for where to submit comments to EPA. Send comments to OMB at the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th St., NW., Washington, DC 20503, Attention: Desk Office for EPA. Since OMB is required to make a decision concerning the ICR between 30 and 60 days after May 6, 2010, a comment to OMB is best assured of having its full effect if OMB receives it by June 7, 2010.

### *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 in accordance with section 601 of RFA as:

1. A small business as defined by the Small Business Administration's (SBA) regulations at 13 CFR 121.201.

2. A small governmental jurisdiction that is a government of a city, county, town, school district, or special district with a population of less than 50,000.

3. A small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

As required by section 604 of RFA, EPA has prepared a final regulatory flexibility analysis (FRFA) for this rule. The FRFA is available for review in the docket and is summarized in this unit (Ref. 8).

1. *Reasons why action by the Agency is being taken.* After further consideration of the opt-out provision, the Agency believes it is in the best interest of the public to remove the provision. EPA believes that the opt-out provision is not sufficiently protective for children under age 6 and pregnant women, because it does not provide protection from improperly performed renovations for visiting children and pregnant women; for children and pregnant women who move into a newly purchased house that was recently renovated under the opt-out provision; and for children and pregnant women who live adjacent to a home where the exterior is being renovated under the opt-out provision. In addition, while the RRP rule focused mainly on protecting young children and pregnant women from lead hazards, exposure can result in adverse health effects for older children and adults as well. Removing the opt-out provision will protect older children and adult occupants of target housing where no child under age 6 or pregnant woman resides, as well as residents of adjacent properties. Finally, EPA believes that implementing the regulations without the opt-out provision promotes, to a greater extent, the statutory directive to promulgate regulations covering renovation activities in target housing.

EPA has determined that providing owners and occupants of renovated buildings with copies of the records documenting the renovation firm's compliance with the RRP rule's training and work practice requirements will serve to reinforce information on both the potential hazards of renovations and on the RRP rule's requirements. It will also enable building owners and occupants to better understand what the renovation firm did to comply with the RRP rule and how the rule's provisions

affected their specific renovation. Educating the owners and occupants in this way is likely to improve their ability to assist the EPA in monitoring compliance with the RRP rule. These improvements in education and monitoring will improve compliance with the RRP rule, which will ultimately protect children and adults from exposure to lead hazards due to renovation activities.

2. *Legal basis and objectives for this rule.* TSCA section 402(c)(2) directs EPA to study the extent to which persons engaged in renovation, repair, and painting activities are exposed to lead or create lead-based paint hazards regularly or occasionally. After concluding this study, TSCA section 402(c)(3) further directs EPA to revise its lead-based paint activities regulations under TSCA section 402(a) to apply to renovation or remodeling activities that create lead-based paint hazards. Because EPA's study found that activities commonly performed during renovation and remodeling create lead-based paint hazards, EPA issued the RRP rule in 2008 (Ref. 1). In issuing the RRP rule, EPA revised the TSCA section 402(a) regulatory scheme to apply to individuals and firms engaged in renovation, repair, and painting activities. In this rule, EPA is revising the TSCA section 402(c)(3) rule to cover renovations in all target housing and child-occupied facilities. In so doing, EPA has also taken into consideration the environmental, economic, and social impact of this rule as provided in TSCA section 2(c). A central objective of this rule is to minimize exposure to lead-based paint hazards created during renovation, repair, and painting activities in all target housing and other buildings frequented by children under age 6.

3. *Potentially affected small entities.* Small entities include small businesses, small organizations, and small governmental jurisdictions. The small entities that are potentially directly regulated by this rule include: Small businesses (including contractors and property owners and managers); small nonprofits (certain childcare centers and private schools); and small governments (school districts which operate pre-schools, kindergartens and certain child care centers).

In determining the number of small businesses affected by the rule, the Agency applied U.S. Economic Census data to the SBA's definition of small business. However, applying the U.S. Economic Census data requires either under or overestimating the number of small businesses affected by the rule. For example, for many construction establishments, the SBA defines small businesses as having revenues of less than $14 million. With respect to those establishments, the U.S. Economic Census data groups all establishments with revenues of $10 million or more into one revenue bracket. On the one hand, using data for the entire industry would overestimate the number of small businesses affected by the rule and would defeat the purpose of estimating impacts on small business. It would also underestimate the rule's impact on small businesses because the impacts would be calculated using the revenues of large businesses in addition to small businesses. On the other hand, applying the closest, albeit lower, revenue bracket would underestimate the number of small businesses affected by the rule while at the same time overestimating the impacts. Similar issues arose in estimating the fraction of property owners and managers that are small businesses. EPA has concluded that a substantial number of small businesses will be affected by the rule. Consequently, EPA has chosen to be more conservative in estimating the cost impacts of the rule by using the closest, albeit lower, revenue bracket for which U.S. Economic Census data is available. For other sectors (nonprofits operating childcare centers or private schools), EPA assumed that all affected firms are small, which may overestimate the number of small entities affected by the rule.

The vast majority of entities in the industries affected by this rule are small. Using EPA's estimates, the revisions to the renovation, repair, and painting program will affect approximately 289,000 small entities.

4. *Potential economic impacts on small entities.* EPA evaluated two factors in its analysis of the rule's requirements on small entities, the number of firms that would experience the impact, and the size of the impact. Average annual compliance costs as a percentage of average annual revenues were used to assess the potential average impacts of the rule on small businesses and small governments. This ratio is a good measure of entities' ability to afford the costs attributable to a regulatory requirement, because comparing compliance costs to revenues provides a reasonable indication of the magnitude of the regulatory burden relative to a commonly available measure of economic activity. Where regulatory costs represent a small fraction of a typical entity's revenues, the financial impacts of the regulation on such entities may be considered as not significant. For non-profit organizations, impacts were measured by comparing rule costs to annual expenditures. When expenditure data were not available, however, revenue information was used as a proxy for expenditures. It is appropriate to calculate the impact ratios using annualized costs, because these costs are more representative of the continuing costs entities face to comply with the rule.

Of the approximately 289,000 small entities estimated to incur costs due to the rule, an estimated 101,000 small residential contractors are assumed to seek certification as a result of the removal of the opt-out provision; therefore, they would incur training, certification, work practice, and recordkeeping costs. The remaining estimated 189,000 small entities (working in buildings that were not eligible for the opt-out) are only expected to incur costs due to the additional recordkeeping provisions in the rule.

The average cost to a typical small renovation contractor of removing the opt-out provision ranges from about $1,100 to about $6,400, depending on the industry sector. This represents 0.8% to 1.7% of revenues depending on the industry sector. Overall, an estimated 101,000 small businesses could be affected by the removal of the opt-out provision, with average impacts of 1.10% of revenues.

This rule's new recordkeeping requirement has an average cost of $1 to $280 for entities not affected by removal of the opt-out provision. This results in incremental cost impacts ranging from 0.0001% to 0.08% of revenues. An estimated 189,000 small entities could be affected solely by the additional recordkeeping requirement, including 165,000 small businesses with average impacts of 0.03% of revenues, 17,000 small non-profits with average impacts of 0.0005%, and 6,000 small governments with average impacts of 0.0001%.

Combining the removal of the opt-out provision with the new recordkeeping requirement, a total of 289,000 small entities could be affected by the rule, including 266,000 small businesses with average impacts of 0.4%, 17,000 small non-profits with average impacts of 0.0005%, and 6,000 small governments with average impacts of 0.0001%.

To the extent that renovators and firms working in housing eligible for the opt-out provision will already have become trained and certified because they also work in regulated facilities ineligible for the opt-out provision, or to the extent that eligible homeowners would decline to opt out, the average

impacts of this action will be lower than estimated.

Some of the small entities subject to the rule have employees while others are non-employers. The non-employers typically perform fewer jobs than firms with employees, and thus have lower work practice compliance costs. However, they also have lower average revenues than entities with employees, so their impacts (measured as costs divided by revenues) can be higher. Impact estimates for non-employers should be interpreted with caution, as some non-employers may have significant issues related to understatement of income, which would tend to exaggerate the average impact ratio for this class of small entities.

There are an estimated 75,000 non-employer renovation contractors that could be affected by the removal of the opt-out provision. The average cost to such contractors is estimated to be $1,193 apiece. This represents 1.3% to 4.7% of reported revenues, depending on the industry sector. The rule's new recordkeeping requirement is estimated to affect approximately 96,000 additional non-employer renovation contractors not affected by removal of the opt-out provision. The costs to such contractors are estimated to be $42 apiece. This represents 0.05% to 0.17% of revenues, depending on the industry sector.

5. *Relevant federal rules.* The requirements in this rule will fit within an existing framework of other Federal regulations that address lead-based paint. Notably, the Pre-Renovation Education Rule, 40 CFR 745.85, requires renovators to distribute a lead hazard information pamphlet to owners and occupants before conducting a renovation in target housing and child-occupied facilities. This rule's requirement that renovators provide owners and occupants with records documenting compliance with the program's training and work practice requirements complements the existing pre-renovation education requirements.

6. *Skills needed for compliance.* Under the lead renovation, repair, and painting program requirements, renovators and dust sampling technicians working in target housing and child-occupied facilities have to take a course to learn the proper techniques for accomplishing the containment, cleaning, cleaning verification, and dust sampling tasks they will perform during renovations. These courses are intended to provide them with the information they would need to comply with the rule based on the skills they already have. Renovators then provide on-the-job training in work practices to any other renovation workers used on a particular renovation. Entities are required to apply for certification to perform renovations; this process does not require any special skills other than the ability to complete the application. They also need to document their training and the work practices used during renovations, which does not require any special skills.

7. *Small business advocacy review panel.* EPA has been concerned with potential small entity impacts since the earliest stages of planning for the RRP program under section 402(c)(3) of TSCA. EPA conducted outreach to small entities and, pursuant to section 609 of RFA, convened a Small Business Advocacy Review Panel (the Panel) in 1999 to obtain advice and recommendations of representatives of the regulated small entities. Pursuant to the RFA, EPA used the report of the Panel convened for the closely related RRP rule promulgated in April 2008. EPA identified eight key elements of a potential renovation and remodeling regulation for the Panel's consideration. These elements were: Applicability and scope, firm certification, individual training and certification, accreditation of training courses, work practice standards, prohibited practices, exterior clearance, and interior clearance.

Details on the Panel and its recommendations are provided in the Panel Report (Ref. 9). Information on how EPA implemented the Panel's recommendations in the development of the RRP program is available in Unit VIII.C. of the preamble to the proposed RRP rule (Ref. 10) and in Unit V.C. of the preamble to the RRP rule (Ref. 1). This rule is closely related to the RRP rule and the conclusions made in 2008 regarding the Panel's recommendations are applicable to this final rule. Although this final rule expands the number of renovation firms that must comply with the RRP requirements, it does not change the elements identified by the Panel. For example, this rule does not change the work practice or certification requirements of the RRP rule. EPA believes that reconvening the Panel would be procedurally duplicative and is unnecessary given that the issues here were within the scope of those considered by the Panel.

8. *Alternatives considered.* EPA considered several significant alternatives to this rule that could affect the economic impacts of the rule on small entities. These alternatives would have applied to both small and large entities, but given the number of small entities in the affected industries, these alternatives would primarily affect small entities. For the reasons described in this unit, EPA believes these alternatives are not consistent with the objectives of the rule.

i. *Delayed effective date.* EPA considered an option that would delay the removal of the opt-out provision by 6 months, and another option that would delay the date by 12 months. These options would make the RRP program more complex to implement and might lead to confusion by renovators and homeowners. These options would also lead to increased exposures during the delay period, including exposures to children under the age of 6 and pregnant women. Therefore, EPA believes that these options are not consistent with the stated objectives of the rule.

ii. *Staged approach.* EPA considered a staged approach that would initially remove the opt-out provision in pre-1960 housing, and then remove it in housing built between 1960 and 1978 a year later. This would make the RRP program more complex to implement and might lead to confusion by renovators and homeowners. It would also increase exposures during the first year of the rule from renovations in houses built between 1960 and 1978, including exposures to children under the age of 6 and pregnant women. EPA does not believe that the reduced burden of a staged approach outweighs the implementation complexity and additional exposures that it would create. Therefore, EPA believes that this option is not consistent with the stated objectives of the rule.

iii. *Alternate work practices.* EPA also considered different options for the work practice requirements in housing that was previously eligible for the opt-out provision. Specifically, EPA considered options: With the containment requirements specified in 40 CFR 745.85, but without any cleaning or cleaning verification work practices; with the cleaning and cleaning verification requirements specified in 40 CFR 745.85, but without any containment work practices; with the cleaning requirements specified in 40 CFR 745.85, but without any containment or cleaning verification work practices; and with the containment, cleaning, and cleaning verification requirements specified in 40 CFR 745.85, but without the prohibitions or restrictions on paint removal practices specified in 40 CFR 745.85(a)(3) (*i.e.,* open-flame burning or torching, the use of machines that remove paint through high-speed operation without HEPA exhaust control, and heat guns operating in excess of 1,100 degrees Fahrenheit).

EPA's Dust Study (Ref. 11) indicated that renovation, repair, and paint preparation activities produce large quantities of lead dust that create dust-lead hazards. The Dust Study showed that the largest decreases in dust levels were observed in the experiments where the rule's practices of containment, specialized cleaning, and cleaning verification were all used. The Dust Study indicated that if the prohibited and restricted practices are avoided, the suite of work practices as a whole are effective at addressing the lead-paint dust that is generated during renovation activities. This is discussed in more detail in the RRP rule (Ref. 1, pp. 21696–21697).

iv. *Conclusion.* EPA is concerned that these alternatives to the rule can create confusion among both contractors and consumers and could potentially result in non-compliance by renovation firms. EPA believes that simplifying the applicability of the work practices will enhance the effectiveness and reliability of the rule.

EPA is concerned that the alternatives with a delayed or staged effective date would lead to increased exposures during the delay period, including exposures to children under the age of 6 and pregnant women.

Based on the data available to EPA (*e.g.,* the Dust Study), the Agency cannot now conclude that the alternatives to the rule with alternate work practices are safe, reliable or effective because none of these would sufficiently minimize exposure to lead-based paint hazards. In sum, when the RRP work practices are not used, residents and visitors are exposed to the lead hazards created by the renovation, and therefore these approaches would not protect older children, women of childbearing age, or other adults currently residing in the home and can result in exposure to children under the age of 6 and pregnant women to lead-based paint hazards.

9. *Summary of significant issues raised by public comments.* There were no public comments specifically on the Initial Regulatory Flexibility Analysis. However, there were public comments that addressed the Agency's compliance with the Regulatory Flexibility Act, or which addressed issues that indirectly affect the Initial Regulatory Flexibility Analysis. The Agency's assessment of these issues is summarized in the FRFA. EPA did not make any changes to the proposed rule as a result of these comments.

10. *Small entity compliance guide.* As required by section 212 of Small Business Regulatory Enforcement Fairness Act (SBREFA), EPA issued a Small Entity Compliance Guide (the Guide) in December 2008 to help small entities comply with the RRP rule. The Guide is available at: *http://www.epa.gov/lead/pubs/sbcomplianceguide.pdf* or from the National Lead Information Center by calling 1–800–424–LEAD [5323]. EPA will revise the Guide, as necessary, to reflect this rulemaking activity.

*D. Unfunded Mandates Reform Act*

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and Tribal governments and the private sector. Under section 202 of UMRA, EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with "Federal mandates" that may result in expenditures to State, local, and Tribal governments, in the aggregate, or to the private sector, of $100 million or more in any 1 year. Before promulgating an EPA rule for which a written statement is needed, section 205 of UMRA generally requires EPA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows EPA to adopt an alternative other than the least costly, most cost-effective or least burdensome alternative if the Administrator publishes with the final rule an explanation why that alternative was not adopted. Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including Tribal governments, it must have developed under section 203 of UMRA a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of EPA proposed rules with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

Under UMRA Title II, EPA has determined that this rule contains a Federal mandate that may result in expenditures that exceed the inflation-adjusted UMRA threshold of $100 million by the private sector in any 1 year, but it will not result in such expenditures by State, local, and Tribal governments in the aggregate. Accordingly, EPA has prepared a written statement under section 202 of UMRA which has been placed in the docket for this rule (Ref. 12) and is summarized here.

1. *Authorizing legislation.* This rule is issued under the authority of TSCA sections 402(c)(3), 404, 406, and 407 (15 U.S.C. 2682(c)(3), 2684, 2686, and 2687).

2. *Cost-benefit analysis.* EPA has prepared an analysis of the costs and benefits associated with this rule, a copy of which is available in the docket for this rule (Ref. 5). The Economic Analysis presents the costs of this rule as well as various regulatory options and is summarized in Unit IV.A. EPA has estimated the total costs of this rule at approximately $500 million in the first year and $300 million per year thereafter.

The benefits of the rule result from the prevention of adverse health effects attributable to lead exposure from renovations in pre-1978 buildings. These health effects include impaired cognitive function in children and several illnesses in children and adults, such as increased adverse cardiovascular outcomes (including increased blood pressure, increased incidence of hypertension, cardiovascular morbidity, and mortality) and decreased kidney function.

3. *State, local, and Tribal government input.* EPA has sought input from State, local, and Tribal government representatives throughout the development of the renovation, repair, and painting program. EPA's experience in administering the existing lead-based paint activities program under TSCA section 402(a) suggests that these governments will play a critical role in the successful implementation of a national program to reduce exposures to lead-based paint hazards associated with renovation, repair, and painting activities. Consequently, as discussed in Unit III.C.2. of the preamble to the proposed RRP rule (Ref. 10), the Agency has met with State, local, and Tribal government officials on numerous occasions to discuss renovation issues.

4. *Least burdensome option.* EPA has considered a wide variety of options for addressing the risks presented by renovation activities where lead-based paint is present. As part of the development of the renovation, repair, and painting program, EPA considered different options for the scope of the rule, various combinations of training and certification requirements for individuals who perform renovations, various combinations of work practice requirements, and various methods for ensuring that no lead-based paint

hazards are left behind by persons performing renovations. The Economic Analysis for this rule analyzed several additional options for the phasing, effective date, and work practices required for the additional owner-occupied housing affected by the removal of the opt-out provision. As described in Unit IV.C., EPA has concluded that the options for delaying or phasing the effective date would make the RRP program more complex to implement, might lead to confusion by renovators and homeowners, and would lead to increased exposures. EPA believes that the selected approach is the least burdensome option available that achieves a central objective of this rule, which is to minimize exposure to lead-based paint hazards created during renovation, repair, and painting activities in all target housing and other buildings frequented by children under age 6.

This rule does not contain a significant Federal intergovernmental mandate as described by section 203 of UMRA. Based on the definition of "small government jurisdiction" in RFA section 601, no State governments can be considered small. Small Territorial or Tribal governments may apply for authorization to administer and enforce this program, which would entail costs, but these small jurisdictions are under no obligation to do so.

EPA has determined that this rule contains no regulatory requirements that might significantly or uniquely affect small governments. Small governments operate public housing, and schools that are child-occupied facilities. If these governments perform renovations in these facilities, they may incur very small additional costs to provide residents, parents or guardians with copies of the records documenting compliance with the training and work practice requirements. EPA generally measures a significant impact under UMRA as being expenditures, in the aggregate, of more than 1% of small government revenues in any 1 year. As explained in Unit IV.C.4., the rule is expected to result in small government impacts well under 1% of revenues. So EPA has determined that the rule does not significantly affect small governments. Nor does the rule uniquely affect small governments, as the rule is not targeted at small governments, does not primarily affect small governments, and does not impose a different burden on small governments than on other entities that operate child-occupied facilities.

*E. Executive Order 13132*

Pursuant to Executive Order 13132, entitled "Federalism" (64 FR 43255, August 10, 1999), EPA has determined that this rule does not have "federalism implications," because it will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. Thus, Executive Order 13132 does not apply to this rule. States are able to apply for, and receive authorization to administer the lead renovation, repair, and painting program requirements, but are under no obligation to do so. In the absence of a State authorization, EPA will administer the requirements. Nevertheless, in the spirit of the objectives of this Executive Order, and consistent with EPA policy to promote communications between the Agency and State and local governments, EPA consulted with representatives of State and local governments in developing the renovation, repair, and painting program. These consultations were described in the preamble to the proposed RRP rule (Ref. 10).

*F. Executive Order 13175*

As required by Executive Order 13175, entitled "Consultation and Coordination with Indian Tribal Governments" (59 FR 22951, November 6, 2000), EPA has determined that this rule does not have Tribal implications because it will not have substantial direct effects on Tribal governments, on the relationship between the Federal government and the Indian Tribes, or on the distribution of power and responsibilities between the Federal government and Indian Tribes, as specified in the Order. Tribes are able to apply for and receive authorization to administer the lead renovation, repair, and painting program on Tribal lands, but Tribes are under no obligation to do so. In the absence of a Tribal authorization, EPA will administer these requirements. While Tribes may operate public housing or child-occupied facilities covered by the rule such as kindergartens, pre-kindergartens, and daycare facilities, EPA has determined that this rule would not have substantial direct effects on the Tribal governments that operate these facilities.

Thus, Executive Order 13175 does not apply to this rule. Although Executive Order 13175 does not apply, EPA consulted with Tribal officials and others by discussing potential renovation regulatory options for the renovation, repair, and painting program at several national lead program meetings hosted by EPA and other interested Federal agencies.

*G. Executive Order 13045*

Executive Order 13045, entitled "Protection of Children from Environmental Health Risks and Safety Risks" (62 FR 19885, April 23, 1997) applies to this rule because it is an "economically significant regulatory action" as defined by Executive Order 12866, and because the environmental health or safety risk addressed by this action may have a disproportionate effect on children.

A central purpose of this rule is to minimize exposure to lead-based paint hazards created during renovation, repair, and painting activities in all housing and other buildings frequented by children under age 6. In the absence of this regulation, adequate work practices are not likely to be employed during renovation, repair, and painting activities in housing eligible for the opt-out provision.

Removing the opt-out provision will protect children under the age of 6 who visit a friend, relative, or caregiver's house where a renovation would have been performed under the opt-out provision; children who move into such housing when their family purchases it after such a renovation would have been performed; and children who live in a property adjacent to owner-occupied housing where renovation would have been performed under the opt-out provision. Removing the opt-out provision will also protect children age 6 and older who live in houses that would have been renovated under the opt-out provision; who move into such housing; and who live in adjacent properties.

*H. Executive Order 13211*

This rule is not a "significant energy action" as defined in Executive Order 13211, entitled "Actions concerning Regulations that Significantly Affect Energy Supply, Distribution, or Use" (66 FR 28355, May 22, 2001) because it is not likely to have any adverse effect on the supply, distribution, or use of energy.

*I. National Technology Transfer and Advancement Act of 1995*

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 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 rulemaking does not involve technical standards. Therefore, EPA is not considering the use of any voluntary consensus standards.

*J. Executive Order 12898*

Pursuant to Executive Order 12898, entitled "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations" (59 FR 7629, February 16, 1994), EPA has assessed the potential impact of this rule on minority and low-income populations. The results of this assessment are presented in the Economic Analysis, which is available in the public docket for this rulemaking (Ref. 5). As a result of this assessment, the Agency has determined that this rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it increases the level of environmental protection for all affected populations without having any disproportionately high and adverse human health or environmental effects on any population, including any minority or low-income population.

**V. Congressional Review Act**

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report to each House of the Congress and the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register.** This rule is a "major rule" as defined by 5 U.S.C. 804(2).

**List of Subjects in 40 CFR Part 745**

Environmental protection, Lead, Lead-based paint, Renovation, Reporting and recordkeeping requirements.

Dated: April 22, 2010.

**Lisa P. Jackson,**

*Administrator.*

■ Therefore, 40 CFR chapter I is amended as follows:

## PART 745—[AMENDED]

■ 1. The authority citation for part 745 continues to read as follows:

**Authority:** 15 U.S.C. 2605, 2607, 2681–2692 and 42 U.S.C. 4852d.

■ 2. In § 745.81, revise paragraph (a)(4) to read as follows:

**§ 745.81 Effective dates.**

(a) * * *

(4) *Work practices.* (i) On or after April 22, 2010 and before July 6, 2010 all renovations must be performed in accordance with the work practice standards in § 745.85 and the associated recordkeeping requirements in § 745.86 (b)(6) in target housing or child-occupied facilities, unless the renovation qualifies for one of the exceptions identified in § 745.82(a). This does not apply to renovations in target housing for which the firm performing the renovation has obtained a statement signed by the owner that the renovation will occur in the owner's residence, no child under age 6 resides there, the housing is not a child-occupied facility, and the owner acknowledges that the work practices to be used during the renovation will not necessarily include all of the lead-safe work practices contained in EPA's renovation, repair, and painting rule. For the purposes of this section, a child resides in the primary residence of his or her custodial parents, legal guardians, and foster parents. A child also resides in the primary residence of an informal caretaker if the child lives and sleeps most of the time at the caretaker's residence.

(ii) On or after July 6, 2010, all renovations must be performed in accordance with the work practice standards in § 745.85 and the associated recordkeeping requirements in § 745.86(b)(1) and (b)(6) in target housing or child-occupied facilities, unless the renovation qualifies for the exception identified in § 745.82(a).

* * * * *

**§ 745.82 [Amended]**

■ 3. In § 745.82, remove paragraph (c).

■ 4. In § 745.84, revise paragraph (b)(2), the introductory text of paragraph (c)(2), and paragraph (c)(2)(ii) to read as follows:

**§ 745.84 Information distribution requirements.**

* * * * *

(b) * * *

(2) *Comply with one of the following.* (i) Notify in writing, or ensure written notification of, each affected unit and make the pamphlet available upon request prior to the start of renovation. Such notification shall be accomplished by distributing written notice to each affected unit. The notice shall describe the general nature and locations of the planned renovation activities; the expected starting and ending dates; and a statement of how the occupant can obtain the pamphlet and a copy of the records required by § 745.86(c) and (d), at no cost to the occupants, or

(ii) While the renovation is ongoing, post informational signs describing the general nature and locations of the renovation and the anticipated completion date. These signs must be posted in areas where they are likely to be seen by the occupants of all of the affected units. The signs must be accompanied by a posted copy of the pamphlet or information on how interested occupants can review a copy of the pamphlet or obtain a copy from the renovation firm at no cost to occupants. The signs must also include information on how interested occupants can review a copy of the records required by § 745.86(c) and (d) or obtain a copy from the renovation firm at no cost to the occupants.

* * * * *

(c) * * *

(2) Provide the parents and guardians of children using the child-occupied facility with the pamphlet, information describing the general nature and locations of the renovation and the anticipated completion date, and information on how interested parents or guardians of children frequenting the child-occupied facility can review a copy of the records required by § 745.86(c) and (d) or obtain a copy from the renovation firm at no cost to the occupants by complying with one of the following:

* * * * *

(ii) While the renovation is ongoing, post informational signs describing the general nature and locations of the renovation and the anticipated completion date. These signs must be posted in areas where they can be seen by the parents or guardians of the children frequenting the child-occupied facility. The signs must be accompanied by a posted copy of the pamphlet or information on how interested parents or guardians of children frequenting the child-occupied facility can review a copy of the pamphlet or obtain a copy from the renovation firm at no cost to the parents or guardians. The signs must

also include information on how interested parents or guardians of children frequenting the child-occupied facility can review a copy of the records required by § 745.86(c) and (d) or obtain a copy from the renovation firm at no cost to the parents or guardians.

* * * * *

■ 5. In § 745.86, remove paragraph (b)(6) and redesignate paragraph (b)(7) as paragraph (b)(6) and revise paragraphs (b)(1), (c), and (d) to read as follows:

**§ 745.86 Recordkeeping and reporting requirements.**

* * * * *

(b) * * *

(1) Records or reports certifying that a determination had been made that lead-based paint was not present on the components affected by the renovation, as described in § 745.82(a). These records or reports include:

(i) Reports prepared by a certified inspector or certified risk assessor (certified pursuant to either Federal regulations at § 745.226 or an EPA-authorized State or Tribal certification program).

(ii) Records prepared by a certified renovator after using EPA-recognized test kits, including an identification of the manufacturer and model of any test kits used, a description of the components that were tested including their locations, and the result of each test kit used.

* * * * *

(c)(1) When the final invoice for the renovation is delivered or within 30 days of the completion of the renovation, whichever is earlier, the renovation firm must provide information pertaining to compliance with this subpart to the following persons:

(i) The owner of the building; and, if different,

(ii) An adult occupant of the residential dwelling, if the renovation took place within a residential dwelling, or an adult representative of the child-occupied facility, if the renovation took place within a child-occupied facility.

(2) When performing renovations in common areas of multi-unit target housing, renovation firms must post the information required by this subpart or instructions on how interested occupants can obtain a copy of this information. This information must be posted in areas where it is likely to be seen by the occupants of all of the affected units.

(3) The information required to be provided by paragraph (c) of this section may be provided by completing the sample form titled "Sample Renovation Recordkeeping Checklist" or a similar form containing the test kit information required by § 745.86(b)(1)(ii) and the training and work practice compliance information required by § 745.86(b)(6).

(d) If dust clearance sampling is performed in lieu of cleaning verification as permitted by § 745.85(c), the renovation firm must provide, when the final invoice for the renovation is delivered or within 30 days of the completion of the renovation, whichever is earlier, a copy of the dust sampling report to:

(1) The owner of the building; and, if different,

(2) An adult occupant of the residential dwelling, if the renovation took place within a residential dwelling, or an adult representative of the child-occupied facility, if the renovation took place within a child-occupied facility.

(3) When performing renovations in common areas of multi-unit target housing, renovation firms must post these dust sampling reports or information on how interested occupants of the housing being renovated can obtain a copy of the report. This information must be posted in areas where they are likely to be seen by the occupants of all of the affected units.

■ 6. In § 745.90, revise paragraphs (a)(4) and (b)(8) to read as follows:

**§ 745.90 Renovator certification and dust sampling technician certification.**

(a) * * *

(4) To maintain renovator certification or dust sampling technician certification, an individual must complete a renovator or dust sampling technician refresher course accredited by EPA under § 745.225 or by a State or Tribal program that is authorized under subpart Q of this part within 5 years of the date the individual completed the initial course described in paragraph (a)(1) of this section. If the individual does not complete a refresher course within this time, the individual must re-take the initial course to become certified again. Individuals who complete a renovator course accredited by EPA before April 22, 2010, must complete an EPA-accredited renovator refresher course before July 1, 2015, to maintain renovator certification.

(b) * * *

(8) Must prepare the records required by § 745.86(b)(1) and (b)(6).

* * * * *

■ 7. In § 745.225, revise paragraph (c)(2)(ii) to read as follows:

**§ 745.225 Accreditation of training programs: Target housing and child-occupied facilities.**

* * * * *

(c) * * *

(2) * * *

(ii) Successfully completed at least 16 hours of any EPA-accredited or EPA-authorized State or Tribal-accredited lead-specific training for instructors of lead-based paint activities courses or 8 hours of any EPA-accredited or EPA-authorized State or Tribal-accredited lead-specific training for instructors of renovator or dust sampling technician courses; and

* * * * *

■ 8. In § 745.326, add paragraph (f) to read as follows:

**§ 745.326 Renovation: State and Tribal program requirements.**

* * * * *

(f) *Revisions to renovation program requirements.* When EPA publishes in the **Federal Register** revisions to the renovation program requirements contained in subparts E and L of this part:

(1) A State or Tribe with a renovation program approved before the effective date of the revisions to the renovation program requirements in subparts E and L of this part must demonstrate that it meets the requirements of this section no later than the first report that it submits pursuant to § 745.324(h) but no later than 2 years after the effective date of the revisions.

(2) A State or Tribe with an application for approval of a renovation program submitted but not approved before the effective date of the revisions to the renovation program requirements in subparts E and L of this part must demonstrate that it meets the requirements of this section either by amending its application or in the first report that it submits pursuant to § 745.324(h) of this part but no later than 2 years after the effective date of the revisions.

(3) A State or Tribe submitting its application for approval of a renovation program on or after the effective date of the revisions must demonstrate in its application that it meets the requirements of the new renovation program requirements in subparts E and L of this part.

[FR Doc. 2010–10100 Filed 5–5–10; 8:45 am]

BILLING CODE 6560–50–P

## GENERAL SERVICES ADMINISTRATION

### 41 CFR Part 102–39

**[FMR Amendment 2010–01; FMR Case 2009–102–3; Docket No. 2009–0002, Sequence 5]**

**RIN 3090–AI92**

## Federal Management Regulation; Replacement of Personal Property Pursuant to the Exchange/Sale Authority

**AGENCY:** Office of Governmentwide Policy, General Services Administration (GSA).

**ACTION:** Final rule.

**SUMMARY:** The General Services Administration (GSA) is amending the Federal Management Regulation (FMR) by making changes to its policy on the replacement of personal property pursuant to the exchange/sale authority.

**DATES:** This final rule is effective on June 7, 2010.

**FOR FURTHER INFORMATION CONTACT:** For clarification of content, contact Mr. Robert Holcombe, Office of Governmentwide Policy, Office of Travel, Transportation, and Asset Management (MT), (202) 501–3828 or e-mail at *robert.holcombe@gsa.gov*. For information pertaining to status or publication schedules contact the Regulatory Secretariat, 1800 F Street, NW., Room 4041, Washington, DC 20405, (202) 501–4755. Please cite FMR Amendment 2010–01; FMR Case 2009–102–3.

**SUPPLEMENTARY INFORMATION:**

### A. Background

A proposed rule was published in the **Federal Register** at 74 FR 30493 on June 26, 2009. Three changes were proposed. One proposed change, removing the exchange/sale prohibition on aircraft and airframe structural components subject to certain conditions, received several comments. GSA is considering those comments and has decided not to go forward with that change at this time.

Another proposed change considered removing the prohibition on using scrap property in an exchange/sale transaction when the property had utility and value at the point in time when a determination was made to use the exchange/sale authority, thus addressing situations where the dismantling of property rendered it as "scrap", but where replacement of property similar to the originally-configured property is still required. Only one substantive comment was received regarding that proposed change. The commenter suggested that property which has been coded as scrap because of damage caused by, for example, natural disaster or accident, should also be eligible for exchange/sale. GSA agrees with that comment, and has addressed it in the final rule.

The third proposed change was editorial in nature. GSA received no comments regarding it.

### B. Executive Order 12866

This final rule is excepted from the definition of "regulation" or "rule" under Section 3(d)(3) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993 and, therefore, was not subject to review under Section 6(b) of that executive order.

### C. Regulatory Flexibility Act

This final rule is not required to be published in the **Federal Register** for comment. Therefore, the Regulatory Flexibility Act does not apply.

### D. Paperwork Reduction Act

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

### E. Small Business Regulatory Enforcement Fairness Act

This final rule is exempt from Congressional review under 5 U.S.C. 801 since it relates solely to agency management and personnel.

### List of Subjects in 41 CFR Part 102–39

Government property management and personal property.

Dated: March 22, 2010.

**Martha Johnson,**

*Administrator of General Services.*

■ For the reasons set forth in the preamble, GSA amends 41 CFR part 102–39 as set forth below:

## PART 102–39—REPLACEMENT OF PERSONAL PROPERTY PURSUANT TO THE EXCHANGE/SALE AUTHORITY

■ 1. The authority citation for 41 CFR part 102–39 continues to read as follows:

**Authority:** 40 U.S.C. 121(c); 40 U.S.C. 503.

■ 2. Amend § 102–39.60 by revising paragraph (e) to read as follows:

**§ 102–39.60 What restrictions and prohibitions apply to the exchange/sale of personal property?**

* * * * *

(e) Property with a condition code of scrap, as defined at FMR 102–36.40, except:

(1) Property that had utility and value at the point in time when a determination was made to use the exchange/sale authority;

(2) Property that was otherwise eligible for exchange/sale, but was coded as scrap due to damage (*e.g.,* accident or natural disaster); or

(3) Scrap gold for fine gold.

* * * * *

**§ 102–39.80 [Amended]**

■ 3. Amend § 102–39.80, second sentence, by adding "exchanged or" before the word "sold".

[FR Doc. 2010–10663 Filed 5–5–10; 8:45 am]

**BILLING CODE 6820–14–P**

## DEPARTMENT OF HOMELAND SECURITY

### Federal Emergency Management Agency

### 44 CFR Part 64

**[Docket ID FEMA–2010–0003; Internal Agency Docket No. FEMA–8129]**

## Suspension of Community Eligibility

**AGENCY:** Federal Emergency Management Agency, DHS.

**ACTION:** Final rule.

**SUMMARY:** This rule identifies communities, where the sale of flood insurance has been authorized under the National Flood Insurance Program (NFIP), that are scheduled for suspension on the effective dates listed within this rule because of noncompliance with the floodplain management requirements of the program. If the Federal Emergency Management Agency (FEMA) receives documentation that the community has adopted the required floodplain management measures prior to the effective suspension date given in this rule, the suspension will not occur and a notice of this will be provided by publication in the **Federal Register** on a subsequent date.

**DATES:** *Effective Dates:* The effective date of each community's scheduled suspension is the third date ("Susp.") listed in the third column of the following tables.

**FOR FURTHER INFORMATION CONTACT:** If you want to determine whether a particular community was suspended on the suspension date or for further information, contact David Stearrett, Mitigation Directorate, Federal

Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–2953.

**SUPPLEMENTARY INFORMATION:** The NFIP enables property owners to purchase flood insurance which is generally not otherwise available. In return, communities agree to adopt and administer local floodplain management aimed at protecting lives and new construction from future flooding. Section 1315 of the National Flood Insurance Act of 1968, as amended, 42 U.S.C. 4022, prohibits flood insurance coverage as authorized under the NFIP, 42 U.S.C. 4001 *et seq.;* unless an appropriate public body adopts adequate floodplain management measures with effective enforcement measures. The communities listed in this document no longer meet that statutory requirement for compliance with program regulations, 44 CFR part 59. Accordingly, the communities will be suspended on the effective date in the third column. As of that date, flood insurance will no longer be available in the community. However, some of these communities may adopt and submit the required documentation of legally enforceable floodplain management measures after this rule is published but prior to the actual suspension date. These communities will not be suspended and will continue their eligibility for the sale of insurance. A notice withdrawing the suspension of the communities will be published in the **Federal Register.**

In addition, FEMA has identified the Special Flood Hazard Areas (SFHAs) in these communities by publishing a Flood Insurance Rate Map (FIRM). The date of the FIRM, if one has been published, is indicated in the fourth column of the table. No direct Federal financial assistance (except assistance pursuant to the Robert T. Stafford Disaster Relief and Emergency Assistance Act not in connection with a flood) may legally be provided for construction or acquisition of buildings in identified SFHAs for communities not participating in the NFIP and identified for more than a year, on FEMA's initial flood insurance map of the community as having flood-prone areas (section 202(a) of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4106(a), as amended). This prohibition against certain types of Federal assistance becomes effective for the communities listed on the date shown in the last column. The Administrator finds that notice and public comment under 5 U.S.C. 553(b) are impracticable and unnecessary because communities listed in this final rule have been adequately notified.

Each community receives 6-month, 90-day, and 30-day notification letters addressed to the Chief Executive Officer stating that the community will be suspended unless the required floodplain management measures are met prior to the effective suspension date. Since these notifications were made, this final rule may take effect within less than 30 days.

*National Environmental Policy Act.* This rule is categorically excluded from the requirements of 44 CFR part 10, Environmental Considerations. No environmental impact assessment has been prepared.

*Regulatory Flexibility Act.* The Administrator has determined that this rule is exempt from the requirements of the Regulatory Flexibility Act because the National Flood Insurance Act of 1968, as amended, 42 U.S.C. 4022, prohibits flood insurance coverage unless an appropriate public body adopts adequate floodplain management measures with effective enforcement measures. The communities listed no longer comply with the statutory requirements, and after the effective date, flood insurance will no longer be available in the communities unless remedial action takes place.

*Regulatory Classification.* This final rule is not a significant regulatory action under the criteria of section 3(f) of Executive Order 12866 of September 30, 1993, Regulatory Planning and Review, 58 FR 51735.

*Executive Order 13132, Federalism.* This rule involves no policies that have federalism implications under Executive Order 13132.

*Executive Order 12988, Civil Justice Reform.* This rule meets the applicable standards of Executive Order 12988.

*Paperwork Reduction Act.* This rule does not involve any collection of information for purposes of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*

**List of Subjects in 44 CFR Part 64**

Flood insurance, Floodplains.

■ Accordingly, 44 CFR part 64 is amended as follows:

## PART 64—[AMENDED]

■ 1. The authority citation for part 64 continues to read as follows:

**Authority:** 42 U.S.C. 4001 *et seq.;* Reorganization Plan No. 3 of 1978, 3 CFR, 1978 Comp.; p. 329; E.O. 12127, 44 FR 19367, 3 CFR, 1979 Comp.; p. 376.

### § 64.6 [Amended]

■ 2. The tables published under the authority of § 64.6 are amended as follows:

| State and location | Community No. | Effective date authorization/cancellation of sale of flood insurance in community | Current effective map date | Date certain Federal assistance no longer available in SFHAs |
|---|---|---|---|---|
| **Region IV** | | | | |
| Kentucky: | | | | |
| Fleming County, Unincorporated Areas | 210335 | April 10, 1991, Emerg; February 5, 1992, Reg; May 20, 2010, Susp. | May 20, 2010 ... | May 20, 2010. |
| Flemingsburg, City of, Fleming County | 210068 | September 10, 1975, Emerg; September 18, 1985, Reg; May 20, 2010, Susp. | .....do * ..... | do. |
| Robertson County, Unincorporated Areas. | 210200 | April 15, 1997, Emerg; November 1, 2008, Reg; May 20, 2010, Susp. | .....do ..... | do. |
| Mississippi: | | | | |
| Neshoba County, Unincorporated Areas | 280276 | April 23, 1979, Emerg; September 15, 1989, Reg; May 20, 2010, Susp. | .....do ..... | do. |
| Philadelphia, City of, Neshoba County | 280120 | November 2, 1974, Emerg; September 29, 1986, Reg; May 20, 2010, Susp. | .....do ..... | do. |
| **Region VI** | | | | |
| Arkansas: | | | | |
| Barling, City of, Sebastian County ..... | 050305 | N/A, Emerg; September 20, 2007, Reg; May 20, 2010, Susp. | .....do ..... | do. |

| State and location | Community No. | Effective date authorization/cancellation of sale of flood insurance in community | Current effective map date | Date certain Federal assistance no longer available in SFHAs |
|---|---|---|---|---|
| Fort Smith, City of, Sebastian County ... | 055013 | December 18, 1970, Emerg; August 27, 1971, Reg; May 20, 2010, Susp. | .....do ..... | do. |
| Greenwood, City of, Sebastian County | 050198 | October 29, 1974, Emerg; April 15, 1981, Reg; May 20, 2010, Susp. | .....do ..... | do. |
| Hartford, City of, Sebastian County ..... | 050200 | March 12, 1975, Emerg; March 15, 1982, Reg; May 20, 2010, Susp. | .....do ..... | do. |
| Lavaca, City of, Sebastian County ..... | 050201 | May 6, 1975, Emerg; March 15, 1982, Reg; May 20, 2010, Susp. | .....do ..... | do. |
| Mansfield, City of, Scott and Sebastian Counties. | 050202 | July 29, 1975, Emerg; June 18, 1987, Reg; May 20, 2010, Susp. | .....do ..... | do. |
| Midland, Town of, Sebastian County .... | 050203 | January 22, 1976, Emerg; June 1, 1987, Reg; May 20, 2010, Susp. | .....do ..... | do. |
| Sebastian County, Unincorporated Areas. | 050462 | January 27, 1983, Emerg; April 1, 1988, Reg; May 20, 2010, Susp. | .....do ..... | do. |
| Texas: | | | | |
| Beeville, City of, Bee County ..... | 480027 | January 14, 1974, Emerg; January 20, 1982, Reg; May 20, 2010, Susp. | .....do ..... | do. |
| Nacogdoches, City of, Nacogdoches County. | 480497 | January 16, 1975, Emerg; February 18, 1981, Reg; May 20, 2010, Susp. | .....do ..... | do. |
| **Region VII** | | | | |
| Missouri: | | | | |
| Crawford County, Unincorporated Areas | 290795 | October 23, 1984, Emerg; May 1, 1987, Reg; May 20, 2010, Susp. | .....do ..... | do. |
| Leasburg, Village of, Crawford County | 290561 | March 7, 1977, Emerg; August 24, 1984, Reg; May 20, 2010, Susp. | .....do ..... | do. |
| Steelville, City of, Crawford County ..... | 290114 | October 15, 1971, Emerg; February 13, 1976, Reg; May 20, 2010, Susp. | .....do ..... | do. |
| Crane, City of, Stone County ..... | 290430 | November 9, 1976, Emerg; July 16, 1980, Reg; May 20, 2010, Susp. | .....do ..... | do. |
| Kimberling City, City of, Stone County .. | 290432 | June 23, 1975, Emerg; April 15, 1979, Reg; May 20, 2010, Susp. | .....do ..... | do. |
| Reeds Spring, City of, Stone County .... | 290433 | November 17, 1975, Emerg; September 18, 1985, Reg; May 20, 2010, Susp. | .....do ..... | do. |
| Stone County, Unincorporated Areas ... | 290429 | January 4, 1994, Emerg; March 19, 1997, Reg; May 20, 2010, Susp. | .....do ..... | do. |

*-do- = Ditto.
Code for reading third column: Emerg—Emergency; Reg—Regular; Susp—Suspension.

Dated: April 23, 2010.

**Sandra K. Knight,**

*Deputy Federal Insurance and Mitigation Administrator, Mitigation.*

[FR Doc. 2010–10667 Filed 5–5–10; 8:45 am]

**BILLING CODE 9110–12–P**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

### 50 CFR Part 622

**[Docket No. 100501208–0208–01]**

**RIN 0648–AY87**

## Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Emergency Fisheries Closure in the Gulf of Mexico Due to the Deepwater Horizon Oil Spill

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

**ACTION:** Emergency rule; request for comments.

**SUMMARY:** NMFS issues this emergency rule to close a portion of the Gulf of Mexico (Gulf) exclusive economic zone (EEZ) to all fishing, in response to the Deepwater Horizon oil spill. The closure was applicable May 2, 2010, and will remain in effect for 10 days, unless conditions allow NMFS to terminate it sooner. NMFS will continue to monitor and evaluate the oil spill and its impacts on Gulf fisheries and will take immediate and appropriate action to extend or reduce this closed area. This closure is implemented for public safety.

**DATES:** This rule is effective May 3, 2010 through 12:01 a.m., local time, May 12, 2010. The closure was applicable on May 2, 2010. Comments may be submitted through May 11, 2010.

**ADDRESSES:** You may submit comments on this rule, identified by "0648–AY87" by any of the following methods:

- Electronic Submissions: Submit all electronic public comments via the Federal e-Rulemaking Portal: *http://www.regulations.gov*.
- Fax: 727–824–5308; Attention: Cynthia Meyer.
- Mail: Cynthia Meyer, Southeast Regional Office, NMFS, 263 13th Avenue South, St. Petersburg, FL 33701.

Instructions: No comments will be posted for public viewing until after the comment period. 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.

To submit comments through the Federal e-Rulemaking Portal: *http://*

*www.regulations.gov*, enter "NOAA-NMFS–2010–0100" in the keyword search, then select "Send a Comment or Submission." NMFS will accept anonymous comments (enter N/A in the required fields, if you wish to remain anonymous). You may submit attachments to electronic comments in Microsoft Word, Excel, WordPerfect, or Adobe PDF file formats only.

**FOR FURTHER INFORMATION CONTACT:** Cynthia Meyer, telephone: 727–551–5753, fax: 727–824–5308, e-mail: *cynthia.meyer@noaa.gov*.

**SUPPLEMENTARY INFORMATION:** This emergency action is taken in response to the April 20, 2010 Deepwater Horizon oil spill, which originated approximately 41 miles (66 km) offshore from Louisiana, and which currently covers an area in the Gulf of approximately 6,817 square miles (17,655 square km). The oil leaking from the Deepwater Horizon drilling rig has resulted in more than 1 million gallons (3.8 million liters) of oil being released into the Gulf of Mexico. NMFS is currently assessing the impacts this oil spill will have on the fishing industry. NMFS is closing the portion of the Gulf EEZ where the oil slick resides for public safety concerns. This action temporarily closes the area bound by the following coordinates to all fishing: From the point where 88°33′ W. long. intersects with the 3 nautical mile state line south of Pascagoula, MS; proceeding southeasterly to the point 29°54.5′ N. lat. and 88°24′ W. long.; thence, easterly to the point 29°54.5′ N. lat. and 86°55′ W. long.; thence, southwesterly to the point 28°40′ N. lat. and 88°20′ W. long.; thence, northwesterly to the point where 29° N. lat. intersects with the 3 nautical mile state line east of Garden Island Bay, LA; thence along the seaward limit of Louisiana's waters and Mississippi's waters, as shown on the current edition of NOAA chart 11360.

NMFS will continue to monitor and evaluate the oil spill and its impacts to Gulf fisheries. When more updated information becomes available, NMFS will take immediate and appropriate action to extend or reduce this closed area by publishing an amendment to this emergency rule in the **Federal Register** and by posting to the NMFS Southeast Regional Office website.

## Classification

This action is issued pursuant to section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), 16 U.S.C. 1855(c).

NMFS has consulted with OIRA and due to exigent circumstances this action is exempt from review under Executive Order 12866.

Pursuant to 40 CFR 1506.11, NMFS has consulted with the Council for Environmental Quality.

The Assistant Administrator for Fisheries, NOAA (AA), finds good cause under 5 U.S.C. 553(b)(B) to waive prior notice and the opportunity for public comment. Prior notice and opportunity for public comment would be contrary to the public interest, as delaying action constitutes a public safety concern. NMFS is implementing this closure in the response to the oil spill to help prevent any potential injuries to fishermen in the area. Any delay of implementation of this fisheries closure could constitute unsafe fishing conditions for the fishing industry.

For the reasons stated above, the AA also finds good cause to waive the 30-day delay in effective date of this rule under 5 U.S.C 553(d)(3).

Because prior notice and opportunity for public comment are not required for this rule by 5 U.S.C. 553 or any other law, the analytical requirements of the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.* are inapplicable.

## List of Subjects in 50 CFR Part 622

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

Dated: May 2, 2010

**John Oliver,**

*Deputy Assistant Administrator for Operations, National Marine Fisheries Service.*

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

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

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

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

■ 2. In § 622.34, paragraph (n) is added to read as follows:

### § 622.34 Gulf EEZ seasonal and/or area closures.

(n) *Gulf EEZ area closure.* Effective May 2, 2010 through 12:01 a.m., local time, May 12, 2010, all fishing is prohibited in the portion of the Gulf EEZ bounded by rhumb lines connecting the following points: From the point where 88°33′ W. long. intersects with the 3 nautical mile state line south of Pascagoula, MS; proceeding southeasterly to the point 29°54.5′ N. lat. and 88°24′ W. long.; thence, easterly to the point 29°54.5′ N. lat. and 86°55′ W. long.; thence, southwesterly to the point 28°40′ N. lat. and 88°20′ W. long.; thence, northwesterly to the point where 29° N. lat. intersects with the 3 nautical mile state line east of Garden Island Bay, LA; thence along the seaward limit of Louisiana's waters and Mississippi's waters, as shown on the current edition of NOAA chart 11360.

[FR Doc. 2010–10661 Filed 5–3–10; 12:00 pm]

BILLING CODE 3510–22–S

# Proposed Rules

Federal Register
Vol. 75, No. 87
Thursday, May 6, 2010

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 ENERGY

### 10 CFR Part 431

**[Docket No. EERE–2010–BT–STD–0003]**

**RIN 1904–AC19**

## Energy Efficiency Program for Consumer Products: Public Meeting and Availability of the Framework Document for Commercial Refrigeration Equipment

**AGENCY:** Office of Energy Efficiency and Renewable Energy, Department of Energy.

**ACTION:** Notice of public meeting and availability of the framework document.

**SUMMARY:** The U.S. Department of Energy (DOE) is initiating the rulemaking and data collection process to consider amended energy conservation standards for commercial refrigeration equipment (CRE). DOE will hold a public meeting to discuss and receive comments on its planned analytical approach and issues it will address in this rulemaking proceeding. DOE welcomes written comments and relevant data from the public on any subject within the scope of this rulemaking. To inform interested parties and to facilitate this process, DOE has prepared a framework document that details the analytical approach and identifies several issues on which DOE is particularly interested in receiving comment.

**DATES:** DOE will hold a public meeting on Tuesday, May 18, 2010, from 9 a.m. to 5 p.m. in Washington, DC. DOE must receive requests to speak at the public meeting before 4 p.m., Tuesday, May 11, 2010. DOE must receive an electronic copy of the statement with the name and, if appropriate, the organization of the presenter to be given at the public meeting before 4 p.m., Tuesday, May 11, 2010. DOE will accept written comments, data, and information regarding the framework document before and after the public meeting, but no later than June 7, 2010. DOE encourages all written comments, data and information to be submitted in electronic form.

**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 20585–0121. Please note that foreign nationals planning to participate in the public meeting are subject to advance security screening procedures. If a foreign national wishes to participate in the public meeting, please inform DOE of this fact as soon a possible by contacting Ms. Brenda Edwards at (202) 586–2945 so that the necessary procedures can be completed.

Interested parties are encouraged to submit comments electronically by the following methods:

• *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.

• *E-mail to the following address: CRE–2010–STD–0003@ee.doe.gov.* Include docket number EERE–2010–BT–STD–0003 and/or RIN 1904–AC19 in the subject line of the message. All comments should clearly identify the name, address and, if appropriate, organization of the commenter. Alternatively, interested parties may submit comments by the following methods:

• *Mail:* Ms. Brenda Edwards, U.S. Department of Energy, Building Technologies Program, Mailstop EE–2J, Framework Document for Commercial Refrigeration Equipment, Docket No. EERE–2010–BT–STD–0003 and/or RIN 1904–AC19, 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, Sixth Floor, 950 L'Enfant Plaza, SW., Washington, DC 20024. Please submit one signed paper original.

*Docket:* For access to the docket to read background documents, a copy of the transcript of the public meeting, or comments received, go to regulations.gov. *Alternatively, interested parties may* go to the U.S. Department of Energy, Resource Room of the Building Technologies Program, Sixth 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 call Ms. Brenda Edwards first at the above telephone number for additional information regarding visiting the Resource Room.

A copy of the framework document and a link to the Docket Web page is available at: *http://www1.eere.energy.gov/buildings/appliance_standards/commercial/refrigeration_equipment.html.*

**FOR FURTHER INFORMATION CONTACT:** Mr. Charles Llenza, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Building Technologies, EE–2J, 1000 Independence Avenue, SW., Washington, DC 20585–0121. Telephone: (202) 586–2192. E-mail: *Charles_Llenza@ee.doe.gov.*

Mr. Michael Kido or Ms. Elizabeth Kohl, U.S. Department of Energy, Office of the General Counsel, GC–71, 1000 Independence Avenue, SW., Washington, DC 20585–0121. Telephone: (202) 586–9507. *E-mail: Michael.Kido@hq.doe.gov,Elizabeth.Kohl@hq.doe.gov.*

For information on how to submit or review public comments and 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, EE–2J, 1000 Independence Avenue, SW., Washington, DC, 20585–0121. Telephone (202) 586–2945. E-mail: *Brenda.Edwards@ee.doe.gov.*

**SUPPLEMENTARY INFORMATION:** Part A of the Energy Policy and Conservation Act of 1975 (EPCA), Public Law 94–163, (42 U.S.C. 6291–6309) established the Energy Conservation Program for Consumer Products Other Than Automobiles, a program covering most major household appliances. Part A–1 of Title III (42 U.S.C. 6311–6317) establishes a similar program for "Certain Industrial Equipment," which includes the commercial refrigeration equipment that is the focus of this notice.[1]

Amendments to EPCA in the Energy Policy Act of 2005 (EPACT 2005), Public Law 109–58, prescribed energy conservation standards for some commercial refrigeration equipment. (42 U.S.C. 6313(c)(2)–(3)) A summary of

[1] These two parts were titled Parts B and C in EPCA, but were codified as Parts A and A–1 in the United States Code for editorial reasons.

these standards can also be found in section 1.4 of the framework document.

In addition, Section 136(c)(4)(A) of EPACT 2005 amended EPCA to mandate that DOE set standards for the following additional categories of commercial refrigeration equipment: Ice-cream freezers; self-contained commercial refrigerators, freezers, and refrigerator-freezers without doors; and remote condensing commercial refrigerators, freezers, and refrigerator-freezers (42 U.S.C. 6313(c)(4)(A)). DOE undertook a rulemaking process beginning in April 2006, when it published a *Rulemaking Framework for Commercial Refrigeration Equipment Including Ice-Cream Freezers; Self-Contained Commercial Refrigerators, Freezers, and Refrigerator-Freezers without doors; and Remote Condensing Commercial Refrigerators, Freezers, and Refrigerator-Freezers.* The final rule was published on January 9, 2009. (74 FR 1091).

The EPACT 2005 amendments to EPCA also require DOE to conduct two cycles of rulemakings to determine whether to amend the standards for commercial refrigeration, both those prescribed by EPACT 2005 and those prescribed by DOE. (42 U.S.C. 6313(c)(5)(A)–(B)). In the first cycle, the subject of this rulemaking, DOE must publish a final rule establishing such amended standards by January 1, 2013 if DOE determines to amend the standards. (42 U.S.C. 6313(c)(5)(A)). Any amended standards adopted by DOE would apply to products manufactured three years or more after the date of publication, except that if DOE decides that a three-year period is inadequate, it shall provide a longer period not to exceed five years. (42 U.S.C. 6313(c)(5)(C)). This framework document is being published as a first step in meeting these statutory requirements.

DOE also considered standby and off mode for commercial refrigeration equipment and does not currently believe that these modes of operation are applicable to this equipment. As described in more detail in the framework document, commercial refrigeration equipment generally operates continuously. DOE plans, however, to examine the issue and address standby and off mode energy use in the analyses conducted over the course of the energy conservation standards rulemaking.

To initiate this rulemaking cycle for the consideration of amended energy conservation standards for commercial refrigeration equipment, DOE has prepared a framework document to explain the relevant issues, analyses, and processes it anticipates using to determine whether to amend the standards, and, if so, for the development of such amended standards. The focus of the public meeting noted above will be to discuss the analyses presented and issues identified in the framework document. At the public meeting, DOE will make a number of presentations, invite discussion on the rulemaking process as it applies to commercial refrigeration equipment, and solicit comments, data, and information from participants and other interested parties.

*DOE is planning to conduct in-depth technical analyses in the following areas:* (1) Engineering; (2) energy-use characterization; (3) product price; (4) life-cycle cost (LCC) and payback period (PBP); (5) national impacts analysis (NIA); (6) manufacturer impact analysis; (7) utility impact analysis; (8) employment impact analysis; (9) environmental assessment; and (10) regulatory impact analysis. DOE will also conduct several other analyses that support those previously listed, including the market and technology assessment, the screening analysis (which contributes to the engineering analysis), and the shipments analysis (which contributes to the national impact analysis).

DOE encourages those who wish to participate in the public meeting to obtain the framework document and to be prepared to discuss its contents. A copy of the draft framework document is available at: *http://www1.eere.energy.gov/buildings/appliance_standards/commercial/refrigeration_equipment.html.*

Public meeting participants need not limit their comments to the issues identified in the framework document. DOE is also interested in comments on other relevant issues that participants believe would affect energy conservation standards for this equipment, applicable test procedures, or the preliminary determination on the scope of coverage. DOE invites all interested parties, whether or not they participate in the public meeting, to submit in writing by June 7, 2010, comments and information on matters addressed in the framework document and on other matters relevant to DOE's consideration of amended standards for commercial refrigeration equipment.

The public meeting will be conducted in an informal, facilitated, conference style. There shall be no discussion of proprietary information, costs or prices, market shares, or other commercial matters regulated by U.S. antitrust laws. A court reporter will record the proceedings of the public meeting, after which a transcript will be available for purchase from the court reporter and placed on the DOE Web site at: *http://www.eere.energy.gov/buildings/appliance_standards/commercial/refrigeration_equipment.html.*

After the public meeting and the close of the comment period on the framework document, DOE will begin collecting data, conducting the analyses as discussed in the framework document and at the public meeting, and reviewing the public comments it receives.

DOE considers public participation to be a very important part of the process for determining whether to amend energy conservation standards, and if so, in setting those amended standards. DOE actively encourages the participation and interaction of the public during the comment period in each stage of the rulemaking process. Beginning with the framework document, and during each subsequent public meeting and comment period, interactions with and between members of the public provide a balanced discussion of the issues to assist DOE in the standards rulemaking process. Accordingly, anyone who wishes to participate in the public meeting, receive meeting materials, or be added to the DOE mailing list to receive future notices and information about this rulemaking should contact Ms. Brenda Edwards at (202) 586–2945, or via e-mail at *Brenda.Edwards@ee.doe.gov.*

Issued in Washington, DC, on April 30, 2010.

**Cathy Zoi,**

*Assistant Secretary, Energy Efficiency and Renewable Energy.*

[FR Doc. 2010–10655 Filed 5–5–10; 8:45 am]

**BILLING CODE 6450–01–P**

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

### 14 CFR Part 39

**[Docket No. FAA–2007–0037; Directorate Identifier 2007–NE–41–AD]**

**RIN 2120–AA64**

## Airworthiness Directives; Rolls-Royce Deutschland Ltd. & Co. KG (RRD) Models Tay 650–15 and Tay 651–54 Turbofan Engines

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

**ACTION:** Notice of proposed rulemaking (NPRM).

**SUMMARY:** We propose to supersede an existing airworthiness directive (AD) for

Tay 650–15 turbofan engines. That AD currently requires initial and repetitive inspections of the low-pressure (LP) turbine discs stage 2 and stage 3 for corrosion, on certain Tay 650–15 serial number engines. This proposed AD results from mandatory continuing airworthiness information (MCAI) issued by an aviation authority of another country to identify and correct an unsafe condition on an aviation product. The MCAI describes the unsafe condition as: Strip results from some of the engines listed in the applicability section of this AD revealed excessively corroded low-pressure turbine disks stage 2 and stage 3. The corrosion is considered to be caused by the environment in which these engines are operated. Following a life assessment based on the strip findings it is concluded that inspections for corrosion attack are required. The action specified by this European Aviation Safety Agency (EASA) AD 2008–0122 was intended to avoid a failure of a low-pressure turbine disk stage 2 or stage 3 due to potential corrosion problems which could result in uncontained engine failure and damage to the airplane. It has been later realized that the same unsafe condition could potentially occur on more serial numbers for the Tay 650–15 engines and on the Tay 651–54 engines. This AD, superseding EASA AD 2008–0122, retaining its requirements, is therefore issued to expand the Applicability in adding further engine serial numbers for the Tay 650–15 engines and in adding the Tay 651–54 engines.

We are proposing this AD to detect corrosion that could cause the stage 2 or stage 3 disk of the LP turbine to fail and result in an uncontained failure of the engine.

**DATES:** We must receive comments on this proposed AD by June 21, 2010.

**ADDRESSES:** You may send comments by any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov* and follow the instructions for sending your comments electronically.
- *Mail:* Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery:* Deliver to Mail address above between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.
- *Fax:* (202) 493–2251.

Contact Rolls-Royce Deutschland Ltd & Co KG, Eschenweg 11, Dahlwitz, 15827 Blankenfelde-Mahlow, Germany; phone: 011 49 (0) 33–7086–1883; fax: 011 49 (0) 33–7086–3276, for the service information identified in this proposed AD.

**Examining the AD Docket**

You may examine the AD docket on the Internet at *http://www.regulations.gov;* or in person at the Docket Operations office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this proposed AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Operations office (phone: (800) 647–5527) is the same as the Mail address provided in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

**FOR FURTHER INFORMATION CONTACT:** Tara Chaidez, Aerospace Engineer, Engine Certification Office, FAA, Engine and Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803; e-mail: *tara.chaidez@faa.gov;* phone: (781) 238–7773; fax: (781) 238–7199.

**SUPPLEMENTARY INFORMATION:**

**Comments Invited**

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include "Docket No. FAA–2007–0037; Directorate Identifier 2007–NE–41–AD" at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD based on those comments.

We will post all comments we receive, without change, to *http://www.regulations.gov,* including any personal information you provide. We will also post a report summarizing each substantive verbal contact with FAA personnel concerning this proposed AD. Using the search function of the Web site, anyone can find and read the comments in any of our dockets, including, if provided, the name of the individual who sent the comment (or signed the comment on behalf of an association, business, labor union, etc.). You may review the DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78).

**Discussion**

On October 8, 2009, the FAA issued AD 2009–22–01 (Amendment 39–16052 (74 FR 55121, October 27, 2009), which superseded AD 2008–10–14 (Amendment 39–15521, 73 FR 29405, May 21, 2008). AD 2009–22–01 requires initial and repetitive inspections of the LP turbine discs stage 2 and stage 3 for corrosion on 79 engines by serial number. That AD was the result of MCAI issued by an aviation authority of another country to identify and correct an unsafe condition on an aviation product. That condition, if not corrected, could result in the stage 2 or stage 3 disk of the LP turbine to fail and result in an uncontained failure of the engine.

Since AD 2009–22–01 was issued, RRD identified 14 additional Tay 650–15 engines by serial number that require the same inspections. RRD also expanded the applicability to all Tay 651–54 engines. EASA, which is the Technical Agent for the Member States of the European Community, has issued EASA AD 2010–0060R1, dated April 14, 2010. That MCAI extends the applicability to include the 14 additional Tay 650–15 engine serial numbers and Tay 651–54 engines for inspections. You may obtain further information by examining the MCAI in the AD docket.

**Relevant Service Information**

Rolls-Royce Deutschland has issued Alert Service Bulletin No. TAY–72–A1524, Revision 3, dated March 24, 2010. The actions described in this service information are intended to correct the unsafe condition identified in the MCAI.

**FAA's Determination and Requirements of This Proposed AD**

These products have been approved by the United Kingdom (UK), and are approved for operation in the United States. Pursuant to our bilateral agreement with the UK, they have notified us of the unsafe condition described in the MCAI ADs, and service information referenced above. We are proposing this AD because we evaluated all pertinent information and determined an unsafe condition exists and is likely to exist or develop on other products of the same type design. This proposed AD would require initial and repetitive eddy current inspections of HP turbine discs.

**Costs of Compliance**

Based on the service information, we estimate that this proposed AD would affect about three Tay 651–54 engines installed on airplanes of U.S. registry. We also estimate that it would take about three work-hours per engine to comply with this proposed AD. The average labor rate is $85 per work-hour. Required parts would cost about $40,000 per engine. Based on these

figures, we estimate the cost of the proposed AD on U.S. operators to be $120,765.

**Authority for This Rulemaking**

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, section 106, describes the authority of the FAA Administrator. "Subtitle VII: Aviation Programs," describes in more detail the scope of the Agency's authority.

We are issuing this rulemaking under the authority described in "Subtitle VII, Part A, Subpart III, Section 44701: General requirements." Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

**Regulatory Findings**

We determined that this proposed AD would not have federalism implications under Executive Order 13132. This proposed AD would not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify this proposed regulation:

1. Is not a "significant regulatory action" under Executive Order 12866;

2. Is not a "significant rule" under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and

3. Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

We prepared a regulatory evaluation of the estimated costs to comply with this proposed AD and placed it in the AD docket.

**List of Subjects in 14 CFR Part 39**

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

**The Proposed Amendment**

Accordingly, under the authority delegated to me by the Administrator, the FAA proposes to amend 14 CFR part 39 as follows:

## PART 39—AIRWORTHINESS DIRECTIVES

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

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

**§ 39.13 [Amended]**

2. The FAA amends § 39.13 by adding the following new AD:

**Rolls-Royce Deutschland Ltd & Co KG (RRD) (formerly Rolls-Royce plc, Derby, England):** Docket No. FAA–2007–0037; Directorate Identifier 2007–NE–41–AD.

**Comments Due Date**

(a) We must receive comments by June 21, 2010.

**Affected Airworthiness Directives (ADs)**

**Affected ADs**

(b) This AD supersedes AD 2009–22–01, Amendment 39–16052.

**Applicability**

(c) This AD applies to:

(1) RRD model Tay 650–15 turbofan engines that have a serial number listed in Table 1, Table 2, or Table 3 of this AD;

(2) All model Tay 651–54 turbofan engines; and

(3) Engines with a low-pressure (LP) turbine module M05300AA installed.

These engines are installed on, but not limited to, Fokker F.28 Mark 0070 and 0100 airplanes, Boeing 727 airplanes modified in accordance with Supplemental Type Certificate No. SA8472SW, and Gulfstream G–IV airplanes.

TABLE 1—AFFECTED TAY 650–15 ENGINES BY SERIAL NUMBER (CARRIED FORWARD FROM AD 2008–10–14 AND AD 2009–22–01)

| Engine serial number | |
|---|---|
| 17251 | 17561 |
| 17255 | 17562 |
| 17256 | 17563 |
| 17273 | 17580 |
| 17275 | 17581 |
| 17280 | 17612 |
| 17281 | 17618 |
| 17282 | 17635 |
| 17300 | 17637 |
| 17301 | 17645 |
| 17327 | 17661 |
| 17332 | 17686 |
| 17365 | 17699 |
| 17393 | 17701 |
| 17437 | 17702 |
| 17443 | 17736 |
| 17470 | 17737 |
| 17520 | 17738 |
| 17521 | 17739 |
| 17523 | 17741 |
| 17539 | 17742 |
| 17542 | 17808 |
| 17556 | |

TABLE 2—AFFECTED TAY 650–15 ENGINES BY SERIAL NUMBER (CARRIED FORWARD FROM AD 2009–22–01)

| Engine serial number | |
|---|---|
| 17249 | 17522 |
| 17303 | 17534 |
| 17358 | 17535 |
| 17370 | 17536 |
| 17425 | 17538 |
| 17426 | 17540 |
| 17433 | 17541 |
| 17438 | 17552 |
| 17445 | 17553 |
| 17446 | 17585 |
| 17460 | 17613 |
| 17474 | 17723 |
| 17478 | 17724 |
| 17490 | 17740 |
| 17491 | 17759 |
| 17517 | 17760 |
| 17518 | 17807 |

TABLE 3—AFFECTED TAY 650–15 ENGINES BY SERIAL NUMBER (ADDED NEW IN THIS AD)

| Engine serial number | |
|---|---|
| 17344 | 17707 |
| 17360 | 17716 |
| 17376 | 17718 |
| 17413 | 17719 |
| 17537 | 17731 |
| 17694 | 17756 |
| 17698 | 17757 |

**Reason**

(d) Strip results from some of the engines listed in the applicability section of this AD revealed excessively corroded low-pressure turbine disks stage 2 and stage 3. The corrosion is considered to be caused by the environment in which these engines are operated. Following a life assessment based on the strip findings it is concluded that inspections for corrosion attack are required. The action specified by this European Aviation Safety Agency (EASA) AD 2008–0122 was intended to avoid a failure of a low-pressure turbine disk stage 2 or stage 3 due to potential corrosion problems which could result in uncontained engine failure and damage to the airplane. It has been later realized that the same unsafe condition could potentially occur on more serial numbers for the Tay 650–15 engines and on the Tay 651–54 engines. This AD, superseding EASA AD 2008–0122, retaining its requirements, is therefore issued to expand the Applicability in adding further engine serial numbers for the Tay 650–15 engines and in adding the Tay 651–54 engines. We are issuing this AD to detect corrosion that could cause the stage 2 or stage 3 disk of the LP turbine to fail and result in an uncontained failure of the engine.

**Actions and Compliance**

(e) Unless already done, do the following actions.

(1) Prior to accumulating 11,700 flight cycles (FC) since new of disk life, and

thereafter at intervals not exceeding 11,700 FC of disk life, inspect the LP turbine disks stage 2 and stage 3 for corrosion using RRD Alert Service Bulletin (ASB) No. TAY–72–A1524, Revision 3, dated March 24, 2010.

(2) For engines with disk life that already exceed 11,700 FC on the effective date of this AD, perform the inspection within 90 days after the effective date of this AD.

(3) When, during any of the inspections as required by paragraphs (e)(1) and (e)(2) of this AD, corrosion is found, replace the affected parts. RRD TAY 650 Engine Manual—E–TAY–3RR, Tasks 72–52–23–200–000 and 72–52–24–200–000, and RRD TAY 651 Engine Manual—E–TAY–5RR, Tasks 72–52–23–200–000 and 72–52–24–200–000, contain guidance on performing the inspection for corrosion and rejection criteria.

**Previous Credit**

(f) Initial inspections done before the effective date of this AD on LP turbine disks stage 2 and stage 3 listed in Table 1 and Table 2 of this AD using RRD ASB No. TAY–72–A1524, Revision 1, dated September 1, 2006, or Revision 2, dated June 13, 2008, comply with the initial inspection requirements specified in this AD.

**Alternative Methods of Compliance (AMOCs)**

(g) The Manager, Engine Certification Office, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19.

**Related Information**

(h) Refer to EASA AD 2010–060R1, dated April 14, 2010, for related information. Contact Rolls-Royce Deutschland Ltd & Co KG, Eschenweg 11, Dahlwitz, 15827 Blankenfelde-Mahlow, Germany; phone: 011 49 (0) 33–7086–1883; fax: 011 49 (0) 33–7086–3276, for a copy of the service information referenced in this AD.

(i) Contact Tara Chaidez, Aerospace Engineer, Engine Certification Office, FAA, Engine and Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803; e-mail: *tara.chaidez@faa.gov;* phone: (781) 238–7773; fax (781) 238–7199, for more information about this AD.

Issued in Burlington, Massachusetts, on April 29, 2010.

**Peter A. White,**

*Assistant Manager, Engine and Propeller Directorate, Aircraft Certification Service.*

[FR Doc. 2010–10739 Filed 5–5–10; 8:45 am]

**BILLING CODE 4910–13–P**

## DEPARTMENT OF ENERGY

## Federal Energy Regulatory Commission

## 18 CFR Part 37

**[Docket No. RM10–22–000]**

## Promoting a Competitive Market for Capacity Reassignments

April 29, 2010.

**AGENCY:** Federal Energy Regulatory Commission.

**ACTION:** Notice of Proposed Rulemaking.

**SUMMARY:** Based on the Commission's experience to date and a two-year study, released April 15, 2010, the Federal Energy Regulatory Commission proposes in this Notice of Proposed Rulemaking to lift the price cap for all transmission customers reassigning transmission capacity beyond October 1, 2010. The reforms proposed in this order are intended to facilitate the development of a market for capacity reassignments as a competitive alternative to primary capacity.

**DATES:** Comments are due July 6, 2010.

**ADDRESSES:** You may submit comments, identified by docket number by any of the following methods:

- *Agency Web site:* Documents created electronically using word processing software should be filed in native applications or print-to-PDF format and not in a scanned format.
- *Mail/Hand Delivery:* Commenters unable to file comments electronically must mail or hand deliver an original and 14 copies of their comments to: Federal Energy Regulatory Commission, Office of the Secretary, 888 First Street, NE., Washington, DC 20426.

*Instructions:* For detailed instructions on submitting comments and additional information on the rulemaking process, see the Comment Procedures Section of this document.

**FOR FURTHER INFORMATION CONTACT:**

Laurel Hyde (Technical Information), Office of Energy Market Regulation, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, (202) 502–8146,

A. Cory Lankford (Legal Information), Office of the General Counsel, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, (202) 502–6711.

**SUPPLEMENTARY INFORMATION:**

1. Based on the Commission's experience to date and a two-year study, released April 15, 2010,[1] the Federal Energy Regulatory Commission (Commission) proposes in this Notice of Proposed Rulemaking (NOPR) to lift the price cap for all transmission customers reassigning transmission capacity beyond October 1, 2010. The reforms proposed in this order are intended to facilitate the development of a market for capacity reassignments as a competitive alternative to primary capacity.

### I. Background

2. In Order No. 888, the Commission concluded that a transmission provider's *pro forma* Open Access Transmission Tariff (OATT) must explicitly permit the voluntary reassignment of all or part of a holder's firm point-to-point capacity rights to any eligible customer.[2] The Commission also found that allowing holders of firm transmission capacity rights to reassign capacity would help parties manage the financial risks associated with their long-term commitment, reduce the market power of transmission providers by enabling customers to compete, and foster efficient capacity allocation.

3. With respect to the appropriate rate for capacity reassignment, the Commission concluded it could not permit reassignments at market-based rates because it was unable to determine that the market for reassigned capacity was sufficiently competitive so that assignors would not be able to exert market power. Instead, the Commission capped the rate at the highest of (1) the original transmission rate charged to the purchaser (assignor), (2) the transmission provider's maximum stated firm transmission rate in effect at the time of the reassignment, or (3) the assignor's own opportunity costs capped at the cost of expansion (price cap). The Commission further explained that opportunity cost pricing had been permitted at "the higher of embedded costs or legitimate and verifiable opportunity costs, but not the sum of the two (*i.e.,* 'or' pricing is permitted;

[1] FERC Staff, *Staff Findings on Capacity Reassignment* (2010), *available at: http://www.ferc.gov* (Staff Report).

[2] *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities,* Order No. 888, 61 FR 21540 (May 10, 1996), FERC Stats. & Regs. ¶ 31,036, at 31,696 (1996), *order on reh'g,* Order No. 888–A, 62 FR 12274 (Mar. 14, 1997), FERC Stats. & Regs. ¶ 31,048 (1997), *order on reh'g,* Order No. 888–B, 81 FERC ¶ 61,248 (1997), *order on reh'g,* Order No. 888–C, 82 FERC ¶ 61,046 (1998), *aff'd in relevant part sub nom. Transmission Access Policy Study Group* v. *FERC,* 225 F.3d 667 (DC Cir. 2000), *aff'd sub nom. New York* v. *FERC,* 535 U.S. 1 (2002).

'and' pricing is not)." [3] In Order No. 888–A, the Commission explained that opportunity costs for capacity reassigned by a customer should be measured in a manner analogous to that used to measure the transmission provider's opportunity cost.[4]

4. To foster the development of a more robust secondary market for transmission capacity, the Commission, in Order No. 890, concluded that it was appropriate to lift the price cap for all transmission customers reassigning transmission capacity.[5] The Commission stated that this would allow capacity to be allocated to those entities that value it most, thereby sending more accurate price signals to identify the appropriate location for construction of new transmission facilities to reduce congestion.[6] The Commission also found that market forces, combined with the requirements of the *pro forma* OATT as modified in Order No. 890, would limit the ability of assignors to exert market power, including affiliates of the transmission provider.

5. To enhance oversight and monitoring activities, the Commission adopted reforms to the underlying rules governing capacity reassignments.[7] First, the Commission required that all sales or assignments of capacity be conducted through or otherwise posted on the transmission provider's OASIS on or before the date the reassigned service commences.[8] Second, the Commission required that assignees of transmission capacity execute a service agreement prior to the date on which the reassigned service commences.[9] Third, in addition to existing OASIS posting requirements, the Commission required transmission providers to aggregate and summarize in an electric quarterly report the data contained in these service agreements.[10]

6. The Commission also directed staff to closely monitor the reassignment-related data submitted by transmission providers in their quarterly reports to identify any problems in the development of the secondary market for transmission capacity and, in particular, the potential exercise of market power.[11] Thus, the Commission directed staff to prepare, within six months of receipt of two years of quarterly reports, a report summarizing its findings.[12] In addition, the Commission encouraged market participants to provide feedback regarding the development of the secondary capacity market and, in particular, to contact the Commission's Enforcement Hotline if concerns arise.

7. In Order No. 890–A, the Commission affirmed its decision to remove the price cap on reassignments of transmission capacity but granted rehearing to limit the period during which reassignments may occur above the cap.[13] The Commission concluded that it would be most appropriate to lift the price cap on reassignments of capacity only to accommodate the Commission staff study period. Accordingly, the Commission amended section 23.1 of the *pro forma* OATT to reinstate the price cap as of October 1, 2010.[14] The Commission stated that, upon review of the staff report and any feedback from the industry, the Commission would determine whether it would be appropriate to continue to allow reassignments of capacity above the price cap beyond that date.

8. The Commission also clarified that, as of the effective date of the reforms adopted in Order No. 890, all reassignments of capacity must take place under the terms and conditions of the transmission provider's OATT. As a result, there was no longer a need for the assigning party to have on file with the Commission a rate schedule governing reassigned capacity. To the extent that a reseller has a market-based rate tariff on file, the provisions of that tariff, including a price cap or reporting obligations, will not apply to the reassignment since such transactions no longer take place pursuant to the authorization of that tariff.

9. In Order No. 890–B, the Commission clarified that the *pro forma* OATT does not, and will not, permit the withholding of transmission capacity by the transmission provider and that it effectively establishes a price ceiling for long-term reassignments at the transmission provider's cost of expanding its system.[15] The Commission further found that the fact that a transmission provider's affiliate may profit from congestion on the system does not relieve the transmission provider of its obligation to offer all available transmission capacity and expand its system as necessary to accommodate requests for service.[16] The Commission pointed out that customers that do not wish to participate in the secondary market may continue to take service from the transmission provider directly, just as if the price cap had not been lifted.[17]

10. With regard to the report to be prepared by Commission staff, the Commission clarified that staff should focus on the competitive effects of removing the price cap for reassigned capacity.[18] The Commission stated that staff should consider the number of reassignments occurring over the study period, the magnitude and variability of resale prices, the term of the reassignments, and any relationship between resale prices and price differentials in related energy markets. In addition, the Commission directed staff to examine the nature and scope of reassignments undertaken by the transmission provider's affiliates and include in its report any evidence of abuse in the secondary market for transmission capacity, whether by those affiliates or other customers.

11. The Commission also granted rehearing and directed transmission providers to include in their electric quarterly reports the identity of the reseller and indicate whether the reseller is affiliated with the transmission provider.[19] The Commission also directed each transmission provider to include in their electric quarterly reports the rate that would have been charged under its OATT had the secondary customer purchased primary service from the transmission provider for the term of the reassignment.[20] The Commission directed transmission providers to submit this additional data for all resales during the study period and to update, as necessary, any previously-filed electric quarterly reports on or before the date they submitted their next electric quarterly reports.

## II. Discussion

12. Based on the Commission's experience and the two-year study, the

[3] Order No. 888, FERC Stats. & Regs. ¶ 31,036 at 31,740.

[4] Order No. 888–A, FERC Stats. & Regs. ¶ 31,048 at 30,224.

[5] *Preventing Undue Discrimination and Preference in Transmission Service,* Order No. 890, 72 FR 12266 (Mar. 15, 2007), FERC Stats. & Regs. ¶ 31,241, at P 808 (2007), *order on reh'g,* Order No. 890–A, 73 FR 2984 (Jan. 16, 2008), FERC Stats. & Regs. ¶ 31,261 (2007), *order on reh'g,* Order No. 890–B, 123 FERC ¶ 61,299 (2008), *order on reh'g,* Order No. 890–C, 126 FERC ¶ 61,228 (2009), *order on reh'g,* Order No. 890–D, 129 FERC ¶ 61,126 (2009).

[6] Order No. 890, FERC Stats. & Regs. ¶ 31,241 at P 808.

[7] *Id.* P 815.

[8] *Id.*

[9] *Id.* P 816.

[10] *Id.* P 817.

[11] *Id.* P 820.

[12] *Id.*

[13] Order No. 890–A, FERC Stats. & Regs. ¶ 31,261 at P 388, 390.

[14] *Id.* P 390.

[15] Order No. 890–B, 123 FERC ¶ 61,299 at P 78.

[16] *Id.*

[17] *Id.* P 79.

[18] *Id.* P 83.

[19] *Id.* P 84.

[20] *Id.*

Commission proposes to permanently remove the price cap on the reassignments of capacity and revise section 23 of the *pro forma* OATT accordingly, as indicated in Appendix A. In addition, the Commission proposes to direct transmission providers to submit corresponding revisions to their OATT's within 30 days of publication of the Final Rule in the **Federal Register.**

13. The secondary market for capacity reassignments experienced strong growth during the study period. Both the number of transactions and capacity volume reassigned rose throughout the two and one half year time span. The number of reassignments increased dramatically from just over 200 in 2007 to almost 32,000 in 2009. Almost 36 TWh flowed on reassigned paths in 2009, up from 3 TWh in 2007. Moreover, the majority of resale prices, 99 percent, were at or below the price cap. While few of the reassignments were at prices above the cap, it appears from the data that reassignment prices comported with pricing differentials between markets. For instance, there were numerous reassignments between points in New England and Quebec with prices comparable to the average spread in energy prices between the regions. These data suggest that resale prices reflect market fundamentals rather than the exercise of market power.

14. During the study period, there were 32 transactions of reassigned capacity by an affiliate of a transmission provider reassigned for more than the tariff rate. However, the percentage of such over-cap reassignments (0.5 percent) was in line with that of over-cap reassignments by non-affiliates (0.4 percent), leading us to believe that affiliate abuse is not an issue. For these reasons, the Commission proposes to find that the Staff Report supports the Commission's decision to lift the price cap beyond October 1, 2010 on all capacity reassignments.

15. The Commission seeks comment on this proposal. Additionally, given that the levels of reassignment and growth of reassignment varies substantially across transmission providers, we believe that there is significant potential for further growth in the reassignment of capacity. Accordingly, the Commission also seeks comments as to whether there are any other reforms that it should undertake to create a more efficient and vibrant secondary market for transmission capacity. Are there non-price limitations or regional factors that may be continuing to limit the utility of reassignment? To the extent any limitations exist, the Commission seeks comment on how they should be addressed. For example, are there reforms to the redirect process that would enable all firm customers to use their firm capacity more flexibly and thereby facilitate capacity reassignment by making point changes by the buyer of reassigned capacity more efficient? In the natural gas industry, the Commission has established a system of secondary firm point priorities to provide greater flexibility in the use of firm capacity.[21] We request comment on whether such an approach could be used effectively in the electric industry and what impact, if any such an approach would have on system operations.

16. As discussed above, we propose to find that the Commission Staff Report supports the Commission's belief that there are no significant market power concerns to justify retaining price caps for any transmission customer.[22] With regard to affiliate abuse, the Staff Report finds that less than one percent of transactions performed by affiliates during the study period were transacted above the tariff rate during the study period. While staff did not detect affiliate abuse associated with reassignment by affiliates of the transmission provider during the study period, the Commission seeks comment on whether market participants have experienced any such affiliate abuse that would argue for maintaining the price cap on affiliates of the transmission provider, or if other safeguards are needed for such reassignments. How should reassignment by a transmission provider's retail service function (that is not a separate affiliate) be treated?

17. Based on the Commission's experience and the two-year study, the Commission believes that the absence of a price cap for transmission capacity reassignment does not present any major market concerns. Nevertheless, the Commission is committed to ensuring just and reasonable transmission service that is not unduly discriminatory or preferential and, therefore, will continue to monitor the secondary market of capacity reassignments for evidence of abuse of market power. The Commission receives sufficient information to monitor the secondary market for capacity reassignment because pursuant to section 23 of the *pro forma* OATT: (1) All sales of capacity must be conducted through or otherwise posted on the transmission provider's OASIS on or before the date of service; and, (2) assignees of transmission capacity must execute a service agreement prior to the date on which the reassigned service commences. In addition, transmission providers must aggregate and summarize in an electric quarterly report the data contained in these service agreements.[23]

## III. Information Collection Statement

18. The following collection of information contained in this proposed rule is subject to review by the Office of Management and Budget (OMB) under section 3507(d) of the Paperwork Reduction Act of 1995.[24] OMB's regulations require OMB to approve certain information collection requirements imposed by agency rule.[25]

[21] Secondary firm priority means that the shipper has scheduling rights to a new point that are superior to interruptible service but inferior to primary firm service for shippers using points specified in their contract. The use of secondary firm service enables shippers obtaining reassigned capacity to establish alternate firm capacity points. *See Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation; and Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol,* Order No. 636, 57 FR 13,267 (Apr. 16, 1992), FERC Stats. & Regs. ¶ 30,939, at 30,428 (1992), *order on reh'g,* Order No. 636–A, 57 FR 36,128 (Aug. 12, 1992), FERC Stats. & Regs. ¶ 30,950 (1992), *order on reh'g,* Order No. 636–B, 57 FR 57,911 (Dec. 8, 1992), 61 FERC ¶ 61,272 (1992), *order on reh'g,* 62 FERC ¶ 61,007 (1993), *aff'd in part and remanded in part sub nom. United Distribution Cos. v. FERC,* 88 F.3d 1105 (DC Cir. 1996), *order on remand,* Order No. 636–C, 62 FR 10,204 (Mar. 6, 1997), 78 FERC ¶ 61,186 (1997); *see also Regulation of Short-Term Natural Gas Transportation Services and Regulation of Interstate Natural Gas Transportation Services,* Order No. 637, 65 FR 10,156 (Feb. 25, 2000), FERC Stats. & Regs. ¶ 31,091, at 31,304–31,306, *clarified,* Order No. 637–A, 65 FR 35,706 (June 5, 2000), FERC Stats. & Regs. ¶ 31,099, *reh'g denied,* Order No. 637–B, 65 FR 47,284 (Aug. 2, 2000), 92 FERC ¶ 61,062 (2000), *aff'd in part and remanded in part sub nom. Interstate Natural Gas Ass'n of America v. FERC,* 285 F.3d 18, 350 U.S. App. DC 366 (DC Cir. 2002), *order on remand,* 101 FERC ¶ 61,127 (2002), *order on reh'g,* 106 FERC ¶ 61,088 (2004), *aff'd sub nom. American Gas Ass'n v. FERC,* 428 F.3d 255, 368 U.S. App. DC 176 (DC Cir. 2005).

[22] *See* Order No. 890, FERC Stats. & Regs. ¶ 31,241 at P 809 (stating that based on ten years of experience regulating capacity reassignments, the Commission believes there are no significant market power concerns to justify retaining the price caps for any transmission customer).

[23] 18 CFR 35.10b; *see also,* Order No. 890, FERC Stats. & Regs. ¶ 31,241 at P 817; *Notice Providing Guidance on the Filing of Information on Transmission Capacity Reassignments in Electric Quarterly Reports,* 124 FERC ¶ 61,244 (2008).

[24] 44 U.S.C. § 3507(d) (2000).

[25] 5 CFR 1320.11 (2009).

*Burden Estimate:* The public reporting and records retention burdens for the proposed reporting requirements and the records retention requirement are as follows.[26]

| Data collection | Number of respondents | Number of responses | Hours per response | Total annual hours |
|---|---|---|---|---|
| Conforming tariff changes | 176 | 1 | 10 | 1,760 |

*Cost to Comply:* $200,640. 1,760 hours @ $114 an hour (average cost of attorney ($200 per hour), consultant ($150), technical ($80), and administrative support ($25)).

OMB's regulations require it to approve certain information collection requirements imposed by an agency rule. The Commission is submitting notification of this proposed rule to OMB. If the proposed requirements are adopted they will be mandatory requirements.

*Title:* FERC–516, Electric Rate Schedules and Tariff Filings; FERC–717, Standards for Business Practices and Communication Protocols for Public Utilities.

*Action:* Proposed Collections.

*OMB Control Nos.* 1902–0096 and 1902–0173.

*Respondents:* Transmission Providers.

*Frequency of responses:* One time.

*Necessity of the Information:*

19. The Federal Energy Regulatory Commission is proposing amendments to the *pro forma* OATT to ensure that transmission services are provided on a basis that is just, reasonable and not unduly discriminatory or preferential. The purpose of this proposed rulemaking is to strengthen the *pro forma* OATT by encouraging more robust competition. We propose to achieve this goal by removing the price cap previously imposed on reassignments of transmission capacity.

20. Interested persons may obtain information on the reporting requirements by contacting the following: Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426 [Attention: Michael Miller, Office of the Executive Director, Phone: (202) 502–8415, fax: (202) 273–0873, e-mail: *michael.miller@ferc.gov*]

21. For submitting comments concerning the collections of information and the associated burden estimate(s), please send your comments to the contact listed above and to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street, NW., Washington, DC 20503 [Attention: Desk Officer for the Federal Energy Regulatory Commission, phone: (202) 395–4650, fax: (202) 395–7285. Due to security concerns, comments should be sent electronically to the following e-mail address: *oira_submission@omb.eop.gov*. Please reference the docket number of this proposed rulemaking in your submission.

## IV. Environmental Analysis

22. The Commission is required to prepare an Environmental Assessment or an Environmental Impact Statement for any action that may have a significant adverse effect on the human environment.[27] The Commission concludes that neither an Environmental Assessment nor an Environmental Impact Statement is required for this NOPR under section 380.4(a)(15) of the Commission's regulations, which provides a categorical exemption for approval of actions under sections 205 and 206 of the FPA relating to the filing of schedules containing all rates and charges for the transmission or sale subject to the Commission's jurisdiction, plus the classification, practices, contracts and regulations that affect rates, charges, classifications and services.[28]

## V. Regulatory Flexibility Act Analysis

23. The Regulatory Flexibility Act of 1980 (RFA)[29] generally requires a description and analysis of final rules that will have significant economic impact on a substantial number of small entities. This proposed rule would apply to public utilities that own, control or operate interstate transmission facilities, not to electric utilities per se. The total number of public utilities that, absent waiver, would have to modify their current OATTs by filing the revised *pro forma* OATT is 176.[30] Of these only six public utilities, or less than two percent, dispose of four million MWh or less per year.[31] The Commission does not consider this a substantial number, and in any event, these small entities may seek waiver of these requirements.[32] Moreover, the criteria for waiver that would be applied under this rulemaking for small entities is unchanged from that used to evaluate requests for waiver under Order Nos. 888 and 889. Thus, small entities who have received waiver of the requirements to have on file an open access tariff or to operate an OASIS would be unaffected by the requirements of this proposed rulemaking.

## VI. Comment Procedures

24. The Commission invites interested persons to submit comments on the matters and issues proposed in this notice to be adopted, including any related matters or alternative proposals that commenters may wish to discuss. Comments are due July 6, 2010. Comments must refer to Docket No. RM10–22–000, and must include the commenter's name, the organization they represent, if applicable, and their address in their comments.

25. The Commission encourages comments to be filed electronically via the eFiling link on the Commission's Web site at *http://www.ferc.gov*. The Commission accepts most standard word processing formats. Documents created electronically using word processing software should be filed in native applications or print-to-PDF

[26] These burden estimates apply only to this NOPR and do not reflect upon all of FERC–516 or FERC–717.

[27] Order No. 486, *Regulations Implementing the National Environmental Policy Act,* 52 FR 47897 (Dec. 17, 1987), FERC Stats. & Regs., Regulations Preambles 1986–1990 ¶ 30,783 (1987).

[28] 18 CFR 380.4(a)(15) (2009).

[29] 5 U.S.C. 601–612.

[30] The sources for this figure are FERC Form No. 1 and FERC Form No. 1–F data.

[31] *Id.*

[32] The Regulatory Flexibility Act defines a "small entity" as "one which is independently owned and operated and which is not dominant in its field of operation." *See* 5 U.S.C. 601(3) and 601(6)(2000); 15 U.S.C. 632(a)(1) (2000). In *Mid-Tex Elec. Coop. v. FERC,* 773 F.2d 327, 340–343 (DC Cir. 1985), the court accepted the Commission's conclusion that, since virtually all of the public utilities that it regulates do not fall within the meaning of the term "small entities" as defined in the Regulatory Flexibility Act, the Commission did not need to prepare a regulatory flexibility analysis in connection with its proposed rule governing the allocation of costs for construction work in progress (CWIP). The CWIP rules applied to all public utilities. The revised *pro forma* OATT will apply only to those public utilities that own, control or operate interstate transmission facilities. These entities are a subset of the group of public utilities found not to require preparation of a regulatory flexibility analysis for the CWIP rule.

format and not in a scanned format. Commenters filing electronically do not need to make a paper filing.

26. Commenters that are not able to file comments electronically must send an original and 14 copies of their comments to: Federal Energy Regulatory Commission, Office of the Secretary, 888 First Street, NE., Washington, DC 20426.

27. All comments will be placed in the Commission's public files and may be viewed, printed, or downloaded remotely as described in the Document Availability section below. Commenters on this proposal are not required to serve copies of their comments on other commenters.

**VII. Document Availability**

28. In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the Internet through FERC's Home Page (*http://www.ferc.gov*) and in FERC's Public Reference Room during normal business hours (8:30 a.m. to 5 p.m. Eastern time) at 888 First Street, NE., Room 2A, Washington, DC 20426.

29. From FERC's Home Page on the Internet, this information is available on eLibrary. The full text of this document is available on eLibrary in PDF and Microsoft Word format for viewing, printing, and/or downloading. To access this document in eLibrary, type the docket number excluding the last three digits of this document in the docket number field.

30. User assistance is available for eLibrary and the FERC's Web site during normal business hours from FERC Online Support at (202) 502–6652 (toll free at 1–866–208–3676) or e-mail at *ferconlinesupport@ferc.gov,* or the Public Reference Room at (202) 502–8371, TTY (202) 502–8659. E-mail the Public Reference Room at *public.referenceroom@ferc.gov.*

**List of Subjects in 18 CFR Part 37**

By direction of the Commission.

**Nathaniel J. Davis, Sr.,**

*Deputy Secretary.*

**Note:** The following appendix will not appear in the Code of Federal Regulations.

**BILLING CODE 6717–01–P**

**Appendix A**

**RM05-17-001, -002 & RM05-25-001, -002**
**(Issued)**

**PRO FORMA OPEN ACCESS**
**TRANSMISSION TARIFF**

**23 Sale or Assignment of Transmission Service**

**23.1 Procedures for Assignment or Transfer of Service:**

(a) ~~Subject to Commission approval of any necessary filings, a~~A Transmission Customer may sell, assign, or transfer all or a portion of its rights under its Service Agreement, but only to another Eligible Customer (the Assignee). The Transmission Customer that sells, assigns or transfers its rights under its Service Agreement is hereafter referred to as the Reseller. ~~Compensation to Resellers shall not exceed the higher of (i) the original rate paid by the Reseller, (ii) the Transmission Provider's maximum rate on file at the time of the assignment, or (iii) the Reseller's opportunity cost capped at the Transmission Provider's cost of expansion; provided that, for service prior to October 1, 2010, c~~Compensation to Resellers shall be at rates established by agreement between the Reseller and the Assignee.

(b) The Assignee must execute a service agreement with the Transmission Provider governing reassignments of transmission service prior to the date on

which the reassigned service commences. The Transmission Provider shall charge the Reseller, as appropriate, at the rate stated in the Reseller's Service Agreement with the Transmission Provider or the associated OASIS schedule and credit the Reseller with the price reflected in the Assignee's Service Agreement with the Transmission Provider or the associated OASIS schedule; provided that, such credit shall be reversed in the event of non-payment by the Assignee. If the Assignee does not request any change in the Point(s) of Receipt or the Point(s) of Delivery, or a change in any other term or condition set forth in the original Service Agreement, the Assignee will receive the same services as did the Reseller and the priority of service for the Assignee will be the same as that of the Reseller. The Assignee will be subject to all terms and conditions of this Tariff. If the Assignee requests a change in service, the reservation priority of service will be determined by the Transmission Provider pursuant to Section 13.2.

**23.2 Limitations on Assignment or Transfer of Service:**

If the Assignee requests a change in the Point(s) of Receipt or Point(s) of Delivery, or a change in any other specifications set forth in the original Service Agreement, the Transmission Provider will consent to such change subject to the provisions of the Tariff, provided that the change will not impair the operation and reliability of the Transmission Provider's generation, transmission, or distribution systems. The Assignee shall compensate the

Transmission Provider for performing any System Impact Study needed to evaluate the capability of the Transmission System to accommodate the proposed change and any additional costs resulting from such change. The Reseller shall remain liable for the performance of all obligations under the Service Agreement, except as specifically agreed to by the Transmission Provider and the Reseller through an amendment to the Service Agreement.

**23.3 Information on Assignment or Transfer of Service:**

In accordance with Section 4, all sales or assignments of capacity must be conducted through or otherwise posted on the Transmission Provider's OASIS on or before the date the reassigned service commences and are subject to Section 23.1. Resellers may also use the Transmission Provider's OASIS to post transmission capacity available for resale.

[FR Doc. 2010–10500 Filed 5–5–10; 8:45 am]
BILLING CODE 6717–01–C

## DEPARTMENT OF LABOR

### Occupational Safety and Health Administration

### 29 CFR Part 1910

**[Docket No. OSHA–2010–0003]**

**RIN No. 1218–AC46**

### Infectious Diseases

**AGENCY:** Occupational Safety and Health Administration (OSHA), Department of Labor.

**ACTION:** Request for information.

**SUMMARY:** OSHA requests information and comment on occupational exposure to infectious agents in settings where healthcare is provided, (*e.g.,* hospitals, outpatient clinics, clinics in schools and correctional facilities), and healthcare-related settings (*e.g.,* laboratories that handle potentially infectious biological materials, medical examiner offices and mortuaries). OSHA is interested in strategies that are being used in such healthcare and other healthcare-related work settings to mitigate the risk of occupationally-acquired infectious diseases. As such, OSHA would like to collect information and data on the facilities and the tasks potentially exposing workers to this risk; successful employee infection control programs; control methodologies being utilized (including engineering, work practice, and administrative controls and personal protective equipment); medical surveillance programs; and training. OSHA will use the information received in response to this request to determine what action, if any, the Agency may take to further limit the spread of occupationally-acquired infectious diseases in these types of settings.

**DATES:** Comments must be submitted by the following date:

*Hard copy:* Your comments must be submitted (postmarked or sent) by August 4, 2010.

*Facsimile and electronic transmission:* Your comments must be sent by August 4, 2010.

**ADDRESSES:** You may submit comments and additional materials by any of the following methods:

*Electronically:* You may submit comments and attachments electronically at *http://www.regulations.gov,* which is the Federal eRulemaking Portal. Follow the instructions online for making electronic submissions:

*Fax:* If your submissions, including attachments, are not longer than 10 pages, you may fax them to the OSHA Docket Office at (202) 693–1648; or

*Mail, hand delivery, express mail, messenger or courier service:* You must submit three copies of your comments and attachments to the OSHA Docket Office, Docket No. OSHA–2010–0003, U.S. Department of Labor, Room N–2625, 200 Constitution Avenue, NW., Washington, DC 20210. Deliveries (hand, express mail, messenger and courier service) are accepted during the Department of Labor's and Docket Office's normal business hours, 8:15 a.m.–4:45 p.m., EST.

*Instructions:* All submissions must include the Agency name and the OSHA docket number for this rulemaking (OSHA Docket No. OSHA–2010–0003). Submissions, including any personal information you provide, are placed in the public docket without change and may be made available online at *http://www.regulations.gov.*

*Docket:* To read or download submissions or other material in the docket, go to *http://www.regulations.gov* or the OSHA Docket Office at the address above. All documents in the

docket are listed in the *http://www.regulations.gov* index, however, some information (*e.g.,* copyrighted material) is not publicly available to read or download through the Web site. All submissions, including copyrighted material, are available for inspection at the OSHA Docket Office.

**FOR FURTHER INFORMATION CONTACT:**

*Press Inquiries:* Jennifer Ashley, Director, OSHA Office of Communications, Room N–3647, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210; telephone: (202) 693–1999.

*General and Technical Information:* Andrew Levinson, Director, Office of Biological Hazards, OSHA Directorate of Standards and Guidance, Room N–3718, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC, 20210; telephone: (202) 693–2048.

**SUPPLEMENTARY INFORMATION:**

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## I. Background

### *A. Introduction*

In 2007, the healthcare and social assistance sector as a whole had 16.5 million employees.[1] Healthcare workplaces can range from small private practices of physicians to hospitals that employ thousands of workers. In addition, healthcare is increasingly being provided in other settings such as nursing homes, free-standing surgical and outpatient centers, emergency care clinics, patients' homes, and pre-hospitalization emergency care settings. Over the last 10 years, the number of healthcare workers (HCWs) (defined as healthcare professionals, technicians, and healthcare support workers, including those not directly providing patient care such as maintenance or laundry workers) has increased from 8.4 million in 1998, to approximately 11 million in 2008. In 1998, of the 8.4 million HCWs, 3.0 million were employed in hospitals and 5.4 million were employed outside of hospitals. In 2008, 3.6 million HCWs were employed in hospitals and 7.3 million outside of hospitals. Of the 7.3 million workers employed outside of hospitals, 2.1 million were employed by establishments not defined as part of the healthcare sector.[2] The increasing number of HCWs outside of hospital settings who are exposed to occupational injuries and illnesses likely has implications for risk management.

Depending on the setting and the job tasks, HCWs may be exposed to a number of occupational hazards including: Exposure to infectious agents, radiation and chemicals. The Bureau of Labor Statistics (BLS) reports that for 2008, the incidence of all occupational injury and illness (including musculo-skeletal disorders from slips and falls and lifting patients and equipment) in the healthcare sector as a whole was 5.6 cases per 100 full-time workers, in contrast to an average of 4.2 cases per 100 full-time workers for private industry overall.[3] Higher rates have been documented in hospitals, with an incidence rate for all injuries and illnesses of 7.6 per 100 full-time workers, and nursing homes, with an incidence rate for all injuries and illnesses of 8.4 per 100 full-time workers.

In addition to settings where healthcare is provided, there are other work settings where workers might be at increased risk for occupational exposure to infectious agents. Occupational exposure to infectious agents may occur in settings where healthcare is provided (*e.g.,* hospitals, clinics, some emergency response settings; clinics in schools or correctional facilities); and healthcare-related settings where there is increased potential for exposure to infectious agents due to the populations being served or the materials being handled (*e.g.,* drug treatment programs; laboratories that handle potentially infectious biological materials; medical examiners' and coroners' offices; and mortuaries). The purpose of this Request for Information (RFI) is to gather additional information on occupational exposure to infectious agents, how occupational exposure is being mitigated, and other types of work settings where there may be an increased risk of exposure. It should be noted that bloodborne pathogens (*e.g.,* HIV, hepatitis B), are already covered by OSHA's Bloodborne Pathogens standard (§ 1910.1030) and are not included in this RFI.

The primary routes of infectious disease transmission in US healthcare settings are contact, droplet, and airborne. Contact transmission can be sub-divided into direct and indirect contact.[4] Direct contact transmission involves physical contact between an infected person and another person, and the physical transfer of microorganisms (*e.g.,* direct skin-to-skin contact). Indirect contact transmission occurs in situations where the physical transfer of microorganisms to a person comes from contact with a contaminated surface (*e.g.,* contaminated environmental surfaces, such as a door knob, inadequately cleaned patient-care instruments or equipment, such as an examination table or patient bed).

Droplets containing microorganisms are generated when an infected person coughs, sneezes, or talks, or during certain medical procedures, such as suctioning or endotracheal intubation. Transmission occurs when droplets generated in this way come into direct contact with the mucosal surfaces of the eyes, nose, or mouth of a susceptible individual.[5] Droplets are too large to be airborne for long periods of time, and droplet transmission does not occur through the air over long distances. However, some of the droplets expelled by the infected patient will desiccate (dry out) very quickly (less than 1–2 seconds) and form what are called droplet nuclei (residue from evaporated droplets). These small particles can remain suspended in air for long periods of time and travel significantly longer distances.

Airborne transmission occurs when infectious droplet nuclei or particles containing infectious agents that remain suspended in air, are inhaled, enter the respiratory tract and cause infection.[6] Since air currents can disperse these droplet nuclei or particles over long distances, airborne transmission does not require face-to-face contact with an infected individual. Airborne transmission only applies to those organisms that are capable of surviving and retaining infectivity for relatively long periods of time in airborne droplet nuclei or particles. Only a limited number of diseases are transmissible via the airborne route.

The major goal of infection control (IC) is to prevent transmission of infectious diseases to patients and HCWs. This fundamental approach is set forth in the guidelines of the Department of Health and Human Services (HHS) Centers for Disease Control and Prevention's (CDC) Healthcare Infection Control Practices Advisory Committee (HICPAC), a Federal advisory committee to CDC on the practice of health care infection control in U.S. healthcare facilities. The HICPAC guidelines include:

Identification and isolation of infectious cases; immunizations for vaccine-preventable diseases; standard and transmission-based precautions; training; personal protective equipment (PPE); management of HCWs' risk of exposure to infected persons, including post-exposure prophylaxis; and work restrictions for exposed or infected healthcare personnel.[7]

These recommendations have been endorsed by professional associations such as the Association for Professionals in Infection Control and Epidemiology (APIC),[8] the Society for Healthcare Epidemiology of America (SHEA),[9] and the Association of periOperative Registered Nurses (AORN).[10] OSHA is soliciting comment through this RFI on any other strategies that might be applied within healthcare or healthcare-related work settings to mitigate the risk of occupationally transmitted infectious diseases.

While the CDC/HICPAC guidelines present the recommended practices for reducing the risk of infectious disease transmission to patients and HCWs, the guidelines are non-mandatory. However, Centers for Medicare and Medicaid Services (CMS) mandates that in order for hospitals and other providers to receive certification and reimbursement through Medicare or Medicaid, the "facility must establish and maintain an Infection Control Program designed to provide a safe, sanitary and comfortable environment and to help prevent the development and transmission of disease and infection." [11] Similarly, the Joint Commission (formerly called the Joint Commission on Accreditation of Healthcare Organizations), a private not-for-profit organization that evaluates and accredits more than 17,000 healthcare organizations and programs in the United States, requires an effective Infection Prevention and Control Plan for accreditation.[12]

CDC/HICPAC has stated that "adherence to recommended infection control practices decreases transmission of infectious agents in healthcare settings." [13] While the infection control guidelines and requirements are widely recognized, day-to-day compliance, surveillance and oversight is left to each individual employer. Due to the continued prevalence of healthcare-associated infections (HAIs), particularly among patients,[14] and the emergence of new infectious diseases that affect both patients and HCWs [*e.g.,* severe acute respiratory syndrome (SARS), 2009 H1N1 pandemic influenza], compliance with routine infection control procedures is an increasingly important issue.

The lack of adherence to voluntary infection control procedures is of particular interest to OSHA. CDC/HICPAC states that "several observational studies have shown limited adherence to recommended practices by healthcare personnel." [15] It should be noted that these were small case studies which were not designed to be representative of healthcare settings in general. CDC/HICPAC has also noted that HCWs generally reported greater self-adherence to infection control practices than was actually reported in observational studies. Observed adherence to universal precautions (now part of standard precautions) ranged from 43% to 89%, with even greater variability reported for certain recommended infection control practices (*e.g.,* glove use).[16]

The World Health Organization (WHO) recognized the lack of compliance with hand hygiene and launched the *First Global Patient Safety Challenge* to achieve improvement in hand hygiene worldwide. In 2009, WHO issued hand hygiene guidelines that were based upon a thorough review of hundreds of manuscripts that dealt with the negative impact of non-compliance with hand hygiene on the transmission of infectious diseases in healthcare settings.[17] A second review that examined the results of 20 hospital-based studies published between 1977 and 2008, concluded that despite study limitations, most studies showed a temporal relation between improved hand hygiene practices and reduced infection and cross-contamination rates.[18]

A study of adherence to CDC recommended respiratory infection control practices examined 653 healthcare workers in primary care clinics and emergency departments of five medical centers and found significant gaps in compliance. There were shortcomings in overall personal and institutional use of CDC recommended practices, including deficiencies in posted alerts, patient masking and separation, hand hygiene, PPE use, staff training, and written procedures.[19] Another study, published in 2009, surveyed nurses and doctors from five medical facilities and documented the lack of compliance with both hand hygiene and respiratory protection guidelines. Although not necessarily representative of, or generalizable to, the healthcare industry, it is of interest that of those doctors that responded to the survey, only 8% of 177 reported using recommended respiratory protection and only 33% of 156 reported practicing recommended hand hygiene. In addition, of those nurses that responded to the survey, only 25% of 249 reported practicing appropriate respiratory precautions and only 43% of 266 reported practicing recommended hand hygiene measures.[20]

In another recent study 292 HCWs were surveyed about their use of PPE for protection against influenza. These HCWs consisted of internal medicine house-staff, pulmonary/critical care fellows, faculty, respiratory therapists and nurses working in four ICU's in two large hospitals. The study found that only 63% of the HCWs surveyed were able to correctly identify appropriate PPE for influenza. The study's authors stated that of the respondents "nearly 40% of HCWs reported poor adherence with influenza PPE, and 53% reported that their colleagues often forget to use appropriate PPE." [21] The CDC initiated a similar investigation of possible occupationally-acquired 2009 H1N1 pandemic influenza, which was published in the April-May 2009 MMWR. In response to a solicitation from CDC, State health departments reported 48 cases of confirmed or probable cases of H1N1 infection in HCWs. Of the 48 cases, information on PPE use was available for 11 of the HCWs who were deemed to have probable or possible acquisition from a patient. Of these 11 HCWs who were infected, only 3 reported always using either a surgical mask or an N95 respirator when appropriate and none reported always following standard precautions (*e.g.*, use of gloves, gown, facemask) and airborne precautions (*e.g.*, use of a respirator).[22]

In its revised 2007 guidelines, CDC/HICPAC noted that "a recent review of the literature concluded that variations in organizational factors (*e.g.*, safety culture, policies and procedures, education and training) and individual factors (*e.g.*, knowledge, perceptions of risk, past experience) were determinants of adherence to infection control guidelines for protection against SARS and other respiratory pathogens." [23]

Several studies have found organizational factors to be the most significant predictor of safe work behaviors. A study by Gershon *et al.* of 1716 hospital-based HCWs, at three regional hospitals, found that those who perceived that their institution had a strong commitment to safety were almost three times more likely to be compliant with standard precautions than those who did not.[24] Similar results were found when a group of 350 HCWs from 28 State correctional facilities were surveyed.[25] In addition, a series of studies demonstrated that interventions targeted at improving

organizational support for worker safety and health, resulted in enhanced compliance with standard precautions. These studies were: a survey of 789 hospital-based HCWs at a large regional research medical center; a survey of 452 nurses employed at one large medical center; a review of behavioral interventions to improve infection control practices; a survey of 1135 HCWs at one large teaching hospital; and finally, a survey of 742 nurses at a 900-bed urban teaching hospital.[26 27 28 29 30] A study by Nichol *et al* sent 400 surveys to nurses in nine nursing units from two urban hospitals. Of these surveys, 177 were returned with responses. The study found that nurses used recommended facial protection (*e.g.*, respirators, surgical masks, and eye/face protection) when they felt that management made health and safety a high priority, took all reasonable steps to minimize hazards, encouraged employees' involvement in health and safety issues, and actively worked to protect employees.[31] Other studies in industrial settings have shown that safety culture has an important influence on implementation of training skills and knowledge.[32 33]

The lack of compliance with recommended infection control practices is also noted by the Institute of Medicine (IOM), a Congressionally-chartered independent, nonprofit organization that provides unbiased and authoritative advice to decision makers and the public. In 2009, the IOM issued a report entitled, *Respiratory protection for healthcare workers in the workplace against novel H1N1 influenza A: A letter report.* The report was requested by both CDC and OSHA, and concluded that:

> * * * although workers are aware of expert guidance and the risk they face, they often do not wear PPE when faced with conditions requiring its use. Such noncompliance is also seen in low rates of hand hygiene and use of gloves, respirators, and eye protection. To improve the compliance rates and thereby improve worker protection, a "culture of safety" for workers must be established in all healthcare organizations evidenced by senior leadership commitment."[34]

The relationship between safety culture and compliance with recommended infection control guidance in some portions of the healthcare sector is not a newly recognized issue. A 1999 IOM report on medical errors in the healthcare sector emphasized the pivotal role of system failures and the benefits of a strong safety culture in the prevention of such errors. The report notes that a safety culture is created through: (1) The actions management takes to improve both patient and worker safety; (2) worker participation in safety planning; (3) the availability of appropriate protective equipment; (4) the influence of group norms regarding acceptable safety practices; and (5) the organization's socialization process for new personnel.[35] Similarly, CDC/HICPAC has noted that "several hospital-based studies have linked measures of safety culture with both employee adherence to safe practices and reduced exposures to blood and body fluids."[36] This evidence was cited by CDC/HICPAC as one of the primary reasons for updating its guidance in 2007.[37] CDC/HICPAC noted that organizational characteristics, including safety culture, influence healthcare personnel adherence to recommended infection control practices and, therefore, are important factors in preventing transmission of infectious agents. CDC/HICPAC further emphasized the need for administrative involvement in the development and support of IC programs.

Noncompliance with recommended infection control practices (*e.g.*, hand hygiene, and proper use of gloves, facemasks, and respirators) increases the risk of transmission of infectious diseases among patients and workers.[19 31 38] HHS notes that HAIs are among the leading causes of death in the United States, accounting for an estimated 1.7 million infections and 99,000 associated deaths in 2002.[39] The 2007 CDC/HICPAC guidelines note that infectious agents are also transmitted from HCWs to patients.[40]

More specifically, poor infection control practices have been implicated in both acquisition and transmission of methicillin-resistant *Staphylococcus aureus* (MRSA) by healthcare personnel.[41] Other studies have documented the nosocomial (hospital-acquired) transmission of adenovirus from patients to HCWs[42 43]; invasive Group A Strep (GAS) from a patient to an HCW[44]; *Clostridium difficile* infection from a patient to a nurse in an oncology ward[45]; and a norovirus outbreak in HCWs in a hospital.[46] Additionally, CDC/HICPAC has documented the occupational transmission of influenza in hospitals and nursing homes.[47] OSHA previously documented occupational exposure to tuberculosis (TB) in its notice "Occupational Exposure to Tuberculosis; Proposed Rule" (62 FR 54160–54308; October 17, 1997). Additionally, an investigation of the 2003 SARS outbreak in Toronto, Canada, described the nosocomial transmission of SARS at a hospital. The investigation found that 42.5% of the cases occurred among hospital employees.[48]

Although HCW infections have been documented, published data on the prevalence of these infections is limited. Recently, the National Institute for Occupational Safety and Health (NIOSH) noted that a lack of occupational data in existing healthcare surveillance systems made tracking illnesses among HCWs difficult.[49] The healthcare sector puts forth substantial effort to track patient infections, but does not appear to match that effort with a systematic means for tracking occupationally acquired worker infections. A weak culture of worker safety in this sector may be a contributing factor to this issue.

*B. History of Occupational Safety and Health Regulations Addressing Protection of Workers From Infectious Diseases*

OSHA's past efforts to protect workers against occupationally acquired infectious diseases include the Bloodborne Pathogens standard (§ 1910.1030), promulgated in 1991. That standard requires a comprehensive programmatic approach to controlling transmission of bloodborne diseases. Following its promulgation, the incidence of Hepatitis B in HCWs dropped from more than 100 cases per 100,000 HCWs in 1991 to only 9.1 cases per 100,000 HCWs in 1995.[50] The standard was revised in 2001 in response to the Needlestick Safety and Prevention Act, Pub. L. 106–430. In general, the revisions require employers to evaluate and use safer medical devices (*e.g.*, needleless devices, sharps with engineered sharps injury protections), and to establish and maintain a sharps injury log for recording percutaneous injuries from contaminated sharps.

As a result of a marked increase in tuberculosis (TB) during the early 1990s, which included worker infections, OSHA initiated action to address occupational exposure to TB. A standard was proposed, but was later withdrawn. In part, the proposal was withdrawn because of healthcare facilities' increased adherence to CDC's TB guidelines and the subsequent decline in TB infection rates.[51] To assure continued protection of workers, OSHA addresses occupational exposure to TB through its TB compliance directive.[52] The directive utilizes the CDC guidelines as the recognized means for controlling TB exposure. When OSHA determines that a TB hazard exists in a facility, exposure control deficiencies may be cited under existing OSHA standards [*e.g.*, the Respiratory

Protection standard (§ 1910.134)] and the General Duty Clause [Section 5(a)(1) of the Occupational Safety and Health Act of 1970, Pub. L. 91–596 (OSH Act)]. The General Duty Clause requires employers to "* * * furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees."

California-OSHA (Cal-OSHA) recently promulgated an Aerosol Transmissible Diseases (ATD) Standard [53] to protect workers from exposure to infectious agents transmitted via the droplet or airborne routes. Following Federal OSHA's withdrawal of the TB proposal, Cal-OSHA developed its standard in response to concerns about TB, the 2003 SARS epidemic, and a potential influenza pandemic. The standard significantly expands protection of California workers against aerosol transmissible diseases (this term, as defined by Cal-OSHA, encompasses those diseases that can be transmitted by the droplet or airborne routes). It should be noted that the standard does not deal with occupational exposure to infectious agents that are transmitted primarily via the contact route (*e.g.*, MRSA, Group A strep, and noroviruses).

Existing OSHA standards that may be applicable to controlling occupational exposure to infectious agents, other than the bloodborne pathogens standard, include: The Respiratory Protection standard (§ 1910.134); the Personal Protective Equipment standard (§ 1910.132); and the Specifications for Accident Prevention Signs and Tags standard (§ 1910.145). OSHA is seeking information through this RFI on whether or not its existing standards and the voluntary guidelines issued by other organizations are effectively protecting workers from occupational exposure to infectious agents. If not, OSHA seeks comment on what measures might be appropriate for the Agency to take to protect workers against infectious diseases (*e.g.,* development of a proposed standard, issuance of guidelines, or other alternatives).

*C. Summary*

In summary, as a result of several factors raised in the preceding discussion, OSHA is seeking additional information to more fully evaluate worker exposures to infectious agents in healthcare and healthcare-related settings. We are particularly interested in additional data regarding indications in some studies that transmission of infectious diseases to both patients and HCWs may be occurring as a result of incomplete adherence to voluntary infection control measures in traditional healthcare facilities. Another concern is the movement of healthcare delivery from the traditional hospital setting, with its greater infrastructure and resources to effectively implement infection control measures, into more diverse and smaller workplace settings with less infrastructure and fewer resources, but with an expanding worker population.

Consequently, the Agency is seeking information to assist in its deliberation on these issues. OSHA is interested in more accurately characterizing the nature and extent of occupationally-acquired infectious diseases and the strategies that are currently being used to mitigate the risk of occupational exposure to infectious agents in healthcare and healthcare-related settings, including patient and non-patient settings and sites where healthcare is embedded within non-healthcare settings such as clinics in schools and correctional facilities. The information being sought includes: the types of facilities and workers incurring this risk; successful employer infection control programs; control methodologies being utilized (including engineering, administrative, and work practice controls, and the use of appropriate personal protective equipment); medical surveillance programs; and training programs. The information received in response to this notice will be carefully reviewed and will assist OSHA in determining the effectiveness of approaches currently being used to eliminate and minimize occupational exposure to infectious agents. Based upon its analysis of this information, OSHA will determine what action, if any, the Agency may take to address these issues.

## II. Request for Data, Information and Comments

*A. General*

The following general information will assist OSHA in more fully understanding each commenter's submissions and the possible differences in their approaches to infection control. The answers to the questions will also help OSHA understand the risk of workers contracting various infectious diseases in different types of workplaces.

**Note:** Diseases spread through bloodborne pathogens are not encompassed by this RFI since a specific OSHA standard (Bloodborne Pathogens, § 1910.1030) addresses those diseases. OSHA encourages those with experience in non-traditional or non-healthcare work settings to respond to these questions.

1. Since healthcare is provided in a wide variety of settings (as previously described), OSHA is interested in being able to sort the responses received by the characteristics of the workplace about which each responding entity is providing information. As such, please describe the characteristics of the workplace to which you are referring. For example: type of workplace (*e.g.,* hospital, long-term care, physician/dentist office, emergency medical services); size (*e.g.,* number of hospital beds, number of residents, average number of patients/clients); total number of employees (both direct care and administrative support).

2. While OSHA is primarily concerned about worker exposure to infectious agents in traditional healthcare settings, the Agency recognizes that there are other settings where healthcare may be provided and where occupational exposure to infectious agents may be a significant concern (*e.g.,* drug treatment facilities, home health services, prison clinics, school clinics, and laboratories that handle potentially infectious biological materials). Please describe any other work settings with an increased risk for occupational exposure to infectious agents that OSHA should consider, including why they should be considered. Please describe the nature and extent to which occupational exposure to infectious agents is a significant concern. For example, to which infectious agents are workers in these settings exposed and how often are they exposed? Please describe any infection control measures that can be or are being used in these settings.

3. One of the most important steps in determining how to effectively protect workers from infectious diseases is identifying who is at risk of exposure. What recommendations do you have for how to determine which employees are potentially exposed to contact, droplet, and airborne transmissible diseases in the type of workplace about which you are responding? How many of your total workers have a risk of exposure to such diseases during the performance of their job duties? What proportion of your workforce does this represent? What are the job titles or classification(s) of these workers? What are the job duties of these workers? To which diseases are they exposed?

4. Workplaces vary in the types of infectious diseases and the number of infected individuals encountered. OSHA is interested in the types of diseases that your workplace encounters and how often they are encountered. Please describe your workplace's experience with infectious diseases over

the past ten years (*e.g.,* which diseases, how often).

5. OSHA is interested in data and information that will further assist in characterizing workers' occupational exposure to contact, droplet, and airborne transmissible infectious diseases.

(a) OSHA encourages the submission of your workplace or your industry's experience with these diseases and the impact of infectious diseases on your workers (*e.g.,* type and number of exposure incidents, occupationally-acquired infectious diseases, days of work missed, and fatalities).

(b) Please provide information about any database that collects and aggregates data on occupationally-acquired infectious diseases (*e.g.,* Federal, State, provider network, or academic).

(c) Please provide any additional information, including peer-reviewed studies, which addresses occupational exposure to infectious agents that you think OSHA should consider.

6. Infection control (IC) programs are currently the primary means of controlling occupational exposure to infectious agents. However, these programs are largely voluntary. OSHA is particularly interested in case studies that highlight experience in the implementation and effectiveness of IC programs in protecting workers against infectious diseases (*e.g.,* the extent to which employers are fully implementing and consistently following their written IC programs). For example, has your workplace had instances where a significant increase in infections (among either patients or workers) required more rigorous implementation of your IC program? If so, please describe any factors that contributed to the increase and what steps your workplace took to address the situation. Please provide any studies that demonstrate the difference in infection rates between situations where the IC program had lapsed and situations where rigorous implementation of control measures was instituted.

7. While OSHA has a Bloodborne Pathogens standard (§ 1910.1030), the Agency does not have a comprehensive standard that addresses occupational exposure to contact, droplet, and airborne transmissible diseases. The Agency has other standards [(*e.g.,* Respiratory Protection (§ 1910.134) and General Personal Protective Equipment (§ 1910.132)] that may apply and, in some situations, Section 5(a)(1) of the OSH Act (the General Duty Clause) would apply. OSHA is interested in commenters' insights regarding the adequacy of existing OSHA requirements to protect workers against occupational exposure to infectious agents.

8. California OSHA recently issued a standard for occupational exposure to "Aerosol" Transmissible Diseases that covers infectious diseases transmitted through the airborne and droplet routes. IC programs that are established in most healthcare settings address exposure to contact, droplet, and airborne transmissible diseases. Please explain whether the Agency's deliberations on occupational exposure to infectious diseases should focus on only droplet and airborne transmission or if contact transmissible diseases should also be included.

9. If the Agency pursues rulemaking and promulgates a standard, jurisdictions with OSHA-approved State plans will be required to cover workers who OSHA determines are at occupational risk for exposure to infectious agents, including public employees. State and local governments are defined very broadly, and would typically include such entities as a university hospital associated with a State university as well as public hospitals and health clinics. What public sector healthcare or healthcare-related workers are at increased risk for occupational exposure to infectious agents? Please describe conditions unique to any of these occupations that are not seen in the private sector. Please describe any other issues specific to OSHA-approved State plans that the Agency should consider.

*B. Infection Prevention and Control Plan*

10. CDC/HICPAC's *2007 Guideline for Isolation Precautions: Preventing Transmission of Infectious Agents in Healthcare Settings* recommends an IC program for addressing the transmission of airborne and other infectious diseases. In certain settings, the Center for Medicare and Medicaid Services (CMS) and the Joint Commission require that healthcare facilities have such programs.

(a) If you are subject to the CMS or Joint Commission requirements or otherwise have an IC program, please provide information on the elements of this program (*e.g.,* early identification of infectious patients, implementation of transmission-based control measures, HCW training) and how the program works.

(b) If you are not subject to these requirements and do not have an IC program, how does your workplace address preventing contact, droplet and airborne transmissible infectious diseases?

11. In most cases, an IC program is managed by an infection control preventionist or other designated person. For example, the CDC/HICPAC guidelines recommend that the IC program be managed by individuals with training in infection control. Who manages your program? What percentage of this individual's time is spent managing the IC program?

12. For the IC program(s) established in your workplace, please describe, in detail, the resource requirements and associated costs, if available, expended to initiate the program(s) and conduct the program(s) annually. Please estimate, in percentage terms where possible, the extent to which the components or elements in your program(s) are typical of those practiced throughout your industry.

13. In your industry, for the IC programs established in your workplace or for IC programs in other workplaces of which you are aware, are there any components or features that may present economic difficulties to small businesses? Please describe and characterize in detail these components and why they might present difficulties for small businesses.

14. Periodic evaluation of IC program effectiveness is recommended by CDC/HICPAC and required by the Joint Commission and CMS for most types of facilities under their jurisdiction. Please describe how your workplace or industry evaluates the effectiveness of its IC program, including the methods and criteria used. How often does your workplace evaluate its program? Please describe the results your program has achieved (*e.g.,* if there has been a decrease in patient and/or worker infections). Please describe any specific problems and/or successes that have been encountered in the implementation and operation of the program.

15. Most peer-reviewed literature evaluating IC programs focuses on protecting patients from contracting HAIs. While this body of evidence can be an indicator of worker exposure, OSHA is seeking data that more specifically address the occupational risk to workers. If your workplace has a system for tracking worker exposures or infections that may have been occupationally acquired, please share with us the following information:

(a) A description of the tracking system and how it works;

(b) The types of infection diseases encountered in your workplace and the number of exposures and/or infections tracked;

(c) Exposure/infection rates; and

(d) Any trend data.

*C. Methods of Control*

16. If your workplace has a process for early identification of patients or clients who may have an infectious disease, please explain how your workplace conveys information to workers about individuals who are confirmed or suspected of being infectious, so that proper precautions can be implemented. Please describe the degree of success with these procedures and whether you think that such procedures are likely to be effective in other healthcare or healthcare-related settings.

17. CDC/HICPAC, CMS, and the Joint Commission provide a variety of approaches that employers can implement to reduce or eliminate workers' exposure to infectious agents. For example, a well-structured IC program can include: immunizations for vaccine-preventable diseases, isolation precautions to prevent exposures to infectious agents, training, personal protective equipment, management of workers' risk of exposure to infected persons, including post exposure prophylaxis, and work restrictions for exposed or infected personnel. Please describe the types of problems/obstacles your workplace or industry encountered with implementing specific control measures. Please include a discussion of each control measure, the problem/obstacle encountered, the affected worker group, and any particularly effective solutions your workplace or industry has implemented to address the obstacle/problem.

18. When developing and implementing infection control measures in your workplace, are there any recommended controls that you have found to be ineffective or unnecessary in controlling infectious diseases? If so, please explain how you arrived at this conclusion.

19. Airborne infection isolation rooms (AIIRs) are recommended as one aspect of controlling certain airborne transmitted diseases (*e.g.,* TB, SARS). OSHA recognizes that most workplaces outside of hospitals do not have an AIIR and will transfer persons requiring airborne precautions to a facility with the necessary capabilities. If your workplace provides healthcare or other services to individuals requiring airborne precautions, how many of these patients/individuals has your workplace encountered in each of the last ten years? If individuals requiring airborne precautions must be transferred to another facility, please describe how your workplace identifies and isolates them while they are awaiting transfer. If your workplace provides extended care to these individuals (*e.g.,* a hospital), does it have sufficient AIIRs to isolate the number of infected individuals your workplace has handled at any one time? If not, how does your facility provide alternate means of isolation and how many additional AIIRs would be necessary to fully accommodate your normal patient load? Please describe how your workplace plans to address surge capacity in the event of an outbreak, epidemic, or pandemic. Please provide any additional information, including peer-reviewed studies, which addresses issues relevant to the use of AIIRs in your workplace or industry.

20. CDC/HICPAC's *2007 Guideline for Isolation Precautions: Preventing Transmission of Infectious Agents in Healthcare Settings* addresses the need for a safety culture and its role in improving a workplace's IC program (*e.g.,* worker adherence to safe work practices). Please describe the policies and actions undertaken in your workplace or industry to develop and maintain a culture of worker safety. Please describe any means that have been particularly effective in fostering a safety culture and any problems or obstacles that have been encountered in developing and/or maintaining the safety culture.

21. Poor adherence to infection control measures (*e.g.,* failure to use necessary PPE or to follow recommended hand hygiene practices) can be one indicator of the breakdown of an IC program. Please describe what actions have been undertaken in your workplace or industry to assess and enforce adherence to infection control measures. What obstacles has your workplace encountered in maintaining adherence and are there any particularly successful ways you have found to maintain adherence (*e.g.,* training initiatives, worker incentives)? Please discuss any underlying factors that you feel may affect non-compliance with current infection control guidelines and standards in your facility.

22. The use of proper PPE is an essential component of an effective IC program. For example, CDC/HICPAC recommends that facemasks (*e.g.,* surgical masks) be worn by workers when droplet precautions are implemented and respirators be worn under certain circumstances when airborne precautions are in place. Please describe how your workplace determines when a facemask (*e.g.,* surgical mask) is used for worker protection and when a respirator is used for worker protection. How does your workplace determine which employees use a facemask and which use a respirator? If your workplace uses different types of respirators, please describe what types and when they are used.

23. NIOSH regulates the testing and certification of respiratory protective equipment, has established minimum performance standards, and conducts independent testing and verification of all respirators prior to certification. The Food and Drug Administration (FDA) approval process for facemasks does not have established minimum performance standards and allows manufacturer submitted data. As noted in a 2009 IOM report,[54] a 2008 study that examined the filter performance of nine different types of facemasks using the sodium chloride NIOSH challenge test, found wide variation in penetration (4 percent to 90 percent) of smaller aerosol particles.[55] Therefore, the protective properties of different manufacturers' facemasks may vary. Is there a need for a more rigorous certification/approval process for facemasks and additional independent verification of the personal protective properties of these devices?

24. Some HCWs have medical conditions or are receiving treatments that impair their ability to resist infection. These HCWs may be unable to develop protective immune responses after vaccination. What is your workplace or industry doing to educate its workers about these conditions? What approaches are being used or should be used to address the special needs of HCWs with these conditions?

*D. Vaccination and Post-Exposure Prophylaxis*

25. In the Bloodborne Pathogens standard (§ 1910.1030), OSHA requires that hepatitis B vaccinations be made available to employees occupationally exposed to blood or other body fluids. It should be noted that while employers are required to offer the vaccine, employees are permitted to decline it. CDC/ACIP recommends a number of other vaccines for various groups of HCWs including: influenza (both seasonal and the 2009 H1N1); measles, mumps, rubella (MMR); varicella; tetanus, diphtheria, pertussis (Td/Tdap); and meningococcal vaccines. What vaccinations, other than hepatitis B, do you consider to be necessary to protect workers from occupational exposure to infectious agents? Who should receive these vaccinations, and why? Does your workplace offer vaccines other than the hepatitis B vaccine to workers and how do you determine who is offered these vaccines?

26. The Bloodborne Pathogens standard (§ 1910.1030) requires that employers follow certain administrative and recordkeeping procedures (*e.g.,* signing a declination statement; placing

an employee's vaccination status in his/her medical record). Does your workplace or industry use similar administrative and recordkeeping procedures for vaccines other than hepatitis B? If not, please describe what administrative and recordkeeping procedures are or should be used.

27. Post-exposure prophylaxis (PEP) and evaluation for bloodborne pathogen exposures, such as hepatitis B and HIV, are addressed in the Bloodborne Pathogens standard [§ 1910.1030(f)]. OSHA is interested in post-exposure evaluation and PEP for other infectious diseases. Please describe the current PEP and evaluation practices in your workplace. For what infectious agent exposures should workers be provided with PEP and/or evaluation? Please describe the disease, its associated PEP, and the PEP efficacy.

28. In some instances, a vaccine may be available for a disease but a worker may decline vaccination. Please describe procedures in your workplace that ensure workers who have declined vaccination have access to necessary PEP.

29. In order to appropriately evaluate the health status of a worker, some basic health information is needed. CDC/HICPAC recommends a personnel health service program for infection control that includes a number of components including: pre-placement evaluations, evaluation and treatment of exposure-related illnesses, and work restriction or work-exclusion policies for exposed HCWs. OSHA is interested in the prevalence, content and efficacy of such personnel health service programs.

(a) What should be included in a pre-placement medical evaluation for a worker who will be exposed to infectious agents? Please describe the possible components of the medical history and physical exam and specific tests (*e.g.,* TB skin test, spirometry, blood tests). How are pre-placement medical evaluations of workers addressed in your workplace? What do these evaluations include? If pre-placement medical evaluations are used in your workplace, have they been effective, and what metrics are used to evaluate effectiveness? Give the rationale, including references if available.

(b) What type of ongoing medical surveillance or periodic medical evaluations should be provided for exposed workers? Please describe the possible components of such surveillance or evaluations. How often should periodic medical evaluations be conducted? In what situations should medical evaluations or surveillance be performed (*e.g.,* return-to-work, fitness for duty)? How are periodic medical evaluations addressed in your workplace?

(c) In your State, are there State laws that apply to pre-placement and periodic medical evaluations of exposed workers? If so, what are they?

(d) Please describe the administrative procedures used by your workplace to evaluate and treat workers who have been occupationally exposed and/or infected (*e.g.,* who do they notify of the exposure/infection). How are the costs for treatment and follow-up (*e.g.,* visits to physician, lab tests) handled in your workplace? If a worker is put on restrictions or excluded from work due to a work-related infectious exposure or illness, how are the worker's salary, benefits, and seniority handled by your workplace?

*E. Communication of Hazards*

30. Training is generally considered a necessary component of an effective IC program in order to assure that workers understand the hazards they are exposed to and the proper methods of protection. Please describe how your workplace assures that workers are adequately trained in the use of infection control measures, including how your workplace assesses if a worker has been adequately trained. Please describe the contribution of training and education to improving adherence to your IC program. Please describe the format used by your workplace to conduct training (*e.g.,* computer-based, written material, interactive classes, hands-on practice, other) and whether you have found some more effective than others. Please describe what role, if any, knowledge and/or competency assessment plays in your workplace training program.

31. Both initial and periodic worker training are recognized as important components of an effective IC program. Initial training provides information that workers need to protect themselves against exposures to hazards while periodic training refreshes worker knowledge, reinforces the importance of the IC program and provides a means of introducing new information and procedures.

(a) What information should be included in initial training for workers who may be exposed to infectious agents? What is the best format for providing initial training to these workers (*e.g.,* specifying a minimum number of hours of training, specifying training content based on job tasks, specifying that training be adequate to demonstrate specified competencies, by a combination of these methods or by some other method)?

(b) How frequently does your workplace provide workers with refresher training on its IC program? What information should be included in periodic refresher training for workers who may be exposed to infectious agents? What is the best format for providing periodic training to these workers (*e.g.,* specifying a minimum number of hours of training, specifying training content based on job tasks, specifying that training be adequate to demonstrate specified competencies, by a combination of these methods or by some other method)? Should refresher training be provided based on lack of competency, or be provided at regular time intervals regardless of demonstrated competency?

*F. Recordkeeping*

32. Please describe the worker health surveillance system used in your workplace. Does the system include tracking of occupational exposures to infectious agents and/or occupationally-acquired infectious diseases? Please describe the procedures used by your workplace to determine whether an infectious disease is considered to have been occupationally-acquired. How is the worker health surveillance information collected under the system used in your IC program? Please describe the factors that affect the successful implementation of such surveillance systems.

33. The OSHA requirements for recording and reporting occupational injuries and illnesses contain an exemption for the common cold and flu (§ 1904.5(b)(2)(viii)). However, the Agency has determined that, if certain criteria are met, occupationally-acquired 2009 H1N1 pandemic influenza is recordable (OSHA Directive CPL–02–02–075). As OSHA more broadly considers the issue of occupational exposure to infectious agents, what are the implications, if any, for the Agency's existing recording and reporting requirements under § 1904?

*G. Economic Impacts and Benefits*

As part of the Agency's consideration of occupational exposure to infectious agents, OSHA is interested in the costs, economic impacts, and benefits of related practices to prevent such exposure. OSHA is also interested in the benefits of such practices in terms of reduced deaths, illnesses, and compromised operations (*i.e.,* infirm personnel, quarantined or disabled units, unexpected reallocation of resources). The following questions will

provide OSHA with needed economic impact and benefits information.

34. As the Agency considers possible actions to address the prevention and control of infectious diseases (*e.g.,* prospective standards or guidelines), what are the potential economic impacts associated with the promulgation of a standard specific to the hazards of infectious diseases? Describe these impacts in terms of benefits from the reduction of incidents and illnesses; effects on revenue and profit; and any other relevant impact measure. If you have any estimates of the costs of controlling infectious disease hazards, please provide them.

35. What changes, if any, in market conditions would reasonably be expected to result from issuing a comprehensive infectious diseases standard? Describe any changes in market structure or concentration, and any effects on services, that would reasonably be expected from issuing such a standard.

36. What are the potential benefits of more widespread compliance with infection control guidelines? How can OSHA best assure such compliance takes place?

*H. Impacts on Small Entities*

As part of the Agency's consideration of occupational exposure to infectious agents, OSHA is concerned whether its actions will have a significant economic impact on a substantial number of small entities. If the Agency pursues development of a standard and the standard has such impacts, OSHA is required to develop a regulatory flexibility analysis and assemble a Small Business Regulatory Enforcement Fairness Act (SBREFA) Panel prior to publishing a proposal. Regardless of the significance of the impacts, OSHA seeks ways of minimizing the burdens on small businesses consistent with OSHA's statutory and regulatory requirements and objectives.

37. How many, and what type of small firms, or other small entities, have infectious disease hazards, and what percentage of their industry (NAICS code) do these entities comprise? Please specify the types of infectious diseases encountered.

38. How, and to what extent, would small entities in your industry be affected by a potential comprehensive OSHA infectious diseases standard regulating occupational exposure to infectious agents? Do special circumstances exist that make controlling infectious diseases more difficult or more costly for small entities than for large entities? Describe these circumstances.

## III. Public Participation

You may submit comments in response to this document by (1) hard copy, (2) fax transmission (facsimile), or (3) electronically through the Federal Rulemaking Portal. Because of security-related problems, there may be a significant delay in the receipt of comments by regular mail. Contact the OSHA Docket Office at (202) 693–2350 for information about security procedures concerning the delivery of materials by express delivery, hand delivery and messenger service.

All comments and submissions are available for inspection and copying at the OSHA Docket Office at the above address. Comments and submissions are also available at *http://www.regulations.gov* . OSHA cautions you about submitting personal information such as social security numbers and birth dates. Contact the OSHA Docket Office at (202) 693–2350 for information about accessing materials in the docket.

Electronic copies of this **Federal Register** notice, as well as news releases and other relevant documents, are available at OSHA's Web page: *http://www.osha.gov/index.html.*

## Authority and Signature

This document was prepared under the direction of David Michaels, Ph.D., MPH, Assistant Secretary of Labor for Occupational Safety and Health, U.S. Department of Labor. It is issued pursuant to sections 4, 6, and 8 of the Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, 657), 29 CFR 1911, and Secretary's Order 5–2007 (72 FR 31160).

Signed at Washington, DC, this 30th day of April, 2010.

**David Michaels,**

*Assistant Secretary of Labor for Occupational Safety and Health.*

**Footnotes:**

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[FR Doc. 2010–10694 Filed 5–5–10; 8:45 am]

**BILLING CODE 4510–26–P**

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 52

**[EPA–R10–OAR–2008–0155; FRL–9144–8 ]**

### Approval and Promulgation of State Implementation Plans: Oregon

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

**ACTION:** Proposed rule.

**SUMMARY:** The EPA is proposing to approve State Implementation Plan (SIP) revisions submitted by the State of Oregon, Department of Environmental Quality (ODEQ). These revisions pertain to the Clean Air Act (CAA) section 110(a)(1) maintenance plans prepared by ODEQ to maintain the 8-hour national ambient air quality standard (NAAQS) for ozone in the Portland portion of the Portland/Vancouver Air Quality Maintenance Area (Pdx/Van AQMA) and the Salem-Keizer Area Transportation Study (SKATS) air quality area. The 110(a)(1) maintenance plans for this area meet CAA requirements and demonstrate that each of the above mentioned areas will be able to remain in attainment for the 1997 and 2008 8-hour ozone NAAQS through 2015. As SKATS appears to be significantly impacted by emissions from the Portland area, an approved plan for the Pdx/Van AQMA is one of the control strategies for SKATS air quality area. Therefore, EPA is proposing to approve the section 110(a)(1) plans for the Portland portion of the Pdx/Van AQMA and the SKATS area at the same time.

Additionally, the EPA is proposing to approve SIP revisions submitted by ODEQ that phase out the State's Vehicle Inspection Program (VIP) enhanced BAR–31 test, and eliminate the Gas Cap Pressure Test and the Evaporative Purge Tests.

**DATES:** Written comments must be received on or before June 7, 2010.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA–R10–

OAR–2008–0155, by one of the following methods:

A. *http://www.regulations.gov.* Follow the on-line instructions for submitting comments.

B. *Mail:* Krishna Viswanathan, EPA, Office of Air, Waste, and Toxics (AWT–107), 1200 Sixth Avenue, Suite 900, Seattle, Washington 98101.

C. *Hand Delivery:* EPA, Region 10 Mailroom, 9th Floor, 1200 Sixth Avenue, Seattle, Washington 98101. Attention: Krishna Viswanathan, Office of Air Waste, and Toxics (AWT–107). Such deliveries are only accepted during normal hours of operation, and special arrangements should be made for deliveries of boxed information.

*Instructions:* Direct your comments to Docket ID No. EPA–R10–OAR–2008–0155. The EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *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 *http://www.regulations.gov* or e-mail. The *http://www.regulations.gov* Web site is an "anonymous access" system, which means the 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 the EPA without going through *http://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, the 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 the EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, the 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 electronic docket are listed in the *http://www.regulations.gov*index. Although listed in the index, some information is not publicly available, *i.e.,* 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 in *http://www.regulations.gov* or in hard copy during normal business hours at the Office of Air, Waste and Toxics, EPA Region 10, 1200 Sixth Avenue, Seattle, Washington 98101.

**FOR FURTHER INFORMATION CONTACT:** Krishna Viswanathan, (206) 553–2684, or by e-mail at *R10–Public_Comments@epa.gov.*

**SUPPLEMENTARY INFORMATION:** Throughout this document whenever "we," "us," or "our" is used, we mean the EPA. Information is organized as follows:

**Table of Contents**



## I. Background

Section 110(a)(1) of the CAA requires, in part, that states submit to EPA plans to maintain any NAAQS promulgated by EPA. EPA interprets this provision to require that states with areas that were maintenance areas for the 1-hour ozone NAAQS but attainment for the 8-hour ozone NAAQS must submit a plan to demonstrate the continued maintenance of the 8-hour ozone NAAQS. EPA established June 15, 2007, three years after the effective date of the initial 8-hour ozone designations, as the deadline for submission of plans for these areas.

On May 20, 2005, EPA issued guidance for States in preparing maintenance plans under section 110(a)(1) of the CAA for areas that are required to do so under 40 CFR 51.905(c) and (d). At a minimum, the maintenance plan should include the five following components:

1. An attainment inventory, which is based on actual typical summer day emissions of volatile organic compounds (VOCs) and oxides of nitrogen ($NO_X$) for a 10-year period from a base year chosen by the State;

2. A maintenance demonstration which shows how the area will remain in compliance with the 8-hour ozone standard for 10 years after the effective date of designations (June 15, 2004);

3. A commitment to continue to operate air quality monitors;

4. A contingency plan that will ensure that a violation of the 8-hour ozone NAAQS is promptly addressed; and

5. An explanation of how the State will track the progress of the maintenance plan.

On May 22, 2007, EPA received a request from the ODEQ to approve a SIP revision pertaining to the maintenance plan for the Portland portion of the Pdx/Van AQMA and SKATS, under section 110 of the CAA. This plan was developed by the ODEQ, in collaboration with the Southwest Clean Air Agency in Vancouver, Washington, and the Washington State Department of Ecology (Ecology).

In 1979, SKATS was defined by EPA as a "rural area" for ozone plan development that appeared to be significantly impacted by emissions from Portland, a major urban area located approximately 40 miles north of Salem (44 FR 20375). Oregon submitted an attainment Plan for SKATS which was approved by EPA on April 12, 1982 (47 FR 15587). Based on EPA's rural ozone policy (45 FR 42265), one of the controls strategies for ozone in the SKATS area, is an approved plan for the Portland portion of the Pdx/Van AQMA; therefore the two plans are considered concurrently in this action.

On January 17, 2007, EPA received a request from Ecology to approve under section 110 of the CAA a SIP revision pertaining to the maintenance plan for the Vancouver portion of the Pdx/Van AQMA. As both these submissions from the States of Washington and Oregon pertain to the Pdx/Van AQMA, EPA intends to act on these submissions concurrently. This action addresses only the Portland portion of the Pdx/Van AQMA and SKATS.

The EPA has also prepared a Technical Support Document (TSD) with more detailed information about the SIP revisions ODEQ has asked us to approve. The TSD is available for review as part of the docket for this action.

## II. Summary of SIP Revisions

### *A. The Pdx/Van AQMA, SKATS, and Section 110(a)(1) Maintenance Plans for the 1997 8-Hour Ozone NAAQS*

ODEQ's 8-hour ozone maintenance plan addresses the five components of the section 110(a)(1) 8-hour ozone maintenance plan as outlined in EPA's May 20, 2005 guidance. Oregon has submitted its 8-hour ozone maintenance plan for approval and also submitted rules that support the maintenance for

approval and incorporation into the federally enforceable SIP.

1. Attainment Inventory

An emissions inventory is an itemized list of emission estimates for sources of air pollution in a given area for a specified time period. ODEQ provided a comprehensive and current emissions inventory for $NO_X$ and VOCs. ODEQ used 2002 as the base year from which it projected emissions. The maintenance plan includes an explanation of the methodology used to determine emissions from point, area, and mobile sources. The inventory is based on emissions from a "typical summer day." The term "typical summer day" refers to a weekday during the months when ozone concentrations are typically the highest.

2. Maintenance Demonstration

With regard to demonstrating continued maintenance of the 8-hour ozone standard, ODEQ projects that the total emissions from the Portland and Salem areas will decrease overall during the 10-year maintenance period. EPA has reviewed ODEQ's emissions projections and maintenance demonstration and finds it to be adequate. ODEQ projected emissions for 2015, which is more than 10 years from the effective date of initial designations, as suggested in the EPA guidance for section 110(a)(1) maintenance plans. In 2002, the total emissions from the Portland portion of the Pdx/Van AQMA were 958,531 lbs/day for VOCs and 377,794 lbs/day for $NO_X$. The projected 2015 emissions are 1,005,171 lbs/day for VOCs and 261,375 lbs/day for $NO_X$. For the Portland area, this amounts to 2015 VOCs increasing by about 5% from 2002 actual emissions, and 2015 $NO_X$ emissions decreasing by about 30% from 2002 levels. The greatest reduction in VOC and $NO_X$ emissions is from on-road and non-road mobile sources.

For SKATS, the 2002 total emissions were 439,610 lbs/day of VOCs and 106,967 lbs/day of $NO_X$. The 2015 projections for this area are 405,062 lbs/day of VOCs and 52,103 lbs/day of $NO_X$. For SKATS, this summarizes to 2015 VOCs decreasing by about 8% from 2002 actual emissions, and 2015 $NO_X$ emissions decreasing by about 51% from the 2002 levels. As such, the plan demonstrates that emissions are projected to decrease overall in both the Portland portion of the Pdx/Van AQMA and SKATS.

It is important to note that the formation of ozone is dependent on a number of variables which cannot be estimated solely through emissions growth and reduction calculations. A few of these variables include weather and the transport of ozone precursors from outside the maintenance area. In order to demonstrate continued maintenance of the standards, a State may utilize more sophisticated tools such as air quality modeling to support their analysis; Oregon used air quality modeling to assess the comprehensive impacts of growth through 2015 on ozone levels in both areas. Results of modeling conducted by ODEQ and submitted to EPA demonstrate that the highest predicted design value for this area is 0.072 parts per million, which is below the 1997 and the 2008 ozone NAAQS and is therefore in compliance with both the 8-hour ozone NAAQS.

*EPA's Evaluation of CAA 110(l) Considerations*

The maintenance demonstration discussed in the preceding section also meets section 110(l) requirements of the CAA which states "Each revision to an implementation plan submitted by a State under this chapter shall be adopted by such State after reasonable notice and public hearing. The Administrator shall not approve a revision of a plan if the revision would interfere with any applicable requirement concerning attainment and reasonable further progress (as defined in section 7501 of this title), or any other applicable requirement of this chapter." ODEQ has submitted evidence to EPA that the State provided reasonable notice and public comments prior to State adoption and submission of this plan to the EPA.

EPA concludes that this plan demonstrates maintenance of all applicable ozone NAAQS, namely the 2008 and 1997 8-hour standards. The Portland and SKATS areas are within the compliance levels for all criteria pollutants [1], based on historical monitoring.

Based on the VOC, $NO_X$, and carbon monoxide (CO) emissions information submitted with this plan, EPA concludes that approval of the changes in this proposed plan will not cause an increase of direct or precursor emissions that will interfere with the Portland area's maintenance of any criteria pollutant NAAQS.

SKATS is well within the compliance level for the remaining NAAQS [1] based on actual monitoring and actions in this proposed SIP will not cause or contribute to higher levels of other criteria pollutants. Therefore, an approval of this plan revision will not interfere with any applicable requirement concerning attainment or maintenance of any NAAQS.

3. Ambient Air Quality Monitoring

With regard to the ambient air monitoring component of the maintenance plan, ODEQ commits to continue operating air quality monitoring stations in accordance with 40 CFR part 58 throughout the maintenance period to verify maintenance of the 8-hour ozone standard, and will submit quality-assured ozone data to EPA through the Air Quality System.

4. Contingency Measures

EPA interprets section 110(a)(1) of the CAA to require that the State develop a contingency plan that will ensure that any violation of a NAAQS is promptly corrected. The purposes of contingency measures, as outlined in ODEQ's maintenance plan, is to accordingly select and adopt one or more measures outlined in the maintenance plan so as to assure continued attainment in the event that a violation of the 1997 8-hour ozone NAAQS is measured. Violation of the 1997 8-hour ozone standard would trigger one or more of the control measures as outlined in the plan.

5. Verification of Continued Attainment

ODEQ will continue to monitor ambient air quality ozone levels in the Portland portion of the Pdx/Van AQMA and SKATS as described in the Contingency Plan. ODEQ will update countywide emissions inventories every three years as required by the Consolidated Emissions and Reporting Rule (CERR) to update the National Emissions Inventory. If ambient ozone levels increase, ODEQ will compare CERR updates with the 2002 and 2015 emissions inventories and evaluate the assumptions used in the 2015 emissions projections to determine whether emissions are increasing at a rate not anticipated in the maintenance plan.

*EPA's Evaluation of Supporting Rules*

ODEQ submitted several rules that would create controls programs to support the emissions reductions and the maintenance demonstration. ODEQ submitted the following modified sections of the Oregon Administrative Rules (OAR) to EPA for approval and incorporation into the Oregon SIP. These sections include: General Air Pollution Procedures and Definition: OAR 340–200; Ambient Air Quality Standards and PSD Increments: OAR 340–202; Designation of Air Quality Areas: OAR 340–204; Major New Source Review: OAR 340–224; Air Quality Analysis Requirements: OAR 340–225;

[1] EPA's AirData Database—*http://www.epa.gov/oar/data/reports.html.*

Emission Standards for VOC Point Sources: OAR 340–232; Rules Applicable to the Portland Area: OAR 340–242; Employee Commute Options Program (OAR 340–242–0010 through 0290); and Industrial Emission Management Program (OAR 340–242–0400 through 0440). After a review of the submissions, EPA is proposing to approve these changes to Oregon's rules and incorporate them into the federally approved SIP for Oregon.

*1-Hour Ozone NAAQS Requirements That No Longer Apply in This Area*

Approval of two amendments to ODEQ's existing 1-hour maintenance plan has also been requested by the State of Oregon pursuant to 40 CFR 51.905(e)(1). ODEQ has submitted a maintenance SIP for the 8-hour ozone NAAQS for these areas that meets the requirements of sections 110 and 193 of the CAA. Therefore, EPA is concurrently proposing to approve these two amendments to the existing 1-hour ozone maintenance plan:

(1) Removal of the obligation to submit a maintenance plan for the 1-hour NAAQS eight years after approval of the initial 1-hour maintenance plan; and

(2) Removal of the State's obligation to implement contingency measures upon a violation of the 1-hour NAAQS. Oregon's SIP submittal meets the CAA requirements for SIP submittals with respect to these two changes.

*B. Phasing Out of the State's VIP Enhanced BAR–31 Test, the Elimination of the Gas Cap Pressure Test and the Evaporative Purge Test*

On August 9, 2005, ODEQ submitted revisions to the Oregon State Implementation Plan: Volume 2—section 5.4.7—Test Procedures and Standards, pertaining to phasing out of the State's VIP enhanced BAR–31 test, the elimination of the Gas Cap Pressure Test and the Evaporative Purge Test.

The submitted revisions are supported by a demonstration that these changes will not affect the ability of the State of Oregon to meet all applicable NAAQS, especially CO and ozone. For CO, this requirement was addressed when the Portland CO Second 10-Year Maintenance Plan demonstrated continued maintenance of attainment of the CO standard through the year 2017, without the enhanced test. The CO maintenance plan was approved by the EPA on January 24, 2006 (71 FR 3768). For ozone, the submittal refers to the subsequently submitted section 110(a)(1) maintenance plans for the Portland portion of the Pdx/Van AQMA and SKATS. Section 110(a)(1) maintenance plans for these areas demonstrate how the State of Oregon will maintain compliance with the 1997 8-hour ozone NAAQS. The 110(a)(1) maintenance plans for both these areas meet the CAA requirements and demonstrate that the Portland portion of the Pdx/Van AQMA and the SKATS Air Quality Area will be able to remain in attainment for 1997 ozone NAAQS through 2015. The applicable NAAQS for ozone is the 2008 8-hour standard and the 110(a)(1) maintenance plan includes technical information that shows the 2008 8-hour ozone NAAQS will also not be violated with all the revisions and changes proposed.

## III. Proposed Action

EPA is proposing to approve the section 110(a)(1) maintenance plan and supporting rules for Portland and Salem, OR submitted on May 22, 2007 and described in this action and the TSD, as revisions to the Oregon SIP. EPA is proposing to approve the maintenance plan and supporting rules for the Portland portion of the Pdx/Van AQMA and the SKATS Air Quality Area because they meet the requirements of section 110(a)(1) and section 110(l) of the CAA.

Further, based on our review, we are proposing recommending a full approval of the revisions to the Oregon State Implementation Plan: Volume 2—section 5.4.7—Test Procedures and Standards and supporting rules.

EPA is soliciting public comments on the issues discussed in this document. These comments will be considered before taking final action.

## IV. Oregon Notice Provision

Oregon Revised Statute 468.126 prohibits ODEQ from imposing a penalty for violation of an air, water or solid waste permit unless the source has been provided five days' advanced written notice of the violation and has not come into compliance or submitted a compliance schedule within that five-day period. By its terms, the statute does not apply to Oregon's Title V program or to any program if application of the notice provision would disqualify the program from federal delegation. Oregon has previously confirmed that, because application of the notice provision would preclude EPA approval of the Oregon SIP, no advance notice is required for violation of SIP requirements.

## V. 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, the EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. Accordingly, this proposed 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 proposed 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.

**List of Subjects in 40 CFR Part 52**

Environmental protection, Air pollution control, Carbon monoxide,

Hydrocarbons, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Ozone, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Dated: March 3, 2010.

**Dennis J. McLerran,**

*Regional Administrator, Region 10.*

[FR Doc. 2010–10652 Filed 5–5–10; 8:45 am]

**BILLING CODE 6560–50–P**

## ENVIRONMENTAL PROTECTION AGENCY

## 40 CFR Part 745

**[EPA–HQ–OPPT–2010–0173; FRL–8823–6]**

**RIN 2070–AJ56**

## Lead; Renovation, Repair, and Painting Program for Public and Commercial Buildings

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

**ACTION:** Advance notice of proposed rulemaking.

**SUMMARY:** EPA is giving advance notice of the Agency's intention to regulate the renovation, repair, and painting of public and commercial buildings under section 402(c)(3) of the Toxic Substances Control Act (TSCA). This notice announces the commencement of proceedings to propose lead-safe work practices and other requirements for renovations on the exteriors of public and commercial buildings and to determine whether lead-based paint hazards are created by interior renovation, repair, and painting projects in public and commercial buildings. For those renovations in the interiors of public and commercial buildings that create lead-based paint hazards, EPA will propose regulations to address these hazards.

**DATES:** Comments must be received on or before July 6, 2010.

**ADDRESSES:** Submit your comments, identified by docket identification (ID) number EPA–HQ–OPPT–2010–0173, by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Mail:* Document Control Office (7407M), Office of Pollution Prevention and Toxics (OPPT), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.
- *Hand Delivery:* OPPT Document Control Office (DCO), EPA East Bldg., Rm. 6428, 1201 Constitution Ave., NW., Washington, DC; Attention: Docket ID Number EPA–HQ–OPPT–2010–0173. The DCO is open from 8 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The telephone number for the DCO is (202) 564–8930. Such deliveries are only accepted during the DCO's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

*Instructions:* Direct your comments to docket ID number EPA–HQ–OPPT–2010–0173. EPA's policy is that all comments received will be included in the docket without change and may be made available online 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 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 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, will be publicly available only in hard copy. Publicly available docket materials are available electronically at *http://www.regulations.gov,* or, if only available in hard copy, at the OPPT Docket. The OPPT Docket is located in the EPA Docket Center (EPA/DC) at Rm. 3334, EPA West Bldg., 1301 Constitution Ave., NW., Washington, DC. The EPA/DC Public Reading Room hours of operation are 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number of the EPA/DC Public Reading Room is (202) 566–1744, and the telephone number for the OPPT Docket is (202) 566–0280. Docket visitors are required to show photographic identification, pass through a metal detector, and sign the EPA visitor log. All visitor bags are processed through an X-ray machine and subject to search. Visitors will be provided an EPA/DC badge that must be visible at all times in the building and returned upon departure.

**FOR FURTHER INFORMATION CONTACT:**

*For technical information contact:* Hans Scheifele, National Program Chemicals Division, Office of Pollution Prevention and Toxics, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (202) 564–3122; e-mail address: *scheifele.hans@epa.gov.*

*For general information contact:* The TSCA-Hotline, ABVI—Goodwill, 422 South Clinton Ave., Rochester, NY 14620; telephone number: (202) 554–1404; e-mail address: *TSCA-Hotline@epa.gov.*

**SUPPLEMENTARY INFORMATION:**

### I. General Information

*A. Does this action apply to me?*

This document is directed to the public in general. However, this document may be of particular interest to the following entities:

- Building construction (North American Industrial Classification System (NAICS) code 236), *e.g.,* commercial building construction, industrial building construction, commercial and institutional building construction, building finishing contractors, drywall and insulation contractors, painting and wall covering contractors, finish carpentry contractors, other building finishing contractors.
- Specialty trade contractors (NAICS code 238), *e.g.,* plumbing, heating, and air-conditioning contractors, painting and wall covering contractors, electrical contractors, finish carpentry contractors, drywall and insulation contractors, siding contractors, tile and terrazzo contractors, glass and glazing contractors.
- Real estate (NAICS code 531), *e.g.,* lessors of non-residential buildings and dwellings, non-residential property managers.
- Facilities support services (NAICS code 561210).
- Other general government support (NAICS code 921) *e.g.,* general services departments, government, public property management services, government.

This listing is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. Other types of entities not listed in this unit could also be affected. The NAICS codes have been provided to assist you and others in determining whether this action might apply to certain entities. If you have any questions regarding the applicability of this action to a particular entity, consult the technical person listed under **FOR FURTHER INFORMATION CONTACT**.

*B. What should I consider as I prepare my comments for EPA?*

1. *Submitting CBI.* Do not submit this information to EPA through *regulations.gov* or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD–ROM that you mail to EPA, mark the outside of the disk or CD–ROM 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. EPA's Lead-Bhased Paint Programs*

In 1992, Congress found that low-level lead poisoning was widespread among American children, affecting, at that time, as many as 3,000,000 children under age 6; that the ingestion of household dust containing lead from deteriorating or abraded lead-based paint was the most common cause of lead poisoning in children; and that the health and development of children living in as many as 3,800,000 American homes was endangered by chipping or peeling lead paint, or excessive amounts of lead-contaminated dust in their homes. Congress further determined that the prior Federal response to this threat was insufficient and enacted Title X of the Housing and Community Development Act of 1992, Public Law 102–550 (also known as the Residential Lead-Based Paint Hazard Reduction Act of 1992) ("the Act" or "Title X"). Title X established a national goal of eliminating lead-based paint hazards in housing as expeditiously as possible and provided a leadership role for the Federal government in building the infrastructure necessary to achieve this goal.

Subsequently, President Clinton created the President's Task Force on Environmental Health Risks and Safety Risks to Children. Co-chaired by the Secretary of the Department of Health and Human Services (HHS) and the Administrator of EPA, the Task Force consisted of representatives from 16 Federal departments and agencies. The Task Force set a Federal goal of eliminating childhood lead poisoning by the year 2010 (Ref. 1). In October 2001, President Bush extended the work of the Task Force for an additional 18 months beyond its original charter. Reducing lead poisoning in children was the Task Force's top priority. Although more work remains to be done, significant progress has been made towards reducing lead poisoning in children. The estimated percentage of children with blood lead levels above 10 micrograms per deciliter (µg/dL) declined from 4.4% between 1991 and 1994 to 1.4% between 1999 and 2004 (Ref. 25). More information on Federal efforts to address lead poisoning, including the responsibilities of EPA and other Federal Agencies under Title X, can be found in Units III.A. and III.B. of the preamble to the 2006 Renovation, Repair, and Painting Program Proposed Rule (2006 Proposal) (Ref. 3).

The Act added a new title to TSCA entitled "Title IV–Lead Exposure Reduction." Most of EPA's responsibilities for addressing lead-based paint hazards can be found in this title, with section 402 of TSCA being one source of the rulemaking authority to carry out these responsibilities. TSCA section 402(a) directs EPA to promulgate regulations covering lead-based paint activities to ensure that persons performing these activities are properly trained, that training programs are accredited, and that contractors performing these activities are certified. These regulations must contain standards for performing lead-based paint activities, taking into account reliability, effectiveness, and safety. On August 29, 1996, EPA promulgated final regulations under TSCA section 402(a) that govern lead-based paint inspections, lead hazard screens, risk assessments, and abatements in target housing and child-occupied facilities (also referred to as the Lead-based Paint Activities Regulations) (Ref. 4). "Target housing" is defined in TSCA section 401 as any housing constructed before 1978, except housing for the elderly or persons with disabilities (unless any child under age 6 resides or is expected to reside in such housing) or any 0-bedroom dwelling. The Lead-based Paint Activities Regulations created a subset of public and commercial buildings called child-occupied facilities, and defined them in terms of the amount of time a young child might spend within them. These regulations, codified at 40 CFR part 745, subpart L, contain an accreditation program for training providers and training and certification requirements for lead-based paint inspectors, risk assessors, project designers, abatement supervisors, and abatement workers. Work practice standards for lead-based paint activities are included. Pursuant to TSCA section 404, provision was made for interested States, Territories, and Indian Tribes to apply for and receive authorization to administer their own lead-based paint activities programs.

On June 9, 1999, the Lead-based Paint Activities Regulations were amended to include a fee schedule for training programs seeking EPA accreditation and for individuals and firms seeking EPA certification (Ref. 5). These fees were established as directed by TSCA section 402(a)(3), which requires EPA to recover the cost of administering and enforcing the lead-based paint activities requirements in unauthorized States. The most recent amendment to the Lead-based Paint Activities Regulations occurred on April 8, 2004, when notification requirements were added to help EPA monitor compliance with the training and certification provisions and

the abatement work practice standards (Ref. 6).

Another of EPA's responsibilities under Title X is to require that purchasers and tenants of target housing and occupants of target housing undergoing renovation are provided information on lead-based paint and lead-based paint hazards. As directed by TSCA section 406(a), the Consumer Products Safety Commission (CPSC), the Department of Housing and Urban Development (HUD), and EPA, in consultation with the Centers for Disease Control and Prevention (CDC), jointly developed a lead hazard information pamphlet entitled Protect Your Family From Lead in Your Home (PYF) (Ref. 7). This pamphlet was designed to be distributed as part of the disclosure requirements of section 1018 of Title X and TSCA section 406(b), to provide home purchasers, renters, owners, and occupants with the information necessary to allow them to make informed choices when selecting housing to buy or rent, or deciding on home renovation projects. The pamphlet contains information on the health effects of lead, how exposure can occur, and steps that can be taken to reduce or eliminate the risk of exposure during various activities in the home.

Pursuant to the authority provided in section 1018 of Title X, on March 6, 1996, HUD and EPA jointly promulgated regulations requiring persons who are selling or leasing target housing to provide the PYF pamphlet and information on known lead-based paint and lead-based paint hazards in the housing to purchasers and renters (Ref. 8). These joint regulations, codified at 24 CFR part 35, subpart A, and 40 CFR part 745, subpart F, describe in detail the information that must be provided before the contract or lease is signed and require that sellers, landlords, and agents document compliance with the disclosure requirements in the contract to sell or lease the property. Title X does not provide for these requirements to be administered by States or Tribes in lieu of the Federal regulations. Therefore, HUD and EPA are responsible for administering and enforcing these disclosure obligations.

TSCA section 406(b) directs EPA to promulgate regulations requiring persons who perform renovations for compensation in target housing to provide a lead hazard information pamphlet to owners and occupants of the home being renovated. These regulations, promulgated on June 1, 1998, are codified at 40 CFR part 745, subpart E (Ref. 9). The term "renovation" is not defined in the statute, but the regulation, at 40 CFR 745.83, defines a "renovation" as the modification of any existing structure, or portion of a structure, that results in the disturbance of painted surfaces. The regulations specifically exclude lead-based paint abatement projects as well as small projects that disturb 2 square feet or less of painted surface per component, emergency projects, and renovations affecting components that have been found to be free of lead-based paint, as that term is defined in the regulations, by a certified inspector or risk assessor. These regulations require the renovation firm to document compliance with the requirement to provide the owner and the occupant with the PYF pamphlet. TSCA section 404 also allows States to apply for, and receive authorization to administer, the TSCA section 406(b) requirements.

TSCA section 403 directs EPA to promulgate regulations that identify, for the purposes of Title X and Title IV of TSCA, dangerous levels of lead in paint, dust, and soil. EPA promulgated regulations pursuant to TSCA section 403 on January 5, 2001, and codified them at 40 CFR part 745, subpart D (Ref. 10). These hazard standards define lead-based paint hazards in target housing and child-occupied facilities as paint-lead, dust-lead, and soil-lead hazards. A paint-lead hazard is defined as any damaged or deteriorated lead-based paint, any chewable lead-based painted surface with evidence of teeth marks, or any lead-based paint on a friction surface if lead dust levels underneath the friction surface exceed the dust-lead hazard standards. A dust-lead hazard is surface dust that contains a mass-per-area concentration of lead equal to or exceeding 40 micrograms per square foot ($\mu g/ft^2$) on floors or 250 $\mu g/ft^2$ on interior windowsills based on wipe samples. A soil-lead hazard is bare soil that contains total lead equal to or exceeding 400 parts per million (ppm) in a play area or average of 1,200 ppm of bare soil in the rest of the yard based on soil samples.

### *B. EPA's Renovation, Repair, and Painting Program*

Section 402(c) of TSCA addresses renovation and remodeling. For the stated purpose of reducing the risk of exposure to lead in connection with renovation and remodeling activities, section 402(c)(1) of TSCA requires EPA to promulgate and disseminate guidelines for the conduct of such activities that may create a risk of exposure to dangerous levels of lead. In response to this statutory directive, EPA developed the guidance document entitled "Reducing Lead Hazards when Remodeling Your Home" in consultation with industry and trade groups (Ref. 11). This document has been widely disseminated to renovation and remodeling stakeholders through the National Lead Information Center, EPA Regions, and EPA's State and Tribal partners and is available at *http://www.epa.gov/lead/pubs/rrpamph.pdf.*

Section 402(c)(2) of TSCA directs EPA to study the extent to which persons engaged in various types of renovation and remodeling activities are exposed to lead during such activities or create a lead-based paint hazard regularly or occasionally. EPA conducted this study in four phases. Phase I, the Environmental Field Sampling Study (Ref. 12), evaluated the amount of leaded dust generated by various typical renovation activities. Phase II, the Worker Characterization and Blood Lead Study (Ref. 22), involved collecting data on blood lead and renovation and remodeling activities from workers. Phase III, the Wisconsin Childhood Blood-Lead Study (Ref. 14), was a retrospective study focused on assessing the relationship between renovation and remodeling activities and children's blood-lead levels. Phase IV, the Worker Characterization and Blood-Lead Study of R&R (Renovation and Repair) Workers Who Specialize in Renovations of Old or Historic Homes (Ref. 15), was similar to Phase II, but focused on individuals who worked primarily in old historic buildings. More information on the results of these peer-reviewed studies can be found in Unit III.C.1. of the preamble to the 2006 Proposal (Ref. 3).

Section 402(c)(3) of TSCA directs EPA to revise the regulations promulgated under TSCA section 402(a), *i.e.,* the Lead-based Paint Activities Regulations, to apply to renovation or remodeling activities in target housing, public buildings constructed before 1978, and commercial buildings that create lead-based paint hazards. Based primarily on the four-phase study conducted under TSCA section 402(c)(2), EPA issued a proposed rule in January 2006 to cover renovation, repair, and painting activities that disturb painted surfaces in target housing and child-occupied facilities (Ref. 3). In the 2006 Proposal, EPA proposed to conclude that all such activities in the presence of lead-based paint create lead-based paint hazards because available information indicated that all such activities create dust-lead levels that exceed the hazard standards established under TSCA section 403.

After the 2006 Proposal was issued, EPA conducted a field study entitled "Characterization of Dust Lead Levels

after Renovation, Repair, and Painting Activities" (Dust Study) to better characterize dust-lead levels resulting from various renovation, repair, and painting activities (Ref. 16). This study, completed in January 2007, was designed to compare environmental lead levels at appropriate stages after various types of renovation, repair, and painting preparation activities were performed on the interiors and exteriors of target housing units and child-occupied facilities. The renovation activities were conducted by local professional renovation firms, using personnel who received lead safe work practices training. The activities conducted represented a range of renovation, repair, and painting activities that would have been permitted under the 2006 Proposal, including work practices that are restricted or prohibited under the final rule, such as the use of high-speed machines without high-efficiency particulate air (HEPA) filtered exhaust control to remove paint. Of particular interest was the impact of using specific work practices that renovation firms would be required to use under the proposed rule, such as the use of plastic to contain the work area and a multi-step cleaning protocol, as opposed to more typical work practices. The Dust Study reinforced EPA's proposed finding that typical renovation and remodeling activities that disturb lead-based paint create lead-based paint hazards.

In April 2008, EPA issued the final Renovation, Repair and Painting Rule (RRP Rule) under the authority of section 402(c)(3) of TSCA to address lead-based paint hazards created by renovation, repair, and painting activities that disturb lead-based paint in target housing and child-occupied facilities (Ref. 17). The term "target housing" is defined in TSCA section 401 as any housing constructed before 1978, except housing for the elderly or persons with disabilities (unless any child under age 6 resides or is expected to reside in such housing) or any 0-bedroom dwelling. Under the RRP Rule, a child-occupied facility is a building, or a portion of a building, constructed prior to 1978, visited regularly by the same child, under 6 years of age, on at least two different days within any week (Sunday through Saturday period), provided that each day's visit lasts at least 3 hours and the combined weekly visits last at least 6 hours, and the combined annual visits last at least 60 hours. The RRP Rule establishes requirements for training renovators, other renovation workers, and dust sampling technicians; for certifying renovators, dust sampling technicians, and renovation firms; for accrediting providers of renovation and dust sampling technician training; for renovation work practices; and for recordkeeping. Interested States, Territories, and Indian Tribes may apply for and receive authorization to administer and enforce all of the elements of the RRP Rule.

*C. Recent Renovation, Repair, and Painting Program Developments*

Shortly after the RRP Rule was published, several petitions were filed challenging the rule. These petitions were consolidated in the Circuit Court of Appeals for the District of Columbia Circuit. On August 24, 2009, EPA entered into an agreement with the environmental and children's health advocacy groups in settlement of their petitions (Ref. 18). In this agreement, EPA committed to propose several changes to the RRP Rule. EPA also agreed to commence rulemaking to address renovations in public and commercial buildings, other than child-occupied facilities, to the extent those renovations create lead-based paint hazards. For these buildings, EPA agreed, at a minimum, to do the following:

- Issue a proposal to regulate renovations on the exteriors of public and commercial buildings other than child-occupied facilities by December 15, 2011 and to take final action on that proposal by July 15, 2013.
- Consult with EPA's Science Advisory Board by September 30, 2011, on a methodology for evaluating the risk posed by renovations in the interiors of public and commercial buildings other than child-occupied facilities.
- Eighteen months after receipt of the Science Advisory Board's report, either issue a proposal to regulate renovations on the interiors of public and commercial buildings other than child-occupied facilities or conclude that such renovations do not create lead-based paint hazards.

On August 10, 2009, EPA received a petition from several environmental and public health advocacy groups requesting that the EPA amend regulations issued under Title IV of TSCA (Ref. 20). Specifically, the petitioners requested that EPA lower the Agency's dust-lead hazard standards issued pursuant to section 403 of TSCA from 40 μg/ft² to 10 μg/ft² or less for floors and from 250 μg/ft² to 100 μg/ft² or less for window sills. The petitioners also asked EPA to modify the definition of lead-based paint in 40 CFR 745.103 and 745.223 from 0.5 percent by weight (5,000 parts per million (ppm)) to 0.06 percent by weight (600 ppm) with a corresponding reduction in the 1.0 milligram per square centimeter standard. On October 22, 2009, EPA granted this petition under section 553(e) of the Administrative Procedures Act, 5 U.S.C. 553(e) (Ref. 21). In granting this petition, EPA agreed to commence the appropriate proceeding, but did not commit to a particular schedule or to a particular outcome. Because Congress gave the Department of Housing and Urban Development (HUD) statutory authority to establish a lower level of lead in paint for the purpose of the definition of the term "lead-based paint" in target housing (see 15 U.S.C. 2681(9)), EPA agreed to work with HUD in taking the appropriate action on the request pertaining to the definition of the term "lead-based paint."

*D. Information on Lead and Its Health Effects*

Lead is a soft, bluish metallic chemical element mined from rock and found in its natural state all over the world. Lead is virtually indestructible, is persistent, and has been known since antiquity for its adaptability in making various useful items. In modern times, it has been used to manufacture many different products, including paint, batteries, pipes, solder, pottery, and gasoline. Through the 1940's, paint manufacturers frequently used lead as a primary ingredient in many oil-based interior and exterior house paints. Usage gradually decreased through the 1950's and 1960's as titanium dioxide replaced lead and as latex paints became more widely available.

*1. Health effects in general.* Lead bioaccumulates, and is only slowly removed, with bone lead serving as a blood lead source for years after exposure and may serve as a significant source of exposure. Bone accounts for more than 90% of the total body burden of lead in adults and 70% in children (Ref. 22). In comparison to adults, bone mineral turns over much more quickly in children as a result of growth. Changes in blood lead concentration in children are thought to parallel more closely to changes in total body burden. Therefore, blood lead concentration is often used in epidemiologic and toxicological studies as an index of exposure and body burden for children.

Lead is known for its "broad array of deleterious effects on multiple organ systems via widely diverse mechanisms of action" (Ref. 22, p. 8–24 and section 8.4.1). This array of health effects includes effects on heme biosynthesis and related functions, neurological development and function,

reproduction and physical development, kidney function, cardiovascular function, and immune function. The weight of evidence varies across this array of effects and is comprehensively described in the EPA Air Quality Criteria for Lead (Criteria Document) (Ref. 22). There is also some evidence of lead carcinogenicity, primarily from animal studies, together with limited human evidence of suggestive associations (Ref. 22, sections 5.6.2, 6.7, and 8.4.10). Lead has also been classified as a probable human carcinogen by the International Agency for Research on Cancer (inorganic lead compounds), based on limited evidence in humans and sufficient evidence in animals, and as reasonably anticipated to be a human carcinogen by the U.S. National Toxicology Program (lead and lead compounds) (Ref. 22, section 6.7.2). EPA considers lead a probable carcinogen based on the available animal data (*http://www.epa.gov/iris/subst/0277.htm* (Ref. 22, p. 6–195)).

This discussion is focused on those effects most pertinent to ambient exposures, which, given the reductions in ambient lead levels over the past 30 years, are generally those associated with individual blood lead levels in children and adults in the range of 10 μg/dL and lower. These key effects include neurological, hematological, and immune effects for children, and hematological, cardiovascular, and renal effects for adults (Ref. 22, Tables 8–5 and 8–6, pp. 8–60 to 8–62). As evident from the discussions in chapters 5, 6, and 8 of the Criteria Document, "neurotoxic effects in children and cardiovascular effects in adults are among those best substantiated as occurring at blood lead concentrations as low as 5 to 10 μg/dL (or possibly lower); and these categories are currently clearly of greatest public health concern" (Ref. 22, p. 8–60). At mean blood lead levels, in children, on the order of 10 μg/dL, and somewhat lower, associations have been found with effects to the immune system, including altered macrophage activation, increased immunoglobulin E (IgE) levels and associated increased risk for autoimmunity and asthma (Ref. 22, sections 5.9, 6.8, and 8.4.6). A meta-analysis of numerous studies estimates that a doubling of blood-lead level (*e.g.,* from 5 to 10 μg/dL) is associated with ~1.0 millimeter of mercury (mm Hg) increase in systolic blood pressure and ~0.6 mm Hg increase in diastolic pressure (Ref. 22, p. E–10). With respect to renal effects in adults, increased risk for nephrotoxicity was observed at the lowest lead exposure levels in epidemiological studies included in the Criteria Document (Ref. 22, p. 8–49). Nephrotic effects were reported among some adults with mean concurrent blood lead levels as low as 2 to 4 μg/dL. "More specifically, the newly available general population studies have shown associations between blood Pb and indicators of renal function impairment at blood-Pb levels extending below 10 μg/dL, with nephrotic effects having been reported among some adults with mean concurrent blood-Pb levels as low as ~2 to 4 μg/dL." (Ref. 22, p. 8–49).

The toxicological and epidemiological information available "includes assessment of new evidence substantiating risks of deleterious effects on certain health endpoints being induced by distinctly lower than previously demonstrated lead exposures indexed by blood lead levels extending well below 10 μg/dL in children and/or adults" (Ref. 22, p. 8– 25). Some health effects associated with individual blood lead levels extend below 5 μg/dL, and some studies have observed these effects at the lowest blood levels considered. With regard to population mean levels, the Criteria Document points to studies reporting "lead effects on the intellectual attainment of preschool and school age children at population mean concurrent blood-lead levels [BLLs] ranging down to as low as 2 to 8 μg/dL" (Ref. 22, p. E–9).

EPA notes that many studies over the past decade, in investigating effects at lower blood lead levels, have utilized the CDC advisory level or level of concern for individual children (10 μg/dL). This level has variously been called an advisory level or level of concern. In addressing children's blood lead levels, CDC has stated, "[s]pecific strategies that target screening to high-risk children are essential to identify children with BLLs ≥ 10 μg/dL" (Ref. 1) as a benchmark for assessment, and this is reflected in the numerous references in the Criteria Document to 10 μg/dL. Individual study conclusions stated with regard to effects observed below 10 μg/dL are usually referring to individual blood lead levels. In fact, many such study groups have been restricted to individual blood lead levels below 10 μg/dL or restricted to blood lead levels below levels that are lower than 10 μg/dL (*e.g.,* the blood lead levels must be below 8 μg/dL). EPA notes that the mean blood lead level for these groups will necessarily be lower than the blood lead level below which they are restricted, because the restricted blood lead level is the upper end of the blood lead level range of the study.

Threshold levels, in terms of blood lead levels in individual children, for neurological effects cannot be discerned from the currently available studies (Ref. 22, pp. 8–60 to 8–63). The Criteria Document states, "There is no level of lead exposure that can yet be identified, with confidence, as clearly not being associated with some risk of deleterious health effects" (Ref. 22, p. 8–63). As discussed in the Criteria Document, "a threshold for lead neurotoxic effects may exist at levels distinctly lower than the lowest exposures examined in these epidemiologic studies" (Ref. 22, p. 8–67). Physiological, behavioral and demographic factors contribute to increased risk of lead-related health effects. Population groups potentially at risk, sometimes also referred to as sensitive populations, include those with increased susceptibility (*i.e.,* physiological factors contributing to a greater response for the same exposure), as well as those with greater vulnerability (*i.e.,* those with increased exposure such as through exposure to higher media concentrations or resulting from behavior leading to increased contact with contaminated media), or those affected by socioeconomic factors, such as reduced access to health care or low socioeconomic status (Ref. 22).

Children are at increased risk of lead-related health effects due to various factors that enhance their exposures (*e.g.,* via the hand-to-mouth activity that is prevalent in very young children, (Ref. 22, section 4.4.3)) and susceptibility. While children are considered to be at a period of maximum exposure around 18–27 months, recent epidemiologic studies have found other blood lead measurements, including concurrent blood lead levels or lifetime averages, to be stronger predictors of lead-associated effects than peak blood lead concentration (Ref. 22, pp. 6–60 and 6–61). The evidence "supports the idea that lead exposure continues to be toxic to children as they reach school age, and [does] not lend support to the interpretation that all the damage is done by the time the child reaches 2 to 3 years of age" (Ref. 22, section 6.2.12). The following physiological and demographic factors can further affect risk of lead-related effects in some children.

- Children with particular genetic polymorphisms (*e.g.,* presence of the d-aminolevulinic acid dehydratase-2 [ALAD-2] allele) may have increased sensitivity to lead toxicity, which may be due to increased susceptibility to the same internal dose and/or to increased internal dose associated with same

exposure (Ref. 22, p. 8–71, sections 6.3.5, 6.4.7.3, and 6.3.6).

• Some children may have blood lead levels higher than those otherwise associated with a given lead exposure (Ref. 22, section 8.5.3) as a result of nutritional status (*e.g.,* iron deficiency, calcium intake), as well as genetic and other factors (Ref. 22, chapter 4 and sections 3.4, 5.3.7, and 8.5.3).

• Situations of elevated exposure, such as residing near sources of ambient lead, as well as socioeconomic factors, such as reduced access to health care or low socioeconomic status can also contribute to increased blood lead levels and increased risk of associated health effects from air-related lead (Refs. 23, 24).

• Children in poverty and black, non-Hispanic children have notably higher blood lead levels than do economically well-off children and white children, in general (Ref. 25).

2. *Neurological effects in children.* Among the wide variety of health endpoints associated with lead exposures, there is general consensus that the developing nervous system in children is among the, if not the, most sensitive. While blood lead levels in U.S. children have decreased notably since the late 1970s, newer studies have investigated and reported associations of effects on the neurodevelopment of children with these more recent blood lead levels (Ref. 22, chapter 6). Functional manifestations of lead neurotoxicity during childhood include neurophysiologic, motor, cognitive, and behavioral impacts. Numerous epidemiological studies have reported neurocognitive, neurobehavioral, neurophysiologic, and neuromotor function effects in children with blood lead levels below 10 μg/dL (Ref. 22, sections 6.2 and 8.4). As discussed in the Criteria Document, "extensive experimental laboratory animal evidence has been generated that (a) substantiates well the plausibility of the epidemiologic findings observed in human children and adults and (b) expands our understanding of likely mechanisms underlying the neurotoxic effects" (Ref. 22, p. 8–25; section 5.3).

Cognitive effects associated with lead exposures that have been observed in epidemiological studies have included decrements in intelligence test results, such as the widely used IQ score, and in academic achievement as assessed by various standardized tests as well as by class ranking and graduation rates (Ref. 22, section 6.2.16 and pp. 8–29 to 8–30). As noted in the Criteria Document with regard to the latter, "[a]ssociations between lead exposure and academic achievement observed in the studies noted in this section were significant even after adjusting for IQ, suggesting that lead-sensitive neuropsychological processing and learning factors not reflected by global intelligence indices might contribute to reduced performance on academic tasks" (Ref. 22, pp. 8–29 to 8– 30). Further, neurological effects in general include behavioral effects, such as delinquent behavior (Ref. 22, sections 6.2.6 and 8.4.2.2), sensory effects, such as those related to hearing and vision (Ref. 22, sections 6.2.7 and 8.4.2.3), and deficits in neuromotor function (Ref. 22, p. 8–36).

With regard to potential implications of lead effects on IQ, the Criteria Document recognizes the "critical" distinction between population and individual risk, identifying issues regarding declines in IQ for an individual and for the population. The Criteria Document further states that a "point estimate indicating a modest mean change on a health index at the individual level can have substantial implications at the population level" (Ref. 22, p. 8–77). As an example, the Criteria Document states, "although an increase of a few mm Hg in blood pressure might not be of concern for an individual's well-being, the same increase in the population mean might be associated with substantial increases in the percentages of individuals with values that are sufficiently extreme that they exceed the criteria used to diagnose hypertension" (Ref. 22, p. 8–77). A downward shift in the mean IQ value is associated with both substantial decreases in percentages achieving very high scores and substantial increases in the percentage of individuals achieving very low scores (Ref. 22, p. 8–81). For example, for a population mean IQ of 100 (and standard deviation of 15), 2.3% of the population would score above 130, but a shift of the population to a mean of 95 results in only 0.99% of the population scoring above 130 (Ref. 22, pp. 8–81 to 8–82). "For an individual functioning in the low [IQ] range due to the influence of developmental risk factors other than lead, a lead-associated [IQ] decline of several points might be sufficient to drop that individual into the range associated with increased risk of educational, vocational, and social failure" (Ref. 22, p. 8–77).

Other cognitive effects observed in studies of children have included effects on attention, executive functions, language, memory, learning, and visuospatial processing (Ref. 22, sections 5.3.5, 6.2.5, and 8.4.2.1), with attention and executive function effects associated with lead exposures indexed by blood lead levels below 10 μg/dL (Ref. 22, section 6.2.5 and pp. 8–30 to 8–31). The evidence for the role of lead in this suite of effects includes experimental animal findings (Ref. 22, section 8.4.2.1; p. 8–31), which provide strong biological plausibility of lead effects on learning ability, memory and attention (Ref. 22, section 5.3.5), as well as associated mechanistic findings.

The persistence of such lead-induced effects is described in the Criteria Document (*e.g.,* Ref. 22, sections 5.3.5, 6.2.11, and 8.5.2). The persistence or irreversibility of such effects can be the result of damage occurring without adequate repair offsets or of the persistence of lead in the body (Ref. 22, section 8.5.2). It is additionally important to note that there may be long-term consequences of such deficits over a lifetime. Poor academic skills and achievement can have "enduring and important effects on objective parameters of success in real life," as well as increased risk of antisocial and delinquent behavior (Ref. 22, section 6.2.16).

Multiple epidemiologic studies of lead and child development have demonstrated inverse associations between blood lead concentrations and children's IQ and other cognitive-related outcomes at successively lower lead exposure levels over the past 30 years (Ref. 22, section 6.2.13). For example, the overall weight of the available evidence, described in the Criteria Document, provides clear substantiation of neurocognitive decrements being associated in children with mean blood lead levels in the range of 5 to 10 μg/dL, and some analyses indicate lead effects on intellectual attainment of children for which population mean blood lead levels in the analysis ranged from 2 to 8 μg/dL (Ref. 22, sections 6.2, 8.4.2, and 8.4.2.6). Thus, while blood lead levels in U.S. children have decreased notably since the late 1970s, newer studies have investigated and reported associations of effects on the neurodevelopment of children with blood lead levels similar to the more recent, lower blood lead levels (Ref. 22, chapter 6).

Children in minority populations and children whose families are poor have an increased risk of exposure to harmful lead levels (Ref. 25, at e376). Analysis of the National Health and Nutrition Examination Surveys (NHANES) data from 1988 through 2004 shows that the prevalence of blood lead levels equal to or exceeding 10 μg/dL in children aged 1 to 5 years has decreased from 8.6% in 1988–1991 to 1.4% in 1999–2004, which is an 84% decline (Ref. 25, at e377). However, the NHANES data from

1999–2004 indicates that non-Hispanic black children aged 1 to 5 years had higher percentages of blood lead levels equal to or exceeding 10 µg/dL (3.4%) than white children in the same age group (1.2%) (Ref. 25). In addition, among children aged 1 to 5 years over the same period, the geometric mean blood lead level was significantly higher for non-Hispanic blacks (2.8 µg/dL), compared with Mexican Americans (1.9 µg/dL) and non-Hispanic whites (1.7 µg/dL) (Ref. 25, at e377). For children aged 1 to 5 years from families with low income, the geometric mean blood lead level was 2.4 µg/dL (Ref. 25, at e377). Further, the incidences of blood-lead levels greater than 10 ug/dL and greater than or equal to 5 ug/dL were higher for non-hispanic blacks (14% and 3.4%, respectively) than for Mexican Americans (4.7% and 1.2%, respectively) and non-Hispanic whites (4.4% and 1.2%, respectively) (Ref. 25). The "analysis indicates that residence in older housing, poverty, age, and being non-Hispanic black are still major risk factors for higher lead levels" (Ref. 25, at e376).

3. *Adult health effects.* As previously noted, the adult health effects of lead exposure include negative impacts on renal and cardiovascular function. While cardiovascular effects in adults are well substantiated as occurring at blood lead levels as low as 5 to 10 µg/dL (or possibly lower), newly-demonstrated renal system effects among general population groups are also emerging as low-level lead exposure effects of concern (Ref. 22, p. 8–60).

Most studies in general adult and patient populations published during the past two decades have observed associations between "Pb dose and worse renal function." (Ref. 22, p. 6–112) The cumulative effect of higher blood lead levels from past exposure may be a factor in the nephrotoxicity observed at current blood lead levels. However, one study found associations between blood lead and concurrent serum creatinine in participants whose peak blood lead levels were equal to or less than 10 µg/dL (Ref. 22, p. 6–112). "The threshold for lead-related nephrotoxicity cannot be determined based on current data, but associations with clinically-relevant renal outcomes have been observed in populations with mean blood lead levels as low as 2.2 µg/dL" (Ref. 22, p. 6–112). In addition, the available data are not sufficient to determine whether the observed nephrotoxicity is related more to such current blood lead levels, higher levels from past exposures, or both (Ref. 22, p. 8–49). Some adult populations are at an even greater risk for adverse health effects as a result of lead exposure. "The influence of an individual's health status on susceptibility to lead toxicity has been demonstrated most clearly for renal outcomes." "Individuals with diabetes, hypertension, and chronic renal insufficiency are at increased risk of Pb-associated declines in renal function, and indications of altered kidney function have been reported at blood Pb levels ranging somewhat below 5 µg/dL (Lin et al., 2001, 2003; Muntner et al., 2003; Tsaih et al., 2004)." (Ref. 22 p. 8–72).

Positive associations between lead exposure and increased blood pressure have been observed in numerous studies. Epidemiologic studies that have examined the effects of blood lead levels on blood pressure have generally found positive associations, even after controlling for confounding factors such as tobacco smoking, exercise, body weight, alcohol consumption, and socioeconomic status (Ref. 22, p. 8–45). Recent meta-analyses of these studies have reported robust, statistically-significant, though small effect-size, associations between blood-Pb concentrations and blood pressure. For example, the meta-analysis of Nawrot *et al.* (2002) indicated that a doubling of blood lead corresponded to a 1 mm Hg increase in systolic blood pressure. Although this magnitude of increase is not clinically meaningful for an individual, a population shift of 1 mm Hg is important (Ref 22, p. 8–45). The majority of the more recent studies employing bone lead level have also found a strong association between long-term lead exposure and arterial pressure. "Since the residence time of Pb in blood is relatively short but very long in bone, the latter observations have provided compelling evidence for the positive relationship between Pb exposure and a subsequent rise in arterial pressure in human adults." (Ref 22, p. 8–45)

Studies also demonstrate a relationship between increased lead exposure and other adverse cardiovascular outcomes, including increased incidence of hypertension and cardiovascular morbidity and mortality (Ref. 22, p. 6–154). "Lead interference in calcium-dependent processes, including ionic transport systems and signaling pathways important in vascular reactivity may only represent the first step in the cascade of Pb-induced physiological events that culminates in cardiovascular disease. Lead alteration of endothelial cell response to vascular damage, inducement of smooth muscle cell hyperplasia, alteration of hormonal and transmitter systems regulating vascular reactivity, and its clear role as promoter of oxidative stress suggest mechanisms that could explain the Pb-associated increase in blood pressure, hypertension, and cardiovascular disease noted in this section" (Ref. 22, p. 6–153).

Current research does not definitively indicate whether health impacts observed later in life are the result of current lead exposure or exposure which occurred during early childhood or at some other time in the past. The following excerpts from the Criteria Document illustrate the uncertainties surrounding this issue:

- "It could be that damage occurred during a circumscribed period when the critical substrate was undergoing rapid development, but that the high correlation between serial blood Pb levels impeded identification of the special significance of exposure at that time." (Ref. 22, p. 8–73).
- "While some observations in children as old as adolescence indicate that exposure biomarkers measured concurrently are the strongest predictors of late outcomes, the interpretation of these observations with regard to critical windows of vulnerability remains uncertain" (Ref. 22, p. 8–74).

*4. Renovations in residential settings and elevated blood lead levels.* EPA's Wisconsin Childhood Blood-Lead Study, described more fully in Unit III.C.1.c. of the preamble to the 2006 Proposal, provides ample evidence of a link between renovation activities and elevated blood lead levels in resident children (Ref. 14). This peer-reviewed study concluded that general residential renovation and remodeling is associated with an increased risk of elevated blood lead levels in children and that specific renovation and remodeling activities are also associated with an increase in the risk of elevated blood lead levels in children. In particular, removing paint (using open flame torches, using heat guns, using chemical paint removers, and using wet scraping/sanding) and preparing surfaces by sanding or scraping significantly increased the risk of elevated blood lead levels.

Three studies from New York support the findings of the Wisconsin Childhood Blood-Lead Study. In 1995, the New York State Department of Health assessed lead exposure among children resulting from home renovation and remodeling in 1993–1994. A review of the health department records of children with blood lead levels equal to or greater than 20 µg/dL identified 320, or 6.9%, with elevated blood lead levels that were attributable to renovation and remodeling (Ref. 26). An update to that study with data from environmental

investigations conducted during 2006–2007 in New York State (excluding New York City) identified renovation, repair, and painting activities as the probable source of lead exposure in 14% of 972 children with blood lead levels equal to or exceeding 20 µg/dL (Ref. 27). The authors concluded that children living in housing undergoing renovation, repair, and painting that was built before 1978, and particularly before 1950, when concentrations of lead in paint were higher, are at high risk for elevated blood lead levels. The final study was a case-control study that assessed the association between elevated blood lead levels in children younger than 5 years and renovation or repair activities in homes in New York City (Ref. 28). EPA notes that the authors show that when dust and debris was reported (by respondents via telephone interviews) to be "everywhere" following a renovation, the children's blood lead levels were significantly higher than those of the children at homes that did not report remodeling work. On the other hand, when the respondent reported either "no visible dust and debris" or that "dust and debris was limited to the work area," there was no statistically significant effect on blood lead levels relative to homes that did not report remodeling work. Although the study found only a weak and nonsignificant link between a report of any renovation activity and the likelihood that a resident child had an elevated blood-lead level, the link to the likelihood of an elevated blood-lead level was statistically significant for surface preparation by sanding and for renovation work that spreads dust and debris beyond the work area. The researchers noted the consistency of their results with EPA's Wisconsin Childhood Blood-Lead Study (Ref. 28, at 509).

## III. Renovations in Public and Commercial Buildings

In many respects, EPA's approach to determining whether and how to regulate exterior renovations on public and commercial buildings and whether and how to regulate interior renovations in public and commercial buildings will be similar to the approach taken towards renovation activities in and on target housing and child-occupied facilities. Although the statutory directive under TSCA section 402(c)(3) is the same for all of these buildings, each type of building may present a different level of exposure to occupants. In this ANPRM, EPA is taking comment on the many considerations it must take into account when revising the regulations issued under TSCA section 402(a) to apply to those renovations that create lead-based paint hazards in public and commercial buildings.

An important consideration in determining how to regulate renovations on the exteriors of public and commercial buildings is that these renovations can create lead-based paint hazards on and in target housing and child-occupied facilities. Lead dust can travel in the environment and has been shown to be readily tracked into homes and other buildings. In fact, as discussed in Unit III.B.1. a substantial proportion of interior dust is due to track-in activities.

### *A. Definitions of "Public Building" and "Commercial Building"*

While the term "target housing" is defined in TSCA section 401, TSCA Title IV does not provide definitions for the terms "public building" and "commercial building." The issue of the buildings that could and should be covered by these terms was raised, but not conclusively resolved, in the rulemaking to establish the existing Lead-based Paint Activities Regulations.

As discussed previously, EPA promulgated the final Lead-based Paint Activities Regulations under TSCA section 402(a) in 1996 (Ref. 4). These regulations cover lead-based paint inspections, lead hazard screens, risk assessments, and abatements. The regulations include training and certification requirements for individuals and firms, accreditation requirements for lead-based paint training providers, and work practice standards designed in accordance with the statutory directive to ensure that lead-based paint activities are conducted safely, reliably and effectively. As initially proposed in 1994, one set of requirements for the training and certification of contractors and the accreditation of training programs, as well as specific work practice standards would have applied to lead-based paint activities conducted in target housing and public buildings (Ref. 29). The 1994 proposal would have defined public buildings to include all buildings generally open to the public or occupied or visited by children, such as stores, museums, airports, offices, restaurants, hospitals, and government buildings, as well as schools and day-care centers. In the final rule, EPA decided to focus on buildings frequented by children and, thus, established a subset of the buildings EPA had intended to define as public. This subset is called "child-occupied facilities" and it is delineated terms of the frequency and duration of visits by particular children (Ref. 4).

EPA continues to believe that it is important to emphasize the deleterious effects of lead exposure on young children, a sub-population that has long been identified as being particularly susceptible to the adverse effects of lead. However, it is also important to address exposures for other sensitive sub-populations, such as women who are pregnant or who may become pregnant in the future. In addition, as discussed in Unit II.D. of this preamble, a growing body of scientific literature documents lead's adverse effects on older children and adults at lower levels of exposure than previously documented. As a result, EPA does not believe that the options considered in this rulemaking should be limited to those buildings or situations where young children are likely to be exposed. EPA intends to evaluate all of the available information on hazards, exposures, and risk to determine which renovations TSCA requires EPA to regulate and how TSCA requires EPA to regulate them.

While TSCA Title IV does not define "public building" or "commercial building," a definition of "public and commercial building" was provided in TSCA Title II. TSCA Title II addresses the management of asbestos-containing building materials in school buildings and the training and accreditation (or certification) of persons who perform asbestos inspections or design or conduct asbestos abatement in public or commercial buildings. Because the primary focus of TSCA Title II is primary and secondary schools, and ensuring that asbestos-containing building materials in such schools are properly managed, primary and secondary schools are specifically excluded from the definition of the term "public and commercial building" in TSCA section 202. However, the rest of the definition signals Congress's intention for EPA to interpret the term broadly, because a public and commercial building is defined as "any building" other than a school building or a "residential apartment building" of fewer than 10 units. EPA's regulatory definition of "public and commercial building" at 40 CFR part 763, Subpart E, Appendix C, Asbestos Model Accreditation Plan, provides examples of the types of buildings covered, including industrial and office buildings, government-owned buildings, colleges, museums, airports, hospitals, churches, preschools, stores, warehouses and factories. Notwithstanding the differences in focus between TSCA Title II and Title

IV, EPA believes that a similar broad approach to interpreting "public building" and "commercial building" is warranted in this rulemaking. Of course, EPA must still determine which renovations in which buildings create lead-based paint hazards.

One other factor must be considered in interpreting the terms "public building" and "commercial building." In 1978, the CPSC banned the use of paint containing more than 0.06% lead by weight on toys, furniture, and interior and exterior surfaces in housing and other buildings and structures used by consumers (Ref. 30). However, this ban specifically exempted "[i]ndustrial (and commercial) building and equipment maintenance coatings, including traffic and safety marking coatings." It is likely that Congress was thinking of this ban, and the exemption, when it limited rulemaking authority in TSCA section 402(c)(3) to public buildings built before 1978, but applied no such limitation to commercial buildings.

With this in mind, EPA requests comment, information and data from the public on the types of buildings that should be considered "public buildings" or "commercial buildings." Specifically, EPA asks commenters to consider the following questions:

1. What types of buildings should be considered to be public buildings? What types should be considered to be commercial buildings? Should outbuildings and structures on the property be included in either category as they are in respect to target housing? Why?

2. What types of building classifications should be considered? Should the criteria for classifying buildings include the presence of young children, pregnant women, or population density? Is it possible to categorize buildings based on the contractors and the workforce renovating them (*i.e.,* do different contractors perform renovations in different types of public and commercial buildings, or do such work differently)? Is it possible to classify public and commercial buildings using building codes, zoning, or other characteristics? Should various classifications of buildings be treated differently with regard to required work practices, cleaning methods, and reoccupancy criteria?

3. Some public or commercial buildings are mixed-use buildings, with residences, schools and/or child care facilities in the buildings. If portions of the buildings are residences that are target housing (*i.e.,* the building was constructed before 1978 and the residences are not otherwise exempt), how should such buildings, or particular portions of them, be addressed in this rulemaking?

4. Every four years, the Department of Energy (DOE) collects information on the stock of commercial buildings in the United States, their energy-related building characteristics, and their energy consumption and expenditures. For the purposes of this survey, the Commercial Buildings Energy Consumption Survey (CBECS), commercial buildings include all buildings in which at least half of the floor space is used for a purpose that is not residential, industrial, or agricultural. This survey includes building types that might not traditionally be considered commercial, such as schools, correctional institutions, and buildings used for religious worship. More information on the CBECS can be found at *http://www.eia.doe.gov/emeu/cbecs/.* DOE also collects data every four years on buildings used for manufacturing activities. The Manufacturing Energy Consumption Survey (MECS) collects data on buildings used by the manufacturing sector, defined by NAICS codes 31 to 33. The MECS data does not include information on building vintage. More information on MECS can be found at *http://www.eia.doe.gov/emeu/mecs/contents.html.* What other information is available on the ages, types, sizes, and other characteristics of public and commercial buildings in the United States? In particular, what data are available on the age, types, sizes, and other characteristics of public or commercial buildings not included in the CBECS or MECS?

Based on the U.S. Census Bureau's 2003 American Housing Survey, there are 77,888,000 target housing units. "Target housing" is defined under section 401 of TSCA as any housing constructed before 1978, except housing for the elderly or persons with disabilities (unless any child under age 6 resides or is expected to reside in such housing) or any 0-bedroom dwelling. EPA estimates that there are 97,000 child-occupied facilities (COFs), as defined at 40 CFR 745.83. By comparison, according to DOE's CBECS data, there are 2,826,000 commercial buildings constructed prior to 1980. This includes building types such as schools and buildings used for religious worship, so there is some double-counting with the target housing and COFs figures described in this paragraph. According to DOE's MECS there are 368,000 manufacturing buildings, but this includes post-1978 buildings because MECS does not indicate the age of the buildings. EPA is not aware of data on the number of agricultural buildings.

The estimates from the CBECS and MECS data provide an indication of the relative magnitude of different building types, but at this time should not be considered reflective of the number of buildings that would be affected by a future EPA regulation. The number of buildings affected by an EPA regulation will depend on how EPA ultimately decides to define public and commercial buildings and the scope of the regulation within that definition. Aside from the number of structures, the characteristics of public and commercial buildings may differ from target housing and COFs, including the prevalence of lead-based paint; the frequency, type, and size of renovation work performed; and the baseline renovation work practices used. EPA is seeking information in this notice on all of these characteristics.

### *B. Lead-Based Paint Hazards and Public and Commercial Building Renovations*

*1. Leaded dust and debris created by exterior renovations.* The Dust Study, as described in Unit II.B., demonstrated that renovations on the exteriors of target housing and child-occupied facilities create an enormous amount of leaded dust that can contaminate soil in the vicinity. Including both bulk debris and dust created by these renovations, geometric mean lead levels in exterior samples from collection trays placed on top of the containment plastic covering the adjacent ground ranged from a low of 60,662 $\mu g/ft^2$ for door replacement to a high of 7,216,358 $\mu g/ft^2$ for removing paint with a high temperature heat gun (Ref. 16). EPA requests public comment on the extent to which this study should inform EPA's determination on lead-based paint hazards created by exterior renovations on public and commercial buildings, especially considering that some of the exterior renovations in the Dust Study were performed on a school building, which represents one type of public buildings.

Studies have demonstrated that exterior dust and soil that contains lead will contaminate interior building areas when dust and soil is tracked inside on the shoes and clothing of building occupants and visitors and through air exchange. In one study, a regression analysis was used to investigate those factors that were most statistically significantly associated with lead loadings in dust samples taken from residential carpets (Ref. 29). The study found that soil-lead concentration, the practice of removing shoes before entering, and the use of walk-off mats at entrances were all statistically

significant predictors of dust-lead loading in carpets. Dust and soil samples collected during the study were screened to include only particles smaller than 150 microns, because these particles were considered more likely to appear on a child's hand (Ref. 31).

EPA possesses data on the transport of leaded dust and debris resulting from exterior renovations. In EPA's Dust Study, measured lead dust and debris were found up to 18 feet from the exterior work area, and the average distance traveled by lead dust and debris was 10.81 feet (Ref. 16). However, it is important to keep in mind that exterior vertical containment was used where necessary during the Dust Study to ensure that leaded dust and debris did not contaminate adjacent properties, and this limited the distance leaded dust and debris could travel. Nevertheless, the Dust Study demonstrates that individuals residing in and visiting nearby properties could be exposed to leaded dust and debris created by exterior renovations when vertical containment or other containment measures are not used. Renovation firms or building owners and managers may not specifically consider the potential for these exposures on nearby properties when designing and performing renovations on the exteriors of public and commercial buildings.

Numerous studies have found elevated soil lead levels in residential areas surrounding residential and public and commercial buildings that have been demolished. In one study of a major building demolition, lead dust was found to travel up to 20 kilometers from the demolition site (Ref. 32). While EPA recognizes that this situation involves whole building demolition, the Agency expects that partial demolition and similar renovation activities would be expected to release similar types of lead-based paint dust particles with the ability to travel long distances and contaminate soil and other horizontal surfaces such as streets, playgrounds and other surfaces with which children could come into contact. Another study (Ref. 33) found increased levels of lead in alleys up to 100 meters from row house demolition. These lead levels were observed despite the fact that water wetting was used during demolition and debris removal to reduce the amount of dust released. In another study, abrasive blasting of a bridge was found to deposit 50% of the removed lead-based paint beyond 300 yards of the operation with a four mile per hour wind. This study indicates that current abrasive methods have the demonstrated potential to contaminate the surrounding environment and have the potential to create lead-based paint hazards (Ref. 34).

There are data on the maintenance of bridges and structures (such as water towers) that could be used to determine the extent of transport of lead dust resulting from exterior renovations. Paints on many of these steel structures contain up to 60–70% lead by weight (Ref. 35). Of particular interest are studies of the impacts of renovating these structures in urban areas or near schools. Evidence from steel structures suggests that exterior public and commercial building renovations can result in significant health impacts for children and others in close proximity to the renovation, repair and painting work.

*Given these considerations, EPA requests public comment, information, and data, especially peer-reviewed studies, on the following topics:*

a. What information is available on dust-lead and soil-lead levels generated by exterior renovations on public and commercial buildings? To what extent is the data from the Dust Study relevant? EPA is aware of information on the content of lead in urban and rural soils, and other settings, such as near highways. Is there more information on the content of lead in soil or what concentrations of lead are currently found in soil that EPA could use to evaluate the risk of human and environmental lead exposure from the renovation of public and commercial buildings?

b. To what extent will dust drift from exterior renovations, especially on public and commercial buildings, onto neighboring properties? Would this, for instance, resemble modeling plumes from smelters?

c. How far will lead-containing dust and debris travel from the exterior of properties undergoing renovation? What factors will influence the travel of lead dust? Such factors might include particular renovation practices, the time of year, wind conditions, ground cover (*e.g.,* asphalt, concrete, dirt, vegetation), average precipitation, or the height and concentration of surrounding structures.

d. To what extent can the data on building demolition or steel structure maintenance be used to predict the extent to which dust and debris travel from exterior public and commercial building renovations?

e. To what extent will exterior dust from the exterior renovation of public and commercial buildings be tracked into the interior of buildings being renovated or other buildings? To what extent will lead-based paint dust enter these buildings through open windows, doorways and air exchange?

f. What actions can a contractor take to prevent transportation of lead dust from exterior renovations or to prevent the lead dust from entering the environment?

*2. Leaded dust and debris generated by interior renovations in public and commercial buildings.* In determining which renovations in target housing and child-occupied facilities create lead-based paint hazards for the 2008 RRP Rule, EPA relied heavily on two Agency studies that evaluated dust-lead levels generated by renovations. One of these studies, the Environmental Field Sampling Study (Ref. 12), Phase I of the study conducted under TSCA section 402(c)(2), evaluated the amount of leaded dust generated by the following activities:

- Paint removal by abrasive sanding.
- Removal of large structures, including demolition of interior plaster walls.
- Window replacement.
- Carpet removal.
- HVAC repair or replacement, including duct work.
- Repairs resulting in isolated small surface disruptions, including drilling and sawing into wood and plaster.

The dust lead levels generated by abrasive sanding were evaluated through a literature survey. The results of the literature survey included both residential buildings and public or commercial buildings. The rest of the evaluated activities were performed as part of the study in residential buildings.

EPA also relied heavily on the Dust Study (Ref. 16) to promulgate the final RRP Rule. The Dust Study evaluated the dust-lead and soil-lead levels generated by the following activities in and on an unoccupied school building and/or unoccupied target housing:

- Making cut-outs in the walls.
- Replacing a window from the inside.
- Removing paint with high and low temperature heat guns.
- Removing paint by dry scraping.
- Removing paint with a power planer.
- Removing kitchen cabinets.

EPA requests public comment, information, and data, particularly peer-reviewed studies, on the dust-lead levels that are generated by renovations on the interiors of non-residential buildings. EPA also requests comment on the extent to which these two EPA studies should inform EPA's determination on lead-based paint hazards created by renovations in the interiors of public and commercial

buildings, especially considering that some of the renovations in the Dust Study were performed in a school building.

*3. Other evidence of lead-based paint hazards.* While EPA primarily relied on the two studies described in section III.B.2. to determine that renovations in and on target housing and child-occupied facilities create lead-based paint hazards, EPA also looked at the available evidence for a relationship between renovations and blood lead levels. In particular, EPA considered the results of the other three phases of the study conducted under TSCA section 402(c)(2). Phase II, the Worker Characterization and Blood Lead Study (Ref. 13), involved collecting data on blood lead and renovation and remodeling activities from workers. Notably, half of the renovations studied occurred in commercial buildings and half occurred in residential housing. Thus, this study provides evidence of a relationship between commercial building renovation activities and worker blood lead levels. Phase IV, the Worker Characterization and Blood-Lead Study of R&R (Renovation and Remodeling) Workers Who Specialize in Renovations of Old or Historic Homes (Ref. 15), was similar to Phase II, but focused on individuals who worked primarily in old historic buildings.

EPA also relied on the evidence presented by Phase III of the TSCA section 402(c)(2) study, the Wisconsin Childhood Blood-Lead Study (Ref. 14), which documented a relationship between renovation and remodeling activities and the blood-lead levels of resident children. This evidence of a relationship is corroborated by New York studies also discussed in II.D.4.

EPA also considered several studies conducted by the National Institute of Occupational Safety and Health (NIOSH) that assessed worker exposure and transport of lead dust from renovation activities (Refs. 36 and 37). For example, one study done at the University of California, Berkeley, assessed lead-based paint exposures of workers during exterior renovation work on campus buildings (Ref. 37). Estimated average exposures during dry manual sanding, dry manual scraping, power finish sanding, and power finish sanding with bag would exceed the permissible exposure limit (PEL) within an 8-hr period. Estimated average exposures for power sanding with HEPA exhaust, flame burning, wet manual sanding, and wet scraping would be below the PEL. Although it resulted in relatively low worker exposures, flame burning was among the tasks associated with the higher lead levels in air and settled dust levels in nearby areas (Ref. 37).

Lead-based paint is defined by TSCA as paint with lead levels equal to or exceeding 1.0 milligrams per square centimeter (mg/cm$^2$) or 0.5% by weight (TSCA section 401(9) (15 U.S.C. 2681(9))). However, OSHA states in 29 CFR 1926.62 that if lead is present in the workplace in any quantity the employer is required to make an initial determination of whether any employee's exposure to lead exceeds the action level (30 ug/m3) averaged over an 8 hour day. This position is supported by the following interpretations:

> OSHA's role is to protect workers from health and safety hazards, including exposure to harmful levels of lead, whatever the source. Accordingly, for all tasks governed by OSHA's Lead in Construction standard (29 CFR 1926.62) involving paints having any level of lead, employers must comply with the assessment measures and any applicable protections of that standard.

*https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=27319.*

> The lead-in-construction standard was intended to apply to any detectable concentration of lead in paint, as even small concentrations of lead can result in unacceptable employee exposures depending upon on the method of removal and other workplace conditions. Since these conditions can vary greatly, the lead-in-construction standard was written to require exposure monitoring or the use of historical or objective data to ensure that employee exposures do not exceed the action level. Historical data may be applied to all construction tasks involving lead. Objective data was intended to apply to all tasks other than those listed under paragraph 1926.62(d)(2) of the standard.

*https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=22701.*

EPA requests public comment, as well as additional information and data, particularly peer-reviewed studies, on the relationship between renovations in and on public and commercial buildings and blood lead levels in workers, building occupants, and visitors. EPA also requests public comment on the extent to which these blood-lead studies can inform EPA's determination on lead-based paint hazards created by public and commercial building renovations.

### *C. Prevalence of Leaded Paint and Lead Levels in Leaded Paint in and on Public and Commercial Buildings*

An important consideration in determining which renovations create lead-based paint hazards and how best to address those hazards is likely to be the prevalence of leaded paint disturbed and the level of lead in that paint. In issuing the 2008 RRP Rule covering renovations in target housing and child-occupied facilities, EPA relied heavily on two surveys sponsored by HUD. The first, the National Survey of Lead and Allergens in Housing, was a representative sampling of housing units where children could reside for lead-based paint, lead-based paint hazards, and allergens (Ref. 38). This survey provided valuable information on the prevalence of and levels of lead in lead-based paint in target housing. A similar survey, the First National Environmental Health Survey of Childcare Centers, was conducted in licensed child-care centers and included sampling for lead in paint, lead-based paint hazards, allergens, and pesticides (Ref. 39).

*EPA requests public input on these issues related to the presence of leaded paint in and on public and commercial buildings:*

1. What information and data are available on the prevalence of leaded paint? What information and data are available on the levels of lead (concentration or percentage of total) in such paint? Does the prevalence or lead level differ by building age, component or type (*e.g.,* interior or exterior; doors and windows, trim or walls; wood substrate or metal substrate)?
2. What information and data are available on the trends in prevalence and lead levels over time?
3. What available data would help EPA estimate the likelihood that a public or commercial building contains lead-based paint? Are there factors that should be considered other than the year in which it was constructed?
4. What voluntary consensus standards or other guidelines or specifications affect the prevalence of leaded paint and the levels of lead in such paint?
5. What federal, state, and local laws, regulations, or ordinances affect the prevalence of leaded paint and the lead levels in such paint?
6. What information is available on the current manufacture and import of lead-based paint for commercial building use?

### *D. Typical Renovation Activities and Building Management Practices for Public and Commercial Buildings*

*In making the determination which renovation activities in and on public and commercial buildings create lead-based paint hazards, EPA must evaluate information on the typical renovations performed and the typical practices used in performing these renovations. EPA is also interested in types of lead-*

*paint containing building components that may be reused during a renovation of a public or commercial building. EPA encourages the public to submit comments, information, and data relating to these considerations.*

1. What types of renovations are typically performed in and on public and commercial buildings, and how often is each type performed? What is the span or range, both typical and extreme, in size and duration of each type of renovation job?

2. Do renovation firms or the building owners or managers typically assess whether the paint the renovation firms will disturb during a renovation job in or on a public or commercial building contains lead? To what extent are there patterns in their making such assessments? Before hiring a renovation firm to perform a renovation, or performing a renovation using building maintenance staff, do public and commercial building owners or managers assess whether leaded paint is present? What methods and procedures are currently employed by contractors or building owners/managers to assess whether paint contains lead?

3. Do building owners or managers typically provide notice of the lead content of building paint to renovation firms, building occupants or the public? What triggers these notifications? Do renovation firms or building owners/managers typically provide advance notice of renovation activities to building occupants or the public? To what extent are there patterns in their making such notifications?

4. Do renovation firms typically separate renovation work areas from other areas of the building or grounds to limit access and minimize the spread of dust, chips, and debris? How often are the following practices used to accomplish this separation, and to what extent are there patterns in their using such practices? To what extent have renovation firms or the public building owners or managers assessed the efficacy of these separation practices on the projects where they are used, and what are the results of such assessments?

- Restricting access of other building occupants or the public into or around the building during renovation through warning signs and/or barriers.
- Closing the windows of the building during exterior renovations and the windows of other buildings adjacent to the work area.
- Placing plastic on the ground to capture the falling chips and paint dust during exterior renovations.
- Avoiding exterior renovation work during windy conditions.
- Shutting off the ventilation system and sealing the supply and return grills during interior renovation.
- Sealing off the work area (establishing a work area containment system) for interior renovations.
- Maintaining negative pressure in the work area with respect to the adjacent areas during interior renovations.
- Follow OSHA housekeeping provisions specified in the OSHA lead standards at 29 CFR 1926.62 or 29 CFR 1910.1025, or practice good housekeeping in the work area.

5. What clean-up practices do renovation firms typically follow during and after renovation activities in and on public and commercial buildings? How often are brooms used? How often is wet cleaning or mopping performed? How often is vacuuming performed, and, in particular, how often are shop vacuums used, and how often are high-efficiency particulate air (HEPA) vacuums used?

6. How often is dust wipe testing for leaded dust performed after renovations in public and commercial buildings? How often is soil tested for lead after renovations on public and commercial buildings, especially after exterior renovations? Do renovation firms or building owners/managers use any other methods to assess lead levels in dust or soil remaining after renovations? Are the results of these tests or assessments used to determine whether the work area may be re-occupied by other building occupants or visited by the public?

7. What routine cleaning procedures do the owners and managers of public and commercial buildings follow, apart from renovation projects? How often are these procedures followed? Are there differences in cleaning procedures and or frequencies between older (*e.g.,* pre-1978) buildings and newer (*e.g.,* post-1977) buildings?

8. To what extent are building components that contain lead-based paint reused? To what extent are reused components tested for lead-based paint before reuse?

9. To what extent are measures taken to avoid the release of lead dust during the installation and use of reused lead-contaminated building materials (such as paint removal techniques)?

10. What information is available on the scale and types of new renovation and repair projects on public and commercial buildings?

### *E. Renovation Waste*

Waste from building renovations can create lead-contaminated waste. Lead-contaminated waste from the renovation of residences, regardless of who generates the waste, is excluded from the Subtitle C Hazardous Waste Regulations under the Resource Conservation and Recovery Act (RCRA) (Ref. 40). This includes waste from the renovation of single family homes, apartment buildings, public housing, and military barracks. This waste may be disposed of in a municipal solid waste landfill or in a construction and demolition (C&D) landfill. However this exclusion does not apply to lead-contaminated waste generated from public and commercial building renovations. That waste must be managed in accordance with the RCRA Hazardous Waste Regulations. Given this regulatory status, EPA requests public comment, information, and data responsive to the following questions:

1. What information is available on current practices for the cleanup, handling, and disposal of lead-contaminated wastes after public and commercial building renovations?

2. Can you provide information and data on the amount of waste from renovation activities in public and commercial buildings that a contractor might currently manage as RCRA Hazardous Waste? What materials are typically included in this waste?

3. To what extent (*i.e.* quantities) is lead-contaminated waste from public and commercial building renovations recycled? What information is available on the methods and practices currently in use for recycling such wastes?

4. To what extent (*i.e.* quantities) are lead-containing building components and other waste removed from public and commercial buildings during renovations reused? What information is available on the methods and practices currently employed for reusing such components?

5. Other than RCRA, what federal, state or local statutes, regulations, ordinances, or protocols govern the cleanup, handling, disposal, and reuse of lead-contaminated waste from public and commercial building renovations?

6. What measures are typically taken to avoid the release of leaded dust during the removal and disposal of lead-contaminated wastes from public and commercial building renovations?

### *F. The Renovation Workforce in Public and Commercial Buildings*

In determining which public and commercial building renovations create lead-based paint hazards and in designing safe, reliable, and effective work practice standards to address those lead-based paint hazards, EPA must take into account the typical renovation workforce for public and commercial buildings. Accordingly, EPA seeks

public comment and data to help inform the Agency's understanding of this workforce.

1. What kinds of contractors perform renovations in and on public and commercial buildings? How often is building maintenance staff used to perform renovations in and on public and commercial buildings? What differences are there in the size or type of projects typically conducted by contractors vs. building maintenance staff?

2. When hiring a contractor to perform a renovation, how often do building owners/managers check to see whether the personnel who will be performing the renovation have been trained in lead-safe work practices, *i.e.,* work practices designed to minimize the creation of leaded dust and debris, control the spread of such dust and debris, and properly clean up this dust and debris after the renovation has been completed? How often do building owners and managers train (either personally or through consultants) building maintenance staff in lead-safe work practices? What kind of lead-safe work practices training do contractor employees or building maintenance staff typically receive?

3. How often do building owners/managers or renovation contractors hire consultants trained to evaluate lead-based paint and lead-based paint hazards, architects, engineers, or others, to assess the renovation work area before work begins? How often do building owners/managers or renovation contractors hire consultants trained in lead-safe work practices, lead-based paint inspection, lead risk assessment, and/or lead project design to assist them in designing and conducting renovation projects? What are the patterns for the use of such consultants in these various situations?

4. Who typically provides health, safety, and environmental oversight during renovation projects in public and commercial buildings—the building owner, the building manager, the construction contractor, or another party? Are other specially qualified individuals involved in the oversight of renovation projects? Are interior and exterior renovations handled differently in this respect?

5. Typically, do contractors who perform renovations in public and commercial buildings also perform renovations in residential buildings? Are the same work practices followed in both settings? To what extent are the contractor employees the same from job to job? How likely is it that an employee used to perform a public or commercial building renovation will have received the training required by the 2008 RRP Rule for renovation work in target housing and child-occupied facilities? Do renovation contractors in public and commercial buildings typically establish and enforce standard renovation work practice procedures for their employees?

*G. Exposure Considerations*

In determining which public and commercial building renovations create lead-based paint hazards and in fashioning reliable, safe, and effective work practices for those renovations, EPA must consider the exposures of building occupants and visitors. To help inform EPA's decision-making, EPA requests public comment, information, and data, particularly relevant peer-reviewed studies, related to exposures.

1. What are the pathways for exposure in each type of public or commercial building?

2. While the Agency has developed research-based daily activity patterns for general use in its analyses for children and adults, none of the patterns distinguish activities based on the character or ownership of the buildings where activities occur (Ref. 41). What data or studies are available that would assist EPA in estimating the amount of time that any particular individual will spend in public and commercial buildings and what portion of that time will be in a building containing leaded paint or lead-based paint hazards? What data or studies exist that characterize the range or distribution of time spent by typical individuals? How much variation in exposure exists in exposure by typical people?

3. What information and data are available on occupancy rates (*e.g.,* number of people, days per year of occupancy), exposed population (*e.g.,* demographic characteristics, reason for being in the building (working, visiting, etc.)), and time-activity patterns of occupants of each type of public or commercial building?

4. How often are public and commercial buildings assessed to determine the presence, distribution and extent of lead-based paint?

5. To what extent will people other than renovation workers, such as other building occupants, visitors, passers-by, and occupants of nearby buildings, be exposed to leaded dust and debris created by public and commercial building renovations? For instance, when scaffolding is installed, how likely are dust and debris to waft down to passersby or to fill the ambient air? To what extent do scaffolding enclosures affect the dispersion of the dust and debris?

6. What information is available on the number of potentially-exposed occupants of buildings undergoing renovations or buildings recently renovated, the duration of the occupants' exposure per work day, and the number of days or hours exposed per year during and after exterior and interior renovations? To what extent are these exposure rates affected by the scheduling of the renovations, *e.g.,* to what extent are renovations conducted during shifts or days when few regular occupants of the buildings are present (typically nights and weekends)?

7. What information and data are available on the proximity of residential properties to public or commercial buildings? What is the distribution of distances of residences, schools and childcare facilities from public or commercial buildings? In particular, to what extent are public or commercial buildings mixed-use buildings, with residences, schools and/or child care facilities in the buildings? What information and data are available on the correlation between the distribution of distances of residences, schools and day care facilities from public or commercial buildings and average incomes of communities or neighborhoods? For example, many low income communities are in mixed-use neighborhoods.

8. What information and data are available on the demographics of mixed-use neighborhoods?

9. For low income communities in mixed-use neighborhoods, particularly those in which the housing stock is primarily pre-1978, how should EPA consider multiple exposures from both residential buildings and public and commercial buildings?

10. Do communities in mixed-use neighborhoods have higher burdens of lead exposure? What factors should EPA consider in assessing the extent to which renovations in and on public and commercial buildings contribute to disproportionate impacts?

11. What studies and other sources of information are available on the frequency of use or effectiveness of work practices designed to prevent other building occupants and visitors and persons in nearby buildings from being exposed to leaded dust and debris created by renovations in and on public and commercial buildings?

12. To what extent have recent building renovations or constructions installed reused building materials that are coated with lead-based paint? To what extent have installers abated or used techniques to eliminate worker or occupant exposure to lead from these materials?

13. To what extent do green building certification systems encourage the reuse of lead-contaminated building materials? To what extent do these systems encourage lead abatement of reused materials?

## IV. References

As indicated under **ADDRESSES**, a docket has been established for this rulemaking under docket ID number EPA–HQ–OPPT–2010–0173. The following is a listing of the documents that are specifically referenced in this document. The docket includes these documents and other information considered by EPA, including documents that are referenced within the documents that are included in the docket, even if the referenced document is not physically located in the docket. For assistance in locating these other documents, please consult the technical contact listed under **FOR FURTHER INFORMATION CONTACT**.


1. President's Task Force on Environmental Health Risks and Safety Risks to Children. Eliminating Childhood Lead Poisoning: A Federal Strategy Targeting Lead Paint Hazards (February 2000).
2. U.S. Department of Health and Human Services (HHS), Public Health Service (PHS), Centers for Disease Control and Prevention (CDC). Preventing Lead Poisoning in Young Children; A Statement by the Centers for Disease Control and Prevention August 2005).
3. USEPA. Lead; Renovation, Repair, and Painting Program; Proposed Rule. **Federal Register** (71 FR 1588, January 10, 2006).
4. USEPA. Lead; Requirements for Lead-Based Paint Activities in Target Housing and Child-Occupied Facilities: Final Rule. **Federal Register** (61 FR 45778, August 29, 1996).
5. USEPA. Lead; Fees for Accreditation of Training Programs and Certification of Lead-based Paint Activities Contractors; Final Rule. **Federal Register** (64 FR 31091, June 9, 1999).
6. USEPA. Lead; Notification Requirements for Lead-based Paint Abatement Activities Training; Final Rule. **Federal Register** (69 FR 18489, April 8, 2004).
7. USEPA, Consumer Product Safety Commission (CPSC), U.S. Department of Housing and Urban Development (HUD). Protect Your Family From Lead in Your Home (EPA-747–K–99–001, June 2003).
8. Department of Housing and Urban Development (HUD), USEPA. Lead; Requirements for Disclosure of Known Lead-Based Paint and/or Lead-Based Paint Hazards in Housing; Final Rule. **Federal Register** (61 FR 9064, March 6, 1996).
9. USEPA. Lead; Requirements for Hazard Education Before Renovation of Target Housing; Final Rule. **Federal Register** (63 FR 29907, June 1, 1998).
10. USEPA. Lead; Identification of Dangerous Levels of Lead; Final Rule. **Federal Register** (66 FR 1206, January 5, 2001).
11. USEPA. Reducing Lead Hazards When Remodeling Your Home (EPA747–K–97–001, September 1997).
12. USEPA. Lead Exposure Associated With Renovation and Remodeling Activities: Phase I, Environmental Field Sampling Study (EPA 747–R–96–007, May 1997).
13. USEPA. Lead Exposure Associated With Renovation and Remodeling Activities: Phase II, Worker Characterization and Blood-Lead Study (EPA747–R–96–006, May 1997).
14. USEPA. Lead Exposure Associated With Renovation and Remodeling Activities: Phase III, Wisconsin Childhood Blood-Lead Study (EPA 747–R–99–002, March 1999).
15. USEPA. Lead Exposure Associated With Renovation and Remodeling Activities: Phase IV, Worker Characterization and Blood-Lead Study of R&R Workers Who Specialize in Renovation of Old or Historic Homes (EPA747–R–99–001, March 1999).
16. USEPA. Characterization of Dust Lead Levels After Renovation, Repair, and Painting Activities. (November 13, 2007).
17. USEPA. Lead; Renovation, Repair, and Painting Program; Final Rule. **Federal Register** (73 FR 21692, April 22, 2008).
18. USEPA, Sierra Club, etc. Settlement. (August, 2009).
19. USEPA. Lead; Amendment to the Opt-out and Recordkeeping Provisions in the Renovation, Repair, and Painting Program; Proposed Rule. **Federal Register** (74 FR 55506, October 28, 2009).
20. Sierra Club, etc. Petition to Lower Dust Lead Hazard Standard. (2009)
21. USEPA. Response to Petition on Dust Lead Hazard Standard (October, 2009).
22. USEPA. Air Quality Criteria for Lead (September 29, 2006).
23. USEPA. Framework for Cumulative Risk Assessment. Risk Assessment Forum, Washington, DC, EPA/630/P–02/001F (May 2003).
24. USEPA. Review of the National Ambient Air Quality Standards for Particulate Matter: Policy Assessment of Scientific and Technical Information, OAQPS Staff Paper. EPA–452/R–05–005a. Office of Air Quality Planning and Standards, Research Triangle Park (2005).
25. Jones, Robert L., David M. Homa, Pamela A. Meyer, Debra J. Brody, Kathleen L. Caldwell, James L. Pirkle, and Mary Jean Brown. "Trends in Blood Lead Levels and Blood Lead Testing Among U.S. Children Aged 1 to 5 Years, 1988–2004." Pediatrics 2009, Vol. 123, No. 3, pp. e376–385, March 2009.
26. HHS, PHS, CDC. "Children with Elevated Blood Lead Levels Attributed to Home Renovation and Remodeling Activities—New York, 1993–1994." Morbidity and Mortality Weekly Report (45(51); 1120–1123, January 3, 1997).
27. HHS, PHS, CDC. Children with Elevated Blood Lead Levels Related to Home Renovation, Repair, and Painting Activities—New York State, 2006–2007. Morbidity and Mortality Weekly Report (58(03); 55–58, January 30, 2009).
28. Reissman, Dori B., Thomas D. Matte, Karen L. Gurnite, Rachel B. Kaufmann, and Jessica Leighton. "Is Home Renovation or Repair a Risk Factor for Exposure to Lead Among Children Residing in New York City?" Journal of Urban Health: Bulletin of the New York Academy of Medicine. Vol. 79, No. 4, 502–511, December 2005.
29. USEPA. Lead; Requirements for Lead-Based Paint Activities: Proposed Rule. **Federal Register** (59 FR 45872, September 2, 1994).
30. CPSC. **Federal Register** (42 FR 44199, September 1, 1977, as amended at 43 FR 8515, March 2, 1978).
31. Roberts, J.W., D.E. Camann, and T.M. Spittler. "Reducing Lead Exposure from Remodeling and Soil Track-In in Older Homes." In: *Proceedings, Annual Meeting—Air and Waste Management Association.* Publication No. 91–134.2. (1991a).
32. Stefani D, D. Wardman, T. Lambert. The Implosion of the Calgary General Hospital: Ambient Air Quality Issues. J Air Waste Manag Assoc. 2005 Jan; 55(1):52–9.
33. Farfel M.R., A.O. Orlova, P.S. Lees, C. Rohde, P.J. Ashley, J. Chisolm. "A Study of Urban Housing Demolition as a Source of Lead in Ambient Dust on Sidewalks, Streets, and Alleys." Environ Res. 2005 Oct; 99(2):204–13. Epub 2004 Dec 15.
34. Snyder, M.K. and D. Bendersky. "Removal of Lead Based Bridge Paints." Midwest Research Institute. National Cooperative Highway Research Program Report #265 for the Transportation Research Board, National Research Council, December 1983.
35. State of Rhode Island and Providence Plantations; Department of the Attorney General. Rhode Island Lead Nuisance Abatement Plan (September 14, 2007).
36. National Institute for Occupational Safety and Health (NIOSH). Health Hazard Evaluation; Vermont Housing & Conservation Board. HETA #98–0285–2989 Montpelier, Vermont (December 2005).
37. NIOSH. Health Hazard Evaluation; University of California, Berkley. HETA #99–0113–2853 Berkeley, California (July 2001).
38. HUD. National Survey of Lead and Allergens in Housing, Volume I: Analysis of Lead Hazards, Final Report, Revision 7.1. (October 31, 2002).
39. HUD. First National Environmental Health Survey of Child Care Centers, Volume I: Analysis of Lead Hazards, Final Report. (July 15, 2003).
40. USEPA, Office of Solid Waste (OSW). Memorandum from Elizabeth A. Cotsworth, Director, "Regulatory Status of Waste Generated by Contractors and Residents from Lead-Based Paint Activities Conducted in Households" (July 31, 2000).
41. USEPA. Exposure Factors Handbook (Final Report) EPA/600/P–95/002F a-c (1997).


## V. Statutory and Executive Order Reviews

Under Executive Order 12866, entitled "Regulatory Planning and

Review" (58 FR 51735, October 4, 1993), this action was submitted to the Office of Management and Budget (OMB) for review. Any changes to the document that were made in response to comments received by EPA during that review have been documented in the docket as required by the Executive Order.

Since this document does not impose or propose any requirements, and instead seeks comments and suggestions for the Agency to consider in possibly developing a subsequent proposed rule, the various other review requirements that apply when an agency imposes requirements do not apply to this action. Nevertheless, as part of your comments on this document, you may include any comments or information that you have regarding the various other review requirements.

In particular, EPA is interested in any information that would help the Agency to assess the potential impact of a rule on small entities pursuant to the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*); to consider voluntary consensus standards pursuant to section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104–113, section 12(d) (15 U.S.C. 272 note); to consider environmental health or safety effects on children pursuant to Executive Order 13045, entitled "Protection of Children from Environmental Health Risks and Safety Risks" (62 FR 19885, April 23, 1997); or to consider human health or environmental effects on minority or low-income populations pursuant to Executive Order 12898, entitled "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations" (59 FR 7629, February 16, 1994).

EPA specifically requests information and data to facilitate its analyses in the following two areas:

*a. Small Entities. EPA is particularly interested in receiving comments and information about the various characteristics of potentially impacted small entities that would facilitate the Agency's evaluation of the number of firms that might experience an impact from a rulemaking in this area, as well as an assessment of the potential size of that impact on small entities. In commenting or providing information about small entities that might be impacted by a rulemaking in this area, please note that the phrase "small entities" encompasses small businesses, small governmental jurisdictions, and small organizations. In the analysis the Agency expects to perform under the RFA, these entities are specifically defined in sections 601(3)–(5) of the RFA. The definitions for "small business" are codified in the Small Business Administration's (SBA) regulations at 13 CFR 121.201. SBA defines small business by category of business using the NAICS–Codes. (http://www.sba.gov/regulations/121/201.htm) Small business default definitions can be found on SBA's internet site at http://www.sba.gov/size/indextableofsize.html. A "small governmental jurisdiction" is "a government of a city, county, town, school district or special district with a population of less than 50,000." A "small organization" is any "not-for-profit enterprise which is independently owned and operated and is not dominant in its field."*

*b. Environmental Justice. EPA is particularly interested in receiving comment and information about potential impacts—both benefits and costs—on the human health or environmental conditions in minority or low-income populations. Such information would facilitate the Agency's consideration of environmental justice during the development of the proposed rule.*

This information will be used in the identification and evaluation of options for the proposed rule, and will inform the analyses that the Agency intends to prepare for the proposed rule. Any comments on this topic should be submitted to the Agency in the manner specified under **ADDRESSES**. The Agency will consider such comments during the development of any subsequent proposed rule as it takes appropriate steps to address any applicable requirements.

### List of Subjects in 40 CFR Part 745

Environmental protection, Hazardous substance, Lead poisoning, Reporting and recordkeeping requirements.

Dated: April 22, 2010.

**Lisa P. Jackson,**

*Administrator.*

[FR Doc. 2010–10097 Filed 5–5–10; 8:45 am]

**BILLING CODE 6560–50–P**

## DEPARTMENT OF THE INTERIOR

## Fish and Wildlife Service

## 50 CFR Part 83

**[Docket No. FWS–R9–WSR–2010–0009] [91400–5110–POLI–7B; 91400–9410–POLI–7B]**

**RIN 1018-AX00**

## Removing Regulations Implementing the Fish and Wildlife Conservation Act

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Proposed rule.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service), propose to remove our regulations implementing the Fish and Wildlife Conservation Act of 1980. The Act authorized financial and technical assistance to States to design conservation plans and programs to benefit nongame species; however, funds never became available to carry out the Act, and we do not expect funds to become available in the future.

**DATES:** We will consider comments received or postmarked on or before July 6, 2010.

**ADDRESSES:** You may submit comments by one of the following methods:

- Federal eRulemaking Portal: *http://www.regulations.gov*. Follow the instructions for submitting comments to Docket No. FWS–R9–WSR–2010–0009.
- U.S. mail or hand-delivery: Public Comments Processing, Attn: FWS–R9–WSR–2010–0009; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, Suite 222; Arlington, VA 22203.

We will not accept e-mail or faxes. We will post all public comments on *http://www.regulations.gov*. This generally means that we will post any personal information you provide us (see the Public Comments section below for more information).

**FOR FURTHER INFORMATION CONTACT:** Joyce Johnson, Wildlife and Sport Fish Restoration Program, Division of Policy and Programs, U.S. Fish and Wildlife Service, 703–358–2156.

**SUPPLEMENTARY INFORMATION:**

### Background

The Service manages or comanages 54 financial assistance programs. Our Wildlife and Sport Fish Restoration Program manages, in whole or in part, 19 of these programs. We implement some of these programs via regulations in title 50 of the Code of Federal Regulations (CFR), particularly in subchapter F "Financial Assistance—Wildlife and Sport Fish Restoration Program," which currently includes parts 80 through 86.

The regulations at part 83 implement the Fish and Wildlife Conservation Act of 1980 (16 U.S.C. 2901–2911). This act authorized the Service to give financial and technical assistance to States and other eligible jurisdictions to design conservation plans and programs to benefit nongame species. The regulations tell the fish and wildlife agencies of the 50 States, the Commonwealths of Puerto Rico and the Northern Mariana Islands, the District of Columbia, and the territories of Guam, the U.S. Virgin Islands, and American Samoa how they can take part in this grant program. However, neither the Fish and Wildlife Conservation Act nor any subsequent legislation established a continuing source of funds for this grant

program, nor have annual Appropriations Acts provided any funds for it. In 1984, the Service's Western Energy and Land Use Team prepared a document identifying potential funding sources, but none of these options were adopted.

Congress has appropriated funds in recent years for State conservation planning and programs to benefit nongame species, but none of these grant programs have been under the authority of the Fish and Wildlife Conservation Act. Instead, Congress made funds available through the Wildlife Conservation and Restoration grant program in 2001 and—during each year since 2002—the State Wildlife Grants program. Based on this 30–year record, we do not expect that the grant program authorized by the Fish and Wildlife Conservation Act of 1980 will receive any funding, so we propose to remove its implementing regulations.

**Public Comments**

You may submit your comments and materials concerning this proposed rule by one of the methods listed in the **ADDRESSES** section. We will not accept comments sent by e-mail or fax or to an address not listed in the **ADDRESSES** section. Finally, we will not consider hand-delivered comments that we do not receive, or mailed comments that are not postmarked, by the date specified in the DATES section.

Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment – including your personal identifying information – may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

**Required Determinations**

*Clarity of This Regulation*

We are required by Executive Orders 12866 and 12988 and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule we publish must:

(a) Be logically organized;

(b) Use the active voice to address readers directly;

(c) Use clear language rather than jargon;

(d) Be divided into short sections and sentences; and

(e) Use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments by one of the methods listed in the "**ADDRESSES**" section. To better help us revise the rule, your comments should be as specific as possible. For example, you should tell us the numbers of the sections or paragraphs with unclear writing, which sections or sentences are too long, the sections where you feel lists or tables would be useful, etc.

*Regulatory Planning and Review*

The Office of Management and Budget (OMB) has determined that this rule is not significant and has not reviewed this rule under E.O. 12866. OMB bases its determination on the following four criteria:

(a) Whether the rule will have an annual effect of $100 million or more on the economy or adversely affect an economic sector, productivity, jobs, the environment, or other units of the government.

(b) Whether the rule will create inconsistencies with other Federal agencies' actions.

(c) Whether the rule will materially affect entitlements, grants, user fees, loan programs, or the rights and obligations of their recipients.

(d) Whether the rule raises novel legal or policy issues.

*Regulatory Flexibility Act*

The Regulatory Flexibility Act requires an agency to consider the impact of proposed rules on small entities, i.e., small businesses, small organizations, and small government jurisdictions. If there is a significant economic impact on a substantial number of small entities, the agency must perform a Regulatory Flexibility Analysis. This is not required if the head of an agency certifies the rule would not have a significant economic impact on a substantial number of small entities. The Small Business Regulatory Enforcement Fairness Act (SBREFA) amended the Regulatory Flexibility Act to require Federal agencies to state the factual basis for certifying that a rule would not have a significant economic impact on a substantial number of small entities.

We are removing a rule governing an unfunded grant program. Consequently, we certify that the removal would not have a significant economic effect on a substantial number of small entities; a Regulatory Flexibility Analysis is not required.

In addition, this proposed rule is not a major rule under SBREFA and would not have a significant impact on a substantial number of small entities because it does not:

a. Have an annual effect on the economy of $100 million or more.

b. Cause a major increase in costs or prices for consumers; individual industries; Federal, State, or local government agencies; or geographic regions.

c. Would not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

*Unfunded Mandates Reform Act*

The Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*) establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. The Act requires each Federal agency, to the extent permitted by law, to prepare a written assessment of the effects of a proposed rule with Federal mandates that may result in the expenditure by State, local, and tribal governments, in aggregate, or by the private sector, of $100 million or more (adjusted annually for inflation) in any 1 year. We have determined the following under the Unfunded Mandates Reform Act:

a. As discussed in the determination for the Regulatory Flexibility Act, this proposed rule would not have a significant economic effect on a substantial number of small entities.

b. The regulation does not require a small government agency plan or any other requirement for expenditure of local funds.

c. There are no mandated costs associated with the proposed rule.

d. This proposed rule would not produce a Federal mandate of $100 million or greater in any year; i.e., it is not a "significant regulatory action" under the Unfunded Mandates Reform Act.

*Takings*

This proposed rule would not have significant takings implications under E.O. 12630 because it would not have a provision for taking private property. Therefore, a takings implication assessment is not required.

*Federalism*

This proposed rule would not have sufficient Federalism effects to warrant preparation of a Federalism assessment under E.O. 13132. It would not interfere with the States' ability to manage themselves or their funds.

*Civil Justice Reform*

The Office of the Solicitor has determined under E.O. 12988 that the rule would not unduly burden the judicial system and that it meets the

requirements of sections 3(a) and 3(b)(2) of E.O. 12988.

*Paperwork Reduction Act*

This proposed rule does not contain any new collections of information that require approval by OMB under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). This rule will not impose recordkeeping or reporting requirements on State or local governments, individuals, businesses, or organizations. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

*National Environmental Policy Act*

We have analyzed this rule under the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*) and part 516 of the Departmental Manual (DM). This rule does not constitute a major Federal action significantly affecting the quality of the human environment. An environmental impact statement/assessment is not required because this proposed action qualifies for the categorical exclusion for administrative changes provided in 516 DM 2, Appendix 1, section 1.10.

*Government-to-Government Relationship with Tribes*

We have evaluated potential effects on federally recognized Indian tribes under the President's memorandum of April 29, 1994, "Government-to-Government Relations with Native American Tribal Governments" (59 FR 22951), E.O. 13175, and 512 DM 2. We have determined that there are no potential effects. This proposed rule would not interfere with the tribes' ability to manage themselves or their funds.

*Energy Supply, Distribution, or Use*

E.O. 13211 addresses regulations that significantly affect energy supply, distribution, and use and requires agencies to prepare Statements of Energy Effects when undertaking certain actions. This rule is not a significant regulatory action under E.O. 12866 and would not affect energy supplies, distribution, or use. Therefore, no Statement of Energy Effects is required.

**List of Subjects in 50 CFR Part 83**

Fish, Grant programs—natural resources, Reporting and recordkeeping requirements, Wildlife.

**Proposed Regulation Promulgation**

For the reasons discussed in the preamble, under the authority of 16 U.S.C. 2901, we propose to amend subchapter F of chapter I, title 50 of the Code of Federal Regulations, as follows:

Part 83—[Removed and Reserved]

Remove and reserve part 83, consisting of §§ 83.1 through 83.21.

Dated: April 6, 2010.

**Thomas L. Strickland,**

*Assistant Secretary for Fish and Wildlife and Parks.*

[FR Doc. 2010–10604 Filed 5–5–10; 8:45 am]

**BILLING CODE 4310–55–S**

# Notices

Federal Register
Vol. 75, No. 87
Thursday, May 6, 2010

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

### Rural Business-Cooperative Service

### Notice of Contract Proposal (NOCP) for Payments to Eligible Advanced Biofuel Producers

**AGENCY:** Rural Business-Cooperative Service, USDA.

**ACTION:** Notice.

**SUMMARY:** This Notice announces the acceptance of applications to enter into Contracts to make payments to Eligible Advanced Biofuel Producers under the Bioenergy Program for Advanced Biofuels to support and ensure an expanding production of Advanced Biofuels. Under this Notice, applications will be accepted for Biorefineries that produce transportation fuels that meet the Renewable Fuel Standard or are currently undergoing an appeal to the U.S. Environmental Protection Agency for inclusion in the Renewable Fuel Standard, or that produce non-transportation renewable energy that results in a reduction in greenhouse gases. The Agency will authorize up to $40 million in funding for this program for fiscal year (FY) 2010.

**DATES:** Applications for participating in this program for Fiscal Year 2010 must be received between May 6, 2010 and July 6, 2010.

**ADDRESSES:** Application materials may be obtained by contacting the USDA, Rural Development State Office, Renewable Energy Coordinator. Submit applications to the Rural Development State Office in the State in which the applicant's principal office is located.

**USDA Rural Development State Renewable Energy Coordinators**

**Note:** Telephone numbers listed are not toll-free.

*Alabama*

Quinton Harris, USDA Rural Development, Sterling Centre, Suite 601, 4121 Carmichael Road, Montgomery, AL 36106–3683, (334) 279–3623, *Quinton.Harris@al.usda.gov.*

*Alaska*

Dean Stewart, USDA Rural Development, 800 West Evergreen, Suite 201, Palmer, AK 99645–6539, (907) 761–7722, *dean.stewart@ak.usda.gov.*

*Arizona*

Alan Watt, USDA Rural Development, 230 North First Avenue, Suite 206, Phoenix, AZ 85003–1706, (602) 280–8769, *Alan.Watt@az.usda.gov.*

*Arkansas*

Tim Smith, USDA Rural Development, 700 West Capitol Avenue, Room 3416, Little Rock, AR 72201–3225, (501) 301–3280, *Tim.Smith@ar.usda.gov.*

*California*

Philip Brown, USDA Rural Development, 430 G Street, #4169, Davis, CA 95616, (530) 792–5811, *Philip.brown@ca.usda.gov.*

*Colorado*

April Dahlager, USDA Rural Development, 655 Parfet Street, Room E–100, Lakewood, CO 80215, (720) 544–2909, *april.dahlager@co.usda.gov.*

*Connecticut*

Charles W. Dubuc, USDA Rural Development, 451 West Street, Suite 2, Amherst, MA 01002, (401) 826–0842 X 306, *Charles.Dubuc@ma.usda.gov.*

*Delaware*

Bruce Weaver, USDA Rural Development, 1221 College Park Drive, Suite 200, Dover, DE 19904, (302) 857–3626, *Bruce.Weaver@de.usda.gov.*

*Federated States of Micronesia*

Tim O'Connell, USDA Rural Development, Federal Building, Room 311, 154 Waianuenue Avenue, Hilo, HI 96720, (808) 933–8313, *Tim.Oconnell@hi.usda.gov.*

*Florida*

Joe Mueller, USDA Rural Development, 4440 NW. 25th Place, Gainesville, FL 32606, (352) 338–3482, *joe.mueller@fl.usda.gov.*

*Georgia*

J. Craig Scroggs, USDA Rural Development, 111 E. Spring St., Suite B, Monroe, GA 30655, Phone 770–267–1413 ext. 113, *craig.scroggs@ga.usda.gov.*

*Guam*

Tim O'Connell, USDA Rural Development, Federal Building, Room 311, 154 Waianuenue Avenue, Hilo, HI 96720, (808) 933–8313, *Tim.Oconnell@hi.usda.gov.*

*Hawaii*

Tim O'Connell, USDA Rural Development, Federal Building, Room 311, 154 Waianuenue Avenue, Hilo, HI 96720, (808) 933–8313, *Tim.Oconnell@hi.usda.gov.*

*Idaho*

Brian Buch, USDA Rural Development, 9173 W. Barnes Drive, Suite A1, Boise, ID 83709, (208) 378–5623, *Brian.Buch@id.usda.gov.*

*Illinois*

Molly Hammond, USDA Rural Development, 2118 West Park Court, Suite A, Champaign, IL 61821, (217) 403–6210, *Molly.Hammond@il.usda.gov.*

*Indiana*

Jerry Hay, USDA Rural Development, 2411 N. 1250 W., Deputy, IN 47230, (812) 873–1100, *Jerry.Hay@in.usda.gov.*

*Iowa*

Teresa Bomhoff, USDA Rural Development, 873 Federal Building, 210 Walnut Street, Des Moines, IA 50309, (515) 284–4447, *teresa.bomhoff@ia.usda.gov.*

*Kansas*

David Kramer, USDA Rural Development, 1303 SW First American Place, Suite 100, Topeka, KS 66604–4040, (785) 271–2744, *david.kramer@ks.usda.gov.*

*Kentucky*

Scott Maas, USDA Rural Development, 771 Corporate Drive, Suite 200,

Lexington, KY 40503, (859) 224–7435, *scott.maas@ky.usda.gov.*

*Louisiana*

Kevin Boone, USDA Rural Development, 905 Jefferson Street, Suite 320, Lafayette, LA 70501, (337) 262–6601, Ext. 133, *Kevin.Boone@la.usda.gov*.

*Maine*

John F. Sheehan, USDA Rural Development, 967 Illinois Avenue, Suite 4, P.O. Box 405, Bangor, ME 04402–0405, (207) 990–9168, *john.sheehan@me.usda.gov*.

*Maryland*

Bruce Weaver, USDA Rural Development, 1221 College Park Drive, Suite 200, Dover, DE 19904, (302) 857–3626, *Bruce.Weaver@de.usda.gov*.

*Massachusetts*

Charles W. Dubuc, USDA Rural Development, 451 West Street, Suite 2, Amherst, MA 01002, (401) 826–0842 X 306, *Charles.Dubuc@ma.usda.gov*.

*Michigan*

Traci J. Smith, USDA Rural Development, 3001 Coolidge Road, Suite 200, East Lansing, MI 48823, (517) 324–5157, *Traci.Smith@mi.usda.gov*.

*Minnesota*

Lisa L. Noty, USDA Rural Development, 1400 West Main Street, Albert Lea, MN 56007, (507) 373–7960 Ext. 120, *lisa.noty@mn.usda.gov*.

*Mississippi*

G. Gary Jones, USDA Rural Development, Federal Building, Suite 831, 100 West Capitol Street, Jackson, MS 39269, (601) 965–5457, *george.jones@ms.usda.gov*.

*Missouri*

Matt Moore, USDA Rural Development, 601 Business Loop 70 West, Parkade Center, Suite 235, Columbia, MO 65203, (573) 876–9321, *matt.moore@mo.usda.gov*.

*Montana*

John Guthmiller, USDA Rural Development, 900 Technology Blvd., Unit 1, Suite B, P.O. Box 850, Bozeman, MT 59771, (406) 585–2540, *John.Guthmiller@mt.usda.gov*.

*Nebraska*

Debra Yocum, USDA Rural Development, 100 Centennial Mall North, Room 152, Federal Building, Lincoln, NE 68508, (402) 437–5554, *Debra.Yocum@ne.usda.gov*.

*Nevada*

Herb Shedd, USDA Rural Development, 1390 South Curry Street, Carson City, NV 89703, (775) 887–1222, *herb.shedd@nv.usda.gov*.

*New Hampshire*

Cheryl Ducharme, USDA Rural Development, 89 Main Street, 3rd Floor, Montpelier, VT 05602, 802–828–6083, *cheryl.ducharme@vt.usda.gov*.

*New Jersey*

Victoria Fekete, USDA Rural Development, 8000 Midlantic Drive, 5th Floor North, Suite 500, Mt. Laurel, NJ 08054, (856) 787–7752, *Victoria.Fekete@nj.usda.gov*.

*New Mexico*

Jesse Bopp, USDA Rural Development, 6200 Jefferson Street, NE., Room 255, Albuquerque, NM 87109, (505) 761–4952, *Jesse.bopp@nm.usda.gov*.

*New York*

Scott Collins, USDA Rural Development, 9025 River Road, Marcy, NY 13403, (315) 736–3316, Ext. 4, *Scott.Collins@ny.usda.gov*.

*North Carolina*

David Thigpen, USDA Rural Development, 4405 Bland Rd. Suite 260, Raleigh, NC 27609, 919–873–2065, *David.Thigpen@nc.usda.gov*.

*North Dakota*

Dennis Rodin, USDA Rural Development, Federal Building, Room 208, 220 East Rosser Avenue, P.O. Box 1737, Bismarck, ND 58502–1737, (701) 530–2068, *Dennis.Rodin@nd.usda.gov*.

*Ohio*

Randy Monhemius, USDA Rural Development, Federal Building, Room 507, 200 North High Street, Columbus, OH 43215–2418, (614) 255–2424, *Randy.Monhemius@oh.usda.gov*.

*Oklahoma*

Jody Harris, USDA Rural Development, 100 USDA, Suite 108, Stillwater, OK 74074–2654, (405) 742–1036, *Jody.harris@ok.usda.gov*.

*Oregon*

Don Hollis, USDA Rural Development, 1229 SE Third Street, Suite A, Pendleton, OR 97801–4198, (541) 278–8049, Ext. 129, *Don.Hollis@or.usda.gov*.

*Pennsylvania*

Bernard Linn, USDA Rural Development, One Credit Union Place, Suite 330, Harrisburg, PA 17110–2996, (717) 237–2182, *Bernard.Linn@pa.usda.gov*.

*Puerto Rico*

Luis Garcia, USDA Rural Development, IBM Building, 654 Munoz Rivera Avenue, Suite 601, Hato Rey, PR 00918–6106, (787) 766–5091, Ext. 251, *Luis.Garcia@pr.usda.gov*.

*Republic of Palau*

Tim O'Connell, USDA Rural Development, Federal Building, Room 311, 154 Waianuenue Avenue, Hilo, HI 96720, (808) 933–8313, *Tim.Oconnell@hi.usda.gov*.

*Republic of the Marshall Islands*

Tim O'Connell, USDA Rural Development, Federal Building, Room 311, 154 Waianuenue Avenue, Hilo, HI 96720, (808) 933–8313, *Tim.Oconnell@hi.usda.gov*.

*Rhode Island*

Charles W. Dubuc, USDA Rural Development, 451 West Street, Suite 2, Amherst, MA 01002, (401) 826–0842 X 306, *Charles.Dubuc@ma.usda.gov*.

*South Carolina*

Shannon Legree, USDA Rural Development, Strom Thurmond Federal Building, 1835 Assembly Street, Room 1007, Columbia, SC 29201, (803) 253–3150, *Shannon.Legree@sc.usda.gov*.

*South Dakota*

Douglas Roehl, USDA Rural Development, Federal Building, Room 210, 200 4th Street, SW., Huron, SD 57350, (605) 352–1145, *doug.roehl@sd.usda.gov*.

*Tennessee*

Will Dodson, USDA Rural Development, 3322 West End Avenue, Suite 300, Nashville, TN 37203–1084, (615) 783–1350, *will.dodson@tn.usda.gov*.

*Texas*

Daniel Torres, USDA Rural Development, Federal Building, Suite 102, 101 South Main Street, Temple, TX 76501, (254) 742–9756, *Daniel.Torres@tx.usda.gov*.

*Utah*

Roger Koon, USDA Rural Development, Wallace F. Bennett Federal Building, 125 South State Street, Room 4311, Salt Lake City, UT 84138, (801) 524–4301, *Roger.Koon@ut.usda.gov*.

*Vermont*

Cheryl Ducharme, USDA Rural Development, 89 Main Street, 3rd Floor,

Montpelier, VT 05602, 802–828–6083, *cheryl.ducharme@vt.usda.gov*.

*Virginia*

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*Virgin Islands*

Joe Mueller, USDA Rural Development, 4440 NW. 25th Place, Gainesville, FL 32606, (352) 338–3482, *joe.mueller@fl.usda.gov*.

*Washington*

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*West Virginia*

Richard E. Satterfield, USDA Rural Development, 75 High Street, Room 320, Morgantown, WV 26505–7500, (304) 284–4874, *Richard.Satterfield@wv.usda.gov*.

*Wisconsin*

Brenda Heinen, USDA Rural Development, 4949 Kirschling Court, Stevens Point, WI 54481, (715) 345–7615, Ext. 139, *Brenda.Heinen@wi.usda.gov*.

*Wyoming*

Jon Crabtree, USDA Rural Development, Dick Cheney Federal Building, 100 East B Street, Room 1005, P.O. Box 11005, Casper, WY 82602, (307) 233–6719, *Jon.Crabtree@wy.usda.gov*.

**FOR FURTHER INFORMATION CONTACT:** For further information on this program, please contact the USDA Rural Development State Renewable Energy Coordinator for your respective State, as provided in the Addresses section of this Notice.

**SUPPLEMENTARY INFORMATION:** On June 12, 2009, the Agency published a Notice of Contract Proposals (NOCP) and Solicitation of Applications in the **Federal Register** announcing policy and application procedures for the Bioenergy Program for Advanced Biofuels. In a Notice published March 12, 2010, the Agency notified applicants from the prior Notice of the availability an additional payment for all applicants determined eligible.

**Paperwork Reduction Act**

In accordance with the Paperwork Reduction Act, the paperwork burden associated with this Notice of Contract for Proposal (Notice) has been approved by the Office of Management and Budget (OMB) under OMB Control Number 0570–0057.

The PRA burden associated with the original Notice, published on June 12, 2009, was approved by OMB, with an opportunity to comment on the burden associated with the program.

Advanced Biofuel Producers seeking funding under this Notice have to submit applications that include specified information, certifications, and agreements. All of the forms, information, certifications, and agreements required to apply for payments under this Notice have been authorized under OMB Control Number 0570–0057.

**Overview Information**

*Federal Agency Name.* Rural Business-Cooperative Service.

*Contract Proposal Title.* Advanced Biofuels Producer Payment Program.

*Announcement Type.* Initial announcement.

*OMB Control Number:* 0570–0057.

*Catalog of Federal Domestic Assistance (CFDA) Number.* The CFDA number for this Notice is 10.078.

*Dates.* The Advanced Biofuels Program Sign-up Period for Fiscal Year 2010 is May 6, 2010 and July 6, 2010.

*Availability of Notice.* This Notice is available on the USDA Rural Development Web site at *http://www.rurdev.usda.gov/rbs/busp/9005Biofuels.htm.*

**I. Funding Opportunity Description**

A. *Purpose of the Program.* The purpose of this program is to support and ensure an expanding production of Advanced Biofuels by providing payments to Eligible Advanced Biofuel Producers. Implementing this program not only promotes the Agency's mission for promoting sustainable economic development in rural America, but is an important part of achieving the Administration's goals for increased biofuel production and use by providing economic incentives for the production of advanced biofuels.

B. *Statutory Authority.* This program is authorized under Title IX, Section 9001, of the Food, Conservation, and Energy Act of 2008 (Pub. L. 110–234).

C. *Definition of Terms.* The following definitions are applicable to this Notice.

*Advanced biofuel.* Fuel derived from Renewable Biomass, other than corn kernel starch, to include:

(i) Biofuel derived from cellulose, hemicellulose, or lignin;

(ii) Biofuel derived from sugar and starch (other than Ethanol derived from corn kernel starch);

(iii) Biofuel derived from waste material, including crop residue, other vegetative waste material, animal waste, food waste, and yard waste;

(iv) Diesel-equivalent fuel derived from Renewable Biomass, including vegetable oil and animal fat;

(v) Biogas (including landfill gas and sewage waste treatment gas) produced through the conversion of organic matter from Renewable Biomass;

(vi) Butanol or other Alcohols produced through the conversion of organic matter from Renewable Biomass; and

(vi) Other fuel derived from cellulosic biomass.

*Advanced biofuel producer.* An individual or legal entity, including, but not limited to, a corporation, company, foundation, association, labor organization, firm, partnership, society, joint stock company, group of organizations, or non-profit entity that produces an Advanced Biofuel.

*Agency.* The Rural Business and Cooperative Service on behalf of the U.S. Department of Agriculture.

*Alcohol.* Anhydrous ethyl Alcohol manufactured in the United States and its territories and sold either:

(i) For fuel use, rendered unfit for beverage use, produced at a Biorefinery and in a manner approved by the Bureau of Alcohol, Tobacco, Firearms, and Explosives of the United States Department of Justice (ATF) for the production of Alcohol for fuel; or

(ii) As denatured Alcohol used by blenders and refiners and rendered unfit for beverage use.

*Alcohol producer.* An individual or legal entity, including, but not limited to, a corporation, company, foundation, association, labor organization, firm, partnership, society, joint stock company, group of organizations, or non-profit entity that is authorized by ATF to produce Alcohol.

*Base production.* The quantity of Eligible Advanced Biofuels produced at an Advanced Biofuel Biorefinery as determined by the Agency under paragraphs (1) through (3), as applicable. An Advanced Biofuel Biorefinery's Base Production cannot be transferred to another Advanced Biofuel Biorefinery.

(1) If the Biorefinery has been in existence for 12 months or more prior to May 6, 2010, the Biorefinery's Base Production for FY 2010 will be equal to the actual amount of Biofuel produced over that 12 month period.

(2) If the Biorefinery has been in existence less than 12 months prior to May 6, 2010, the Biorefinery's Base Production for the sign-up fiscal year will be equal to the quantity projected to be produced by the biorefinery's producer as reported in Form RD 9005–

1, "Advanced Biofuel Payment Program Application."

(3) If the Advanced Biofuel Biorefinery will begin producing after May 6, 2010, the Biorefinery's Base Production for FY 2010 will be equal to the quantity projected to be produced by the Biorefinery's producer as reported in Form RD 9005–1.

*Biodiesel.* A mono alkyl ester, manufactured in the United States and its territories, that meets the requirements of the appropriate American Society for Testing and Materials Standard (ASTM).

*Biofuel.* Fuel derived from Renewable Biomass.

*Biorefinery.* A facility (including equipment and processes) that converts Renewable Biomass into Biofuels and biobased products and may produce electricity.

*Certificate of Analysis.* A document approved by the Agency that certifies the quality and purity of the Advanced Biofuel being produced. The document must be from a qualified, independent third party.

*Contract.* The Advanced Biofuels Program Contract, or other form prescribed by the Agency.

*Eligible advanced biofuel producer.* A producer of Advanced Biofuels that meets all requirements for program payments.

*Eligible renewable biomass.* Renewable Biomass excluding corn kernel starch.

*Eligible renewable energy content.* That portion of an Advanced Biofuel's energy content derived from eligible Renewable Biomass feedstock. The energy content from any portion of the Biofuel, whether from, for example, blending with another fuel or a denaturant, that is derived from a non-Eligible Renewable Biomass feedstock (*e.g.,* corn kernel starch) is not eligible for payment under this program.

*Ethanol.* Anhydrous ethyl Alcohol manufactured in the United States and its territories and sold either:

(i) For fuel use, and which has been rendered unfit for beverage use and produced at a biofinery approved by the ATF for the production of Ethanol for fuel, or

(ii) As denatured Ethanol used by blenders and energy refiners, which has been rendered unfit for beverage use.

*Ethanol producer.* An individual or legal entity, including but is not limited to, a corporation, company, foundation, association, labor organization, firm, partnership, society, joint stock company, group of organizations, or non-profit entity that is authorized by ATF to produce ethanol.

*Fiscal Year (FY).* A 12 month period beginning each October 1 and ending September 30 of the following calendar year.

*Incremental production.* The quantity of Eligible Advanced Biofuel produced at an Advanced Biofuel Biorefinery that is in excess of that Biorefinery's Base Production, except that for Advanced Biofuel Biorefineries that begin producing Eligible Advanced Biofuels after May 6, 2010. For such Biorefineries, production in excess of Base Production, as determined under paragraph (3) under the definition of Base Production, will not be treated as Incremental Production.

*Larger producer.* Eligible producers with a refining capacity exceeding 150,000,000 gallons of Advanced Biofuel per year.

*Payment application.* Form RD 9005–3, "Advanced Biofuel Payment Program—Payment Request," which is required in order to receive payments under this program.

*Quarter.* The federal fiscal time period for any fiscal year as follows:

(i) 1st Quarter: October 1 through December 31;

(ii) 2nd Quarter: January 1 through March 31;

(iii) 3rd Quarter: April 1 through June 30; and

(iv) 4th Quarter: July 1 through September 30.

*Renewable Biomass.*

(i) 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:

(A) 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;

(B) Would not otherwise be used for higher-value products; and

(C) Are harvested in accordance with applicable law and land management plans and the requirements for old-growth maintenance, restoration, and management direction of paragraphs (e)(2), (e)(3), and (e)(4) and large-tree retention of paragraph (f) of section 102 of the Healthy Forests Restoration Act of 2003 (16 U.S.C. 6512); or

(ii) 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:

(A) Renewable plant material, including feed grains; other agricultural commodities; other plants and trees; and algae; and

(B) 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.

*Rural or rural area.* 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, and any area that has been determined to be "rural in character" by the Under Secretary for Rural Development, or as otherwise identified in this definition. In determining which census blocks in an urbanized area are not in a Rural Area, the Agency will 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 two census blocks that are otherwise considered not in a Rural Area under this definition.

(i) 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.

(ii) For the Commonwealth of Puerto Rico, the island is considered rural and eligible for Business Programs assistance, except for the San Juan Census Designated Place (CDP) and any other CDP with greater than 50,000 inhabitants. CDPs with greater than 50,000 inhabitants, other than the San Juan CDP, may be determined to be eligible if they are "not urban in character." Any such requests must be forwarded to the National Office, Business and Industry Division, with supporting documentation as to why the area is "not urban in character" for review, analysis, and decision by the Administrator, Business and Cooperative Programs.

(iii) For the State of Hawaii, all areas within the State are considered rural and eligible for Business Programs assistance, except for the Honolulu CDP within the County of Honolulu.

(iv) 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.

(v) The determination that an area is "rural in character" under this definition will be to areas that are within:

(A) An urbanized area that has two points on its boundary that are at least 40 miles apart, which is not contiguous or adjacent to a city or town that has a population of greater than 150,000 inhabitants or the urbanized area of such a city town; or

(B) An urbanized area contiguous and adjacent to a city or town of greater than 50,000 population that is within one-quarter mile of a rural area.

*Sign-up period.* The time period announced by the Agency in this Notice during which the Agency will accept program Contracts.

*Smaller producer.* Eligible producers with a refining capacity of 150,000,000 gallons or less of Advanced Biofuel per year.

*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.

*USDA.* The United States Department of Agriculture.

## II. Funding Information

A. *Available Funds.* Congress appropriated mandatory budget authority to this program as follows: $55 million for FY 2009 and $55 million for FY 2010. However, in FY 2009, the program was allotted $30 million. The remaining FY 2009 funding of $25 million will be used in FY 2010, and $15 million of new funding from FY 2010. The Agency, therefore, will authorize up to $40 million in budget authority for this program for fiscal year (FY) 2010.

B. *Number of Payments.* Under this notice, payments to participating Advanced Biofuel Producers will be made as follows for:

(1) Actual production produced from October 1, 2009 to June 30, 2010; and

(2) Actual production from July 1, 2010 through September 30, 2010.

The amount of payments made will depend on the number of eligible participating Advanced Biofuel Producers.

C. *Range of Amounts of Each Payment.* The amount of each payment will depend on the number of Eligible Advanced Biofuel Producers participating in the program, the amount of Advanced Biofuels being produced by such Advanced Biofuel Producers, and the amount of funds available.

D. *Contract period.* October 1, 2009 through September 30, 2010.

E. *Type of Instrument.* Payment.

## III. Eligibility Information

This Notice contains eligibility requirements for Advanced Biofuel Producers seeking payments under this program.

### *A. Applicant Eligibility*

To be eligible for this program, the applicant must be an Eligible Advanced Biofuel Producer, which is defined in this Notice as a producer of Advanced Biofuels who meets all requirements for program payments, and must meet the citizenship requirement specified in paragraph (1) or (2), as applicable, of this section.

(1) If the applicant is an individual, the applicant must be a citizen or national 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 must reside in the U.S. after legal admittance for permanent residence.

(2) If the applicant is an entity other than an individual, the applicant must be at least 51 percent owned by persons who are either citizens or nationals 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 legally admitted permanent residents residing in the U.S. When an entity owns an interest in the applicant, its citizenship will be determined by the citizenship of the individuals who own an interest in the entity or any sub-entity based on their ownership interest.

(3) The Agency will determine an applicant's eligibility for participation in this program.

(4) If an applicant's original submittal is not sufficient to verify an applicant's eligibility, the Agency will notify the Advanced Biofuel Producer, in writing, as soon as practicable. This notification will identify, at a minimum, the additional information being requested to enable the Agency to determine the applicant's eligibility and a timeframe in which to supply the information.

(5) An otherwise Eligible Advanced Biofuel Producer will be determined to be ineligible if the Advanced Biofuel Producer:

(i) Refuses to allow the Agency to verify any information provided by the Advanced Biofuel Producer under this program, including information for determining applicant eligibility, Advanced Biofuel eligibility, and application payments; or

(ii) Fails to meet any of the conditions set out in this Notice, in the Contract, or in other program documents; or

(iii) Fails to comply with all applicable Federal, State, or local laws.

### *B. Biorefinery Eligibility Requirements*

To be eligible for program payments under this Notice, an otherwise Eligible Advanced Biofuel must:

(1) Be either a transportation fuel that meets the Renewable Fuel Standard or are currently undergoing an appeal to the U.S. Environmental Protection Agency for inclusion in the Renewable Fuel Standard, or non-transportation renewable energy that results in a reduction in greenhouse gases;

(2) Be produced at an Advanced Biofuel Biorefinery located in a Rural Area; and

(3) If the biofuel is used on-site, there must be an Agency-approved system to verify the quantity of biofuel used on-site.

In the case where an Agency receives an application that is undergoing an appeal before the U.S. Environmental Protection Agency for inclusion in the Renewable Fuel Standard, the Agency will be unable to finalize processing of the application until the appeal has been completed.

### *C. Payment Eligibility*

To be eligible for program payments, an Advanced Biofuel Producer must maintain adequate records for FY 2010, quantifying:

(1) Feedstock usage and Advanced Biofuel production for each Advanced Biofuel Biorefinery, and

(2) All other records required to establish program eligibility and compliance.

## IV. Application and Submission Information

### *A. Address To Request Applications*

Contract and Payment Application forms are available from the USDA, Rural Development State Office, Renewable Energy Coordinator. The list of Renewable Energy Coordinators is provided in the **ADDRESSES** section of this Notice.

### *B. Content and Form of Submission*

Applicants must submit an original, signed hard copy of the Form RD 9005–1, "Advanced Biofuel Payment Program Annual Application," required in this section to the Rural Development State Renewable Energy Coordinators in the State in which the Advanced Biofuel Producer's principal office is located. A list of the Rural Development State Renewable Energy Coordinators is provided in the **ADDRESSES** section of this Notice. Applicants must submit to the Agency the following:

(1) *Form RD 9005–1,* "*Advanced Biofuel Payment Program Application.*" This form requires an Advanced Biofuel

Producer seeking to participate in this program to provide information on the Advanced Biofuel Producer; the Advanced Biofuel Producer's Biorefineries at which the Advanced Biofuels are produced, including location and quantities produced; and the types and quantities of Renewable Biomass feedstock being used to produce the Advanced Biofuels. The form also requires the Advanced Biofuel Producer to certify the information provided, including that the Advanced Biofuels are Eligible Advanced Biofuels and that the Renewable Biomass feedstock used to produce the Advanced Biofuels are eligible biomass feedstock.

(i) Producers must submit authoritative evidence (as specified in paragraph B(2) below) documenting production of Advanced Biofuels, and the eligibility of the Advanced Biofuels, between October 1, 2008, and September 30, 2009. Advanced Biofuel production must be certified as stated elsewhere in this notice in order to be eligible for payment, including determining Base and Incremental Production amounts.

(ii) Applicants may submit this form for an Advanced Biofuel Biorefinery that is scheduled to begin producing Eligible Advanced Biofuels after the application period for FY 2010 closes and before the end of FY 2010.

(iii) Please note that applicants are required to have a Dun and Bradstreet Universal Numbering System (DUNS) number (unless the applicant is an individual). The DUNS number is a nine-digit identification number, which uniquely identifies business entities. A DUNS number can be obtained at no cost via a toll-free request line at 1–866–705–5711 or online at *http://fedgov.dnb.com/webform.*

(2) *Certifications.* The Advanced Biofuel Producer must furnish the Agency all required certifications identified in paragraphs (B)(2)(i) and (ii), as applicable, before acceptance into the program, and furnish access to the Advanced Biofuel Producer's records required by the Agency to verify compliance with program provisions. The required certifications depend on the type of Biofuel produced. Certifications are to be completed and provided by an accredited independent, third-party.

(i) *Alcohol.* For Alcohol Producers with authority from ATF to produce Alcohol, copies of either:

(A) The Alcohol Fuel Producers Permit (ATF F 5110.74) or

(B) The registration of Distilled Spirits Plant (ATF F 5110.41) and Operating Permit (ATF F 5110.23).

(ii) *Hydrous ethanol.* If the Advanced Biofuel Producer entering into this agreement is:

(A) The hydrous Ethanol Producer, then the Advanced Biofuel Producer shall include with the Contract an affidavit, acceptable to the Agency, from the distiller stating that the:

(*1*) Applicable hydrous Ethanol produced is distilled and denatured for fuel use according to ATF requirements, and

(*2*) Distiller will not include the applicable Ethanol in any payment requests that the distiller may make under this program.

(B) The distiller that upgrades hydrous Ethanol to anhydrous ethyl Alcohol, then the Advanced Biofuel Producer shall include with the Contract an affidavit, acceptable to the Agency, from the hydrous Ethanol Producer stating that the hydrous Ethanol Producer will not include the applicable Ethanol in any payment requests that may be made under this program.

**Note:** The Agency may pay the first applicant to the exclusion of other possible applicants. Or, the Agency may require an agreement as to payment before paying either. Alternatively, the Agency may designate whether the distiller or the hydrous Ethanol Producer will be the payee where needed to ensure program integrity.

(C) *Biodiesel, biomass-based diesel, and liquid hydrocarbons derived from biomass.* For these fuels, the Advanced Biofuel Producer shall self-certify that the producer, the Advanced Biofuel Biorefinery, and the Biofuel meet the definition, registration requirements as applicable under Energy Independence and Security Act, Clean Air Act, Environmental Protection Agency, Internal Revenue Service, and quality requirements per applicable ASTM International standards and commercially acceptable quality standards of the local market.

(D) *Gaseous Advanced Biofuel.* For gaseous Advanced Biofuel Producers, third party certification that the Biofuel meets commercially acceptable pipeline quality standards of the local market.

(3) RD Instruction 1940–Q, Exhibit A–1, "Restriction on Lobbying (if over $100,000)."

(4) SF–LLL, "Disclosure of Lobbying Activities."

(5) RD 400–4, "Assurance Agreement."

(6) Each participating advanced biofuel producer that is projecting an increase in production from the previous fiscal year and each new applicant must submit documentation to support the production estimates reported in the enrollment application. Such documentation includes, but is not limited to:

(i) Historical production data;

(ii) Production capacity of the biorefinery; and

(iii) Evidence of ability to distribute final product, including distribution networks and contracts for purchase of final product.

(7) Each participating advanced biofuel producer must provide documentation from an Agency-approved recognized published source quantifying the reduction in greenhouse gas emissions that result from the displacement of fossil fuel.

*C. Submission Dates and Times*

(1) *Enrollment.* Advanced Biofuel Producers who expect to have eligible production at any time during FY 2010 must enroll in the program between May 6, 2010 and July 6, 2010.

(2) *Payment applications.* Advanced Biofuel Producers must submit Form RD 9005–3 by 4:30 p.m. local time November 2, 2010. Payment will be made for the time period October 1, 2009 through September 30, 2010.

*D. Intergovernmental Review*

This program is not subject to Executive Order 12372—Intergovernmental Review of Federal Programs because the Government is not providing financial assistance for the development of advanced biofuel biorefineries.

*E. Funding Restrictions*

For a FY, not more than five percent of the funds shall be made available to eligible producers with a refining capacity exceeding 150,000,000 gallons of Advanced Biofuel per year. In calculating whether a producer meets the 150,000,000 capacity, production of all Advanced Biofuel Biorefineries owned or operated by the producer will be totaled.

**V. Program Payment Provisions**

This section of the Notice identifies the process and procedures the Agency will use to make payments to Eligible Advanced Biofuel Producers.

As noted previously in this Notice, Form RD 9005–1, "Advanced Biofuel Payment Program Annual Application," will be used by Advanced Biofuels producers to apply for participation in this program. When a producer submits Form RD 9005–1, the Agency will make its determination as to whether or not the producer is eligible to participate. If an Advanced Biofuel Producer is determined to be ineligible, the Agency will notify the producer, in writing, of its determination.

If an Advanced Biofuel Producer is determined eligible to receive payments, the Eligible Advanced Biofuel Producer must then enter into a Contract with the Agency using Form RD 9005–2, "Advanced Biofuel Payment Program Contract," in order to participate in this program. The Agency will forward Form RD 9005–2 to the Advanced Biofuel Producer. The Advanced Biofuel Producer must agree to the terms and conditions of the Contract, sign, date, and return it to the Agency within the time provided by the Agency. Each contract issued under this notice will be for FY 2010.

Once the Eligible Advanced Biofuel Producer has entered into a valid Contract with the Agency, the Advanced Biofuel Producer will be required to submit Form RD 9005–3, "Advanced Biofuel Payment Program—Payment Request," in order to receive payments under this program. This form requires the Advanced Biofuel Producer to provide information on the types and quantities of Advanced Biofuels produced in a Quarter and on the types and quantities of renewable feedstock used to produce those Advanced Biofuels. In addition, the Advanced Biofuel Producer will report cumulative production of Advanced Biofuels and the use of Renewable Biomass feedstock for all Advanced Biofuel Biorefineries. The information for each Advanced Biofuel Biorefinery is to be provided cumulatively and on an individual Advanced Biofuel Biorefinery basis.

(a) *Payment applications.* To request payments under this program, an Eligible Advanced Biofuel Producer must:

(1) Submit Form RD 9005–3, "Advanced Biofuel Program Payments Application," within 30 days after the end of each periods in B (1) and (2);

(2) Certify that the request is accurate;

(3) Furnish the Agency such certification, and access to such records, as the Agency considers necessary to verify compliance with program provisions; and

(4) Provide documentation as requested by the Agency regarding the net production of Advanced Biofuel at all Advanced Biofuel Biorefineries during FY 2010.

(b) *Additional documentation.* After a Payment Application is submitted, Eligible Advanced Biofuel Producers may be required to submit additional clarification if their original submittal is not sufficient to verify eligibility for payment or quantity of the Advanced Biofuel product.

(c) *Notification.* The Agency will notify the Advanced Biofuel Producer, in writing, whenever the Agency determines that a Payment Application is ineligible and why the application was determined ineligible.

(d) *Payment provisions.* Determination of payments to Eligible Advanced Biofuel Producers will be made in accordance with the provisions of this paragraph. As stated previously, making these payments promotes the Agency's mission for promoting sustainable economic development in rural America and is an important part of achieving the Administration's goals for increased biofuel production and use by providing economic incentives for the production of advanced biofuels.

(1) *Determination of payment rate.* The Agency will establish payment rates for both Base and Incremental Production of Eligible Advanced Biofuels for both Smaller Producers and Larger Producers using the procedures specified in paragraphs (d)(1)(i) through (v). These rates will be applied to the actual quantity of Eligible Advanced Biofuel produced when making payments to Eligible Advanced Biofuel Producers, as described below.

(i) Based on the information provided in each eligible Form RD 9005–1, when applicable, the Agency will determine Base and Incremental Eligible Advanced Biofuel Production being projected for the FY for both Smaller Producers and Larger Producers. Thus, the Agency will determine the Base Production quantity for Smaller Producers, the Incremental Production quantity for Smaller Producers, the Base Production quantity for Larger Producers, and the Incremental Production quantity for Larger Producers.

(ii) If an applicant is blending its Advanced Biofuel using ineligible feedstocks (*e.g.,* fossil gasoline or methanol, corn kernel starch), only the quantity of Advanced Biofuel being produced from eligible feedstocks will be used in determining the payment rates and for which payments will be made.

(iii) For each combination of production type (base, incremental) and producer size (smaller, larger—over 150 million equivalent gallons of production), the Agency will convert the projected Base and Incremental Production determined to be eligible under paragraph (d)(1)(i) into British Thermal Unit (BTU) equivalent using factors published by the Energy Information Administration (or successor organization). If the Energy Information Administration (or successor organization) does not publish such conversion factor for a specific type of Advanced Biofuel, the Agency will establish and use a conversion formula as appropriate until such time as the Energy Information Administration (or successor organization) publishes a conversion factor for said Advanced Biofuel. The Agency will then calculate the total eligible BTUs across all eligible applications.

(iv) The Agency will determine the amount of program funds available to Smaller Producers and to Larger Producers in the FY.

(v) The Agency will then determine the Base Production and Incremental Production payment rates ($/Btu) for Smaller Producers and for Larger Producers. For both Small Producers and Larger Producers, the Incremental Production payment rate will be 3 times higher than their respective Base Production payment rate. These rates will be calculated such that all of the funds allocated will be distributed in the FY.

(2) *Contract Value.* Using the payment rates established under paragraph (d)(1) and the projected Base and Incremental Production for each Advanced Biofuel Biorefinery, the Agency will calculate a value for each Eligible Advanced Biofuel Producer's Contract for FY 2010 using Equation 4:

$$CV_{2010} = (BPPR \times BP) + (IPPR \times IP) \qquad \text{(Eq. 4)}$$

Where:

$CV_{2010}$ = Contract value for FY 2010
BPPR = Base Production payment rate, $/million BTU
BP = projected eligible Base Production, million BTUs
IPPR = Incremental Production payment rate, $/million BTU
IP = projected eligible Incremental Production, million BTUs

(3) *Payment Amount.* Each eligible Advanced Biofuel Producer will be paid for the actual amount of BTUs produced from Eligible Advanced Biofuels produced in FY 2010. Except as provided under paragraph (d)(4), the Agency will not pay a producer more than the Contract value established under paragraph (d)(2).

(4) *Remaining funds.* If available funds remain at the end of FY 2010 (*e.g.,* due to underproduction of Eligible Advanced Biofuels), the Agency will carry the funds over to FY 2011.

(5) *Other payment provisions.* The following provisions apply.

(i) Advanced Biofuel Producers will be paid on the basis of the amount of Eligible Renewable Energy Content of the Advanced Biofuels only if the producer provides documentation sufficient, including a Certificate of Analysis, for the Agency to determine the Eligible Renewable Energy Content for which payment is being requested, and quantity produced through such documentation as, but not limited to, records of sale and calibrated flow meter records.

(ii) There shall only be one Eligible Advanced Biofuel Producer per Advanced Biofuel Biorefinery. If needed, the Agency may treat Advanced Biofuel Producers with common interests, common ownership, or common Advanced Biofuel Biorefineries or arrangements as the same Advanced Biofuel Producer.

(iii) Hydrous Ethanol that is upgraded by another distiller to anhydrous ethyl Alcohol is eligible for payment only once; that is, the Agency will make payment either to the Advanced Biofuel Producer of the hydrous ethanol or to the Advanced Biofuel Producer who distills the hydrous Ethanol to anhydrous ethyl Alcohol.

(iv) Subject to other provisions of this section, Advanced Biofuel Producers shall be paid any sum due for the payment period, subject to the requirements and refund provisions of this Notice.

(e) *Payment Adjustments.* The Agency will adjust the payment otherwise payable to an Advanced Biofuel Producer if there is a difference between the amount actually produced and the amount determined by the Agency to be eligible for payment.

(f) *Payment liability.* Any payment, or portion thereof, made under this program shall be made without regard to questions of title under State law and without regard to any claim or lien against the Advanced Biofuel, or proceeds thereof, in favor of the owner or any other creditor except agencies of the U.S. Government.

(g) *Verification.* The Agency reserves the right to verify all payment requests and subsequent payments made under this program, as frequently as necessary to ensure the integrity of the program. The Agency will conduct site visits to review producer records in order to verify information submitted in Forms RD 9005–1 and RD 9005–3.

(1) *Production and feedstock verification.* The Agency will review producer records that the type and amount of biofuel produced and the type and amount of feedstocks used.

(2) *Blending verification.* The Agency will review the producer's certificates of analysis and feedstock records to verify the portion of the advanced biofuel eligible for payment.

(3) *Certificate of Analysis.* The Agency will review the producer records to ensure that each certificate of analysis has been issued by a qualified, independent third party.

(h) *Refunds and interest payments.* An Eligible Advanced Biofuel Producer who receives payments under this program may be required to refund such payments as specified in this paragraph. If the Agency suspects fraudulent representation through its site visits and records inspections under paragraph (g) of this section, it will be referred to the Office of Inspector General for appropriate action.

(1) An Eligible Advanced Biofuel Producer receiving payments under this program shall become ineligible if the Agency determines the Advanced Biofuel Producer has:

(i) Made any fraudulent representation; or

(ii) Misrepresented any material fact affecting a program determination.

(2) All payments made to an entity determined by the Agency to be ineligible shall be refunded to the Agency with interest and other such sums as may become due, including, but not limited to, any interest, penalties, and administrative costs as determined appropriate under 7 CFR 901.9.

(3) When a refund is due, it shall be paid promptly. If a refund is not made promptly, the Agency may use all remedies available to it, including Treasury offset under the Debt Collection Improvement Act of 1996, financial judgment against the producer, and sharing information with the Department of Justice.

(4) Late payment interest shall be assessed on each refund in accordance with the provisions and rates established by the United States Treasury.

(i) Interest charged by the Agency under this Notice shall be established by the United States Treasury. Such interest shall accrue from the date such payments were made to the date of repayment.

(ii) The Agency may waive the accrual of interest or damages if the Agency determines that the cause of the erroneous determination was not due to any action of the Advanced Biofuel Producer.

(5) Any Advanced Biofuel Producer or person engaged in an act prohibited by this section and any Advanced Biofuel Producer or person receiving payment under this Notice shall be jointly and severally liable for any refund due under this Notice and for related charges.

## VI. Administration Information

### *A. Notice of eligibility*

If an applicant is determined by the Agency to be eligible for participation, the Agency will notify the applicant, in writing, and will assign the applicant a Contract number. If an applicant is determined by the Agency to be ineligible, the Agency will notify the applicant, in writing, as to the reason(s) the applicant was rejected. Such applicant will have appeal rights as specified in this Notice.

### *B. Administrative and National Policy Requirements*

(1) *Review or appeal rights.* A person may seek a review of an Agency decision under this Notice from the appropriate Agency official that oversees the program in question or appeal to the National Appeals Division in accordance with 7 CFR part 11 of this title.

(2) *Remedies.* If the Agency has determined that a producer has misrepresented the information or defrauded the Government, the Agency will take one of the following steps in accordance to 7 CFR 3017, Government-wide Debarment and Suspension:

(i) Suspend payments on the Contract until the violation has been reconciled;

(ii) Terminate the Contract; or

(iii) Debarment to participate in any Federal Government program.

(3) *Records.* For the purpose of verifying compliance with the requirements of this Notice, each Eligible Advanced Biofuel Producer shall make available at one place at all reasonable times for examination by representatives of USDA, all books, papers, records, Contracts, scale tickets, settlement sheets, invoices, written price quotations, and other documents related to the program that is within the control of such Advanced Biofuel Producer for not less than three years from each payment date.

(4) *Succession and control of biorefineries and production.* An entity who becomes the Eligible Advanced Biofuel Producer for a Biorefinery that is under Contract under this Notice must request permission from the Agency to succeed to the program Contract and the Agency may grant such request if it is determined that the entity

is an eligible producer and permitting such succession would serve the purposes of the program. If appropriate, the Agency may require the consent of the previous Eligible Advanced Biofuel Producer to such succession.

Payments will be made only to an eligible Advanced Biofuel Producer with a valid Contract and for Biorefineries owned or controlled by said Producer. If payments are made to an Advanced Biofuel Producer for production at a Biorefinery no longer owned or controlled by said Producer or to an otherwise ineligible Advanced Biofuel Producer, the Agency will demand full refund of all such payments.

*C. Environmental Review*

All recipients under this Notice are subject to the requirements of subpart G of part 1940 of title 7 of the CFR. However, 7 CFR 1940.310(c)(1) excludes this activity. In accordance with § 1940.310(c)(1), General Exclusions, if a program provides assistance that is not related to the development of a specific site, it is excluded from conducting an environmental review. RD's compliance with the National Environmental Policy Act of 1969 (NEPA) is implemented in its regulations at 7 CFR 1940 subpart G. Applicants whose proposal involves additional facility construction should provide RD Form 1940–20 as part of this application. RD will then determine whether the approval falls under Section 1940.310(c)(1), which categorically excludes the action from NEPA compliance.

**VII. Agency Contacts**

*Assistance.* For assistance on this payment program, please contact a USDA Rural Development State Renewable Energy Coordinator, as provided in the Addresses section of this Notice.

**VIII. Non-Discrimination Statement**

USDA prohibits discrimination in all its programs and activities on the basis of race, color, national origin, age, disability, and where applicable, sex, marital status, familial status, parental status, religion, sexual orientation, genetic information, political beliefs, reprisal, or because all or part of an individual's income is derived from any public assistance programs. (Not all prohibited bases apply to all programs.) Persons with disabilities who require alternative means for communication of program information (braille, large print, audiotape, etc.) should contact USDA's TARGET Center at (202) 720–2600 (voice and TDD). To file a complaint of discrimination, write to USDA, Director, Office of Civil Rights, 1400 Independence Avenue, SW., Washington, DC, 20250–9410, or call (800) 795–3272 (voice) or (202) 720–6382 (TDD). USDA is an equal opportunity provider and employer.

Dated: April 27, 2010.

**Judith A. Canales,**

*Administrator, Rural Development, Business and Cooperative Programs.*

[FR Doc. 2010–10247 Filed 5–5–10; 8:45 am]

**BILLING CODE 3410–XY–P**

## DEPARTMENT OF AGRICULTURE

### Rural Business—Cooperative Service

### Notice of Funding Availability (NOFA) for Repowering Assistance Payments to Eligible Biorefineries

**AGENCY:** Rural Business—Cooperative Service.

**ACTION:** Notice.

**SUMMARY:** This Notice announces the acceptance of applications for payments to eligible biorefineries to encourage the use of renewable biomass as a replacement fuel source for fossil fuels used to provide process heat or power in the operation of these eligible biorefineries. Under this Notice, applications will be accepted for biorefineries that produce transportation fuels that meet the Renewable Fuel Standard or are currently undergoing an appeal to the U.S. Environmental Protection Agency for inclusion in the Renewable Fuel Standard, or that produce non-transportation renewable energy that results in a reduction in greenhouse gases.

**DATES:** Applications for participating in this program for Fiscal Year 2010 must be received between May 6, 2010 and July 20, 2010.

**ADDRESSES:** Application materials may be obtained by contacting USDA, Rural Development—Energy Division, Program Branch, Attention: Repowering Assistance Program, 1400 Independence Avenue, SW., Stop 3225, Washington, DC 20250–3225.

**FOR FURTHER INFORMATION CONTACT:** For further information on this payment program, please contact USDA, Rural Development—Energy Division, Program Branch, Attention: Repowering Assistance Program, 1400 Independence Avenue, SW., Stop 3225, Washington, DC 20250–3225. Telephone: 202–720–1400.

**SUPPLEMENTARY INFORMATION:** On June 12, 2009, the Agency published a Notice of Funds Availability (NOFA) and Solicitation of Applications in the **Federal Register** announcing general policy and application procedures for the Repowering Assistance Program (the Program). Congress appropriated mandatory budget authority of $35 million over the life of the 2008 Farm Bill. However, in FY 2009, the program was allotted $20 million. The Agency will now authorize up to $8 million in additional budget authority for this program for fiscal year (FY) 2010.

**Paperwork Reduction Act**

In accordance with the Paperwork Reduction Act (PRA), the paperwork burden associated with this notice has been approved by the Office of Management and Budget (OMB) under OMB Control Number 0570–0058.

The PRA burden associated with the original Notice was approved by OMB, with an opportunity to comment on the burden associated with the program.

Biorefineries seeking funding under this program have to submit applications that include specified information, certifications, and agreements. All of the forms, information, certifications, and agreements required to apply for this program under this Notice have been authorized under OMB Control Number 0570–0058.

**Overview Information**

*Federal Agency Name.* Rural Business—Cooperative Service.

*Payment Proposal Title.* Repowering Assistance Program.

*Announcement Type.* Initial announcement.

*OMB Control Number.* 0570–0058.

*Catalog of Federal Domestic Assistance (CFDA) Number.* The CFDA number for this Notice is 10.866.

*Dates.* The Repowering Assistance Program application period for fiscal year 2010 is May 6, 2010 through July 20, 2010.

*Availability of Notice.* This Notice is available on the USDA Rural Development Web site at *http://www.rurdev.usda.gov/rbs.*

**I. Funding Opportunity Description**

A. *Purpose of the Program.* The purpose of this program is to provide financial incentives to biorefineries in existence on June 18, 2008, the date of the enactment of the Food, Conservation, and Energy Act of 2008 (the 2008 Farm Bill) (Pub. L. 110–246), to replace the use of fossil fuels used to produce heat or power at their facilities by installing new systems that use renewable biomass, or to produce new energy from renewable biomass.

The Agency may make payments under this program to any biorefinery

that meets the requirements of this Notice for a period of up to three years. The Agency will determine the amount of payments to be made to a biorefinery based on the quantity of fossil fuel a renewable biomass system is replacing, the percentage reduction in fossil fuel used by the biorefinery, and the cost-effectiveness of the renewable biomass system, economic benefit to the community, and the potential to improve the quality of life in rural America.

The Agency will determine who receives payment under this program based on the percentage reduction in fossil fuel used by the biorefinery that will result from the installation of the renewable biomass system; the cost and cost-effectiveness of the renewable biomass system; and other selection criteria identified in Section V, Application Review Information. The above criteria will be used to determine priority for awards of $5 million or 50 percent of total eligible project costs, whichever is less. Based on our research and survey of medium sized project costs, the Agency has determined that the dollar amount identified will provide adequate incentive for biorefineries to apply.

B. *Statutory Authority.* This program is authorized under Title IX, Section 9001, of the Food, Conservation, and Energy Act of 2008 (Pub. L. 110–246).

C. *Definition of Terms.* The following definitions are applicable to this Notice.

*Application period.* The time period announced by the Agency in this or subsequent Notices during which the Agency will accept applications.

*Base energy use.* The amount of documented fossil fuel energy use over an extended operating period.

(i) The extended operating period must be at least 24 months of recorded usage, and requires metered utility records for electric energy, natural gas consumption, fuel oil, coal shipments and propane use, as applicable for providing heat or power for the operation of the biorefinery.

(ii) Utility billing, oil and coal shipments must be actual bills, with meter readings, applicable rates and tariffs, costs and usage. Billing must be complete, without gaps and arranged in chronological order. Drop shipments of coal or oil can be substituted for metered readings, provided the biorefinery documents the usage and its relationship to providing heat or power to the biorefinery.

(iii) A biorefinery in existence on or before June 18, 2008 with less than 24 months of actual operating data must provide at least 12 months of data supported by engineering and design calculations, and site plans, prepared by the construction engineering firm.

*Biobased products.* Is a product determined by the Secretary to be a commercial or industrial product (other than food or feed) that is: (a) Composed, in whole or in significant part, of biological products, including renewable domestic agricultural materials and forestry materials; or (b) an intermediate ingredient or feedstock.

*Biofuel.* Fuel derived from renewable biomass.

*Biorefinery.* A facility (including equipment and processes) that converts renewable biomass into biofuels and biobased products, and may produce electricity.

*Eligible biorefinery.* A producer, whose primary production is liquid transportation biofuels, that meets all requirements of this program. The biorefinery must have been in existence on or before June 18, 2008.

*Eligible renewable biomass.* Renewable biomass as defined in this Notice.

*Energy Information Agency (EIA*). The statistical agency of the Department of Energy and source of official energy statistics from the U.S. Government.

*Feasibility study.* An Agency-acceptable analysis of the economic, environmental, technical, financial, and management capabilities of a proposed project or business in terms of its expected success. See Section III G(9) of this notice for a list of items included in a feasibility study.

*Feedstock unit.* Bushel, hundredweight, pound, or other unit of measure, as applicable, for the renewable biomass feedstock used in liquid transportation biofuel production.

*Financial Interest.* For the purposes of this notice means any ownership, creditor, or management interest in the biorefinery.

*Fiscal year.* The 12-month period beginning each October 1 and ending September 30 of the following calendar year.

*Fossil fuel.* Fuels derived from coal, oil and natural gas.

*Renewable biomass.*

(i) 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:

(A) 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; and

(B) Would not otherwise be used for higher value products; and

(C) Are harvested in accordance with applicable law and land management plans and the requirements for old growth maintenance, restoration, and management direction as per paragraphs (e)(2), (e)(3), and (e)(4), and large tree retention as per paragraph (f), of section 102 of the Healthy Forests Restoration Act of 2003 (16 U.S.C. 6512); or

(ii) 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:

(A) Renewable plant material, including feed grains; other agricultural commodities; other plants and trees; and algae; and

(B) 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.

*Rural or rural area.* 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, and any area that has been determined to be "rural in character" by the Under Secretary for Rural Development, or as otherwise identified in this definition. In determining which census blocks in an urbanized area are not in a rural area, the Agency will 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 two census blocks that are otherwise considered not in a rural area under this definition.

(i) 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.

(ii) For the Commonwealth of Puerto Rico, the island is considered rural and eligible for Business Programs assistance, except for the San Juan Census Designated Place (CDP) and any other CDP with greater than 50,000 inhabitants. CDPs with greater than 50,000 inhabitants, other than the San Juan CDP, may be determined to be eligible if they are "not urban in character." Any such requests must be forwarded to the National Office, Business and Industry Division, with supporting documentation as to why the area is "not urban in character" for

review, analysis, and decision by the Administrator, Business and Cooperative Programs.

(iii) For the State of Hawaii, all areas within the State are considered rural and eligible for Business Programs assistance, except for the Honolulu CDP within the County of Honolulu.

(iv) 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.

(v) The determination that an area is "rural in character" under this definition will be to areas that are within:

(A) An urbanized area that has two points on its boundary that are at least 40 miles apart, which is not contiguous or adjacent to a city or town that has a population of greater than 150,000 inhabitants or the urbanized area of such a city town; or

(B) An urbanized area contiguous and adjacent to a city or town of greater than 50,000 population that is within one-quarter mile of a rural area.

**II. Funding Information**

A. *Available Funds.* The Agency will authorize $8 million in budget authority for this program for FY 2010.

B. *Number of Payments.* The number of payments made will vary and be based on the number of applicants selected for award and availability of funds.

C. *Range of Amounts of Each Payment.* The amount of each payment will depend on the number of eligible applicants selected for award in the program, the amount of fossil fuel replaced, the cost effectiveness of the system, and the percentage reduction in fossil fuel use.

D. *Payment Limitations.* For the purposes of this program, the maximum payment an applicant may receive will be 50 percent of total eligible project costs or $5 million, whichever is less. Based on our research and survey of medium sized project costs, the Agency has determined that the dollar amount identified will provide adequate incentive for biorefineries to apply.

E. *Type of Instrument.* Payment Agreement.

**III. Eligibility Information**

This Notice contains eligibility requirements for applicants seeking payments under this program.

A. *Applicant Eligibility.* To be eligible for this program, the applicant must be an eligible biorefinery, defined in this Notice as a biorefinery in existence on or before June 18, 2008. Additionally, applicants must meet the citizenship requirement specified in paragraph (1) or (2), as applicable, of this section.

(1) If the applicant is an individual, the applicant must be a citizen or national 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 must reside in the U.S. after legal admittance for permanent residence.

(2) If the applicant is an entity other than an individual, the applicant must be at least 51 percent owned by persons who are either citizens or nationals 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 legally admitted permanent residents residing in the U.S. When an entity owns an interest in the applicant, its citizenship will be determined by the citizenship of the individuals who own an interest in the entity or any sub-entity based on their ownership interest.

(3) The Agency will determine an applicant's eligibility for participation in this program.

B. *Biorefinery Eligibility Requirements.* To be eligible for program payments under this Notice, the biorefinery must:

(1) Be located in a rural area and

(2) produce either transportation fuels that meet the Renewable Fuel Standard or are currently undergoing an appeal to the U.S. Environmental Protection Agency for inclusion in the Renewable Fuel Standard, or non-transportation renewable energy that results in a reduction in greenhouse gases.

In the case where an Agency receives an application that is undergoing an appeal before the U.S. Environmental Protection Agency for inclusion in the Renewable Fuel Standard, the Agency will be unable to finalize processing of the application until the appeal has been completed.

C. *Payment Eligibility.* To be eligible for program payments, an applicant must submit a complete application for consideration of payment. Payments will be made based on ranking of applicants in relation to project cost, cost-effectiveness, the quantity of fossil fuels the renewable biomass system is replacing, the reduction of fossil fuel usage resulting from the installation of a renewable biomass system.

D. *Ranking of Applications.* All scored applications will be ranked by the Agency as soon after the application deadline as possible. The Agency will consider the score an application has received compared to the scores of other applications in the priority list, with higher scoring applications receiving first consideration for payments.

E. *Selection of Applications for Payments.* Using the ranking created under Section V, Application Review Information, the Agency will select applications for payments. The Agency will notify, in writing, all applicants whose applications have been selected for payments. Applicants whose applications have not been selected for payments will be notified in writing, with a brief explanation as to why.

F. *Availability of funds.* If, after the majority of applications have been considered, insufficient funds remain to pay the next highest scoring application, the Agency may elect to pay a lower scoring application. Before this occurs, the Administrator, as applicable, will provide the applicant of the higher scoring application the opportunity to reduce the amount of its payment request to the amount of funds available. If the applicant agrees to lower its payment request, it must certify that the purposes of the project can be met, and the Administrator must determine the project is feasible at the lower amount.

G. *Application Package Contents.* Applicants are required to provide relevant data to allow for technical analysis of their existing facilities to demonstrate replacement of fossil fuel by renewable biomass with reasonable costs and maximum efficiencies. Applicants in existence on or before June 18, 2008 with more than 24 months of actual operating data must provide data for the most recent 24-month period. Applicants in existence on or before June 18, 2008 with less than 24 months of actual operating data must provide 12 months of data supported by engineering and design calculations, and site plans, prepared by the construction engineering firm.

All applicants must submit the following information as part of their application package:

(1) *Contact Data.* Contact information for the primary technical contact for the biorefinery.

(2) *Biorefinery Data.* Basic information on facility operations over time (hours/day, days/year).

(3) *Electric Use Data.* Information on existing electric service to the facility, data on consumption, peak and average demand, and monthly/seasonal use patterns.

(4) *Fuel Use Data.* Information on natural gas and current fuel use for boilers and heaters, including fuel type, costs, and use patterns.

(5) *Thermal Loads.* Information on existing thermal loads, including type (steam, hot water, direct heat),

conditions (temperature, pressure) and use patterns.

(6) *Existing Equipment.* Information on existing heating and cooling equipment, including type, capacities, efficiencies and emissions.

(7) *Site-Specific Data.* Information on other site-specific issues, such as expansion plans or neighborhood considerations that might impact the proposed new system design or operation; or environmental impacts.

(8) *Biofuel Production.* Information on liquid biofuel production (gallons/year).

(9) Each applicant must provide documentation from an Agency-approved recognized published source quantifying the reduction in greenhouse gas emissions that results from the displacement of fossil fuels.

(10) *Feasibility Study.* The applicant must submit a feasibility study by an independent qualified consultant, which has no financial interest in the biorefinery, and demonstrates that the renewable biomass system of the biorefinery is feasible, taking into account the economic, technical and environmental aspects of the system. The study must include the following:

(i) Executive summary, including resume of the consultant.

(A) Introduction/project overview (brief general overview of project location, size, etc.)

(ii) Economic feasibility determination.

(A) Information regarding project site.

(B) Availability of trained or trainable labor.

(C) Availability of infrastructure and rail and road service to the site.

(iii) Technical feasibility determination.

(A) Report must be based upon verifiable data and contain sufficient information and analysis so that a determination may be made on the technical feasibility of achieving the levels of energy production that are projected in the statements.

(B) Report must also identify and estimate project operation and development costs and specify the level of accuracy of these estimates and the assumptions on which these estimates have been based. The project engineer or architect is considered an independent party provided neither any principal of the firm nor any individual of the firm who participates in the technical feasibility report has a financial interest in the project.

(iv) Financial feasibility determination.

(A) Reliability of the financial projections and assumptions on which the project is based including all sources of project capital, both private and public, such as Federal funds.

(B) Projected balance sheets and costs associated with project operations.

(C) Cash flow projections for the life of the project.

(D) Adequacy of raw materials and supplies.

(E) Sensitivity analysis, including feedstock and energy costs, product/co-product prices.

(F) Risks related to the project.

(G) Continuity, maintenance and availability of other records and adequacy of management.

(v) Management feasibility determination.

(vi) Recommendations for implementation.

(vii) Environmental aspects of the system.

(viii) Feedstock:

(A) Feedstock source management.

(B) Estimates of feedstock volumes and costs.

(C) Collection, pre-treatment, transportation, and storage.

(D) Impacts on existing manufacturing plants or other facilities that use similar feedstock.

(ix) Feasibility/plans of project to work with producer associations or cooperatives including estimated amount of annual feedstock.

(x) Documentation that any and all woody biomass feedstock cannot be used as a higher value wood-based product.

H. *Eligible Project Costs.* Eligible project costs will be only for construction costs for repowering improvements associated with the equipment, installation, engineering, design, site plans, associated professional fees, permits and financing fees.

I. *Ineligible Project Costs.* Any project costs not directly associated with the repowering project and system incurred by the applicant prior to application for payment assistance under this program will be ineligible for payment assistance. A project is not eligible under this notice if it is using feedstocks for repowering that are feedgrains that received benefits under Title I of the Food, Conservation, and Energy Act of 2008.

## IV. Application and Submission Information

A. *Address to Make Application.* Application must be made to USDA, Rural Development-Energy Division, Program Branch, Attention: Repowering Assistance Program, 1400 Independence Avenue, SW., Stop 3225, Washington, DC 20250–3225.

B. *Content and Form of Submission.* Applicants must submit a signed original and one copy of an application containing all the information required in this section. The applicant must also furnish the Agency the required documentation identified in the following forms to verify compliance with program provisions before acceptance into the program:

- Form RD 9004–1, Part C; and
- Form RD 9004–2, Part H; and
- Form RD 9004–3, Part E.

Note that applicants are required to have a Dun and Bradstreet Universal Numbering System (DUNS) number (unless the applicant is an individual). The DUNS number is a nine-digit identification number, which uniquely identifies business entities. A DUNS number can be obtained at no cost via a toll-free request line at 1–866–705–5711, or online at *http://fedgov.dnb.com/webform.* In addition to the previously referenced feasibility study, applicants must submit to the Agency the following:

(1) Form RD 9004–1, "Repowering Assistance Program Application." Applicants must submit this form and all necessary attachments providing project information on the biorefinery; the facility at which the biorefinery operates, including location and products produced; and the types and quantities of renewable biomass feedstock being proposed to produce heat or power. This form requires the applicant to provide relevant data to allow for technical analysis of their existing facility to demonstrate replacement of fossil fuel by renewable biomass with reasonable costs and maximum efficiencies. Applicant must also submit evidence that the biorefinery was in existence on or before June 18, 2008. The applicant is required to certify the information provided.

(2) Form RD 9004–2, "Repowering Assistance Program Agreement."

(3) RD Instruction 1940–Q, Exhibit A–1, "Restriction on Lobbying (if over $100,000)."

(4) Form RD 400–1, "Equal Opportunity Agreement."

(5) Form RD 400–4, "Assurance Agreement."

(6) Form RD 1940–20, "Request for Environmental Information."

(7) Certifications. The applicant must furnish the Agency all required certifications before acceptance into the program, and furnish access to records required by the Agency to verify compliance with program provisions. Applicant must submit forms or other written documentation certifying to the following:

(i) AD–1047, "Certification Regarding Debarment, Suspension, and Other Responsibility Matters—Primary

Covered Transactions" or other written documentation.

(ii) AD–1048, "Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion—Lower Tier Covered Transactions" or other written documentation.

(8) SF–LLL, "Disclosure of Lobbying Activities".

C. *Submission Dates and Times.* For FY 2010, the application period is May 6, 2010 and July 20, 2010.

D. *Multiple Submissions.* Only one application from corporations and entities with more than one biorefinery location will be eligible under this Notice. A project that serves multiple biorefineries located at the same location is an eligible project provided the heat and power are centrally produced.

**V. Application Review Information**

The Agency is evaluating projects based on the cost, cost-effectiveness, and capacity of projects to reduce fossil fuels. The cost of the project is taken into consideration in the context of each project's ability to economically produce energy from renewable biomass to replace its dependence on fossil fuels. Projects with higher costs that are less efficient will not score well. The scoring criteria are designed to evaluate projects on simple payback as well as the percentage of fossil fuel reduction.

Submission of an application neither reserves payments nor ensures payments. The Agency will evaluate each application and make a determination as to whether the applicant is eligible, whether the proposed project is eligible, and whether the proposed payment request complies with all applicable statutes and regulations. This evaluation will be based on the information provided by the applicant and on other sources of information, such as recognized industry experts from the Agricultural Research Service and the Forest Service. The Agency will score each application in order to prioritize each proposed project. The maximum number of points awardable to any applicant will be 100. The evaluation criteria that the Agency will use to score these projects are as follows.

A. *Cost.* Payment will not exceed 50 percent of the total eligible project costs associated with the project or $5 million, whichever is less. Points will be awarded to applicants based on their ability to demonstrate the availability of sufficient other funding to complete the project. The applicant must provide evidence, satisfactory to the Agency, showing they have sufficient funds or commitment of funds to complete the project, including applicant financial statements or lender commitment letters. A maximum of 10 points will be awarded as follows:

(1) Applicant demonstrates availability of all funding needed to complete the project, award 10 points.

(2) Applicant does not demonstrate the availability of all the funding needed to complete the project, no points will be awarded.

B. *Cost-Effectiveness.* Cost-effectiveness will be scored based on the anticipated return on investment (ROI). Anticipated ROI will be demonstrated by calculating documented base energy use costs for the 24-month period prior to submission of the application or for at least 12 months of data supported by engineering and design calculations, and site plans, prepared by the construction engineering firm.

(1) ROI is equal to the simple payback period.

- ROI = C/S; where C = capital expenses; and S = savings in annual operating costs.
- Example: Capital expenses, including handling equipment, biomass boiler, piping improvements and plant modifications, are equal to $5,300,500. The annual difference in fossil fuel cost versus the cost for renewable biomass is $990,500. Assume these costs and uses are based on a yearly operating cycle, which may include handling, storage and treatment costs. In this example, C = $5,300,500; S = $990,500; ROI = 5.35 years (C/S = ROI).

(2) A maximum of 30 points will be awarded as follows:

(i) If the anticipated ROI is less than or equal to four years, up to award 30 points.

(ii) If the anticipated ROI is greater than four years but less than or equal to six years, award up to 10 points.

(iii) If the anticipated ROI will be greater than six years, award 0 points.

C. *Percentage of Reduction of Fossil Fuel Use.* The anticipated percent of reduction in the use of fossil fuels will be measured using the same evidence provided by the applicant for measuring cost-effectiveness. However, this set of criteria will measure actual fossil fuel use for the 24-month period prior to submission of the application or for at least 12 months of data supported by engineering and design calculations, and site plans, prepared by the construction engineering firm.

**Note:** Fossil fuel use in terms of electric usage will be evaluated by using generating information provided by the Energy Information Agency (EIA). Not all electric generated power originates from fossil fuels, based on the definition in Section I of this notice. The Agency will determine the percentage reduction of fossil use based on and in cooperation with the applicant's submission of electric power provider contracts, power agreements, and utility billings in relation to available information from the EIA.

A maximum of 25 points will be awarded as follows:

(1) Applicant demonstrates an anticipated reduction in fossil fuel use of 100 percent, award 25 points.

(2) Applicant demonstrates an anticipated reduction in fossil fuel use of at least 80 percent but less than 100 percent, award 20 points.

(3) Applicant demonstrates an anticipated reduction in fossil fuel use of at least 60 percent but less than 80 percent, award 15 points.

(4) Applicant demonstrates an anticipated reduction in fossil fuel use of at least 40 percent but less than 60 percent, award 10 points.

(5) Applicant demonstrates an anticipated reduction in fossil fuel use of at least 30 percent but less than 40 percent, award 5 points.

(6) Applicant demonstrates an anticipated reduction in fossil fuel use of less than 30 percent, award 0 points.

D. *Renewable Biomass Factors.* Applicants must demonstrate the availability of the project-specific renewable biomass for the project. If the biorefinery has a commitment or contract for biomass feedstocks, a maximum of 10 points will be awarded as follows:

(1) Applicant demonstrates acceptable evidence of 100 percent biomass availability, award 10 points.

(2) Applicant demonstrates acceptable evidence of 50 percent or greater biomass availability, award 5 points.

(3) Applicant is unable to demonstrate acceptable evidence of biomass availability, award 0 points.

E. *Technical Review Factors.* Technical reviews will be conducted by a team of experts, including rural energy coordinators and state engineers. The Agency may engage the services of other government agencies or other recognized industry experts in the applicable technology field, at its discretion, to evaluate and rate the application. Each section of the technical review will be scored within a range of possible points available within that section. A maximum of 25 points will be awarded as follows:

(1) *Qualifications of the Applicant's Project Team.* The applicant must describe its qualifications in terms of those individuals who will be essential to successful performance of the proposed project. This will include information regarding professional credentials, relevant experience, and

education, and must be supported with documentation of service capabilities, professional credentials, licenses, certifications, and resumes, as applicable. Award 0–5 points.

(2) *Agreements and Permits.* The applicant must describe the agreements and permits necessary for project implementation. An Agency-acceptable schedule for securing the required documents and permits must be provided. Award 0–3 points.

(3) *Design and Engineering.* The applicant has described the design, engineering, and testing needed for the proposed project. This description supports that the system will be designed, engineered, and tested so as to meet its intended purpose, ensure public safety, and comply with all applicable laws, regulations, agreements, permits, codes, and standards. Award 0–5 points.

(4) *Project Development Schedule.* The applicant has provided a detailed plan for project development including a proposed schedule of activities, a description of each significant task, its beginning and end, and its relationship to the time needed to initiate and carry the project through to successful completion. This description must address the applicant's project development cash flow requirements. Award 0–3 points.

(5) *Equipment Procurement.* The applicant must describe the equipment needed, and the availability of the equipment needed, to complete installation and activation of the new system. The description supports that the required equipment is available, and can be procured and delivered within the proposed project development schedule. Award 0–3 points.

(6) *Equipment Installation.* The applicant has provided a satisfactory description of the plan for site development and system installation that reflects the soundness of the project plan. Award 0–3 points.

(7) *Operations and Maintenance.* The applicant has described the operations and maintenance requirements of the system necessary for the system to operate as designed and provide the savings and efficiencies as described. The description and requirements noted must be supportable by the technical review. Award 0–3 points.

**VI. Program Payment Provisions**

Applicants must agree to the terms and conditions of the payment program's provisions. This section of the Notice identifies the process and procedures the Agency will use to make payments to eligible biorefineries.

A. *Payment Applications.* To request payments under this program during a fiscal year, an eligible biorefinery must:

(1) Submit Form RD 9004–3, "Repowering Assistance Program-Payment Request."

(i) Upon completion of the project or project improvements, the first payment will be paid at the rate not to exceed 20 percent of the project award. Subsequent semiannual payments will be paid based on actual measured renewable biomass energy production at a rate of 50 cents per million British thermal units (MMBTUs), up to the limit of the award.

(ii) After processing an initial payment, additional payments may be processed semiannually with the submission of Form RD 9004–3. This form must be accompanied by measurement and verification records including metered data demonstrating displacement of fossil fuel use from the conversion to renewable biomass. Payment will be at the rate of 50 cents per MMBTU up to and until the project payment limit has been reached.

(2) Certify that the request is accurate.

(3) Furnish the Agency such certifications and access to records that verify compliance with program provisions.

(4) Provide documentation, as requested by the Agency, regarding the production of usable energy at the biorefinery during the relevant payment period. Approved documentation for payment and verification of energy production from renewable biomass must include the following:

(i) Metered data documenting the production of heat, gas and power must be obtained utilizing an Agency approved measurement device.

(ii) Metered data must be verifiable and subject to independent calibration testing.

(iii) Applicant must present payment request for energy production in units of MMBTU and request payment based on verifiable and documented data.

(iv) Applicant must present receipts for drop shipments of and use of renewable biomass as applicable for the corresponding period in which they are requesting payments. Applicant must also present the current utility billing data from the same utilities used in the base energy use period for the corresponding payment request period.

B. *Additional Documentation.* After semiannual payment applications are submitted, eligible biorefineries may be required to submit additional supporting clarification if their original submittal is not sufficient to verify eligibility for payment.

C. *Notification.* The Agency will notify the biorefinery, in writing, whenever the Agency determines that a payment application is ineligible and why the application was determined ineligible.

D. *Payment Provisions.* After the initial payment, payments to eligible applicants will be made based on energy produced as measured in output MMBTUs.

E. *Payment Amounts.* An eligible biorefinery may receive a payment in an amount as determined according to the procedures specified in this section, subject to the availability of funds. The Agency will determine total available funds.

F. *Verification.* The Agency reserves the right to verify all payment requests and subsequent payments made under this program, including field visits, as frequently as necessary to ensure the integrity of the program. Documentation provided will be used to verify, reconcile, and enforce the payment terms of the agreement along with any potential refunds that the recipient will be required to make should they fail to adequately document their request. The required documentation is given in RD form 9004–3, the Repowering Program Payment Request, which details and provides that the requester demonstrate a reduction in fossil fuel use by providing concurrent readings from their previously metered usage, along with the readings from the metered, measured, and verifiable production of renewable energy from renewable biomass.

G. *Payment adjustments.* The Agency may make adjustments to payments otherwise payable to the biorefinery if it finds there is a difference between the quantity of fossil fuel actually replaced by renewable biomass and the quantity certified to in a payment application.

H. *Refunds and Interest Payments.* An eligible biorefinery that has received a payment under this program may be required to refund such payment as specified in this paragraph.

(1) An eligible biorefinery receiving payment under this program will become ineligible if the Agency determines the producer has:

(i) Made any material fraudulent representation; or

(ii) Misrepresented any material fact affecting a program determination.

(2) All payments made to a biorefinery determined by the Agency to be ineligible must be refunded to the Agency with interest and other such sums as may become due, including, but not limited to, any interest, penalties, and administrative costs, as determined appropriate under 31 CFR 901.9.

(3) When a refund is due, it must be paid promptly. If a refund is not made promptly, the Agency may use all remedies available to it, including Treasury offset under the Debt Collection Improvement Act of 1996, financial judgment against the producer, and sharing information with the Department of Justice.

(4) Late payment interest will be assessed on each refund in accordance with provisions and rates as determined by the Agency.

(i) Interest charged by the Agency under this program will be at the rate established annually by the Secretary of the U.S. Treasury pursuant to 31 U.S.C. 3717. Interest will accrue from the date payments were received by the biorefinery to the date of repayment, as determined in accordance with applicable regulations.

(ii) The Agency may waive the accrual of interest and/or damages if the Agency determines that the cause of the erroneous determination was not due to any action of the biorefinery.

(5) Any biorefinery or person receiving payment under this program will be jointly and severally liable for any refund or related charges due under this program.

**VII. Administration Information**

A. *Notice of Eligibility.* If an applicant is determined by the Agency to be eligible for participation, the Agency will notify the applicant, in writing, and will assign the applicant an agreement number. If an applicant is determined by the Agency to be ineligible, the Agency will notify the applicant, in writing, as to the reason(s) the applicant was rejected. Such applicants will have appeal rights as specified in this Notice.

B. *Conditions for Receipt of Payment.* A signed copy of Form RD 9004–2, "Repowering Assistance Program-Agreement," will be required for payment.

C. *Administrative and National Policy Requirements.* In the event that all program funds are not expended in 2010 and/or discretionary money becomes available, then the Agency will proceed with a rulemaking process.

(1) *Review or appeal rights.* Any person or entity who has applied for payments or whose right to receive payments under this program who is adversely affected by a decision by the Agency may appeal such decision to the USDA National Appeals Division pursuant to 7 CFR Part 11.

(2) *Remedies.* The remedies provided in this Notice will be in addition to other civil, criminal, or administrative remedies that may apply.

(3) *Records.* For the purpose of verifying compliance with the requirements of this Notice, each biorefinery must make available and provide for the metering of all power and heat producing boilers, containment vessels, generators and any other equipment related to the production of heat or power required to displace fossil fuel loads with renewable biomass. These records must be held in one place and be available at all reasonable times for examination by the Agency. Such records include all books, papers, contracts, scale tickets, settlement sheets, invoices, written price quotations, and any other documents related to the program that are within the control of the biorefinery. These records must be held and made available for Agency examination for a period of not less than three years from each payment date.

(4) *Succession and control of facilities and production.* Any party obtaining a biorefinery that is under this program must request permission to participate in this program as a successor. The Agency may grant such request if it is determined that, the party is eligible, and permitting such succession would serve the purposes of the program. If appropriate, the Agency may require the consent of the previous party to such succession. Also, the Agency may terminate payments and demand full refund of payments made if a party loses control of a biorefinery whose production of heat or power from renewable biomass is the basis of a program payment, or otherwise fails to retain the ability to assure that all program obligations and requirements will be met.

D. *Environmental Review.* All recipients under this subpart are subject to the requirements of 7 CFR Part 1940, subpart G.

E. *Civil Rights Requirements.* The Agency will comply with the civil rights law and compliance requirements in accordance with 7 CFR Part 1901–E. This program is subject to Executive Order 12898, Environmental Justice, and RD Instruction 2006–P.

**VIII. Agency Contacts**

*Notice Contact.* For further information about this Notice, please contact USDA, Rural Development-Energy Division, Program Branch, Attention: Frederick Petok, Stop 3225, Room 6870, 1400 Independence Avenue, SW., Washington, DC 20250–3225. Telephone: (202) 690–0784.

*Technical Assistance.* For technical assistance on this payment program, please contact the USDA, Rural Development-Energy Division, Attention: Repowering Assistance Program, 1400 Independence Avenue, SW., Stop 3225, Washington, DC 20250–3225. Telephone: (202) 720–1400.

**IX. Non-Discrimination Statement**

USDA prohibits discrimination in all its programs and activities on the basis of race, color, national origin, age, disability and, where applicable, sex, marital status, familial status, parental status, religion, sexual orientation, genetic information, political beliefs, reprisal, or because all or part of an individual's income is derived from any public assistance programs. (Not all prohibited bases apply to all programs.) Persons with disabilities who require alternative means for communication of program information (Braille, large print, audiotape, etc.) should contact USDA's TARGET Center at (202) 720–2600 (voice and TTY). To file a complaint of discrimination, write to USDA, Director, Office of Civil Rights, Room 326–W, Whitten Building, 1400 Independence Avenue, SW., Washington, DC, 20250–9410, or call (800) 795–3272 (voice) or (202) 720–5964 (voice and TDD). USDA is an equal opportunity provider and employer.

Dated: April 27, 2010.

**Judith A. Canales,**

*Administrator, Rural Development, Business and Cooperative Programs.*

[FR Doc. 2010–10244 Filed 5–5–10; 8:45 am]

**BILLING CODE 3410–XY–P**

## DEPARTMENT OF AGRICULTURE

### Forest Service

### Notice of Southwest Idaho Resource Advisory Committee Meeting

**AGENCY:** Forest Service, USDA.

**ACTION:** Notice of meeting.

**SUMMARY:** Pursuant to the authorities in the Federal Advisory Committee Act (Pub. L. 92–463) and under the Secure Rural Schools and Community Self-Determination Act of 2000, as amended, (Pub. L. 110–343), the Boise, Payette, and Sawtooth National Forests' Southwest Idaho Resource Advisory Committee will conduct a business meeting. The meeting is open to the public.

**DATES:** Thursday, May 20, 2010, beginning at 10:30 a.m.

**ADDRESSES:** Idaho Counties Risk Management Program Building, 3100 South Vista Avenue, Boise, Idaho.

**SUPPLEMENTARY INFORMATION:** Agenda topics will include review and approval of project proposals, and is an open public forum.

**FOR FURTHER INFORMATION CONTACT:** Dale Olson, Designated Federal Official, at (208) 347–0322 or e-mail *dolson07@fs.fed.us.*

Dated: April 27, 2010.

**Suzanne C. Rainville,**

*Forest Supervisor, Payette National Forest.*

[FR Doc. 2010–10379 Filed 5–5–10; 8:45 am]

**BILLING CODE 3410–11–M**

## COMMISSION ON CIVIL RIGHTS

### Sunshine Act Notice

**AGENCY:** United States Commission on Civil Rights.

**ACTION:** Notice of meeting.

**DATE AND TIME:** Friday, May 14, 2010; 11 a.m. EDT.

**PLACE:** 624 9th St., NW., Room 540, Washington, DC 20425.

**Meeting Agenda**

This meeting is open to the public, except where noted otherwise.

I. Approval of Agenda
II. Announcements
III. Program Planning
- Approval of Briefing Report on Health Care Disparities
- Approval of Findings & Recommendations on Educational Effectiveness of Historically Black Colleges & Universities Briefing Report
- Approval of 2011 Business Meeting Calendar
- Update on Status of Title IX Project—Some of the discussion of this agenda item may be held in closed session.

IV. State Advisory Committee Issues
- Colorado SAC
- Ohio SAC
- South Carolina SAC
- Consideration of Additional Nominee to the New Jersey SAC

V. Staff Director's Report
VI. Adjourn

**CONTACT PERSON FOR FURTHER INFORMATION:** Lenore Ostrowsky, Acting Chief, Public Affairs Unit (202) 376–8591. TDD: (202) 376–8116.

Persons with a disability requiring special services, such as an interpreter for the hearing impaired, should contact Pamela Dunston at least seven days prior to the meeting at 202–376–8105. TDD: (202) 376–8116.

Dated: May 4, 2010.

**David Blackwood,**

*General Counsel.*

[FR Doc. 2010–10891 Filed 5–4–10; 4:15 pm]

**BILLING CODE 6335–01–P**

## DEPARTMENT OF COMMERCE

### Submission for OMB Review; Comment Request

The Department of Commerce will submit to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35).

*Agency:* U.S. Census Bureau.

*Title:* U.S. Census Age Search.

*OMB Control Number:* 0607–0117.

*Form Number(s):* BC–600, BC–600(SP), BC–649(L), BC–658(L).

*Type of Request:* Extension of a currently approved collection.

*Burden Hours:* 629.

*Number of Respondents:* 2,642.

*Average Hours Per Response:* Ten and a half minutes.

*Needs and Uses:* The age and citizenship searching service is a self-supporting operation of the U.S. Census Bureau. Expenses incurred in providing census transcripts are covered by the fees paid by individuals requesting a search of the census records. The Census Bureau maintains the 1910–2000 Federal censuses for searching purposes. The purpose of the searching is to provide, upon request, transcripts of personal data from historical population census records. Information relating to age, place of birth, and citizenship is provided upon payment of the established fee to individuals for their use in qualifying for Social Security, old age benefits, retirement, court litigation, passports, insurance settlements, etc. The census records are confidential by an Act of Congress. The Census Bureau is prohibited by federal laws from disclosing any information contained in the records except upon written request from the person to whom the information pertains or to a legal representative.

*Affected Public:* Individuals or households.

*Frequency:* On occasion.

*Respondent's Obligation:* Required to obtain or retain benefits.

*Legal Authority:* Title 13 U.S.C. Section 8a.

*OMB Desk Officer:* Brian Harris-Kojetin, (202) 395–7314.

Copies of the above information collection proposal can be obtained by calling or writing Diana Hynek, Departmental Paperwork Clearance Officer, (202) 482–0266, Department of Commerce, Room 6625, 14th and Constitution Avenue, NW., Washington, DC 20230 (or via the Internet at *dhynek@doc.gov*).

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to Brian Harris-Kojetin, OMB Desk Officer either by fax (202–395–7245) or e-mail (*bharrisk@omb.eop.gov*).

Dated: April 30, 2010.

**Glenna Mickelson,**

*Management Analyst, Office of the Chief Information Officer.*

[FR Doc. 2010–10609 Filed 5–5–10; 8:45 am]

**BILLING CODE 3510–07–P**

## DEPARTMENT OF COMMERCE

### International Trade Administration

**[A–570–863]**

### Administrative Review of Honey from the People's Republic of China: Final Results of Antidumping Duty Administrative Review and Rescission of Review, In Part

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

**SUMMARY:** On December 23, 2009, the Department of Commerce ("Department") published in the **Federal Register** the preliminary results of the seventh administrative review, covering the period December 1, 2007, through November 30, 2008, of the antidumping duty order on honey from the People's Republic of China ("PRC").[1] We gave interested parties an opportunity to comment on the Preliminary Results. After reviewing interested parties' comments, we made no changes for the final results of review. The final antidumping duty margins for this review are listed in the "Final Results of Review" section below.

**DATES:** *Effective Date:* May 6, 2010.

**FOR FURTHER INFORMATION CONTACT:** Katie Marksberry or Josh Startup, AD/CVD Operations, Office 9, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230; telephone: (202) 482–7906 or (202) 482–5260, respectively.

**SUPPLEMENTARY INFORMATION:**

**Background**

On February 2, 2009, the Department initiated this review with respect to thirty–eight companies upon which an administrative review was requested.[2]

[1] *See Seventh Administrative Review of Honey from the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review and Intent to Rescind, In Part*, 74 FR 68249 (December 23, 2009) ("Preliminary Results").

[2] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and*

Subsequently, pursuant to section 351.213(d)(1) of the Department's regulations, the Department rescinded the administrative review with respect to thirty–three companies, based upon Petitioners'[3] timely withdrawal of review requests.[4] Thus, five companies remain subject to this review.

As noted above, on December 23, 2009, the Department published the *Preliminary Results* of this administrative review. In the *Preliminary Results* **Federal Register** notice, we set the deadline for interested parties to submit case briefs and rebuttal briefs to January 22, 2010, and January 29, 2010, respectively. On January 26, 2010, we extended the deadline for parties to submit rebuttal briefs to February 3, 2010. On January 21, 2010, Dongtai Peak Honey Industry Co., Ltd. ("Dongtai Peak") filed a case brief. On February 4, 2010, the Petitioners filed a rebuttal brief. On February 17, 2010, the Department sent Dongtai Peak a letter requiring it to remove new factual information from its brief, pursuant to section 351.301(b)(2) of the Department's regulations. Subsequently, Dongtai Peak resubmitted its case brief on February 24, 2010. On March 30, 2010, the Department sent Dongtai Peak another letter, rejecting Dongtai Peak's resubmitted case brief which continued to contain new information. On April 2, 2010, Dongtai Peak resubmitted its case brief. The Department did not hold a public hearing pursuant to 19 CFR 351.310(d), as there were no hearing requests made by interested parties.

As explained in the memorandum from the Deputy Assistant Secretary for Import Administration, the Department has exercised its discretion to toll deadlines for the duration of the closure of the Federal Government from February 5, through February 12, 2010.[5] Thus, all deadlines in this segment of the proceeding were extended by seven days, and the revised deadline for the final results of this review became April 29, 2010.

**Analysis of Comments Received**

All issues raised in the case and rebuttal briefs by parties to these reviews are addressed in the "Administrative Review of Honey from the People's Republic of China: Issue and Decision Memorandum for the Final Results," ("Issues and Decision Memorandum") which is dated concurrently with this notice, and which is hereby adopted by this notice. A list of the issues which parties raised and to which we respond in the Issues and Decision Memorandum is attached to this notice as an Appendix. The Issues and Decision Memorandum is a public document and is on file in the Central Records Unit ("CRU"), Main Commerce Building, Room 1117, and is accessible on the Department's website at *http://www.trade.gov/ia*. The paper copy and electronic version of the memorandum are identical in content.

**Scope of the Order**

The products covered by this order are natural honey, artificial honey containing more than 50 percent natural honey by weight, preparations of natural honey containing more than 50 percent natural honey by weight and flavored honey. The subject merchandise includes all grades and colors of honey whether in liquid, creamed, comb, cut comb, or chunk form, and whether packaged for retail or in bulk form.

The merchandise subject to this order is currently classifiable under subheadings 0409.00.00, 1702.90.90 and 2106.90.99 of the Harmonized Tariff Schedule of the United States ("HTSUS"). Although the HTSUS subheadings are provided for convenience and customs purposes, the Department's written description of the merchandise under order is dispositive.

**Final Partial Rescission of Administrative Review**

In the *Preliminary Results*, the Department preliminarily rescinded the administrative review of Dongtai Peak, whose POR sales the Department found to be non–*bona fide. See Preliminary Result; see also* Memorandum to James C. Doyle, Director, Office 9; through Catherine Bertrand, Program Manager; from Blaine Wiltse, International Trade Compliance Analyst; regarding Antidumping Duty Administrative Review of Honey from the People's Republic of China: *Bona fide* Analysis of the Sales Under Review for Dongtai Peak Honey Industry Co., Ltd. (dated December 16, 2009). The Department received comments with respect to our preliminary decision to rescind the review. The Department continues to find the sales by Dongtai Peak to be non–*bona fide*.[6]

**Facts Available**

For the reasons stated below, we are applying adverse facts available ("AFA") to the PRC–wide entity which includes Anhui Native Produce Import and Export Corp. ("Anhui Native"). Section 776(a)(2) of the Act provides that if an interested party: (A) withholds information that has been requested by the Department; (B) fails to provide such information in a timely manner or in the form or manner requested, subject to subsections 782(c)(1) and (e) of the Act; (C) significantly impedes a determination under the antidumping statute; or (D) provides such information but the information cannot be verified, the Department shall, subject to subsection 782(d) of the Act, use facts otherwise available in reaching the applicable determination.

Furthermore, section 776(b) of the Act provides that, if the Department finds that an interested party "has failed to cooperate by not acting to the best of its ability to comply with a request for information," the Department may use information that is adverse to the interests of that party as facts otherwise available. Adverse inferences are appropriate "to ensure that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully." *See* Statement of Administrative Action ("SAA") accompanying the URAA, H.R. Doc. No. 316, 103d Cong., 2d Session at 870 (1994). An adverse inference may include reliance on information derived from the petition, the final determination in the investigation, any previous review, or any other information placed on the record. *See* section 776(b) of the Act.

In the *Preliminary Results*, the Department determined that in accordance with section 776(a)(2)(B) of the Act and 782(c)(1) of the Act, the use of facts available is appropriate for the PRC–wide entity, which the Department determined includes Anhui Native. As discussed in the *Preliminary Results*, Anhui Native was selected as a mandatory respondent in the current review but did not submit a response to the antidumping duty questionnaires issued by the Department on March 9, 2009. On April 15, 2009, Anhui Native submitted a letter informing the Department that it would not participate in the current review. As Anhui Native was selected as a mandatory respondent but did not submit its response to the

*Request for Revocation in Part*, 74 FR 5821 (February 2, 2009) ("Initiation Notice").

[3] The petitioners are the members of the American Honey Producers Association and the Sioux Honey Association (hereinafter referred to as "Petitioners").

[4] *See Honey from the People's Republic of China: Partial Rescission of the Seventh Antidumping Administrative Review*, 74 FR 11087 (March 16, 2009).

[5] *See* Memorandum to the Record regarding ''Tolling of Administrative Deadlines As a Result of the Government Closure During the Recent Snowstorm,'' dated February 12, 2010.

[6] *See* Issues and Decision Memorandum at Comment 1.

questionnaire, Anhui Native did not demonstrate its eligibility for a separate rate and thus was determined to be part of the PRC–wide entity for purposes of this review. Because Anhui Native, as part of the PRC–wide entity, failed to respond to the Department's requests for information, the Department finds that the PRC–wide entity did not cooperate to the best of its ability, and its non–responsiveness necessitates the use of facts available, pursuant to sections 776(a)(2)(A), (B) and (C) of the Act. Because the PRC–wide entity, now including Anhui Native, withheld requested information, failed to provide information in a timely manner and in the form requested, and significantly impeded this proceeding, we continue to find that the PRC–wide entity, failed to cooperate to the best of its ability, and, accordingly, find it appropriate to apply to it a margin based on AFA.. The Department's determination is in accordance with sections 776(a)(2)(A), (B), (C) and 776(b) of the Act.[7] As no interested party commented on this determination regarding Anhui Native or the PRC–wide entity, we have made no changes from our *Preliminary Results* with respect to this issue.

**Separate Rate Status**

In the *Preliminary Results*, the Department noted that it was unable to deliver the antidumping duty questionnaire to Qinhuangdao Municipal Dafeng Industrial Co., Ltd. ("QMD") after it was selected for individual examination in this review. Also, in the *Preliminary Results*, we stated that because QMD did not submit a separate rate certification or application, as instructed in the *Initiation Notice*, we found that QMD did not demonstrate its eligibility for a separate rate and thus is properly considered part of the PRC–wide entity. Consequently, as no interested party commented on this issue, we are continuing to find that QMD is not eligible for a separate rate in this review and will be considered part of the PRC–Wide entity.

In the *Initiation Notice*, we required that all companies listed therein wishing to qualify for separate rate status in this administrative review to submit, as appropriate, either a separate rate application or certification.[8] As noted above, the Department initiated this administrative review with respect to thirty–eight companies, and rescinded the review on thirty–three of those thirty–eight companies. Thus, in addition to Dongtai Peak, Anhui Native, and QMD, two companies remain subject to this review. We note that neither of the two remaining companies, Inner Mongolia Youth Trade Development Co., Ltd. and Wuhu Qinshgi Tangye, demonstrated eligibility for separate rate status in this administrative review. In the *Preliminary Results*, the Department determined that those companies which did not demonstrate eligibility for a separate rate are properly considered part of the PRC–Wide entity.[9] Since the *Preliminary Results*, no interested parties submitted comments regarding these findings. Therefore, we continue to treat these two entities as part of the PRC–Wide entity.

**Final Results of Review**

The weighted–average dumping margins for the POR are as follows:

HONEY FROM THE PEOPLE'S REPUBLIC OF CHINA

| Manufacturer/Exporter | Margin (per kilogram) |
|---|---|
| PRC–Wide Rate[10] ..... | $2.63 |

**Assessment**

Upon issuance of these final results, the Department will determine, and Customs and Border Protection ("CBP") shall assess, antidumping duties on all appropriate entries covered by these reviews. The Department intends to issue assessment instructions to CBP 15 days after the publication date of the final results of this review.

**Cash Deposit Requirements**

The following cash deposit requirements will be effective upon publication of these final results of administrative review for all shipments of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the publication date, as provided for by section 751(a)(2)(C) of the Act: (1) for the exporters listed above, the cash deposit rate will be established in the final results of this review (except, if the rate is zero or *de minimis, i.e.*, less than 0.5 percent, no cash deposit will be required for that company); (2) for previously investigated or reviewed PRC and non–PRC exporters not listed above that have separate rates, the cash deposit rate will continue to be the exporter–specific rate published for the most recent period; (3) for all PRC exporters of subject merchandise which have not been found to be entitled to a separate rate, the cash deposit rate will be the PRC–wide rate $2.68 per kilogram; and (4) for all non–PRC exporters of subject merchandise which have not received their own rate, the cash deposit rate will be the rate applicable to the PRC exporters that supplied that non–PRC exporter. These deposit requirements, when imposed, shall remain in effect until further notice.

**Reimbursement of Duties**

This notice also serves as a final reminder to importers of their responsibility under 19 CFR 351.402(f) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this POR. Failure to comply with this requirement could result in the Department's presumption that reimbursement of antidumping duties has occurred and the subsequent assessment of doubled antidumping duties.

**Administrative Protective Orders**

This notice also serves as a reminder to parties subject to administrative protective orders ("APO") of their responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305, which continues to govern business proprietary information in this segment of the proceeding. Timely written notification of the return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a violation which is subject to sanction.

We are issuing and publishing this administrative review and notice in accordance with sections 751(a)(1) and 777(i) of the Act.

[7] *See e.g., Non–Malleable Cast Iron Pipe Fittings from the People's Republic of China: Final Results of Antidumping Duty Administrative Review*, 71 FR 69546 (December 1, 2006) and accompanying Issues and Decision Memorandum at Comment 1. *See also Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Preliminary Results of the First Administrative Review and New Shipper Review*, 72 FR 10689, 10692 (March 9, 2007) (decision to apply total AFA to the NME–wide entity) unchanged in *Certain Frozen Warmwater Shrimp From the Socialist Republic of Vietnam: Final Results of the First Antidumping Duty Administrative Review and First New Shipper Review*, 72 FR 52052 (September 12, 2007) ("*Vietnam Shrimp* AR1").

[8] *See Initiation Notice.*

[9] *See Preliminary Results.*

[10] The PRC–wide entity includes: Anhui Native Produce Import and Export Corp., Inner Mongolia Youth Trade Development Co., Ltd., Qinhuangdao Municipal Dafeng Industrial Co., Ltd., and Wuhu Qinshgi Tangye.

Dated: April 29, 2010.

**Ronald K. Lorentzen,**

*Deputy Assistant Secretary for Import Administration.*

### Appendix I – Decision Memorandum

**Company Specific Issues**

*Comment 1:* Whether Dongtai Peak' Sales Were Not Bona Fide

a. Timing of POR Sales
b. Prices of Sales
c. Quantity of Sales
d. Business Practices of U.S. Customers

[FR Doc. 2010–10685 Filed 5–5–10; 8:45 am]

**BILLING CODE 3510–DS–S**

## DEPARTMENT OF COMMERCE

### International Trade Administration

**[A–552–802]**

### Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Extension of Time Limits for Preliminary and Final Results of Full Five-year ( "Sunset'') Review of Antidumping Duty Order

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

**DATES:** *Effective Date:* May 6, 2010.

**FOR FURTHER INFORMATION CONTACT:** Jerry Huang, AD/CVD Operations, Office 9, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, N.W., Washington, DC 20230; telephone: (202) 482–4047.

**SUPPLEMENTARY INFORMATION:**

#### Background

On January 4, 2010, the Department of Commerce ("the Department") published in the **Federal Register** the notice of initiation of its sunset reviews of the antidumping duty orders on certain frozen warmwater shrimp from Brazil, the People's Republic of China, India, Thailand, and the Socialist Republic of Vietnam ("Vietnam"). *See Initiation of Five-year ("Sunset") Review*, 75 FR 103 (January 4, 2010). On January 19, 2010, domestic interested parties, the Ad Hoc Shrimp Trade Action Committee, and the American Shrimp Processors Association, submitted letters indicating their intent to participate in the sunset review on certain frozen warmwater shrimp from Vietnam. On February 3, 2010, domestic interested parties and 34 respondent interested parties provided substantive responses as required under section 351.218(d)(3) of the Department's regulations. Domestic and respondent interested parties included, in their substantive responses, arguments regarding whether dumping is likely to continue or recur. Domestic and respondent interested parties filed rebuttal comments on February 12, 2010.

On March 2, 2010, the Department determined that the substantive responses filed by the domestic and respondent interested parties were adequate, and that it was appropriate to conduct a full sunset review. *See* Memorandum to James C. Doyle: Adequacy Determination in Antidumping Duty Sunset Review of Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam, dated March 2, 2010, and on file in the Central Records Unit, Room B 099 of the Department of Commerce building. On February 16, 2010, the Department issued a memorandum that tolled the deadlines for all Import Administration cases by seven calendar days due to the recent Federal Government closure. *See* Memorandum for the Record from Ronald Lorentzen, DAS for Import Administration, Tolling of Administrative Deadlines as a Result of the Government Closure During the Recent Snowstorm, dated February 12, 2010. The Department's preliminary and final results of the sunset review of the antidumping duty order on certain frozen warmwater shrimp are currently scheduled for May 1, 2010 and September 1, 2010, respectively.

#### Extension of Time Limits for Preliminary and Final Results of Reviews

The Tariff Act of 1930, as amended (the "Act") provides for the completion of a full sunset review within 240 days of the publication of the initiation notice. *See* section 751(c)(5)(A) of the Act. In accordance with section 751(c)(5)(B) of the Act, the Department may extend the period of time for making its determination by not more than 90 days, if it determines that the review is extraordinarily complicated.

We determine that this review is extraordinarily complicated, pursuant to section 751(c)(5)(C)(i), (ii) and (iii) of the Act, because there are a large number of issues, a large number of companies involved in this sunset review and because the Department must consider a number of complex issues such as the trends of pre–order and post–order shipment volume. Therefore, the Department requires additional time to complete its analysis. Accordingly, the Department is extending the deadline in this proceeding for 90 days. As a result, the Department intends to issue the preliminary results of the full sunset review by July 30, 2010, and the final results by November 30, 2010.

This notice is issued in accordance with sections 751(c)(5)(B) and (C) of the Act.

Dated: April 30, 2010.

**Edward C. Yang,**

*Acting Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.*

[FR Doc. 2010–10718 Filed 5–5–10; 8:45 am]

**BILLING CODE 3510–DS–S**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

**RIN: 0648–XW31**

### Fisheries of the South Atlantic; Southeast Data, Assessment, and Review (SEDAR); Public Meeting

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

**ACTION:** Notice of SEDAR 24 Data Workshop for South Atlantic red snapper.

**SUMMARY:** The SEDAR assessment of the South Atlantic stock of red snapper will consist of a series of workshops and webinars: a Data Workshop, a series of Assessment webinars, and a Review Workshop. This is the twenty-fourth SEDAR. This is notice of the Data Workshop component of SEDAR 24. Notice of the Assessment Process and the Review Workshop will be made at a later date. See **SUPPLEMENTARY INFORMATION**.

**DATES:** The Data Workshop will take place May 24 -28, 2010. See **SUPPLEMENTARY INFORMATION**.

**ADDRESSES:** The Data Workshop will be held at the Francis Marion Hotel, 387 King Street, Charleston, SC 29403; telephone: (843) 722–0600 or (877) 756–2121.

**FOR FURTHER INFORMATION CONTACT:** Dale Theiling, SEDAR Coordinator, 4055 Faber Place Drive, Suite 201, North Charleston, SC 29405; telephone: (843) 571–4366.

**SUPPLEMENTARY INFORMATION:** The Gulf of Mexico, South Atlantic, and Caribbean Fishery Management Councils, in conjunction with NOAA Fisheries and the Atlantic and Gulf States Marine Fisheries Commissions have implemented the Southeast Data, Assessment and Review (SEDAR) process, a multi-step method for determining the status of fish stocks in the Southeast Region. SEDAR includes a Data Workshop, a Stock Assessment Process and a Review Workshop. The

product of the Data Workshop is a data report which compiles and evaluates potential datasets and recommends which datasets are appropriate for assessment analyses. The product of the Stock Assessment Process is a stock assessment report which describes the fisheries, evaluates the status of the stock, estimates biological benchmarks, projects future population conditions, and recommends research and monitoring needs. The assessment is independently peer reviewed at the Review Workshop. The product of the Review Workshop is a Peer Review Evaluation Report documenting Panel opinions regarding the strengths and weaknesses of the stock assessment and input data. Participants for SEDAR Workshops and Assessment Process are appointed by the Gulf of Mexico, South Atlantic, and Caribbean Fishery Management Councils; the Atlantic and Gulf States Marine Fisheries Commissions; and NOAA Fisheries Southeast Regional Office and Southeast Fisheries Science Center. Participants include data collectors and database managers; stock assessment scientists, biologists, and researchers; constituency representatives including fishermen, environmentalists, and NGO's; International experts; and staff of Councils, Commissions, and state and federal agencies.

**SEDAR 24 Data Workshop Schedule**

**May 24–28, 2010; SEDAR 24 Data Workshop**

*May 24, 2010: 1 p.m. - 8 p.m.; May 25–27, 2010: 8 a.m. - 8 p.m.; May 28, 2010: 8 a.m. - 12 p.m.*

An assessment data set and associated documentation will be developed during the Data Workshop. Participants will evaluate all available data and select appropriate sources for providing information on life history characteristics, catch statistics, discard estimates, length and age composition, and fishery dependent and fishery independent measures of stock abundance.

Although non-emergency issues not contained in this agenda may come before this group for discussion, those issues may not be the subject of formal action during these meetings. Action will be restricted to those issues specifically listed in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the Council's intent to take final action to address the emergency.

**Special Accommodations**

These meetings are physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to the Council office (see **ADDRESSES**) at least 10 business days prior to each workshop.

Dated: May 3, 2010.

**Tracey L. Thompson,**

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

[FR Doc. 2010–10698 Filed 5–5–10; 8:45 am]

**BILLING CODE 3510–22–S**

## DEPARTMENT OF COMMERCE

### International Trade Administration

**[C–570–913]**

### Certain New Pneumatic Off–the-Road Tires from the People's Republic of China: Partial Rescission of Countervailing Duty Administrative Review

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

**SUMMARY:** The Department of Commerce (the Department) is rescinding, in part, the administrative review of the countervailing duty order on Certain New Pneumatic Off–the-Road Tires (OTR Tires) from the People's Republic of China (PRC) for the period December 17, 2007 through December 31, 2008, with respect to the following two companies:

1. Hangzhou Zhongce Rubber Co., Ltd. (Zhongce)
2. Tianjin United Tire & Rubber International Co., Ltd. (TUTRIC)

This partial rescission is based on withdrawals by GPX International Tire Corporation (GPX), Zhongce, and TUTRIC of their requests for review.

**DATES:** *Effective Date:* May 6, 2010.

**FOR FURTHER INFORMATION CONTACT:** Andrew Huston, AD/CVD Operations, Office 6, Import Administration, International Trade Administration, Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230; telephone: (202) 482–4261.

**SUPPLEMENTARY INFORMATION:**

**Background**

The Department published a notice of opportunity to request an administrative review of the countervailing duty order on OTR Tires from the PRC. *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity To Request Administrative Review*, 74 FR 45179 (September 1, 2009). GPX timely requested an administrative review of the countervailing duty order on OTR Tires from the PRC for the period December 17, 2007 through December 31, 2008 for several companies, including TUTRIC. In addition, the Department received timely requests from Zhongce and TUTRIC. These two companies only requested reviews of themselves.

In accordance with section 751(a)(1) of the Tariff Act of 1930, as amended, (the Act) and 19 CFR 351.221(c)(1)(i), the Department published a notice initiating an administrative review of the countervailing duty order. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Requests for Revocation in Part*, 74 FR 54956 (October 26, 2009).

On December 30, 2009, the Department rescinded the review with respect to the following six companies, pursuant to a timely withdrawal by GPX of its request for reviews of these companies: Aeolus Tyre Co. Ltd., Guizhou Tire Co. Ltd., Jiangsu Feichi Co., Ltd., Shandong Huitong Tyre Co., Ltd., Tianjin Wanda Tyre Co., Ltd., and Triangle Tyre Co., Ltd. *See Certain New Pneumatic Off–the-Road Tires From the People's Republic of China: Partial Rescission of Countervailing Duty Administrative Review*, 75 FR 846 (December 30, 2009). On November 20, 2009, GPX withdrew its request for review of Zhongce and TUTRIC, and on January 4, 2010 and January 12, 2010, respectively, Zhongce and TUTRIC withdrew their requests for review.

**Rescission, in Part, of Countervailing Duty Administrative Review**

The Department's regulations provide that the Department will rescind an administrative review if the party that requested the review withdraws its request for review within 90 days of the date of publication of the notice of initiation. *See* 19 CFR 351.213(d)(1). Zhongce, the only party that self–requested a review, timely withdrew its request within the 90-day deadline. In addition, GPX and TUTRIC, the only parties that requested a review of TUTRIC, each timely withdrew their requests regarding TUTRIC within the 90-day deadline. Therefore, in accordance with 19 CFR 351.213(d)(1), the Department is rescinding this administrative review of the countervailing duty order with respect to Zhongce and TUTRIC. This administrative review will continue with respect to Hebei Starbright Tire Co.

**Assessment**

The Department will instruct U.S. Customs and Border Protection (CBP) to assess countervailing duties on all appropriate entries. For Zhongce and TUTRIC, countervailing duties shall be assessed at rates equal to the cash deposit or bonding rate of the estimated countervailing duties required at the time of entry, or withdrawal from warehouse, for consumption, in accordance with 19 CFR 351.212(c)(1)(i). The Department intends to issue appropriate assessment instructions directly to CBP 15 days after publication of this notice.

**Notification Regarding Administrative Protective Order**

This notice serves as a final reminder to parties subject to administrative protective orders (APO) of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3), which continues to govern business proprietary information in this segment of the proceeding. Timely written notification of the return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a violation which is subject to sanction.

This notice is issued and published in accordance with sections 751(a)(1) and 777(i)(1) of the Act, and 19 CFR 351.213(d)(4).

Dated: April 29, 2010.

**Edward C. Yang,**

*Acting Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.*

[FR Doc. 2010–10707 Filed 5–5–10; 8:45 am]

**BILLING CODE 3510–DS–S**

## DEPARTMENT OF COMMERCE

### International Trade Administration

**[A–560–823]**

### Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses From Indonesia: Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination

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

**DATES:** *Effective Date:* May 6, 2010.

**SUMMARY:** The Department of Commerce (the Department) preliminarily determines that certain coated paper suitable for high-quality print graphics using sheet-fed presses (coated paper) from Indonesia is being, or is likely to be, sold in the United States at less than fair value (LTFV), as provided in section 733(b) of the Tariff Act of 1930, as amended (the Act). The estimated dumping margins are listed in the "Suspension of Liquidation" section of this notice. Interested parties are invited to comment on this preliminary determination. Pursuant to requests from interested parties, we are postponing for 60 days the final determination and extending provisional measures from a four-month period to not more than six months. Accordingly, we will make our final determination not later than 135 days after publication of the preliminary determination.

**FOR FURTHER INFORMATION CONTACT:** Gemal Brangman or Brian Smith, AD/CVD Operations, Office 2, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482–3773 and (202) 482–1766, respectively.

**SUPPLEMENTARY INFORMATION:**

**Background**

In its initiation of this investigation (*see Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses From Indonesia and the People's Republic of China: Initiation of Antidumping Duty Investigations,* 74 FR 53710 (October 20, 2009) (*Initiation Notice*)), the Department stated that it had selected PT. Pabrik Kertas Tjiwi Kimia Tbk. (TK) and PT. Pindo Deli Pulp and Paper (PD) as the mandatory respondents in this investigation. *See Initiation Notice,* 74 FR 53714. Since the *Initiation Notice,* the following events have occurred.

The Department set aside a period of time for parties to raise issues regarding product coverage and encouraged all parties to submit comments within 20 calendar days of publication of the *Initiation Notice. See Initiation Notice,* 74 FR at 53710; *see also Antidumping Duties; Countervailing Duties; Final Rule,* 62 FR 27296, 27323 (May 19, 1997). We received several scope comment submissions from interested parties during the period November 2009 through April 2010. For further details, see "Scope Comments" section of this notice. The Department also set aside a time for parties to comment on product characteristics for use in the antidumping questionnaire. We received such comments from the respondents on November 2, 2009, and from the petitioners[1] on November 10, 2009.

On November 17, 2009, the U.S. International Trade Commission (ITC) preliminarily determined that there is a reasonable indication that imports of coated paper from Indonesia are materially injuring the U.S. industry and notified the Department of its findings. *See Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses from China and Indonesia,* Investigation Nos. 701–TA–470–471 and 731–TA–1169–1170 (Preliminary), 74 FR 61174 (November 23, 2009).

On November 20, 2009, we issued PD and TK the antidumping duty questionnaire.

On December 16, 2009, we issued a memorandum detailing the reasons why it would not be practicable in this investigation to examine individually more than the two Indonesian producers/exporters of coated paper named in the *Initiation Notice. See* Memorandum from James Maeder, Office Director, to John M. Andersen, Acting Deputy Assistant Secretary, entitled, "Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses from Indonesia: Selection of Respondents," dated December 16, 2009 (Respondent Selection Memo).

On December 22, 2009, PD and TK submitted a consolidated response to section A (*i.e.,* the section covering general information about the company) of the antidumping duty questionnaire. In this submission, PD and TK indicated that not only are they affiliated with each other, but they are also affiliated with a third company that produces coated paper in Indonesia, PT Indah Kiat Pulp and Paper Tbk. (IK). Based on an analysis of the facts of record, as discussed in the "Collapsing" section of this notice below, we find that it is appropriate to treat these companies as a single entity, hereafter referred to as PD/TK/IK.

On January 12, 2010, PD and TK submitted their responses to sections B (*i.e.,* the section covering comparison-market sales) and C (*i.e.,* the section covering U.S. sales) of the antidumping duty questionnaire). On January 19, 2010, PD and TK submitted their response to section D (*i.e.,* the section covering cost of production (COP) and constructed value (CV)) of the

[1] The petitioners include the following companies: Appleton Coated LLC, NewPage Corporation, S.D. Warren Company d/b/a/ Sappi Fine Paper North America, and the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union.

antidumping duty questionnaire. These responses did not include sales and cost data for multi-ply coated paper products the respondents produced and sold during the POI. Therefore, on January 25, 2010, we requested that PD/TK/IK provide such data, if the multi-ply coated paper they produced and sold during the POI met the description of the merchandise in the scope, pending the Department's ruling on the matter. PD/TK/IK provided the requisite data on multi-ply coated paper on February 16, 2010.

On January 22, 2010, the petitioners made a timely request pursuant to section 733(c)(1)(A) of the Act and 19 CFR 351.205(e) for a 50-day postponement of the preliminary determination. Therefore, pursuant to section 733(c)(1)(A) of the Act, on February 4, 2010, the Department postponed the preliminary determination of this investigation until April 21, 2010. *See Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses From Indonesia and the People's Republic of China: Postponement of Preliminary Determinations of Antidumping Duty Investigations,* 75 FR 7447 (February 19, 2010). As explained in the memorandum from the Deputy Assistant Secretary for Import Administration, the Department has exercised its discretion to toll deadlines for the duration of the closure of the Federal Government from February 5, through February 12, 2010. Thus, all deadlines in this proceeding have been extended by seven days. The revised deadline for the preliminary determination of this investigation is now April 28, 2010. *See* Memorandum to the file regarding "Tolling of Administrative Deadlines As a Result of the Government Closure During the Recent Snowstorm," dated February 12, 2010.

On March 2, 2010, the Department issued PD/TK/IK a supplemental questionnaire concerning its responses to sections A, B, and C of the antidumping questionnaire, and received PD/TK/IK's responses to this supplemental questionnaire during March and April 2010. On March 12, 2010, the Department issued PD/TK/IK a section D supplemental questionnaire and received a response to this questionnaire on April 2 and 9, 2010. The Department requested additional information from PD/TK/IK regarding its responses to sections A through D of the questionnaire in March and April 2010. PD/TK/IK provided the requested information pertaining to sections A through C of the questionnaire, and some of the requested information pertaining to section D of the questionnaire during the same months. The Department expects to receive the remaining information requested with respect to section D in May 2010.

On March 12, 2010, the petitioners filed an allegation of targeted dumping by PD/TK/IK. *See* the "Targeted Dumping Allegation" section below.

On April 6, 2010, the petitioners submitted comments for consideration with respect to the preliminary determination.

On April 13, 2010, PD/TK/TK requested that in the event of an affirmative preliminary determination in this investigation, the Department: (1) Postpone its final determination by 60 days in accordance with 735(a)(2)(A) of the Act and 19 CFR 351.210(b)(2)(ii); and 2) extend the application of the provisional measures prescribed under 19 CFR 351.210(e)(2) from a four-month period to a six-month period.

Similarly, on April 16, 2010, the petitioners requested that in the event of a negative preliminary determination in this investigation, the Department postpone its final determination by 60 days in accordance with 735(a)(2)(B) of the Act and 19 CFR 351.210(b)(2)(i). For further discussion, see the "Postponement of Final Determination and Extension of Provisional Measures" section of this notice, below.

**Period of Investigation**

The period of investigation (POI) is July 1, 2008, to June 30, 2009. This period corresponds to the four most recent fiscal quarters prior to the month of the filing of the petition.

**Scope of Investigation**

The merchandise covered by this investigation includes certain coated paper and paperboard [2] in sheets suitable for high quality print graphics using sheet-fed presses; coated on one or both sides with kaolin (China or other clay), calcium carbonate, titanium dioxide, and/or other inorganic substances; with or without a binder; having a GE brightness level of 80 or higher; [3] weighing not more than 340 grams per square meter; whether gloss grade, satin grade, matte grade, dull grade, or any other grade of finish; whether or not surface-colored, surface-decorated, printed (except as described below), embossed, or perforated; and irrespective of dimensions ("Certain Coated Paper").

Certain Coated Paper includes (a) coated free sheet paper and paperboard that meets this scope definition; (b) coated groundwood paper and paperboard produced from bleached chemi-thermo-mechanical pulp ("BCTMP") that meets this scope definition; and (c) any other coated paper and paperboard that meets this scope definition.

Certain Coated Paper is typically (but not exclusively) used for printing multi-colored graphics for catalogues, books, magazines, envelopes, labels and wraps, greeting cards, and other commercial printing applications requiring high quality print graphics.

Specifically excluded from the scope are imports of paper and paperboard printed with final content printed text or graphics.

As of 2009, imports of the subject merchandise are provided for under the following categories of the Harmonized Tariff Schedule of the United States ("HTSUS"): 4810.14.11, 4810.14.1900, 4810.14.2010, 4810.14.2090, 4810.14.5000, 4810.14.6000, 4810.14.70, 4810.19.1100, 4810.19.1900, 4810.19.2010, 4810.19.2090, 4810.22.1000, 4810.22.50, 4810.22.6000, 4810.22.70, 4810.29.1000, 4810.29.5000, 4810.29.6000, 4810.29.70. While HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope of the investigation is dispositive.

**Scope Comments**

As discussed in the preamble to the regulations, we set aside a period for interested parties to raise issues regarding product coverage. *See Antidumping Duties; Countervailing Duties; Final Rule,* 62 FR 27296, 27323 (May 19, 1997). The Department encouraged all interested parties to submit such comments within 20 calendar days of signature of the *Initiation Notice. See Initiation Notice,* 74 FR at 31692. As we stated in *Certain Coated Paper Suitable For High-Quality Print Graphics Using Sheet-Fed Presses from the People's Republic of China: Preliminary Affirmative Countervailing Duty Determination and Alignment of Final Countervailing Duty Determination with Final Antidumping Duty Determination,* 75 FR 10774 (March 9, 2010) (*PRC Coated Paper CVD Prelim*) and *Certain Coated Paper from Indonesia: Preliminary Affirmative*

[2] "'Paperboard' refers to Certain Coated Paper that is heavier, thicker and more rigid than coated paper which otherwise meets the product description. In the context of Certain Coated Paper, paperboard typically is referred to as 'cover,' to distinguish it from 'text.'"

[3] One of the key measurements of any grade of paper is brightness. Generally speaking, the brighter the paper the better the contrast between the paper and the ink. Brightness is measured using a GE Reflectance Scale, which measures the reflection of light off of a grade of paper. One is the lowest reflection, or what would be given to a totally black grade, and 100 is the brightest measured grade.

*Countervailing Duty Determination and Alignment of Final Countervailing Duty Determination with Final Antidumping Duty Determination,* 75 FR 10761 (March 9, 2010) (*Indonesia Coated Paper CVD Prelim*), the Department received scope comments from interested parties on November 6, 2009,[4] November 16, 2009,[5] December 16, 2009,[6] December 28, 2009,[7] and March 12, 2010,[8] with respect to whether multi-ply coated paper products are covered by the scope of the AD/CVD investigations of certain coated paper from the PRC and Indonesia. As the Department stated in the *PRC Coated Paper CVD Prelim* and *Indonesia Coated Paper CVD Prelim,* based on our review of the scope, we find that the number of plies is not among the specific physical characteristics (*e.g.,* brightness, coating, weight, etc.) defining the subject merchandise. Accordingly, we preliminarily find that multi-ply coated paper is covered by the scope of these investigations, to the extent that it meets the description of the merchandise in the scope.

On February 25, 2010, the petitioners filed additional comments rebutting certain documents filed by the PRC and Indonesian respondents which contained scope comments and restating their prior claims. In response to a question the Department posed during an *ex parte* meeting, the petitioners stated that the phrase "suitable for high quality print graphics" could be stricken from the description of the subject merchandise without altering the scope of these investigations. In the *PRC Coated Paper CVD Prelim* and *Indonesia Coated Paper CVD Prelim,* the Department invited interested parties to comment within 20 calendar days of publication of the *PRC Coated Paper CVD Prelim* and *Indonesia Coated Paper CVD Prelim* with respect to whether striking the language "suitable for high quality print graphics" from the description of the subject merchandise would alter the scope of these investigations. We received comments from interested parties on March 29, 2010,[9] and April 8, 2010.[10] Based on the information contained in these submissions, on April 23, 2010, the Department requested additional information from the petitioners with respect to this scope issue. The submission of this information is due May 3, 2010. Therefore, we intend to address this issue for the final determination in these coated paper AD/CVD investigations.

In their February 25, 2010, submission, the petitioners also stated that the phrase in the scope, "(c) any other coated paper that meets the scope definition" should also include the word "paperboard." As the Department stated in the *PRC Coated Paper CVD Prelim* and *Indonesia Coated Paper CVD Prelim,* we agree that the word "paperboard" was inadvertently omitted (*e.g.,* it is already explicitly included in the first sentence of the scope language and in "(b)" of the second paragraph) and have corrected the scope language to read "(c) any other coated paper and paperboard that meets this scope definition."

**Collapsing**

On December 22, 2009, PD and TK submitted a consolidated questionnaire response, based on a claim that they are producers of subject merchandise in Indonesia that are affiliated via common ownership and membership in the companies' Boards of Directors. In this response, PD and TK claimed that they are also affiliated with an additional producer of certain coated paper in Indonesia, IK, by reason of a common parent company, as well as certain common board members.

In their March 26, 2010, response to the Department's section A supplemental questionnaire, PD, TK and IK provided additional information regarding their relationship during the POI. After an analysis of this information, we preliminarily determine that, in accordance with 19 CFR 351.401(f), it is appropriate to collapse these entities for purposes of this investigation because: (1) These entities are affiliated pursuant to section 771(33)(F) of the Act because they are under the control of a common parent company, PT. Purinusa Ekapersada (Purinusa), which owns a majority of the shares in each company; (2) PD, TK and IK have the facilities to produce identical or similar products, such that substantial retooling would not be required to restructure manufacturing priorities; and (3) we find that there exists a significant potential for manipulation of price or production if PD, TK and IK do not receive the same antidumping duty rate. With respect to the significant potential for manipulation, we find, in accordance with 19 CFR 351.401(f)(2), that: (1) There is common ownership through the shared parent, Purinusa; (2) PD, TK and IK share members on their Boards of Directors and other employees; and (3) these companies have intertwined operations. For further discussion, see Memorandum to John M. Andersen, Deputy Assistant Secretary for Import Administration, from the Team entitled, "Whether to Treat Respondents as a Single Entity for Margin Calculation Purposes in the Antidumping Duty Investigation of Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses From Indonesia," dated April 21, 2010 (Collapsing Memo).

**Targeted Dumping Allegation**

The statute allows the Department to employ the average-to-transaction margin-calculation methodology under the following circumstances: (1) There is a pattern of export prices that differ significantly among purchasers, regions, or periods of time; (2) the Department explains why such differences cannot be taken into account using the average-to-average or transaction-to-transaction methodology. *See* section 777A(d)(1)(B) of the Act.

On March 12, 2010, the petitioners submitted allegations of targeted dumping with respect to PD/TK/IK and asserted that the Department should apply the average-to-transaction methodology in calculating the margin for this entity. In their allegations, the petitioners assert that there are patterns of export prices (EPs) (or constructed export prices (CEPs)) for comparable merchandise that differ significantly among purchasers, regions, and time periods. The petitioners relied on the Department's targeted-dumping test in *Certain Steel Nails from the United Arab Emirates: Notice of Final Determination of Sales at Not Less Than Fair Value,* 73 FR 33985 (June 16, 2008),

[4] *See* "Scope Comments: Coated Paper Suitable For High-Quality Print Graphics Using Sheet-Fed Presses from China and Indonesia," dated November 6, 2009.

[5] *See* "Certain Coated Paper Suitable For High-Quality Print Graphics Using Sheet-Fed Presses ("Certain Coated Paper") from Indonesia and the People's Republic of China: Petitioners' Rebuttal Comments on Scope," dated November 16, 2009.

[6] *See* "Request to Re-Examine the Department's Industry Support Calculation Coated Paper Suitable For High-Quality Print Graphics Using Sheet-Fed Presses from China," dated December 16, 2009.

[7] *See* "Certain Coated Paper Suitable For High-Quality Print Graphics Using Sheet-Fed Presses from Indonesia and the People's Republic of China: Petitioners' Response to Chinese and Indonesian Respondents' Request to Re-examine the Department's Industry Support Calculation," dated December 28, 2009.

[8] *See* "Ex Parte Meeting Regarding Scope: Records Documents, Certain Coated Paper Suitable For High-Quality Print Graphics Using Sheet-Fed Presses from Indonesia and the People's Republic of China," originally dated February 23, 2010, resubmitted on March 12, 2010.

[9] *See* "Additional Scope Comments: Certain Coated Paper Suitable For High-Quality Print Graphics Using Sheet-Fed Presses from China and Indonesia," dated March 29, 2010.

[10] *See* "Certain Coated Paper Suitable For High-Quality Print Graphics Using Sheet-Fed Presses (Certain Coated Paper) from Indonesia and the People's Republic of China: Petitioners' Rebuttal Comments on Scope," dated April 8, 2010.

and *Certain Steel Nails from the People's Republic of China: Final Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances,* 73 FR 33977 (June 16, 2008) (collectively *Nails*), as applied in more recent investigations such as *Notice of Final Determination of Sales at Less Than Fair Value: Polyethylene Retail Carrier Bags from Taiwan,* 75 FR 14569 (March 26, 2010) (*PRCBs from Taiwan*).[11] *See* Petitioners' Submission of Targeted Dumping Allegations dated March 12, 2010, at pages 3–8.

On April 6, 2010, the petitioners filed additional comments urging the Department to follow the practice it recently adopted in *PRCBs from Taiwan,* and make average-to-transaction price comparisons for all of PD/TK/IK's U.S. sales if it finds any targeted dumping by PD/TK/IK. Given the Department's current practice in investigations of allowing the dumped U.S. sales to be offset by non-dumped U.S. sales, the petitioners maintain that the only way for the Department to ensure that targeted dumping is captured in its final determination in this investigation without being offset by any non-dumped sales is to employ the alternative (average-to-transaction) price comparison methodology to all of PD/TK/IK'S U.S. sales.

*A. Targeted-Dumping Test*

We conducted customer, regional, and time-period targeted-dumping analyses for PD/TK/IK using the methodology we adopted in *Nails* and most recently articulated in *PRCBs from Taiwan* and *Polyethylene Retail Carrier Bags from Indonesia: Final Determination of Sales at Less Than Fair Value,* 75 FR 16431 (April 1, 2010), and accompanying Issues and Decision Memorandum at Comment 1 (*PRCBs from Indonesia*) (collectively *PRCBs*); and *Certain Oil Country Tubular Goods from the People's Republic of China: Final Determination of Sales at Less Than Fair Value, Affirmative Final Determination of Critical Circumstances and Final Determination of Targeted Dumping,* 75 FR 20335 (April 19, 2010) and accompanying Issues and Decision Memorandum at Comment 2 (*OCTG*).

The methodology we employed involves a two-stage test; the first stage addresses the pattern requirement and the second stage addresses the significant-difference requirement. *See* section 777A(d)(1)(B)(i) of the Act, *Nails, PRCBs,* and *OCTG.* In this test we made all price comparisons on the basis of identical merchandise (*i.e.,* by control number or CONNUM). The test procedures are the same for the customer, region, and time-period targeted-dumping allegations. We based all of our targeted-dumping calculations on the U.S. net price which we determined for U.S. sales by PD/TK/IK in our standard margin calculations. For further discussion of the test and results, *see* the Department's memorandum entitled, "Calculations Performed for PT. Pindo Deli Pulp and Paper Mills ("PD"), PT. Pabrik Kertas Tjiwi Kimia Tbk ("TK"), and PT Indah Kiat Pulp & Paper Tbk ("IK") for the Preliminary Determination in the Antidumping Duty Investigation of Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses from Indonesia," dated April 28, 2010 (Calculation Memo). As a result of our analysis, we preliminarily determine that there is a pattern of EPs for comparable merchandise that differ significantly among certain customers, regions and time periods for PD/TK/IK in accordance with section 777A(d)(1)(B)(i) of the Act and our current practice as discussed in *Nails, PRCBs,* and *OCTG.*

*B. Price-Comparison Method*

Section 777A(d)(1)(B)(ii) of the Act states that the Department may compare the weighted average of the normal value (NV) to EPs (or CEPs) of individual transactions for comparable merchandise if the Department explains why differences in the patterns of EPs (or CEPs) cannot be taken into account using the average-to-average methodology. As described above, we preliminarily determine that, with respect to sales by PD/TK/IK for certain customers, regions and time periods, there was a pattern of prices that differed significantly. We find that these differences can be taken into account using the average-to-average methodology because the average-to-average methodology does not conceal differences in the patterns of prices between the targeted and non-targeted groups by averaging low-priced sales to the targeted group with high-priced sales to the non-targeted group. Therefore, for the preliminary determination, we find that the standard average-to-average methodology takes into account the price differences because the alternative average-to-transaction methodology yields no difference in the margin or yields a difference in the margin that is so insignificant relative to the size of the resulting margin as to be immaterial. Accordingly, for this preliminary determination we have applied the standard average-to-average methodology to all U.S. sales. *See* Calculation Memo for further discussion.

**Product Comparisons**

We have taken into account the comments that were submitted by the interested parties concerning product-comparison criteria. In accordance with section 771(16) of the Act, we considered all products produced by PD/TK/IK that fit the description in the "Scope of Investigation" section of this notice, and sold in Indonesia during the POI, to be foreign like products for purposes of determining appropriate product comparisons to U.S. sales. In making the product comparisons, we matched U.S. sales of the subject merchandise to home market sales of the foreign like product based on the physical characteristics reported by PD/TK/IK in the following order of importance: cast coating, coating sides, basis weight, brightness, finish, opacity, and sheet size.

Where there were no sales of identical merchandise in the home market made in the ordinary course of trade and produced by PD/TK/IK to compare to U.S. sales, we compared U.S. sales to sales of the next most similar foreign like product on the basis of the characteristics listed above, which were made in the ordinary course of trade.

**Fair Value Comparisons**

To determine whether sales of coated paper from Indonesia to the United States made by PD/TK/IK were made at LTFV, we compared, where appropriate, the EP to the NV, as described in the "Export Price," and "Normal Value" sections of this notice, below. In accordance with section 777A(d)(1)(A)(i) of the Act, we compared POI weighted-average EPs to POI weighted-average NVs. *See* discussion below.

**Export Price**

Section 772(a) of the Act defines EP as the price at which the subject merchandise is first sold (or agreed to be

[11] In addition to a targeted dumping analysis based on the methodology established in *Nails,* the petitioners provided an alternative analysis based on two elements which they maintain are permissible options for the Department to consider in addressing targeted dumping under the statute: (1) Identification of product-specific weighted-average prices to a targeted entity that are two percent below the weighted-average prices of those products to non-targeted entities (a methodology rejected by the Department in recent prior investigations such as *Nails* and *PRCBs from Taiwan*); and (2) identification of any sales to a targeted entity that are below cost (a methodology which is not price-based and, therefore, not relevant to addressing targeted dumping under the Department's current practice). *See* Petitioners' Submission of Targeted Dumping Allegations dated March 12, 2010, at pages 8–12.

sold) before the date of importation by the producer or exporter outside of the United States to an unaffiliated purchaser for exportation to the United States, as adjusted under subsection (c).

During the POI, PD/TK/IK's U.S. sales were made through the following general channels of distribution: (1) Sales directly to unaffiliated customers in the United States; (2) sales to unaffiliated customers in the United States via affiliated trading companies located in countries other than Indonesia and the United States, but shipped directly from the producer; and (3) sales to unaffiliated customers in the United States via an affiliated trading company located in a country other than Indonesia and the United States, shipped out of that company's inventory. In accordance with section 772(a) of the Act, we have applied the EP methodology for sales made through the first channel of distribution noted above because they were made by the respondent and exported from Indonesia to the first unaffiliated purchaser in the United States prior to importation.

Regarding the second channel of distribution noted above, PD/TK/IK claimed that it was affiliated with all but one of the trading companies used in this distribution channel [12] because it: (1) Was involved in agreements legally binding the trading companies to buy all products they sell from PD/TK/IK and its affiliates; and (2) exercised almost total control of the trading companies' day-to-day operations, including establishing all prices and sales agreements with the U.S. customers. We have analyzed the information on the record with respect to this affiliation claim and preliminarily find that the trading companies are affiliated with PD/TK/IK pursuant to section 771(33)(G) of the Act given that there is, in essence, an agent relationship in which PD/TK/IK controls each trading company used in this second channel of distribution. Evidence on the record indicates that, among other things, PD/TK/IK establishes all prices and sales agreements with the U.S. customer, the affiliated trading companies do not inventory subject merchandise, and the merchandise is shipped directly from the respondent to the U.S. customer. *See e.g., Coated Free Sheet Paper from Indonesia: Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination,* 72 FR 30753, 30755 (June 4, 2007) (unchanged in *Notice of Final Determination of Sales at Less Than Fair Value: Coated Free Sheet Paper from Indonesia,* 72 FR 60636 (October 25, 2007)) (*CFS from Indonesia*). Accordingly, we have applied EP methodology for sales made through this second channel of distribution because they were made by the producer's affiliate outside the United States to the first unaffiliated purchaser in the United States prior to importation. We intend to examine each trading company's involvement in the U.S. sales process and the affiliation claim further at verification.

Regarding the third channel of distribution noted above, PD/TK/IK claimed that it was affiliated with the trading company involved in this distribution channel by reason of a common parent company (Purinusa), which owns a majority of the shares in each company, as well as certain common board members. Based on the record evidence, we find that PD/TK/IK is affiliated with this company pursuant to section 771(33)(F) of the Act because they are under the common control of Purinusa. Accordingly, we have applied EP methodology for sales made through this third channel of distribution because they were made by the producer's affiliate outside the United States to the first unaffiliated purchaser in the United States prior to importation.

PD/TK/IK claimed that a portion of its U.S. sales through affiliated trading companies during the POI involved an affiliated U.S. company. PD/TK/IK reported these sales as CEP sales. According to PD/TK/IK, the U.S. company at issue was affiliated by reason of an exclusive selling agent arrangement with PD/TK/IK during the POI. After analyzing the information on the record with respect to this affiliation claim, we preliminarily find that the U.S. company is not affiliated with PD/TK/IK because the written agreement between PD/TK/IK and this company does not establish the exclusive nature of the relationship. The U.S. company is not precluded from selling merchandise produced by other manufacturers, and there is no evidence that PD/TK/IK otherwise has the ability to control this company. *See, e.g., CFS from Indonesia,* at 72 FR 30755; and *Notice of Final Determination of Sales at Less Than Fair Value: Carbon and Certain Alloy Steel Wire Rod from Mexico,* 67 FR 55800 (August 30, 2002), and accompanying Issues and Decision Memorandum at Comment 1c. Accordingly, we have applied EP methodology (vs. CEP methodology) to these sales for purposes of the preliminary determination. We intend to examine the U.S. company's involvement in the U.S. sales process and PD/TK/IK's affiliation claim further at verification.

We based EP on the packed FOB, CFR, CIF, or DDU prices to unaffiliated purchasers in the United States. We adjusted the starting price, where appropriate, for billing adjustments. In accordance with section 772(c)(2)(A) of the Act, we made deductions, where appropriate, for foreign inland freight from plant to the port of exportation, insurance (including domestic, marine, and U.S. inland), freight and warehousing expenses (incurred on sales of subject merchandise sold out of the inventory of an affiliated trading company located in a third country), international freight (including foreign and U.S. brokerage and handling expenses and U.S. inland freight), and U.S. importation fees. We also added freight revenue, where applicable, and capped it by the amount of freight expenses incurred, in accordance with our practice. *See Certain Orange Juice from Brazil: Final Results of Antidumping Administrative Review,* 74 FR 40167 (August 11, 2009), and accompanying Issues and Decision Memorandum at Comment 3.

**Normal Value**

*A. Home Market Viability and Comparison-Market Selection*

To determine whether there is a sufficient volume of sales in the home market to serve as a viable basis for calculating NV (*i.e.,* the aggregate volume of home market sales of the foreign like product is equal to or greater than five percent of the aggregate volume of U.S. sales), we compared PD/TK/IK's volume of home market sales of the foreign like product to the volume of U.S. sales of the subject merchandise. *See* section 773(a)(1)(C) of the Act. Based on this comparison, we determined that PD/TK/IK had a viable home market during the POI. Consequently, we based NV on home market sales.

*B. Level of Trade*

In accordance with section 773(a)(1)(B) of the Act, to the extent practicable, we determine NV based on sales in the comparison market at the same level of trade (LOT) as the EP or CEP. Pursuant to 19 CFR 351.412(c)(1), the NV LOT is that of the starting-price sales in the comparison market or, when NV is based on constructed value (CV),

[12] The remaining trading company involved in this channel of distribution also made sales of subject merchandise to unaffiliated customers in the United States out of its inventory. PD/TK/IK's claim of affiliation with this company is discussed in the context of the third channel of distribution below.

that of the sales from which we derive selling, general and administrative expenses (SG&A) and profit. For EP, the U.S. LOT is also the level of the starting-price sale, which is usually from exporter to importer. For CEP, it is the level of the constructed sale from the exporter to the importer.

To determine whether NV sales are at a different LOT than EP or CEP sales, we examine stages in the marketing process and selling functions along the chain of distribution between the producer and the unaffiliated customer. *See* 19 CFR 351.412(c)(2). If the comparison-market sales are at a different LOT, and the difference affects price comparability, as manifested in a pattern of consistent price differences between the sales on which NV is based and comparison-market sales at the LOT of the export transaction, we make an LOT adjustment under section 773(a)(7)(A) of the Act. Finally, for CEP sales, if the NV level is more remote from the factory than the CEP level and there is no basis for determining whether the difference in levels between NV and CEP affects price comparability, we adjust NV under section 773(a)(7)(B) of the Act (the CEP-offset provision). *See Notice of Final Determination of Sales at Less Than Fair Value: Certain Cut-to-Length Carbon Steel Plate from South Africa,* 62 FR 61731, 61732 (Nov. 19, 1997).

In this investigation, we obtained information from PD/TK/IK regarding the marketing stages involved in making their reported home market and U.S. sales, including a description of the selling activities performed by the respondent (and its affiliates) for each channel of distribution.

PD/TK/IK reported that it made EP sales in the U.S. market through the following general channels of distribution: (1) Direct sales to U.S. customers (Channel 1); (2) direct sales through affiliated trading companies (Channel 2); and (3) out-of-inventory sales through an affiliated trading company (Channel 3). PD/TK/IK stated that its U.S. sales were made at the same LOT, regardless of distribution channel. We examined the selling activities performed for all three channels and found that PD/TK/IK performed the following selling functions for all three channels: Sales forecasting, strategic/economic planning, personnel training/exchange, order input/processing, provision of direct sales personnel, packing, payment of commissions, and freight and delivery services. Regarding sales through Channel 2, we found that, in addition to the selling functions performed by PD/TK/IK on these sales, the trading companies further performed the following selling functions: Order input/processing and payment of commissions. Regarding sales through Channel 3, we found that the trading company performed the following selling functions: Sales promotion, inventory maintenance, order input/processing, provision of direct sales personnel, sales/marketing support, technical assistance, freight and delivery services, and repacking. These selling activities can be generally grouped into four categories for analysis: (1) Sales and marketing; (2) freight and delivery; (3) inventory maintenance and warehousing; and (4) warranty and technical support. Accordingly, we found that PD/TK/IK (and its affiliates) performed sales and marketing and freight and delivery services for all U.S. sales. We also note that PD/TK/IK's affiliated trading company performed certain selling activities (*e.g.,* inventory maintenance and technical services) for PD/TK/IK's sales through Channel 3 that were not performed for PD/TK/IK's sales through Channels 1 and 2. However, there is no evidence on the record to support finding these differences to be material selling function distinctions significant enough to warrant a separate LOT in the U.S. market, as the respondent did not provide information on the extent to which the selling activities identified above are performed in one channel or the other. Therefore, we preliminarily determine that there is one LOT in the U.S. market.

With respect to the home market, PD/TK/IK made sales through a single channel of distribution (*i.e.,* sales to unaffiliated customers through an affiliated reseller).[13] We examined the selling activities performed for this channel and found that PD/TK/IK performed the following selling functions: Sales forecasting, strategic/economic planning, personnel training/exchange, packing, inventory maintenance, order input/processing, provision of direct sales personnel, technical assistance, after-sales services, and freight and delivery services. In addition, PD/TK/IK's affiliated reseller performed the following sales functions: Sales forecasting, strategic/economic planning, personnel training/exchange, advertising, sales promotion, distributor/dealer training, inventory maintenance, order input/processing, provision of direct sales personnel, sales/marketing support, market research, technical assistance, provision of cash discounts, and after-sales services. Accordingly, based on the four selling function categories identified above, we find that PD/TK/IK and its affiliated reseller performed sales and marketing, freight and delivery services, inventory maintenance and warehousing, and warranty and technical services in the home market. Because all sales in the home market were made through a single distribution channel, we preliminarily determine that there is one LOT in the home market.

Finally, we compared the EP LOT to the home market LOT and found that the home market selling functions differed from the U.S. selling functions with respect to: (1) Inventory maintenance and technical services performed in the home market that are performed only on certain sales to the United States; and (2) certain sales and marketing activities performed in the home market that are either not performed on U.S. sales or are performed only on certain U.S. sales. However, there is no evidence on the record to support a finding that these differences are significant enough to distinguish the home market LOT from the EP LOT, as the respondent did not provide information on the extent to which the selling activities identified above are performed in one market or the other. Notwithstanding this fact, we note that given that PD/TK/IK sold at only one LOT in the home market, and there is no additional information on the record that would allow for an LOT adjustment, no LOT adjustment is possible for PD/TK/IK.

*C. Cost of Production Analysis*

Based on our analysis of the petitioners' sales-below-cost of production (COP) allegation in the petition, we found reasonable grounds to believe or suspect that coated paper sales were made in Indonesia at prices below the COP, and initiated a country-wide cost investigation. *See* section 773(b)(2)(A)(i) of the Act and *Initiation Notice* at 74 FR 53713. Accordingly, we conducted a sales-below-cost investigation to determine whether PD/TK/IK's sales were made at prices below their COP.

[13] PD/TK/IK reported that it also made some sales directly to unaffiliated customers in the home market. However, these sales were not included in the home market database PD/TK/IK submitted to the Department. Given that the quantity of these sales constitute an insignificant percentage of the total home market sales quantity that PD/TK/IK reported in its home market sales database, we have excluded these sales from our preliminary LOT (and margin) analysis. *See, e.g., Notice of Final Determination of Sales at Less Than Fair Value and Negative Final Determination of Critical Circumstances: Certain Color Television Receivers From the People's Republic of China,* 69 FR 20594 (April 16, 2004), and accompanying Issues and Decision Memorandum at Comment 27.

1. Calculation of COP

In accordance with section 773(b)(3) of the Act, we calculated COP based on the sum of the cost of materials and fabrication for the foreign like product, plus an amount for general and administrative expenses (G&A), and financial expenses. *See* "Test of Home Market Sales Prices" section below for treatment of home market selling expenses and packing costs. We relied on the COP data submitted by PD/TK/IK in the April 15, 2010, response to section D of the Department's questionnaire, except where noted below.

1. We applied the major input rule under section 773(f)(3) of the Act to PD/TK's purchases of certain pulp from an affiliated supplier. As a result, we adjusted PD/TK's reported cost of manufacturing to reflect the higher of transfer price, market price or COP for pulp. Regarding the affiliated supplier's COP of the pulp, we currently have outstanding requests for information concerning affiliated log purchases by this company used in the production of pulp and will consider this information for the final determination.

2. We applied the transactions disregarded rule under section 773(f)(2) of the Act to purchases of certain pulp from affiliated parties, and we adjusted PD's reported cost of manufacturing to the higher of transfer price or market price.

3. We eliminated the inter-company profit arising from the affiliated pulp transactions between IK and PD/TK. We currently have outstanding requests for information concerning affiliated log purchases by IK used in the production of pulp and will consider this information for the final determination.

4. We adjusted the COP of certain pulp PD/TK purchased from IK and an affiliated supplier to reflect the total financial expenses of an affiliated trading company.

5. We revised PD/TK/IK's G&A expense ratios to include unconsolidated non-operating expenses in the numerator of the ratios.

6. We revised the reported financial expense ratio of the parent company (Purinusa) to exclude that portion of the interest income offset that we are unable to determine was generated from short-term interest-bearing assets from the numerator of the ratio.

7. We revised the denominator of the financial expense ratio to exclude TK's and PD's reported packing expenses.

8. We applied the parent company's financial expense ratio against each company's reported total cost of manufacturing to determine the company's per-unit financial expenses.

*See* the April 28, 2010, Memorandum from LaVonne Clark and Robert Greger, Senior Accountants, to Neal M. Halper, Director, Office of Accounting, entitled, "Cost of Production and Constructed Value Calculation Adjustments for the Preliminary Determination—PT. Pabrik Kertas Tjiwi Kimia Tbk., PT. Pindo Deli Pulp and Paper, and PT Indah Kiat Pulp and Paper Tbk.," for further discussion.

For the preliminary determination, we have relied upon the POI weighted-average COP PD/TK/IK reported, as adjusted above. However, depending on the extent to which production costs changed throughout the cost reporting period, we are considering whether it is more appropriate to use the Department's alternative cost averaging methodology for the final determination. Accordingly, we have requested product-specific quarterly cost information from PD/TK/IK for consideration prior to the final determination.

2. Test of Home Market Sales Prices

On a product-specific basis, we compared the adjusted weighted-average COP to the home market sales prices of the foreign like product, as required under section 773(b) of the Act, to determine whether the sale prices were below the COP. The sales prices were exclusive of any applicable discounts, movement charges, direct and indirect selling expenses, and packing expenses. For purposes of this comparison, we used the COP exclusive of selling and packing expenses.

3. Results of the COP Test

Pursuant to section 773(b)(2)(C)(i) of the Act, where less than 20 percent of the respondent's sales of a given product during the POI are at prices less than the COP, we do not disregard any below-cost sales of that product, because we determined that the below-cost sales were not made in "substantial quantities." Where 20 percent or more of the respondent's sales of a given product during the POI were at prices less than the COP, we determine that such sales have been made in "substantial quantities." *See* section 773(b)(2)(C) of the Act. Further, we determine that the sales were made within an extended period of time, in accordance with section 773(b)(2)(B) of the Act, because we examine below-cost sales occurring during the entire POI. In accordance with section 773(b)(2)(D) of the Act, we compare prices to the POI-average costs to determine whether the prices permit recovery of costs within a reasonable period of time.

In this case, we found that, for certain products, more than 20 percent of PD/TK/IK's sales were made at prices less than the COP and, in addition, such sales did not provide for the recovery of costs within a reasonable period of time. We, therefore, excluded these sales and used the remaining sales as the basis for determining NV, in accordance with section 773(b)(1) of the Act.

4. Calculation of Normal Value Based on Comparison-Market Prices

We based NV for PD/TK/IK on packed CIF prices to unaffiliated customers. Where appropriate, we made adjustments for quantity discounts. We made deductions for movement expenses, including foreign inland freight, warehousing, and insurance expenses, under section 773(a)(6)(B)(ii) of the Act.

Pursuant to section 773(a)(6)(C)(iii) of the Act and 19 CFR 351.410(b), we made, where appropriate, circumstance-of-sale adjustments for imputed credit expenses, bank charges, courier expenses, and commissions. Regarding commissions, PD/TK/IK incurred commissions only in relation to U.S. sales. Therefore, pursuant to 19 CFR 351.410(e), we offset U.S. commissions by the lesser of the commission amount or home market indirect selling expenses.

Furthermore, we made adjustments for differences in costs attributable to differences in the physical characteristics of the merchandise in accordance with section 773(a)(6)(C)(ii) of the Act and 19 CFR 351.411. We also deducted home market packing costs and added U.S. packing costs in accordance with sections 773(a)(6)(A) and (B) of the Act.

**Currency Conversion**

We made currency conversions into U.S. dollars in accordance with section 773A(a) of the Act and 19 CFR 351.415 based on the exchange rates in effect on the dates of the U.S. sales as certified by the Federal Reserve Bank.

**Verification**

As provided in section 782(i)(1) of the Act, we intend to verify the information relied upon in making our final determination for PD/TK/IK.

**Suspension of Liquidation**

In accordance with section 733(d)(2) of the Act, we will direct U.S. Customs and Border Protection (CBP) to suspend liquidation of all entries of coated paper from Indonesia that are entered, or withdrawn from warehouse, for consumption on or after the date of publication of this notice in the **Federal Register**. We will also instruct CBP to require a cash deposit or the posting of

a bond equal to the weighted-average dumping margins, as indicated in the chart below. These suspension-of-liquidation instructions will remain in effect until further notice.

The weighted-average dumping margins are as follows:

| Manufacturer/Exporter | Weighted-Average margin (percent) |
|---|---|
| PT. Pabrik Kertas Tjiwi Kimia Tbk./PT. Pindo Deli Pulp and Paper/PT. Indah Kiat Pulp and Paper Tbk | 10.62 |
| All Others | 10.62 |

**All Others Rate**

Section 735(c)(5)(A) of the Act provides that the estimated "All Others" rate shall be an amount equal to the weighted average of the estimated weighted-average dumping margins established for exporters and producers individually investigated, excluding any zero or *de minimis* margins, and any margins determined entirely under section 776 of the Act. As mentioned above in this notice, the collapsed entity (*i.e.,* PD/TK/IK) is the only respondent in this investigation for which the Department calculated a company-specific rate. Therefore, for purposes of determining the all-others rate and pursuant to section 735(c)(5)(A) of the Act, we are using the weighted-average dumping margin calculated for PD/TK/IK, as referenced above. *See, e.g., CFS from Indonesia,* 72 FR at 60637; and *Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Sheet and Strip in Coils From Italy,* 64 FR 30750, 30755 (June 8, 1999).

**Disclosure**

The Department will disclose to parties the calculations performed in connection with this preliminary determination within five days of the date of publication of this notice. *See* 19 CFR 351.224(b).

**Postponement of Final Determination and Extension of Provisional Measures**

Section 735(a)(2) of the Act provides that a final determination may be postponed until not later than 135 days after the date of the publication of the preliminary determination if, in the event of an affirmative preliminary determination, a request for such postponement is made by exporters, who account for a significant proportion of exports of the subject merchandise, or in the event of a negative preliminary determination, a request for such postponement is made by the petitioner. The Department's regulations, at 19 CFR 351.210(e)(2), require that requests by respondents for postponement of a final determination be accompanied by a request for extension of provisional measures from a four-month period to not more than six months.

On April 13, 2010, PD/TK/IK requested that in the event of an affirmative preliminary determination in this investigation, the Department postpone its final determination by 60 days. At the same time, PD/TK/IK requested that the Department extend the application of the provisional measures prescribed under section 733(d) of the Act and 19 CFR 351.210(e)(2), from a four-month period to a six-month period. In accordance with section 735(a)(2) of the Act and 19 CFR 351.210(b)(2), because (1) our preliminary determination is affirmative, (2) the requesting exporters account for a significant proportion of exports of the subject merchandise, and (3) no compelling reasons for denial exist, we are granting this request and are postponing the final determination until no later than 135 days after the publication of this notice in the **Federal Register**. Suspension of liquidation will be extended accordingly.

**ITC Notification**

In accordance with section 733(f) of the Act, we have notified the ITC of the Department's preliminary affirmative determination. If the Department's final determination is affirmative, the ITC will determine before the later of 120 days after the date of this preliminary determination or 45 days after our final determination whether imports of coated paper from Indonesia are materially injuring, or threatening material injury to, the U.S. industry (*see* section 735(b)(2) of the Act). Because we are postponing the deadline for our final determination to 135 days from the date of the publication of this preliminary determination, the ITC will make its final determination no later than 45 days after our final determination.

**Public Comment**

Interested parties are invited to comment on the preliminary determination. Interested parties may submit case briefs to the Department no later than seven days after the date of the issuance of the last sales or cost verification report in this proceeding. *See* 19 CFR 351.309(c). Rebuttal briefs, the content of which is limited to the issues raised in the case briefs, must be filed within five days from the deadline date for the submission of case briefs. *See* 19 CFR 351.309(d). A list of authorities used, a table of contents, and an executive summary of issues should accompany any briefs submitted to the Department. Executive summaries should be limited to five pages total, including footnotes. Further, we request that parties submitting briefs and rebuttal briefs provide the Department with a copy of the public version of such briefs on diskette.

In accordance with section 774 of the Act, the Department will hold a public hearing, if timely requested, to afford interested parties an opportunity to comment on arguments raised in case or rebuttal briefs, provided that such a hearing is requested by an interested party. *See* also 19 CFR 351.310(d). If a timely request for a hearing is made in this investigation, we intend to hold the hearing two days after the rebuttal brief deadline date at the U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230, at a time and in a room to be determined. *See* 19 CFR 351.310. Parties should confirm by telephone, the date, time, and location of the hearing 48 hours before the scheduled date.

Interested parties, who wish to request a hearing, or to participate in a hearing if one is requested, must submit a written request to the Assistant Secretary for Import Administration, U.S. Department of Commerce, Room 1870, within 30 days of the publication of this notice. Requests should contain: (1) The party's name, address, and telephone number; (2) the number of participants; and (3) a list of the issues to be discussed. At the hearing, oral presentations will be limited to issues raised in the briefs.

This determination is issued and published pursuant to sections 733(f) and 777(i)(1) of the Act.

Dated: April 28, 2010.

**Ronald K. Lorentzen,**

*Deputy Assistant Secretary for Import Administration.*

[FR Doc. 2010–10682 Filed 5–5–10; 8:45 am]

**BILLING CODE 3510–DS–P**

## DEPARTMENT OF COMMERCE

### International Trade Administration

**[A–570–958]**

### Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses From the People's Republic of China: Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination

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

**DATES:** *Effective Date:* May 6, 2010.

**SUMMARY:** The Department of Commerce ("Department") preliminarily determines that certain coated paper suitable for high-quality print graphics using sheet-fed presses ("coated paper") from the People's Republic of China ("PRC") is being, or is likely to be, sold in the United States at less than fair value ("LTFV"), as provided in section 733 of the Tariff Act of 1930, as amended ("the Act"). The estimated margins of sales at LTFV are shown in the "Preliminary Determination" section of this notice. Pursuant to requests from interested parties, we are postponing the final determination and extending the provisional measures from a four-month period to not more than six months. Accordingly, we will make our final determination not later than 135 days after publication of the preliminary determination.

**FOR FURTHER INFORMATION CONTACT:** Lindsey Novom or Demitrios Kalogeropoulos, 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) 482–5256 or (202) 482–2623, respectively.

**SUPPLEMENTARY INFORMATION:**

## Initiation

On September 23, 2009, the Department received an antidumping duty ("AD") petition concerning imports of coated paper from the PRC filed in proper form by Appleton Coated LLC, NewPage Corporation, S.D. Warren Company d/b/a Sappi Fine Paper North America, and United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (collectively, "Petitioners"). *See* the Petition for the Imposition of Antidumping and Countervailing Duties Pursuant to Sections 701 and 731 of the Tariff Act of 1930, as amended ("Petition"), filed on September 23, 2009. Based on the Department's request, Petitioners filed supplements to the Petitions on October 2, 8, and 9, 2009.

The Department initiated this investigation on October 13, 2009.[1] In the *Initiation Notice,* the Department notified parties of the application process by which exporters and producers may obtain separate-rate status in non-market economy ("NME") investigations. The process requires exporters and producers to submit a separate-rate status application ("SRA")[2] and to demonstrate an absence of both *de jure* and *de facto* government control over its export activities. The SRA for this investigation was posted on the Department's Web site *http://ia.ita.doc.gov/ia-news-2009.html* on October 14, 2009. The due date for filing an SRA was December 22, 2009.

On November 23, 2009, the International Trade Commission ("ITC") determined that there is a reasonable indication that an industry in the United States is materially injured or threatened with material injury by reason of imports of coated paper from the PRC.[3]

## Period of Investigation

The period of investigation ("POI") is January 1, 2009, through June 30, 2009. This period corresponds to the two most recent fiscal quarters prior to the month of the filing of the petition, which was September 2009. *See* 19 CFR 351.204(b)(1).

## Postponement of Preliminary Determination

On January 22, 2010, petitioners made a timely request pursuant to section 733(c)(1)(A) of the Act and 19 CFR 351.205(b)(2) and (e) for a 50-day postponement of the preliminary determination. On February 19, 2010, the Department published a postponement of the preliminary AD determination on coated paper from the PRC.[4]

## Tolling of Administrative Deadlines

As explained in the memorandum from the Deputy Assistant Secretary for Import Administration, the Department has exercised its discretion to toll deadlines for the duration of the closure of the Federal Government from February 5, through February 12, 2010. Thus, all deadlines in this segment of the proceeding have been extended by seven days. The revised deadline for this preliminary determination is now April 28, 2010. *See* Memorandum to the Record from Ronald Lorentzen, DAS for Import Administration, regarding "Tolling of Administrative Deadlines As a Result of the Government Closure During the Recent Snowstorm," dated February 12, 2010.

## Scope of the Investigation

The merchandise covered by this investigation includes certain coated paper and paperboard[5] in sheets suitable for high quality print graphics using sheet-fed presses; coated on one or both sides with kaolin (China or other clay), calcium carbonate, titanium dioxide, and/or other inorganic substances; with or without a binder; having a GE brightness level of 80 or higher;[6] weighing not more than 340 grams per square meter; whether gloss grade, satin grade, matte grade, dull grade, or any other grade of finish; whether or not surface-colored, surface-decorated, printed (except as described below), embossed, or perforated; and irrespective of dimensions ("Certain Coated Paper").

Certain Coated Paper includes (a) coated free sheet paper and paperboard that meets this scope definition; (b) coated groundwood paper and paperboard produced from bleached chemi-thermo-mechanical pulp ("BCTMP") that meets this scope definition; and (c) any other coated paper and paperboard that meets this scope definition.

Certain Coated Paper is typically (but not exclusively) used for printing multi-colored graphics for catalogues, books, magazines, envelopes, labels and wraps, greeting cards, and other commercial printing applications requiring high quality print graphics.

Specifically excluded from the scope are imports of paper and paperboard printed with final content printed text or graphics.

As of 2009, imports of the subject merchandise are provided for under the following categories of the Harmonized Tariff Schedule of the United States ("HTSUS"): 4810.14.11, 4810.14.1900, 4810.14.2010, 4810.14.2090, 4810.14.5000, 4810.14.6000, 4810.14.70, 4810.19.1100, 4810.19.1900, 4810.19.2010, 4810.19.2090,

[1] *See Coated Paper From the People's Republic of China: Initiation of Antidumping Duty Investigation,* 74 FR 53710 (October 20, 2009) ("*Initiation Notice*").

[2] *See* Policy Bulletin 05.1: Separate-Rates Practice and Application of Combination Rates in Antidumping Investigations Involving Non-Market Economy Countries (April 5, 2005) ("Policy Bulletin 05.1"), available at *http://ia.ita.doc.gov/policy/bull05–1.pdf.*

[3] *See Investigation Nos. 701–TA–470–471 and 731–TA–1169–1170 (Preliminary): Coated Paper From China,* 74 FR 61174 (November 23, 2009).

[4] *See Coated Paper From the People's Republic of China: Postponement of Preliminary Determinations of Antidumping Duty Investigations,* 75 FR 7447 (February 19, 2010).

[5] " 'Paperboard' refers to Certain Coated Paper that is heavier, thicker and more rigid than coated paper which otherwise meets the product description. In the context of Certain Coated Paper, paperboard typically is referred to as 'cover,' to distinguish it from 'text.' "

[6] One of the key measurements of any grade of paper is brightness. Generally speaking, the brighter the paper the better the contrast between the paper and the ink. Brightness is measured using a GE Reflectance Scale, which measures the reflection of light off of a grade of paper. One is the lowest reflection, or what would be given to a totally black grade, and 100 is the brightest measured grade.

4810.22.1000, 4810.22.50, 4810.22.6000, 4810.22.70, 4810.29.1000, 4810.29.5000, 4810.29.6000, 4810.29.70. While HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope of the investigations is dispositive.

**Scope Comments**

As discussed in the preamble to the regulations, we set aside a period for interested parties to raise issues regarding product coverage. *See Antidumping Duties; Countervailing Duties; Final Rule,* 62 FR 27296, 27323 (May 19, 1997). The Department encouraged all interested parties to submit such comments within 20 calendar days of signature of the *Initiation Notice*. *See Initiation Notice,* 74 FR at 31692. As we stated in *Certain Coated Paper Suitable For High-Quality Print Graphics Using Sheet-Fed Presses From the People's Republic of China: Preliminary Affirmative Countervailing Duty Determination and Alignment of Final Countervailing Duty Determination With Final Antidumping Duty Determination,* 75 FR 10774 (March 9, 2010) ("*PRC Coated Paper CVD Prelim*") and *Certain Coated Paper From Indonesia: Preliminary Affirmative Countervailing Duty Determination and Alignment of Final Countervailing Duty Determination With Final Antidumping Duty Determination,* 75 FR 10761 (March 9, 2010) ("*Indonesia Coated Paper CVD Prelim*"), the Department received scope comments from interested parties on November 6, 2009,[7] November 16, 2009,[8] December 16, 2009,[9] December 28, 2009,[10] and March 12, 2010,[11] with respect to whether multi-ply coated paper products are covered by the scope of the AD/CVD investigations of coated paper from the PRC and Indonesia. As the Department stated in the *PRC Coated Paper CVD Prelim* and *Indonesia Coated Paper CVD Prelim,* based on our review of the scope, we find that the number of plies is not among the specific physical characteristics (*e.g.,* brightness, coating, weight, etc.) defining the subject merchandise. Accordingly, we preliminarily find that multi-ply coated paper is covered by the scope of these investigations, to the extent that it meets the description of the merchandise in the scope.

On February 25, 2010, Petitioners filed additional comments rebutting certain documents filed by the PRC and Indonesian respondents which contained scope comments and restating their prior claims. In response to a question the Department posed during an *ex parte* meeting, Petitioners stated that the phrase "suitable for high quality print graphics" could be stricken from the description of the subject merchandise without altering the scope of these investigations. In the *PRC Coated Paper CVD Prelim* and *Indonesia Coated Paper CVD Prelim,* the Department invited interested parties to comment within 20 calendar days of publication of the *PRC Coated Paper CVD Prelim and Indonesia Coated Paper CVD Prelim* with respect to whether striking the language "suitable for high quality print graphics" from the description of the subject merchandise would alter the scope of these investigations. We received comments from interested parties on March 29, 2010,[12] and April 8, 2010.[13] Based on the information contained in these submissions, on April 23, 2010, the Department requested additional information from Petitioners with respect to this scope issue. Petitioners' submission is due May 3, 2010. Therefore, we intend to address this issue for the final determinations in these coated paper AD/CVD investigations.

In their February 25, 2010 submission, Petitioners also stated that the phrase in the scope, "(c) any other coated paper that meets the scope definition" should also include the word "paperboard." As the Department stated in the *PRC Coated Paper CVD Prelim* and *Indonesia Coated Paper CVD Prelim,* we agree that the word "paperboard" was inadvertently omitted (*e.g.,* it is already explicitly included in the first sentence of the scope language and in "(b)" of the second paragraph) and have corrected the scope language to read "(c) any other coated paper and paperboard that meets this scope definition."

**Non-Market Economy Country**

For purposes of initiation, Petitioners submitted an LTFV analysis for the PRC as an NME.[14] The Department's most recent examination of the PRC's market status determined that NME status should continue for the PRC.[15] Additionally, in two recent investigations, the Department also determined that the PRC is an NME country.[16] In accordance with section 771(18)(C)(i) of the Act, the NME status remains in effect until revoked by the Department. The Department has not revoked the PRC's status as an NME country, and we have therefore treated the PRC as an NME in this preliminary determination and applied our NME methodology.

**Market Oriented Industry Treatment**

In the *Amendment to Final Determination of Sales at Less Than Fair Value and Amendment to Antidumping Duty Order: Chrome-Plated Lug Nuts From the People's Republic of China,* 57 FR 15052 (April 24, 1992) ("*Lug Nuts From the PRC*"), the Department set forth the factors to be considered in determining whether an MOI exists in an economy which is considered an NME for the purposes of the antidumping duty law. These factors include, but are not limited to:

— For the merchandise under investigation, there must be virtually

[7] *See* "Scope Comments: Coated Paper Suitable For High-Quality Print Graphics Using Sheet-Fed Presses from China and Indonesia," dated November 6, 2009.

[8] *See* "Certain Coated Paper Suitable For High-Quality Print Graphics Using Sheet-Fed Presses ("Certain Coated Paper") from Indonesia and the People's Republic of China: Petitioners' Rebuttal Comments on Scope," dated November 16, 2009.

[9] *See* "Request to Re-Examine the Department's Industry Support Calculation Coated Paper Suitable For High-Quality Print Graphics Using Sheet-Fed Presses from China," dated December 16, 2009.

[10] *See* "Certain Coated Paper Suitable For High-Quality Print Graphics Using Sheet-Fed Presses from Indonesia and the People's Republic of China: Petitioners' Response to Chinese and Indonesian Respondents' Request to Re-examine the Department's Industry Support Calculation," dated December 28, 2009.

[11] *See* "Ex Parte Meeting Regarding Scope: Records Documents, Certain Coated Paper Suitable For High-Quality Print Graphics Using Sheet-Fed Presses from Indonesia and the People's Republic of China," originally dated February 23, 2010, resubmitted on March 12, 2010.

[12] *See* "Additional Scope Comments: Certain Coated Paper Suitable For High-Quality Print Graphics Using Sheet-Fed Presses from China and Indonesia," dated March 29, 2010.

[13] *See* "Certain Coated Paper Suitable For High-Quality Print Graphics Using Sheet-Fed Presses ("Certain Coated Paper") from Indonesia and the People's Republic of China: Petitioners' Rebuttal Comments on Scope," dated April 8, 2010.

[14] *See Initiation Notice,* 74 FR at 53713.

[15] *See* the Department's memorandum entitled, "Antidumping Duty Investigation of Certain Lined Paper Products from the People's Republic of China ("China")—China's status as a non-market economy ("NME")," dated August 30, 2006. This document is available online at: *http://ia.ita.doc.gov/download/prc–nmestatus/prc–lined-paper–memo–08302006.pdf.*

[16] *See, e.g., Certain Kitchen Appliance Shelving and Racks From the People's Republic of China: Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination,* 74 FR 9591 (March 5, 2009) ("*Kitchen Racks Prelim*") unchanged in *Certain Kitchen Appliance Shelving and Racks From the People's Republic of China: Final Determination of Sales at Less Than Fair Value,* 74 FR 36656 (July 24, 2009) ("*Kitchen Racks Final*") and *Certain Tow Behind Lawn Groomers and Certain Parts Thereof from the People's Republic of China: Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination,* 74 FR 4929 (January 28, 2009) unchanged in *Certain Tow Behind Lawn Groomers and Certain Parts Thereof from the People's Republic of China: Final Determination of Sales at Less Than Fair Value,* 74 FR 29167 (June 19, 2009).

no government involvement in setting prices or amounts to be produced. For example, state-required production of the merchandise, whether for export or domestic consumption in the non-market economy country would be an almost insuperable barrier to finding a market-oriented industry (first prong).

—The industry producing the merchandise under investigation should be characterized by private or collective ownership. There may be state-owned enterprises in the industry but substantial state ownership would weigh heavily against finding a market-oriented industry (second prong).

—Market-determined prices must be paid for all significant inputs, whether material or non-material (*e.g.,* labor and overhead), and for all but an insignificant proportion of all the inputs accounting for the total value of the merchandise under investigation. For example, an input price will not be considered market-determined if the producers of the merchandise under investigation pay a state-set price for the input or if the input is supplied to the producers at government direction. Moreover, if there is any state-required production in the industry producing the input, the share of state-required production must be insignificant (third prong).

If any one of these conditions is not met, then, pursuant to sections 773(c)(1), (3) and (4) of the Act and 19 CFR 351.408, the producers of the merchandise under investigation will be treated as NME-producers, and the normal value will be calculated on the basis of the value of the factors of production, which to the extent possible will be based on prices and costs of the factors of production in one or more market economy countries that are (A) at a level of economic development comparable to that of the nonmarket economy country, and (B) are significant producers of comparable merchandise.

In *Lug Nuts From the PRC,* the Department stated that the test for finding such a market-oriented industry must begin with a strong presumption that such situations do not occur. *See Lug Nuts From the PRC.* The presumption against finding a market-oriented industry must prevail unless thorough and convincing evidence is presented on the record which demonstrates that the producers operate in an environment of market-based costs and prices. *See Lug Nuts From the PRC.*

All of the mandatory respondents and the separate rate respondent, Chenming (collectively, "MOI Respondents"), in this investigation have claimed that the coated paper industry is a market-oriented industry ("MOI"). In their February 5, 24, March 9, and April 14, 2010, submissions, the MOI Respondents claim that the market determines the prices for major inputs (pulp, China clay, and caustic soda) as evidenced by the existence of imports and an absence of government price controls. In addition, MOI Respondents claim that privately held companies and foreign-invested enterprises ("FIEs") account for a significant majority of production of these three inputs during the POI. MOI Respondents claim that the government did not regulate the quantity or pricing of subject merchandise during the POI and that the coated paper industry in the PRC consists predominantly of privately held companies and FIEs that act according to market considerations. Accordingly, these MOI Respondents state that these submissions demonstrate that the coated paper industry is an MOI and, as such, is fully entitled to market treatment in this investigation.

On February 5, 2010, MOI Respondents provided an initial MOI submission addressing the second prong (as articulated in *Lug Nuts From the PRC*) and indicated they intended to submit additional data and other factual evidence in support of their request for MOI treatment. After receiving this initial submission, the Department prompted MOI Respondents to complete their submission and address the first and third prong (as articulated in *Lug Nuts From the PRC*), as well as address the specific inputs of land, capital, and labor.[17] MOI Respondents provided the Department information for three material inputs: pulp, caustic soda, and China clay, as well as information regarding land, capital, and labor.[18] On March 9 and 19, 2010, Petitioners submitted information citing deficiencies in MOI Respondents' MOI submissions. MOI Respondents on April 14, 2010 provided additional information in support of their MOI claim and provided responses to some of the Petitioners' arguments.

The Department requires that any MOI claim be submitted such that it provides sufficient time to consider the claim. *See, e.g., Final Determination of Sales at Less Than Fair Value: Wooden Bedroom Furniture From the People's Republic of China,* 69 FR 67314 (November 17, 2004). While the Department has given MOI Respondents' claim full consideration in this case, for future cases, the Department wishes to clarify that MOI Respondents should submit their complete MOI claim no later than two months after the initiation of a segment of a proceeding such that in the event of granting MOI treatment to a certain industry, this could allow sufficient time to request and analyze market economy data for use in the Department's determinations.

For the reasons explained below, the Department concludes that the MOI Respondents' claim is insufficient with respect to prongs two and three. The Department requires that an MOI claim cover virtually all of the producers of the industry and virtually all inputs. *See, e.g., Notice of Final Determination of Sales at Less Than Fair Value: Certain Preserved Mushrooms From the People's Republic of China,* 63 FR 72255 (December 31, 1998) ("*Preserved Mushrooms From the PRC*"). The Department finds that the MOI Respondents' claim does not sufficiently address the ownership of coated paper producers and does not address virtually all inputs for the coated paper industry.

With respect to the second prong, regarding private or collective ownership, the evidence on the record is inconclusive with respect to the ownership status of enterprises in the coated paper industry. MOI Respondents themselves identified one of the largest producers of coated paper as a state-owned enterprise ("SOE").[19] Petitioners have provided evidence on the record that another one of the largest producers is also an SOE.[20] In addition, Petitioners provided information that several other enterprises, classified as non-SOE by MOI Respondents, are in fact state-owned.[21] The Department further notes that MOI Respondents' April 14, 2010, submission failed to address, respond, or otherwise rebut Petitioners' evidence on the record that several enterprises are misclassified as private, FIE, and collective, and should be reclassified as SOEs. For example, under Article 4 of China's Law on Chinese-Foreign Equity Joint Ventures, an enterprise with at least 25 percent foreign capital contribution is classified as an FIE. For some enterprises, it appears that MOI Respondents classified enterprises as FIEs in the case where an SOE, or company owned by an ultimate SOE parent, contributed the

[17] *See* Department's February 24, 2010, Request for Additional Information Concerning Market-Oriented Industry Treatment.

[18] *See* MOI Respondents' March 9 and April 14 submissions.

[19] *See* Exhibit 1 of Respondents' February 5, 2010 submission.

[20] *See* Petitioners' March 9, 2010 submission.

[21] *See* Petitioners' March 9, 2010 submission.

majority of the capital.[22] The Department also notes that MOI respondents provided no information on the ultimate ownership structure of the companies that own the coated paper producers. Moreover, because the information provided by MOI Respondents regarding the percentage of ownership structure in the coated paper industry in China is presented in aggregate form on a production basis, as opposed to providing enterprise-level production data, the Department is precluded from performing its own calculation of the portion of the coated paper industry that is state-owned. For all of the above reasons, the Department finds that the MOI Respondents' claim is not sufficient with respect to the second prong of the MOI test.

Under the third MOI prong, the Department requires that the MOI claim provide a sufficient basis to demonstrate that "market determined prices" are paid for *virtually all inputs* (emphasis added, *see Preserved Mushrooms From the PRC*). With regard to the third prong, the MOI claim must provide evidence that market determined prices are paid for (1) all significant inputs, whether material or non-material (*e.g.,* labor and overhead), and (2) all but an insignificant proportion of the inputs accounting for the total value of the merchandise under investigation. *See Lug Nuts From the PRC.* The Department does not expect MOI Respondents' MOI claim to provide ownership documentation for every input supplier, and for each and every input; the Department, however, does require that, at a minimum, a claim at least include aggregate information on the state-ownership of a material input as well as summary information that provides sufficient evidence that market determined prices are paid (See factors cited in the preceding paragraph).

Aside from the lack of *de jure* price controls, MOI Respondents' claim with respect to whether market prices are paid for inputs consists of providing ownership information for three input producers in addition to the existence of imports.[23] The mere existence of imports, however, without a basis for comparison, does not provide a sufficient basis for the claim that market prices were paid. Import volumes alone do not provide a meaningful indicator unless they are, *inter alia,* compared to domestic consumption, *i.e.* the import penetration ratio. The Department notes that MOI Respondents did not provide this metric for any of the inputs. Absent or in addition to such information, it may also be appropriate to consider: (1) Whether the input is subject to any state guidance pricing, decrees, circulars, or other administratively determined reference pricing that is not explicitly referred to in the law and, (2) the absence of border measures (export taxes and quotas) on raw material inputs that can depress domestic prices. While no one factor, alone, is dispositive, the Department finds that MOI Respondents did not provide a sufficient basis to support the claim for market determined prices.

Additionally, the Department requires that the MOI claim provide information that addresses virtually all inputs. *See, e.g., Preserved Mushrooms From the PRC.* Coated paper production requires anywhere from several dozen up to hundreds of different material inputs.[24] MOI Respondents, however, have only provided information on three material inputs. For certain coated paper products, these three inputs do not account for a large portion of the direct material cost.[25] Further, the Department notes that at least one of the inputs has substantial state production.[26] With regard to the remaining material inputs, MOI Respondents' only assertion is to reference the mandatory respondents' questionnaire responses.[27] As the Department has previously stated, the MOI claim must encompass the entire industry and provide information that addresses virtually all inputs. *See, e.g., Notice of Final Determination of Sales at Less Than Fair Value: Freshwater Crawfish Tail Meat From the People's Republic of China,* 62 FR 41347, 41353 (August 1, 1997); *see also Preserved Mushrooms From the PRC.*

For the reasons noted above, the Department determines that MOI Respondents' MOI claim did not provide sufficient evidence as to the second and third prongs to warrant the Department's further consideration in this investigation of whether producers in the coated paper industry operate in an environment of market-based costs and prices sufficient to overcome the strong presumption that an MOI does not exist in a nonmarket economy. In light of this finding, we do not need to reach the issues with respect to the first prong or with respect to the claims concerning land, capital, and labor.

**Market-Oriented Enterprise Treatment**

On January 21, 2010, Gold East Paper (Jiangsu) Co., Ltd. ("GE") and Gold Huasheng Paper Co., Ltd. ("GHS") requested that the Department apply its market economy ("ME") methodology when calculating its AD margins for the GE Group. In its request, GE and GHS presented the following claims as to why the Department should afford the GE Group market-oriented enterprise ("MOE") treatment: (1) GE and GHS are 100 percent foreign owned which "signifies that market principles are being applied;" (2) a significant portion of GE and GHS's material inputs are sourced from ME countries and "reliance on market economy inputs makes it less likely that there will be residual influence from the non-market economy on the respondents' operations;" and (3) GE and GHS are subject to a companion countervailing duty case. On April 19, 2010, the GE Group submitted a ME questionnaire response, notwithstanding that the Department had not issued the GE Group a ME questionnaire.

As an initial matter, we note that the antidumping statute and the Departments' regulations are silent with respect to the term "MOE." Neither the statute nor the regulations compel the agency to treat some constituents of the NME industry as MOEs while treating others as NME entities. To date, the Department has not adopted any MOE exception to the application of the NME methodology in any proceeding involving an NME country. As we stated in *Final Determination of Sales at Less Than Fair Value: Coated Free Sheet Paper From the People's Republic of China,* 72 FR 60632 (Oct. 25, 2007), and accompanying Issues and Decision Memorandum at Comment 1, no determination has been made "whether it would be appropriate to introduce a market oriented enterprise process" in NME antidumping investigations. Speaking to the complexity of the issue, the Department has twice asked for public comment on whether it should consider granting market-economy treatment to individual respondents operating in non-market economies, the conditions under which individual firms should be granted market-economy treatment, and how such treatment might affect antidumping calculations for such qualifying respondents. *See First MOE Comment Request,* 72 FR at 29302–03; *Antidumping Methodologies in Proceedings Involving Certain Non-Market Economies: Market-Oriented*

[22] *See* Exhibit 1 of Respondents' April 14, 2010 submission.

[23] *See* MOI Respondents' March 9, 2010 and April 14, 2010 submissions.

[24] *See* GE Group's and Sun Paper and Board's Section D questionnaire responses.

[25] Due to the proprietary nature of this data, please see the analysis memos for the GE Group and Sun Paper and Board.

[26] *See* Exhibit INPUT–3 of MOI Respondent's March 9, 2010 submission.

[27] *See* MOI Respondents' April 14, 2010 submission.

*Enterprise: Request for Comment,* 72 FR 60649 (Oct. 25, 2007) ("Second MOE Comment Request"). The Department received numerous comments in response to the two **Federal Register** notices. The Department is still considering those comments while evaluating whether to adopt an official policy concerning MOEs.

Pursuant to section 771(18)(A) of the Act, when a country is determined to be an NME, it means that the designated country, in this case the PRC, "{d}oes not operate on market principles of cost or pricing structures, so that sales of merchandise in such country do not reflect the fair value of the merchandise." In accordance with section 771(18)(C)(i) of the Act, the presumption of NME status remains in effect until revoked by the Department. The presumption of NME status for the PRC has not been revoked by the Department and remains in effect for the purpose of this investigation. Accordingly, the normal value ("NV") of the product is appropriately based on factors of production ("FOP") valued in a surrogate ME country in accordance with section 773(c) of the Act, a methodology that has been repeatedly upheld by the Courts. *See, e.g., Sigma Corp. v. United States,* 117 F.3d 1401, 1405 (Fed. Cir. 1997); *Nation Ford Chem. Co.* vs. *United States,* 166 F.3d 1373 (Fed. Cir. 1999).[28]

**Selection of Respondents**

In accordance with section 777A(c)(2) of the Act, the Department selected the four largest exporters of coated paper (*i.e.,* GE, GHS, Yanzhou Tianzhang Paper Industry Co., Ltd. ("Tianzhang"), and Shandong International Paper and Sun Coated Paperboard Co., Ltd./ International Paper and Sun Cartonboard Co., Ltd. ("IP Paperboard" and "IP Cartonboard") by volume as the mandatory respondents in this investigation based on the quantity and value ("Q&V") information from exporters/producers that were identified in the Petition, of which five firms filed timely Q&V questionnaire responses.[29] Of the five Q&V questionnaire responses, four companies (GE, GHS, Tiangzhang and IP Paperboard/IP Cartonboard) filed two consolidated Q&V questionnaire responses.

The Department issued its antidumping questionnaire to Tianzhang and IP Paperboard/IP Cartonboard (collectively, "Sun Paper and Board") and GE and GHS on November 27, 2009. The Department requested that the respondents provide a response to section A of the Department's questionnaire on December 18, 2009, and a response to sections C and D of the questionnaire on January 4, 2010. From December 15, 2009, until the present, the Department has granted both respondents several extensions for their submissions.

Sun Paper and Board submitted its responses to the section A and sections C and D questionnaires on December 29, 2009 and January 20, 2010, respectively. Sun Paper and Board submitted responses to the section A and section C supplemental questionnaires on March 18 and March 25, 2010, respectively. The Department received Sun Paper and Board's section D supplemental questionnaire response and section A and C 2nd supplemental questionnaire response on April 9, 2010. After the Department requested reconciliation of sales in a memorandum to the file, Sun Paper and Board submitted its reconciliation of sales on March 26, 2010. In two memorandums to the file requesting affiliation information, Sun Paper and Board submitted affiliation information on April 6, 2010, and April 14, 2010.

GE, GHS, and its affiliated producers Ningbo Zhonghua Paper Co., Ltd., ("NBZH") and Ningbo Asia Pulp and Paper Co., Ltd., ("NAPP") (collectively, "GE Group") submitted their section A responses on December 23, 2009. GE and GHS submitted responses to section C and D on January 20, 2010, and January 22, 2010, respectively. NAPP and NBZH submitted its section C and D responses on March 5, 2010. The Department received the GE Group's section A supplemental response on March 16, 2010. The Department received GE, GHS, NBZH's and NAPP's section C and D supplemental questionnaire responses on April 6, 2010.

**Targeted Dumping**

On March 15, 2010, the Department received Petitioners' allegations of targeted dumping by the GE group[30] using a variation of the Department's methodology as established in *Certain Steel Nails From the United Arab Emirates: Notice of Final Determination of Sales at Not Less Than Fair Value,* 73 FR 33985 (June 16, 2008) ("*Steel Nails*"), in addition to proposing an alternative targeted dumping methodology. Based on our examination of the targeted dumping allegations filed by Petitioners on March 15, 2010, pursuant to 777A(d)(1)(B)(i) of the Act, the Department has determined that the Petitioners' allegations sufficiently indicate that there is a pattern of export prices (or constructed export prices) for comparable merchandise that differ significantly among purchasers and regions. Therefore, for purposes of this preliminary determination, we have applied the targeted dumping methodology established in *Steel Nails.*

We have rejected Petitioners' proposed targeted dumping test for purposes of the preliminary determination, for the same reasons we have explained in recent past investigations involving targeted dumping allegations (*see Steel Nails* and *Certain Oil Country Tubular Goods From the People's Republic of China: Final Determination of Sales at Less Than Fair Value, Affirmative Final Determination of Critical Circumstances and Final Determination of Targeted Dumping,* 75 FR 20335 (April 19, 2010) ("*OCTG*"), where the Department rejected use of the "P/2" test). The Department will, therefore, continue to apply the targeted dumping methodology established in *Steel Nails,* and most recently applied in *OCTG.*

As a result, the Department has applied the targeted dumping analysis established in *Steel Nails* to the GE Group's U.S. sales to targeted customers and regions. The methodology we employed involves a two-stage test; the first stage addresses the pattern requirement and the second stage addresses the significant-difference requirement. *See* section 777A(d)(1)(B)(i) of the Act and *Steel Nails.* In this test we made all price comparisons on the basis of comparable merchandise (*i.e.,* by control number or CONNUM). The test procedures are the same for the customer and region targeted-dumping allegations. We based all of our targeted-dumping calculations

[28] Under the NME presumption established by the statutory scheme, the only mechanism for market economy treatment currently available to respondents in NME proceedings is market-oriented industry ("MOI") classification. Commerce currently employs an industry-wide test to determine whether, under section 773(c)(1)(B), available information in the NME country permits the use of the ME methodology for the NME industry producing the subject merchandise. The MOI test affords NME-country respondents the possibility of market economy treatment, but only upon a case-by-case, *industry-specific* basis. This test is performed only upon the request of a respondent. *See, e.g., Antidumping Methodologies in Proceedings Involving Certain Non-Market Economies: Market-Oriented Enterprise,* 72 FR 29302, 29302 (May 25, 2007) ("*First MOE Comment Request*").

[29] *See* the Department's memorandum entitled, "Antidumping Duty Investigation of Coated Paper from the People's Republic of China: Respondent Selection," dated November 25, 2009 ("Respondent Selection Memo").

[30] Specifically filed against Gold East (Jiangsu) Co., Ltd.; Gold Huasheng Paper Co., Ltd., Ningbo Zhonghua Paper Co., Ltd.; and Ningbo Asia Pulp and Paper Co., Ltd.

on the U.S. net price which we determined for U.S. sales by the GE Group in our standard margin calculations. For further discussion of the test and the results, *see* Memorandum from Bobby Wong to Wendy Frankel, regarding the "Targeted Dumping Analysis of the GE Group" ("Targeted Dumping Memo"), dated concurrently with this notice. As a result of our analysis, we preliminarily determine that there is a pattern of sales for comparable merchandise that differ significantly among certain customers for the GE Group in accordance with section 777A(d)(1)(B)(i) of the Act, and our practice as discussed in *Steel Nails.* We determine that the standard average-to-average comparison methodology does not account for the identified pattern of price differences. Therefore, consistent with *OCTG,* we have applied the average-to-transaction methodology to all sales.

**Postponement of Final Determination and Extension of Provisional Measures**

Pursuant to section 735(a)(2) of the Act, on April 13, and April 20, 2010, respectively, GE Group and Sun Paper and Board requested that in the event of an affirmative preliminary determination in this investigation, the Department postpone the final determination by 60 days. On April 16, 2010, Petitioners requested that in the event of a negative preliminary determination in this investigation, the Department postpone the final determination by 60 days, as well as the deadline to allege critical circumstances. Sun Paper and Board, and the GE Group, also requested that the Department extend the application of the provisional measures prescribed under 19 CFR 351.210(e)(2) from a four-month period to a six-month period. In accordance with section 733(d) of the Act and 19 CFR 351.210(b), because (1) our preliminary determination is affirmative, (2) the requesting exporters account for a significant proportion of exports of the subject merchandise, and (3) no compelling reasons for denial exist, we are granting the requests and are postponing the final determination until no later than 135 days after the publication of this notice in the **Federal Register**. Suspension of liquidation will be extended accordingly.

**Surrogate Country**

When the Department is investigating imports from an NME, section 773(c)(1) of the Act directs it to base NV, in most circumstances, on the NME producer's FOPs valued in a surrogate ME country or countries considered to be appropriate by the Department. In accordance with section 773(c)(4) of the Act, in valuing the FOPs, the Department shall utilize, to the extent possible, the prices or costs of FOPs in one or more ME countries that are at a level of economic development comparable to that of the NME country and are significant producers of comparable merchandise. The sources of the surrogate values we have used in this investigation are discussed under the "Normal Value" section below.

The Department's practice with respect to determining economic comparability is explained in Policy Bulletin 04.1,[31] which states that "OP {Office of Policy} determines per capita economic comparability on the basis of per capita gross national income, as reported in the most current annual issue of the *World Development Report* (The World Bank)." The Department considers the six countries identified in its Surrogate Country List as "equally comparable in terms of economic development." *See* Policy Bulletin 04.1 at 2. Thus, we find that India, Indonesia, the Philippines, Ukraine, Thailand, and Peru are all at an economic level of development equally comparable to that of the PRC.

Second, Policy Bulletin 04.1 provides some guidance on identifying comparable merchandise and selecting a producer of comparable merchandise. Based on the financial statements of various Indian producers provided by Petitioners in the petition, we find that India is a producer of identical merchandise. *See* Petition at Volume II-a, Exhibit 4. Because the Department was unable to find production data, we are relying on export data to proxy for overall production data in this case. Of the six countries listed in the Surrogate Country List, only India, Indonesia, and Thailand are significant exporters of coated paper. *See* Memorandum to the File regarding, "Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses ("Certain Coated Paper") from the People's Republic of China: Surrogate Values for the Preliminary Determination," dated concurrently with this notice ("Surrogate Value Memorandum"), at Exhibit 1. Consequently, at this time, Ukraine, Peru, and the Philippines, are not being considered to be appropriate surrogate countries for the PRC as they are not significant exporters of subject coated paper. During the POI, India exported over 12,925 MT of comparable merchandise, Indonesia exported over 325,965 MT of comparable merchandise, and Thailand exported over 9,003 MT of comparable merchandise. Thus, India, Indonesia, and Thailand are considered as appropriate surrogate countries because each exported significant quantities of comparable merchandise. Finally, we have reliable data from India on the record that we can use to value the FOPs. Petitioners, GE Group, and Sun Paper and Board submitted surrogate values using Indian sources, suggesting greater availability of appropriate surrogate value data in India.

Therefore, the Department is preliminarily selecting India as the surrogate country on the basis that: (1) It is at a similar level of economic development pursuant to 773(c)(4) of the Act; (2) it is a significant producer of comparable merchandise; and (3) we have reliable data from India that we can use to value the factors of production. Thus, we have calculated normal value using Indian prices when available and appropriate to value respondents' factors of production. *See* Surrogate Value Memorandum.

In accordance with 19 CFR 351.301(c)(3)(i), for the final determination in an antidumping investigation, interested parties may submit publicly available information to value the FOPs within 40 days after the date of publication of the preliminary determination.[32]

**Surrogate Value Comments**

Surrogate factor valuation comments and surrogate value information with which to value the FOPs in this proceeding were originally due January 29, 1010. GE Group and Sun Paper and Board requested an extension to submit surrogate values on January 25, 2010, and January 27, 2010, respectively; on January 27, 2010, the Department granted this request to extend the deadline for submission of surrogate value information for all interested

[31] *See* Policy Bulletin 04.1: Non-Market Economy Surrogate Country Selection Process, (March 1, 2004), ("Policy Bulletin 04.1") at Attachment II of the Department's Surrogate Country Letter, also available at *http://ia.ita.doc.gov/policy/bull04-1.html.*

[32] In accordance with 19 CFR 351.301(c)(1), for the final determination of this investigation, interested parties may submit factual information to rebut, clarify, or correct factual information submitted by an interested party less than ten days before, on, or after, the applicable deadline for submission of such factual information. However, the Department notes that 19 CFR 351.301(c)(1) permits new information only insofar as it rebuts, clarifies, or corrects information recently placed on the record. The Department generally cannot accept the submission of additional, previously absent-from-the-record alternative surrogate value information pursuant to 19 CFR 351.301(c)(1). *See Glycine from the People's Republic of China: Final Results of Antidumping Duty Administrative Review and Final Rescission, in Part,* 72 FR 58809 (October 17, 2007) and accompanying Issues and Decision Memorandum at Comment 2.

parties until February 12, 2010. Surrogate value submissions were filed February 12, 2010, February 17, 2010, February 19, 2010 by Sun Paper and Board, GE Group, and Petitioners, respectively. GE Group filed rebuttal surrogate values comments on February 22, 2010. Petitioners filed rebuttal surrogate values comments on February 24, 2010, and April 12, 2010. GE filed rebuttal surrogate values comments on April 12, 2010. For a detailed discussion of the surrogate values used in this LTFV proceeding, *see* the "Factor Valuation" section below and the Surrogate Value Memorandum.

**Affiliation**

Based on the evidence presented in Sun Paper and Board's questionnaire responses, we preliminarily find affiliation between Tianzhang, IP Sun Cartonboard, and IP Sun Paperboard ("Sun Paper and Board") pursuant to sections 771(33)(E) and (F) of the Act. In addition, we find that Shandong Sun Paper Industry Joint Stock Co., Ltd. and Yanzhou City Jintaiyang Investment Co., Ltd. are affiliated pursuant to sections 771(33)(E) of the Act. Further, we find Yanzhou City Jintaiyang Investment Co., Ltd. and Jin Rui Group, Inc. to be under the common control of the Li family and thus constitute a single group ("Li Family Group") pursuant to section 771(33)(F) of the Act and section 351.102(b)(3) of the Department's regulations. Next, we find that International Paper Company ("IP Company") (which includes the division, xpedx), International Paper International Holdings, International Paper Singapore, and International Paper Asia ("IP Companies") are affiliated to each other pursuant to section 771(33)(E) of the Act. In addition, based on their ownership interests, we consider the IP Companies to be a single entity.

We also find that the IP Companies and Sun Paper and Board are affiliated pursuant to section 771(33)(E) of the Act. Moreover, we preliminarily find that the Li Family Group and the IP Companies are affiliated under section 771(33)(F) of the Act through their direct and indirect control over the joint venture partnership in IP Sun Cartonboard and IP Sun Paperboard, producers of subject merchandise.

In addition, based on the evidence presented in Sun Paper and Board's questionnaire responses, we preliminarily find that Tianzhang, IP Sun Cartonboard, and IP Sun Paperboard should be collapsed for the purposes of this investigation. This finding is based on the determination that Tianzhang, IP Sun Cartonboard, and IP Sun Paperboard are affiliated, that all three companies are producers of similar or identical products and no retooling would be necessary in order to restructure manufacturing priorities, and that there is significant potential for manipulation of price or production between the parties. *See* 19 CFR 351.401(f)(1) and (2).

For further discussion of the Department's affiliation and collapsing decisions, *see* the Department's Memorandum regarding, "Antidumping Duty Investigation of Coated Paper from the People's Republic of China: Affiliation of Tianzhang, IP Sun Cartonboard, IP Sun Paperboard, the Li Family Group, and the IP Companies, and Collapsing of Tianzhang, IP Sun Cartonboard, IP Sun Paperboard," dated concurrently with this notice.

Based on the evidence presented in the GE Group's questionnaire responses, we preliminarily find that GHS, NBZH, NAPP, and Gold East (Hong Kong) Trading Co., Ltd., ("GEHK"), a company that plays a role in GE, GHS, NBZH, and NAPP's operations involving subject merchandise, are affiliated with GE, pursuant to sections 771(33)(E) and (F) of the Act. In addition, based on the evidence presented in their respective questionnaire responses, we preliminarily find that GE, GHS, NBZH, NAPP, and GEHK should be treated as a single entity for the purposes of this investigation. This finding is based on the determination that GE, GHS, NBZH, and NAPP are producers of similar or identical products and no retooling would be necessary in order to restructure manufacturing priorities, and that GEHK is involved in the export of subject merchandise. Further, we find that there is significant potential for manipulation of price or production between the parties.[33] *See* 19 CFR Sec. 351.401(f)(1) and (2). For further discussion of the Department's affiliation and collapsing decision, *see* the Department's Memorandum titled, "Antidumping Duty Investigation of Certain Coated Paper from the People's Republic of China: Affiliation and Collapsing of Gold East Paper (Jiangsu) Co., Ltd., Gold Huasheng Paper Co., Ltd., Ningbo Asia Pulp and Paper Co., Ltd., Ningbo Zhoughua Paper Co., Ltd., and Gold East (Hong Kong) Trading Co., Ltd.," dated concurrently with this notice.

**Separate Rates**

In the *Initiation Notice,* the Department notified parties of the application process by which exporters and producers may obtain separate-rate status in NME investigations. *See Initiation Notice,* 74 FR at 31695. The process requires exporters and producers to submit an SRA. *See also* Policy Bulletin 05.1.[34] The standard for eligibility for a separate rate is whether a firm can demonstrate an absence of both *de jure* and *de facto* government control over its export activities. In this instant investigation, the Department received a timely-filed SRA from one company.[35] The four mandatory respondents (*i.e.,* GE, GHS, Tianzhang, and IP Paperboard/IP Cartonboard), the separate-rate respondent Chenming, and NAPP and NBZH, GE's affiliated exporters of subject merchandise, provided company-specific information and each stated that it meets the criteria for the assignment of a separate rate.

In proceedings involving NME countries, the Department has a rebuttable presumption that all companies within the country are subject to government control and thus should be assessed a single antidumping duty rate. It is the Department's policy to assign all exporters of merchandise subject to investigation in an NME country this single rate unless an exporter can demonstrate that it is sufficiently independent so as to be entitled to a separate rate. Exporters can demonstrate this independence through the absence of both *de jure* and *de facto* governmental control over export activities. The Department analyzes

[33] While GEHK is not a producer of coated paper, we note that where companies are affiliated, and there exists a significant potential for manipulation of prices and/or export decisions, the Department has found it appropriate to treat those companies as a single entity. The Court of International Trade ("CIT") upheld the Department's decision to include export decisions in its analysis of whether there was a significant potential for manipulation. *See Hontex Enterprises v. United States,* 248 F. Supp. 2d 1323, 1343 (CIT 2003). In this case, not only is GEHK an exporter of subject merchandise, but it is an exporter of the subject merchandise produced by its four affiliated producers of subject merchandise (*i.e.,* GE, GHS, NAPP, and NBZH).

[34] Policy Bulletin 05.1 states: "while continuing the practice of assigning separate rates only to exporters, all separate rates that the Department will now assign in its NME investigations will be specific to those producers that supplied the exporter during the period of investigation. Note, however, that one rate is calculated for the exporter and all of the producers which supplied subject merchandise to it during the period of investigation. This practice applied both to mandatory respondents receiving an individually calculated separate rate as well as the pool of non-investigated firms receiving the weighted-average of the individually calculated rates. This practice is referred to as the application of "combination rates" because such rates apply to specific combinations of exporters and one or more producers. The cash-deposit rate assigned to an exporter will apply only to merchandise both exported by the firm in question and produced by a firm that supplied the exporter during the period of investigation." *See* Policy Bulletin 05.1 at 6.

[35] The one separate-rate applicant is: (1) Shandong Chenming Paper Holdings Ltd. ("Chenming").

each entity exporting the subject merchandise under a test arising from *Final Determination of Sales at Less Than Fair Value: Sparklers From the People's Republic of China, 56 FR 20588* (May 6, 1991) ("*Sparklers*"), as further developed in *Final Determination of Sales at Less Than Fair Value: Silicon Carbide From the People's Republic of China, 59 FR 22585* (May 2, 1994) ("*Silicon Carbide* "). In accordance with the separate-rates criteria, the Department assigns separate rates in NME cases only if respondents can demonstrate the absence of both *de jure* and *de facto* governmental control over export activities. GE, GHS, NBZH, and NAPP all indicated that they sold subject merchandise through Gold East (Hong Kong) Trading Co., Ltd. ("GEHK"). As information on the record demonstrates that GEHK is located in Hong Kong,[36] consistent with our practice, we have not conducted a separate rate analysis of GEHK.

a. Absence of De Jure Control

*The Department considers the following de jure criteria in determining whether an individual company may be granted a separate rate:* (1) An absence of restrictive stipulations associated with an individual exporter's business and export licenses; (2) any legislative enactments decentralizing control of companies; and (3) other formal measures by the government decentralizing control of companies. *See Sparklers,* 56 FR at 20589.

*The evidence provided by all separate rate applicants supports a preliminary finding of de jure absence of government control based on the following:* (1) An absence of restrictive stipulations associated with the individual exporter's business and export licenses; (2) applicable legislative enactments that decentralize control of the companies; and (3) formal measures by the government decentralizing control of companies. *See* Chenming's SRA submissions, dated December 22, 2009, and March 25, 2010; GE Group's section A questionnaire submissions dated December 23, 2009; and Sun Paper and Board's separate rate information in the section A questionnaire submissions dated December 30, 2009, where the separate-rate applicants certified that they had no relationship with any level of the PRC government with respect to ownership, internal management, and business operations.

[36] *See* page 8 of GEHK's financial statements, at GE's December 23, 2009, section A questionnaire response at Volume 3.

b. Absence of De Facto Control

*Typically, the Department considers four factors in evaluating whether each respondent is subject to de facto government control of its export functions:* (1) Whether the export prices are set by or are subject to the approval of a government agency; (2) whether the respondent has authority to negotiate and sign contracts and other agreements; (3) whether the respondent has autonomy from the government in making decisions regarding the selection of management; and (4) whether the respondent retains the proceeds of its export sales and makes independent decisions regarding disposition of profits or financing of losses. *See Silicon Carbide,* 59 FR at 22586–87; *see also Notice of Final Determination of Sales at Less Than Fair Value: Furfuryl Alcohol From the People's Republic of China,* 60 FR 22544, 22545 (May 8, 1995). The Department has determined that an analysis of *de facto* control is critical in determining whether respondents are, in fact, subject to a degree of government control which would preclude the Department from assigning separate rates.

*In this investigation, all separate rate applicants each asserted the following:* (1) That the export prices are not set by, and are not subject to, the approval of a governmental agency; (2) they have authority to negotiate and sign contracts and other agreements; (3) they have autonomy from the government in making decisions regarding the selection of management; and (4) they retain the proceeds of their export sales and make independent decisions regarding disposition of profits or financing of losses. Additionally, each of these companies' SRA responses indicate that its pricing during the POI does not involve coordination among exporters. *See* Chenming's SRA submission dated December 22, 2009, and March 25, 2010; GE Group's separate rate information in the section A questionnaire submissions dated December 23, 2009; and Sun Paper and Board's separate rate information in the section A questionnaire submissions dated December 30, 2009.

Evidence placed on the record of this investigation by Sun Paper and Board, GE Group, and Chenming demonstrate an absence of *de jure* and *de facto* government control with respect to their respective exports of the merchandise under investigation, in accordance with the criteria identified in *Sparklers* and *Silicon Carbide.* Therefore, we are preliminarily granting a separate rate to these entities.

**Application of Facts Otherwise Available and Adverse Facts Available**

*The PRC-Wide Entity and PRC-Wide Rate*

We issued our request for Q&V information to 56 potential Chinese exporters of the subject merchandise, in addition to posting the Q&V questionnaire on the Department's Web site. *See* Respondent Selection Memo. While information on the record of this investigation indicates that there are numerous producers/exporters of coated paper in the PRC, we received only five timely filed Q&V responses. Although all exporters were given an opportunity to provide Q&V information, not all exporters provided a response to the Department's Q&V letter. Therefore, the Department has preliminarily determined that there were exporters/producers of the subject merchandise during the POI from the PRC that did not respond to the Department's request for information. We have treated these PRC producers/exporters as part of the PRC-wide entity because they did not apply for a separate rate. *See, e.g., Kitchen Racks Prelim,* unchanged in *Kitchen Racks Final.*

Section 776(a)(2) of the Act provides that, if an interested party (A) withholds information that has been requested by the Department, (B) fails to provide such information in a timely manner or in the form or manner requested, subject to subsections 782(c)(1) and (e) of the Act, (C) significantly impedes a proceeding under the antidumping statute, or (D) provides such information but the information cannot be verified, the Department shall, subject to subsection 782(d) of the Act, use facts otherwise available in reaching the applicable determination.

Information on the record of this investigation indicates that the PRC-wide entity was non-responsive. Certain companies did not respond to our questionnaire requesting Q&V information. As a result, pursuant to section 776(a)(2)(A) of the Act, we find that the use of facts available ("FA") is appropriate to determine the PRC-wide rate. *See Preliminary Determination of Sales at Less Than Fair Value, Affirmative Preliminary Determination of Critical Circumstances and Postponement of Final Determination: Certain Frozen Fish Fillets From the Socialist Republic of Vietnam,* 68 FR 4986 (January 31, 2003), unchanged in *Final Determination of Sales at Less Than Fair Value and Affirmative Critical Circumstances: Certain Frozen Fish Fillets From the Socialist Republic of Vietnam,* 68 FR 37116 (June 23, 2003).

Section 776(b) of the Act provides that, in selecting from among the facts otherwise available, the Department may employ an adverse inference if an interested party fails to cooperate by not acting to the best of its ability to comply with requests for information. *See Statement of Administrative Action,* accompanying the Uruguay Round Agreements Act ("URAA"), H.R. Rep. No. 103–316, 870 (1994) ("*SAA*"); *see also Notice of Final Determination of Sales at Less Than Fair Value: Certain Cold-Rolled Flat-Rolled Carbon-Quality Steel Products From the Russian Federation,* 65 FR 5510, 5518 (February 4, 2000). We find that, because the PRC-wide entity did not respond to our requests for information, it has failed to cooperate to the best of its ability. Furthermore, the PRC-wide entity's refusal to provide the requested information constitutes circumstances under which it is reasonable to conclude that less than full cooperation has been shown. *See Nippon Steel Corporation v. United States,* 337 F.3d 1373, 1383 (Fed. Cir. 2003) ("*Nippon Steel*") where the Court of Appeals for the Federal Circuit provided an explanation of the "failure to act to the best of its ability" standard noting that the Department need not show intentional conduct existed on the part of the respondent, but merely that a "failure to cooperate to the best of a respondent's ability" existed (*i.e.,* information was not provided "under circumstances in which it is reasonable to conclude that less than full cooperation has been shown"). Therefore, the Department preliminarily finds that, in selecting from among the facts available, an adverse inference is appropriate.

When employing an adverse inference, section 776 of the Act indicates that the Department may rely upon information derived from the petition, the final determination from the LTFV investigation, a previous administrative review, or any other information placed on the record. In selecting a rate for adverse facts available ("AFA"), the Department selects a rate that is sufficiently adverse to ensure that the uncooperative party does not obtain a more favorable result by failing to cooperate than if it had fully cooperated. It is the Department's practice to select, as AFA, the higher of the (a) highest margin alleged in the petition, or (b) the highest calculated rate of any respondent in the investigation. *See Final Determination of Sales at Less Than Fair Value: Certain Cold-Rolled Carbon Quality Steel Products From the People's Republic of China,* 65 FR 34660 (May 31, 2000), and accompanying Issues and Decision Memorandum, at "Facts Available." As AFA, we have preliminarily assigned to the PRC-wide entity a rate of 135.8 percent, the highest calculated rate from the petition. The Department preliminarily determines that this information is the most appropriate from the available sources to effectuate the purposes of AFA. The Department's reliance on the petition rate to determine an AFA rate is subject to the requirement to corroborate secondary information, discussed in the Corroboration section below.

*Partial AFA to Sun Paper and Board*

In its questionnaire responses, Tianzhang, IP Sun Paperboard, and IP Sun Cartonboard stated that they made constructed export ("CEP") sales through their U.S. affiliate, Jin Rui. Jin Rui resold some of the three producers/exporters' subject merchandise to xpedx, an operating division of IP Company. As stated above in the "Affiliation Section," we preliminarily find that IP Company, as part of the IP Companies, and Sun Paper and Board are affiliated pursuant to section 771(33)(F) of the Act. In addition, as explained above, we preliminarily find that the IP Companies, of which xpedx is a part, and the Li Family Group, of which Jin Rui is a part, are affiliated.

In finding that the Li Family Group and the IP Companies are affiliated, we find that sales from Jin Rui to xpedx are affiliated party transactions, and we requested that xpedx report its downstream sales of subject merchandise during the POI. We originally requested this data from Sun Paper and Board on March 26, 2010, with a due date of April 2, 2010. On March 31, 2010, we spoke with company officials from xpedx and IP Company who claimed that it would be difficult to provide xpedx's downstream sales. We detailed the conversation in a memo to the file and responded by continuing to request xpedx's sales.[37] On April 1, 2010, we granted an extension for xpedx to submit its downstream sales until April 9, 2010. On April 8, 2010, we granted a second (partial) extension until April 16, 2010. On April 14, 2010,[38] Sun Paper and Board stated that there were substantial operational difficulties in meeting the Department's request, reiterating that on April 8, 2010, they had requested an extension of time to submit the downstream sales. We did not receive xpedx's downstream sales on April 16, 2010. On April 20, 2010, we received communication from counsel to Sun Paper and Board that xpedx was not going to submit the information requested by the Department.[39] Nevertheless, subsequently on April 20, 2010, after the deadline for xpedx to submit the required downstream sales had passed, we received from Sun Paper and Board a request for a further extension to submit xpedx's downstream sales until April 27, 2010, one day prior to the preliminary determination.

Sun Paper and Board, in its March 31, 2010, and April 8, 2010, requests for extensions to provide the downstream sales database, outlined certain difficulties in providing the requested data. In response, the Department granted the first extension request in full, and the second extension request in part. However, Sun Paper and Board's April 20, 2010, request for extension, submitted to the Department four days subsequent to the date the downstream sales were due, while referencing certain circumstances surrounding its business relationship with xpedex, did not indicate a particular reason for not responding timely to the Department's request for information, nor did it indicate a reason why it was requesting additional time. Based on the above, *i.e.,* Sun Paper and Board's failure to submit xpedx's downstream sales in a timely manner, and its untimely submitted request for a third extension to do so, the Department finds that Sun Paper and Board did not cooperate to the best of its ability to provide the Department with timely information regarding xpedx's downstream sales of the subject merchandise, consistent with *Nippon Steel.*

Thus, Sun Paper and Board failed to report information that had been requested and significantly impeded this proceeding, pursuant to sections 776(a)(1) and (2)(A), (B) and (C) of the of Act, by not reporting certain downstream sales of its affiliate, as requested by the Department. As a result, the Department has determined to apply the facts otherwise available for the unreported downstream sales. Further, because the Department finds that Sun Paper and Board failed to cooperate to the best of its ability, pursuant to section 776(b) of the Act,

[37] *See* Memo to the File regarding "IP–Xpedx affiliation and Xpedx's downstream sales," dated April 1, 2010.

[38] *See* Sun Paper and Board's "Submission of Section D, C, and A Supplemental response," dated April 14, 2010.

[39] *See* Memo to the File, regarding, "Communicating with the Counsel to Sun Paper and Board regarding the Department's request for Xpedx's Downstream Sales dated April 20, 2010.

the Department has determined to use an adverse inference when applying facts available for the preliminary determination. As partial AFA, the Department is applying to the unreported sales the highest margin from the Petition.[40]

**Corroboration**

Section 776(c) of the Act provides that, when the Department relies on secondary information rather than on information obtained in the course of an investigation as facts available, it must, to the extent practicable, corroborate that information from independent sources reasonably at its disposal. Secondary information is described as "information derived from the petition that gave rise to the investigation or review, the final determination concerning merchandise subject to this investigation, or any previous review under section 751 concerning the merchandise subject to this investigation."[41] To "corroborate" means that the Department will satisfy itself that the secondary information to be used has probative value. Independent sources used to corroborate may include, for example, published price lists, official import statistics and customs data, and information obtained from interested parties during the particular investigation. To corroborate secondary information, the Department will, to the extent practicable, examine the reliability and relevance of the information used.[42]

The AFA rate that the Department used is from the Petition. Petitioners' methodology for calculating the United States price and NV in the Petition is discussed in the *Initiation Notice.* To corroborate the AFA margin that we have selected, we compared this margin to the margin we found for the mandatory respondents. We found that the margin of 135.8 percent has probative value because it is in the range of the control number (CONNUM)-specific margins that we found for the GE Group during the period of investigation. *See* GE Group's Analysis Memo. Given that numerous PRC-wide entities did not respond to the Department's requests for information and that Sun Paper and Board failed to report a significant portion of U.S. sales, the Department concludes that the petition rate of 135.8 percent, as total AFA for the PRC-wide entity and as partial AFA for Sun Paper and Board, is sufficiently adverse to prevent these respondents from benefitting from their lack of cooperation. *See* SAA at 870. Accordingly, we find that the rate of 135.8 percent is corroborated to the extent practicable within the meaning of section 776(c) of the Act.

**Margin for the Separate Rate Company**

As discussed above, the Department received a timely and complete separate rate application from Chenming, who is an exporter of coated paper from the PRC during the POI and who was not selected as a mandatory respondent in this investigation. Through the evidence in its SRA, this company has demonstrated its eligibility for a separate rate, as discussed above. Consistent with the Department's practice, as the separate rate, we have established a margin for Chenming based on the average of the rates we calculated for the mandatory respondents, Sun Paper and Board and the GE Group, excluding any rates that were zero, *de minimis,* or based entirely on AFA.[43]

**Date of Sale**

19 CFR 351.401(i) states that, "in identifying the date of sale of the merchandise under consideration or foreign like product, the Secretary normally will use the date of invoice, as recorded in the exporter or producer's records kept in the normal course of business." In *Allied Tube,* the CIT noted that a "party seeking to establish a date of sale other than invoice date bears the burden of producing sufficient evidence to 'satisf{y}' the Department that 'a different date better reflects the date on which the exporter or producer establishes the material terms of sale.'" *Allied Tube & Conduit Corp. v. United States* 132 F. Supp. 2d at 1090 (CIT 2001) (quoting 19 CFR 351.401(i)) ("*Allied Tube*"). Additionally, the Secretary may use a date other than the date of invoice if the Secretary is satisfied that a different date better reflects the date on which the exporter or producer establishes the material terms of sale. *See* 19 CFR 351.401(i); *see also Allied Tube,* 132 F. Supp. 2d 1087, 1090–1092. The date of sale is generally the date on which the parties agree upon all substantive terms of the sale. This normally includes the price, quantity, delivery terms and payment terms. *See Carbon and Alloy Steel Wire Rod From Trinidad and Tobago: Final Results of Antidumping Duty Administrative Review,* 72 FR 62824 (November 7, 2007), and accompanying Issue and Decision Memorandum at Comment 1; *Notice of Final Determination of Sales at Less Than Fair Value: Certain Cold-Rolled Flat-Rolled Carbon Quality Steel Products From Turkey,* 65 FR 15123 (March 21, 2000), and accompanying Issues and Decision Memorandum at Comment 1.

For sales by the GE Group, consistent with 19 CFR 351.401(i), we used the commercial invoice date as the sale date because record evidence indicates that the terms of were not set until the issuance of the commercial invoice. *See, e.g.,* GE's section A response at Exhibit A–2 and Volume 5, page 26. *See also* GHS' section A response at page 21.

For Sun Paper and Board, we will use the pro forma/internal invoice date of Jin Rui Group, Sun Paper and Board's U.S. affiliate, as the date of sale because based on the record evidence to date, we preliminarily find that pro forma/internal invoice date best reflects the date on which the essential terms of sale are fixed and final. In our analysis of Sun Paper and Board's information, we determined that the sale date reported in Tianzhang's January 19, 2010, U.S. sales database represents the commercial invoice date (which is issued to the customer 30–60 days later when the product arrives to the customer) that Jin Rui chose to record the sale of merchandise under consideration in its books and records, not the date the material terms of the sale were established with its U.S. customer. On March 19, 2010, we asked Jin Rui to provide a new U.S. sales database based on the pro forma/internal invoice date, which it did on March 26, 2010. We preliminarily determine Jin Rui's pro forma/internal invoice date best reflects the date on which the essential terms are fixed and final.

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[40] *See* Sun Paper and Board's Analysis Memo.

[41] *See Final Determination of Sales at Less Than Fair Value: Sodium Hexametaphosphate From the People's Republic of China,* 73 FR 6479, 6481 (February 4, 2008), quoting SAA at 870.

[42] *See Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From Japan, and Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, From Japan; Preliminary Results of Antidumping Duty Administrative Reviews and Partial Termination of Administrative Reviews,* 61 FR 57391, 57392 (November 6, 1996), unchanged in *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From Japan, and Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, From Japan; Final Results of Antidumping Duty Administrative Reviews and Termination in P*art, 62 FR 11825 (March 13, 1997).

[43] *See, e.g., Preliminary Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances: Certain Polyester Staple Fiber From the People's Republic of China,* 71 FR 77373, 77377 (December 26, 2006), unchanged in *Final Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances: Certain Polyester Staple Fiber From the People's Republic of China,* 72 FR 19690 (April 19, 2007).

**Fair Value Comparisons**

To determine whether sales of coated paper to the United States by the respondents were made at LTFV, we compared Export Price ("EP") and CEP to NV, as described in the "Constructed Export Price," "Export Price," and "Normal Value" sections of this notice.

**U.S. Price**

*Constructed Export Price*

In accordance with section 772(a) of the Act, CEP is the price at which the subject merchandise is first sold (or agreed to be sold) in the United States before or after the date of importation by or for the account of the producer or exporter of such merchandise or by a seller affiliated with the producer or exporter, to a purchaser not affiliated with the producer or exporter, as adjusted under subsections (c) and (d). In accordance with section 772(a) of the Act, we used CEP for Sun Paper and Board's U.S. sales because the merchandise subject to this investigation was sold directly to an affiliated purchaser located in the United States. In addition, in accordance with section 772(a) of the Act, we used CEP for certain U.S. sales of the GE Group because the merchandise, in these cases, was sold directly to an affiliated purchaser located in the United States.

We calculated CEP for Sun Paper and Board and the GE Group based on delivered prices to unaffiliated purchasers in the United States. We made deductions from the U.S. sales price, where applicable, for movement expenses in accordance with section 772(c)(2)(A) of the Act. These included such expenses as foreign inland freight from the plant to the port of exportation, international freight, marine insurance, other U.S. transportation, U.S. customs duty, U.S. inland freight from port to the warehouse, and U.S. inland freight from the warehouse to the customer. In accordance with section 772(d)(1) of the Act, the Department deducted credit expenses, inventory carrying costs and indirect selling expenses from the U.S. price, all of which relate to commercial activity in the United States. Finally, we deducted CEP profit, in accordance with sections 772(d)(3) and 772(f) of the Act.[44]

*Export Price*

In accordance with section 772(a) of the Act, we used EP for certain U.S. sales of the GE Group. We calculated EP based on the packed prices to unaffiliated purchasers in, or for exportation to, the United States. We made deductions, as appropriate, for any movement expenses (*e.g.,* foreign inland freight from the plant to the port of exportation, domestic brokerage, international freight to the port of importation, etc.) in accordance with section 772(c)(2)(A) of the Act. Where foreign inland freight or foreign brokerage and handling fees were provided by PRC service providers or paid for in renminbi, we based those charges on surrogate value rates from India. *See* "Factor Valuation" section below for further discussion of surrogate value rates.

In determining the most appropriate surrogate values to use in a given case, the Department's stated practice is to use period-wide price averages, prices specific to the input in question, prices that are net of taxes and import duties, prices that are contemporaneous with the POI, and publicly available data.[45] We valued brokerage and handling using a simple average of the brokerage and handling costs that were reported in public submissions that were filed in three antidumping duty cases. Specifically, we averaged the public brokerage and handling expenses reported by Navneet Publications (India) Ltd. in the 2007–2008 administrative review of certain lined paper products from India, Essar Steel Limited in the 2006–2007 antidumping duty administrative review of hot-rolled carbon steel flat products from India, and Himalya International Ltd. in the 2005–2006 administrative review of certain preserved mushrooms from India. Because these values were not concurrent with the POI, we adjusted these rates for inflation using the Wholesale Price Indices ("WPI") for India as published in the International Monetary Fund's ("IMF's") *International Financial Statistics,* available at *http://ifs.apdi.net/imf,* and then calculated a simple average of the three companies' brokerage expense data.[46] *See* Surrogate Value Memorandum.

To value domestic insurance, the Department used the publicly summarized version of the average insurance expenses reported by Agro Dutch Industries Limited in a submission dated May 24, 2005, in the antidumping administrative review of *Certain Preserved Mushrooms From India.*

To value marine insurance, the Department used data from RGJ Consultants (*http://www.rjgconsultants.com/*). This source provides information regarding the per-value rates of marine insurance of imports and exports to/from various countries.

**Normal Value**

Section 773(c)(1) of the Act provides that the Department shall determine the NV using an FOP methodology if the merchandise is exported from an NME and the information does not permit the calculation of NV using home-market prices, third-country prices, or constructed value under section 773(a) of the Act. The Department bases NV on the FOPs because the presence of government controls on various aspects of NMEs renders price comparisons and the calculation of production costs invalid under the Department's normal methodologies. *See, e.g., Kitchen Racks Prelim,* 71 FR at 19703 (unchanged in *Kitchen Racks Final*).

In accordance with 19 CFR 351.408(c)(1), the Department will normally use publicly available information to find an appropriate surrogate value to value FOPs, but when a producer sources an input from a ME and pays for it in a ME currency, the Department may value the factor using the actual price paid for the input. *See* 19 CFR 351.408(c)(1); *see also Shakeproof Assembly Components Div of Ill v. United States,* 268 F.3d 1376, 1382–1383 (Fed. Cir. 2001) (affirming the Department's use of market-based prices to value certain FOPs).

**Factor Valuations**

In accordance with section 773(c) of the Act, we calculated NV based on FOP data reported by respondents during the POI. To calculate NV, we multiplied the reported per-unit factor-consumption rates by publicly available surrogate values (except as discussed below). In selecting the surrogate values, we considered the quality, specificity, and contemporaneity of the data. *See, e.g., Fresh Garlic From the People's Republic of China: Final Results of Antidumping Duty New Shipper Review,* 67 FR 72139 (December 4, 2002), and accompanying Issues and Decision Memorandum at Comment 6; and *Final Results of First New Shipper Review and First Antidumping Duty Administrative Review: Certain Preserved Mushrooms From the People's Republic of China,* 66 FR 31204 (June 11, 2001), and accompanying Issues and Decision

[44] *See* Surrogate Value Memorandum.

[45] *See, e.g., Certain Cased Pencils from the People's Republic of China; Final Results and Partial Rescission of Antidumping Duty Administrative Review, 71 FR 38366 (July 6, 2006), and accompanying Issues and Decision Memorandum* at Comment 1.

[46] *See, e.g., Tapered Roller Bearings and Parts Thereof, Finished or Unfinished, From the People's Republic of China: Preliminary Results of the 2007 2008 Administrative Review of the Antidumping Duty Order,* 74 FR 32539 (July 8, 2009), (unchanged in final results) ("07–08 TRBs").

Memorandum at Comment 5. As appropriate, we adjusted input prices by including freight costs to make them delivered prices. Specifically, we added to Indian import surrogate values a surrogate freight cost using the shorter of the reported distance from the domestic supplier to the factory or the distance from the nearest seaport to the factory where appropriate. This adjustment is in accordance with the Court of Appeals for the Federal Circuit's decision in *Sigma Corp. v. United States,* 117 F.3d 1401, 1407–08 (Fed. Cir. 1997). A detailed description of all surrogate values used for Sun Paper and Board and the GE Group can be found in the Surrogate Value Memorandum.

For the preliminary determination, in accordance with the Department's practice, we used data from the Indian Import Statistics and other publicly available Indian sources in order to calculate surrogate values for Sun Paper and Board's and GE Group's FOPs (direct materials, energy, and packing materials) and certain movement expenses. In selecting the best available information for valuing FOPs in accordance with section 773(c)(1) of the Act, the Department's practice is to select, to the extent practicable, surrogate values which are non-export average values, most contemporaneous with the POI, product-specific, and tax-exclusive. *See, e.g., Notice of Preliminary Determination of Sales at Less Than Fair Value, Negative Preliminary Determination of Critical Circumstances and Postponement of Final Determination: Certain Frozen and Canned Warmwater Shrimp From the Socialist Republic of Vietnam,* 69 FR 42672, 42682 (July 16, 2004), unchanged in *Final Determination of Sales at Less Than Fair Value: Certain Frozen and Canned Warmwater Shrimp From the Socialist Republic of Vietnam,* 69 FR 71005 (December 8, 2004). The record shows that data in the Indian Import Statistics, as well as those from the other Indian sources, are contemporaneous with the POI, product-specific, and tax-exclusive. *See* Surrogate Value Memorandum. In those instances where we could not obtain publicly available information contemporaneous to the POI with which to value factors, we adjusted the surrogate values using, where appropriate, the Indian WPI as published in the IMF's *International Financial Statistics. See, e.g., Kitchen Racks,* 74 FR at 9600.

Furthermore, with regard to the Indian import-based surrogate values, we have disregarded import prices that we have reason to believe or suspect may be subsidized. We have reason to believe or suspect that prices of inputs from Indonesia, South Korea, and Thailand may have been subsidized. We have found in other proceedings that these countries maintain broadly available, non-industry-specific export subsidies and, therefore, it is reasonable to infer that all exports to all markets from these countries may be subsidized. *See Notice of Final Determination of Sales at Less Than Fair Value and Negative Final Determination of Critical Circumstances: Certain Color Television Receivers From the People's Republic of China,* 69 FR 20594 (April 16, 2004), and accompanying Issues and Decision Memorandum at Comment 7.

Further, guided by the legislative history, it is the Department's practice not to conduct a formal investigation to ensure that such prices are not subsidized. *See* Omnibus Trade and Competitiveness Act of 1988, Conference Report to accompany H.R. Rep. 100–576 at 590 (1988) reprinted in 1988 U.S.C.C.A.N. 1547, 1623–24; *see also Preliminary Determination of Sales at Less Than Fair Value: Coated Free Sheet Paper From the People's Republic of China,* 72 FR 30758 (June 4, 2007) unchanged in *Final Determination of Sales at Less Than Fair Value: Coated Free Sheet Paper From the People's Republic of China,* 72 FR 60632 (October 25, 2007). Rather, the Department bases its decision on information that is available to it at the time it makes its determination. *See Polyethylene Terephthalate Film, Sheet, and Strip from the People's Republic of China: Preliminary Determination of Sales at Less Than Fair Value,* 73 FR 24552, 24559 (May 5, 2008), unchanged in *Polyethylene Terephthalate Film, Sheet, and Strip from the People's Republic of China: Final Determination of Sales at Less Than Fair Value,* 73 FR 55039 (September 24, 2008). Therefore, we have not used prices from these countries in calculating the Indian import-based surrogate values. Additionally, we disregarded prices from NME countries. Finally, imports that were labeled as originating from an "unspecified" country were excluded from the average value, because the Department could not be certain that they were not from either an NME country or a country with general export subsidies. *See id.*

Both the GE Group and Sun Paper and Board claimed that certain of their reported raw material inputs were sourced from an ME country and paid for in ME currencies. Pursuant to 19 CFR 351.408(c)(1), when a respondent sources inputs from an ME supplier in meaningful quantities (*i.e.,* not insignificant quantities), we use the actual price paid by respondent for those inputs, except when prices may have been distorted by findings of dumping by the PRC and/or subsidies.[47] Where we found ME purchases to be of significant quantities (*i.e.,* 33 percent or more), in accordance with our statement of policy as outlined in *Antidumping Methodologies: Market Economy Inputs,*[48] we used the actual purchases of these inputs to value the inputs.

Accordingly, we valued certain of respondents' inputs using the ME prices paid for in ME currencies for the inputs where the total volume of the input purchased from all ME sources during the POI exceeds or is equal to 33 percent of the total volume of the input purchased from all sources during the period. Where the quantity of the reported input purchased from ME suppliers was below 33 percent of the total volume of the input purchased from all sources during the POI, and were otherwise valid, we weight-averaged the ME input's purchase price with the appropriate surrogate value for the input according to their respective shares of the reported total volume of purchases.[49] Where appropriate, we added freight to the ME prices of inputs. Additionally, consistent with the Department's practice,[50] we excluded certain of the GE Group's claimed ME purchases which involved a PRC intermediary because we find that these sales did not occur directly between the respondent and an ME supplier. For a detailed description of the actual values used for the ME inputs reported, *see* the Department's analysis memoranda dated concurrently with this notice.

For direct, indirect, and packing labor, consistent with 19 CFR 351.408(c)(3), we used the PRC regression-based wage rate as reported on Import Administration's home page, Import Library, Expected Wages of Selected NME Countries, revised in December 2009. *See 2009 Calculation of Expected Non-Market Economy Wages,* 74 FR 65092 (December 9, 2009), and

[47] *See Antidumping Duties; Countervailing Duties; Final Rule,* 62 FR 27296, 27366 (May 19, 1997).

[48] *See Antidumping Methodologies: Market Economy Inputs, Expected Non-Market Economy Wages, Duty Drawback; and Request for Comments,* 71 FR 61716, 61717 (October 19, 2006) ("*Antidumping Methodologies: Market Economy Inputs*").

[49] *See Antidumping Methodologies: Market Economy Inputs,* 71 FR at 61718.

[50] *See, e.g., Certain New Pneumatic Off-The-Road Tires From the People's Republic of China: Final Affirmative Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances,* 73 FR 40485 (July 15, 2008), and accompanying Issues and Decision Memorandum at comment 70.

*http://ia.ita.doc.gov/wages/index.html.* The source of these wage-rate data on the Import Administration's Web site is the 2006 and 2007 data in Chapter 5B of the International Labour Organization's *Yearbook of Labour Statistics.* Because this regression-based wage rate does not separate the labor rates into different skill levels or types of labor, we have applied the same wage rate to all skill levels and types of labor reported by the respondents.

We valued truck freight expenses using a per-unit average rate calculated from data on the infobanc Web site: *http://www.infobanc.com/logistics/logtruck.htm.* The logistics section of this Web site contains inland freight truck rates between many large Indian cities.

Consistent with past practice and these submissions, the Department has applied a surrogate value for hydrochloric acid using the values submitted by the parties from *Chemical Weekly. See* Surrogate Value Memorandum.

We valued electricity using price data for small, medium, and large industries, as published by the Central Electricity Authority of the Government of India in its publication titled Electricity Tariff & Duty and Average Rates of Electricity Supply in India, dated March 2008. These electricity rates represent actual country-wide, publicly available information on tax-exclusive electricity rates charged to industries in India.

We valued diesel oil using published prices from the International Energy Agency: Key World Statistics 2007. We used the first quarter 2007 value for automotive diesel oil. *See* Surrogate Value Memorandum.

To value water, we used the revised Maharashtra Industrial Development Corporation water rates available at *http://www.midcindia.com/water-supply. See* Surrogate Value Memorandum.

We calculated the surrogate value for steam based upon the April 2007–March 2008 financial statement of Hindalco Industries Limited. *See 1-Hydroxyethylidene-1, 1-Diphosphonic Acid From the People's Republic of China: Final Determination of Sales at Less than Fair Value*, 74 FR 10545 (March 11, 2009), and accompanying Issues and Decision Memorandum at Comment 4. We inflated the steam value using the appropriate WPI inflator. *See* Surrogate Value Memorandum.

We valued natural gas using April through June 2002 data from the Gas Authority of India Ltd. Consistent with the Department's recent determination in Polyvinyl Alcohol, we averaged the base and ceiling gas prices of 2,850 rupees per 1000 cubic meters ("m3") and 2,150 rupees per 1000 m3, and added a transmission charge of 1,150 rupees per 1000 m3 to calculate a value of Rs 3.650/cubic meter. *See* Surrogate Value Memorandum.

We used the Indian Bureau of Mines' publication: 2007 edition of the Indian Minerals Yearbook ("IBM Yearbook") to value coal. For this preliminary determination, we find that the IBM Yearbook's reported Grade C coal most closely matches the coal consumed by respondents during the POI. *See* Surrogate Value Memorandum.

To value factory overhead, selling, general, and administrative expenses, and profit, we used audited financial statements of JK Paper Ltd., and Seshasayee Paper and Boards, Ltd., each covering the fiscal period April 1, 2008, through March 31, 2009. The Department may consider other publicly available financial statements for the final determination, as appropriate.

**Currency Conversion**

Where necessary, we made currency conversions into U.S. dollars, in accordance with section 773A(a) of the Act, based on the exchange rates in effect on the dates of the U.S. sales as certified by the Federal Reserve Bank.

**Verification**

As provided in section 782(i)(1) of the Act, we intend to verify the information from Sun Paper and Board and the GE Group upon which we will rely in making our final determination.

**Combination Rates**

In the *Initiation Notice*, the Department stated that it would calculate combination rates for certain respondents that are eligible for a separate rate in this investigation.[51] This practice is described in Policy Bulletin 05.1.

**Preliminary Determination**

The weighted-average dumping margin percentages are as follows:

| Exporter | Producer | Percent margin |
|---|---|---|
| Yanzhou Tianzhang Paper Industry Co., Ltd | Yanzhou Tianzhang Paper Industry Co., Ltd | 89.71 |
| Shandong International Paper and Sun Coated Paperboard Co., Ltd. | Shandong International Paper and Sun Coated Paperboard Co., Ltd. | |
| International Paper and Sun Cartonboard Co., Ltd | International Paper and Sun Cartonboard Co., Ltd. | |
| Gold East Paper (Jiangsu) Co., Ltd | Gold East Paper (Jiangsu) Co., Ltd | 30.82 |
| Gold Huasheng Paper Co., Ltd | Gold Huasheng Paper Co., Ltd. | |
| Ningbo Zhonghua Paper Co., Ltd | Ningbo Zhonghua Paper Co., Ltd. | |
| Ningbo Asia Pulp and Paper Co., Ltd | Ningbo Asia Pulp and Paper Co., Ltd. | |
| Gold East (Hong Kong) Trading Co., Ltd. | | |
| Shandong Chenming Paper Holdings Ltd | Shandong Chenming Paper Holdings Ltd | 60.27 |
| PRC-Wide Entity | | 135.8 |

**Disclosure**

We will disclose the calculations performed to parties in this proceeding within five days of the date of publication of this notice in accordance with 19 CFR 351.224(b).

**Suspension of Liquidation**

In accordance with section 733(d) of the Act, we will instruct U.S. Customs and Border Protection ("CBP") to suspend liquidation of all entries of coated paper from the PRC as described in the "Scope of Investigation" section, entered, or withdrawn from warehouse, for consumption on or after the date of publication of this notice in the **Federal Register**. We will instruct CBP to require a cash deposit or the posting of a bond equal to the weighted-average amount by which the normal value exceeds U.S. price, as follows: (1) The rate for the exporter/producer combinations listed in the chart above will be the rate we have determined in this preliminary determination; (2) for

[51] *See Initiation Notice*, 74 FR at 31695.

all PRC exporters of subject merchandise which have not received their own rate, the cash-deposit rate will be the PRC-wide rate; and (3) for all non-PRC exporters of subject merchandise which have not received their own rate, the cash-deposit rate will be the rate applicable to the PRC exporter/producer combination that supplied that non-PRC exporter. These suspension-of-liquidation instructions will remain in effect until further notice.

**International Trade Commission Notification**

In accordance with section 733(f) of the Act, we have notified the ITC of our preliminary affirmative determination of sales at LTFV. Section 735(b)(2) of the Act requires the ITC to make its final determination as to whether the domestic industry in the United States is materially injured, or threatened with material injury, by reason of imports of coated paper, or sales (or the likelihood of sales) for importation, of the merchandise under consideration within 45 days of our final determination.

**Public Comment**

Case briefs or other written comments may be submitted to the Assistant Secretary for Import Administration no later than seven days after the date on which the final verification report is issued in this proceeding and rebuttal briefs, limited to issues raised in case briefs, may be submitted no later than five days after the deadline date for case briefs. *See* 19 CFR 351.309. A table of contents, list of authorities used and an executive summary of issues should accompany any briefs submitted to the Department. This summary should be limited to five pages total, including footnotes. The Department also requests that parties provide an electronic copy of its case and rebuttal brief submissions in either a "Microsoft Word" or a "pdf" format.

In accordance with section 774 of the Act, we will hold a public hearing, if requested, to afford interested parties an opportunity to comment on arguments raised in case or rebuttal briefs. Interested parties, who wish to request a hearing, or to participate if one is requested, must submit a written request to the Assistant Secretary for Import Administration, U.S. Department of Commerce, Room 1870, within 30 days after the date of publication of this notice. *See* 19 CFR 351.310(c). Requests should contain the party's name, address, and telephone number, the number of participants, and a list of the issues to be discussed. If a request for a hearing is made, we intend to hold the hearing three days after the deadline of submission of rebuttal briefs at the U.S. Department of Commerce, 14th Street and Constitution Ave., NW., Washington, DC 20230, at a time and location to be determined. *See* 19 CFR 351.310. Parties should confirm by telephone the date, time, and location of the hearing two days before the scheduled date.

We will make our final determination no later than 135 days after the date of publication of this preliminary determination, pursuant to section 735(a)(2) of the Act.

This determination is issued and published in accordance with sections 733(f) and 777(i)(1) of the Act.

Dated: April 28, 2010.

**Ronald K. Lorentzen,**

*Deputy Assistant Secretary for Import Administration.*

[FR Doc. 2010–10701 Filed 5–5–10; 8:45 am]

**BILLING CODE 3510–DS–P**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

**RIN 0648–XW09**

### Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to Operation and Maintenance of a Liquefied Natural Gas Facility off Massachusetts

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

**ACTION:** Notice; proposed incidental harassment authorization; receipt of application for letter of authorization; request for comments.

**SUMMARY:** NMFS has received an application from Neptune LNG LLC (Neptune) for an Incidental Harassment Authorization (IHA) to take marine mammals, by harassment, incidental to port commissioning and operations, including maintenance and repair activities, at its Neptune Deepwater Port. Pursuant to the Marine Mammal Protection Act (MMPA), NMFS is requesting comments on its proposal to issue an IHA to Neptune to take, by Level B harassment only, several species of marine mammals during the specified activity. NMFS is also requesting comments on its intent to promulgate regulations governing the take of marine mammals over a 5–year period incidental to the same activities described herein.

**DATES:** Comments and information must be received no later than June 7, 2010.

**ADDRESSES:** Comments on the application 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. The mailbox address for providing email comments is *PR1.0648–XW09@noaa.gov*. NMFS is not responsible for e mail comments sent to addresses other than the one provided here. Comments sent via e mail, including all attachments, must not exceed a 10 megabyte file size.

Instructions: All comments received are a part of the public record and will generally be posted to http://www.nmfs.noaa.gov/pr/permits/incidental.htm 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.

A copy of the application used in this document may be obtained by writing to the address specified above, telephoning the contact listed below (see **FOR FURTHER INFORMATION CONTACT**), or visiting the internet at: *http://www.nmfs.noaa.gov/pr/permits/incidental.htm*. Documents cited in this notice may also be viewed, by appointment, during regular business hours, at the aforementioned address.

The Maritime Administration (MARAD) and U.S. Coast Guard (USCG) Final Environmental Impact Statement (Final EIS) on the Neptune LNG Deepwater Port License Application is available for viewing at *http://www.regulations.gov* by entering the search words "Neptune LNG."

**FOR FURTHER INFORMATION CONTACT:** Candace Nachman, Office of Protected Resources, NMFS, (301) 713 2289, ext 156.

**SUPPLEMENTARY INFORMATION:**

**Background**

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

Authorization for incidental takings 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 (where relevant), and if the permissible methods of taking and requirements pertaining to the mitigation, monitoring and reporting of such takings are set forth. NMFS has defined "negligible impact" in 50 CFR 216.103 as "...an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival."

Section 101(a)(5)(D) of the MMPA established an expedited process by which citizens of the U.S. can apply for an authorization to incidentally take small numbers of marine mammals by harassment. Section 101(a)(5)(D) establishes a 45 day time limit for NMFS review of an application followed by a 30 day public notice and comment period on any proposed authorizations for the incidental harassment of marine mammals. Within 45 days of the close of the comment period, NMFS must either issue or deny the authorization.

Except with respect to certain activities not pertinent here, the MMPA defines "harassment" as:

> any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild ["Level A harassment"]; or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering ["Level B harassment"].

**Summary of Request**

NMFS received an application on December 14, 2009, from Neptune for the taking, by harassment, of marine mammals incidental to port commissioning and operations, including maintenance and repair activities, at its Neptune Deepwater Port (Port) facility in Massachusetts Bay. NMFS reviewed Neptune's application and identified a number of issues requiring further clarification. After addressing comments from NMFS, Neptune modified its application and submitted a revised application on March 11, 2010. The March 11, 2010, application is the one available for public comment (see **ADDRESSES**) and considered by NMFS for this proposed IHA and subsequent promulgation of regulations.

NMFS issued a 1–year IHA to Neptune in June 2008 for the construction of the Port (73 FR 33400, June 12, 2008), which expired on June 30, 2009. NMFS issued a second 1–year IHA to Neptune for the completion of construction and beginning of Port operations on June 26, 2009 (74 FR 31926, July 6, 2009). This IHA became effective on July 1, 2009, and expires on June 30, 2010.

During the period of this third IHA, Neptune intends to commission its second shuttle and regasification vessel (SRV) and conduct limited port operations. There is also a chance that some maintenance and repairs may need to be conducted on the Port facility. The Neptune Port is located approximately 22 mi (35 km) northeast of Boston, Massachusetts, in Federal waters approximately 260 ft (79 m) in depth. The purpose of the Port is the importation of liquefied natural gas (LNG) into the New England region. Take of marine mammals may occur during port operations from thruster use during maneuvering of the SRVs while docking and undocking, occasional weathervaning (turning of a vessel at anchor from one direction to another under the influence of wind or currents) at the port, and during thruster use of dynamic positioning (DP) maintenance vessels should a major repair be necessary. Neptune has requested an authorization to take 12 marine mammal species by Level B harassment. They are: North Atlantic right whale; humpback whale; fin whale; sei whale; minke whale; long-finned pilot whale; Atlantic white-sided dolphin; harbor porpoise; common dolphin; Risso's dolphin; bottlenose dolphin; and harbor seal. In the current IHA, NMFS also authorized take of killer whales and gray seals. NMFS has preliminarily determined that it would be appropriate to authorize take, by Level B harassment only, of these two species as well for port operations and maintenance.

**Description of the Specified Activity**

On March 23, 2007, Neptune received a license to own, construct, and operate a deepwater port from MARAD. The Port, which will be located in Massachusetts Bay, will consist of a submerged buoy system to dock specifically designed LNG carriers approximately 22 mi (35 km) northeast of Boston, Massachusetts, in Federal waters approximately 260 ft (79 m) in depth. The two buoys will be separated by a distance of approximately 2.1 mi (3.4 km). The locations of the Neptune Port and the associated pipeline are shown in Figure 2–1 in Neptune's application (see **ADDRESSES**).

Neptune anticipates completion of construction and commissioning of its first SRV in late April or early May 2010. These activities will be completed under the current IHA. Between July 1, 2010, and June 30, 2011, (the requested time period for this proposed IHA), Neptune plans to commission its second SRV and begin limited operations of the Port. Upon expiration of this third proposed IHA, Neptune has requested that NMFS promulgate regulations and subsequently issue annual Letters of Authorization to cover full port operations and any major repairs that may be necessary to the Port facility.

Neptune will be capable of mooring LNG SRVs with a capacity of approximately 140,000 cubic meters ($m^3$). Up to two SRVs will temporarily moor at the Port by means of a submerged unloading buoy system. Two separate buoys will allow natural gas to be delivered in a continuous flow, without interruption, by having a brief overlap between arriving and departing SRVs. The annual average throughput capacity will be around 500 million standard cubic feet per day (mmscfd) with an initial throughput of 400 mmscfd, and a peak capacity of approximately 750 mmscfd.

The SRVs will be equipped to store, transport, and vaporize LNG and to odorize, meter and send out natural gas by means of two 16–in (40.6–cm) flexible risers and one 24–in (61–cm) subsea flowline. These risers and flowline will lead to a 24–in (61–cm) gas transmission pipeline connecting the deepwater port to the existing 30–in (76.2–cm) Algonquin Hubline$^{SM}$ (Hubline$^{SM}$) located approximately 9 mi (14.5 km) west of the Neptune deepwater port location. The Port will have an expected operating life of approximately 25 years. Figure 1–1 of Neptune's application shows an isometric view of the Port (see **ADDRESSES**). The following subsections describe the operational activities for the Port.

*Description of Port Operations*

During Neptune port operations, sound will be generated by the regasification of the LNG aboard the SRVs and the use of thrusters by vessels maneuvering and maintaining position at the port. Large construction-type DP vessels used for major repair of the subsea pipeline or unloading facility may be another potential sound source, although necessity for such a repair is unlikely. Of these potential operations and maintenance/repair sound sources, thruster use for DP is the most significant. The following text describes the activities that will occur at the port upon its commissioning.

(1) Vessel Activity

The SRVs will approach the port using the Boston Harbor Traffic Separation Scheme (TSS), entering the TSS within the Great South Channel (GSC) and remaining in the TSS until they reach the Boston Harbor Precautionary Area. At the Boston Lighted Horn Buoy B (at the center of the Boston Harbor Precautionary Area), the SRV will be met by a pilot vessel and a support vessel. A pilot will board the SRV, and the support vessel will accompany the SRV to the port. SRVs carrying LNG typically travel at speeds up to 19.5 knots (36 km/hr); however, Neptune SRVs will reduce speed to 10 knots (18.5 km/hr) within the TSS year-round in the Off Race Point Seasonal Management Area (SMA) and to a maximum of 10 knots (18.5 km/hr) when traveling to and from the buoys once exiting the shipping lanes at the Boston Harbor Precautionary Area. In addition, Neptune is committed to reducing speed to 10 knots in the GSC SMA from April 1 to July 31.

To supply a continuous flow of natural gas into the pipeline, about 50 roundtrip SRV transits will take place each year on average (one transit every 3.65 days). As an SRV approaches the port, vessel speed will gradually be reduced. Upon arrival at the port, one of the submerged unloading buoys will be located and retrieved from its submerged position by means of a winch and recovery line. The SRV is designed for operation in harsh environments and can connect to the unloading buoy in up to 11.5 ft (3.5 m) significant wave heights and remain operational in up to 36 ft (11 m) significant wave heights providing high operational availability.

The vessel's aft/forward thrusters will be used intermittently. Neptune SRVs will use both bow and stern thrusters when approaching the unloading buoy and when docking the buoy inside the Submerged Turret Loading (STL) compartment, as well as when releasing the buoy after the regasifying process is finished. The thrusters will be energized for up to 2 hours during the docking process and up to 1 hour during the undocking/release process. When energized, the thrusters will rotate at a constant RPM with the blades set at zero pitch. There will be little cavitation when the thruster propellers idle in this mode. The sound levels in this operating mode are expected to be approximately 8 decibels (dB) less than at 100 percent load, based on measured data from other vessels.

When the thrusters are engaged, the pitch of the blades will be adjusted in short bursts for the amount of thrust needed. These short bursts will cause cavitation and elevated sound levels. The maximum sound level with two thrusters operating at 100 percent load will be 180 dB re 1 μPa at 1m. This is not the normal operating mode, but a worst-case scenario. Typically, thrusters are operated for only seconds at a time and not at continuous full loading. These thrusters will be engaged for no more than 20 minutes, in total, when docking at the buoy. The same applies for the undocking scenario.

During normal conditions, the vessel will be allowed to weathervane on the single-point mooring system. However, aft thrusters may be used under certain conditions to maintain the vessel's heading into the wind when competing tides operate to push the vessel broadside to the wind. Neptune has assumed a total of 200 hr/yr operating under these conditions. In these circumstances, the ambient sound will already be high because of the wind and associated wave sound.

(2) Regasification System

Once an SRV is connected to a buoy, the vaporization of LNG and send-out of natural gas can begin. Each SRV will be equipped with three vaporization units, each with the capacity to vaporize 250 mmscfd. Under normal operation, two units will be in service. The third vaporization unit will be on standby mode, though all three units could operate simultaneously.

(3) Maintenance and Repairs

Routine maintenance activities typically are short in duration (several days or less) and require small vessels (less than 300 gross tons) to perform. Activities include attaching and detaching and/or cleaning the buoy pick up line to the STL buoy, performing surveys and inspections with a remotely operated vehicle, and cleaning or replacing parts (e.g., bulbs, batteries, etc.) on the floating navigation buoys. Every 7–10 years, Neptune will run an intelligent pig (a gauging/cleaning device) down the pipeline to assess its condition. This particular activity will require several larger, construction-type vessels and several weeks to complete.

Unplanned repairs can be either relatively minor, or in some cases, major, requiring several large, construction-type vessels and a mitigation program similar to that employed during the construction phase of the project. Minor repairs are typically shorter in duration and could include fixing flange or valve leaks, replacing faulty pressure transducers, or repairing a stuck valve. These kinds of repairs require one diver support vessel with three or four anchors to hold its position. Minor repairs could take from a few days to 1–2 weeks depending on the nature of the problem.

Major repairs are longer in duration and typically require large construction vessels similar to those used to install the pipeline and set the buoy and anchoring system. These vessels will typically mobilize from local ports or the Gulf of Mexico. Major repairs require upfront planning, equipment procurement, and mobilization of vessels and saturation divers. Examples of major repairs - although unlikely to occur - are damage to a riser or umbilical and their possible replacement, damage to the pipeline and manifolds, or anchor chain replacement. These types of repairs could take 1–4 weeks and possibly longer.

*Operations Sound*

The acoustic effects of using the thrusters for maneuvering at the unloading buoys were modeled by JASCO Research Limited (2005). The analysis assumed the use of four thrusters (two bow, two stern) at 100 percent power during all four seasons. The one-third (1/3)-octave band source levels for the thrusters ranged from 148.5 dB re 1 μPa at 1 m at 2,000 Hertz (Hz) to 174.5 dB re 1 μPa at 1 m at 10 Hz. Figures 1–2 through 1–5 in Neptune's application show the received sound level at 164–ft (50–m) depth at the south unloading buoy during each of the four seasons.

The acoustic effects of operating the regasification system at the unloading buoys were also modeled by JASCO Research Limited (2005). In addition, supplemental analysis was performed to assess the potential underwater acoustic impacts of using the two aft thrusters after mooring for maintaining the heading of the vessel in situations when competing tides operate to push the vessel broadside to the wind. Additionally, Samsung performed an underwater noise study on the newly constructed SRV and an evaluation of these data was performed by JASCO Applied Sciences. Additional details of all the modeling analyses can be found in Appendices B and C of Neptune's application (see **ADDRESSES**). The loudest source of sound during operations at the port will be the use of thrusters for dynamic positioning.

*Maintenance/Repair Sound*

Acoustic modeling originally performed to predict received levels of underwater sound that could result from the construction of Neptune also could

be applicable to major maintenance/repair during operations (see Appendices B and C in Neptune's application for a discussion of the acoustic modeling methodology employed). Activities considered to be potential sound sources during major maintenance/repair activities include excavation (jetting) of the flowline or main transmission pipeline routes and lowering of materials (pipe, anchors, and chains) to the sea floor. These analyses evaluated the potential impacts of construction of the flowline and pipeline using surrogate source levels for vessels that could be employed during Neptune's construction. One surrogate vessel used for modeling purposes was the Castoro II (and four accompanying vessels). Figures 1–6 and 1–7 in Neptune's application illustrate the worst-case received sound levels that would be associated with major maintenance/repair activities along the flowline between the two unloading buoys and along the pipeline route at the 164–ft (50–m) depth during the spring season if a vessel similar to the Castoro II were used.

**Description of Marine Mammals in the Area of the Specified Activity**

Massachusetts Bay (as well as the entire Atlantic Ocean) hosts a diverse assemblage of marine mammals, including: North Atlantic right whale; blue whale; fin whale; sei whale; minke whale; humpback whale; killer whale; long-finned pilot whale; sperm whale; Atlantic white-beaked dolphin; Atlantic white-sided dolphin; bottlenose dolphin; common dolphin; harbor porpoise; Risso's dolphin; striped dolphin; gray seal; harbor seal; harp seal; and hooded seal. Table 3–1 in Neptune's application outlines the marine mammal species that occur in Massachusetts Bay and the likelihood of occurrence of each species. Of the species listed here, the North Atlantic right, blue, fin, sei, humpback, and sperm whales are all listed as endangered under the Endangered Species Act (ESA) and as depleted under the MMPA. The northern coastal stock of bottlenose dolphins is considered depleted under the MMPA. Certain stocks or populations of killer whales are listed as endangered under the ESA or depleted under the MMPA; however, none of those stocks or populations occurs in the proposed activity area.

Of these species, 14 are expected to occur in the area of Neptune's proposed operations. These species include: the North Atlantic right, humpback, fin, sei, minke, killer, and long-finned pilot whale; Atlantic white-sided, common, Risso's, and bottlenose dolphins; harbor porpoise; and harbor and gray seals. Neptune used information from the Cetacean and Turtle Assessment Program (CETAP; 1982) and the U.S. Navy's Marine Resource Assessment (MRA) for the Northeast Operating Areas (DoN, 2005) to estimate densities for the species in the area. Nonetheless, NMFS used the data on cetacean distribution within Massachusetts Bay, such as those published by the NCCOS (2006), to determine density estimates of several species of marine mammals in the vicinity of the project area. The explanation for those derivations and the actual density estimates are described later in this document (see the "Estimated Take by Incidental Harassment" section).

Blue and sperm whales are not commonly found in Massachusetts Bay. The sperm whale is generally a deepwater animal, and its distribution off the northeastern U.S. is concentrated around the 13,280–ft (4,048–m) depth contour, with sightings extending offshore beyond the 6,560–ft (2,000–m) depth contour. Sperm whales also can be seen in shallow water south of Cape Cod from May to November (Cetacean and Turtle Assessment Program, 1982). In the North Atlantic, blue whales are most commonly sighted in the waters off eastern Canada. Although they are rare in the shelf waters of the eastern U.S., occasional sightings of blue whales have been made off Cape Cod. Harp and hooded seals are seasonal visitors from much further north, seen mostly in the winter and early spring. Prior to 1990, harp and hooded seals were sighted only very occasionally in the Gulf of Maine, but recent sightings suggest increasing numbers of these species now visit these waters (Harris *et al.*, 2001, 2002). Juveniles of a third seal species, the ringed seal, are seen on occasion as far south as Cape Cod in the winter, but this species is considered to be quite rare in these waters (Provincetown Center for Coastal Studies, 2005). Due to the rarity of these species in the proposed project area and the remote chance they would be affected by Neptune's proposed port operations, these species are not discussed further in this proposed IHA notice.

In addition to the 16 cetacean species listed in Table 3–1 in Neptune's application, 10 other cetacean species have been recorded for Massachusetts as rare vagrants or from strandings (Cardoza *et al.*, 1999). The following six species of beaked whale are all pelagic and recorded mostly as strandings: the northern bottlenose whale; Cuvier's beaked whale; Sowerby's beaked whale; Blainville's beaked whale; Gervais' beaked whale; and True's beaked whale. Vagrants include the beluga whale, a northern species with rare vagrants reported as far south as Long Island (Katona *et al.*, 1993); the pantropical spotted dolphin and false killer whale, which are primarily tropical species with rare sightings in Massachusetts waters (Cardoza *et al.*, 1999); and the pygmy sperm whale, which is generally an offshore species that occasionally wanders inshore. Due to the rarity of these species in the proposed project area and the remote chance they would be affected by Neptune's proposed port operations, these species are not discussed further in this proposed IHA notice.

Information on those species that may be impacted by this activity is provided in Neptune's application and sections 3.2.3 and 3.2.5 in the MARAD/USCG Final EIS on the Neptune LNG proposal (see **ADDRESSES**). Please refer to those documents for more information on these species. In addition, general information on these marine mammal species can also be found in the NMFS U.S. Atlantic and Gulf of Mexico Marine Mammal Stock Report (Waring *et al.*, 2009), which is available at: *http://www.nefsc.noaa.gov/publications/tm/tm213/*. A brief summary on several commonly sighted marine mammal species distribution and abundance in the vicinity of the action area is provided below.

*Humpback Whale*

The highest abundance for humpback whales is distributed primarily along a relatively narrow corridor following the 100–m (328 ft) isobath across the southern Gulf of Maine from the northwestern slope of Georges Bank, south to the GSC, and northward alongside Cape Cod to Stellwagen Bank and Jeffreys Ledge. The relative abundance of whales increases in the spring with the highest occurrence along the slope waters (between the 40- and 140–m, 131- and 459–ft, isobaths) off Cape Cod and Davis Bank, Stellwagen Basin and Tillies Basin and between the 50- and 200–m (164- and 656–ft) isobaths along the inner slope of Georges Bank. High abundance was also estimated for the waters around Platts Bank. In the summer months, abundance increases markedly over the shallow waters (<50 m, or <164 ft) of Stellwagen Bank, the waters (100–200 m, 328–656 ft) between Platts Bank and Jeffreys Ledge, the steep slopes (between the 30- and 160–m isobaths, 98- and 525–ft isobaths) of Phelps and Davis Bank north of the GSC towards Cape Cod, and between the 50- and 100–m

(164- and 328–ft) isobath for almost the entire length of the steeply sloping northern edge of Georges Bank. This general distribution pattern persists in all seasons except winter when humpbacks remain at high abundance in only a few locations including Porpoise and Neddick Basins adjacent to Jeffreys Ledge, northern Stellwagen Bank and Tillies Basin, and the GSC. The best estimate of abundance for Gulf of Maine, formerly western North Atlantic, humpback whales is 847 animals (Waring *et al.*, 2009). Current data suggest that the Gulf of Maine humpback whale stock is steadily increasing in size, which is consistent with an estimated average trend of 3.1 percent in the North Atlantic population overall for the period 1979–1993 (Stevick *et al.*, 2003, cited in Waring *et al.*, 2009).

*Fin Whale*

Spatial patterns of habitat utilization by fin whales are very similar to those of humpback whales. Spring and summer high-use areas follow the 100–m (328 ft) isobath along the northern edge of Georges Bank (between the 50- and 200–m, 164- and 656–ft, isobaths), and northward from the GSC (between the 50- and 160–m, 164- and 525–ft, isobaths). Waters around Cashes Ledge, Platts Bank, and Jeffreys Ledge are all high-use areas in the summer months. Stellwagen Bank is a high-use area for fin whales in all seasons, with highest abundance occurring over the southern Stellwagen Bank in the summer months. In fact, the southern portion of Stellwagen Bank National Marine Sanctuary (SBNMS) is used more frequently than the northern portion in all months except winter, when high abundance is recorded over the northern tip of Stellwagen Bank. In addition to Stellwagen Bank, high abundance in winter is estimated for Jeffreys Ledge and the adjacent Porpoise Basin (100- to 160–m, 328- to 525–ft, isobaths), as well as Georges Basin and northern Georges Bank. The best estimate of abundance for the western North Atlantic stock of fin whales is 2,269 (Waring *et al.*, 2009). Currently, there are insufficient data to determine population trends for this species.

*Minke Whale*

Like other piscivorus baleen whales, highest abundance for minke whale is strongly associated with regions between the 50- and 100–m (164- and 328–ft) isobaths, but with a slightly stronger preference for the shallower waters along the slopes of Davis Bank, Phelps Bank, GSC, and Georges Shoals on Georges Bank. Minke whales are sighted in SBNMS in all seasons, with highest abundance estimated for the shallow waters (approximately 40 m, 131 ft) over southern Stellwagen Bank in the summer and fall months. Platts Bank, Cashes Ledge, Jeffreys Ledge, and the adjacent basins (Neddick, Porpoise, and Scantium) also support high relative abundance. Very low densities of minke whales remain throughout most of the southern Gulf of Maine in winter. The best estimate of abundance for the Canadian East Coast stock, which occurs from the western half of the Davis Strait to the Gulf of Mexico, of minke whales is 3,312 animals (Waring *et al.*, 2009). Currently, there are insufficient data to determine population trends for this species.

*North Atlantic Right Whale*

North Atlantic right whales are generally distributed widely across the southern Gulf of Maine in spring with highest abundance located over the deeper waters (100- to 160–m, or 328- to 525–ft, isobaths) on the northern edge of the GSC and deep waters (100–300 m, 328–984 ft) parallel to the 100–m (328–ft) isobath of northern Georges Bank and Georges Basin. High abundance was also found in the shallowest waters (<30 m, <98 ft) of Cape Cod Bay (CCB), over Platts Bank and around Cashes Ledge. Lower relative abundance is estimated over deep-water basins including Wilkinson Basin, Rodgers Basin, and Franklin Basin. In the summer months, right whales move almost entirely away from the coast to deep waters over basins in the central Gulf of Maine (Wilkinson Basin, Cashes Basin between the 160- and 200–m, 525- and 656–ft, isobaths) and north of Georges Bank (Rogers, Crowell, and Georges Basins). Highest abundance is found north of the 100–m (328–ft) isobath at the GSC and over the deep slope waters and basins along the northern edge of Georges Bank. The waters between Fippennies Ledge and Cashes Ledge are also estimated as high-use areas. In the fall months, right whales are sighted infrequently in the Gulf of Maine, with highest densities over Jeffreys Ledge and over deeper waters near Cashes Ledge and Wilkinson Basin. In winter, CCB, Scantum Basin, Jeffreys Ledge, and Cashes Ledge were the main high-use areas. Although SBNMS does not appear to support the highest abundance of right whales, sightings within SBNMS are reported for all four seasons, albeit at low relative abundance. Highest sighting within SBNMS occurs along the southern edge of the Bank.

The western North Atlantic population size was estimated to be at least 345 individuals in 2005 based on a census of individual whales identified using photo-identification techniques (Waring *et al.*, 2009). This value is a minimum and does not include animals that were alive prior to 2003 but not recorded in the individual sightings database as seen from December 1, 2003, to October 10, 2008. It also does not include calves known to be born during 2005 or any other individual whale seen during 2005 but not yet entered into the catalog (Waring *et al.*, 2009). Examination of the minimum alive population index calculated from the individual sightings database, as it existed on October 10, 2008, for the years 1990–2005 suggests a positive trend in numbers. These data reveal a significant increase in the number of catalogued whales alive during this period but with significant variation due to apparent losses exceeding gains during 1998–1999. Mean growth rate for the period 1990–2005 was 1.8 percent (Waring *et al.*, 2009).

*Long-finned Pilot Whale*

The long-finned pilot whale is more generally found along the edge of the continental shelf (a depth of 100 to 1,000 m, or 328 to 3,280 ft), choosing areas of high relief or submerged banks in cold or temperate shoreline waters. This species is split into two subspecies: the Northern and Southern subspecies. The Southern subspecies is circumpolar with northern limits of Brazil and South Africa. The Northern subspecies, which could be encountered during operation of the Neptune Port facility, ranges from North Carolina to Greenland (Reeves *et al.*, 2002; Wilson and Ruff, 1999). In the western North Atlantic, long-finned pilot whales are pelagic, occurring in especially high densities in winter and spring over the continental slope, then moving inshore and onto the shelf in summer and autumn following squid and mackerel populations (Reeves *et al.*, 2002). They frequently travel into the central and northern Georges Bank, GSC, and Gulf of Maine areas during the summer and early fall (May and October; NOAA, 1993). According to the SAR, the best population estimate for the western North Atlantic stock of long-finned pilot whale is 31,139 individuals (Waring *et al.*, 2009). Currently, there are insufficient data to determine population trends for the long-finned pilot whale.

*Sei Whale*

The sei whale is the least likely of all the baleen whale species to occur near the Neptune Port. However, there were a couple of sightings in the general vicinity of the port facility during the construction phase (Neptune Marine

Mammal Monitoring Weekly Reports, 2008). The Nova Scotia stock of sei whales ranges from the continental shelf waters of the northeastern U.S. and extends northeastward to south of Newfoundland. The southern portion of the species range during spring and summer includes the northern portions of the U.S. Atlantic Exclusive Economic Zone: the Gulf of Maine and Georges Bank. Spring is the period of greatest abundance in U.S. waters, with sightings concentrated along the eastern margin of Georges Bank and into the Northeast Channel area and along the southwestern edge of Georges Bank in the area of Hydrographer Canyon (CETAP, 1982). The best estimate of abundance for this stock is 386 animals (Waring *et al.*, 2009). There are insufficient data to determine population trends for this species.

*Atlantic White-sided Dolphin*

In spring, summer and fall, Atlantic white-sided dolphins are widespread throughout the southern Gulf of Maine, with the high-use areas widely located on either side of the 100–m (328–ft) isobath along the northern edge of Georges Bank, and north from the GSC to Stellwagen Bank, Jeffreys Ledge, Platts Bank, and Cashes Ledge. In spring, high-use areas exist in the GSC, northern Georges Bank, the steeply sloping edge of Davis Bank, and Cape Cod, southern Stellwagen Bank, and the waters between Jeffreys Ledge and Platts Bank. In summer, there is a shift and expansion of habitat toward the east and northeast. High-use areas occur along most of the northern edge of Georges Bank between the 50- and 200–m (164- and 656–ft) isobaths and northward from the GSC along the slopes of Davis Bank and Cape Cod. High sightings are also recorded over Truxton Swell, Wilkinson Basin, Cashes Ledge and the bathymetrically complex area northeast of Platts Bank. High sightings of white-sided dolphin are recorded within SBNMS in all seasons, with highest density in summer and most widespread distributions in spring located mainly over the southern end of Stellwagen Bank. In winter, high sightings were recorded at the northern tip of Stellwagen Bank and Tillies Basin.

A comparison of spatial distribution patterns for all baleen whales and all porpoises and dolphins combined showed that both groups have very similar spatial patterns of high- and low-use areas. The baleen whales, whether piscivorus or planktivorous, are more concentrated than the dolphins and porpoises. They utilize a corridor that extends broadly along the most linear and steeply sloping edges in the southern Gulf of Maine indicated broadly by the 100 m (328 ft) isobath. Stellwagen Bank and Jeffreys Ledge support a high abundance of baleen whales throughout the year. Species richness maps indicate that high-use areas for individual whales and dolphin species co-occurred, resulting in similar patterns of species richness primarily along the southern portion of the 100–m (328–ft) isobath extending northeast and northwest from the GSC. The southern edge of Stellwagen Bank and the waters around the northern tip of Cape Cod are also highlighted as supporting high cetacean species richness. Intermediate to high numbers of species are also calculated for the waters surrounding Jeffreys Ledge, the entire Stellwagen Bank, Platts Bank, Fippennies Ledge, and Cashes Ledge. The best estimate of abundance for the western North Atlantic stock of white-sided dolphins is 63,368 (Waring *et al.*, 2009). A trend analysis has not been conducted for this species.

*Killer Whale, Common Dolphin, Bottlenose Dolphin, Risso's Dolphin, and Harbor Porpoise*

Although these five species are some of the most widely distributed small cetacean species in the world (Jefferson *et al.*, 1993), they are not commonly seen in the vicinity of the project area in Massachusetts Bay (Wiley *et al.*, 1994; NCCOS, 2006; Northeast Gateway Marine Mammal Monitoring Weekly Reports, 2007; Neptune Marine Mammal Monitoring Weekly Reports, 2008). The total number of killer whales off the eastern U.S. coast is unknown, and present data are insufficient to calculate a minimum population estimate or to determine the population trends for this stock (Blaylock *et al.*, 1995). The best estimate of abundance for the western North Atlantic stock of common dolphins is 120,743 animals, and a trend analysis has not been conducted for this species (Waring *et al.*, 2007). There are several stocks of bottlenose dolphins found along the eastern U.S. from Maine to Florida. The stock that may occur in the area of the Neptune Port is the western North Atlantic coastal northern migratory stock of bottlenose dolphins. The best estimate of abundance for this stock is 7,489 animals (Waring *et al.*, 2009). There are insufficient data to determine the population trend for this stock. The best estimate of abundance for the western North Atlantic stock of Risso's dolphins is 20,479 animals (Waring *et al.*, 2009). There are insufficient data to determine the population trend for this stock. The best estimate of abundance for the Gulf of Maine/Bay of Fundy stock of harbor porpoise is 89,054 animals (Waring *et al.*, 2009). A trend analysis has not been conducted for this species.

*Harbor and Gray Seals*

In the U.S. western North Atlantic, both harbor and gray seals are usually found from the coast of Maine south to southern New England and New York (Waring *et al.*, 2007).

Along the southern New England and New York coasts, harbor seals occur seasonally from September through late May (Schneider and Payne, 1983). In recent years, their seasonal interval along the southern New England to New Jersey coasts has increased (deHart, 2002). In U.S. waters, harbor seal breeding and pupping normally occur in waters north of the New Hampshire/Maine border, although breeding has occurred as far south as Cape Cod in the early part of the 20th century (Temte *et al.*, 1991; Katona *et al.*, 1993). The best estimate of abundance for the western North Atlantic stock of harbor seals is 99,340 animals (Waring *et al.*, 2009). Between 1981 and 2001, the uncorrected counts of seals increased from 10,543 to 38,014, an annual rate of 6.6 percent (Gilbert *et al.*, 2005, cited in Waring *et al.*, 2009).

Although gray seals are often seen off the coast from New England to Labrador, within U.S. waters, only small numbers of gray seals have been observed pupping on several isolated islands along the Maine coast and in Nantucket-Vineyard Sound, Massachusetts (Katona *et al.*, 1993; Rough, 1995). In the late 1990s, a year-round breeding population of approximately 400 gray seals was documented on outer Cape Cod and Muskeget Island (Waring *et al.*, 2007). Depending on the model used, the minimum estimate for the Canadian gray seal population was estimated to range between 125,541 and 169,064 animals (Trzcinski *et al.*, 2005, cited in Waring *et al.*, 2009); however, present data are insufficient to calculate the minimum population estimate for U.S. waters. Waring *et al.* (2009) note that gray seal abundance in the U.S. Atlantic is likely increasing, but the rate of increase is unknown.

**Brief Background on Marine Mammal Hearing**

When considering the influence of various kinds of sound on the marine environment, it is necessary to understand that different kinds of marine life are sensitive to different frequencies of sound. Based on available behavioral data, audiograms derived using auditory evoked potential

techniques, anatomical modeling, and other data, Southall *et al.* (2007) designate "functional hearing groups" for marine mammals and estimate the lower and upper frequencies of functional hearing of the groups. The functional groups and the associated frequencies are indicated below (though animals are less sensitive to sounds at the outer edge of their functional range and most sensitive to sounds of frequencies within a smaller range somewhere in the middle of their functional hearing range):

- Low frequency cetaceans (13 species of mysticetes): functional hearing is estimated to occur between approximately 7 Hz and 22 kHz;
- Mid-frequency cetaceans (32 species of dolphins, six species of larger toothed whales, and 19 species of beaked and bottlenose whales): functional hearing is estimated to occur between approximately 150 Hz and 160 kHz;
- High frequency cetaceans (eight species of true porpoises, six species of river dolphins, Kogia, the franciscana, and four species of cephalorhynchids): functional hearing is estimated to occur between approximately 200 Hz and 180 kHz; and
- Pinnipeds in Water: functional hearing is estimated to occur between approximately 75 Hz and 75 kHz, with the greatest sensitivity between approximately 700 Hz and 20 kHz.

As mentioned previously in this document, 14 marine mammal species (12 cetacean and two pinniped species) are likely to occur in the Neptune Port area. Of the 12 cetacean species likely to occur in Neptune's project area, five are classified as low frequency cetaceans (i.e., North Atlantic right, humpback, fin, minke, and sei whales), six are classified as mid-frequency cetaceans (i.e., killer and pilot whales and bottlenose, common, Risso's, and Atlantic white-sided dolphins), and one is classified as a high-frequency cetacean (i.e., harbor porpoise) (Southall *et al.*, 2007).

**Potential Effects of the Specified Activity on Marine Mammals**

Potential effects of Neptune's proposed port operations and maintenance/repair activities would most likely be acoustic in nature. LNG port operations and maintenance/repair activities introduce sound into the marine environment. Potential acoustic effects on marine mammals relate to sound produced by thrusters during maneuvering of the SRVs while docking and undocking, occasional weathervaning at the port, and during thruster use of DP maintenance vessels should a major repair be necessary. The potential effects of sound from the proposed activities associated with the Neptune Port might include one or more of the following: tolerance; masking of natural sounds; behavioral disturbance; non-auditory physical effects; and, at least in theory, temporary or permanent hearing impairment (Richardson *et al.*, 1995). However, for reasons discussed later in this document, it is unlikely that there would be any cases of temporary, or especially permanent, hearing impairment resulting from these activities. As outlined in previous NMFS documents, the effects of noise on marine mammals are highly variable, and can be categorized as follows (based on Richardson *et al.*, 1995):

(1) The noise may be too weak to be heard at the location of the animal (i.e., lower than the prevailing ambient noise level, the hearing threshold of the animal at relevant frequencies, or both);

(2) The noise may be audible but not strong enough to elicit any overt behavioral response;

(3) The noise may elicit reactions of variable conspicuousness and variable relevance to the well being of the marine mammal; these can range from temporary alert responses to active avoidance reactions such as vacating an area at least until the noise event ceases but potentially for longer periods of time;

(4) Upon repeated exposure, a marine mammal may exhibit diminishing responsiveness (habituation), or disturbance effects may persist; the latter is most likely with sounds that are highly variable in characteristics, infrequent, and unpredictable in occurrence, and associated with situations that a marine mammal perceives as a threat;

(5) Any anthropogenic noise that is strong enough to be heard has the potential to reduce (mask) the ability of a marine mammal to hear natural sounds at similar frequencies, including calls from conspecifics, and underwater environmental sounds such as surf noise;

(6) If mammals remain in an area because it is important for feeding, breeding, or some other biologically important purpose even though there is chronic exposure to noise, it is possible that there could be noise-induced physiological stress; this might in turn have negative effects on the well-being or reproduction of the animals involved; and

(7) Very strong sounds have the potential to cause a temporary or permanent reduction in hearing sensitivity. In terrestrial mammals, and presumably marine mammals, received sound levels must far exceed the animal's hearing threshold for there to be any temporary threshold shift (TTS) in its hearing ability. For transient sounds, the sound level necessary to cause TTS is inversely related to the duration of the sound. Received sound levels must be even higher for there to be risk of permanent hearing impairment. In addition, intense acoustic or explosive events may cause trauma to tissues associated with organs vital for hearing, sound production, respiration and other functions. This trauma may include minor to severe hemorrhage.

*Tolerance*

Numerous studies have shown that underwater sounds from industry activities are often readily detectable by marine mammals in the water at distances of many kilometers. Numerous studies have also shown that marine mammals at distances more than a few kilometers away often show no apparent response to industry activities of various types (Miller *et al.*, 2005). This is often true even in cases when the sounds must be readily audible to the animals based on measured received levels and the hearing sensitivity of that mammal group. Although various baleen whales, toothed whales, and (less frequently) pinnipeds have been shown to react behaviorally to underwater sound such as airgun pulses or vessels under some conditions, at other times mammals of all three types have shown no overt reactions (e.g., Malme *et al.*, 1986; Richardson *et al.*, 1995; Madsen and Mohl, 2000; Croll *et al.*, 2001; Jacobs and Terhune, 2002; Madsen *et al.*, 2002; Miller *et al.*, 2005). In general, pinnipeds and small odontocetes seem to be more tolerant of exposure to some types of underwater sound than are baleen whales. Richardson *et al.* (1995) found that vessel noise does not seem to strongly affect pinnipeds that are already in the water. Richardson *et al.* (1995) went on to explain that seals on haul-outs sometimes respond strongly to the presence of vessels and at other times appear to show considerable tolerance of vessels, and (Brueggeman *et al.*, 1992; cited in Richardson *et al.*, 1995) observed ringed seals hauled out on ice pans displaying short-term escape reactions when a ship approached within 0.25–0.5 mi (0.4–0.8 km).

*Masking*

Masking is the obscuring of sounds of interest by other sounds, often at similar frequencies. Marine mammals are highly dependent on sound, and their ability to recognize sound signals amid

noise is important in communication, predator and prey detection, and, in the case of toothed whales, echolocation. Even in the absence of manmade sounds, the sea is usually noisy. Background ambient noise often interferes with or masks the ability of an animal to detect a sound signal even when that signal is above its absolute hearing threshold. Natural ambient noise includes contributions from wind, waves, precipitation, other animals, and (at frequencies above 30 kHz) thermal noise resulting from molecular agitation (Richardson *et al.*, 1995). Background noise also can include sounds from human activities. Masking of natural sounds can result when human activities produce high levels of background noise. Conversely, if the background level of underwater noise is high (e.g., on a day with strong wind and high waves), an anthropogenic noise source will not be detectable as far away as would be possible under quieter conditions and will itself be masked. Ambient noise is highly variable on continental shelves (Thompson, 1965; Myrberg, 1978; Chapman *et al.*, 1998; Desharnais *et al.*, 1999). This inevitably results in a high degree of variability in the range at which marine mammals can detect anthropogenic sounds.

Although masking is a natural phenomenon to which marine mammals must adapt, the introduction of strong sounds into the sea at frequencies important to marine mammals increases the severity and frequency of occurrence of masking. For example, if a baleen whale is exposed to continuous low-frequency noise from an industrial source, this will reduce the size of the area around that whale within which it can hear the calls of another whale. In general, little is known about the importance to marine mammals of detecting sounds from conspecifics, predators, prey, or other natural sources. In the absence of much information about the importance of detecting these natural sounds, it is not possible to predict the impacts if mammals are unable to hear these sounds as often, or from as far away, because of masking by industrial noise (Richardson *et al.*, 1995). In general, masking effects are expected to be less severe when sounds are transient than when they are continuous.

Although some degree of masking is inevitable when high levels of manmade broadband sounds are introduced into the sea, marine mammals have evolved systems and behavior that function to reduce the impacts of masking. Structured signals, such as the echolocation click sequences of small toothed whales, may be readily detected even in the presence of strong background noise because their frequency content and temporal features usually differ strongly from those of the background noise (Au and Moore, 1988, 1990). The components of background noise that are similar in frequency to the sound signal in question primarily determine the degree of masking of that signal. Low-frequency industrial noise, such as shipping, has little or no masking effect on high frequency echolocation sounds. Redundancy and context can also facilitate detection of weak signals. These phenomena may help marine mammals detect weak sounds in the presence of natural or manmade noise. Most masking studies in marine mammals present the test signal and the masking noise from the same direction. The sound localization abilities of marine mammals suggest that, if signal and noise come from different directions, masking would not be as severe as the usual types of masking studies might suggest (Richardson *et al.*, 1995). The dominant background noise may be highly directional if it comes from a particular anthropogenic source such as a ship or industrial site. Directional hearing may significantly reduce the masking effects of these noises by improving the effective signal-to-noise ratio. In the cases of high-frequency hearing by the bottlenose dolphin, beluga whale, and killer whale, empirical evidence confirms that masking depends strongly on the relative directions of arrival of sound signals and the masking noise (Penner *et al.*, 1986; Dubrovskiy, 1990; Bain *et al.*, 1993; Bain and Dahlheim, 1994). Toothed whales, and probably other marine mammals as well, have additional capabilities besides directional hearing that can facilitate detection of sounds in the presence of background noise. There is evidence that some toothed whales can shift the dominant frequencies of their echolocation signals from a frequency range with a lot of ambient noise toward frequencies with less noise (Au *et al.*, 1974, 1985; Moore and Pawloski, 1990; Thomas and Turl, 1990; Romanenko and Kitain, 1992; Lesage *et al.*, 1999). A few marine mammal species are known to increase the source levels of their calls in the presence of elevated sound levels (Dahlheim, 1987; Au, 1993; Lesage *et al.*, 1999; Terhune, 1999).

These data demonstrating adaptations for reduced masking pertain mainly to the very high frequency echolocation signals of toothed whales. There is less information about the existence of corresponding mechanisms at moderate or low frequencies or in other types of marine mammals. For example, Zaitseva *et al.* (1980) found that, for the bottlenose dolphin, the angular separation between a sound source and a masking noise source had little effect on the degree of masking when the sound frequency was 18 kHz, in contrast to the pronounced effect at higher frequencies. Directional hearing has been demonstrated at frequencies as low as 0.5–2 kHz in several marine mammals, including killer whales (Richardson *et al.*, 1995). This ability may be useful in reducing masking at these frequencies. In summary, high levels of noise generated by anthropogenic activities may act to mask the detection of weaker biologically important sounds by some marine mammals. This masking may be more prominent for lower frequencies. For higher frequencies, such as used in echolocation by toothed whales, several mechanisms are available that may allow them to reduce the effects of such masking.

*Disturbance*

Disturbance can induce a variety of effects, such as subtle changes in behavior, more conspicuous dramatic changes in activities, and displacement. Disturbance is one of the main concerns of the potential impacts of manmade noise on marine mammals. For many species and situations, there is no detailed information about reactions to noise. While there are no specific studies available on the reactions of marine mammals to sounds produced by a LNG facility, information from studies of marine mammal reactions to other types of continuous and transient anthropogenic sound (e.g., drillships) are described here as a proxy.

Behavioral reactions of marine mammals to sound are difficult to predict because they are dependent on numerous factors, including species, state of maturity, experience, current activity, reproductive state, time of day, and weather. If a marine mammal does react to an underwater sound by changing its behavior or moving a small distance, the impacts of that change may not be important to the individual, the stock, or the species as a whole. However, if a sound source displaces marine mammals from an important feeding or breeding area for a prolonged period, impacts on the animals could be important. Based on the literature reviewed in Richardson *et al.* (1995), it is apparent that most small and medium-sized toothed whales exposed to prolonged or repeated underwater sounds are unlikely to be displaced unless the overall received level is at

least 140 dB re 1 µPa (rms). The limited available data indicate that the sperm whale is sometimes, though not always, more responsive than other toothed whales. Baleen whales probably have better hearing sensitivities at lower sound frequencies, and in several studies have been shown to react to continuous sounds at received sound levels of approximately 120 dB re 1 µPa (rms). Toothed whales appear to exhibit a greater variety of reactions to manmade underwater noise than do baleen whales. Toothed whale reactions can vary from approaching vessels (e.g., to bow ride) to strong avoidance, while baleen whale reactions range from neutral (little or no change in behavior) to strong avoidance. In general, pinnipeds seem more tolerant of, or at least habituate more quickly to, potentially disturbing underwater noise than do cetaceans.

*Baleen Whales* - Baleen whales sometimes show behavioral changes in response to received broadband drillship noises of 120 dB (rms) or greater. On their summer range in the Beaufort Sea, bowhead whales (a species closely related to the right whale) reacted to drillship noises within 4–8 km (2.5–5 mi) of the drillship at received levels 20 dB above ambient, or about 118 dB (Richardson *et al.*, 1990). Reactions were stronger at the onset of the sound (Richardson *et al.*, 1995). Migrating bowhead whales avoided an area with a radius of 10–20 km (6.2–12.4 mi) around drillships and their associated support vessels, corresponding to a received noise level around 115 dB (Greene, 1987; Koski and Johnson, 1987; Hall *et al.*, 1994; Davies, 1997; Schick and Urban, 2000). For gray whales off California, the predicted reaction zone around a semi-submersible drill rig was less than 1 km (0.62 mi), at received levels of approximately 120 dB (Malme *et al.*, 1983, 1984). Humpback whales showed no obvious avoidance response to broadband drillship noises at a received level of 116 dB (Malme *et al.*, 1985).

Reactions of baleen whales to boat noises include changes in swimming direction and speed, blow rate, and the frequency and kinds of vocalizations (Richardson *et al.*, 1995). Baleen whales, especially minke whales, occasionally approach stationary or slow-moving boats, but more commonly avoid boats. Avoidance is strongest when boats approach directly or when vessel noise changes abruptly (Watkins, 1986; Beach and Weinrich, 1989). Humpback whales responded to boats at distances of at least 0.5–1 km (0.31–0.62 mi), and avoidance and other reactions have been noted in several areas at distances of several kilometers (Jurasz and Jurasz, 1979; Dean *et al.*, 1985; Bauer, 1986; Bauer and Herman, 1986).

During some activities and at some locations, humpbacks exhibit little or no reaction to boats (Watkins, 1986). Some baleen whales seem to show habituation to frequent boat traffic. Over 25 years of observations in Cape Cod waters, minke whales' reactions to boats changed from frequent positive interactions (i.e., reactions of apparent curiosity or reactions that appeared to provide some reward to the animal) to a general lack of interest (i.e., ignored the stimuli), while humpback whales reactions changed from being often negative to being often positive, and fin whales reactions changed from being mostly negative (i.e., sudden changes from activity to inactivity or a display of agonistic responses) to being mostly uninterested (Watkins, 1986).

North Atlantic right whales also display variable responses to boats. There may be an initial orientation away from a boat, followed by a lack of observable reaction (Atkins and Swartz, 1989). A slowly moving boat can approach a right whale, but an abrupt change in course or engine speed usually elicits a reaction (Goodyear, 1989; Mayo and Marx, 1990; Gaskin, 1991). When approached by a boat, right whale mothers will interpose themselves between the vessel and calf and will maintain a low profile (Richardson *et al.*, 1995). In a long-term study of baleen whale reactions to boats, while other baleen whale species appeared to habituate to boat presence over the 25–year period, right whales continued to show either uninterested or negative reactions to boats with no change over time (Watkins, 1986).

Biassoni *et al.* (2000) and Miller *et al.* (2000) reported behavioral observations for humpback whales exposed to a low-frequency sonar stimulus (160- to 330–Hz frequency band; 42–s tonal signal repeated every 6 min; source levels 170 to 200 dB) during playback experiments. Exposure to measured received levels ranging from 120 to 150 dB resulted in variability in humpback singing behavior. Croll *et al.* (2001) investigated responses of foraging fin and blue whales to the same low frequency active sonar stimulus off southern California. Playbacks and control intervals with no transmission were used to investigate behavior and distribution on time scales of several weeks and spatial scales of tens of kilometers. The general conclusion was that whales remained feeding within a region for which 12 to 30 percent of exposures exceeded 140 dB.

Frankel and Clark (1998) conducted playback experiments with wintering humpback whales using a single speaker producing a low-frequency "M-sequence" (sine wave with multiple-phase reversals) signal in the 60 to 90 Hz band with output of 172 dB at 1 m. For 11 playbacks, exposures were between 120 and 130 dB re 1 µPa (rms) and included sufficient information regarding individual responses. During eight of the trials, there were no measurable differences in tracks or bearings relative to control conditions, whereas on three occasions, whales either moved slightly away from (n = 1) or towards (n = 2) the playback speaker during exposure. The presence of the source vessel itself had a greater effect than did the M-sequence playback.

Finally, Nowacek *et al.* (2004) used controlled exposures to demonstrate behavioral reactions of northern right whales to various non-pulse sounds. Playback stimuli included ship noise, social sounds of conspecifics, and a complex, 18–min "alert" sound consisting of repetitions of three different artificial signals. Ten whales were tagged with calibrated instruments that measured received sound characteristics and concurrent animal movements in three dimensions. Five out of six exposed whales reacted strongly to alert signals at measured received levels between 130 and 150 dB (i.e., ceased foraging and swam rapidly to the surface). Two of these individuals were not exposed to ship noise, and the other four were exposed to both stimuli. These whales reacted mildly to conspecific signals. Seven whales, including the four exposed to the alert stimulus, had no measurable response to either ship sounds or actual vessel noise.

*Odontocetes* - In reviewing responses of cetaceans with best hearing in mid-frequency ranges, which includes toothed whales, Southall *et al.* (2007) reported that combined field and laboratory data for mid-frequency cetaceans exposed to non-pulse sounds did not lead to a clear conclusion about received levels coincident with various behavioral responses. In some settings, individuals in the field showed profound (significant) behavioral responses to exposures from 90 to 120 dB, while others failed to exhibit such responses for exposure to received levels from 120 to 150 dB. Contextual variables other than exposure received level, and probable species differences, are the likely reasons for this variability. Context, including the fact that captive subjects were often directly reinforced with food for tolerating noise exposure, may also explain why there was great

disparity in results from field and laboratory conditions-exposures in captive settings generally exceeded 170 dB before inducing behavioral responses.

Dolphins and other toothed whales may show considerable tolerance of floating and bottom-founded drill rigs and their support vessels. Kapel (1979) reported many pilot whales within visual range of drillships and their support vessels off West Greenland. Beluga whales have been observed swimming within 100–150 m (328–492 ft) of an artificial island while drilling was underway (Fraker and Fraker, 1979, 1981), and within 1,600 m (1 mi) of the drillship Explorer I while the vessel was engaged in active drilling (Fraker and Fraker, 1981). Some belugas in Bristol Bay and Beaufort Sea, Alaska, when exposed to playbacks of drilling sounds, altered course to swim around the source, increased swimming speed, or reversed direction of travel (Stewart *et al.*, 1982; Richardson *et al.*, 1995). Reactions of beluga whales to semi-submersible drillship noise were less pronounced than were reactions to motorboats with outboard engines. Captive belugas exposed to playbacks of recorded semi-submersible noise seemed quite tolerant of that sound (Thomas *et al.*, 1990).

Morton and Symonds (2002) used census data on killer whales in British Columbia to evaluate avoidance of non-pulse acoustic harassment devices (AHDs). Avoidance ranges were about 4 km (2.5 mi). Also, there was a dramatic reduction in the number of days "resident" killer whales were sighted during AHD-active periods compared to pre- and post-exposure periods and a nearby control site.

Harbor porpoise off Vancouver Island, British Columbia, were found to be sensitive to the simulated sound of a 2–megawatt offshore wind turbine (Koschinski *et al.*, 2003). The porpoises remained significantly further away from the sound source when it was active, and this effect was seen out to a distance of 60 m (197 ft). The device used in that study produced sounds in the frequency range of 30 to 800 Hz, with peak source levels of 128 dB re 1 µPa at 1 m at the 80- and 160–Hz frequencies.

Some species of small toothed cetaceans avoid boats when they are approached to within 0.5–1.5 km (0.31–0.93 mi), with occasional reports of avoidance at greater distances (Richardson *et al.*, 1995). Some toothed whale species appear to be more responsive than others. Beaked whales and beluga whales seem especially responsive to boats. Dolphins may tolerate boats of all sizes, often approaching and riding the bow and stern waves (Shane *et al.*, 1986). At other times, dolphin species that are known to be attracted to boats will avoid them. Such avoidance is often linked to previous boat-based harassment of the animals (Richardson *et al.*, 1995). Coastal bottlenose dolphins that are the object of whale-watching activities have been observed to swim erratically (Acevedo, 1991), remain submerged for longer periods of time (Janik and Thompson, 1996; Nowacek *et al.*, 2001), display less cohesiveness among group members (Cope *et al.*, 1999), whistle more frequently (Scarpaci *et al.*, 2000), and rest less often (Constantine *et al.*, 2004) when boats were nearby. Pantropical spotted dolphins and spinner dolphins in the eastern Tropical Pacific, where they have been targeted by the tuna fishing industry because of their association with these fish, display avoidance of survey vessels up to 11.1 km (6.9 mi; Au and Perryman, 1982; Hewitt, 1985), whereas spinner dolphins in the Gulf of Mexico were observed bow riding the survey vessel in all 14 sightings of this species during one survey (Wursig *et al.*, 1998).

Harbor porpoises tend to avoid boats. In the Bay of Fundy, Polacheck and Thorpe (1990) found harbor porpoises to be more likely to be swimming away from the transect line of their survey vessel than swimming toward it and more likely to be heading away from the vessel when they were within 400 m (1,312 ft). Similarly, off the west coast of North America, Barlow (1988) observed harbor porpoises avoiding a survey vessel by moving rapidly out of its path within 1 km (0.62 mi) of that vessel. Beluga whales are generally quite responsive to vessels. Belugas in Lancaster Sound in the Canadian Arctic showed dramatic reactions in response to icebreaking ships, with received levels of sound ranging from 101 dB to 136 dB re 1 ?Pa in the 20 to 1,000–Hz band at a depth of 20 m (66 ft; Finley *et al.*, 1990). Responses included emitting distinctive pulsive calls that were suggestive of excitement or alarm and rapid movement in what seemed to be a flight response. Reactions occurred out to 80 km (50 mi) from the ship. Another study found belugas to use higher-frequency calls, a greater redundancy in their calls (more calls emitted in a series), and a lower calling rate in the presence of vessels (Lesage *et al.*, 1999). The level of response of belugas to vessels is partly a function of habituation. Sperm whales generally show no overt reactions to vessels unless approached within several hundred meters (Watkins and Schevill, 1975; Wursig *et al.*, 1998; Magalhaes *et al.*, 2002). Observed reactions include spending more (Richter *et al.*, 2003) or less (Watkins and Schevill, 1975) time at the surface, increasing swimming speed, or changing heading (Papastavrou *et al.*, 1989; Richter *et al.*, 2003) and diving abruptly (Wursig *et al.*, 1998).

*Pinnipeds* - Pinnipeds generally seem to be less responsive to exposure to industrial sound than most cetaceans. Pinniped responses to underwater sound from some types of industrial activities such as seismic exploration appear to be temporary and localized (Harris *et al.*, 2001; Reiser *et al.*, 2009).

Responses of pinnipeds to drilling noise have not been well studied. Richardson *et al.* (1995) summarizes the few available studies, which showed ringed and bearded seals in the Arctic to be rather tolerant of drilling noise. Seals were often seen near active drillships and approached, to within 50 m (164 ft), a sound projector broadcasting low-frequency drilling sound.

Southall *et al.* (2007) reviewed literature describing responses of pinnipeds to non-pulsed sound and reported that the limited data suggest exposures between approximately 90 and 140 dB generally do not appear to induce strong behavioral responses in pinnipeds exposed to non-pulse sounds in water; no data exist regarding exposures at higher levels. It is important to note that among these studies, there are some apparent differences in responses between field and laboratory conditions. In contrast to the mid-frequency odontocetes, captive pinnipeds responded more strongly at lower levels than did animals in the field. Again, contextual issues are the likely cause of this difference.

Jacobs and Terhune (2002) observed harbor seal reactions to AHDs (source level in this study was 172 dB) deployed around aquaculture sites. Seals were generally unresponsive to sounds from the AHDs. During two specific events, individuals came within 43 and 44 m (141 and 144 ft) of active AHDs and failed to demonstrate any measurable behavioral response; estimated received levels based on the measures given were approximately 120 to 130 dB.

Costa *et al.* (2003) measured received noise levels from an Acoustic Thermometry of Ocean Climate (ATOC) program sound source off northern California using acoustic data loggers placed on translocated elephant seals. Subjects were captured on land,

transported to sea, instrumented with archival acoustic tags, and released such that their transit would lead them near an active ATOC source (at 939–m depth [0.6 mi]; 75–Hz signal with 37.5- Hz bandwidth; 195 dB maximum source level, ramped up from 165 dB over 20 min) on their return to a haul-out site. Received exposure levels of the ATOC source for experimental subjects averaged 128 dB (range 118 to 137) in the 60- to 90–Hz band. None of the instrumented animals terminated dives or radically altered behavior upon exposure, but some statistically significant changes in diving parameters were documented in nine individuals. Translocated northern elephant seals exposed to this particular non-pulse source began to demonstrate subtle behavioral changes at exposure to received levels of approximately 120 to 140 dB.

Kastelein *et al.* (2006) exposed nine captive harbor seals in an approximately 25 30 m (82 98 ft) enclosure to non-pulse sounds used in underwater data communication systems (similar to acoustic modems). Test signals were frequency modulated tones, sweeps, and bands of noise with fundamental frequencies between 8 and 16 kHz; 128 to 130 [3] dB source levels; 1- to 2–s duration [60–80 percent duty cycle]; or 100 percent duty cycle. They recorded seal positions and the mean number of individual surfacing behaviors during control periods (no exposure), before exposure, and in 15–min experimental sessions (n = 7 exposures for each sound type). Seals generally swam away from each source at received levels of approximately 107 dB, avoiding it by approximately 5 m (16 ft), although they did not haul out of the water or change surfacing behavior. Seal reactions did not appear to wane over repeated exposure (i.e., there was no obvious habituation), and the colony of seals generally returned to baseline conditions following exposure. The seals were not reinforced with food for remaining in the sound field.

Reactions of harbor seals to the simulated noise of a 2–megawatt wind power generator were measured by Koschinski *et al.* (2003). Harbor seals surfaced significantly further away from the sound source when it was active and did not approach the sound source as closely. The device used in that study produced sounds in the frequency range of 30 to 800 Hz, with peak source levels of 128 dB re 1 µPa at 1 m at the 80- and 160–Hz frequencies.

Ship and boat noise do not seem to have strong effects on seals in the water, but the data are limited. When in the water, seals appear to be much less apprehensive about approaching vessels. Some will approach a vessel out of apparent curiosity, including noisy vessels such as those operating seismic airgun arrays (Moulton and Lawson, 2002). Gray seals have been known to approach and follow fishing vessels in an effort to steal catch or the bait from traps. In contrast, seals hauled out on land often are quite responsive to nearby vessels. Terhune (1985) reported that northwest Atlantic harbor seals were extremely vigilant when hauled out and were wary of approaching (but less so passing) boats. Suryan and Harvey (1999) reported that Pacific harbor seals commonly left the shore when powerboat operators approached to observe the seals. Those seals detected a powerboat at a mean distance of 264 m (866 ft), and seals left the haul-out site when boats approached to within 144 m (472 ft).

*Hearing Impairment and Other Physiological Effects*

Temporary or permanent hearing impairment is a possibility when marine mammals are exposed to very strong sounds. Non-auditory physiological effects might also occur in marine mammals exposed to strong underwater sound. Possible types of non-auditory physiological effects or injuries that theoretically might occur in mammals close to a strong sound source include stress, neurological effects, bubble formation, and other types of organ or tissue damage. It is possible that some marine mammal species (i.e., beaked whales) may be especially susceptible to injury and/or stranding when exposed to strong pulsed sounds, particularly at higher frequencies. Non-auditory physiological effects are not anticipated to occur as a result of port operations or maintenance, as none of the activities associated with the Neptune Port will generate sounds loud enough to cause such effects. The following subsections discuss in somewhat more detail the possibilities of TTS and permanent threshold shift (PTS).

*TTS* - TTS is the mildest form of hearing impairment that can occur during exposure to a strong sound (Kryter, 1985). While experiencing TTS, the hearing threshold rises and a sound must be stronger in order to be heard. At least in terrestrial mammals, TTS can last from minutes or hours to (in cases of strong TTS) days. For sound exposures at or somewhat above the TTS threshold, hearing sensitivity in both terrestrial and marine mammals recovers rapidly after exposure to the noise ends. Few data on sound levels and durations necessary to elicit mild TTS have been obtained for marine mammals, and none of the published data concern TTS elicited by exposure to multiple pulses of sound.

Human non-impulsive noise exposure guidelines are based on exposures of equal energy (the same sound exposure level [SEL]) producing equal amounts of hearing impairment regardless of how the sound energy is distributed in time (NIOSH, 1998). Until recently, previous marine mammal TTS studies have also generally supported this equal energy relationship (Southall *et al.*, 2007). Three newer studies, two by Mooney *et al.* (2009a,b) on a single bottlenose dolphin either exposed to playbacks of U.S. Navy mid-frequency active sonar or octave-band noise (4–8 kHz) and one by Kastak *et al.* (2007) on a single California sea lion exposed to airborne octave-band noise (centered at 2.5 kHz), concluded that for all noise exposure situations the equal energy relationship may not be the best indicator to predict TTS onset levels. Generally, with sound exposures of equal energy, those that were quieter (lower sound pressure level [SPL]) with longer duration were found to induce TTS onset more than those of louder (higher SPL) and shorter duration. Given the available data, the received level of a single seismic pulse (with no frequency weighting) might need to be approximately 186 dB re 1 $\mu Pa^2$.s (i.e., 186 dB sound exposure level [SEL]) in order to produce brief, mild TTS. NMFS considers TTS to be a form of Level B harassment, which temporarily causes a shift in an animal's hearing, and the animal is able to recover. Data on TTS from continuous sound (such as that produced by Neptune's proposed Port activities) are limited, so the available data from seismic activities are used as a proxy. Exposure to several strong seismic pulses that each have received levels near 175–180 dB SEL might result in slight TTS in a small odontocete, assuming the TTS threshold is (to a first approximation) a function of the total received pulse energy. Given that the SPL is approximately 10–15 dB higher than the SEL value for the same pulse, an odontocete would need to be exposed to a sound level of 190 dB re 1 µPa (rms) in order to incur TTS.

TTS was measured in a single, captive bottlenose dolphin after exposure to a continuous tone with maximum SPLs at frequencies ranging from 4 to 11 kHz that were gradually increased in intensity to 179 dB re 1 µPa and in duration to 55 minutes (Nachtigall *et al.*, 2003). No threshold shifts were measured at SPLs of 165 or 171 dB re 1 µPa. However, at 179 dB re 1 µPa, TTSs greater than 10 dB were measured during different trials with exposures

ranging from 47 to 54 minutes. Hearing sensitivity apparently recovered within 45 minutes after noise exposure.

For baleen whales, there are no data, direct or indirect, on levels or properties of sound that are required to induce TTS. The frequencies to which baleen whales are most sensitive are lower than those to which odontocetes are most sensitive, and natural background noise levels at those low frequencies tend to be higher. Marine mammals can hear sounds at varying frequency levels. However, sounds that are produced in the frequency range at which an animal hears the best do not need to be as loud as sounds in less functional frequencies to be detected by the animal. As a result, auditory thresholds of baleen whales within their frequency band of best hearing are believed to be higher (less sensitive) than are those of odontocetes at their best frequencies (Clark and Ellison, 2004), meaning that baleen whales require sounds to be louder (i.e., higher dB levels) than odontocetes in the frequency ranges at which each group hears the best. From this, it is suspected that received levels causing TTS onset may also be higher in baleen whales. Since current NMFS practice assumes the same thresholds for the onset of hearing impairment in both odontocetes and mysticetes, the threshold is likely conservative for mysticetes.

In free-ranging pinnipeds, TTS thresholds associated with exposure to brief pulses (single or multiple) of underwater sound have not been measured. However, systematic TTS studies on captive pinnipeds have been conducted (Bowles *et al.*, 1999; Kastak *et al.*, 1999, 2005, 2007; Schusterman *et al.*, 2000; Finneran *et al.*, 2003; Southall *et al.*, 2007). Kastak *et al.* (1999) reported TTS of approximately 4–5 dB in three species of pinnipeds (harbor seal, Californian sea lion, and northern elephant seal) after underwater exposure for approximately 20 minutes to noise with frequencies ranging from 100 Hz to 2,000 Hz at received levels 60–75 dB above hearing threshold. This approach allowed similar effective exposure conditions to each of the subjects, but resulted in variable absolute exposure values depending on subject and test frequency. Recovery to near baseline levels was reported within 24 hours of noise exposure (Kastak *et al.*, 1999). Kastak *et al.* (2005) followed up on their previous work using higher sensitive levels and longer exposure times (up to 50–min) and corroborated their previous findings. The sound exposures necessary to cause slight threshold shifts were also determined for two California sea lions and a juvenile elephant seal exposed to underwater sound for similar duration. The sound level necessary to cause TTS in pinnipeds depends on exposure duration, as in other mammals; with longer exposure, the level necessary to elicit TTS is reduced (Schusterman *et al.*, 2000; Kastak *et al.*, 2005, 2007). For very short exposures (e.g., to a single sound pulse), the level necessary to cause TTS is very high (Finneran *et al.*, 2003). For pinnipeds exposed to in-air sounds, auditory fatigue has been measured in response to single pulses and to non-pulse noise (Southall *et al.*, 2007), although high exposure levels were required to induce TTS-onset (SEL: 129 dB re: 20 µPa2.s; Bowles *et al.*, unpub. data).

NMFS (1995, 2000) concluded that cetaceans and pinnipeds should not be exposed to pulsed underwater noise at received levels exceeding, respectively, 180 and 190 dB re 1 µPa (rms). The established 180- and 190–dB re 1 µPa (rms) criteria are not considered to be the levels above which TTS might occur. Rather, they are the received levels above which, in the view of a panel of bioacoustics specialists convened by NMFS before TTS measurements for marine mammals started to become available, one could not be certain that there would be no injurious effects, auditory or otherwise, to marine mammals. Since the modeled broadband source level for 100 percent thruster use during port operations is 180 dB re 1 µPa at 1 m (rms), it is highly unlikely that marine mammals would be exposed to sound levels at the 180- or 190–dB thresholds.

*PTS* - When PTS occurs, there is physical damage to the sound receptors in the ear. In some cases, there can be total or partial deafness, whereas in other cases, the animal has an impaired ability to hear sounds in specific frequency ranges.

There is no specific evidence that exposure to underwater industrial sound can cause PTS in any marine mammal (see Southall *et al.*, 2007). However, given the possibility that mammals might incur TTS, there has been further speculation about the possibility that some individuals occurring very close to such activities might incur PTS. Richardson *et al.* (1995) hypothesized that PTS caused by prolonged exposure to continuous anthropogenic sound is unlikely to occur in marine mammals, at least for sounds with source levels up to approximately 200 dB re 1 µPa at 1 m (rms). Single or occasional occurrences of mild TTS are not indicative of permanent auditory damage in terrestrial mammals. Relationships between TTS and PTS thresholds have not been studied in marine mammals but are assumed to be similar to those in humans and other terrestrial mammals. PTS might occur at a received sound level at least several decibels above that inducing mild TTS.

It is highly unlikely that marine mammals could receive sounds strong enough (and over a sufficient duration) to cause PTS (or even TTS) during the proposed port operations and maintenance/repair activities. The modeled broadband source level for 100 percent thruster use during port operations is 180 dB re 1 µPa at 1 m (rms). This does not reach the threshold of 190 dB currently used for pinnipeds. The threshold for cetaceans is 180 dB; therefore, cetaceans would have to be immediately adjacent to the vessel for even the possibility of hearing impairment to occur. Based on this and mitigation measures proposed for inclusion in the IHA (described later in this document in the "Proposed Mitigation" section), it is highly unlikely that any type of hearing impairment would occur as a result of Neptune's proposed activities.

Additionally, the potential effects to marine mammals described in this section of the document do not take into consideration the proposed monitoring and mitigation measures described later in this document (see the "Proposed Mitigation" and "Proposed Monitoring and Reporting" sections).

**Anticipated Effects on Habitat**

The primary potential impacts to marine mammals and other marine species are associated with elevated sound levels produced by the Port operations and maintenance/repair activities. However, other potential impacts from physical disturbance are also possible.

*Potential Impacts from Repairs*

Major repairs to the Neptune port and pipeline may affect marine mammal habitat in several ways: cause disturbance of the seafloor; increase turbidity slightly; and generate additional underwater sound in the area. Sediment transport modeling conducted by Neptune on construction procedures indicated that initial turbidity from installation of the pipeline could reach 100 milligrams per liter (mg/L), but will subside to 20 mg/L after 4 hours. Turbidity associated with the flowline and hot-tap will be considerably less and also will settle within hours of the work being completed. Therefore, any increase in turbidity from a major repair during operations is anticipated to be

insignificant. Repair activities will not create long-term habitat changes, and marine mammals displaced by the disturbance to the seafloor are expected to return soon after the repair is completed.

During repair of the Neptune port and the pipeline, underwater sound levels will be temporarily elevated. These underwater sound levels will cause some species to temporarily disperse from or avoid repair areas, but they are expected to return shortly after the repair is completed.

Based on the foregoing, repair activities will not create long-term habitat changes, and marine mammals displaced by the disturbance to the seafloor are expected to return soon after repair activities cease. Marine mammals also could be indirectly affected if benthic prey species were displaced or destroyed by repair activities. However, affected species are expected to recover soon after the completion of repairs and will represent only a small portion of food available to marine mammals in the area.

*Potential Impacts from Operation*

Operation of the Port will result in long-term, continued disturbance of the seafloor, regular withdrawal of seawater, and generation of underwater sound.

*Seafloor Disturbance:* The structures associated with the Port (flowline and pipeline, unloading buoys and chains, suction anchors) will be permanent modifications to the seafloor. Up to 63.7 acres (0.25 km2) of additional seafloor will be subject to disturbance due to chain and flexible riser sweep while the buoys are occupied by SRVs.

*Ballast and Cooling Water Withdrawal:* Withdrawal of ballast and cooling water at the Port as the SRV unloads cargo (approximately 2.39 million gallons per day) could potentially entrain zooplankton and ichthyoplankton that serve as prey for whale species. This estimate includes the combined seawater intake while two SRVs are moored at the Port (approximately 9 hr every 6 days). The estimated zooplankton abundance in the vicinity of the seawater intake ranges from 25.6–105 individuals per gallon (Libby *et al.*, 2004). This means that the daily intake will remove approximately 61.2–251 million individual zooplankton per day, the equivalent of approximately 3.47–14.2 kg (7.65–31.4 lbs). Since zooplankton are short-lived species (e.g., most copepods live from 1 wk to several months), these amounts will be indistinguishable from natural variability.

In the long-term, approximately 64.6 acres (0.26 $km^2$) of seafloor will be permanently disturbed to accommodate the Port (including the associated pipeline). The area disturbed because of long-term chain and riser sweep includes 63.7 acres (0.25 km2) of soft sediment. This area will be similar in calm seas and in hurricane conditions. The chain weight will restrict the movement of the buoy or the vessel moored on the buoy. An additional 0.9 acre (0.004 km2) of soft sediments will be converted to hard substrate. The total affected area will be small compared to the soft sediments available in the proposed project area. Long-term disturbance from installation of the Port will comprise approximately 0.3 percent of the estimated 24,000 acres (97 $km^2$) of similar bottom habitat surrounding the project area (northeast sector of Massachusetts Bay).

It is likely that displaced organisms will not return to the area of continual chain and riser sweep. A shift in benthic faunal community is expected in areas where soft sediment is converted to hard substrate (Algonquin Gas Transmission LLC, 2005). This impact will be beneficial for species that prefer hard-bottom structure and adverse for species that prefer soft sediment. Overall, because of the relatively small areas that will be affected compared to the overall size of Massachusetts Bay, impacts on soft-bottom communities are expected to be minimal.

Daily removal of seawater will reduce the food resources available for planktivorous organisms. The marine mammal species in the area have fairly broad diets and are not dependent on any single species for survival. Because of the relatively low biomass that will be entrained by the Port, the broad diet, and broad availability of organisms in the proposed project area, indirect impacts on the food web that result from entrainment of planktonic fish and shellfish eggs and larvae are expected to be minor and therefore should have minimal impact on affected marine mammal species or stocks.

*Potential Impacts from Sound Generation*

The groups of important fish, which include those that constitute prey for some of the marine mammals found in the project area, that occur in the vicinity of the Neptune Port are comprised of species showing considerable diversity in hearing sensitivity, anatomical features related to sound detection (e.g., swim bladder, connections between swim bladder and ear), habitat preference, and life history. Neptune's application contains a discussion on sound production, sound detection, and variability of fish hearing sensitivities. Please refer to the application (see **ADDRESSES**) for the full discussion. A few summary paragraphs are provided here for reference.

Fishes produce sounds that are associated with behaviors that include territoriality, mate search, courtship, and aggression. It has also been speculated that sound production may provide the means for long distance communication and communication under poor underwater visibility conditions (Zelick *et al.*, 1999), although the fact that fish communicate at low-frequency sound levels where the masking effects of ambient noise are naturally highest suggests that very long distance communication would rarely be possible. Fishes have evolved a diversity of sound generating organs and acoustic signals of various temporal and spectral contents. Fish sounds vary in structure, depending on the mechanism used to produce them (Hawkins, 1993). Generally, fish sounds are predominantly composed of low frequencies (less than 3 kHz).

Since objects in the water scatter sound, fish are able to detect these objects through monitoring the ambient noise. Therefore, fish are probably able to detect prey, predators, conspecifics, and physical features by listening to the environmental sounds (Hawkins, 1981). There are two sensory systems that enable fish to monitor the vibration-based information of their surroundings. The two sensory systems, the inner ear and the lateral line, constitute the acoustico-lateralis system.

Although the hearing sensitivities of very few fish species have been studied to date, it is becoming obvious that the intra- and inter-specific variability is considerable (Coombs, 1981). Nedwell *et al.* (2004) compiled and published available fish audiogram information. A noninvasive electrophysiological recording method known as auditory brainstem response (ABR) is now commonly used in the production of fish audiograms (Yan, 2004). Generally, most fish have their best hearing (lowest auditory thresholds) in the low-frequency range (i.e., less than 1 kHz). Even though some fish are able to detect sounds in the ultrasonic frequency range, the thresholds at these higher frequencies tend to be considerably higher than those at the lower end of the auditory frequency range. This generalization applies to the fish species occurring in the Neptune Port area. Table 9–1 in Neptune's application (see **ADDRESSES**) outlines the measured auditory sensitivities of fish that are most relevant to the Neptune Port area.

Literature relating to the impacts of sound on marine fish species can be

divided into the following categories: (1) pathological effects; (2) physiological effects; and (3) behavioral effects. Pathological effects include lethal and sub-lethal physical damage to fish; physiological effects include primary and secondary stress responses; and behavioral effects include changes in exhibited behaviors of fish. Behavioral changes might be a direct reaction to a detected sound or a result of the anthropogenic sound masking natural sounds that the fish normally detect and to which they respond. The three types of effects are often interrelated in complex ways. For example, some physiological and behavioral effects could potentially lead to the ultimate pathological effect of mortality. Hastings and Popper (2005) reviewed what is known about the effects of sound on fishes and identified studies needed to address areas of uncertainty relative to measurement of sound and the responses of fishes. Popper *et al.* (2003/2004) also published a paper that reviews the effects of anthropogenic sound on the behavior and physiology of fishes.

The following discussions of the three primary types of potential effects on fish from exposure to sound consider continuous sound sources since such sounds will be generated by operation and repair activities associated with the Neptune Project. Note that most research reported in the literature focuses on the effects of seismic airguns which produce pulsed sounds. A full discussion is provided in Neptune's application (see **ADDRESSES**), and a summary is provided here.

Potential effects of exposure to continuous sound on marine fish include TTS, physical damage to the ear region, physiological stress responses, and behavioral responses such as startle response, alarm response, avoidance, and perhaps lack of response due to masking of acoustic cues. Most of these effects appear to be either temporary or intermittent and therefore probably do not significantly impact the fish at a population level. The studies that resulted in physical damage to the fish ears used noise exposure levels and durations that were far more extreme than would be encountered under conditions similar to those expected at the Neptune Port.

The known effects of underwater noise on fish have been reviewed. The noise levels that are necessary to cause temporary hearing loss and damage to hearing are higher and last longer than noise that will be produced at Neptune. The situation for disturbance responses is less clear. Fish do react to underwater noise from vessels and move out of the way, move to deeper depths, or change their schooling behavior. The received levels at which fish react are not known and apparently are somewhat variable depending upon circumstances and species of fish. In order to assess the possible effects of underwater project noise, it is best to examine project noise in relation to continuous noises routinely produced by other projects and activities such as shipping, fishing, etc.

The two long-term sources of continuous noise associated with the project are the ship transits between the Boston shipping lanes and the unloading buoys and the regasification process at the carriers when moored to the unloading buoys. Noise levels associated with these two activities are relatively low and unlikely to have any effect on prey species in the area. One other activity expected to produce short periods of continuous noise is the carrier maneuvering bouts at the Port. Although this activity is louder, it is still less than the noise levels associated with large ships at cruising speed. The carrier maneuvering using the ship's thrusters would produce short periods of louder noise for 10 to 30 minutes every 4 to 8 days. On average, these thruster noises would be heard about 20 hours per year. Even in the unlikely event that these two activities caused disturbance to marine fish, the short periods of time involved serve to minimize the effects.

In conclusion, NMFS has preliminarily determined that Neptune's proposed port operations and maintenance/repair activities are not expected to have any habitat-related effects that could cause significant or long-term consequences for individual marine mammals or on the food sources that they utilize.

**Proposed Mitigation**

In order to issue an incidental take authorization (ITA) under Sections 101(a)(5)(A) and (D) of the MMPA, NMFS must, where applicable, set forth the permissible methods of taking pursuant to such activity, and other means of effecting the least practicable impact on such species or stock and its habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of such species or stock for taking for certain subsistence uses (where relevant).

*Mitigation Measures Proposed in Neptune's IHA Application*

Neptune submitted a "Marine Mammal Detection, Monitoring, and Response Plan for the Operations Phase" (the Plan) as part of its MMPA application (Appendix D of the application; see **ADDRESSES**). The measures, which include safety zones and vessel speed reductions, are fully described in the Plan and summarized here. Any maintenance and/or repairs needed will be scheduled in advance during the May 1 to November 30 seasonal window, whenever possible, so that disturbance to North Atlantic right whales will be largely avoided. If the repair cannot be scheduled during this time frame, additional mitigation measures are proposed.

(1) Mitigation Measures for Major Repairs (May 1 to November 30)

(A) During repairs, if a marine mammal is detected within 0.5 mi (0.8 km) of the repair vessel, the vessel superintendent or on-deck supervisor will be notified immediately. The vessel's crew will be put on a heightened state of alert. The marine mammal will be monitored constantly to determine if it is moving toward the repair area.

(B) Repair vessels will cease any movement in the area if a marine mammal other than a right whale is sighted within or approaching to a distance of 100 yd (91 m) from the operating repair vessel. Repair vessels will cease any movement in the construction area if a right whale is sighted within or approaching to a distance of 500 yd (457 m) from the operating vessel. Vessels transiting the repair area, such as pipe haul barge tugs, will also be required to maintain these separation distances.

(C) Repair vessels will cease all sound emitting activities if a marine mammal other than a right whale is sighted within or approaching to a distance of 100 yd (91 m) or if a right whale is sighted within or approaching to a distance of 500 yd (457 m), from the operating repair vessel. The back-calculated source level, based on the most conservative cylindrical model of acoustic energy spreading, is estimated to be 139 dB re 1 µPa.

(D) Repair activities may resume after the marine mammal is positively reconfirmed outside the established zones (either 500 yd (457 m) or 100 yd (91 m), depending upon species).

(E) While under way, all repair vessels will remain 500 yd (457 m) away from right whales and 100 yd (91 m) away from all other marine mammals to the extent physically feasible given navigational constraints.

(F) All repair vessels 300 gross tons or greater will maintain a speed of 10 knots (18.5 km/hr) or less. Vessels less than 300 gross tons carrying supplies or crew

between the shore and the repair site will contact the Mandatory Ship Reporting System (MSRS), the USCG, or the marine mammal observers (MMOs) at the repair site before leaving shore for reports of recent right whale sightings or active Dynamic Management Areas (DMAs) and, consistent with navigation safety, restrict speeds to 10 knots (18.5 km/hr) or less within 5 mi (8 km) of any recent sighting location and within any existing DMA.

(G) Vessels transiting through the Cape Cod Canal and CCB between January 1 and May 15 will reduce speeds to 10 knots (18.5 km/hr) or less, follow the recommended routes charted by NOAA to reduce interactions between right whales and shipping traffic, and avoid aggregations of right whales in the eastern portion of CCB.

(2) Additional Port and Pipeline Major Repair Measures (December 1 to April 30)

If unplanned/emergency repair activities cannot be conducted between May 1 and November 30, Neptune has proposed to implement the following additional mitigation measures:

(A) If on-board MMOs do not have at least 0.5–mi (0.8–km) visibility, they shall call for a shutdown of repair activities. If dive operations are in progress, then they shall be halted and brought on board until visibility is adequate to see a 0.5–mi (0.8–km) range. At the time of shutdown, the use of thrusters must be minimized. If there are potential safety problems due to the shutdown, the captain will decide what operations can safely be shut down and will document such activities.

(B) Prior to leaving the dock to begin transit, the barge will contact one of the MMOs on watch to receive an update of sightings within the visual observation area. If the MMO has observed a North Atlantic right whale within 30 minutes of the transit start, the vessel will hold for 30 minutes and again get a clearance to leave from the MMOs on board. MMOs will assess whale activity and visual observation ability at the time of the transit request to clear the barge for release.

(C) A half-day training course will be provided to designated crew members assigned to the transit barges and other support vessels. These designated crew members will be required to keep watch on the bridge and immediately notify the navigator of any whale sightings. All watch crew will sign into a bridge log book upon start and end of watch. Transit route, destination, sea conditions, and any protected species sightings/mitigation actions during watch will be recorded in the log book. Any whale sightings within 3,281 ft (1,000 m) of the vessel will result in a high alert and slow speed of 4 knots (7.4 km/hr) or less. A sighting within 2,461 ft (750 m) will result in idle speed and/or ceasing all movement.

(D) The material barges and tugs used for repair work shall transit from the operations dock to the work sites during daylight hours, when possible, provided the safety of the vessels is not compromised. Should transit at night be required, the maximum speed of the tug will be 5 knots (9.3 km/hr).

(E) Consistent with navigation safety, all repair vessels must maintain a speed of 10 knots (18.5 km/hr) or less during daylight hours. All vessels will operate at 5 knots or less at all times within 3.1 mi (5 km) of the repair area.

(3) Speed Restrictions in Seasonal Management Areas (SMAs)

Repair vessels and SRVs will transit at 10 knots (18.5 km/hr) or less in the following seasons and areas, which either correspond to or are more restrictive than the times and areas in NMFS' final rule (73 FR 60173, October 10, 2008) to implement speed restrictions to reduce the likelihood and severity of ship strikes of right whales:

- CCB SMA from January 1 through May 15, which includes all waters in CCB, extending to all shorelines of the Bay, with a northern boundary of 42° 12' N. latitude;
- Off Race Point SMA year round, which is bounded by straight lines connecting the following coordinates in the order stated: 42° 30' N. 69° 45' W.; thence to 42° 30' N. 70° 30' W.; thence to 42° 12' N. 70° 30' W.; thence to 42° 12' N. 70° 12' W.; thence to 42° 04' 56.5'' N. 70° 12' W.; thence along mean high water line and inshore limits of COLREGS limit to a latitude of 41° 40' N.; thence due east to 41° 41' N. 69° 45' W.; thence back to starting point; and
- GSC SMA from April 1 through July 31, which is bounded by straight lines connecting the following coordinates in the order stated:

42° 30' N. 69° 45' W.
41° 40' N. 69° 45' W.
41° 00' N. 69° 05' W.
42° 09' N. 67° 08' 24'' W.
42° 30' N. 67° 27' W.
42° 30' N. 69° 45' W.

(4) Additional Mitigation Measures

(A) In approaching and departing from the Neptune Port, SRVs shall use the Boston Traffic Separation Scheme (TSS) starting and ending at the entrance to the GSC. Upon entering the TSS, the SRV shall go into a "heightened awareness" mode of operation, which is outlined in great detail in the Plan (see Neptune's application).

(B) In the event that a whale is visually observed within 0.6 mi (1 km) of the Port or a confirmed acoustic detection is reported on either of the two auto-detection buoys (ABs; more information on the acoustic devices is contained in the "Proposed Monitoring and Reporting" section later in this document) closest to the Port, departing SRVs shall delay their departure from the Port, unless extraordinary circumstances, defined in the Plan, require that the departure is not delayed. The departure delay shall continue until either the observed whale has been visually (during daylight hours) confirmed as more than 0.6 mi (1 km) from the Port or 30 minutes have passed without another confirmed detection either acoustically within the acoustic detection range of the two ABs closest to the Port or visually within 0.6 mi (1 km) from Neptune.

(C) SRVs that are approaching or departing from the Port and are within the Area to be Avoided (ATBA) surrounding Neptune shall remain at least 0.6 mi (1 km) away from any visually detected right whales and at least 100 yards (91 meters) away from all other visually detected whales unless extraordinary circumstances, as defined in Section 1.2 of the Plan in Neptune's application, require that the vessel stay its course. The ATBA is defined in 33 CFR 150.940. It is the largest area of the Port marked on nautical charts and it is enforceable by the USCG in accordance with the 150.900 regulations. The Vessel Master shall designate at least one lookout to be exclusively and continuously monitoring for the presence of marine mammals at all times while the SRV is approaching or departing Neptune.

(D) Neptune will ensure that other vessels providing support to Neptune operations during regasification activities that are approaching or departing from the Port and are within the ATBA shall be operated so as to remain at least 0.6 mi (1 km) away from any visually detected right whales and at least 100 yd (91 m) from all other visually detected whales.

*Additional Mitigation Measures Proposed by NMFS*

In addition to the mitigation measures proposed in Neptune's IHA application, NMFS proposes the following measures be included in the IHA, if issued, in order to ensure the least practicable impact on the affected species or stocks:

(1) Neptune must immediately suspend any repair and maintenance or operations activities if a dead or injured marine mammal is found in the vicinity of the project area, and the death or

injury of the animal could be attributable to the LNG facility activities. Neptune must contact NMFS and the Northeast Stranding and Disentanglement Program. Activities will not resume until review and approval has been given by NMFS.

(2) MMOs will direct a moving vessel to slow to idle if a baleen whale is seen less than 0.6 mi (1 km) from the vessel.

(3) Use of lights during repair or maintenance activities shall be limited to areas where work is actually occurring, and all other lights must be extinguished. Lights must be downshielded to illuminate the deck and shall not intentionally illuminate surrounding waters, so as not to attract whales or their prey to the area.

*Mitigation Conclusions*

NMFS has carefully evaluated the applicant's proposed mitigation measures and considered a range of other measures in the context of ensuring that NMFS prescribes the means of effecting the least practicable impact on the affected marine mammal species and stocks and their habitat. Our evaluation of potential measures included consideration of the following factors in relation to one another:

- The manner in which, and the degree to which, the successful implementation of the measure is expected to minimize adverse impacts to marine mammals;
- The proven or likely efficacy of the specific measure to minimize adverse impacts as planned; and
- The practicability of the measure for applicant implementation.

Based on our evaluation of the applicant's proposed measures, as well as other measures considered by NMFS, NMFS has preliminarily determined that the proposed mitigation measures provide the means of effecting the least practicable impact on marine mammal species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance.

**Proposed Monitoring and Reporting**

In order to issue an ITA for an activity, Section 101(a)(5)(D) of the MMPA states that NMFS must, where applicable, set forth "requirements pertaining to the monitoring and reporting of such taking". The MMPA implementing regulations at 50 CFR 216.104 (a)(13) indicate that requests for ITAs must include the suggested means of accomplishing the necessary monitoring and reporting that will result in increased knowledge of the species and of the level of taking or impacts on populations of marine mammals that are expected to be present in the proposed action area.

Neptune proposed both visual and acoustic monitoring programs in the Plan contained in the IHA application. Summaries of those plans, as well as the proposed reporting, are contained next.

*Passive Acoustic Monitoring*

Neptune LNG will deploy and maintain a passive acoustic detection network along a portion of the TSS and in the vicinity of Neptune. This network will consisting of autonomous recording units (ARUs) and near-real-time ABs. To develop, implement, collect, and analyze the acoustic data obtained from deployment of the ARUs and ABs, as well as to prepare reports and maintain the passive acoustic detection network, Neptune LNG has engaged the Cornell University Bioacoustic Research Program (BRP) in Ithaca, New York, and the Woods Hole Oceanographic Institution (WHOI) in Woods Hole, Massachusetts.

During June 2008, an array of 19 passive seafloor ARUs was deployed by BRP for Neptune. The layout of the array centered on the terminal site and was used to monitor the noise environment in Massachusetts Bay in the vicinity of Neptune during construction of the port and associated pipeline lateral. The ARUs were not designed to provide real-time or near-real-time information about vocalizing whales. Rather archival noise data collected from the ARU array were used for the purpose of understanding the seasonal occurrences and overall distributions of whales (primarily North Atlantic right whales) within approximately 10 nm (18.5 km) of the Neptune Port. Neptune LNG will maintain these ARUs in the same configuration for a period of five years during full operation of Neptune in order to monitor the actual acoustic output of port operations and to alert NOAA to any unanticipated adverse effects of port operations, such as large scale abandonment by marine mammals of the area. To further assist in evaluations of the Neptune's acoustic output, source levels associated with DP of SRVs at the buoys will be estimated using empirical measurements collected from the passive detection network.

In addition to the ARUs, Neptune LNG has deployed 10 ABs within the Separation Zone of the TSS for the operational life of the Port. The purpose of the AB array is to detect the presence of vocalizing North Atlantic right whales. Each AB has an average detection range of 5 nm (9.3 km) of the AB, although detection ranges will vary based on ambient underwater conditions. The AB system will be the primary detection mechanism that alerts the SRV Master to the occurrence of right whales in the TSS and triggers heightened SRV awareness. The configurations of the ARU array and AB network (see Figure 3 in the Plan in Neptune's application) were based upon the configurations developed and recommended by NOAA personnel.

Each AB deployed in the TSS will continuously screen the low-frequency acoustic environment (less than 1,000 Hz) for right whale contact calls occurring within an approximately

5–nm (9.3–km) radius from each buoy (the ABs' detection range) and rank detections on a scale from 1 to 10. Each AB shall transmit all detection data for detections of rank greater than or equal to 6 via Iridium satellite link to the BRP server website every 20 minutes. This 20–minute transmission schedule was determined by consideration of a combination of factors including the tendency of right whale calls to occur in clusters (leading to a sampling logic of listening for other calls rather than transmitting immediately upon detection of a possible call) and the amount of battery power required to complete a satellite transmission. Additional details on the protocol can be found in Neptune's application.

Additionally, Neptune shall provide empirically measured source level data for all sources of noise associated with LNG port maintenance and repair activities. Measurements should be carefully coordinated with noise-producing activities and should be collected from the passive acoustic monitoring network.

*Visual Monitoring*

During maintenance- and repair-related activities, Neptune LNG shall employ two qualified MMOs on each vessel that has a DP system. All MMOs must receive training and be approved in advance by NOAA after a review of their qualifications. Qualifications for these MMOs shall include direct field experience on a marine mammal observation vessel and/or aerial surveys in the Atlantic Ocean/Gulf of Mexico. The MMOs (one primary and one secondary) are responsible for visually locating marine mammals at the ocean's surface and, to the extent possible, identifying the species. The primary MMO shall act as the identification specialist, and the secondary MMO will serve as data recorder and will assist with identification. Both MMOs shall have responsibility for monitoring for the presence of marine mammals.

The MMOs shall monitor the area where maintenance and repair work is

conducted beginning at daybreak using the naked eye, hand-held binoculars, and/or power binoculars (e.g, Big Eyes). The MMOs shall scan the ocean surface by eye for a minimum of 40 minutes every hour. All sightings must be recorded on marine mammal field sighting logs.

While an SRV is navigating within the designated TSS, three people have lookout duties on or near the bridge of the ship including the SRV Master, the Officer-of-the-Watch, and the Helmsman on watch. In addition to standard watch procedures, while the SRV is within the ATBA and/or while actively engaging in the use of thrusters an additional lookout shall be designated to exclusively and continuously monitor for marine mammals. Once the SRV is moored and regasification activities have begun, the vessel is no longer considered in "heightened awareness" status. However, when regasification activities conclude and the SRV prepares to depart from Neptune, the Master shall once again ensure that the responsibilities as defined in the Plan are carried out. All sightings of marine mammals by the designated lookout, individuals posted to navigational lookout duties, and/or any other crew member while the SRV is within the TSS, in transit to the ATBA, within the ATBA, and/or when actively engaging in the use of thrusters shall be immediately reported to the Officer-of-the-Watch who shall then alert the Master.

*Reporting Measures*

Since the Neptune Port is within the Mandatory Ship Reporting Area (MSRA), all SRVs transiting to and from Neptune shall report their activities to the mandatory reporting section of the USCG to remain apprised of North Atlantic right whale movements within the area. All vessels entering and exiting the MSRA shall report their activities to WHALESNORTH. Vessel operators shall contact the USCG by standard procedures promulgated through the Notice to Mariner system.

For any repair work associated with the pipeline lateral or other port components, Neptune LNG shall notify the appropriate NOAA personnel as soon as practicable after it is determined that repair work must be conducted. During maintenance and repair of the pipeline lateral or other port components, weekly status reports must be provided to NOAA. The weekly report must include data collected for each distinct marine mammal species observed in the project area during the period of the repair activity. The weekly reports shall include the following:

- The location, time, and nature of the pipeline lateral repair activities;
- Whether the DP system was operated and, if so, the number of thrusters used and the time and duration of DP operation;
- Marine mammals observed in the area (number, species, age group, and initial behavior);
- The distance of observed marine mammals from the repair activities;
- Observed marine mammal behaviors during the sighting;
- Whether any mitigation measures were implemented;
- Weather conditions (sea state, wind speed, wind direction, ambient temperature, precipitation, and percent cloud cover, etc.);
- Condition of the marine mammal observation (visibility and glare); and
- Details of passive acoustic detections and any action taken in response to those detections.

For minor repairs and maintenance activities, the following protocols will be followed:

- All vessel crew members will be trained in marine mammal identification and avoidance procedures;
- Repair vessels will notify designated NOAA personnel when and where the repair/maintenance work is to take place along with a tentative schedule and description of the work;
- Vessel crews will record/document any marine mammal sightings during the work period; and
- At the conclusion of the repair/maintenance work, a report will be delivered to designated NOAA personnel describing any marine mammal sightings, the type of work taking place when the sighting occurred, and any avoidance actions taken during the repair/maintenance work.

During all phases of project construction, sightings of any injured or dead marine mammals will be reported immediately to the USCG and NMFS, regardless of whether the injury or death is caused by project activities. Sightings of injured or dead marine mammals not associated with project activities can be reported to the USCG on VHF Channel 16 or to NMFS Stranding and Entanglement Hotline. In addition, if the injury or death was caused by a project vessel (e.g., SRV, support vessel, or construction vessel), USCG must be notified immediately, and a full report must be provided to NMFS, Northeast Regional Office. The report must include the following information: (1) the time, date, and location (latitude/longitude) of the incident; (2) the name and type of vessel involved; (3) the vessel's speed during the incident; (4) a description of the incident; (5) water depth; (6) environmental conditions (e.g., wind speed and direction, sea state, cloud cover, and visibility); (7) the species identification or description of the animal; (8) the fate of the animal; and (9) photographs or video footage of the animal (if equipment is available).

An annual report on marine mammal monitoring and mitigation will be submitted to NMFS Office of Protected Resources and NMFS Northeast Regional Office within 90 days after the expiration of the IHA. The weekly reports and the annual report should include data collected for each distinct marine mammal species observed in the project area in the Massachusetts Bay during the period of LNG facility construction and operations. Description of marine mammal behavior, overall numbers of individuals observed, frequency of observation, and any behavioral changes and the context of the changes relative to construction and operation activities shall also be included in the annual report. Additional information that will be recorded during construction and contained in the reports include: date and time of marine mammal detections (visually or acoustically), weather conditions, species identification, approximate distance from the source, activity of the vessel or at the construction site when a marine mammal is sighted, and whether thrusters were in use and, if so, how many at the time of the sighting.

*General Conclusions Drawn from Previous Monitoring Reports*

Throughout the construction period, Neptune submitted weekly reports on marine mammal sightings in the area. While it is difficult to draw biological conclusions from these reports, NMFS can make some general conclusions. Data gathered by MMOs is generally useful to indicate the presence or absence of marine mammals (often to a species level) within the safety zones (and sometimes without) and to document the implementation of mitigation measures. Though it is by no means conclusory, it is worth noting that no instances of obvious behavioral disturbance as a result of Neptune's activities were observed by the MMOs. Of course, these observations only cover the animals that were at the surface and within the distance that the MMOs could see. Based on the number of sightings contained in the weekly reports, it appears that NMFS' estimated take levels are accurate. As operation of the Port has not yet commenced, there are no reports describing the results of the visual monitoring program for this

phase of the project. However, it is anticipated that visual observations will be able to continue as they were during construction.

As described previously in this document, Neptune was required to maintain an acoustic array to monitor calling North Atlantic right whales (humpback and fin whale calls were also able to be detected). Cornell BRP analyzed the data and submitted a report covering the initial construction phase of the project, which occurred in 2008. While acoustic data can only be collected if the animals are actively calling, the report indicates that humpback and fin whales were heard calling on at least some of the ARUs on all construction days, and right whale calls were heard only 28 percent of the time during active construction days. The passive acoustic arrays will remain deployed during the time frame of this proposed IHA in order to obtain information during the operational phase of the Port facility.

**Estimated Take by Incidental Harassment**

Except with respect to certain activities not pertinent here, the MMPA defines "harassment" as: any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild [Level A harassment]; or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering [Level B harassment]. Only take by Level B harassment is anticipated as a result of Neptune's operational and repair/maintenance activities. Anticipated take of marine mammals is associated with thruster sound during maneuvering of the SRVs while docking and undocking, occasional weathervaning at the Port, and during thruster use of DP maintenance vessels should a major repair be necessary. The regasification process itself is an activity that does not rise to the level of taking, as the modeled source level for this activity is 110 dB (rms). Certain species may have a behavioral reaction to the sound emitted during the activities. Hearing impairment is not anticipated. Additionally, vessel strikes are not anticipated, especially because of the speed restriction measures that are proposed that were described earlier in this document.

For continuous sounds, such as those produced by Neptune's proposed activities, NMFS uses a received level of 120–dB (rms) to indicate the onset of Level B harassment. The basis for Neptune's "take" estimate is the number of marine mammals that potentially could be exposed to sound levels in excess of 120 dB. This has been determined by applying the modeled zone of influence (ZOI; e.g., the area ensonified by the 120–dB contour) to the seasonal use (density) of the area by marine mammals and correcting for seasonal duration of sound-generating activities and estimated duration of individual activities when the maximum sound-generating activities are intermittent to occasional. Nearly all of the required information is readily available in the MARAD/USCG Final EIS, with the exception of marine mammal density estimates for the project area. In the case of data gaps, a conservative approach was used to ensure that the potential number of takes is not underestimated, as described next.

Neptune contractors have conducted modeling of various vessels for several years to determine the 120–dB ZOI. Prior to submitting its most recent IHA application, Neptune contracted JASCO to conduct new sound source measurement tests on the SRV while using the thrusters at full power. The reports are contained in Appendix C of Neptune's application (see **ADDRESSES**). The vessels used in the most recent tests conducted in 2009 use vessels that are closer in similarity to the ones that will be used at the Neptune Port facility. The results indicate that the 120–dB radius from thruster use is estimated to be 1.6 nm (3 km), creating a maximum ZOI of 8.5 nm2 (29 km2). This zone is smaller than the one that was used to estimate the level of take in the previous IHA. However, the vessels used in the 2009 tests more closely resemble the vessels that will be used by Neptune.

NMFS recognizes that baleen whale species other than North Atlantic right whales have been sighted in the project area from May to November. However, the occurrence and abundance of fin, humpback, and minke whales is not well documented within the project area. Nonetheless, NMFS used the data on cetacean distribution within Massachusetts Bay, such as those published by the NCCOS (2006), to determine potential takes of marine mammals in the vicinity of the project area. Neptune presented density estimates using the CETAP (1982) and U.S. Navy MRA (2005) data. The NCCOS (2006) uses information from these sources; however, it also includes information from some other studies. Therefore, NMFS used density information for the species that are included in the NCCOS (2006) report. These species include: North Atlantic right, fin, humpback, minke, pilot, and sei whales and Atlantic white-sided dolphins.

The NCCOS study used cetacean sightings from two sources: (1) the North Atlantic Right Whale Consortium (NARWC) sightings database held at the University of Rhode Island (Kenney, 2001); and (2) the Manomet Bird Observatory (MBO) database, held at the NMFS Northeast Fisheries Science Center (NEFSC). The NARWC data contained survey efforts and sightings data from ship and aerial surveys and opportunistic sources between 1970 and 2005. The main data contributors included: the CETAP, the Canadian Department of Fisheries and Oceans, the Provincetown Center for Coastal Studies, International Fund for Animal Welfare, NEFSC, New England Aquarium, WHOI, and the University of Rhode Island. A total of 406,293 mi (653,725 km) of survey track and 34,589 cetacean observations were provisionally selected for the NCCOS study in order to minimize bias from uneven allocation of survey effort in both time and space. The sightings-per-unit-effort (SPUE) was calculated for all cetacean species by month covering the southern Gulf of Maine study area, which also includes the project area (NCCOS, 2006).

The MBO's Cetacean and Seabird Assessment Program (CSAP) was contracted from 1980 to 1988 by NEFSC to provide an assessment of the relative abundance and distribution of cetaceans, seabirds, and marine turtles in the shelf waters of the northeastern U.S. (MBO, 1987). The CSAP program was designed to be completely compatible with NEFSC databases so that marine mammal data could be compared directly with fisheries data throughout the time series during which both types of information were gathered. A total of 8,383 mi (5,210 km) of survey distance and 636 cetacean observations from the MBO data were included in the NCCOS analysis. Combined valid survey effort for the NCCOS studies included 913,840 mi (567,955 km) of survey track for small cetaceans (dolphins and porpoises) and 1,060,226 mi (658,935 km) for large cetaceans (whales) in the southern Gulf of Maine. The NCCOS study then combined these two data sets by extracting cetacean sighting records, updating database field names to match the NARWC database, creating geometry to represent survey tracklines and applying a set of data selection criteria designed to minimize uncertainty and bias in the data used.

Based on the comprehensiveness and total coverage of the NCCOS cetacean

distribution and abundance study, NMFS calculated the estimated take number of marine mammals based on the most recent NCCOS report published in December, 2006. A summary of seasonal cetacean distribution and abundance in the project area is provided previously in this document, in the "Description of Marine Mammals in the Area of the Specified Activity" section. For a detailed description and calculation of the cetacean abundance data and SPUE, refer to the NCCOS study (NCCOS, 2006). SPUE for all four seasons were analyzed, and the highest value SPUE for the season with the highest abundance of each species was used to determine relative abundance. Based on the data, the relative abundance of North Atlantic right, fin, humpback, minke, sei, and pilot whales and Atlantic white-sided dolphins, as calculated by SPUE in number of animals per square kilometer, is 0.0082, 0.0097, 0.0265, 0.0059, 0.0084, 0.0407, and 0.1314 n/km, respectively. Table 1 in this document outlines the density, abundance, take estimates, and percent of population for the 14 species for which NMFS is proposing to authorize Level B harassment.

In calculating the area density of these species from these linear density data, NMFS used 0.4 km (0.25 mi), which is a quarter the distance of the radius for visual monitoring, as a conservative hypothetical strip width (W). Thus the area density (D) of these species in the project area can be obtained by the following formula:

D = SPUE/2W.

Based on the calculation, the estimated take numbers by Level B harassment for the 1–year IHA period for North Atlantic right, fin, humpback, minke, sei, and pilot whales and Atlantic white-sided dolphins, within the 120–dB ZOI of the LNG Port facility area of approximately 8.5 $nm^2$ (29 $km^2$) maximum ZOI, corrected for 50 percent underwater, are 23, 27, 72, 16, 6, 111, and 357, respectively. This estimate is based on an estimated 50 SRV trips for the period July 1, 2010, through June 30, 2011, that will produce sounds of 120 dB or greater.

Based on the same calculation method described above for Port operations, the estimated take numbers by Level B harassment for North Atlantic right, fin, humpback, minke, sei, and pilot whales and Atlantic white-sided dolphins for the 1–year IHA period incidental to Port maintenance and repair activities, corrected for 50 percent underwater, are 6, 7, 20, 5, 6, 31, and 100, respectively. These numbers are based on 14 days of repair and maintenance activities occurring between July 1, 2010, and June 30, 2011. It is unlikely that this much repair and maintenance work would be required this soon after completion of the construction phase of the facility.

The total estimated take of these species as a result of both operations and repair and maintenance activities of the Neptune Port facility between July 1, 2010, and June 30, 2011, is: 29 North Atlantic right whales; 34 fin whales; 92 humpback whales; 21 minke whales; 12 sei whales; 142 long-finned pilot whales; and 457 Atlantic white-sided dolphins. These numbers represent a maximum of 8.4, 1.5, 10.9, 0.6, 3.1, 0.5, and 0.7 percent of the populations for these species or stocks in the western North Atlantic, respectively. It is likely that individual animals will be "taken" by harassment multiple times (since certain individuals may occur in the area more than once while other individuals of the population or stock may not enter the proposed project area). Additionally, the highest value SPUE for the season with the highest abundance of each species was used to determine relative abundance. Moreover, it is not expected that Neptune will have 50 SRV transits and LNG deliveries in the first year of operations. Therefore, these percentages are the upper boundary of the animal population that could be affected. Thus, the actual number of individual animals being exposed or taken is expected to be far less.

In addition, bottlenose dolphins, common dolphins, Risso's dolphins, killer whales, harbor porpoises, harbor seals, and gray seals could also be taken by Level B harassment as a result of the deepwater LNG port project. Since these species are less likely to occur in the area, and there are no density estimates specific to this particular area, NMFS based the take estimates on typical group size. Therefore, NMFS estimates that up to approximately 10 bottlenose dolphins, 20 common dolphins, 20 Risso's dolphins, 20 killer whales, 5 harbor porpoises, 15 harbor seals, and 15 gray seals could be exposed to continuous noise at or above 120 dB re 1 ?Pa rms incidental to operations and repair and maintenance activities during the one year period of the IHA, respectively.

Since Massachusetts Bay represents only a small fraction of the western North Atlantic basin where these animals occur NMFS has preliminarily determined that only small numbers of the affected marine mammal species or stocks would be potentially affected by the Neptune LNG deepwater project. The take estimates presented in this section of the document do not take into consideration the mitigation and monitoring measures that are proposed for inclusion in the IHA (if issued).

TABLE 1. DENSITY ESTIMATES, POPULATION ABUNDANCE ESTIMATES, TOTAL PROPOSED TAKE (WHEN COMBINE TAKES FROM OPERATION AND MAINTENANCE/REPAIR ACTIVITIES), AND PERCENTAGE OF POPULATION THAT MAY BE TAKEN FOR THE POTENTIAL AFFECTED SPECIES.

| Species | Density (n/$km^2$) | Abundance[1] | Total Proposed Take (operation & maintenance) | Percentage of Stock or Population |
|---|---|---|---|---|
| North Atlantic right whale | 0.0082 | 345 | 29 | 8.4 |
| Fin whale | 0.0097 | 2,269 | 34 | 1.5 |
| Humpback whale | 0.0265 | 847 | 92 | 10.9 |
| Minke whale | 0.0059 | 3,312 | 21 | 0.6 |
| Sei whale | 0.0084 | 386 | 12 | 3.1 |
| Long-finned pilot whale | 0.0407 | 31,139 | 142 | 0.5 |
| Atlantic white-sided dolphin | 0.1314 | 63,368 | 457 | 0.7 |

TABLE 1. DENSITY ESTIMATES, POPULATION ABUNDANCE ESTIMATES, TOTAL PROPOSED TAKE (WHEN COMBINE TAKES FROM OPERATION AND MAINTENANCE/REPAIR ACTIVITIES), AND PERCENTAGE OF POPULATION THAT MAY BE TAKEN FOR THE POTENTIAL AFFECTED SPECIES.—Continued

| Species | Density (n/km$^2$) | Abundance[1] | Total Proposed Take (operation & maintenance) | Percentage of Stock or Population |
|---|---|---|---|---|
| Bottlenose dolphin | NA | 7,489 | 10 | 0.1 |
| Common dolphin | NA | 120,743 | 20 | 0.02 |
| Risso's dolphin | NA | 20,479 | 20 | 0.1 |
| Killer whale | NA | NA | 20 | NA |
| Harbor porpoise | NA | 89,054 | 5 | 0.01 |
| Harbor seal | NA | 99,340 | 15 | 0.02 |
| Gray seal | NA | 125,541–169,064 | 15 | 0.01 |

[1] Abundance estimates taken from NMFS Atlantic and Gulf of Mexico SAR; NA=Not Available

**Negligible Impact and Small Numbers Analysis and Preliminary Determination**

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." In making a negligible impact determination, NMFS considers a variety of factors, including but not limited to: (1) the number of anticipated mortalities; (2) the number and nature of anticipated injuries; (3) the number, nature, intensity, and duration of Level B harassment; and (4) the context in which the takes occur.

No injuries or mortalities are anticipated to occur as a result of Neptune's proposed port operation and maintenance and repair activities, and none are proposed to be authorized by NMFS. Additionally, animals in the area are not anticipated to incur any hearing impairment (i.e., TTS or PTS), as the modeling results for the SRV indicate a source level of 180 dB (rms).

While some of the species occur in the proposed project area year-round, some species only occur in the area during certain seasons. Sei whales are only anticipated in the area during the spring. Therefore, if shipments and/or maintenance/repair activities occur in other seasons, the likelihood of sei whales being affected is quite low. Additionally, any repairs that can be scheduled in advance will be scheduled to avoid the peak time that North Atlantic right whales occur in the area, which usually is during the early spring. North Atlantic right, humpback, and minke whales are not expected in the project area in the winter. During the winter, a large portion of the North Atlantic right whale population occurs in the southeastern U.S. calving grounds (i.e., South Carolina, Georgia, and northern Florida). The fact that certain activities will occur during times when certain species are not commonly found in the area will help reduce the amount of Level B harassment for these species.

Many animals perform vital functions, such as feeding, resting, traveling, and socializing, on a diel cycle (24–hr cycle). Behavioral reactions to noise exposure (such as disruption of critical life functions, displacement, or avoidance of important habitat) are more likely to be significant if they last more than one diel cycle or recur on subsequent days (Southall *et al.*, 2007). Consequently, a behavioral response lasting less than one day and not recurring on subsequent days is not considered particularly severe unless it could directly affect reproduction or survival (Southall *et al.*, 2007). Operational activities are not anticipated to occur at the Port on consecutive days. Once Neptune is at full operations, SRV shipments would occur every 4–8 days, with thruster use needed for a couple of hours. Therefore, Neptune will not be creating increased sound levels in the marine environment for several days at a time.

Of the 14 marine mammal species likely to occur in the area, four are listed as endangered under the ESA: North Atlantic right, humpback, fin, and sei whales. All of these species, as well as the northern coastal stock of bottlenose dolphin, are also considered depleted under the MMPA. As stated previously in this document, the affected humpback and North Atlantic right whale populations have been increasing in recent years. However, there is insufficient data to determine population trends for the other depleted species in the proposed project area. There is currently no designated critical habitat or known reproductive areas for any of these species in or near the proposed project area. However, there are several well known North Atlantic right whale feeding grounds in the CCB and GSC. As mentioned previously, to the greatest extent practicable, all maintenance/repair work will be scheduled during the May 1 to November 30 time frame to avoid peak right whale feeding in these areas, which occur close to the Neptune Port. No mortality or injury is expected to occur and due to the nature, degree, and context of the Level B harassment anticipated, the activity is not expected to impact rates of recruitment or survival.

The population estimates for the species that may be taken by harassment from the most recent U.S. Atlantic SAR were provided earlier in this document (see the "Description of Marine Mammals in the Area of the Specified Activity" section). From the most conservative estimates of both marine mammal densities in the project area and the size of the 120–dB ZOI, the maximum calculated number of individual marine mammals for each species that could potentially be harassed annually is small relative to the overall population sizes (10.9 percent for humpback whales and 8.4 percent for North Atlantic right whales and no more than 3.1 percent of any other species).

Based on the analysis contained herein of the likely effects of the specified activity on marine mammals and their habitat, and taking into consideration the implementation of the

mitigation and monitoring measures, NMFS preliminarily finds that operation, including repair and maintenance activities, of the Neptune Port will result in the incidental take of small numbers of marine mammals, by Level B harassment only, and that the total taking from Neptune's proposed activiites will have a negligible impact on the affected species or stocks.

**Impact on Availability of Affected Species or Stock for Taking for Subsistence Uses**

There are no relevant subsistence uses of marine mammals implicated by this action.

**Endangered Species Act (ESA)**

On January 12, 2007, NMFS concluded consultation with MARAD and USCG under section 7 of the ESA on the proposed construction and operation of the Neptune LNG facility and issued a Biological Opinion. The finding of that consultation was that the construction and operation of the Neptune LNG terminal may adversely affect, but is not likely to jeopardize, the continued existence of northern right, humpback, and fin whales, and is not likely to adversely affect sperm, sei, or blue whales and Kemp's ridley, loggerhead, green, or leatherback sea turtles.

On March 2, 2010, MARAD and USCG sent a letter to NMFS requesting reinitiation of the section 7 consultation. MARAD and USCG determined that certain routine planned operations and maintenance activities, inspections, surveys, and unplanned repair work on the Neptune Deepwater Port pipelines and flowlines, as well as any other Neptune Deepwater Port component (including buoys, risers/umbilicals, mooring systems, and sub-sea manifolds), may constitute a modification not previously considered in the 2007 Biological Opinion. Construction of the Port facility will be completed by summer 2010, and, therefore, is no longer part of the proposed action. This consultation will be concluded prior to a determination on the issuance of this IHA.

**National Environmental Policy Act (NEPA)**

MARAD and the USCG released a Final EIS/Environmental Impact Report (EIR) for the proposed Neptune LNG Deepwater Port (see **ADDRESSES**). A notice of availability was published by MARAD on November 2, 2006 (71 FR 64606). The Final EIS/EIR provides detailed information on the proposed project facilities, construction methods, and analysis of potential impacts on marine mammals.

NMFS was a cooperating agency in the preparation of the Draft and Final EISs based on a Memorandum of Understanding related to the Licensing of Deepwater Ports entered into by the U.S. Department of Commerce along with 10 other government agencies. On June 3, 2008, NMFS adopted the USCG and MARAD FEIS and issued a separate Record of Decision for issuance of authorizations pursuant to sections 101(a)(5)(A) and (D) of the MMPA for the construction and operation of the Neptune LNG Port facility.

**Proposed Authorization**

As a result of these preliminary determinations, NMFS proposes to authorize the take of marine mammals incidental to port commissioning and operations, including repair and maintenance activities at the Neptune Deepwater Port, provided the previously mentioned mitigation, monitoring, and reporting requirements are incorporated.

Dated: April 30, 2010.

**Helen M. Golde,**

*Deputy Director, Office of Protected Resources, National Marine Fisheries Service.*

[FR Doc. 2010–10715 Filed 5–5–10; 8:45 am]

**BILLING CODE 3510–22–S**

## CONSUMER PRODUCT SAFETY COMMISSION

### Sunshine Act Meetings

**TIME AND DATE:** Wednesday, May 12, 2010; 2 p.m.–4 p.m.

**PLACE:** Hearing Room 420, Bethesda Towers, 4330 East West Highway, Bethesda, Maryland.

**STATUS:** Closed to the Public.

**MATTERS TO BE CONSIDERED:**

*Compliance Status Report:*

The Commission staff will brief the Commission on the status of compliance matters.

For a recorded message containing the latest agenda information, call (301) 504–7948.

**CONTACT PERSON FOR MORE INFORMATION:** Todd A. Stevenson, Office of the Secretary, U.S. Consumer Product Safety Commission, 4330 East West Highway, Bethesda, MD 20814, (301) 504–7923.

Dated: May 3, 2010.

**Todd A. Stevenson,**

*Secretary.*

[FR Doc. 2010–10833 Filed 5–4–10; 4:15 pm]

**BILLING CODE 6355–01–P**

## CONSUMER PRODUCT SAFETY COMMISSION

### Sunshine Act Meetings

**TIME AND DATE:** Wednesday, May 12, 2010, 9 a.m.–11 a.m.

**PLACE:** Hearing Room 420, Bethesda Towers, 4330 East West Highway, Bethesda, Maryland.

**STATUS:** Commission Meeting—Open to the Public.

**MATTERS TO BE CONSIDERED:**

*1. Pending Decisional Matter: Infant Bath Seats—Final Rule:*

A live webcast of the Meeting can be viewed at *http://www.cpsc.gov/webcast/index.html.* For a recorded message containing the latest agenda information, call (301) 504–7948.

**CONTACT PERSON FOR MORE INFORMATION:** Todd A. Stevenson, Office of the Secretary, U.S. Consumer Product Safety Commission, 4330 East West Highway, Bethesda, MD 20814 (301) 504–7923.

Dated: May 3, 2010.

**Todd A. Stevenson,**

*Secretary.*

[FR Doc. 2010–10834 Filed 5–4–10; 4:15 pm]

**BILLING CODE 6355–01–P**

## DEPARTMENT OF DEFENSE

### Office of the Secretary

### Federal Advisory Committee; Defense Intelligence Agency Advisory Board; Closed Meeting

**AGENCY:** Defense Intelligence Agency, DoD.

**ACTION:** Meeting notice.

**SUMMARY:** Under the provisions of the Federal Advisory Committee Act of 1972 (5 U.S.C., Appendix, as amended), the Government in the Sunshine Act of 1976 (5 U.S.C. 552b, as amended), and 41 CFR 102–3.150 the Department of Defense announces that Defense Intelligence Agency Advisory Board, and its subcommittees, will meet on June 15 and 16, 2010. The meeting is closed to the public.

**DATES:** The meeting will be held on June 15, 2010 (from 1:30 p.m. to 5:15 p.m.) and on June 16, 2010 (from 9 a.m. to 4:30 p.m.).

**ADDRESSES:** The meeting will be held at Bolling Air Force Base.

**FOR FURTHER INFORMATION CONTACT:** Mr. Mark Harrison, (703) 647–5102, Alternate Designated Federal Official, DIA Office for Congressional and Public Affairs, Pentagon, 1A874, Washington, DC 20340.

Committee's Designated Federal Official: Mr. William Caniano, (703) 614–4774, DIA Office for Congressional and Public Affairs, Pentagon, 1A874 Washington, DC 20340. *William.Caniano@dia.mil.*

**SUPPLEMENTARY INFORMATION:**

**Purpose of the Meeting**

For the Advisory Board to review and discuss DIA operations and capabilities in support of current operations.

**Agenda**

*June 15, 2010*

| Time | Topic | Presenter |
|---|---|---|
| 1:30 p.m. | Convene Full Advisory Board for Administrative Issues | Mr. William Caniano, Designated Federal Official. |
| 3 p.m. | Review and Discussion | Ms. Mary Margaret Graham, Chairman. |
| 3:30 p.m. | Break | |
| 3:45 p.m. | Subcommittee Business | |
| 5:15 p.m. | Adjourn | |

*June 16, 2010*

| Time | Topic | Presenter |
|---|---|---|
| 9 a.m. | Subcommittees Reconvene | |
| 12 p.m. | Lunch | |
| 1 p.m. | Full Advisory Board Meeting for Review and Discussion | Ms. Graham and LTG Ronald L. Burgess, Director, DIA. |
| 3 p.m. | Break | |
| 3:15 p.m. | Deliberations and Guidance | LTG Ronald L. Burgess. |
| 4:30 p.m. | Adjourn | |

Pursuant to 5 U.S.C. 552b, as amended and 41 CFR 102–3.155, the Defense Intelligence Agency has determined that all meetings shall be closed to the public. The Director, DIA, in consultation with his General Counsel, has determined in writing that the public interest requires that all sessions of the Board's meetings will be closed to the public because they will be concerned with classified information and matters covered by section 5 U.S.C. 552b(c)(1).

**Written Statements**

Pursuant to 41 CFR 102–3.105(j) and 102–3.140, and section 10(a)(3) of the Federal Advisory Board Committee Act of 1972, the public or interested organizations may submit written statements at any time to the DIA Advisory Board regarding its missions and functions. All written statements shall be submitted to the Designated Federal Official for the DIA Advisory Board. He will ensure that written statements are provided to the membership for their consideration. Written statements may also be submitted in response to the stated agenda of planned committee meetings. Statements submitted in response to this notice must be received by the Designated Federal Official at least five calendar days prior to the meeting which is the subject of this notice. Written statements received after that date may not be provided or considered by the Board until its next meeting. All submissions provided before that date will be presented to the Board members before the meeting that is subject of this notice. Contact information for the Designated Federal Official is listed under **FOR FURTHER INFORMATION CONTACT**.

Dated: May 3, 2010.

**Mitchell S. Bryman,**

*Alternate OSD Federal Register Liaison Officer, Department of Defense.*

[FR Doc. 2010–10669 Filed 5–5–10; 8:45 am]

**BILLING CODE 5001–06–P**

## DEPARTMENT OF DEFENSE

### Office of the Secretary

### Federal Advisory Committee; Military Leadership Diversity Commission (MLDC)

**AGENCY:** Office of the Under Secretary of Defense for Personnel and Readiness, DoD.

**ACTION:** Meeting notice.

**SUMMARY:** Under the provisions of the Federal Advisory Committee Act of 1972 (5 U.S.C., Appendix, as amended), the Government in the Sunshine Act of 1976 (5 U.S.C. 552b, as amended), and 41 CFR 102–3.150, the Department of Defense announces that the Military Leadership Diversity Commission (MLDC) will meet May 24 through 26, 2010.

**DATES:** The meeting will be held: May 24, 2010—2 p.m. to 5:45 p.m.; May 25, 2010—8 a.m. to 4:45 p.m.; May 26, 2010—8 a.m. to 5:15 p.m.

**ADDRESSES:** The meeting will be held at the Hilton Seattle Airport and Conference Center, 17620 International Blvd., Seattle, WA 98188–4001.

**FOR FURTHER INFORMATION CONTACT:** Master Chief Steven A. Hady, Designated Federal Officer, MLDC, at (703) 602–0838, 1851 South Bell Street, Suite 532, Arlington, VA. *E-mail: steven.hady@wso.whs.mil.*

**SUPPLEMENTARY INFORMATION:**

**Agenda**

*May 24, 2010*

2 p.m.–5:45 p.m.
- DFO opens meeting
- Commission Chairman opening remarks
- Dr. Martha Farnsworth Riche, former Director of the U.S. Bureau of the Census, briefs the MLDC on demographic trends
- Open discussion on metrics
- Open discussion on implementation and accountability
- DFO adjourns the meeting

*May 25, 2010*

8 a.m.–12:15 p.m.
- DFO opens the meeting
- Commission Chairman opening remarks
- Mr. Edmund D. Cooke, Jr. briefs the MLDC on legal issues related to diversity management
- Mr. Mario L. Barnes briefs the MLDC on legal issues related to diversity management
- Decision brief on legal implications
- DFO recesses the meeting

1:45 p.m.–4:45 p.m.
DFO opens the meeting
Decision brief on outreach and recruiting
Open discussion on retention
Commission Chairman closing remarks
DFO adjourns the meeting

*May 26, 2010*

8 a.m.–11:45 a.m.
DFO opens the meeting
Commission Chairman opening remarks
Decision brief on promotion
Briefings from the Office of the Secretary of Defense (OSD) and Service representatives from organizations responsible for diversity leadership and training
11:45 a.m.
DFO recesses the meeting
1 p.m.–5:15 p.m.
DFO opens meeting
Briefings from OSD and Service representatives from organizations responsible for diversity leadership and training (continued)
Public comments
Commission Chairman closing remarks
DFO adjourns the meeting

**Public's Accessibility to the Meeting**

Pursuant to 5 U.S.C. 552b and 41 CFR 102–3.140 through 102–3.165, and the availability of space, the meetings on May 24 thru 26, 2010 will be open to the public. **Please note** that the availability of seating is on a first-come basis.

**Written Statements**

Pursuant to 41 CFR 102–3.105(j) and 102–3.140, and section 10(a)(3) of the Federal Advisory Committee Act of 1972, the public or interested organizations may submit written statements to the Military Leadership Diversity Commission about its mission and functions. Written statements may be submitted at any time or in response to the stated agenda of a planned meeting of the Military Leadership Diversity Commission.

All written statements shall be submitted to the Designated Federal Officer for the Military Leadership Diversity Commission, and this individual will ensure that the written statements are provided to the membership for its consideration. Contact information for the Designated Federal Officer can be obtained from the GSA's FACA Database—*https://www.fido.gov/facadatabase/public.asp.*

Statements being submitted in response to the agenda mentioned in this notice must be received by the Designated Federal Officer at the address listed above at least five calendar days prior to the meeting that is the subject of this notice. Written statements received after this date may not be provided to or considered by the Military Leadership Diversity Commission until its next meeting.

The Designated Federal Officer will review all timely submissions with the Military Leadership Diversity Commission Chairperson and ensure they are provided to all members of the Military Leadership Diversity Commission before the meeting that is the subject of this notice.

Dated: May 3, 2010.

**Mitchell S. Bryman,**

*Alternate OSD Federal Register Liaison Officer, Department of Defense.*

[FR Doc. 2010–10670 Filed 5–5–10; 8:45 am]

**BILLING CODE 5001–06–P**

## DEPARTMENT OF DEFENSE

### Office of the Secretary

**[Docket ID: DOD–2010–OS–0059]**

### Privacy Act of 1974; System of Records

**AGENCY:** Office of the Secretary, DoD.

**ACTION:** Notice to add a system of records.

**SUMMARY:** The Office of the Secretary of Defense proposes to add a system of records to its inventory of record systems subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended.

**DATES:** This proposed action would be effective without further notice on June 7, 2010 unless comments are received which result in a contrary determination.

**ADDRESSES:** You may submit comments, identified by docket number and title, by any of the following methods:

* *Federal Rulemaking Portal: http://www.regulations.gov*. Follow the instructions for submitting comments.

* *Mail:* Federal Docket Management System Office, 1160 Defense Pentagon, Washington, DC 20301–1160.

*Instructions:* All submissions received must include the agency name and docket number for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

**FOR FURTHER INFORMATION CONTACT:** Ms. Cindy Allard at (703) 588–6830.

**SUPPLEMENTARY INFORMATION:** The Office of the Secretary of Defense notices for systems of records subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended, have been published in the **Federal Register** and are available from the Chief, OSD/JS Privacy Office, Freedom of Information Directorate, Washington Headquarters Services, 1155 Defense Pentagon, Washington DC 20301–1155.

The proposed system report, as required by 5 U.S.C. 552a(r) of the Privacy Act of 1974, as amended, was submitted on April 26, 2010, to the House Committee on Oversight and Government Reform, the Senate Committee on Governmental Affairs, and the Office of Management and Budget (OMB) pursuant to paragraph 4c of Appendix I to OMB Circular No. A–130, "Federal Agency Responsibilities for Maintaining Records About Individuals," dated February 8, 1996 (February 20, 1996; 61 FR 6427).

Dated: May 3, 2010.

**Mitchell S. Bryman,**

*Alternate OSD Federal Register Liaison Officer, Department of Defense.*

**DHA 20 DoD**

**SYSTEM NAME:**

Department of Defense Suicide Event Report (DoDSER) System.

**SYSTEM LOCATION:**

Fort Detrick Network Enterprise Center (NEC), 1422 Sultan Drive, Fort Detrick, MD 21702–5020.

**CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:**

Department of Defense active and reserve military personnel (Air Force, Army, Navy, Marines), National Guard with reportable suicide and self-harm behaviors (to include suicide attempts, self harm behaviors, and suicidal ideation). All other DoD active and reserve military personnel records collected without evidence of reportable suicide and self-harm behaviors will exist as a de-identified control group, and are not retrievable.

**CATEGORIES OF RECORDS IN THE SYSTEM:**

Type of suicide event (non-fatal suicide events), event details, location of event, residence at time of event, circumstance of death, psychological, social history, behavioral, economic, education/training history, name, Social Security Number (SSN), date of birth, gender, race/ethnic group, marital status, rank/pay grade, military service, military status, job title, service duty specialty code, duty environment/status, Unit Identification Code (UIC), permanent duty station, the major command of the permanent duty

station, temporary duty station (if applicable), residence address, deployment history, use of military helping services, information regarding the individual's past military experience, medical history, medical facility, unit or military treatment facility where suicide was attempted, behavioral health provider information and form completer information.

**AUTHORITY FOR MAINTENANCE OF THE SYSTEM:**

10 U.S.C. 136, Under Secretary of Defense for Personnel and Readiness; 10 U.S.C. 8013, Secretary of the Air Force; 10 U.S.C. 5013, Secretary of the Navy; 10 U.S.C. 3013, Secretary of the Army; 10 U.S.C. chapter 55, Medical and Dental Care; 29 CFR part 1960, Occupational Illness/Injury Reporting Guidelines for Federal Agencies; 45 CFR parts 160 and 164, Health Insurance Portability and Accountability Act, General Administrative Requirements and Privacy and Security Rules; DoD 6490.02, Comprehensive Health Surveillance; AR 600–63, Army Health Promotion, Rapid Action Revision 20 Sep 09, Paragraph 4–4 Suicide Prevention and Surveillance; OPNAV Instruction 1720.4A, Suicide Prevention Program, 5.d, Reporting; AFI 44–154, Suicide and Violence Prevention Education and Training; AFPAM 44–160, The Air Force Suicide Prevention Program, XI, Epidemiological Database and Surveillance System; and E.O. 9397 (SSN), as amended.

**PURPOSE(S):**

This data system will provide integrated enterprise and survey data to be used for direct reporting of suicide events and ongoing population-based health surveillance activities. These surveillance activities include the systematic collection, analysis, interpretation, and reporting of outcome-specific data for use in planning, implementation, evaluation, and prevention of suicide behaviors within the Department of Defense. Data is collected on individuals with reportable suicide and self-harm behaviors (to include suicide attempts, self harm behaviors, and suicidal ideation). All other DoD active and reserve military personnel records collected without evidence of reportable suicide and self-harm behaviors will exist as a control group. Records are integrated from enterprise systems and created and revised by civilian and military personnel in the performance of their duties.

Routine uses of records maintained in the system, including categories of users and the purposes of such uses: In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act of 1974, these records, or information contained therein, may specifically be disclosed outside the DoD as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

Statistical summary data with no personally identifiable information may be provided to Federal, State, and local governments for health surveillance and research. The DoD "Blanket Routine Uses" published at the beginning of the Office of the Secretary of Defense compilation of record system notices apply to this system, except as stipulated in "Notes" below.

**Note:** Records of identity, diagnosis, prognosis or treatment of any client/patient, irrespective of whether or when he/she ceases to be a client/patient, maintained in connection with the performance of any alcohol/drug abuse treatment function conducted, requested, or directly or indirectly assisted by any department or agency of the United States, shall, except as provided herein, be confidential and be disclosed only for the purposes and under the circumstances expressly authorized in 42 U.S.C. 290dd–2. This statute takes precedence over the Privacy Act of 1974 concerning accessibility of such records except to the individual to whom the record pertains.

**Note:** This system of records contains individually identifiable health information. The DoD Health Information Privacy Regulation (DoD 6025.18–R) issued pursuant to the Health Insurance Portability and Accountability Act of 1996 applies to most such health information. DoD 6025.18–R may place additional procedural requirements on the uses and disclosures of such information beyond those found in the Privacy Act of 1974 or mentioned in this system of records notice.

**POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:**

**STORAGE:**

Electronic storage media.

**RETRIEVABILITY:**

By individual's name and/or Social Security Number (SSN). After 180 days, records are not retrievable. Control group records are never retrievable.

**SAFEGUARDS:**

Records are maintained in a controlled facility. Physical entry is restricted by the use of locks, guards, and is accessible only to authorized personnel. Access to identified records is limited by role-based access controls (RBAC) to those individuals responsible for creating and updating the records and who are properly screened and responsible for servicing the record in performance of their official duties. Record retrieval from the system is limited to aggregated data and access is further restricted by Common Access Cards and passwords that are changed periodically. Control group data is not retrievable.

All personnel with authorized access to the system must have appropriate Information Assurance training, Privacy Act training, and Health Insurance Portability and Accountability Act training. All access to records is tracked by electronic audit logs. Audit logs are always on and they are archived for historical review and tracking.

**RETENTION AND DISPOSAL:**

Disposition pending (until the National Archives and Records Administration approves retention and disposal schedule, records will be treated as permanent).

**SYSTEM MANAGER(S) AND ADDRESS:**

Dr. Gregory A. Gahm, Director, National Center for Telehealth and Technology (T2) Defense Centers of Excellence, 9933 West Hayes Street, OMAMC, Joint Base Lewis-McChord, Tacoma, WA 98431–1100.

**NOTIFICATION PROCEDURE:**

Individuals seeking to determine whether information about themselves is contained in this system of records should address written inquiries to Director, National Center for Telehealth & Technology (T2) Defense Centers of Excellence, 9933 West Hayes Street, OMAMC, Joint Base Lewis-McChord, Tacoma, WA 98431–1100.

Requests should include individual's Social Security Number (SSN), date of birth, and current address.

After 180 days, records are not retrievable. Control group records are never retrievable.

**RECORD ACCESS PROCEDURES:**

Individuals seeking to access records about themselves contained in this system of records should address written inquiries to TRICARE Management Activity, Freedom of Information Action Officer, 16401 East Centretech Parkway, Aurora, CO 80011–9066.

Requests should include individual's Social Security Number (SSN), date of birth, and current address.

After 180 days, records are not retrievable. Control group records are never retrievable.

**CONTESTING RECORD PROCEDURES:**

The rules for accessing records, for contesting contents and appealing initial agency determinations are published in Office of the Secretary of Defense Administrative instruction 81;

32 CFR part 311; or may be obtained from the system manager.

**RECORD SOURCE CATEGORIES:**

Medical and behavioral health records; pre- and post-deployment screening records, family advocacy records; personnel records; responsible investigative agency records; court martial records; records related to manner of death, such as casualty reports; toxicology/lab reports; pathology/autopsy reports; suicide notes; interviews with coworkers/supervisors; responsible investigative agencies; involved professionals such as physicians, behavioral health counselors, chaplains, military police, family service personnel; family members; and Defense Manpower Data Center (DMDC).

**EXEMPTIONS CLAIMED FOR THE SYSTEM:**

None.

[FR Doc. 2010–10671 Filed 5–5–10; 8:45 am]

**BILLING CODE 5001–06–P**

## DEPARTMENT OF DEFENSE

### Department of the Army

### Fort Bliss (Texas) Army Growth and Force Structure Realignment Final Environmental Impact Statement (FEIS)

**AGENCY:** Department of the Army, DOD.

**ACTION:** Notice of availability.

**SUMMARY:** The Department of the Army announces the availability of the Fort Bliss Army Growth and Force Structure Realignment FEIS (hereon referred to as FEIS) identifying the potential environmental effects that would result from use of stationing and training capacity, land use changes, and training infrastructure improvements at Fort Bliss to support Army growth and force structure realignment.

The FEIS tiers from the Records of Decision (2007) for the Army Growth and Force Structure Realignment Programmatic Environmental Impact Statement (GTA PEIS); and the Fort Bliss, Texas and New Mexico Mission and Master Plan Final Supplemental Programmatic Environmental Impact Statement (SEIS).

After reviewing the alternatives presented in the FEIS, the Army has selected its preferred alternative from a mixture of the three different categories of interrelated alternatives. The preferred alternative is to implement the following: Alternative 4 stationing action; Alternative 5 land use change; and Alternative 4 training infrastructure improvement. Alternative 4 stationing action includes a Stryker Brigade Combat Team (SBCT) (for a total of two) or allows replacing a BCT equivalent with an SBCT and various support units to the Fort Bliss stationing package. Alternative 5 land use changes allow fixed sites (*e.g.*, military bivouac), mission support facilities, live-fire military uses and off-road vehicle maneuvers in new locations around the Sacramento Mountains and McGregor Range areas. Alternative 4 training infrastructure improvements include: construction of new ranges to support the stationing of SBCTs; expansion of existing range camps; construction of 16 austere Contingency Operating Locations (COLs); and construction of a rail line connecting the Fort Bliss Cantonment area to the Fort Bliss Training Complex.

**DATES:** The waiting period will end 30 days after the publication of a notice of availability for the FEIS in the **Federal Register** by the U.S. Environmental Protection Agency.

**ADDRESSES:** Written comments should be sent to: Mr. John F. Barrera, IMWE–BLS–PWE, Building 624, Taylor Road, Fort Bliss, TX 79916–6812; e-mail: *bliss.eis@conus.army.mil.*

**FOR FURTHER INFORMATION CONTACT:** Ms. Jean Offutt, Public Affairs Officer, IMWE–BLS–PA, Fort Bliss, TX 79916–6812; telephone: (915) 568–4505; fax: (915) 568–2995; e-mail: *jean.offutt@us.army.mil.*

**SUPPLEMENTARY INFORMATION:** The Proposed Action would support the growth of the Army and allow for reasonably foreseeable future stationing actions, land use changes, and training infrastructure improvements that take advantage of Fort Bliss's varied terrain; full suite of training ranges; collocation with heavy, light, and aviation combat units; and collocation with various support units.

Three categories of interrelated alternatives are analyzed in this document: stationing/training; land use changes; and training infrastructure improvements. Each category contains a No Action alternative and several action alternatives.

(1) The stationing/training category of alternatives analyzes the stationing decision made in the GTA PEIS. The document also analyzes reasonably foreseeable future growth at Fort Bliss, including adding one or more SBCTs and additional support units.

(2) Land uses analyzed in the FEIS are primarily focused in the rugged terrain of northeast McGregor Range, with minor changes in the southeast and Tularosa Basin portions of McGregor Range, for the purpose of supporting realistic and effective light infantry training. None of the proposed land use changes include the Culp Canyon Wilderness Study Area or the Black Grama Grassland Area of Critical Environmental Concern.

(3) Training infrastructure improvements analyzed in the FEIS include construction of additional firing ranges and expansion or construction of administrative and training support facilities to support the units stationed at Fort Bliss.

Actions analyzed in this document would result in a range of potential impacts. Erosion would increase substantially on range roads interior to the Fort Bliss Training Complex, requiring more frequent maintenance. The most expansive stationing alternative selected may, as a result of high-tempo training schedules, reduce Native American access to areas of the installation in which they have an ongoing interest. The proposed action would, in certain alternatives, result in a small increase in the economic benefit provided by growth of the installation, and a small decrease in certain quality of life indicators (*e.g.*, traffic, access to government services). Use of restricted airspace for military training would increase under certain alternatives, further limiting access of general and commercial aviation. Training related noise remains significant in areas adjacent to Dona Ana Range and portions of McGregor Range.

The FEIS and other environmental documents are available on the Fort Bliss Web site at *https://www.bliss.army.mil* or in the following libraries: In El Paso (TX), the Richard Burges Regional Library, 9600 Dyer; the Irving Schwartz Branch Library, 1865 Dean Martin; the Clardy Fox Branch Library, 5515 Robert Alva; and the Doris van Doren Regional Branch Library, 551 Redd Road. In Las Cruces (NM), the New Mexico State University Zuhl Library, 2999 McFie Circle. In Alamogordo (NM), the Alamogordo Public Library, 920 Oregon Avenue.

Dated: April 29, 2010.

**Addison D. Davis, IV,**

*Deputy Assistant Secretary of the Army (Environment, Safety, and Occupational Health).*

[FR Doc. 2010–10697 Filed 5–5–10; 8:45 am]

**BILLING CODE 3710–08–P**

## DEPARTMENT OF DEFENSE

### Department of the Navy

**[Docket ID USN–2010–0017]**

### Privacy Act of 1974; System of Records

**AGENCY:** Department of the Navy, DoD.

**ACTION:** Notice to add a system of records.

**SUMMARY:** The Department of Navy proposes to add a system of records to its inventory of record systems subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended.

**DATES:** This notice will be effective on June 7, 2010 unless comments are received that would result in a contrary determination.

**ADDRESSES:** You may submit comments, identified by docket number and title, by any of the following methods:

* *Federal Rulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.

* *Mail:* Federal Docket Management System Office, 1160 Defense Pentagon, Washington, DC 20301–1160.

*Instructions:* All submissions received must include the agency name and docket number for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

**FOR FURTHER INFORMATION CONTACT:** Mrs. Miriam Brown-Lam at (202) 685–6545.

**SUPPLEMENTARY INFORMATION:** The Office of the Secretary of Defense notices for systems of records subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended, have been published in the **Federal Register** and are available from the Department of the Navy, Chief of Naval Operation, DNS 36, 2000 Navy Pentagon, Washington, DC 20350–2000.

The proposed systems reports, as required by 5 U.S.C. 552a(r) of the Privacy Act of 1974, as amended, were submitted on April 26, 2010, to the House Committee on Oversight and Government Reform, the Senate Committee on Homeland Security and Governmental Affairs, and the Office of Management and Budget (OMB) pursuant to paragraph 4c of Appendix I to OMB Circular No. A–130, "Federal Agency Responsibilities for Maintaining Records About Individuals," dated February 8, 1996 (February 20, 1996; 61 FR 6427).

Dated: May 3, 2010.

**Mitchell S. Bryman,**

*Alternate OSD Federal Register Liaison Officer, Department of Defense.*

**N05520–6 DoD**

**SYSTEM NAME:**

Law Enforcement Defense Data Exchange.

**SYSTEM LOCATION:**

Naval Criminal Investigative Service, 716 Sicard St., Washington, DC 20388–5380.

**CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:**

Any individual involved in, or suspected of being involved in a crime incident or criminal investigation. In addition, individuals who provide information that is relevant to the investigation, such as subjects, suspects, associates, victims, witnesses, persons of interest; and/or any individual named in an arrest, booking, parole and/or probation report.

**CATEGORIES OF RECORDS IN THE SYSTEM:**

The records in the system consist of incident, offense and case reports, arrest, booking, incarceration, and parole and/or probation information from Federal, State, local and tribal law enforcement entities. Identifying information in this system include, individual's name; sex; race; citizenship; date and place of birth; address(es); telephone number(s); Social Security Number (SSN) or other unique identifiers; physical description to include, height, weight, hair color, eye color, gender; photographs; occupation and vehicle identifiers.

**AUTHORITY FOR MAINTENANCE OF THE SYSTEM:**

5 U.S.C. 301, Departmental Regulations; 10 U.S.C. 136, Under Secretary of Defense for Personnel and Readiness; 10 U.S.C. 3013, Secretary of the Army; 10 U.S.C. 8013, Secretary of the Air Force, 10 U.S.C. 5013, Secretary of the Navy; 47 U.S.C. 605; Secretary of the Navy Instruction 5430.107, Mission and Functions of the Naval Criminal Investigative Service and E.O. 9397 (SSN), as amended.

**PURPOSE(S):**

To enhance the interconnectivity of criminal law enforcement databases in order to improve the sharing of multiple levels of criminal law enforcement data. This system of records will strengthen the criminal justice objectives for crime analysis, law enforcement administration, and strategic/tactical operations in investigating, reporting, solving, and preventing crime.

**ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:**

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act of 1974, these records contained therein may specifically be disclosed outside the DoD as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

To any criminal, civil, or regulatory law enforcement authority (whether Federal, State, local, territorial, tribal, or foreign) where the information is relevant to the recipient entity's law enforcement agency for their situational awareness.

To a Federal, State, local, joint, tribal, foreign, international, or other public agency/organization, or to any person or entity in either the public or private sector, domestic or foreign, where such disclosure may facilitate the apprehension of fugitives, the location of missing persons, the location and/or return of stolen property or similar criminal justice objectives.

To appropriate agencies, entities, and persons when (1) The DoD suspects or has confirmed that the security or confidentiality of information in the system of records has been compromised; (2) the DoD has determined that as a result of the suspected or confirmed compromise there is a risk of harm to economic or property interests, identity theft, or fraud, or harm to the security or integrity of this system, other systems, or programs (whether maintained by the Department or another agency or entity) that rely upon the compromised information; and (3) the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with the DoD efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm.

To those agencies, entities and persons the DoD may consider necessary or appropriate incident to the ensuring the continuity of government functions in the event of any actual or potential significant disruption of normal operations.

The DoD 'Blanket Routine Uses' set forth at the beginning of Department of Navy compilation of systems of records notices apply to this system.

**POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:**

**STORAGE:**

Electronic storage media.

**RETRIEVABILITY:**

Individual's name, Social Security Number (SSN), and other personal identifying data collected on involved individuals, places and things and/or events.

**SAFEGUARDS:**

Records are maintained in a controlled facility. Physical entry is restricted by the use of locks, guards, and is accessible only to authorized personnel. Access to records is limited to individuals responsible for servicing the record in performance of their official duties and who are properly screened and cleared for need-to-know. Access is restricted by passwords, which are changed periodically.

**RETENTION AND DISPOSAL:**

This system of records is a compilation of information from other Department of Defense law enforcement agency systems of records. To that extent these records are subject to retention and disposal requirements claimed in the original primary system of which they are a part.

**SYSTEM MANAGER(S) AND ADDRESS:**

Director, Naval Criminal Investigative Service, 716 Sicard St., Washington, DC 20388–5380.

**NOTIFICATION PROCEDURES:**

Individuals seeking to determine whether information about themselves is contained in this system of records should address written inquiries to the FOIA/Privacy Act Section, Naval Criminal Investigative Service, 716 Sicard St., Washington, DC 20388–5380.

Requestors must provide full name, sufficient details to permit locating pertinent records, and signature. The system manager will require a notarized signature as a means of proving the identity of the individual requesting access to the records.

**RECORD ACCESS PROCEDURES:**

Individuals seeking access to information about themselves contained in this system of records should address written inquiries to the FOIA/Privacy Act Section, Naval Criminal Investigative Service, 716 Sicard St., Washington, DC 20388–5380.

Requests must contain the individual's full name, sufficient details to permit locating pertinent records, and signature. The system manager will require a notarized signature as a means of proving the identity of the individual requesting access to the records.

**CONTESTING RECORD PROCEDURES:**

The Navy's rules for accessing records, and for contesting contents and appealing initial agency determinations are published in Secretary of the Navy Instruction 5211.5; 32 CFR part 701; or may be obtained from the system manager.

**RECORD SOURCE CATEGORIES:**

Information contained in the DDEX system is obtained from Federal, State, local and tribal law enforcement agencies.

**EXEMPTIONS CLAIMED FOR THE SYSTEM:**

Parts of this system may be exempt pursuant to 5 U.S.C. 552a(j)(2) if the information is compiled and maintained by a component of the agency that performs as its principle function any activity pertaining to the enforcement of criminal laws.

Records maintained solely for statistical research or program evaluation purposes and which are not used to make decisions on the rights, benefits, or entitlement of an individual except for census records which may be disclosed under 13 U.S.C. 8, may be exempt pursuant to 5 U.S.C. 552a(k)(4).

Investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for federal civilian employment, military service, federal contracts, or access to classified information may be exempt pursuant to 5 U.S.C. 552a(k)(5), but only to the extent that such material would reveal the identity of a confidential source.

Testing or examination material used solely to determine individual qualifications for appointment or promotion in the federal or military service, if the disclosure would compromise the objectivity or fairness of the test or examination process may be exempt pursuant to 5 U.S.C. 552a(k)(6), if the disclosure would compromise the objectivity or fairness of the test or examination process.

Evaluation material used to determine potential for promotion in the Military Services may be exempt pursuant to 5 U.S.C. 552a(k)(7), but only to the extent that the disclosure of such material would reveal the identity of a confidential source.

To the extent that copies of exempt records from those other systems of records are entered into this system of records, the same exemptions apply for the records as claimed in the original primary systems of records which they are a part.

[FR Doc. 2010–10672 Filed 5–5–10; 8:45 am]

**BILLING CODE 5001–06–P**

## DEPARTMENT OF DEFENSE

### Department of the Navy

**[Docket ID USN–2010–0018]**

### Privacy Act of 1974; System of Records

**AGENCY:** U.S. Marine Corps, Department of the Navy, DoD.

**ACTION:** Notice to add a system of records.

**SUMMARY:** The U.S. Marine Corps proposes to add a system of records to its inventory of record systems to the Privacy Act of 1974, (5 U.S.C. 552a), as amended.

**DATES:** This proposed action will be effective without further notice on June 7, 2010 unless comments are received which result in a contrary determination.

**ADDRESSES:** You may submit comments, identified by docket number and title, by any of the following methods:

- *Federal Rulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* Federal Docket Management System Office, 1160 Defense Pentagon, Washington, DC 20301–1160.

*Instructions:* All submissions received must include the agency name and docket number for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

**FOR FURTHER INFORMATION CONTACT:** Ms. Tracy Ross at (703) 614–4008.

**SUPPLEMENTARY INFORMATION:** The U.S. Marine Corps system of records notices subject to the Privacy Act of 1974, (5 U.S.C. 552a), as amended, have been published in the **Federal Register** and are available from Headquarters, U.S. Marine Corps, FOIA/PA Section (ARSF), 2 Navy Annex, Room 3134, Washington, DC 20380–1775.

The proposed system report, as required by 5 U.S.C. 552a (r), of the Privacy Act of 1974, as amended, was submitted on April 26, 2010, to the House Committee on Oversight and Government Reform, the Senate Committee on Homeland Security and Governmental Affairs, and the Office of Management and Budget (OMB) pursuant to paragraph 4c of Appendix I to OMB Circular No. A–130, "Federal Agency Responsibilities for Maintaining Records About Individuals," dated

February 8, 1996 (February 20, 1996; 61 FR 6427).

Dated: May 3, 2010.

**Mitchell S. Bryman,**

*Alternate OSD Federal Register Liaison Officer, Department of Defense.*

**NM05512–2**

**SYSTEM NAME:**

Badge and Access Control System Records

**SYSTEM LOCATION:**

All organization elements of the Department of the Navy. Official mailing addresses are published in the Standard Navy Distribution List that is available at *http://doni.daps.dla.mil/sndl.aspx.*

Commander, U.S. Joint Forces Command, 1562 Mitscher Avenue, Suite 200, Norfolk, VA 23551–2488.

Commander, U.S. Pacific Command, P.O. Box 64028, Camp H.M. Smith, HI 96861–4028.

**CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:**

Individuals considered or seeking consideration for access to space under the control of the Department of the Navy/combatant command and any visitor (military, civilian, or contractor) requiring access to a controlled facility.

**CATEGORIES OF RECORDS IN THE SYSTEM:**

Name, Social Security Number (SSN); case number; visit requests for permission to transact commercial business; visitor clearance data for individuals to visit a Navy/Marine Corps base/activity/contractor facility; barring lists and letters of exclusion; badge/pass issuance records; information that reflects time of entry/exit from facility, and bio-metric data (iris scan, face and fingerprints).

**AUTHORITY FOR MAINTENANCE OF THE SYSTEM:**

10 U.S.C. 5013, Secretary of the Navy; 10 U.S.C. 5041, Headquarters, Marine Corps; OPNAVINST 5530.14C, Navy Physical Security; Marine Corps Order P5530.14, Marine Corps Physical Security Program Manual; and E.O. 9397 (SSN), as amended.

**PURPOSE(S):**

To control physical access to DoD, Department of the Navy (DON) or U.S. Marine Corps Installations/Units controlled information, installations, facilities, or areas over which DoD, DON or USMC has security responsibilities by identifying or verifying an individual through the use of biometric databases and associated data processing/information services for designated populations for purposes of protecting U.S./Coalition/allied government/national security areas of responsibility and information; to issue badges, replace lost badges and retrieve passes upon separation; to maintain visitor statistics; collect information to adjudicate access to facility; and track the entry/exit times of personnel.

**ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:**

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act of 1974, these records contained therein may specifically be disclosed outside the DoD as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

To designated contractors, Federal agencies, and foreign governments for the purpose of granting Navy officials access to their facility.

The DoD 'Blanket Routine Uses' that appear at the beginning of the Navy's compilation of systems of records notices apply to this system.

**POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:**

**STORAGE:**

Paper records in file folders and electronic storage media.

**RETRIEVABILITY:**

Name, Social Security Number (SSN), biometric template, (fingerprints, face and iris scan), case number, company's name or other unique identifiers.

**SAFEGUARDS:**

Access is provided on a need-to-know basis only. Manual records are maintained in file cabinets under the control of authorized personnel during working hours. The office space in which the file cabinets are located is locked outside of official working hours. Computer terminals are located in supervised areas. Access is controlled by password or other user code system.

Computerized records maintained in a controlled area are accessible only to authorized personnel. Records are maintained in a controlled facility. Physical entry is restricted by the use of locks, guards, and is accessible only to authorized personnel. Physical and electronic access is restricted to designated individuals having a need therefore in the performance of official duties and who are properly screened and cleared for need-to-know. Access is restricted only by authorized persons who are properly screened. These systems are password and/or Systems Software uses Primary Key Infrastructure (PKI)/Common Access Card (CAC) protected.

**RETENTION AND DISPOSAL:**

Badges and passes are destroyed three months after return to issuing office. Records of issuance are destroyed six months after new accountability system is established or one year after final disposition of each issuance record is entered in retention log or similar record, whichever is earlier. Visit request records are destroyed two years after final entry or two years after date of document, whichever is later.

**SYSTEM MANAGER(S) AND ADDRESS:**

*Navy Policy Official:* Program Manager, Commander, Navy Installations Command, 716 Sicard Street, SE., Suite 1000, Washington Navy Yard, DC 20374–5140.

*Marine Corps Policy Official:* Program Manager, Physical Security/Electronic Security Systems, Mission Assurance Branch, Security Division, Plans, Policies and Operations (PP&O), Headquarters, U.S. Marine Corps, 3000 Pentagon Room 4A324, Washington, DC 20350–3000.

*Record Holders:* Commanding officers of the U.S. Navy activity in question and/or local Provost Marshal's Office at U.S. Marine Corps installations/units. Official mailing addresses are published in the Standard Navy Distribution List that is available at *http://doni.daps.dla.mil/sndl.aspx.*

**NOTIFICATION PROCEDURE:**

Individuals seeking to determine whether information about themselves is contained in this system should address written inquiries to the Commanding officer of the activity in question. Official mailing addresses are published in the Standard Navy Distribution List that is available at *http://doni.daps.dla.mil/sndl.aspx.*

For verification purposes, individual should provide full name, Social Security Number (SSN), sufficient details to permit locating pertinent records and notarized signature. Failure to provide a notarized document may result in your request not being processed.

**RECORD ACCESS PROCEDURES:**

Individuals seeking access to records about themselves contained in this system should address written inquiries to the Commanding officer of the U.S. Navy activity in question or the local Provost Marshal's Office at U.S. Marine Corps installations/units. Official mailing addresses are published in the Standard Navy Distribution List that is available at *http://doni.daps.dla.mil/sndl.aspx.*

For verification purposes, individual should provide full name, Social

Security Number (SSN), sufficient details to permit locating pertinent records and notarized signature. Failure to provide a notarized document may result in your request not being processed.

**CONTESTING RECORD PROCEDURES:**

The Navy's rules for accessing records, and for contesting contents and appealing initial agency determinations are published in Secretary of the Navy Instruction 5211.5; 32 CFR part 701; or may be obtained from the system manager.

**RECORD SOURCE CATEGORIES:**

Individuals, Department of Defense, Department of Army, Department of the Air Force, Department of Navy, and U.S. Marine Corps security offices, system managers, computer facility managers, commercial businesses whose employees require access to the bases, visit requests, automated interfaces for user codes on file at Department of Defense sites.

**EXEMPTIONS CLAIMED FOR THE SYSTEM:**

None.

[FR Doc. 2010–10673 Filed 5–5–10; 8:45 am]

**BILLING CODE 5001–06–P**

## DEPARTMENT OF EDUCATION

### Notice of Proposed Information Collection Requests

**AGENCY:** Department of Education.

**SUMMARY:** The Acting Director, Information Collection Clearance Division, Regulatory Information Management Services, Office of Management, invites comments on the proposed information collection requests as required by the Paperwork Reduction Act of 1995.

**DATES:** Interested persons are invited to submit comments on or before July 6, 2010.

**SUPPLEMENTARY INFORMATION:** Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) requires that the Office of Management and Budget (OMB) provide interested Federal agencies and the public an early opportunity to comment on information collection requests. OMB may amend or waive the requirement for public consultation to the extent that public participation in the approval process would defeat the purpose of the information collection, violate State or Federal law, or substantially interfere with any agency's ability to perform its statutory obligations. The Acting Director, Information Collection Clearance Division, Regulatory Information Management Services, Office of Management, publishes that notice containing proposed information collection requests prior to submission of these requests to OMB. Each proposed information collection, grouped by office, contains the following: (1) Type of review requested, *e.g.* new, revision, extension, existing or reinstatement; (2) Title; (3) Summary of the collection; (4) Description of the need for, and proposed use of, the information; (5) Respondents and frequency of collection; and (6) Reporting and/or Recordkeeping burden. OMB invites public comment.

The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology.

Dated: May 3, 2010.

**Stephanie Valentine,**

*Acting Director, Information Collection Clearance Division, Regulatory Information Management Services, Office of Management.*

**Institute of Education Sciences**

*Type of Review:* New.

*Title:* Common Core of Data—Teacher Compensation Survey (TCS): 2010–2013.

*Frequency:* Annually.

*Affected Public:* State, Local, or Tribal Gov't, SEAs or LEAs.

*Reporting and Recordkeeping Hour Burden:*

*Responses:* 30.

*Burden Hours:* 2,580.

*Abstract:* National data on teachers are limited to periodic sample surveys or to simple counts at the district or school level. In response to the need for individual teacher-level data, the National Center for Education Statistics (NCES) developed the Teacher Compensation Survey (TCS), an administrative records survey that collects total compensation, teacher status, and demographic data about individual teachers from multiple states. In 2007, NCES launched the pilot TCS data collection, with seven states volunteering to provide administrative records for school year (SY) 2005–06. In the second year of the data collection, the TCS expanded to 17 states reporting SY 2006–07 data. The information collected from these records included base salary, total salary, benefits, highest level of education, years of teaching experience, gender, and race/ethnicity for each teacher. The TCS file can be merged with the Common Core of Data (CCD) Public Elementary/Secondary School Universe Survey file to obtain such school information as school type, operational status, locale code, number of students eligible for free and reduced-price lunch, student enrollment by grade, race/ethnicity, and gender, and pupil/teacher ratio. NCES will continue to request data from more states and to make the data more comparable across states. It is anticipated that up to thirty-five states will volunteer to participate in the TCS from 2010 to 2013.

Requests for copies of the proposed information collection request may be accessed from *http://edicsweb.ed.gov,* by selecting the "Browse Pending Collections" link and by clicking on link number 4288. When you access the information collection, click on "Download Attachments" to view. Written requests for information should be addressed to U.S. Department of Education, 400 Maryland Avenue, SW., LBJ, Washington, DC 20202–4537. Requests may also be electronically mailed to *ICDocketMgr@ed.gov* or faxed to 202–401–0920. Please specify the complete title of the information collection when making your request.

Comments regarding burden and/or the collection activity requirements should be electronically mailed to *ICDocketMgr@ed.gov.* Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

[FR Doc. 2010–10712 Filed 5–5–10; 8:45 am]

**BILLING CODE 4000–01–P**

## DEPARTMENT OF EDUCATION

### Submission for OMB Review; Comment Request

**AGENCY:** Department of Education.

**SUMMARY:** The Acting Director, Information Collection Clearance Division, Regulatory Information Management Services, Office of Management invites comments on the submission for OMB review as required by the Paperwork Reduction Act of 1995.

**DATES:** Interested persons are invited to submit comments on or before July 6, 2010.

**ADDRESSES:** Written comments should be addressed to the Office of Information and Regulatory Affairs,

*Attention:* Education Desk Officer, Office of Management and Budget, 725 17th Street, NW., Room 10222, New Executive Office Building, Washington, DC 20503, be faxed to (202) 395–5806 or e-mailed to *oira_submission@omb.eop.gov* with a cc: to *ICDocketMgr@ed.gov.*

**SUPPLEMENTARY INFORMATION:** Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) requires that the Office of Management and Budget (OMB) provide interested Federal agencies and the public an early opportunity to comment on information collection requests. OMB may amend or waive the requirement for public consultation to the extent that public participation in the approval process would defeat the purpose of the information collection, violate State or Federal law, or substantially interfere with any agency's ability to perform its statutory obligations. The Acting Director, Information Collection Clearance Division, Regulatory Information Management Services, Office of Management, publishes that notice containing proposed information collection requests prior to submission of these requests to OMB. Each proposed information collection, grouped by office, contains the following: (1) Type of review requested, *e.g.* new, revision, extension, existing or reinstatement; (2) Title; (3) Summary of the collection; (4) Description of the need for, and proposed use of, the information; (5) Respondents and frequency of collection; and (6) Reporting and/or Recordkeeping burden. OMB invites public comment.

Dated: May 3, 2010.

**Stephanie Valentine,**

*Acting Director, Information Collection Clearance Division, Regulatory Information Management Services, Office of Management.*

**Institute of Education Sciences**

*Type of Review:* Extension.
*Title:* Impact Study: Lessons in Character Program.
*Frequency:* One time.
*Affected Public:* Individuals or household: State, Local, or Tribal Gov't, SEAs or LEAs.
*Reporting and Recordkeeping Hour Burden:*
*Responses:* 34,906.
*Burden Hours:* 15,460.

*Abstract:* This OMB package requests clearance for data collection instruments to be used in a four-year evaluation of Lessons in Character (LIC) program. This study is based on an experimental design that utilizes the random assignment. LIC is an English Language Arts (ELA)-based character education curriculum that is expected to have positive impacts on student academic performance, attendance, school motivation, and endorsement of universal values consistent with character education. The evaluation will be conducted by REL West, one of the National Regional Education Laboratories administered by the Institute of Education Sciences of the U.S. Department of Education. Evaluation measures include student archived data (e.g., state mandated standardized test scores); follow-up surveys for students; teacher and parent rating/observation on various student aspects (e.g., student social skills); baseline and follow-up surveys for teachers; and teacher/administrator interviews. Baseline data collection will take place in 2007; follow-up data collection will take place in 2008, 2009, and 2010.

Requests for copies of the information collection submission for OMB review may be accessed from *http://edicsweb.ed.gov,* by selecting the "Browse Pending Collections" link and by clicking on link number 4220. When you access the information collection, click on "Download Attachments " to view. Written requests for information should be addressed to U.S. Department of Education, 400 Maryland Avenue, SW., LBJ, Washington, DC 20202–4537. Requests may also be electronically mailed to the Internet address *ICDocketMgr@ed.gov* or faxed to 202–401–0920. Please specify the complete title of the information collection when making your request.

Comments regarding burden and/or the collection activity requirements should be electronically mailed to *ICDocketMgr@ed.gov.* Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

[FR Doc. 2010–10714 Filed 5–5–10; 8:45 am]

**BILLING CODE 4000–01–P**

## DEPARTMENT OF EDUCATION

### Notice of Proposed Information Collection Requests

**AGENCY:** Department of Education.

**SUMMARY:** The Acting Director, Information Collection Clearance Division, Regulatory Information Management Services, Office of Management, invites comments on the proposed information collection requests as required by the Paperwork Reduction Act of 1995.

**DATES:** Interested persons are invited to submit comments on or before July 6, 2010.

**SUPPLEMENTARY INFORMATION:** Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) requires that the Office of Management and Budget (OMB) provide interested Federal agencies and the public an early opportunity to comment on information collection requests. OMB may amend or waive the requirement for public consultation to the extent that public participation in the approval process would defeat the purpose of the information collection, violate State or Federal law, or substantially interfere with any agency's ability to perform its statutory obligations. The Acting Director, Information Collection Clearance Division, Regulatory Information Management Services, Office of Management, publishes that notice containing proposed information collection requests prior to submission of these requests to OMB. Each proposed information collection, grouped by office, contains the following: (1) Type of review requested, *e.g.* new, revision, extension, existing or reinstatement; (2) Title; (3) Summary of the collection; (4) Description of the need for, and proposed use of, the information; (5) Respondents and frequency of collection; and (6) Reporting and/or Recordkeeping burden. OMB invites public comment.

The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology.

Dated: May 3, 2010.

**Stephanie Valentine,**

*Acting Director, Information Collection Clearance Division, Regulatory Information Management Services, Office of Management.*

**Institute of Education Sciences**

*Type of Review:* Reinstatement.
*Title:* Education Longitudinal Study (ELS) 2002 Third Follow-up 2011 Field Test Batch Tracing.
*Frequency:* Annually.
*Affected Public:* Individuals or household.
*Reporting and Recordkeeping Hour Burden:*

*Responses:* 6,692.

*Burden Hours:* 558.

*Abstract:* The Education Longitudinal Study of 2002 (ELS:2002) is a nationally representative longitudinal study of two high school grade cohorts (spring 2002 tenth-graders and spring 2004 twelfth-graders) comprising over 16,000 sample members. The study focuses on achievement growth, and its correlates, in the high school years; the family and school social context of secondary education; and transitions from high school to postsecondary education and/or the labor market. Major issues for the postsecondary years include postsecondary educational access and choice, and persistence and baccalaureate and sub-baccalaureate attainment, as well as the work experiences of the non-college-bound, and other markers of adult status, such as family formation and civic participation. Data collections took place in 2002, 2004, 2006 (two years out of high school), and now a final data collection will take place in 2012, when most sample members are around 26 years of age. This submission requests OMB's approval for batch tracing for the third follow-up 2011 field test and 2012 full scale respondents.

Requests for copies of the proposed information collection request may be accessed from *http://edicsweb.ed.gov,* by selecting the "Browse Pending Collections" link and by clicking on link number 4292. When you access the information collection, click on "Download Attachments" to view. Written requests for information should be addressed to U.S. Department of Education, 400 Maryland Avenue, SW., LBJ, Washington, DC 20202–4537. Requests may also be electronically mailed to *ICDocketMgr@ed.gov* or faxed to 202–401–0920. Please specify the complete title of the information collection when making your request.

Comments regarding burden and/or the collection activity requirements should be electronically mailed to *ICDocketMgr@ed.gov.* Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

[FR Doc. 2010–10713 Filed 5–5–10; 8:45 am]

**BILLING CODE 4000–01–P**

## DEPARTMENT OF ENERGY

## Federal Energy Regulatory Commission

**[ Docket No. CP10–152–000]**

## Columbia Gas Transmission, LLC, and D&B Resources; Notice of Application

April 28, 2010.

Take notice that on April 22, 2010, Columbia Gas Transmission, LLC (Columbia Gas) 5151 San Felipe, Suite 2500, Houston, Texas 77056, and D&B Resources (D&B), Rt. 4 Box 232, Cameron, West Virginia 26033, filed with the Commission a joint application under section 7(b) of the Natural Gas Act (NGA) for authorization for Columbia Gas to abandon by sale to D&B certain storage and pipeline facilities located in Greene County, Pennsylvania. Applicants also request a determination that upon abandonment, D&B's ownership and operation of the subject facilities will be exempt from the Commission's jurisdiction under section 1(b) of the NGA, all as more fully set forth in the application which is on file with the Commission and open to public inspection. This filing is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the "eLibrary" link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC at *FERCOnlineSupport@ferc.gov* or call toll-free, (886) 208–3676 or TYY, (202) 502–8659.

Any questions regarding the petition should be directed to Fredric J. George, Senior Counsel Columbia Gas Transmission, LLC, P.O. Box 1273, Charleston, West Virginia 25325; telephone (304) 357–2359, fax (304) 357–3206, or Steven T. Taylor, Esquire or Eric M. Gordon, Esquire, counsel for D&B Resources at 514 Seventh Street, Moundsville, West Virginia 26041; telephone (304) 845–9055.

There are two ways to become involved in the Commission's review of this project. First, any person wishing to obtain legal status by becoming a party to the proceedings for this project should, on or before the comment date stated below file with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, a motion to intervene in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.214 or 385.211) and the Regulations under the NGA (18 CFR 157.10). A person obtaining party status will be placed on the service list maintained by the Secretary of the Commission and will receive copies of all documents filed by the applicant and by all other parties. A party must submit 14 copies of filings made in the proceeding with the Commission and must mail a copy to the applicant and to every other party. Only parties to the proceeding can ask for court review of Commission orders in the proceeding.

However, a person does not have to intervene in order to have comments considered. The second way to participate is by filing with the Secretary of the Commission, as soon as possible, an original and two copies of comments in support of or in opposition to this project. The Commission will consider these comments in determining the appropriate action to be taken, but the filing of a comment alone will not serve to make the filer a party to the proceeding. The Commission's rules require that persons filing comments in opposition to the project provide copies of their protests only to the party or parties directly involved in the protest.

Persons who wish to comment only on the environmental review of this project should submit an original and two copies of their comments to the Secretary of the Commission. Environmental commentors will be placed on the Commission's environmental mailing list, will receive copies of the environmental documents, and will be notified of meetings associated with the Commission's environmental review process. Environmental commentors will not be required to serve copies of filed documents on all other parties. However, the non-party commentors will not receive copies of all documents filed by other parties or issued by the Commission (except for the mailing of environmental documents issued by the Commission) and will not have the right to seek court review of the Commission's final order.

The Commission strongly encourages electronic filings of comments, protests and interventions 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:* May 19, 2010.

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. 2010–10640 Filed 5–5–10; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Project No. 12717–002]**

### Northern Illinois Hydropower, LLC; Notice of Application Accepted for Filing and Soliciting Motions To Intervene and Protests

April 29, 2010.

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection.

a. *Type of Application:* Original Major License.

b. *Project No.:* 12717–002.

c. *Date filed:* May 27, 2009.

d. *Applicant:* Northern Illinois Hydropower, LLC.

e. *Name of Project:* Brandon Road Hydroelectric Project.

f. *Location:* U.S. Army Corps of Engineers Brandon Road Dam on the Des Plaines River, in the City of Joliet, Will County, Illinois.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C 791 (a)–825(r).

h. *Applicant Contact:* Damon Zdunich, Northern Illinois Hydropower, LLC, 801 Oakland Avenue, Joliet, IL 60435, (312) 320–1610.

i. *FERC Contact:* Dr. Nicholas Palso, (202) 502–8854 or nicholas.palso@ferc.gov.

j. *Deadline for filing motions to intervene and protests:* 60 days from the issuance date of this notice.

All documents may be filed electronically via the Internet. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site (*http://www.ferc.gov/docs-filing/ferconline.asp*) under the "eFiling" link. For a simpler method of submitting text only comments, click on "Quick Comment." For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov;* call toll-free at (866) 208–3676; or, for TTY, contact (202) 502–8659. Although the Commission strongly encourages electronic filing, documents may also be paper-filed. To paper-file, mail an original and eight copies to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

The Commission's Rules of Practice and Procedures require all intervenors filing documents with the Commission to serve a copy of that document on each person on the official service list for the project. Further, if an intervenor files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency.

k. This application has been accepted for filing, but is not ready for environmental analysis at this time.

l. *Project Description:* The Brandon Road Hydroelectric Project would utilize the Corps of Engineer's existing Brandon Road Dam and reservoir and would consist of: (1) A new 90-foot-by 118-foot concrete powerhouse between headgate sections 1 through 4 immediately below the existing dam containing two S-type turbine generator units with a combined installed capacity of 10.2 MW; (2) one 50-foot by 50-foot switchyard adjacent to the west side of the proposed powerhouse; (3) a new one-mile-long, 34.5-kilovolt transmission line; and (4) appurtenant facilities. The project would have an average annual generation of about 59,100 megawatt-hours.

m. A copy of the application is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the "eLibrary" link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC Online Support. A copy is also available for inspection and reproduction at the address in item h above.

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, contact FERC Online Support.

n. Any qualified applicant desiring to file a competing application must submit to the Commission, on or before the specified intervention deadline date, a competing development application, or a notice of intent to file such an application. Submission of a timely notice of intent allows an interested person to file the competing development application no later than 120 days after the specified intervention deadline date. Applications for preliminary permits will not be accepted in response to this notice.

A notice of intent must specify the exact name, business address, and telephone number of the prospective applicant, and must include an unequivocal statement of intent to submit a development application. A notice of intent must be served on the applicant(s) named in this public notice.

Anyone may submit a protest or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, 385.211, and 385.214. In determining the appropriate action to take, the Commission will consider all protests 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 protests or motions to intervene must be received on or before the specified deadline date for the particular application.

When the application is ready for environmental analysis, the Commission will issue a public notice requesting comments, recommendations, terms and conditions, and prescriptions.

All filings must (1) bear in all capital letters the title "PROTEST" or "MOTION TO INTERVENE," "NOTICE OF INTENT TO FILE COMPETING APPLICATION," or "COMPETING APPLICATION;" (2) set forth in the heading the name of the applicant and the project number of the application to which the filing responds; (3) furnish the name, address, and telephone number of the person protesting or intervening; and (4) otherwise comply with the requirements of 18 CFR 385.2001 through 385.2005. Agencies may obtain copies of the application directly from the applicant. A copy of any protest or motion to intervene must be served upon each representative of the applicant specified in the particular application.

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. 2010–10638 Filed 5–5–10; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

## Federal Energy Regulatory Commission

**[Project No. 12667–029]**

### City of Hamilton, Ohio American Municipal Power, Inc.; Notice of Application for Transfer of License and Soliciting Comments and Motions To Intervene

April 28, 2010.

On February 26, 2010, City of Hamilton, Ohio (Hamilton) and American Municipal Power, Inc. (AMP) filed an application for a partial transfer of license of the Meldahl Hydroelectric Project No. 12677. The project would be located at the U.S. Army Corps of Engineers' (Corps) Captain Anthony Meldahl Lock and Dam on the Ohio River, near the City of Augusta, Bracken County, Kentucky.

Applicants seek Commission approval to transfer the license for the Meldahl Project from Hamilton to Hamilton and AMP.

*Applicants' Contacts:* City of Hamilton—Mr. Mark Brandenburger, City Manager, City of Hamilton, 345 High Street, Hamilton, OH 45011–6071 (513) 785–7000 *e-mail: brandenb@ci.hamilton.oh.us.* American Municipal Power, Inc.—Mr. Mark S. Gerken, P.E., President and CEO, American Municipal Power, Inc., 1111 Schrock Road, Suite 100, Columbus, OH 43229, phone (614) 540–0855, *e-mail: mgerken@amppartners.org.*

*FERC Contact:* Patricia W. Gillis, (202) 502–8735.

*Deadline for filing comments and motions to intervene:* 30 days from the issuance of this notice. Comments and motions to intervene may be filed electronically via the Internet. *See* 18 CFR 385.2001(a)(1)(iii)(2009) 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–12667–029) in the docket number field to access the document. For assistance, call toll-free 1–866–208–3372.

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. 2010–10635 Filed 5–5–10; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

## Federal Energy Regulatory Commission

**[Docket No. PF10–7–000]**

### Questar Pipeline Company; Notice of Intent to Prepare an Environmental Assessment for the Planned Mainline 104 Expansion Project and Request for Comments on Environmental Issues

April 29, 2010.

The staff of the Federal Energy Regulatory Commission (FERC or Commission) will prepare an environmental assessment (EA) that will discuss the environmental impacts of the Mainline 104 Expansion Project, involving construction and operation of facilities by Questar Pipeline Company (Questar) in Uintah County, Utah. This EA will be used by the Commission in its decision-making process to determine whether the project is in the public convenience and necessity.

This notice announces the opening of the scoping process the Commission will use to gather input from the public and interested agencies on the project. Your input will help the Commission staff determine what issues need to be evaluated in the EA. Please note that the scoping period will close on May 29, 2010.

This notice is being sent to the Commission's current environmental mailing list for this project. State and local government representatives are asked to notify their constituents of this planned project and encourage them to comment on their areas of concern.

A fact sheet prepared by the FERC entitled "An Interstate Natural Gas Facility On My Land? What Do I Need To Know?" is available for viewing on the FERC Web site (*http://www.ferc.gov*). This fact sheet addresses a number of typically-asked questions, including the use of eminent domain and how to participate in the Commission's proceedings.

#### Summary of the Planned Project

Questar plans to construct and operate about 23.3 miles of 24-inch-diameter pipeline in Uintah County, Utah. The Mainline 104 Expansion Project would loop [1] the western end of Questar's existing Mainline 40 between its existing Green River Block Valve and its Fidlar Compressor Staiton. According to Questar, its project would allow existing shippers to amend the primary receipt-point capacity eastward to Fidlar.

*The Mainline 104 Expansion Project would consist of the following facilities:*

- 23.5 miles of 24-inch-diameter looping pipeline;
- four mainline block valves;
- two pig launchers/receivers; [2]
- six taps; and
- minor modifications at the existing Fidlar Compressor Station.

The general location of the project facilities is shown in appendix 1.[3]

#### Land Requirements for Construction

Construction of the planned facilities would disturb about 336 acres of land for the above ground facilities and the pipeline. Following construction, about 142 acres would be maintained for permanent operation of the project's facilities; the remaining acreage would be restored and allowed to revert to former uses. About 70 percent of the planned pipeline route parallels existing pipeline, utility, or road rights-of-way.

#### The EA Process

The National Environmental Policy Act (NEPA) requires the Commission to take into account the environmental impacts that could result from an action whenever it considers the issuance of a Certificate of Public Convenience and Necessity. NEPA also requires us [4] to discover and address concerns the public may have about proposals. This process is referred to as scoping. The main goal of the scoping process is to focus the analysis in the EA on the important environmental issues. By this notice, the Commission requests public comments on the scope of the issues to address in the EA. All comments received will be considered during the preparation of the EA.

*In the EA, we will discuss impacts that could occur as a result of the construction and operation of the*

[1] A pipeline loop is constructed parallel to an existing pipeline to increase capacity.

[2] A "pig" is a tool that is inserted into and moves through the pipeline, and is used for cleaning the pipeline, internal inspections, or other purposes.

[3] The appendices referenced in this notice are not being printed in the **Federal Register.** Copies of appendices were sent to all those receiving this notice in the mail and are available at *http://www.ferc.gov* using the link called "eLibrary" or from the Commission's Public Reference Room, 888 First Street, NE., Washington, DC 20426, or call (202) 502–8371. For instructions on connecting to eLibrary, refer to the last page of this notice.

[4] "We", "us", and "our" refer to the environmental staff of the Commission's Office of Energy Projects.

*planned project under these general headings:*

- Geology and soils;
- land use;
- water resources, fisheries, and wetlands;
- cultural resources;
- vegetation and wildlife;
- air quality and noise;
- endangered and threatened species; and
- public safety.

We will also evaluate possible alternatives to the planned project or portions of the project, and make recommendations on how to lessen or avoid impacts on the various resource areas.

Although no formal application has been filed, we have already initiated our NEPA review under the Commission's pre-filing process. The purpose of the pre-filing process is to encourage early involvement of interested stakeholders and to identify and resolve issues before an application is filed with the FERC. As part of our pre-filing review, we have begun to contact some federal and state agencies to discuss their involvement in the scoping process and the preparation of the EA.

Our independent analysis of the issues will be presented in the EA. The EA will be placed in the public record and, depending on the comments received during the scoping process, may be published and distributed to the public. A comment period will be allotted if the EA is published for review. We will consider all comments on the EA before we make our recommendations to the Commission. To ensure your comments are considered, please carefully follow the instructions in the Public Participation section beginning on page 4.

With this notice, we are asking agencies with jurisdiction and/or special expertise with respect to environmental issues to formally cooperate with us in the preparation of the EA. These agencies may choose to participate once they have evaluated the proposal relative to their responsibilities. Agencies that would like to request cooperating agency status should follow the instructions for filing comments provided under the Public Participation section of this notice. Currently, the U.S. Department of Interior's Bureau of Indian Affairs, Bureau of Land Management (BLM), and U.S. Fish and Wildlife Service have expressed their intention to participate as cooperating agencies in the preparation of the EA to satisfy their NEPA responsibilities related to this project.

**Consultations Under Section 106 of the National Historic Preservation Act**

In accordance with the Advisory Council on Historic Preservation's implementing regulations, we are using this notice to solicit the views of the public on the project's potential effects on historic properties.[5] We will document our findings on the impacts on cultural resources and summarize the status of consultations under section 106 of the National Historic Preservation Act in our EA.

**Currently Identified Environmental Issues**

We have already identified several issues that we think deserve attention based on a preliminary review of the planned facilities and the environmental information provided by Questar. This preliminary list of issues may be changed based on your comments and our analysis.

- Approach and crossing of the Green River;
- Crossing the Uintah and Ouray Reservation; and
- Crossing state and federal lands.

**Public Participation**

You can make a difference by providing us with your specific comments or concerns about the project. Your comments should focus on the potential environmental effects, reasonable alternatives, and measures to avoid or lessen environmental impacts. The more specific your comments, the more useful they will be. To ensure that your comments are timely and properly recorded, please send your comments so that they will be received in Washington, DC on or before May 29, 2010.

For your convenience, there are three methods you can use to submit your comments to the Commission. In all instances, please reference the project docket number PF10–7–000 with your submission. The Commission encourages electronic filing of comments and has expert eFiling staff available to assist you at (202) 502–8258 or *efiling@ferc.gov*.

(1) You may file your comments electronically by using the Quick Comment feature, which is located at *http://www.ferc.gov* under the link called "*Documents and Filings*". A Quick Comment is an easy method for interested persons to submit text-only comments on a project;

(2) You may file your comments electronically by using the "eFiling" feature that is listed under the "*Documents and Filings*" link. eFiling involves preparing your submission in the same manner as you would if filing on paper, and then saving the file on your computer's hard drive. You will attach that file to your submission. New eFiling users must first create an account by clicking on the links called "*Sign up*" or "*eRegister*". You will be asked to select the type of filing you are making. A comment on a particular project is considered a "Comment on a Filing"; or

(3) You may file a paper copy of your comments at the following address: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Room 1A, Washington, DC 20426.

**Environmental Mailing List**

The environmental mailing list includes federal, state, and local government representatives and agencies; elected officials; environmental and public interest groups; Native American Tribes; and local libraries and newspapers. This list includes all affected landowners (as defined in the Commission's regulations) who are potential right-of-way grantors, whose property may be used temporarily for project purposes, or who own homes within certain distances of aboveground facilities, and anyone who submits comments on the project. We will update the environmental mailing list as the analysis proceeds to ensure that we send the information related to this environmental review to all individuals, organizations, and government entities interested in and/or potentially affected by the planned project.

If the EA is published for distribution, copies will be sent to the environmental mailing list for public review and comment. If you would prefer to receive a paper copy of the document instead of the CD version or would like to remove your name from the mailing list, please return the attached Information Request (appendix 2).

**Becoming an Intervenor**

Once Questar files its application with the Commission, you may want to become an "intervenor" which is an official party to the Commission's proceeding. Intervenors play a more formal role in the process and are able to file briefs, appear at hearings, and be heard by the courts if they choose to appeal the Commission's final ruling.

[5] The Advisory Council on Historic Preservation's regulations are at Title 36 of the Code of Federal Regulations, Part 800. Historic properties are defined in those regulations as any prehistoric or historic district, site, building, structure, or object included in or eligible for inclusion in the National Register for Historic Places.

An intervenor formally participates in the proceeding by filing a request to intervene. Instructions for becoming an intervenor are included in the User's Guide under the "e-filing" link on the Commission's Web site. Please note that the Commission will not accept requests for intervenor status at this time. You must wait until a formal application for the project is filed with the Commission.

**Additional Information**

Additional information about the project is available from the Commission's Office of External Affairs, at (866) 208–FERC, or on the FERC Web site (*http://www.ferc.gov*) using the eLibrary link. Click on the eLibrary link, click on "General Search" and enter the docket number, excluding the last three digits in the Docket Number field (*i.e.,* PF10–7). Be sure you have selected an appropriate date range. For assistance, please contact FERC Online Support at *FercOnlineSupport@ferc.gov* or toll free at (866) 208–3676, or for TTY, contact (202) 502–8659. The eLibrary link also provides access to the texts of formal documents issued by the Commission, such as orders, notices, and rulemakings.

In addition, the Commission offers a free service called eSubscription which allows you to keep track of all formal issuances and submittals in specific dockets. This can reduce the amount of time you spend researching proceedings by automatically providing you with notification of these filings, document summaries, and direct links to the documents. Go to *http://www.ferc.gov/esubscribenow.htm.*

Finally, public meetings or site visits will be posted on the Commission's calendar located at *http://www.ferc.gov/EventCalendar/EventsList.aspx* along with other related information.

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. 2010–10641 Filed 5–5–10; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

## Federal Energy Regulatory Commission

**[Docket No. PR10–16–000]**

## Acacia Natural Gas Corporation; Notice of Baseline Filing

April 29, 2010.

Take notice that on April 27, 2010, Acacia Natural Gas Corporation (Acacia) submitted its baseline filing of its Statement of Operating Conditions for the interruptible transportation services provided under section 311(a)(2) of the Natural Gas Policy Act of 1978 (NGPA).

Any person desiring to participate in this rate proceeding must file a motion to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the date as indicated below. Anyone filing an intervention or protest must serve a copy of that document on the Applicant. Anyone filing an intervention or protest on or before the intervention or protest date need not serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the "eFiling" link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible online 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 Friday, May 7, 2010.

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. 2010–10642 Filed 5–5–10; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

## Federal Energy Regulatory Commission

**[Docket No. EL05–15–010]**

## Entergy Services, Inc.; Notice of Filing

April 29, 2010.

Take notice that on April 28, 2010, Entergy Services, Inc. filed a compliance refund report, pursuant to the Federal Energy Regulatory Commission's, *Order Conditionally Accepting Refund Report and Ordering Further Funds,* issued on January 8, 2010, *Arkansas Electric Cooperative Corp.* v. *Entergy Arkansas, Inc.* 130 FERC ¶ 61,020 (2010).

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. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant and all the parties in this proceeding.

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 May 19, 2010.

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. 2010–10637 Filed 5–5–10; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket No. ER10–1097–000]**

### PBF Power Marketing LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

April 28, 2010.

This is a supplemental notice in the above-referenced proceeding of PBF Power Marketing LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR Part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR Part 34, of future issuances of securities and assumptions of liability, is May 18, 2010.

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-referenced proceeding 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.

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. 2010–10634 Filed 5–5–10; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket No. ER10–1093–000]**

### Delaware City Refining Company LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

April 28, 2010.

This is a supplemental notice in the above-referenced proceeding of Delaware City Refining Company LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR Part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the applicant.

*Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR Part 34, of future issuances of securities and assumptions of liability, is May 18, 2010.*

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-referenced proceeding 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.

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. 2010–10633 Filed 5–5–10; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[ Project No. 13715–000]**

### Osprey III, LLC; Notice of Preliminary Permit Application Accepted for Filing and Soliciting Comments, Motions To Intervene, and Competing Applications

April 29, 2010.

On April 15, 2010, Osprey III, LLC filed an application, pursuant to section 4(f) of the Federal Power Act, proposing to study the feasibility of the Morgan Dam Hydroelectric Project (Morgan Dam Project), to be located on the Sebasticook River in the Town of Hartland, Somerset County, Maine.

*The proposed project would consist of:* (1) An existing 29-foot-high concrete dam containing three sluice gates with a 100-foot-long, 25-foot-high spillway; (2) the existing 1,728-acre Great Moose Lake; (3) a new powerhouse containing multiple turbine generator units with total installed capacity of 1.0 megawatts (MW); (4) a new transmission line connecting to an existing Central Maine Power distribution line located in the Town of Hartland; and (5) appurtenant facilities. The project would produce an estimated average annual generation of about 5,000 megawatt-hours, which would be sold directly to a local utility.

*Applicant Contact:* Mr. Hoon Won, 275 River Road, P.O. Box 202, Woolwich, Maine 04579, (207) 443–9747.

*FERC Contact:* John Ramer, (202) 502–8969.

*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–13715) in the docket number field to access the document. For assistance, call toll-free 1–866–208–3372.

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. 2010–10631 Filed 5–5–10; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Project No. 13709–000]**

### Osprey I, LLC; Notice of Preliminary Permit Application Accepted for Filing and Soliciting Comments, Motions To Intervene, and Competing Applications

April 29, 2010.

On April 9, 2010, Osprey I, LLC filed an application, pursuant to section 4(f) of the Federal Power Act, proposing to study the feasibility of the New Mills Dam Hydroelectric Project (New Mills Dam), to be located on the Cobbossecontee River in the Town of Gardiner, Kennebec County, Maine.

The proposed project would consist of: (1) An existing 12-foot-high, 91-foot-wide concrete dam with a 58-foot-wide spillway; (2) an existing 140-acre reservoir; (3) an existing powerhouse, penstock, and outlet structure; (4) new turbine generator units with a total installed capacity of 250 kilowatts (kW); (5) a new transmission line connecting to an existing Central Maine Power distribution line located 3,000 feet downstream of the dam; and (6) appurtenant facilities. The project would produce an estimated average annual generation of about 1,300 megawatt-hours, which would be sold directly to a local utility.

*Applicant Contact:* Mr. Hoon Won, 275 River Road, P.O. Box 202, Woolwich, Maine 04579, (207) 443–9747.

*FERC Contact:* John Ramer, (202) 502–8969.

*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–13709) in the docket number field to access the document. For assistance, call toll-free 1–866–208–3372.

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. 2010–10639 Filed 5–5–10; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket No. CP10–140–000]**

### Natural Gas Pipeline Company of America LLC; Notice of Request Under Blanket Authorization

April 29, 2010.

Take notice that on April 19, 2010, Natural Gas Pipeline Company of America LLC (Natural), 3250 Lacey Road, Suite 700, Downers Grove, Illinois 60515, filed in Docket No. CP10–140–000, an application pursuant to sections 157.205 and 157.208 of the Commission's Regulations under the Natural Gas Act (NGA) as amended, to make certain revisions and modifications to its Calumet No. 3 pipeline in Cook and Will Counties, Illinois, under Natural's blanket certificate issued in Docket No. CP82–402–000,[1] all as more fully set forth in the application which is on file with the Commission and open to the public for inspection.

Natural proposes replace approximately 1,200 feet of two 24-inch diameter pipes located under the Little Calumet River with 36-inch diameter pipe by horizontal directional drilling; remove, replace, or modify minor appurtenant facilities at various locations along the 45 miles of the Calumet No. 3 pipeline; and install pigging facilities at the east side of the Des Plaines River and at the 139th Street meter station. Natural states that it would cost approximately $11,000,000 to install the proposed facilities.

Any questions concerning this application may be directed to Bruce H. Newsome, Vice President, Regulatory Products and Services, Natural Gas Pipeline Company of America LLC, 3250 Lacey Road, 7th Floor, Downers Grove, Illinois 60515–7918, or via telephone at (630) 725–3070, or by e-mail *bruce_newsome@kindermorgan.com.*

This filing is available for review at the Commission or may be viewed on the Commission's Web site at *http://www.ferc.gov,* using the "eLibrary" link. Enter the docket number excluding the last three digits in the docket number filed to access the document. For assistance, please contact FERC Online Support at FERC *OnlineSupport@ferc.gov* or call toll-free at (866)206–3676, or, for TTY, contact (202)502–8659. Comments, protests and interventions may be filed electronically via the Internet in lieu of paper. *See,* 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the "e-Filing" link. The Commission strongly encourages intervenors to file electronically.

Any person or the Commission's staff may, within 60 days after issuance of the instant notice by the Commission, file pursuant to Rule 214 of the Commission's Procedural Rules (18 CFR 385.214) a motion to intervene or notice of intervention and pursuant to Section 157.205 of the regulations under the NGA (18 CFR 157.205), a protest to the request. If no protest is filed within the time allowed therefore, the proposed activity shall be deemed to be authorized effective the day after the time allowed for filing a protest. If a protest is filed and not withdrawn within 30 days after the allowed time for filing a protest, the instant request

[1] 20 FERC ¶ 62,415 (1982).

shall be treated as an application for authorization pursuant to Section 7 of the NGA.

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. 2010–10636 Filed 5–5–10; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket No. CP10–176–000]**

### Millennium Pipeline Company, LLC; Notice of Request Under Blanket Authorization

April 28, 2010.

Take notice that on April 23, 2010, Millenium Pipeline Company, LLC (Millennium), One Blue Hill Plaza, Seventh Floor, PO Box 1565, Pearl River, New York 10965 filed in Docket No. CP10–176–000, a prior notice request pursuant to sections 157.205 and 157.208 of the Commission's regulations under the Natural Gas Act (NGA). Millennium seeks authorization to increase the Commission-approved maximum allowable operating pressure (MAOP) on its Hickory Grove Lateral Line from 1072 pounds per square inch gage (psig) to 1200 psig. The Hickory Grove Lateral is located in Chemung County, New York and extends from Millennium's mainline facilities at a tie-in at Chambers Road near Horseheads, New York to an interconnection with the facilities of Southern Tier Transmission Company (STT) near Hickory Grove Road, in Horseheads, New York. Millennium proposes to perform these activities under its blanket certificate issued in Docket No. CP98–155–000 [97 FERC ¶ 61,292, at 62,327 (2001)], all as more fully set forth in the application which is on file with the Commission and open to public inspection.

Specifically, the facility at issue is approximately 2.6 mile, 12-inch lateral pipeline segment of Millenniums Line A–5 in Chemung County, New York, extending from Millennium's 30-inch mainline to an interconnect with STT at Hickory Grove in Horseheads, New York. The Hickory Grove Lateral was constructed in 1993 by Columbia Gas Transmission, LLC and the pipeline was originally designed, tested and qualified for an MAOP of 1236 psig in a Class Three Location under applicable Department of Transportation (DOT) regulations. The facilities were transferred to Millennium by certificate issued to Millennium in Docket No. CP98–150, *et al;* however, in Millenniums application the MAOP of the pipeline is listed at 1072 psig. The proposed increase to the Commission-approved MAOP of the Hickory Grove Lateral is being made to correct the apparent inconsistency between the Commission-approved MAOP and the MAOP at which Millennium intends to operate the segment. Recently, Anschulz Exploration Corporation (AEC) requested to connect certain gathering facilities to the Hickory Grove Lateral to allow a new supply of gas to flow through the Hickory Grove Lateral to Millennium's mainline system, which operates a 1200 psig. The increase in Commission-approved MAOP is required to receive local production gas, to be produced by AEC; and, increasing the Commission-approved MAOP corrects an apparent mistake in Millenniums original certificate application.

The filing may be viewed on the Web at *http://www.ferc.gov* using the "eLibrary" link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC at *FERCOnlineSupport@ferc.gov* or call toll-free, (886) 208–3676 or TYY, (202) 502–8659.

Any questions regarding this application may be directed to Gary A. Kruse, Vice President—General Counsel and Secretary, Millennium Pipeline Company, LLC, One Blue Hill Plaza, Seventh Floor, PO Box 1565, Pearl River, New York 10965, (845) 620–1300, or to Thomas E. Holmberg, Baker Botts LLP, 1299 Pennsylvania Avenue, NW., Washington, DC 20004, (202) 639–7700.

Any person or the Commission's Staff may, within 60 days after the issuance of the instant notice by the Commission, file pursuant to Rule 214 of the Commission's Procedural Rules (18 CFR 385.214) a motion to intervene or notice of intervention and, pursuant to section 157.205 of the Commission's Regulations under the NGA (18 CFR 157.205) a protest to the request. If no protest is filed within the time allowed therefore, the proposed activity shall be deemed to be authorized effective the day after the time allowed for protest. If a protest is filed and not withdrawn within 30 days after the time allowed for filing a protest, the instant request shall be treated as an application for authorization pursuant to section 7 of the NGA.

The Commission strongly encourages electronic filings of comments, protests, and interventions via the internet in lieu of paper. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site (*http://www.ferc.gov*) under the "e-Filing" link. 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.

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. 2010–10632 Filed 5–5–10; 8:45 am]

**BILLING CODE 6717–01–P**

## ENVIRONMENTAL PROTECTION AGENCY

**[EPA–R05–OAR–2008–0398; FRL–9145–9]**

### Adequacy Status of the Indianapolis, Indiana Submitted Annual Fine Particulate Matter Attainment Demonstration for Transportation Conformity Purposes

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

**ACTION:** Notice of adequacy.

**SUMMARY:** In this notice, EPA is notifying the public that we have found that the motor vehicle emissions budgets (MVEBs) for fine particulate matter ($PM_{2.5}$) and oxides of nitrogen (NOx) as a precursor to $PM_{2.5}$ in the Indianapolis, Indiana area are adequate for use in transportation conformity determinations. Indiana submitted the Indianapolis area budgets with the final $PM_{2.5}$ attainment demonstration submittal on June 5, 2008. As a result of our finding, the Indianapolis, Indiana area must use the MVEBs from the submitted $PM_{2.5}$ attainment demonstration plan for future transportation conformity determinations.

**DATES:** This finding is effective May 21, 2010.

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

**SUPPLEMENTARY INFORMATION:** Throughout this document, whenever "we", "us" or "our" is used, we mean EPA.

#### Background

Today's notice is simply an announcement of a finding that we have already made. On April 12, 2010, EPA Region 5 sent a letter to the Indiana Department of Environmental

Management stating that the 2002 and 2009 MVEBs for the Indianapolis, Indiana area, which were submitted with the state's $PM_{2.5}$ attainment demonstration, are adequate. Receipt of these MVEBs was announced on EPA's transportation conformity website with a 30 day public comment period, and no comments were submitted. The finding is available at EPA's conformity Web site: *http://www.epa.gov/otaq/stateresources/transconf/adequacy.htm.*

The adequate 2002 and 2009 MVEBs, in tons per year (tpy), for $PM_{2.5}$ and $NO_X$ for the Indianapolis, Indiana area are as follows:

INDIANAPOLIS, INDIANA

| | $PM_{2.5}$ (tpy) | $NO_X$ (tpy) |
|---|---|---|
| 2002 | 842.37 | 47,815.51 |
| 2009 | 518.43 | 28,537.23 |

Transportation conformity is required by section 176(c) of the Clean Air Act. EPA's conformity rule requires that transportation plans, programs, and projects conform to state air quality implementation plans and establishes the criteria and procedures for determining whether or not they do conform. Conformity to a State Implementation Plan (SIP) means that transportation activities will not produce new air quality violations, worsen existing violations, or delay timely attainment of the national ambient air quality standards.

The criteria by which we determine whether a SIP's motor vehicle emission budgets are adequate for transportation conformity purposes are outlined in 40 CFR 93.118(e)(4). We have described our process for determining the adequacy of submitted SIP budgets in our July 1, 2004, preamble starting at 69 FR 40038, and we used the information in these resources while making our adequacy determination. Please note that an adequacy review is separate from EPA's completeness review, and it also should not be used to prejudge EPA's ultimate approval of the SIP. Even if we find a budget adequate, the SIP could later be disapproved.

The finding and the response to comments are available at EPA's transportation conformity Web site: *http://www.epa.gov/otaq/stateresources/transconf/adequacy.htm.*

**Authority:** 42 U.S.C. 7401–7671 q.

Dated: April 26, 2010.

**Margaret Guerriero,**

*Acting Regional Administrator, Region 5.*

[FR Doc. 2010–10693 Filed 5–5–10; 8:45 am]

**BILLING CODE 6560–50–P**

## ENVIRONMENTAL PROTECTION AGENCY

**[EPA–R05–OAR–2009–0730; FRL–9146–1]**

## Adequacy Status of the Milwaukee-Racine, Door County, Manitowoc County, and Sheboygan County, Wisconsin Areas Submitted 8-Hour Ozone Redesignation and Maintenance Plans for Transportation Conformity Purposes

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

**ACTION:** Notice of adequacy.

**SUMMARY:** In this notice, EPA is notifying the public that we have found that the motor vehicle emissions budgets (MVEBs) for volatile organic compounds (VOCs) and oxides of nitrogen (NOx) in the Milwaukee-Racine area, Door County, Manitowoc County, and Sheboygan County, Wisconsin ozone nonattainment areas are adequate for use in transportation conformity determinations. Wisconsin submitted a redesignation request and maintenance plan for the Milwaukee-Racine area, Door County, Manitowoc County, and Sheboygan County, Wisconsin on September 11, 2009. As a result of our finding, these Wisconsin areas must use the MVEBs from the submitted ozone maintenance plan for future transportation conformity determinations.

**DATES:** This finding is effective May 21, 2010.

**FOR FURTHER INFORMATION CONTACT:** Michael Leslie, Environmental Engineer, Criteria Pollutant Section (AR–18J), Air Programs Branch, Air and Radiation Division, United States Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 353–6680, *leslie.michael@epa.gov.*

**SUPPLEMENTARY INFORMATION:** Throughout this document, whenever "we", "us" or "our" is used, we mean EPA.

### Background

Today's notice is simply an announcement of a finding that we have already made. On April 7, 2010, EPA Region 5 sent a letter to the Wisconsin Department of Natural Resources stating that the 2012 and 2020 MVEBs for the Milwaukee-Racine area, Door County, Manitowoc County, and Sheboygan County, Wisconsin 8-hour ozone areas are adequate. Receipt of these MVEBs was announced on EPA's transportation conformity Web site, and no comments were submitted. The finding is available at EPA's conformity Web site: *http://www.epa.gov/otaq/stateresources/transconf/adequacy.htm.*

The adequate 2012 and 2020 MVEBs, in tons per day (tpd), for VOCs and NOx for the Wisconsin areas are as follows:

| Area | 2012 | | 2020 | |
|---|---|---|---|---|
| | NOx (tpd) | VOCs (tpd) | NOx (tpd) | VOCs (tpd) |
| Milwaukee-Racine | 47.27 | 22.66 | 20.41 | 14.91 |
| Door County | 1.55 | 0.78 | 0.74 | 0.53 |
| Manitowoc County | 3.76 | 1.76 | 1.86 | 1.25 |
| Sheboygan County | 4.15 | 2.01 | 1.79 | 1.32 |

Transportation conformity is required by section 176(c) of the Clean Air Act. EPA's conformity rule requires that transportation plans, programs, and projects conform to state air quality implementation plans and establishes

the criteria and procedures for determining whether or not they do conform. Conformity to a State Implementation Plan (SIP) means that transportation activities will not produce new air quality violations, worsen existing violations, or delay timely attainment of the national ambient air quality standards.

The criteria by which we determine whether a SIP's MVEBs are adequate for transportation conformity purposes are outlined in 40 CFR 93.118(e)(4). We have described our process for determining the adequacy of submitted SIP budgets in our July 1, 2004, preamble starting at 69 FR 40038, and we used the information in these resources while making our adequacy determination. **Please note** that an adequacy review is separate from EPA's completeness review, and it also should not be used to prejudge EPA's ultimate approval of the SIP. Even if we find a budget adequate, the SIP could later be disapproved.

The finding and the response to comments are available at EPA's transportation conformity Web site: *http://www.epa.gov/otaq/stateresources/transconf/adequacy.htm.*

**Authority:** 42 U.S.C. 7401–7671 q.

Dated: April 26, 2010.

**Margaret Guerriero,**

*Acting Regional Administrator, Region 5.*

[FR Doc. 2010–10684 Filed 5–5–10; 8:45 am]

**BILLING CODE 6560–50–P**

## ENVIRONMENTAL PROTECTION AGENCY

**[EPA–HQ–OECA–2009–0395; FRL–9145–2]**

## Agency Information Collection Activities; Submission to OMB for Review and Approval; Comment Request; NESHAP for Mineral Wool Production (Renewal), EPA ICR Number 1799.05, OMB Control Number 2060–0362

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

**ACTION:** Notice.

**SUMMARY:** In compliance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), this document announces that an Information Collection Request (ICR) has been forwarded to the Office of Management and Budget (OMB) for review and approval. This is a request to renew an existing approved collection. The ICR which is abstracted below describes the nature of the collection and the estimated burden and cost.

**DATES:** Additional comments may be submitted on or before June 7, 2010.

**ADDRESSES:** Submit your comments, referencing docket ID number EPA–HQ–OECA–2009–0395 to (1) EPA online using *www.regulations.gov* (our preferred method), or by e-mail to *docket.oeca@epa.gov,* or by mail to: EPA Docket Center (EPA/DC), Environmental Protection Agency, Enforcement and Compliance Docket and Information Center, mail code 28221T, 1200 Pennsylvania Avenue, NW., Washington, DC 20460, and (2) OMB at: Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Attention: Desk Officer for EPA, 725 17th Street, NW., Washington, DC 20503.

**FOR FURTHER INFORMATION CONTACT:** Learia Williams, Compliance Assessment and Media Programs Division, Office of Compliance, Mail Code 2223A, Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Washington, DC 20460; *telephone number:* (202) 564–4113; *fax number:* (202) 564–0050; e-mail address: *williams.learia@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 July 8, 2009 (74 *FR* 32581), EPA sought comments on this ICR pursuant to 5 CFR 1320.8(d). EPA received no comments. Any additional comments on this ICR should be submitted to EPA and OMB within 30 days of this notice.

EPA has established a public docket for this ICR under docket ID number EPA–HQ–OECA–2009–0395, which is available for public viewing online at *http://www.regulations.gov,* in person viewing at the Enforcement and Compliance Docket in the EPA Docket Center (EPA/DC), EPA West, Room 3334, 1301 Constitution Avenue, NW., Washington, DC. The EPA Docket Center Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Reading Room is (202) 566–1744, and the telephone number for the Enforcement and Compliance Docket is (202) 566–1752.

Use EPA's electronic docket and comment system at *http://www.regulations.gov,* to submit or view public comments, access the index listing of the contents of the docket, and to access those documents in the docket that are available electronically. Once in the system, select "docket search," then key in the docket ID number identified above. Please note that EPA's policy is that public comments, whether submitted electronically or in paper will be made available for public viewing at *http://www.regulations.gov,* as EPA receives them and without change, unless the comment contains copyrighted material, Confidential Business Information (CBI), or other information whose public disclosure is restricted by statute. For further information about the electronic docket, go to *http://www.regulations.gov.*

*Title:* NESHAP for Mineral Wool Production (Renewal).

*ICR Numbers:* EPA ICR Number 1799.05, OMB Control Number 2060–0362.

*ICR Status:* This ICR is scheduled to expire on June 30, 2010. Under OMB regulations, the Agency may continue to conduct or sponsor the collection of information while this submission is pending at OMB. An Agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in title 40 of the CFR, after appearing in the **Federal Register** when approved, are listed in 40 CFR part 9, and displayed either by publication in the **Federal Register** or by other appropriate means, such as on the related collection instrument or form, if applicable. The display of OMB control numbers in certain EPA regulations is consolidated in 40 CFR part 9.

*Abstract:* The National Emission Standards for Hazardous Air Pollutants (NESHAP) for Mineral Wool Production (40 CFR part 63, subpart DDD) were proposed on May 8, 1997, and promulgated on June 1, 1999. Owners/operators of mineral wool production plants are required to install fabric filter bag leak detection systems and then initiate corrective action procedures in the event of an operating problem. Owners/operators subject to NESHAP subpart DDD must also continuously monitor and record: (1) The operating temperature of each thermal incinerator; (2) cupola production (melt) rate; and (3) for each curing oven, the formaldehyde content of each binder formulation used to manufacture bonded products.

Owners/operators of affected mineral wool production facility must submit initial notifications (where applicable), performance test and periodic reports. Owners or operators are also required to maintain records of the occurrence and duration of any startup, shutdown, or malfunction in the operation of an affected facility, or any period during which the monitoring system is inoperative. Semiannual reports are also required. These notifications, reports,

and records are essential in determining compliance; and are required, in general, of all sources subject to NESHAP.

Any owner or operator subject to the provisions of this part shall maintain a file of these measurements, and retain the records for at least five years following the date of such measurements and records. These notifications, reports, and records are essential in determining compliance; and are required, in general, of all sources subject to NESHAP.

All reports are sent to the delegated state or local authority. In the event that there is no such delegated authority, the reports are sent directly to the EPA regional office. This information is being collected to assure compliance with 40 CFR part 63, subpart DDD, as authorized in sections 112 and 114(a) of the Clean Air Act. The required information consists of emissions data and other information that have been determined to be private.

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 Number for EPA regulations listed in 40 CFR part 9 and 48 CFR chapter 15, are identified on the form and/or instrument, if applicable.

*Burden Statement:* The annual public reporting and recordkeeping burden for this collection of information, estimated to average 132 hours per response. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose, and 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. All existing ways will have to adjust to comply with any previously applicable instructions and requirements that 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:* Mineral wool production.

*Estimated Number of Respondents:* 6.

*Frequency of Response:* Initially, and semiannually.

*Estimated Total Annual Hour Burden:* 1,581.

*Estimated Total Annual Cost:* $153,169, which includes $148,669 in labor costs, no capital/startup costs, and $4,500 in operation and maintenance (O&M) costs.

*Changes in the Estimates:* There is a change in this ICR as compared to the previous one. Based on our discussions with the mineral wool production industry representative, the decrease is due to the closures of a number of facilities that the industry has been experiencing. There is no growth anticipated in the mineral wool production industry over the next three years.

There is a decrease in the capital/startup and operations and maintenance (O&M) costs from the previous ICR, which is also due to the decrease in the number of mineral wool production facilities.

Dated: April 29, 2010.

**John Moses,**

*Director, Collection Strategies Division.*

[FR Doc. 2010–10653 Filed 5–5–10; 8:45 am]

**BILLING CODE 6560–50–P**

## ENVIRONMENTAL PROTECTION AGENCY

**[FRL–9146–3]**

## Proposed Consent Decree, Clean Air Act Citizen Suit

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

**ACTION:** Notice of Proposed Consent Decree; Request for Public Comment.

**SUMMARY:** In accordance with section 113(g) of the Clean Air Act, as amended (“CAA”), 42 U.S.C. 7413(g), notice is hereby given of a proposed consent decree, to address a lawsuit filed by Sierra Club and WildEarth Guardians in the United States District Court for the District of Columbia: *Sierra Club, et al.* v. *Jackson,* No. 1:10–cv–133–(PLF) (D. DC). On January 27, 2010, Plaintiffs filed an amended complaint to compel EPA to take final action on the State Implementation Plan (“SIP”) infrastructure submittals for Maine, Rhode Island, Connecticut, New Hampshire, Alabama, Kentucky, Mississippi, South Carolina, Wisconsin, Indiana, Michigan, Ohio, Louisiana, Kansas, Nebraska, Missouri, Colorado, Montana, South Dakota, Utah, and Wyoming with regard to the 1997 8-hour ozone National Ambient Air Quality Standards (“NAAQS”) as required by section 110(k)(2) of the CAA. Under the terms of the proposed consent decree, EPA has agreed to take final action no later than April 29, 2011.

**DATES:** Written comments on the proposed consent decree must be received by *June 7, 2010.*

**ADDRESSES:** Submit your comments, identified by Docket ID number EPA–HQ–OGC–2010–0419, online at *http://www.regulations.gov* (EPA’s preferred method); by e-mail to *oei.docket@epa.gov;* mailed to EPA Docket Center, Environmental Protection Agency, Mailcode: 2822T, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; or by hand delivery or courier to EPA Docket Center, EPA West, Room 3334, 1301 Constitution Ave., NW., Washington, DC, between 8:30 a.m. and 4:30 p.m. Monday through Friday, excluding legal holidays. Comments on a disk or CD–ROM should be formatted in Word or ASCII file, avoiding the use of special characters and any form of encryption, and may be mailed to the mailing address above.

**FOR FURTHER INFORMATION CONTACT:** Geoffrey L. Wilcox, Air and Radiation Law Office (2344A), Office of General Counsel, U.S. Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; *telephone:* (202) 564–5601; fax number (202) 564–5603; *e-mail address: branning.amy@epa.gov.*

**SUPPLEMENTARY INFORMATION:**

### I. Additional Information About the Proposed Consent Decree

The proposed consent decree establishes a deadline of April 29, 2011 for the Administrator to sign a notice or notices, pursuant to section 110(k)(2) of the CAA, either approving, disapproving, or approving in part and disapproving in part, the 1997 8-hour ozone NAAQS Infrastructure SIPS for Maine, Rhode Island, Connecticut, New Hampshire, Alabama, Kentucky, Mississippi, South Carolina, Wisconsin, Indiana, Michigan, Ohio, Louisiana, Kansas, Nebraska, Missouri, Colorado, Montana, South Dakota, Utah, and Wyoming.

In addition, the proposed consent decree states that within fifteen (15) business days following signature of such action, EPA shall deliver notice of such action to the Office of the **Federal Register** for publication. The proposed consent decree also states that after EPA’s demonstration that it has satisfied all of the obligations under the decree, it may move to have this decree terminated.

For a period of thirty (30) days following the date of publication of this notice, the Agency will accept written comments relating to the proposed consent decree from persons who were not named as parties or intervenors to

the litigation in question. EPA or the Department of Justice may withdraw or withhold consent to the proposed consent decree if the comments disclose facts or considerations that indicate that such consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the Act. Unless EPA or the Department of Justice determines, based on any comment submitted, that consent to this consent decree should be withdrawn, the terms of the decree will be affirmed.

**II. Additional Information About Commenting on the Proposed Consent Decree**

*A. How can I get a copy of the consent decree?*

The official public docket for this action (identified by Docket ID No. EPA–HQ–OGC–2010–0419) contains a copy of the proposed consent decree. The official public docket is available for public viewing at the Office of Environmental Information (OEI) Docket in the EPA Docket Center, EPA West, Room 3334, 1301 Constitution Ave., NW., Washington, DC. The EPA Docket Center Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the OEI Docket is (202) 566–1752.

An electronic version of the public docket is available through *http://www.regulations.gov.* You may use the *http://www.regulations.gov* to submit or view public comments, access the index listing of the contents of the official public docket, and to access those documents in the public docket that are available electronically. Once in the system, key in the appropriate docket identification number then select "search".

It is important to note that EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing online at *http://www.regulations.gov* without change, unless the comment contains copyrighted material, CBI, or other information whose disclosure is restricted by statute. Information claimed as CBI and other information whose disclosure is restricted by statute is not included in the official public docket or in the electronic public docket. EPA's policy is that copyrighted material, including copyrighted material contained in a public comment, will not be placed in EPA's electronic public docket but will be available only in printed, paper form in the official public docket. Although not all docket materials may be available electronically, you may still access any of the publicly available docket materials through the EPA Docket Center.

*B. How and to whom do I submit comments?*

You may submit comments as provided in the **ADDRESSES** section. Please ensure that your comments are submitted within the specified comment period. Comments received after the close of the comment period will be marked "late." EPA is not required to consider these late comments.

If you submit an electronic comment, EPA recommends that you include your name, mailing address, and an e-mail address or other contact information in the body of your comment and with any disk or CD ROM you submit. This ensures that you can be identified as the submitter of the comment and allows EPA to contact you in case EPA cannot read your comment due to technical difficulties or needs further information on the substance of your comment. Any identifying or contact information provided in the body of a comment will be included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket. 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.

Use of the *http://www.regulations.gov* Web site to submit comments to EPA electronically is EPA's preferred method for receiving comments. The electronic public docket system is an "anonymous access" system, which means EPA will not know your identity, e-mail address, or other contact information unless you provide it in the body of your comment. In contrast to EPA's electronic public docket, EPA's electronic mail (e-mail) system is not an "anonymous access" system. If you send an e-mail comment directly to the Docket without going through *http://www.regulations.gov,* your e-mail address is automatically captured and included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket.

Dated: April 30, 2010.

**Richard B. Ossias,**

*Associate General Counsel.*

[FR Doc. 2010–10686 Filed 5–5–10; 8:45 am]

**BILLING CODE 6560–50–P**

## ENVIRONMENTAL PROTECTION AGENCY

**[FRL–9146–2]**

### Proposed Consent Decree, Clean Air Act Citizen Suit; Correction

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

**ACTION:** Notice of Proposed Consent Decree; Request for Public Comment; Correction.

**SUMMARY:** The Environmental Protection Agency published a document in the **Federal Register** on April 30, 2010, concerning request for comments on a proposed consent decree to address a lawsuit filed by Sierra Club in the United States District Court for the Western District of Wisconsin: *Sierra Club* v. *Jackson,* No. 09–cv–0751 (W.D. WI). The document did not include the docket identification number for this action.

**FOR FURTHER INFORMATION CONTACT:** Amy Branning, Air and Radiation Law Office (2344A), Office of General Counsel, U.S. Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone: (202) 564–1744; fax number (202) 564–5603; e-mail address: *branning.amy@epa.gov.*

*Correction:* In the **Federal Register** of April 30, 2010, in FR Doc. 2010–10149, on page 22786, in the second and third columns, correct the docket identification number to read: Docket ID No. EPA–HQ–OGC–2010–0399.

Dated: April 30, 2010.

**Richard B. Ossias,**

*Associate General Counsel.*

[FR Doc. 2010–10681 Filed 5–5–10; 8:45 am]

**BILLING CODE 6560–50–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 June 1, 2010.

**A. Federal Reserve Bank of St. Louis** (Glenda Wilson, Community Affairs Officer) 411 Locust Street, St. Louis, Missouri 63166-2034:

*1. Soteria Financial Group, Inc., Henderson, Kentucky;* to become a bank holding company by acquiring 100 percent of The Bank of Henderson, Inc., Henderson, Kentucky.

**B. Federal Reserve Bank of San Francisco** (Kenneth Binning, Vice President, Applications and Enforcement) 101 Market Street, San Francisco, California 94105-1579:

*1. U and I Financial Corporation., Lynnwood, Washington;* to become a Bank Holding Company by acquiring 100 percent of UniBank, of Lynnwood, Washington.

Board of Governors of the Federal Reserve System, May 3, 2010.

**Robert deV. Frierson,**

*Deputy Secretary of the Board.*

[FR Doc. 2010–10666 Filed 5–5–10; 8:45 am]

**BILLING CODE 6210–01–S**

## FEDERAL TRADE COMMISSION

### Granting of Request for Early Termination of the Waiting Period Under the Premerger Notification Rules

Section 7A of the Clayton Act, 15 U.S.C. 18a, as added by Title II of the Hart-ScottRodino Antitrust Improvements Act of 1976, requires persons contemplating certain mergers or acquisitions to give the Federal Trade Commission and the Assistant Attorney General advance notice and to wait designated periods before consummation of such plans. Section 7A(b)(2) of the Act permits the agencies, in individual cases, to terminate this waiting period prior to its expiration and requires that notice of this action be published in the **Federal Register**.

The following transactions were granted early termination of the waiting period provided by law and the premerger notification rules. The grants were made by the Federal Trade Commission and the Assistant Attorney General for the Antitrust Division of the Department of Justice. Neither agency intends to take any action with respect to these proposed acquisitions during the applicable waiting period.

TRANSACTION GRANTED EARLY TERMINATION

| ET Date | Trans No. | ET Req status | Party name |
|---|---|---|---|
| 01–MAR–10 | 20100424 | G | New Mountain Partners III, L.P. |
| | | G | Francisco Partners, L.P. |
| | | G | RedPrairie Holdings, Inc. |
| 02–MAR–10 | 20090638 | G | Carlyle Partners IV, L.P. |
| | | G | Welsh, Carson, Anderson & Stowe VIII, LP. |
| | | G | Viant Holdings, Inc. |
| | 20090639 | G | Welsh, Carson, Anderson & Stowe VIII, L.P. |
| | | G | Carlyle Partners IV, L.P. |
| | | G | Holdco. |
| | 20100416 | G | CME Group Inc. |
| | | G | CIMD Holdings, LLC. |
| | | G | CIMD Holdings, LLC. |
| 03–MAR–10 | 20090223 | Y | Essilor international (Compagnie Generale d'Optique) S.A. |
| | | Y | Armorlite S.p.A. |
| | | Y | Signet Armorlite, Inc. |
| 05–MAR–10 | 20100432 | G | Fidelity National Information Services, Inc. |
| | | G | Marshall & Ilsley Corporation. |
| | | G | M&I Marshall & Ilsley Bank. |
| | 20100436 | G | SSI Pooling, LP. |
| | | G | SkillSoft PLC. |
| | | G | SkillSoft PLC. |
| 08–MAR–10 | 20100320 | G | Morgan Stanley Infrastructure Partners A Sub LP. |
| | | G | NSTAR |
| | | G | Medical Area Total Energy Plant, Inc. |
| 09–MAR–10 | 20100430 | G | The Bank of New York Mellon Corporation. |
| | | G | The PNC Financial Services Group, Inc. |
| | | G | PNC Global Investment Servicing Inc. |
| | 20100440 | G | Baxter International Inc. |
| | | G | Apalech Limited. |
| | | G | ApaTech Limited. |
| 10–MAR–1 | 20100441 | G | Texas Health Resources. |
| | | G | Wilson N. Jones Medical Center. |

TRANSACTION GRANTED EARLY TERMINATION—Continued

| ET Date | Trans No. | ET Req status | Party name |
|---|---|---|---|
| | | G | Wilson N. Jones Medical Center. |
| 11–MAR–10 | 20100427 | G | ITT Corporation. |
| | | G | Nova Holdings, LLC. |
| | | G | Nova Analytics Corporation. |
| 12–MAR–10 | 20100413 | G | Detroit Edison Credit Union. |
| | | G | NuUnion Credit Union. |
| | | G | NuUnion Credit Union. |
| | 20100451 | G | Mr. Carlo Gherardi. |
| | | G | Equifax Inc. |
| | | G | Equifax Enabling Technologies. |
| | 20100460 | G | Wolverine Power Supply Cooperative, Inc. |
| | | G | FirstEnergy Corp. |
| | | G | FirstEnergy Generation Corp. |
| | 20100466 | G | Harbour Group Investments V, L.P. |
| | | G | Atlantic Street Capital I, L.L.C. |
| | | G | Fleetgistics Holdings, Inc. |
| 15–MAR–10 | 20100455 | G | Fairfax Financial Holdings Limited. |
| | | G | Zenith National Insurance Corp. |
| | | G | Zenith National Insurance Corp. |
| 16–MAR–10 | 20100464 | G | KKR European Fund III, Limited Partnership. |
| | | G | Dr. Hans Peter Wild. |
| | | G | WILD Flavors (Schweiz) SG. |
| | | G | WILD Flavors (Canada), Inc. |
| | | G | SweetUP AG. |
| | | G | WILD Flavors Middle East FZE. |
| | | G | WILD Procurement GmbH. |
| | | G | WILD Flavors (Austria) GmbH. |
| | | G | WILD Affiliated Holdings, Inc. |
| | | G | Rudolf Wild Verwaltungs GmbH. |
| | | G | Rudolf Wild GmbH & Co KG. |
| | | G | WILD Juice B.V. |
| 18–MAR–10 | 20100465 | G | Total System Services, Inc. |
| | | G | First National of Nebraska, Inc. |
| | | G | FNMS Holding, LLC. |
| 19–MAR–10 | 20100468 | G | Religare Enterprises Limited. |
| | | G | Northgate Capital LP. |
| | | G | Northgate Capital LP. |
| | 20100475 | G | HSBC Holdings plc. |
| | | G | Better Place, Inc. |
| | | G | Better Place, Inc. |
| | 20100480 | G | James C. Davis. |
| | | G | Erickson Group, LLC. |
| | | G | Erickson Retirement Communities, LLC. |
| | 20100481 | G | Mr. Shahid Khan. |
| | | G | Georgia Frontiere Revocable Trust u/d/t 2/18/03. |
| | | G | The St. Louis Rams Partnership. |
| | 20100482 | G | Thomas H. Lee Equity Fund VI, L.P. |
| | | G | CKE Restaurants, Inc. |
| | | G | CKE Restaurants, Inc. |
| 22–MAR–10 | 20100429 | G | Kieppe Patrimonial Ltda. |
| | | G | Sunoco, Inc. |
| | | G | Sunoco Chemicals, Inc. |
| | 20100469 | G | Golden Gate Capital Opportunity Fund, L.P. |
| | | G | Clover Holdings Inc. |
| | | G | Clover Holdings Inc. |
| | 20100473 | G | Helen of Troy Limited. |
| | | G | Jahm Najafi. |
| | | G | Innovative Brands, LLC. |
| | 20100485 | G | Francois Pinault. |
| | | G | Fortune Brands, Inc. |
| | | G | Cobra Golf Incorporated. |
| | 20100487 | G | Hearthside Holdco, LLC. |

TRANSACTION GRANTED EARLY TERMINATION—Continued

| ET Date | Trans No. | ET Req status | Party name |
|---|---|---|---|
| | | G | Golden Temple Management, LLC. |
| | | G | Golden Temple of Oregon, LLC. |
| | 20100489 | G | Littlejohn Fund III, L.P. |
| | | G | CTI Foods Holding Co., LLC. |
| | | G | CTI Foods Holding Co. LLC. |
| | 20100495 | G | Alinda Infrastructure Parallel Fund I, L.P. |
| | | G | GSS Contract Services III Inc. |
| | | G | NorTex Gas Storage Company, LLC. |
| 23–MAR–10 | 20100359 | G | Koch Industries, Inc. |
| | | G | Grant Forest Products Inc. |
| | | G | Grant US. Holdings GP. |
| | 20100453 | G | Holly Energy Partners, LP. |
| | | G | Holly Corporation. |
| | | G | Navajo Refining Company, L.L.C. |
| | | G | Holly Refining & Marketing—Tulsa LLC. |
| | 20100461 | G | Nucor Corporation. |
| | | G | NuMit LLC. |
| | | G | NuMit LLC. |
| | 20100484 | G | Bristol-Myers Squibb Company. |
| | | G | Allergan, Inc. |
| | | G | Allergan, Inc. |
| | | G | Allergan Sales, LLC. |
| 24–MAR–10 | 20100150 | G | Service Corporation International. |
| | | G | Keystone North America Inc. |
| | | G | Keystone North America Inc. |
| | 20100366 | G | Nestle S.A. |
| | | G | Sirion Holdings, Inc. |
| | | G | Sirion Therapeutics, Inc. |
| | 20100433 | G | Canam Group, Inc. |
| | | G | Fabsouth LLC. |
| | | G | Fabsouth LLC. |
| 26–MAR–10 | 20100462 | G | Diamond Foods, Inc. |
| | | G | Lion Capital Fund I, L.P. |
| | | G | Lion/Stove Luxembourg Investment 2 S.a.r.l. |
| | 20100486 | G | JPMorgan Chase & Co. |
| | | G | Sempra Energy. |
| | | G | RBS Sempra Commodities Holdings IV B.V. |
| | | G | RBS Sempra Oil Trading (Ireland) Limited. |
| | | G | RBS Sempra Metals Group Limited. |
| | | G | RBS Sempra Metals Far East Limited. |
| | | G | RBS Sempra Energy Trading Holdings Sari. |
| | | G | RBS Sempra Energy Europe Espana, S.L.U. |
| | | G | RBS Sempra Energy Europe d.o.o. |
| | | G | RBS Sempra Commodities PTE Ltd. |
| | | G | Sempra Energy Trading LLC. |
| | | G | RBS Sempra Plastics LLC. |
| | | G | Trading & Transportation Management LLC. |
| | | G | RBS Sempra Metals Services LLC. |
| | | G | RBS Sempra Metals & Concentrates LLC. |
| | | G | RBS Sempra Energy Europe Kereskedelmi Korlatolt Fele. Tarsa. |
| | 20100490 | G | Court Square Capital Partners II. L.P. |
| | | G | H.I.G. Capital Partners III, L.P. |
| | | G | Generic Drug Holdings, Inc. |
| | 20100492 | G | CONSOL Energy Inc. |
| | | G | Dominion Resources, Inc. |
| | | G | Dominion Exploration & Production, Inc. |
| | | G | Dominion Reserves, Inc. |
| | 20100494 | G | Russell Sigler, Inc. |
| | | G | United Technologies Corporation. |
| | | G | Edward B. Ward & Company. |
| | | G | Carrier Corporation. |
| | 20100498 | G | Max Capital Group Ltd. |
| | | G | Harbor Point Limited. |
| | | G | Harbor Point Limited. |

TRANSACTION GRANTED EARLY TERMINATION—Continued

| ET Date | Trans No. | ET Req status | Party name |
|---|---|---|---|
| | 20100504 | G | Wilibros Group, Inc. |
| | | G | Tenaska Power Fund, L.P. |
| | | G | InfrastruX Group, Inc. |
| | 20100505 | G | Tenaska Power Fund, LP. |
| | | G | Willbros Group, Inc. |
| | | G | Willbros Group, Inc. |
| 29–MAR–10 | 20100070 | G | Cisco Systems, Inc. |
| | | G | Tandberg ASA. |
| | | G | Tandberg ASA. |
| | 20100445 | G | Mistral Equity Partners, LP. |
| | | G | Snakcorp Holdings Inc. |
| | | G | Snack Alliance, Inc. |
| | 20100458 | G | Walgreens Co. |
| | | G | Duane Reade Shareholders, LLC. |
| | | G | Duane Reade Holdings, Inc. |
| | 20100513 | G | Marc Ethan Berman. |
| | | G | RiskMetrics Group, Inc. |
| | | G | RiskMetrics Group, Inc. |
| 31–MAR–10 | 20100472 | G | Liberty Media Corporation. |
| | | G | Sirius XM Radio Inc. |
| | | G | Sirius XM Radio Inc. |
| | 20100483 | G | KKR European Fund II, Limited Partnership. |
| | | G | Convergys Corporation. |
| | | G | Convergys CMG Utah, Inc. |
| | | G | Convergys Customer Management Group Inc. |
| | | G | Comvergys Learning Solutions Inc. |
| | 20100507 | G | Alan Trefler. |
| | | G | Chordiant Software, Inc. |
| | | G | Chordiant Software, Inc. |
| | 20100515 | G | Liberty Dialysis Holdings, Inc. |
| | | G | Liberty Dialysis, Inc. |
| | | G | Liberty Dialysis, Inc. |

**FOR FURTHER INFORMATION CONTACT:** Sandra M. Peay, Contact Representative or Renee I–Tallman, Contact Representative:

Federal Trade Commission, Premerger Notification Office, Bureau of Competition, Room H–303, Washington, DC 20580, (202) 326–3100.

By Direction of the Commission.

**Donald S. Clark,**

*Secretary.*

[FR Doc. 2010–10438 Filed 5–5–10; 8:45 am]

**BILLING CODE 6750–01–M**

## FEDERAL TRADE COMMISSION

### Granting of Request for Early Termination of the Waiting Period Under the Premerger Notification Rules

Section 7A of the Clayton Act, 15 U.S.C.S 18a, as added by Title II of the Hart-Scott Rodino Antitrust Improvements Act of 1976, requires persons contemplating certain mergers or acquisitions to give the Federal Trade Commission and the Assistant Attorney General advance notice and to wait designated periods before consummation of such plans. Section 7A(b)(2) of the Act permits the agencies, in individual cases, to terminate this waiting period prior to its expiration and requires that notice of this action be published in the **Federal Register**.

The following transactions were granted early termination of the waiting period provided by law and the premerger notification rules. The grants were made by the Federal Trade Commission and the Assistant Attorney General for the Antitrust Division of the Department of Justice. Neither agency intends to take any action with respect to these proposed acquisitions during the applicable waiting period.

TRANSACTION GRANTED EARLY TERMINATION

| ET date | Trans No. | ET req status | Party name |
|---|---|---|---|
| 02–FEB–10 | 20100338 | G | The Kroger Co. |
| | | G | The Little Clinic LLC. |
| | | G | The Little Clinic LLC. |
| | 20100353 | G | Merz GmbH & Co. KGaA. |
| | | G | BioForm Medical, Inc. |
| | | G | BioForm Medical, Inc. |

TRANSACTION GRANTED EARLY TERMINATION—Continued

| ET date | Trans No. | ET req status | Party name |
|---|---|---|---|
| | 20100364 | G | Hillenbrand, Inc. |
| | | G | K–Tron International, Inc. |
| | | G | K–Tron International, Inc. |
| 03–FEB–10 | 20100315 | G | Gianni Chiarva. |
| | | G | Tangent Rail Corporation. |
| | | G | Tangent Rail Corporation. |
| | 20100316 | G | Giorgio Chiarva. |
| | | G | Tangent Rail Corporation. |
| | | G | Tangent Rail Corporation. |
| 04–FEB–10 | 20100365 | G | CCMP Capital Investors II, L.P. |
| | | G | Francescas Holdings Corporation. |
| | | G | Francescas Holdings Corporation. |
| 05–FEB–10 | 20100269 | G | Grupo Proeza S.A. de C.V. |
| | | G | Dana Holding Corporation. |
| | | G | Dana Holding Corporation. |
| | 20100373 | G | Trustmark Mutual Holding Company. |
| | | G | Health Fitness Corporation |
| | | G | Health Fitness Corporation. |
| | 20100379 | G | Shiseido Company, Limited. |
| | | G | Bare Escentuals, Inc. |
| | | G | Bare Escentuals, Inc. |
| | 20100385 | G | Martek Biosciences Corporation. |
| | | G | Charterhouse Equity Partners IV, L.P. |
| | | G | Charter Amerifit LLC. |
| 17–FEB–10 | 20090650 | G | Microsoft Corporation. |
| | | G | Yahoo! Inc. |
| | | G | Yahoo! Inc. |
| 19–FEB–10 | 20100380 | G | Ares Corporate Opportunities Fund III, L.P. |
| | | G | LyondellBasell Industries N.V. |
| | | G | LyondellBasell Industries N.V. |
| | 20100383 | G | LeverageSource, L.P. |
| | | G | LyondellBasell Industries N.V. |
| | | G | LyondellBasell Industries N.V. |
| | 20100411 | G | Electricite de France S.A. |
| | | G | Constellation Energy Group, Inc. |
| | | G | Safe Harbor Water Power Corporation. |
| | | G | CER Generation II, LLC. |
| | | G | Panther Creek Partners. |
| | | G | ACE Cogeneration Company. |
| | | G | Constellation Power Source Generation, Inc. |
| | | G | Handsome Lake Energy LLC. |
| | | G | Sunnyside Cogeneration Associates. |
| | | G | Inter-Power/Ahlcon Partners L.P. |
| 22–FEB–10 | 20100381 | G | International Business Machines Corp. |
| | | G | NISC Holdings, LLC. |
| | | G | National Interest Security Company LLC. |
| | | G | Technology and Management Services, Inc. |
| | 20100386 | G | Ipsos SA. |
| | | G | Pilot Group LP. |
| | | G | OTX Corporation. |
| | 20100396 | G | Jeffrey Vinik. |
| | | G | Lightning Investment Holdings L.P. |
| | | G | Lightning Properties, Ltd. |
| | | G | Palace Florida Properties L.P. |
| | | G | Lightning Hockey GP LLC. |
| | | G | Tampa Bay Arena, L.P. |
| | | G | Lightning Hockey LP. |
| | | G | Lightning Real Estate Investment GP LLC. |
| | 20100398 | G | Roark Capital Partners II, LP. |
| | | G | Mr. Robert Baggett. |
| | | G | Peachtree Business Products, Inc. |
| | 20100399 | G | AREVA SA. |
| | | G | Ausra, Inc. |
| | | G | Ausra, Inc. |

TRANSACTION GRANTED EARLY TERMINATION—Continued

| ET date | Trans No. | ET req status | Party name |
|---|---|---|---|
| | 20100400 | G | Carl C. Icahn |
| | | G | Regeneron Pharmaceuticals, Inc. |
| | | G | Regeneron Pharmaceuticals, Inc. |
| | 20100403 | G | Chuck Greenberg. |
| | | G | Thomas O. Hicks. |
| | | G | Texas Rangers Baseball Partners. |
| | | G | Rangers Ballpark LLC. |
| | | G | Emerald Diamond, L.P. |
| | | G | Ballpark Real Estate, L.P. |
| 23–FEB–10 | 20100369 | G | HealthpointCapital Partners, L.P. |
| | | G | Alphatec Holdings, Inc. |
| | | G | Alphatec Holdings, Inc. |
| | 20100374 | G | Thermo Fisher Scientific Inc. |
| | | G | Ahura Scientific Inc. |
| | | G | Ahura Scientific Inc. |
| | 20100392 | G | America Movil, S.A.B. de C.V. |
| | | G | Carso Global Telecom, S.A.B. de C.V. |
| | | G | Carso Global Telecom, S.A.B. de C.V. |
| | 20100394 | G | Energy Transfer Equity, L.P. |
| | | G | Energy Spectrum Partners V LP. |
| | | G | TSM Treating, LLC. |
| | | G | Tristate North Louisiana Midstream, LLC. |
| | 20100397 | G | IBM Corporation. |
| | | G | Initiate Systems, Inc. |
| | | G | Initiate Systems, Inc. |
| 25–FEB–10 | 20100406 | G | Samsung Electronics Co., Ltd. |
| | | G | Samsung Digital Imaging Co., Ltd. |
| | | G | Samsung Digital Imaging Co., Ltd. |
| | 20100412 | G | GTCR Fund IX/A, L.P. |
| | | G | ATI Holdings, Inc. |
| | | G | ATI Holdings, Inc. |
| | 20100418 | G | PepsiCo, Inc. |
| | | G | PepsiAmericas, Inc. |
| | | G | PepsiAmericas, Inc. |
| | 20100419 | G | PepsiCo, Inc. |
| | | G | The Pepsi Bottling Group, Inc. |
| | | G | The Pepsi Bottling Group, Inc. |
| 26–FEB–10 | 20100420 | G | S.A.C. Private Equity Investors, L.P. |
| | | G | Spheris Holding II, Inc. a debtor-in-possession. |
| | | G | Spheris Leasing LLC. |
| | | G | Spheris Canada Inc. |
| | | G | Spheris Holding II, Inc., a debtor-in-possession. |
| | | G | Spheris Operations LLC. |
| | | G | Vianeta Communications. |

**FOR FURTHER INFORMATION CONTACT:** Sandra M. Peay, Contact Representative, or Renee Hallman, Contact Representative, Federal Trade Commission, Premerger Notification Office, Bureau of Competition, Room H–303, Washington, DC 20580, (202) 326–3100.

By Direction of the Commission.

**Donald S. Clark,**

*Secretary.*

[FR Doc. 2010–10442 Filed 5–5–10; 8:45 am]

**BILLING CODE 6750–01–M**

## FEDERAL TRADE COMMISSION

### Granting of Request for Early Termination of the Waiting Period Under the Premerger Notification Rules

Section 7A of the Clayton Act, 15 U.S.C. 1A18a, as added by Title II of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, requires persons contemplating certain mergers or acquisitions to give the Federal Trade Commission and the Assistant Attorney General advance notice and to wait designated periods before consummation of such plans. Section 7A(b)(2) of the Act permits the agencies, in individual cases, to terminate this waiting period prior to its expiration and requires that notice of this action be published in the **Federal Register.**

The following transactions were granted early termination of the waiting period provided by law and the premerger notification rules. The grants were made by the Federal Trade Commission and the Assistant Attorney General for the Antitrust Division of the Department of Justice. Neither agency intends to take any action with respect to these proposed acquisitions during the applicable waiting period.

TRANSACTION GRANTED EARLY TERMINATION

| ET date | Trans No. | ET req status | Party name |
|---|---|---|---|
| 02–APR–10 | 20100474 | G | Cephalon, Inc. |
| | | G | Ception Therapeutics, Inc. |
| | | G | Ception Therapeutics, Inc. |
| | 20100478 | G | Alliant Techsystems Inc. |
| | | G | Michael M. Noell. |
| | | G | Blackhawk Industries Product Group Unlimited, LLC. |
| | 20100496 | G | CCMP Capital Advisors, II (AV–2) L.P. |
| | | G | Chaparral Energy, Inc. |
| | | G | Chaparral Energy, Inc. |
| | 20100508 | G | ABRY Partners VI, L.P. |
| | | G | RCN Corporation. |
| | | G | RCN Corporation. |
| | 20100510 | G | Phillips-Van Heusen Corporation. |
| | | G | Apax Europe VI–A, L.P. |
| | | G | Tommy Hilfiger B.V. |
| | | G | Tommy Hilfiger US Inc. |
| | 20100511 | G | Apax Europe VI–A, L.P. |
| | | G | Phillips-Van Heusen Corporation. |
| | | G | Phillips-Van Heusen Corporation. |
| | 20100512 | G | Apax US VII, L.P. |
| | | G | Phillips-Van Heusen Corporation. |
| | | G | Phillips-Van Heusen Corporation. |
| | 20100514 | G | Fred Gehring. |
| | | G | Phillips-Van Heusen Corporation. |
| | | G | Phillips-Van Heusen Corporation. |
| | 20100516 | G | Baker Brothers Life Sciences, L.P. |
| | | G | Auxilium Pharmaceuticals, Inc. |
| | | G | Auxilium Pharmaceuticals, Inc. |
| | 20100518 | G | ConAgra Foods, Inc. |
| | | G | Sun Capital Partners II, LP. |
| | | G | Elan Holdings, Inc. |
| 05–APR–10 | 20100517 | G | Carl C. Icahn. |
| | | G | Lions Gate Entertainment Corp. |
| | | G | Lions Gate Entertainment Corp. |
| | 20100519 | G | Glencore Holding AG. |
| | | G | Xstrata plc. |
| | | G | Chestfleld Coal Resources Ltd. |
| | | G | Tikolan Ltd. |
| | | G | Milner House. |
| | | G | Simkana Ltd. |
| | | G | Merani Holding Ltd. |
| | | G | Wichita Holding Ltd. |
| | | G | Xstrata Coal (Bermuda) Ltd. |
| | 20100520 | G | CCMP Capital Investors II, L.P. |
| | | G | infoGroup Inc. |
| | | G | infoGroup Inc. |
| | 20100528 | G | Viterra Inc. |
| | | G | Dakota Growers Pasta Company, Inc. |
| | | G | Dakota Growers Pasta Company, Inc. |
| | 20100530 | G | Catterton Partners VI, L.P. |
| | | G | Exxon Mobil Corporation. |
| | | G | ExxonMobii Oil Corporation. |
| | 20100539 | G | Roark Capital Partners II, LP. |
| | | G | Gemini Investors III, L.P. |
| | | G | Wingstop Holdings, Inc. |
| | 20100542 | G | Trident III, L.P. |
| | | G | Max Capital Group Limited. |
| | | G | Max Capital Group Limited. |
| | 20100548 | G | The Chubb Corporation. |
| | | G | Max Capital Group Ltd. |
| | | G | Max Capital Group Ltd. |
| 06–APR–10 | 20100538 | G | Jian Zhao. |
| | | G | Texas Seamless, LLC. |

TRANSACTION GRANTED EARLY TERMINATION—Continued

| ET date | Trans No. | ET req status | Party name |
|---|---|---|---|
| | | G | Texas Seamless, LLC. |
| | 20100547 | G | CHS Private Equity V LP. |
| | | G | Audax Private Equity Fund II, L.P. |
| | | G | Thermon Holding Corp. |
| 08–APR–10 | 20100543 | G | Perrigo Company. |
| | | G | Paul B. Manning. |
| | | G | PBM Holdings, Inc. |
| | | G | PBM Nutritionals, LLC. |
| | 20100545 | G | Affiliated Managers Group, Inc. |
| | | G | The Northwestern Mutual Life Insurance Company. |
| | | G | Pantheon Capital (Asia) Limited. |
| | | G | Pantheon Holdings Limited. |
| | | G | Pantheon Ventures Inc. |
| | 20100570 | G | Transcend Services, Inc. |
| | | G | Spheris Holding II, Inc. |
| | | G | Spheris Holding II, Inc. |
| 09–APR–10 | 20100541 | G | Golden Gate Capital Opportunity Fund, L.P. |
| | | G | Brinker International, Inc. |
| | | G | Chili's, Inc. |
| | | G | Brinker Restaurant Corporation. |
| | | G | Brinker Connecticut Corporation. |
| | | G | Brinker North Carolina, Inc. |
| | | G | Brinker Rhode Island, Inc. |
| | | G | Brinker South Carolina, Inc. |
| | | G | Brinker Indiana, Inc. |
| | | G | Brinker Ohio, Inc. |
| | | G | Brinker Arkansas, Inc. |
| | | G | Brinker Florida, Inc. |
| | | G | Brinker Georgia, Inc. |
| | | G | Brinker Iowa, Inc. |
| | | G | Chili's of Kansas, Inc. |
| | | G | Brinker of Louisiana, Inc. |
| | | G | Brinker of Howard County, Inc. |
| | | G | Brinker Missouri, Inc. |
| | | G | Brinker Michigan, Inc. |
| | | G | Brinker Mississippi, Inc. |
| | | G | Brinker New Jersey, Inc. |
| | | G | Brinker Oklahoma, Inc. |
| | | G | Brinker Penn Trust. |
| | | G | Brinker Virginia, Inc. |
| | | G | Brinker Texas, Inc. |
| | 20100561 | G | Sterling Group Partners II, L.P. |
| | | G | General Electric Company. |
| | | G | Distribution International, Inc. |
| | 20100567 | G | Golden Gate Capital Opportunity Fund, L.P. |
| | | G | Atrium Corporation. |
| | | G | Atrium Corporation. |
| 12–APR–10 | 20100564 | G | Centerbridge Capital Partners, L.P. |
| | | G | Wells Fargo & Company. |
| | | G | American Rental Holdings Inc. |
| 13–APR–10 | 20100502 | G | Massey Energy Company. |
| | | G | Richard B. Gifliam. |
| | | G | Cloverlick Management LLC. |
| | | G | Dorchester Associates LLC. |
| | | G | Harlan Reclamation Services LLC. |
| | | G | Powell River Resources Corporation. |
| | | G | Cumberland Resources Corporation. |
| | | G | Maggard Branch Coal LLC. |
| | | G | Roda Resources LLC. |
| | | G | Meadow Branch Coal LLC. |
| | | G | Nine Mile Spur LLC. |
| | | G | Resource Development LLC. |
| | | G | Resource Land Company LLC. |
| | 20100532 | G | Blue Harbour Strategic Value Partners Offshore, Ltd. |
| | | G | Novell, Inc. |
| | | G | Novell, Inc. |
| | 20100573 | G | Silver Point Capital Offshore Master Fund, L.P. |

TRANSACTION GRANTED EARLY TERMINATION—Continued

| ET date | Trans No. | ET req status | Party name |
|---|---|---|---|
| | | G | Cooper-Standard Holdings Inc. |
| | | G | Cooper-Standard Holdings Inc. |
| | 20100574 | G | Barclays PLC. |
| | | G | Cooper-Standard Holdings Inc. |
| | | G | Cooper-Standard Holdings Inc. |
| | 20100575 | G | ORIX Corporation. |
| | | G | The PNC Financial Services Group, Inc. |
| | | G | Red Capital Advisors, LLC. |
| | | G | Red Capital Community Development Company, LLP. |
| | | G | Red Capital Markets, Inc. |
| | | G | Red Mortgage Capital, Inc. |
| 14–APR–10 | 20100540 | G | Energy Capital Partners II–A, LP. |
| | | G | BG Group plc. |
| | | G | BG MP Partners I, LLC. |
| | | G | BG Lake Road Holdings GP, LLC. |
| | | G | c/o BG North America, LLC. |
| | | G | BG MP Holdings, LLC. |
| | | G | BG Dighton Power, LLC. |
| | | G | BG Lake Road Holdings LP, LLC. |
| | 20100546 | G | Leap Wireless International, Inc. |
| | | G | STX Wireless, LLC. |
| | | G | STX Wireless, LLC. |
| 15–APR–10 | 20100544 | G | LNK Partners, L.P. |
| | | G | Phillips-Van Heusen Corporation. |
| | | G | Phillips-Van Heusen Corporation. |
| 16–APR–10 | 20100563 | G | Wells Fargo & Company. |
| | | G | GMAC Inc. |
| | | G | GMAC Commercial Finance LLC. |
| 19–APR–10 | 20100571 | G | ABRY Partners VI, L.P. |
| | | G | Automated HealthCare Solutions, LLC. |
| | | G | Automated HealthCare Solutions, LLC. |
| | 20100572 | G | Communications Infrastructure Investments, LLC. |
| | | G | AGL Resources Inc. |
| | | G | AGL Networks, LLC. |
| | 20100579 | G | OCM Opportunities ALS Holdings, L.P. |
| | | G | Aleris International, Inc. |
| | | G | ACH1 Holding Co. |
| | 20100580 | G | Babcock International Group plc. |
| | | G | VT Group plc. |
| | | G | VT Group plc. |
| | 20100583 | G | Coastal Villages Region Fund. |
| | | G | Bernt O. Bodal. |
| | | G | American Seafoods, L.P. |
| 20–APR–10 | 20100591 | G | Targa Resources Partners LP. |
| | | G | Targa Resources Investments Inc. |
| | | G | Targa Straddle GP LLC. |
| | | G | Targa Straddle LP. |
| | | G | Targa Midstream Services Ltd. Partnership. |
| | | G | Targa Permian LP. |
| | | G | Targa Gas Marketing LLC. |
| 21–APR–10 | 20100565 | G | Schneider Electric SA. |
| | | G | ALSTOM. |
| | | G | ALSTOM Sextant 5. |
| 22–APR–10 | 20100521 | G | General Dynamics Corporation. |
| | | G | Frank D. Winkler. |
| | | G | EBV Explosives Environmental Company. |
| 23–APR–10 | 20100092 | G | Equinix, Inc. |
| | | G | Switch & Data Facilities Company, Inc. |
| | | G | Switch & Data Facilities Company, Inc. |
| | 20100585 | G | Lee Equity Partners Fund, L.P. |
| | | G | Charlesbank Equity Fund V, Limited Partnership. |
| | | G | PMI Holdings, Inc. |
| | 20100589 | G | Picasso Parent Company, Inc. |
| | | G | BWAY Holding Company. |

TRANSACTION GRANTED EARLY TERMINATION—Continued

| ET date | Trans No. | ET req status | Party name |
|---|---|---|---|
| | | G | BWAY Holding Company. |
| | 20100595 | G | AZZ Incorporated. |
| | | G | North American Galvanizing & Coatings, Inc. |
| | | G | North American Galvanizing & Coatings, Inc. |
| | 20100596 | G | Kratos Defense & Security Solutions, Inc. |
| | | G | Altus Capital Partners SBIC Parent, L.P. |
| | | G | Gichner Holdings, Inc. |
| | 20100599 | G | Oak Hill Capital Partners III, LP. |
| | | G | RNB Communications, Inc. |
| | | G | RNB Communications, Inc. |
| | 20100600 | G | H Partners, LP. |
| | | G | Six Flags, Inc. |
| | | G | Six Flags, Inc. |
| | 20100601 | G | BHR Capital Holdings, LLC. |
| | | G | Six Flags, Inc. |
| | | G | Six Flags, Inc. |
| | 20100607 | G | Apache Corporation. |
| | | G | Devon Energy Corporation. |
| | | G | Devon Energy Production Company, L.P. |
| | | G | Bonito Pipe Line Company. |
| | | G | Devon Energy Petroleum Pipeline Company. |
| | 20100610 | G | Riverstone/Carlyle Global Energy and Power Fund IV. |
| | | G | Halifax Capital Partners II, LP. |
| | | G | Taylor Companies, LLC |

**FOR FURTHER INFORMATION CONTACT:** Sandra M. Peay, Contact Representative or Renee Hallman, Contact Representative, Federal Trade Commission, Premerger Notification Office, Bureau of Competition, Room H–303, Washington, DC 20580, (202) 326–3100.

By Direction of the Commission.

**Donald S. Clark,**

*Secretary.*

[FR Doc. 2010–10440 Filed 5–5–10; 8:45 am]

**BILLING CODE 6750–01–M**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Decision to Evaluate a Petition to Designate a Class of Employees From BWX Technologies Inc., Lynchburg, VA, To Be Included in the Special Exposure Cohort

**AGENCY:** National Institute for Occupational Safety and Health (NIOSH), Department of Health and Human Services (HHS).

**ACTION:** Notice.

**SUMMARY:** HHS gives notice as required by 42 CFR 83.12(e) of a decision to evaluate a petition to designate a class of employees from BWX Technologies Inc., Lynchburg, Virginia, to be included in the Special Exposure Cohort under the Energy Employees Occupational Illness Compensation Program Act of 2000. The initial proposed definition for the class being evaluated, subject to revision as warranted by the evaluation, is as follows:

*Facility:* BWX Technologies, Inc.

*Location:* Lynchburg, Virginia.

*Job Titles and/or Job Duties:* All Atomic Weapons Employer employees.

*Period of Employment:* January 1, 1959 through December 31, 1959; or from January 1, 1968 through December 31, 1972.

**FOR FURTHER INFORMATION CONTACT:** Stuart L. Hinnefeld, Interim Director, Division of Compensation Analysis and Support, National Institute for Occupational Safety and Health (NIOSH), 4676 Columbia Parkway, MS C–46, Cincinnati, OH 45226, Telephone 877–222–7570. Information requests can also be submitted by e-mail to *DCAS@CDC.GOV.*

**John Howard,**

*Director, National Institute for Occupational Safety and Health.*

[FR Doc. 2010–10704 Filed 5–5–10; 8:45 am]

**BILLING CODE 4163–19–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Decision to Evaluate a Petition to Designate a Class of Employees From the Los Alamos National Laboratory, Los Alamos, NM, To Be Included in the Special Exposure Cohort

**AGENCY:** National Institute for Occupational Safety and Health (NIOSH), Department of Health and Human Services (HHS).

**ACTION:** Notice.

**SUMMARY:** HHS gives notice as required by 42 CFR 83.12(e) of a decision to evaluate a petition to designate a class of employees from the Los Alamos National Laboratory, Los Alamos, New Mexico, to be included in the Special Exposure Cohort under the Energy Employees Occupational Illness Compensation Program Act of 2000. The initial proposed definition for the class being evaluated, subject to revision as warranted by the evaluation, is as follows:

*Facility:* Los Alamos National Laboratory.

*Location:* Los Alamos, New Mexico.

*Job Titles and/or Job Duties:* All employees of the Department of Energy, its predecessor agencies, and their contractors and subcontractors.

*Period of Employment:* March 15, 1943 through December 31, 1975.

**FOR FURTHER INFORMATION CONTACT:** Stuart L. Hinnefeld, Interim Director, Division of Compensation Analysis and Support, National Institute for Occupational Safety and Health (NIOSH), 4676 Columbia Parkway, MS C–46, Cincinnati, OH 45226, Telephone 877–222–7570. Information requests can also be submitted by e-mail to *DCAS@CDC.GOV.*

**John Howard,**

*Director, National Institute for Occupational Safety and Health.*

[FR Doc. 2010–10705 Filed 5–5–10; 8:45 am]

**BILLING CODE 4163–19–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Decision To Evaluate a Petition To Designate a Class of Employees From the Hanford Site, Richland, WA, To Be Included in the Special Exposure Cohort

**AGENCY:** National Institute for Occupational Safety and Health (NIOSH), Department of Health and Human Services (HHS).

**ACTION:** Notice.

**SUMMARY:** HHS gives notice as required by 42 CFR 83.12(e) of a decision to evaluate a petition to designate a class of employees from the Hanford site, Richland, Washington, to be included in the Special Exposure Cohort under the Energy Employees Occupational Illness Compensation Program Act of 2000. The initial proposed definition for the class being evaluated, subject to revision as warranted by the evaluation, is as follows:

*Facility:* Hanford site.

*Location:* Richland, Washington.

*Job Titles and/or Job Duties:* All personnel who were internally monitored (urine or fecal), who worked at the Plutonium Finishing Plant in the 200 Area.

*Period of Employment:* January 1, 1987 through December 31, 1989.

**FOR FURTHER INFORMATION CONTACT:** Stuart L. Hinnefeld, Interim Director, Division of Compensation Analysis and Support, National Institute for Occupational Safety and Health (NIOSH), 4676 Columbia Parkway, MS C–46, Cincinnati, OH 45226, Telephone 877–222–7570. Information requests can also be submitted by e-mail to *DCAS@CDC.GOV.*

**John Howard,**

*Director, National Institute for Occupational Safety and Health.*

[FR Doc. 2010–10706 Filed 5–5–10; 8:45 am]

**BILLING CODE 4163–19–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Disease Control and Prevention

**[60Day–10–0783]**

### Proposed Data Collections Submitted for Public Comment and Recommendations

In compliance with the requirement of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 for opportunity for public comment on proposed data collection projects, the Centers for Disease Control and Prevention (CDC) will publish periodic summaries of proposed projects. To request more information on the proposed projects or to obtain a copy of the data collection plans and instruments, call 404–639–5960 and send comments to Maryam I. Daneshvar, CDC Acting Reports Clearance Officer, 1600 Clifton Road, MS–D74, Atlanta, GA 30333 or send an e-mail to *omb@cdc.gov.*

*Comments are invited on:* (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Written comments should be received within 60 days of this notice.

**Proposed Project**

Evaluation of Safe Dates Project—(OMB No. 0920–0783 exp. 6/30/2011)—Revision—National Center for Injury Prevention and Control (NCIPC), Centers for Disease Control and Prevention (CDC).

*Background and Brief Description*

The Centers for Disease Control (CDC) requests a revision of this Information Collection Request for the Evaluation of the Safe Dates Project. Safe Dates is a research-based adolescent dating violence prevention program. The Safe Dates program includes a nine-session dating abuse curriculum, a play about dating abuse, and a poster contest.

The current information collection request is approved to conduct focus groups and interviews about the Safe Dates adolescent dating violence prevention program. Previously approved were the effectiveness, implementation, and cost surveys with students, school principals, school prevention coordinators, and teachers at a mix of schools. CDC would like to add focus groups with students and interviews with teachers in the urban schools. Data collection staff will use new interview guides designed for this purpose. This revision is requested because CDC has learned additional information about violence and risk factors for adolescents in urban, high-risk communities since the original OMB clearance package was submitted. Recent research has shown that adolescents who live in urban, disadvantaged communities report significantly higher prevalence of some risky behaviors, including violence, than nationally representative U.S. adolescents (Swahn & Bossarte, 2009). Students and teachers in urban schools participating in the effectiveness, cost, and implementation evaluation are an important source of information about possible adaptations to the Safe Dates program that may be needed for urban, high-risk adolescents. Thus, CDC would like to conduct qualitative research with students and teachers in urban schools.

This program has been shown to be effective in one rural North Carolina school district, but appropriateness of the program with urban, high-risk adolescents is unknown. An assessment of whether the Safe Dates adolescent dating violence prevention program needs modification/adaptation for urban, high-risk adolescents is required. The data collection will require participation from teachers at eight schools who delivered the Safe Dates program and students at one school who received the program. Qualitative data will be collected through student focus groups and teacher interviews. Students will complete a participant profile form to capture basic demographic information.

Approximately 1,318 students will participate in the Effectiveness Follow-Up Survey data collection, with 20 teachers and 40 students to participate in interviews and focus groups, respectively. Informed written consent from parents for each student's participation and informed written assent from tenth graders for their own participation will be obtained. Twenty teachers will participate in interviews. Students and teachers will be asked about their experiences with the Safe Dates program and ideas they may have about adapting the program for urban schools.

Data collection will occur in July 2010. Total response burden for this

project is summarized in the following table. There is no cost to respondents other than their time.

ESTIMATED ANNUALIZED BURDEN HOURS

| Type of respondent | Form name | Number of respondents | Number of responses per respondent | Average burden per response (in hours) | Total response burden (hours) |
|---|---|---|---|---|---|
| Student | Effectiveness follow-up survey | 1,318 | 1 | 35/60 | 769 |
| | Focus group guide and demographic form. | 40 | 1 | 1.5 | 60 |
| Teacher | Interview guide | 20 | 1 | 1 | 20 |
| | Total | 1,378 | | | 849 |

Dated: April 30, 2010.

**Maryam I. Daneshvar,**

*Acting Reports Clearance Office, Centers for Disease Control and Prevention.*

[FR Doc. 2010–10711 Filed 5–5–10; 8:45 am]

**BILLING CODE 4163–18–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Administration for Children and Families

### Proposed Information Collection Activity: Comment Request

*Proposed Projects:*

*Title:* TANF ARRA Tribal Financial Reporting ACF–196T–477 form under Public Law 102–477 OMB No.: New Collection.

*Description:* The ACF–196T–477 is a new Temporary Assistance for Needy Families (TANF) financial form that collects tribal expenditures from all the federally recognized tribes under Public Law 102–477, receiving funds from the American Recovery and Reactivation Act of 2009 (ARRA).

The Public Law 102–477 is the Indian Employment, training and related Services programs legislation that authorizes the tribal government, under specified conditions to use available funds, and now authorized by Public Law 111–5.

The Public Law 111–5 is the American Recovery and Reinvestment Act of 2009 (ARRA), that was created to jumpstart the economy, and create or save millions of jobs.

The ACF–196–477 TANF ARRA Financial Reporting form will Collect Exclusively ARRA Expenditures from Tribes under Public Law 102–477, which received transfer of funds from the Department of the Interior by means of an 1151 as required by Public Law 102–477—Action.

The collection of financial information is mandated by legislation and applicable to Tribes administering TANF programs under Public Law 102–477 demonstration projects that Receive ARRA Emergency funds.

This report must be used to report only ARRA funds expenditures quarterly. This report is required to be submitted quarterly to the Division of Workforce Development in the Office of Indian Energy and Economic Development, Department of the Interior with a copy to the Administration for Children and Families (ACF).

*Respondents:* All federally recognized tribes under Public Law 102–477 that received ARRA Emergency Contingency funds for Temporary Assistance for Needy Families (TANF).

ANNUAL BURDEN ESTIMATES

| Instrument | Number of respondents | Number of reponses per respondent | Average burden hours per response | Total burden hours |
|---|---|---|---|---|
| ACF–196–T–477 | 17 | 4 | 1.50 | 102 |

Estimated Total Annual Burden Hours: 102.

In compliance with the requirements of section 506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Administration for Children and Families is soliciting public comment on the specific aspects of the information collection described above. Copies of the proposed collection of information can be obtained and comments may be forwarded by writing to the Administration for Children and Families, 370 L'Enfant Promenade, SW., Washington, DC 20447, Attn: ACF Reports Clearance Officer. E-mail address: *infocollection@acf.hhs.gov.* All requests should be identified by the title of the information collection.

The department specifically requests comments on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted within 60 days of this publication.

Dated: April 29, 2010.

**Robert Sargis,**

*Reports Clearance Officer.*

[FR Doc. 2010–10434 Filed 5–5–10; 8:45 am]

**BILLING CODE 4184–01–M**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

**[Docket No. FDA–2010–N–0062]**

### Agency Information Collection Activities; Submission for Office of Management and Budget Review; Comment Request; Exception From General Requirements for Informed Consent

**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 June 7, 2010.

**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: 202–395–7285, or e-mailed to *oira_submission@omb.eop.gov*. All comments should be identified with the OMB control number 0910–0586. Also include the FDA docket number found in brackets in the heading of this document.

**FOR FURTHER INFORMATION CONTACT:** Daniel Gittleson, Office of Information Management, Food and Drug Administration, 1350 Piccard Dr., PI50–400B, Rockville, MD 20850, 301–796–5156, *Daniel.Gittleson@fda.hhs.gov*.

**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.

### Medical Devices; Exception From General Requirements for Informed Consent—21 CFR 50.23 (OMB Control Number 0910–0586)—Extension

#### Background Information

In the **Federal Register** of June 7, 2006 (71 FR 32827), FDA issued an interim final rule (hereinafter referred to as the June 7, 2006, interim final rule) to amend its regulations to establish a new exception from the general requirements for informed consent, to permit the use of investigational in vitro diagnostic devices to identify chemical, biological, radiological, or nuclear agents without informed consent in certain circumstances. The agency took this action because it was concerned that, during a potential terrorism event or other potential public health emergency, delaying the testing of specimens to obtain informed consent may threaten the life of the subject. In many instances, there may also be others who have been exposed to, or who may be at risk of exposure to, a dangerous chemical, biological, radiological, or nuclear agent, thus necessitating identification of the agent as soon as possible. FDA created this exception to help ensure that individuals who may have been exposed to a chemical, biological, radiological, or nuclear agent are able to benefit from the timely use of the most appropriate diagnostic devices, including those that are investigational.

Section 50.23(e)(1) (21 CFR 50.23(e)(1)) provides an exception to the general rule that informed consent is required for the use of an investigational in vitro diagnostic device. This exception will apply to those situations in which the in vitro investigational diagnostic device is used to prepare for and respond to a chemical, biological, radiological, or nuclear terrorism event or other public health emergency, if the investigator and an independent licensed physician make the determination and later certify in writing that: (1) There is a life-threatening situation necessitating the use of the investigational device; (2) obtaining informed consent from the subject is not feasible because there was no way to predict the need to use the investigational device when the specimen was collected and there is not sufficient time to obtain consent from the subject or the subject's legally authorized representative; and (3) no satisfactory alternative device is available. Under the June 7, 2006, interim final rule, these determinations are made before the device is used, and the written certifications are made within 5 working days after the use of the device. If use of the device is necessary to preserve the life of the subject and there is not sufficient time to obtain the determination of the independent licensed physician in advance of using the investigational device, § 50.23(e)(2) provides that the certifications must be made within 5 working days of use of the device. In either case, the certifications are submitted to the Institutional Review Board (IRB) within 5 working days of the use of the device.

Section 50.23(e)(4) provides that an investigator must disclose the investigational status of the device and what is known about the performance characteristics of the device at the time test results are reported to the subject's health care provider and public health authorities, as applicable. Under the June 7, 2006, interim final rule, the investigator provides the IRB with the information required by § 50.25 (21 CFR 50.25) (except for the information described in § 50.25(a)(8)) and the procedures that will be used to provide this information to each subject or the subject's legally authorized representative.

From its knowledge of the industry, FDA estimates that there are approximately 150 laboratories that could perform testing that uses investigational in vitro diagnostic devices to identify chemical, biological, radiological, or nuclear agents. FDA estimates that in the United States each year there are approximately 450 naturally occurring cases of diseases or conditions that are identified in the Centers for Disease Control's list of category 'A' biological threat agents. The number of cases that would result from a terrorist event or other public health emergency is uncertain. Based on its knowledge of similar types of submissions, FDA estimates that it will take about 2 hours to prepare each certification.

Based on its knowledge of similar types of submissions, FDA estimates that it will take about 1 hour to prepare a report disclosing the investigational status of the in vitro diagnostic device and what is known about the performance characteristics of the device and submit it to the health care provider and, where appropriate, to public health authorities.

The June 7, 2006, interim final rule refers to previously approved collections of information found in FDA regulations. These collections of information are subject to review by OMB under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). The collections of information in § 50.25 have been approved under 0910–0130.

In the **Federal Register** of February 18, 2010 (75 FR 7278), FDA published a 60-day notice requesting public comment on the proposed collection of information. No comments were received.

FDA estimates this burden of the collection of information as follows:

TABLE 1.—ESTIMATED AVERAGE ANNUAL REPORTING BURDEN[1]

| 21 CFR Section | No. of Respondents | Annual Frequency of Responses | Total Annual Responses | Hours per Response | Total Hours | Total Operating & Maintenance Costs |
|---|---|---|---|---|---|---|
| 50.23(e)(1) and (e)(2) | 150 | 3 | 450 | 2 | 900 | $0.00 |
| 50.23(e)(4) | 150 | 3 | 450 | 1 | 450 | $100.00 |
| Total | | | | | 1,350 | $100.00 |

Dated: April 29, 2010.

**Leslie Kux,**

*Acting Assistant Commissioner for Policy.*

[FR Doc. 2010–10656 Filed 5–5–10; 8:45 am]

**BILLING CODE 4160–01–S**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

**[Docket No. FDA–2009–N–0480]**

### Agency Information Collection Activities; Announcement of Office of Management and Budget Approval; Investigational Device Exemptions Reports and Records

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Notice.

**SUMMARY:** The Food and Drug Administration (FDA) is announcing that a collection of information entitled " Investigational Device Exemptions Reports and Records—21 CFR Part 812" has been approved by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995.

**FOR FURTHER INFORMATION CONTACT:** Daniel Gittleson, Office of Information Management, Food and Drug Administration, 1350 Piccard Dr., PI50–400B, Rockville, MD 20850, 301–796–5156, *Daniel.Gittleson@fda.hhs.gov*.

**SUPPLEMENTARY INFORMATION:** In the **Federal Register** of January 19, 2010 (75 FR 2869), the agency announced that the proposed information collection had been submitted to OMB for review and clearance under 44 U.S.C. 3507. 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. OMB has now approved the information collection and has assigned OMB control number 0910–0078. The approval expires on February 28, 2013. A copy of the supporting statement for this information collection is available on the Internet at *http://www.reginfo.gov/public/do/PRAMain*.

Dated: April 29, 2010.

**Leslie Kux,**

*Acting Assistant Commissioner for Policy.*

[FR Doc. 2010–10657 Filed 5–6–10; 8:45 am]

**BILLING CODE 4160–01–S**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### National Institute on Alcohol Abuse and Alcoholism; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), 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 on Alcohol Abuse and Alcoholism Special Emphasis Panel; NADIA Consortium Review (IN).

*Date:* May 19, 2010.

*Time:* 8 a.m. to 7 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* Embassy Suites at the Chevy Chase Pavilion, 4300 Military Road, NW., Washington, DC 20015.

*Contact Person:* Ranga Srinivas, PhD, Chief, Extramural Project Review Branch, Office of Extramural Activities, National Institutes of Health, National Institute on Alcohol Abuse & Alcoholism, 5635 Fishers Lane, Room 2085, Rockville, MD 20852.

*Name of Committee:* National Institute on Alcohol Abuse and Alcoholism Special Emphasis Panel; NADIA Consortium Review (NC).

*Date:* May 20, 2010.

*Time:* 8 a.m. to 6 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* Embassy Suites at the Chevy Chase Pavilion, 4300 Military Road, NW., Washington, DC 20015.

*Contact Person:* Ranga Srinivas, PhD, Chief, Extramural Project Review Branch, Office of Extramural Activities, National Institutes of Health, National Institute on Alcohol Abuse & Alcoholism, 5635 Fishers Lane, Room 2085, Rockville, MD 20852.

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

(Catalogue of Federal Domestic Assistance Program Nos. 93.271, Alcohol Research Career Development Awards for Scientists and Clinicians; 93.272, Alcohol National Research Service Awards for Research Training; 93.273, Alcohol Research Programs; 93.891, Alcohol Research Center Grants; 93.701, ARRA Related Biomedical Research and Research Support Awards, National Institutes of Health, HHS)

Dated: April 28, 2010.

**Jennifer Spaeth,**

*Director, Office of Federal Advisory Committee Policy.*

[FR Doc. 2010–10432 Filed 5–5–10; 8:45 am]

**BILLING CODE 4140–01–M**

## DEPARTMENT OF HOMELAND SECURITY

### Coast Guard

**[USCG–2009–1086]**

### Pittsburgh Area Maritime Security Committee; Vacancies

**AGENCY:** Coast Guard, DHS.

**ACTION:** Solicitation for membership.

**SUMMARY:** This notice requests individuals interested in serving on the Pittsburgh Area Maritime Security Committee (AMSC) to submit their application for membership, to the Captain of the Port, Pittsburgh, Pennsylvania.

**DATES:** Requests for membership should reach the Pittsburgh Captain of the Port on or before June 7, 2010.

**ADDRESSES:** Requests for membership should be submitted to the Captain of the Port at the following address: Commander, USCG Marine Safety Unit

Pittsburgh, 100 Forbes Avenue, Suite 1150, Pittsburgh, PA 15222–1371.

**FOR FURTHER INFORMATION CONTACT:** For questions about submitting an application or about the Pittsburgh AMSC in general, contact Mr. Dave Morgan at 412–600–7324.

**SUPPLEMENTARY INFORMATION:**

**Authority**

Section 102 of the Maritime Transportation Security Act (MTSA) of 2002 (Pub. L. 107–295) added section 70112 to Title 46 of the U.S. Code, and authorized the Secretary of the Department in which the Coast Guard is operating to establish Area Maritime Security Advisory Committees for any port area of the United States. (*See* 33 U.S.C. 1226; 46 U.S.C.; 33 CFR 1.05–1, 6.01; Department of Homeland Security Delegation No. 0170.1). The MTSA includes a provision exempting these Area Maritime Security Committees (AMSCs) from the Federal Advisory Committee Act (FACA), Public Law 92–436, 86 Stat. 470 (5 U.S.C. App.2). The AMSCs shall assist the Captain of the Port in the review, update, and exercising of the AMS Plan for their area of responsibility. Such matters may include, but are not limited to: Identifying critical port infrastructure and operations; Identifying risks (threats, vulnerabilities, and consequences); Determining mitigation strategies and implementation methods; Developing strategies to facilitate the recovery of the Maritime Transportation Security (MTS) after a Transportation Security Incident; Developing and describing the process to continually evaluate overall port security by considering consequences and vulnerabilities, how they may change over time, and what additional mitigation strategies can be applied; and Providing advice to, and assisting the Captain of the Port in developing and maintaining the Area maritime Security Plan.

**Pittsburgh AMSC Membership**

Members of the AMSC should have at least 5 years of experience related to maritime or port security operations. The Pittsburgh AMSC is comprised of individuals who represent federal, state, local, and industry stakeholders from Pennsylvania, Ohio, and West Virginia. We are seeking to fill up to eight positions with this solicitation. Applicants may be required to pass an appropriate security background check prior to appointment to the committee. Members' term of office will be for 5 years, however, a member is eligible to serve an additional term of office. Members will not receive any salary or other compensation for their service on the AMSC. In support of the USCG policy on gender and ethnic diversity, we encourage qualified women and members of minority groups to apply.

**Request for Applications**

Those seeking membership are not required to submit formal applications to the local Captain of the Port, however, because we do have an obligation to ensure that a specific number of members have the prerequisite maritime security experience, we encourage the submission of résumés highlighting experience in the maritime and security industries.

Dated: March 26, 2010.

**R.V. Timme,**

*Commander, U.S. Coast Guard, Federal Maritime Security Coordinator, Pittsburgh.*

[FR Doc. 2010–10611 Filed 5–5–10; 8:45 am]

**BILLING CODE 9110–04–P**

## DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

**[Docket No. FR–5382–N–10]**

## Notice of Proposed Information Collection for Public Comment: Disaster Assistance Program Incremental Rent Transition Study

**AGENCY:** Office of Policy Development and Research, HUD.

**ACTION:** Notice.

**SUMMARY:** The proposed information collection requirement described below will be submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

**DATES:** *Comment Due Date:* July 6, 2010.

**ADDRESSES:** Interest persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and should be sent to: Reports Liaison Officer, Office of Policy Development and Research, Department of Housing and Urban Development, 451 7th Street, SW., Room 8234, Washington, DC 20410.

**FOR FURTHER INFORMATION CONTACT:** Marina Myhre, PhD, Department of Housing and Urban Development, 451 7th Street, SW., Washington, DC 20410; telephone (202) 402–5705 (this is not a toll-free number). Copies of the proposed data collection and other available documents may be obtained from Dr. Myhre.

**SUPPLEMENTARY INFORMATION:** This Notice is soliciting comments from members of the public and affecting agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) enhance the quality, utility, and clarity of the information to be collected; and (4) minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, such as permitting electronic submission of responses.

*Title of Proposal:* Disaster Assistance Program Incremental Rent Transition Study.

*Description of the need for the information and proposed use:* To assist households displaced by Hurricane Katrina in 2005, the Disaster Housing Assistance Program (DHAP) was implemented to provide rental assistance and case management services to eligible displaced families from September 1, 2007, through February 28, 2009. DHAP was implemented in phases, and the type and terms of rental assistance varied over time. DHAP presents a unique opportunity to track families transitioning from stepped-down rental subsidies (*i.e.,* starting with a full subsidy of rent and then decreasing it by $50 per month) or a full rental subsidy (*i.e.,* a full subsidy—$0 rent) to market rate or alternative housing assistance programs and to measure their outcomes over time.

The U.S. Department of the Housing and Urban Development (HUD) is conducting an outcome evaluation entitled the Disaster Housing Assistance Program (DHAP) Incremental Rent Transition (IRT) Study. This study represents an important opportunity for HUD to learn about rent-setting strategies and case management services in a post-disaster housing program. The results of this study will feed into decisions about how HUD should operate such programs after future disasters. In particular, this study will increase HUD's understanding of how to structure and scale down voucher rent systems and the accompanying case management services following a disaster.

The data collection effort for the DHAP IRT Study initially involved a baseline survey conducted under OMB

control number 2528–0256. Approximately 1,430 DHAP participants responded to the baseline survey. Respondents were contacted in January-February 2010 to update their contact information under the same OMB control number.

A 12-month follow-up survey of respondents to the baseline survey is planned for fall 2010 and is the subject of this notice. The survey will collect data on participants' housing employment, income, and savings/debt outcomes approximately 12 to 15 months after they transitioned off DHAP assistance. The survey also will ask about participants' experiences with the alternative strategies employed by participating public housing authorities (PHAs) for providing case management to help households with the recovery process. The information collected through these surveys will be supplemented by administrative data on participant characteristics and program services (including rental assistance and case management) collected during program operation. The participant survey will take approximately 40 minutes per respondent to complete.

*Members of affected public:* The data collection effort for the DHAP IRT Study initially involved a baseline survey conducted under OMB control number 2528–0256. Approximately 1,430 DHAP participants responded to the baseline survey. Respondents were contacted in January-February 2010 to update their contact information under the same OMB control number.

*Estimation of the total number of hours needed to prepare the information collection, including the number of respondents, frequency of response, and hours of response:* The researchers will survey 1,430 participants in all; the surveys are expected to last 40 minutes. This constitutes a total burden hour estimate of 958 burden hours.

*Status of the proposed information collection:* Pending OMB approval.

**Authority:** Section 3506 of the Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35, as amended.

Dated: April 20, 2010.

**Raphael W. Bostic,**

*Assistant Secretary for Policy Development and Research, R .*

[FR Doc. 2010–10687 Filed 5–5–10; 8:45 am]

**BILLING CODE 4210–67–P**

## DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

**[Docket No. FR–5382–N–09]**

## Notice of Proposed Information Collection for Public Comment: 202 Demonstration Planning Grant Evaluation

**AGENCY:** Office of Policy Development and Research, HUD.

**ACTION:** Notice.

**SUMMARY:** The proposed information collection requirement described below will be submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

**DATES:** *Comments Due Date:* July 6, 2010.

**ADDRESSES:** Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB Control Number and should be sent to: Ashaki Robinson Johns, Office of Policy Development and Research, Department of Housing and Urban Development, 451 7th Street, SW., Suite 8120, Washington, DC 20410.

**FOR FURTHER INFORMATION CONTACT:** Ashaki Robinson Johns (202) 402–7545, (this is not a toll free number) for copies of the proposed forms and other available documents.

**SUPPLEMENTARY INFORMATION:** The Department will submit the proposed information collection to OMB for review, as required by the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35, as amended). This notice is soliciting comments from members of the public and affected agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including if the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of proposed collection of information; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

*Title of Proposal:* Research Plan for an Evaluation of the Section 202 Demonstration Planning Grant Program.

*Description of the need for information and proposed use:* The Department is conducting, through a contract to Abt Associates Inc. and its subcontractor, VIVA Consulting LLC, a study of the Section 202 Supportive Housing for the Elderly Demonstration Planning Grant Program. The Section 202 Supportive Housing for the Elderly program provides capital advances and operating funds to nonprofit organizations ("sponsors") to develop affordable elderly housing. HUD's goal for Section 202 properties is for sponsors to reach initial closing within 18 months of fund reservation. However, a 2003 study of the Section 202 program by the Governmental Accountability Office (GAO) found that approximately 70 percent of Section 202 properties funded between 1998 and 2009 did not meet this goal and that properties that did not meet the 18-month timeline took an average of 29 months to reach initial closing. The predevelopment delays were attributed to a number of factors, including the lack of predevelopment funding.

The Section 202 Demonstration Planning Grant Program (DPG) was created in 2004 to provide predevelopment funding to Section 202 sponsors to reduce development delays and increase the number of affordable rental units made available each year for low-income elderly households. This evaluation will assess the awareness and effectiveness of the program through telephone surveys with project sponsors. The key research question is whether the DPG helps sponsors get from Section 202 award to initial closing on the project within 18 months, HUD's target duration for the predevelopment period.

To collect the information necessary for this study, the Department will conduct a telephone survey of staff members from a sample of sponsor organizations. The surveys will be conducted with both staff from sponsor organizations that have received Demonstration Planning Grants ("DPG recipients") and staff from sponsor organizations that have received Section 202 funding between fiscal years 2004 and 2008 but have not received a Demonstration Planning Grant ("non-recipients"). Surveys will be conducted with 70 DPG recipients and 30 non-recipients. The samples will be selected purposively to provide geographic diversity by Census region and a range of durations of predevelopment periods.

DPG recipients will be asked about their knowledge of and experience with the DPG program and how the DPG and other factors influenced their ability to reach initial closing within 18 months.

Non-recipients will be asked about their familiarity with the DPG program, the reasons they did not apply for the program, and the factors that contributed to their ability to reach initial closing within 18 months.

*Members of Affected Public:* The telephone sponsor survey will affect approximately 100 recipients of a Section 202 Supportive Housing for the Elderly grant.

*Estimation of the total number of hours needed to prepare the information collection including number of respondents, frequency of response, and hours of response:* For the DPG recipient survey, the researchers will administer a one-time telephone survey to 70 sponsor staff. These interviews are expected to last 60 minutes for a total burden hour estimate of 70 hours. For the non-recipient survey, the researchers will administer a one-time telephone survey to 30 sponsor staff. The non-recipient interviews are expected to last 30 minutes for a total burden hour estimate of 15 hours.

| Respondents | Number of respondents | Number responses per respondent | Average burden/response (in hours) | Total burden hours |
|---|---|---|---|---|
| DPG Recipients | 70 | 1 | 1.0 | 70 |
| Non-recipients | 30 | 1 | 0.5 | 15 |
| Total | 100 | 100 | | 85 |

*Status of the proposed information collection:* Pending OMB approval.

**Authority:** Section 3506 of the Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35, as amended.

Dated: April 28, 2010.

**Raphael W. Bostic,**

*Assistant Secretary for Policy Development and Research.*

[FR Doc. 2010–10689 Filed 5–5–10; 8:45 am]

**BILLING CODE 4210–67–P**

## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

**[FWS-R4-R-2010-N091] [40137-1263-0000-0X]**

### Proposed Information Collection; OMB Control Number 1018-NEW; Refuge Daily Visitor Use Report and Check-In Permit

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Notice; request for comments.

**SUMMARY:** We (Fish and Wildlife Service) will ask the Office of Management and Budget (OMB) to approve the information collection (IC) described below. As required by the Paperwork Reduction Act of 1995 and as part of our continuing efforts to reduce paperwork and respondent burden, we invite the general public and other Federal agencies to take this opportunity to comment on this IC. We may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

**DATES:** To ensure that we are able to consider your comments on this IC, we must receive them by July 6, 2010.

**ADDRESSES:** Send your comments on the IC to Hope Grey, Information Collection Clearance Officer, Fish and Wildlife Service, MS 222–ARLSQ, 4401 North Fairfax Drive, Arlington, VA 22203 (mail); or *hope_grey@fws.gov* (e-mail).

**FOR FURTHER INFORMATION CONTACT:** To request additional information about this IC, contact Hope Grey by mail or e-mail (see ADDRESSES) or by telephone at (703) 358–2482.

**SUPPLEMENTARY INFORMATION:**

#### I. Abstract

The National Wildlife Refuge System Administration Act of 1966 (16 U.S.C. 668dd-668ee), as amended by the National Wildlife Refuge System Improvement Act of 1997, and the Refuge Recreation Act of 1962 (16 U.S.C. 460k-460k-4) govern the administration and uses of national wildlife refuges and wetland management districts. We are authorized to permit public uses on lands of the National Wildlife Refuge System, including hunting, fishing, wildlife observation, wildlife photography, and environmental education and interpretation, and other visitor uses when we find that the activities are compatible and appropriate with the purpose or purposes for which the refuges were established.

We collect information on hunters and anglers and other visitors in order to protect refuge resources and administer and evaluate the success of visitor programs. Because of high demand and limited resources, we often provide visitor opportunities by permit, based on dates, locations, or type of public use. We may not allow all opportunities on all refuges and harvest information differs on each refuge. Therefore, we are proposing two forms to collect this information. Not all refuges will use each form and some refuges may collect the information in a nonform format. We propose to collect:

- Information on the visitor (name, address, and contact information).
- Whether or not hunters/anglers were successful (number and type of harvest/caught).
- Purpose of visit (hunting, fishing, wildlife observation, wildlife photography, auto touring, birding, hiking, boating/canoeing, visitor center, special event, environmental education class, volunteering, other recreation).
- Date of visit.

This information will be a vital tool in meeting refuge objectives and maintaining quality visitor experiences. The above information will help us:

- Administer and monitor visitor programs and facilities on refuges.
- Distribute visitor permits to ensure safety of visitors.
- Ensure a quality visitor experience.
- Minimize resource disturbance, manage healthy game populations, and ensure the protection of fish and wildlife species.
- Assist in Statewide wildlife management and enforcement and develop reliable estimates of the number of all game fish and wildlife.
- Determine facility and program needs and budgets.

#### II. Data

*OMB Control Number:* 1018-XXXX.

*Title:* Refuge Daily Visitor Use Report and Check-In Permit.

*Service Form Number(s):* 3-2405 and 3-2406.

*Type of Request:* Request for a new OMB control number.

*Affected Public:* Visitors to national wildlife refuges.

*Respondent's Obligation:* Required to obtain or retain a benefit.

*Frequency of Collection:* On occasion.

| Activity | Number of annual respondents | Number of annual responses | Completion time per response | Annual burden hours |
|---|---|---|---|---|
| FWS Form 3-2405 - Visitor Check-In Permit and Use Report | 590,000 | 590,000 | 5 minutes ..... | 49,167 |
| FWS Form 3-2406 - Daily Visitor Use Report ..... | 60,000 | 60,000 | 5 minutes ..... | 5,000 |
| Totals ..... | 650,000 | 650,000 | ..... | 54,167 |

**III. Request for Comments**

We invite comments concerning this IC on:

• Whether or not the collection of information is necessary, including whether or not the information will have practical utility;

• The accuracy of our estimate of the burden for this collection of information;

• Ways to enhance the quality, utility, and clarity of the information to be collected; and

• Ways to minimize the burden of the collection of information on respondents.

Comments that you submit in response to this notice are a matter of public record. We will include or summarize each comment in our request to OMB to approve this IC. Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment, including your personal identifying information, may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Dated: April 30, 2010

**Hope Grey,**

*Information Collection Clearance Officer, Fish and Wildlife Service.*

[FR Doc. 2010–10695 Filed 5–5–10; 8:45 am]

**BILLING CODE 4310–55–S**

## DEPARTMENT OF THE INTERIOR

### Bureau of Reclamation

### Mormon Island Auxiliary Dam (MIAD) Modification Project, Sacramento and El Dorado Counties, CA

**AGENCY:** Bureau of Reclamation, Interior.

**ACTION:** Notice of availability of the Final Supplemental Environmental Impact Statement/Environmental Impact Report (EIS/EIR).

**SUMMARY:** Pursuant to the National Environmental Policy Act and the California Environmental Quality Act (CEQA), the Bureau of Reclamation (Reclamation), the lead Federal agency and the Sacramento Area Flood Control Agency (SAFCA), the CEQA lead agency, have prepared a Final Supplemental EIS/EIR for the MIAD Modification Project. The Final Supplemental EIS/EIR contains responses to comments received on the Draft Supplemental EIS/EIR.

A Notice of Availability of the Draft Supplemental EIS/EIR was published in the **Federal Register** on Friday, November 27, 2009 (74 FR 62346). The public review period on the Draft Supplemental EIS/EIR ended on January 18, 2010.

The MIAD Modification Project is a feature of the larger Folsom Dam Safety/Flood Damage Reduction (DS/FDR) Project currently underway by Reclamation, the U.S. Army Corps of Engineers (Corps), and the Corps' non-Federal sponsors, the Central Valley Flood Protection Board and SAFCA, to address hydrologic, static, and seismic issues at Folsom Dam and Reservoir. The analysis in the Folsom DS/FDR EIS/EIR considered several methods to modify MIAD to achieve Reclamation's risk standards for dam safety. Subsequent investigations have shown that the preferred alternative's design approaches and construction techniques need to be changed to achieve Reclamation's existing risk standards for dam safety. Specifically, the utilization of jet grouting to stabilize the foundation of MIAD will not meet Reclamation's dam safety standards. The MIAD Supplemental EIS/EIR analyzes additional techniques to stabilize the MIAD foundation to meet the existing risk standards for dam safety.

Additionally, the supplement addresses potential environmental effects associated with completing mitigation for the Folsom DS/FDR Project at the Mississippi Bar site. The two mitigation alternatives include the improvement of up to 80 acres of seasonal wetland and riparian habitat and the no action alternative. The environmental effects of the mitigation were not addressed in the previous environmental document as the location for mitigation had not been determined.

**DATES:** SAFCA will complete a CEQA Findings on the Final Supplemental EIS/EIR within 30 days of the document's release. No Federal decision will be made until 30 days after the release of the Final Supplemental EIS/EIR. After this 30-day waiting period, Reclamation will complete a Record of Decision (ROD) for the MIAD modifications. A second ROD is anticipated for the habitat mitigation actions at Mississippi Bar. The RODs and CEQA Findings will identify the recommended action to be implemented, including any measures found necessary to avoid, reduce, or mitigate any significant adverse project effects.

**ADDRESSES:** Send requests for a compact disk or a bound copy of the Final Supplemental EIS/EIR to Mr. Matthew See, Bureau of Reclamation, 7794 Folsom Dam Road, Folsom, CA 95630 (*e-mail: msee@usbr.gov; telephone:* 916–989–7198). The MIAD Final Supplemental EIS/EIR will also be available at: *http://www.usbr.gov/mp/nepa/nepa_projdetails.cfm?Project_ID=3472*.

See the **SUPPLEMENTARY INFORMATION** section for locations where copies of the Final Supplemental EIS/EIR are available for public review.

**FOR FURTHER INFORMATION CONTACT:** Mr. Matthew See at 916–989–7198, TDD 916–989–7285, e-mail *msee@usbr.gov.*

**SUPPLEMENTARY INFORMATION:** The Folsom Facility consists of 12 structures (dams and dikes), that impound the American River forming Folsom Reservoir. As part of their responsibilities, Reclamation and the Corps have determined that the Folsom Facility requires structural improvements to increase overall public safety above existing conditions including addressing dam safety and security issues. Both Reclamation and the Corps share in the responsibility of ensuring that the Folsom Facility is maintained and operated under their respective agency dam safety regulations and guidelines, as defined by Congress. The improvements will enhance the facility's ability to reduce flood damages posed by hydrologic (flood), seismic (earthquake), and static (seepage) events. These events have a low probability of occurrence in a given year; however, due to the large population downstream of Folsom Dam, modifying the facilities is prudent and necessary to improve public safety above current baseline conditions and meet current safety standards.

Reclamation has identified the need for expedited action to reduce hydrologic, static, and seismic risks under its Safety of Dams (SOD) Program and security issues under its Security Program. These identified risks are among the highest risks for all dams in Reclamation's inventory, and the Folsom Facility is among Reclamation's highest priorities within its SOD Program. Both Reclamation and the Corps have conducted engineering studies to identify potential corrective measures for the Folsom Facility to alleviate seismic, static, and hydrologic dam safety issues and flood management concerns. These two Federal agencies have combined their efforts resulting in (1) a Joint Federal Project for addressing Reclamation's dam safety hydrologic risk and the Corps' flood damage reduction objectives and (2) other stand-alone flood damage reduction and dam safety actions to be completed by the respective agencies in a coordinated manner. The MIAD Modification Project Final Supplemental EIS/EIR discusses the project background, purpose and need, project description, and proposed action. Responses to all comments received from interested organizations and individuals on the Draft Supplemental EIS/EIR during the public review period and at the public meetings are addressed in the Final Supplemental EIS/EIR.

The Final Supplemental EIS/EIR addresses the impacts of project construction on aquatic resources, terrestrial vegetation and wildlife, hydrology, water quality, flood control, groundwater, water supply, socioeconomics, cultural resources, soils, minerals, geological resources, visual resources, transportation and circulation, land use, planning and zoning, recreation resources, public services and utilities, air quality, public health and safety, growth inducement, noise, environmental justice, and Indian trust assets. There is the potential for significant impacts to air quality, recreation resources, and visual resources.

The MIAD Modification Project proposed action considered by the lead agencies is the alternative that includes:

- Cellular open excavation as the preferred method to excavate and replace the downstream MIAD foundation to reduce seismic (earthquake) risks associated with the downstream foundation.
- Placement of an overlay on the downstream side of MIAD to address seismic (earthquake) risks associated with the upstream foundation and installation of filters and drains to reduce static (seepage and piping) risks.
- Creation of up to 80 acres of riparian habitat mitigation and 5 acres of seasonal wetland mitigation at Mississippi Bar.

Copies of the MIAD Modification Project Final Supplemental EIS/EIR are available for public review at the following locations:

- Bureau of Reclamation, Denver Office Library, Building 67, Room 167, Denver Federal Center, 6th and Kipling, Denver, CO 80225.
- Bureau of Reclamation, Mid-Pacific Regional Office Library, 2800 Cottage Way, W–1825, Sacramento, CA 95825–1989.
- El Dorado County Library, 345 Fair Lane, Placerville, CA 95667–5699.
- Folsom Public Library, 411 Stafford Street, Folsom, CA 95630.
- Natural Resources Library, U.S. Department of the Interior, 1849 C Street, NW., Main Interior Building, Washington, DC 20240–0001.
- Roseville Public Library, 311 Vernon Street, Roseville, CA 95678.
- Sacramento Central Library, 828 I Street, Sacramento, CA 95814–2589.

**Public Disclosure**

Before including your name, address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Dated: March 19, 2010.

**Pablo R. Arroyave,**

*Deputy Regional Director, Mid-Pacific Region.*

[FR Doc. 2010–10716 Filed 5–5–10; 8:45 am]

**BILLING CODE 4310–MN–P**

## DEPARTMENT OF THE INTERIOR

### Minerals Management Service

### Notice on Outer Continental Shelf Oil and Gas Lease Sales

**AGENCY:** Minerals Management Service, Interior.

**ACTION:** List of Restricted Joint Bidders.

**SUMMARY:** Pursuant to the authority vested in the Director of the Minerals Management Service by the joint bidding provisions of 30 CFR 256.41, each entity within one of the following groups shall be restricted from bidding with any entity in any other of the following groups at Outer Continental Shelf oil and gas lease sales to be held during the bidding period May 1, 2010, through October 31, 2010. The List of Restricted Joint Bidders published in the **Federal Register** on November 23, 2009, covered the period November 1, 2009, through April 30, 2010.

*Group I.* Exxon Mobil Corporation, ExxonMobil Exploration Company.

*Group II.* Shell Oil Company, Shell Offshore Inc., SWEPI LP, Shell Frontier Oil & Gas Inc., Shell Onshore Ventures Inc., SOI Finance Inc., Shell Rocky Mountain Production LLC, Shell Gulf of Mexico Inc.

*Group III.* BP America Production Company, BP Exploration & Production Inc., BP Exploration (Alaska) Inc.

*Group IV.* Chevron Corporation, Chevron U.S.A. Inc., Chevron Midcontinent, L.P., Unocal Corporation, Union Oil Company of California, Pure Partners, L.P.

*Group V.* ConocoPhillips Company, ConocoPhillips Alaska, Inc., ConocoPhillips Petroleum Company, Phillips Pt. Arguello Production Company, Burlington Resources Oil & Gas Company L.P., Burlington Resources Offshore Inc., The Louisiana Land and Exploration Company, Inexco Oil Company.

*Group VI.* Eni Petroleum Co. Inc., Eni Petroleum US LLC, Eni Oil US LLC, Eni Marketing Inc., Eni BB Petroleum Inc., Eni US Operating Co. Inc., Eni BB Pipeline LLC.

*Group VII.* Petrobras America Inc., Petroleo Brasileiro S.A.

*Group VIII.* StatoilHydro ASA, Statoil Gulf of Mexico LLC, StatoilHydro USA E&P, Inc., StatoilHydro Gulf Properties Inc.

Dated: April 12, 2010.

**S. Elizabeth Birnbaum,**

*Director, Minerals Management Service.*

[FR Doc. 2010–10692 Filed 5–5–10; 8:45 am]

**BILLING CODE 4310–MR–P**

## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

**[FWS–R3–ES–2010–N093; 30120–1113–0000–F6]**

### Endangered and Threatened Wildlife and Plants; Permit Applications

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Notice of availability of permit applications; request for comments.

**SUMMARY:** We, the U.S. Fish and Wildlife Service, invite the public to comment on the following applications to conduct certain activities with

endangered species. With some exceptions, the Endangered Species Act (Act) prohibits activities with endangered and threatened species unless a Federal permit allows such activity. The Act requires that we invite public comment before issuing these permits.

**DATES:** We must receive any written comments on or before June 7, 2010.

**ADDRESSES:** Send written comments by U.S. mail to the Regional Director, Attn: Peter Fasbender, U.S. Fish and Wildlife Service, Ecological Services, 1 Federal Drive, Fort Snelling, MN 55111–4056; or by electronic mail to *permitsR3ES@fws.gov.*

**FOR FURTHER INFORMATION CONTACT:** Peter Fasbender, (612) 713–5343.

**SUPPLEMENTARY INFORMATION:**

**Background**

We invite public comment on the following permit applications for certain activities with endangered species authorized by section 10(a)(1)(A) of the Act (16 U.S.C. 1531 *et seq.*) and our regulations governing the taking of endangered species in the Code of Federal Regulations (CFR) at 50 CFR part 17. Submit your written data, comments, or request for a copy of the complete application to the address shown in **ADDRESSES.**

**Permit Applications**

*Permit Application Number:* TE09357A.

*Applicant:* Ecological Specialties LLC, Symsonia, Kentucky.

The applicant requests a permit renewal/amendment to take (capture, radio-tag, and release) Indiana bats (*Myotis sodalis*), gray bats (*Myotis grisescens*), Ozark big-eared bats (*Corynorhinus townsendii ingens*), Virginia big-eared bats (*Corynorhinus townsendii virginianus*), Mexican long-nosed bats (*Leptonycteris nivalis*), and Sanborn's long-nosed bats (*Leptonycteris sanborni (=yerbabuenae)*) throughout the States of Arkansas, Alabama, California, Illinois, Indiana, Iowa, Michigan, Minnesota, Missouri, New Jersey, New Mexico, New York, Ohio, Pennsylvania, Tennessee, Texas, Virginia, and West Virginia to document presence/absence and distribution of the species and to conduct habitat use assessments. Proposed activities are aimed at enhancement of survival of the species in the wild.

*Permit Application Number:* TE010887A.

*Applicant:* U.S. Geological Survey, Great Lakes Science Center, Porter, Indiana.

The applicant requests a permit to take (capture, rear and release) Karner blue butterflies (*Lycaeides melissa samuelis*) throughout the range of the species in New York, Indiana, Michigan, and Wisconsin. Proposed activities involve capture of adult butterflies for captive rearing, experimental treatments on captive-reared larvae, and nonlethal tissue sampling in the wild. Population studies are designed to answer questions posed in the Karner blue butterfly recovery plan and are aimed at enhancement of survival of the species in the wild.

*Permit Application Number:* TE10891A.

*Applicant:* Illinois State Museum, Department of Natural Resources, Springfield, Illinois.

The applicant requests a permit renewal to take (capture and release, collect) Hine's emerald dragonfly (*Somatochlora hineana*) throughout the range of the species in the States of Alabama, Arkansas, Connecticut, Delaware, District of Columbia, Georgia, Illinois, Indiana, Iowa, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, New Hampshire, New Jersey, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, Vermont, Virginia, West Virginia, and Wisconsin. Proposed activities are for the recovery and enhancement of survival of the species in the wild.

*Permit Application Number:* TE212427.

*Applicant:* Ecology & Environment, Inc., Lancaster, New York.

The applicant requests an amendment to permit number TE212427 for the Indiana bat, Ozark big-eared bat, and gray bat. The applicant's request includes addition of qualified personnel and addition of the States of Iowa, Michigan, and Pennsylvania to their area of jurisdiction for conducting survey and assessment work. Activities are for the enhancement of survival of the species in the wild.

*Permit Application Number:* TE11035A.

*Applicant:* Robert J. Vande Kopple, University of Michigan, Pellston, Michigan.

The applicant requests a permit renewal to take (capture and release, collect) Hungerford's crawling water beetle (*Brychius hungerfordi*) throughout the States of Michigan and Wisconsin. Proposed activities include surveys to document presence of the species, habitat use, and scientific study related to recovery and enhancement of the survival of the species in the wild.

**Public Comments**

We seek public review and comments on these permit applications. Please refer to the permit number when you submit comments. Comments and materials we receive are available for public inspection, by appointment, during normal business hours at the address shown in the **ADDRESSES** section. Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

**National Environmental Policy Act (NEPA)**

In compliance with NEPA (42 U.S.C. 4321 *et seq.*), we have made an initial determination that the proposed activities in these permits are categorically excluded from the requirement to prepare an environmental assessment or environmental impact statement (516 DM 6 Appendix 1, 1.4C(1)).

Dated: April 30, 2010.

**Lynn M. Lewis,**

*Assistant Regional Director, Ecological Services, Region 3.*

[FR Doc. 2010–10659 Filed 5–5–10; 8:45 am]

**BILLING CODE 4310–55–P**

## INTERNATIONAL TRADE COMMISSION

**[Investigation No. 332–352]**

### Andean Trade Preference Act: Impact on the U.S. Economy and on Andean Drug Crop Eradication

**AGENCY:** United States International Trade Commission.

**ACTION:** Notice of public hearing and opportunity to submit comments in connection with the 14th report on the Andean Trade Preference Act (ATPA).

**SUMMARY:** Section 206 of the ATPA (19 U.S.C. 3204) requires the Commission to report biennially to the Congress by September 30 of each reporting year on the economic impact of the Act on U.S. industries and U.S. consumers, as well as on the effectiveness of the Act in promoting drug related crop eradication and crop substitution efforts by beneficiary countries. The Commission prepares these reports under investigation No. 332–352, *Andean*

*Trade Preference Act: Impact on the U.S. Economy and on Andean Drug Crop Eradication.*

**DATES:** *June 24, 2010:* Deadline for filing requests to appear at the public hearing.

*June 30, 2010:* Deadline for filing pre-hearing briefs and statements.

*July 7, 2010:* Public hearing.

*July 14, 2010:* Deadline for filing post-hearing briefs and statements and all other written submissions.

*September 30, 2010:* Transmittal of Commission report to Congress.

**ADDRESSES:** All Commission offices, including the Commission's hearing rooms, are located in the United States International Trade Commission Building, 500 E Street SW., Washington, DC. All written submissions should be addressed to the Secretary, United States International Trade Commission, 500 E Street SW., Washington, DC 20436. The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *http://www.usitc.gov/secretary/edis.htm.*

**FOR FURTHER INFORMATION CONTACT:** Walker Pollard (202–205–3228, or *walker.pollard@usitc.gov*), Country and Regional Analysis Division, Office of Economics, U.S. International Trade Commission, Washington, DC 20436. For information on the legal aspects of this investigation, contact William Gearhart of the Commission's Office of the General Counsel (202–205–3091 or *william.gearhart@usitc.gov*). The media should contact Peg O'Laughlin, Public Affairs Officer (202–205–1819 or *margaret.olaughlin@usitc.gov*). General information concerning the Commission may be obtained by accessing its internet server (*http://www.usitc.gov*).

*Background:* Section 206 of the Andean Trade Preference Act (ATPA) (19 U.S.C. 3204) requires that the Commission submit biennial reports to the Congress regarding the economic impact of the Act on U.S. industries and consumers and, in conjunction with other agencies, the effectiveness of the Act in promoting drug-related crop eradication and crop substitution efforts of the beneficiary countries. Section 206(b) of the Act requires that each report include:

(1) The actual effect of ATPA on the U.S. economy generally as well as on specific domestic industries which produce articles that are like, or directly competitive with, articles being imported under the Act from beneficiary countries;

(2) The probable future effect that ATPA will have on the U.S. economy generally and on such domestic industries; and

(3) The estimated effect that ATPA has had on drug-related crop eradication and crop substitution efforts of beneficiary countries.

Notice of institution of this investigation for preparing these reports was published in the **Federal Register** of March 10, 1994 (59 FR 11308). This 14th report, covering the period since the previous report and focusing on calendar year 2009, is to be submitted by September 30, 2010.

*Public Hearing:* A public hearing in connection with this investigation will be held at the U.S. International Trade Commission Building, 500 E Street SW., Washington, DC, beginning at 9:30 a.m. on July 7, 2010. Requests to appear at the public hearing should be filed with the Secretary, no later than 5:15 p.m., June 24, 2010, in accordance with the requirements in the "Submissions" section below. All pre-hearing briefs and statements should be filed not later than 5:15 p.m., June 30, 2010, and all post-hearing briefs and statements should be filed not later than 5:15 p.m., July 14, 2010. In the event that, as of the close of business on June 24, 2010, no witnesses are scheduled to appear at the hearing, the hearing will be canceled. Any person interested in attending the hearing as an observer or nonparticipant may call the Secretary to the Commission (202–205–2000) after June 24, 2010, for information concerning whether the hearing will be held.

*Written Submissions:* In lieu of or in addition to participating in the hearing, interested parties are invited to submit written statements concerning this investigation. All written submissions should be addressed to the Secretary, and should be received not later than 5:15 p.m., July 14, 2008. All written submissions must conform with the provisions of section 201.8 of the Commission's *Rules of Practice and Procedure* (19 CFR 201.8). Section 201.8 requires that a signed original (or a copy so designated) and fourteen (14) copies of each document be filed. In the event that confidential treatment of a document is requested, at least four (4) additional copies must be filed, in which the confidential information must be deleted (see the following paragraph for further information regarding confidential business information). The Commission's rules authorize filing submissions with the Secretary by facsimile or electronic means only to the extent permitted by section 201.8 of the rules (*see* Handbook for Electronic Filing Procedures, *http://www.usitc.gov/secretary/fed_reg_notices/rules/handbook_on_electronic_filing.pdf*). Persons with questions regarding electronic filing should contact the Secretary (202–205–2000).

Any submissions that contain confidential business information must also conform with the requirements of section 201.6 of the *Commission's Rules of Practice and Procedure* (19 CFR 201.6). Section 201.6 of the rules requires that the cover of the document and the individual pages be clearly marked as to whether they are the "confidential" or "non-confidential" version, and that the confidential business information be clearly identified by means of brackets. All written submissions, except for confidential business information, will be made available for inspection by interested parties.

Congressional committee staff has indicated that the receiving committees intend to make the Commission's report available to the public in its entirety, and has asked that the Commission not include any confidential business information or national security classified information in the report that the Commission sends to the Congress. Any confidential business information received by the Commission in this investigation and used in preparing this report will not be published in a manner that would reveal the operations of the firm supplying the information.

Issued: May 3, 2010.

By order of the Commission.

**Marilyn R. Abbott,**

*Secretary.*

[FR Doc. 2010–10688 Filed 5–5–10; 8:45 am]

**BILLING CODE 7020–02–P**

## INTERNATIONAL TRADE COMMISSION

**[Investigation No. 731–TA–1070A (Review)]**

## Crepe Paper Products From China Determination

On the basis of the record [1] developed in the subject five-year review, the United States International Trade Commission (Commission) determines, pursuant to section 751(c) of the Tariff Act of 1930 (19 U.S.C. 1675(c)), that revocation of the antidumping duty order on crepe paper from China would be likely to lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time.

### Background

The Commission instituted this review on December 1, 2009 (74 FR

[1] The record is defined in sec. 207.2(f) of the Commission's Rules of Practice and Procedure (19 CFR 207.2(f)).

62815) and determined on March 8, 2010 that it would conduct an expedited review (75 FR 13779, March 23, 2010).

The Commission transmitted its determination in this review to the Secretary of Commerce on April 30, 2010. The views of the Commission are contained in USITC Publication 4148 (April 2010), entitled *Crepe Paper Products from China: Investigation No. 731–TA–1070A (Review).*

By order of the Commission.

Issued: May 3, 2010.

**Marilyn R. Abbott,**

*Secretary.*

[FR Doc. 2010–10691 Filed 5–5–10; 8:45 am]

**BILLING CODE 7020–02–P**

## INTERNATIONAL TRADE COMMISSION

**[Investigation No. 731–TA–1178 (Preliminary)]**

### Glyphosate From China

**AGENCY:** United States International Trade Commission.

**ACTION:** Notice of withdrawal of petition in antidumping investigation.

**SUMMARY:** On April 29, 2010, the Department of Commerce and the Commission received letters on behalf of the petitioner in the subject investigation (Albaugh, Inc., Ankeny, IA) withdrawing its petition. Commerce has not initiated an investigation as provided for in section 732(c) of the Tariff Act of 1930 (19 U.S.C. 1673a(c)). Accordingly, the Commission gives notice that its antidumping investigation concerning glyphosate from China (investigation No. 731–TA–1178 (Preliminary)) is discontinued.

**DATES:** *Effective Date:* April 29, 2010.

**FOR FURTHER INFORMATION CONTACT:** Amy Sherman (202–205–3289), Office of Investigations, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436. Hearing-impaired individuals are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on 202–205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000. General information concerning the Commission may also be obtained by accessing its Internet server (*http://www.usitc.gov*). The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov.*

By order of the Commission.

Issued: April 30, 2010.

**Marilyn R. Abbott,**

*Secretary to the Commission.*

[FR Doc. 2010–10649 Filed 5–5–10; 8:45 am]

**BILLING CODE 7020–02–P**

## INTERNATIONAL TRADE COMMISSION

**[Investigation No. 332–518]**

### China's Agricultural Trade: Competitive Conditions and Effects on U.S. Exports

**AGENCY:** United States International Trade Commission.

**ACTION:** Institution of investigation and scheduling of hearing.

**SUMMARY:** Following receipt on April 1, 2010, of a request from the United States Senate Committee on Finance (Committee) under section 332(g) of the Tariff Act of 1930 (19 U.S.C. 1332(g)), the U.S. International Trade Commission (Commission) instituted investigation No. 332–518, *China's Agricultural Trade: Competitive Conditions and Effects on U.S. Exports.*

**DATES:** *May 25, 2010:* Deadline for filing requests to appear at the public hearing.

*June 3, 2010:* Deadline for filing prehearing briefs and statements.

*June 22, 2010:* Public hearing.

*June 29, 2010:* Deadline for filing posthearing briefs and statements.

*September 15, 2010:* Deadline for filing all other written submissions.

*March 1, 2011:* Transmittal of Commission report to the Committee.

**ADDRESSES:** All Commission offices, including the Commission's hearing rooms, are located in the United States International Trade Commission Building, 500 E Street, SW., Washington, DC. All written submissions should be addressed to the Secretary, United States International Trade Commission, 500 E Street, SW., Washington, DC 20436. The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *http://www.usitc.gov/secretary/edis.htm.*

**FOR FURTHER INFORMATION CONTACT:** Project leader Joanna Bonarriva (202–205–3312 or *joanna.bonarriva@usitc.gov*) or deputy project leader Marin Weaver (202–205–3461 or *marin.weaver@usitc.gov*) for information specific to this investigation. For information on the legal aspects of this investigation, contact William Gearhart of the Commission's Office of the General Counsel (202–205–3091 or *william.gearhart@usitc.gov*). The media should contact Margaret O'Laughlin, Office of External Relations (202–205–1819 or *margaret.olaughlin@usitc.gov*). Hearing-impaired individuals may obtain information on this matter by contacting the Commission's TDD terminal at 202–205–1810. General information concerning the Commission may also be obtained by accessing its Internet server (*http://www.usitc.gov*). Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000.

*Background:* As requested by the Committee, the Commission will conduct an investigation and prepare a report on the conditions of competition in China's agricultural market and trade and their effect on U.S. agricultural exports. As requested, to the extent possible, the report will include—

(1) An overview of China's agricultural market, including recent trends in production, consumption, and trade;

(2) A description of the competitive factors affecting the agricultural sector in China, in such areas as costs of production, technology, domestic support and government programs related to agricultural markets, foreign direct investment policies, and pricing and marketing regimes;

(3) An overview of China's participation in global agricultural export markets, particularly in the Asia-Pacific region and in those markets with which China has negotiated trade agreements;

(4) A description of the principal measures affecting China's agricultural imports, including tariffs and non-tariff measures such as sanitary and phytosanitary measures and technical barriers to trade, and;

(5) A quantitative analysis of the economic effects of China's MFN tariffs, preferential tariffs negotiated under China's free trade agreements, and China's non-tariff measures on U.S. agricultural exports to China and on imports from the rest of the world.

The Committee asked that the Commission's report cover the period 2005–2009, or the period 2005 to the latest year for which data are available. The Committee requested that the Commission deliver its report by March 1, 2011.

*Public Hearing:* The Commission will hold a public hearing in connection with this investigation at the U.S. International Trade Commission Building, 500 E Street, SW., Washington, DC, beginning at 9:30 a.m. on Tuesday, June 22, 2010. Requests to appear at the public hearing should be filed with the Secretary no later than

5:15 p.m., May 25, 2010, in accordance with the requirements in the "Submissions" section below. All prehearing briefs and statements should be filed with the Secretary not later than 5:15 p.m., June 3, 2010; and all posthearing briefs and statements responding to matters raised at the hearing should be filed with the Secretary not later than 5:15 p.m., June 29, 2010. All hearing-related briefs and statements should be filed in accordance with the requirements for filing written submissions set out below. In the event that, as of the close of business on May 25, 2010, no witnesses are scheduled to appear at the hearing, the hearing will be canceled. Any person interested in attending the hearing as an observer or nonparticipant may call the Office of the Secretary (202–205–2000) after May 25, 2010, for information concerning whether the hearing will be held.

*Written Submissions:* In lieu of or in addition to participating in the hearing, interested parties are invited to file written submissions concerning this investigation. All written submissions should be addressed to the Secretary, and all such submissions (other than pre- and post-hearing briefs and statements) should be received not later than 5:15 p.m., September 15, 2010. All written submissions must conform with the provisions of section 201.8 of the Commission's Rules of Practice and Procedure (19 CFR 201.8). Section 201.8 requires that a signed original (or a copy so designated) and fourteen (14) copies of each document be filed. In the event that confidential treatment of a document is requested, at least four (4) additional copies must be filed, in which the confidential information must be deleted (see the following paragraph for further information regarding confidential business information). The Commission's rules authorize filing submissions with the Secretary by facsimile or electronic means only to the extent permitted by section 201.8 of the rules (*see* Handbook for Electronic Filing Procedures, *http://www.usitc.gov/secretary/fed_reg_notices/rules/documents/handbook_on_electronic_filing.pdf*). Persons with questions regarding electronic filing should contact the Office of the Secretary (202–205–2000).

Any submissions that contain confidential business information must also conform with the requirements of section 201.6 of the Commission's Rules of Practice and Procedure (19 CFR 201.6). Section 201.6 of the rules requires that the cover of the document and the individual pages be clearly marked as to whether they are the "confidential" or "nonconfidential" version, and that the confidential business information be clearly identified by means of brackets. All written submissions, except for confidential business information, will be made available for inspection by interested parties.

In its request letter, the Committee stated that it intends to make the Commission's report available to the public in its entirety, and asked that the Commission not include any confidential business information in the report it sends to the Committee. Any confidential business information received by the Commission in this investigation and used in preparing this report will not be published in a manner that would reveal the operations of the firm supplying the information.

By order of the Commission.

Issued: April 30, 2010.

**Marilyn R. Abbott,**

*Secretary to the Commission.*

[FR Doc. 2010–10650 Filed 5–5–10; 8:45 am]

**BILLING CODE 7020–02–P**

## INTERNATIONAL TRADE COMMISSION

**[USITC SE–10–014]**

### Government in the Sunshine Act Meeting Notice

**AGENCY HOLDING THE MEETING:** United States International Trade Commission.

**TIME AND DATE:** May 14, 2010 at 10 a.m.

**PLACE:** Room 101, 500 E Street, SW., Washington, DC 20436, Telephone: (202) 205–2000.

**STATUS:** Open to the public.

**MATTERS TO BE CONSIDERED:**

1. Agenda for future meetings: none.
2. Minutes.
3. Ratification List.
4. Inv. Nos. 701–TA–475 and 731–TA–1177 (Preliminary) (Certain Aluminum Extrusions from China)—briefing and vote. (The Commission is currently scheduled to transmit its determinations to the Secretary of Commerce on or before May 17, 2010; Commissioners' opinions are currently scheduled to be transmitted to the Secretary of Commerce on or before May 24, 2010.)
5. Inv. Nos. 731–TA–770–773 and 775 (Second Review) (Stainless Steel Wire Rod from Italy, Japan, Korea, Spain, and Taiwan)—briefing and vote. (The Commission is currently scheduled to transmit its determinations and Commissioners' opinions to the Secretary of Commerce on or before May 28, 2010.)
6. Outstanding action jackets: None.

In accordance with Commission policy, subject matter listed above, not disposed of at the scheduled meeting, may be carried over to the agenda of the following meeting.

By order of the Commission:

Issued: April 26, 2010.

**William R. Bishop,**

*Hearings and Meetings Coordinator.*

[FR Doc. 2010–10801 Filed 5–4–10; 4:15 pm]

**BILLING CODE 7020–02–P**

## DEPARTMENT OF JUSTICE

### Federal Bureau of Investigation

**[Docket No. FBI 122]**

### FBI Records Management Division National Name Check Program Section User Fees

**AGENCY:** Federal Bureau of Investigation (FBI), Justice.

**ACTION:** Notice.

**SUMMARY:** This notice establishes the user fee schedule for federal agencies requesting name-based background checks of the FBI's National Name Check Program for noncriminal justice purposes. These checks of the Central Records System are performed by the Records Management Division.

**DATES:** *Effective Date:* June 7, 2010.

**FOR FURTHER INFORMATION CONTACT:** FBI, RMD, National Name Check Program Section, 170 Marcel Drive, Winchester, VA 22602, *Attention:* Michael Cannon, 540 868–4400.

**SUPPLEMENTARY INFORMATION:** Pursuant to the authority in Public Law 101–515 as amended, the FBI has established user fees for federal agencies requesting noncriminal name-based background checks of the Central Records System (CRS) through the National Name Check Program (NNCP) of the Records Management Division (RMD). The final rule, to be codified under 28 CFR 20.31 (f), is set out elsewhere in today's issue of the **Federal Register.**

The following fee schedule provides the user fees for name-based CRS checks by the NNCP through the FBI's RMD.

NAME-BASED NNCP CHECKS

| *If the check is a/an* | *The fee is* |
|---|---|
| Electronic transaction: | |
| Batch Process Only ..... | $1.50 |
| Batch + File Review ..... | 29.50 |
| Manual Submission ..... | 56.00 |
| Expedited Submission ..... | 56.00 |

This fee schedule will become effective 30 days following publication of this notice.

Dated: April 29, 2010.

**Robert S. Mueller, III,**

*Director, Federal Bureau of Investigation.*

[FR Doc. 2010–10626 Filed 5–5–10; 8:45 am]

**BILLING CODE 4410–02–P**

## DEPARTMENT OF JUSTICE

### Parole Commission

### Notice of Meeting; Sunshine Act

**PUBLIC ANNOUNCEMENT:** Pursuant to the Government in the Sunshine Act (Pub. L. 94–409) [5 U.S.C. Section 552b].

**AGENCY HOLDING MEETING:** Department of Justice, Parole Commission.

**TIME AND DATE:** 10 a.m., Thursday, May 6, 2010.

**PLACE:** 5550 Friendship Blvd., Fourth Floor, Chevy Chase, MD 20815.

**STATUS:** Open.

**MATTERS TO BE CONSIDERED:** The following matters have been placed on the agenda for the open Parole Commission meeting:

1. Approval of Minutes from the January 21, 2010 Quarterly Business Meeting.
2. Reports from the Chairman, Commissioners, and Section Administrators.
3. Revision of YRA Set Aside Rule.

**AGENCY CONTACT:** Patricia W. Moore, Staff Assistant to the Chairman, United States Parole Commission, (301) 492–5933.

Dated: April 27, 2010.

**Rockne J. Chickinell,**

*General Counsel, U.S. Parole Commission.*

[FR Doc. 2010–10436 Filed 5–5–10; 8:45 am]

**BILLING CODE 4410–31–M**

## DEPARTMENT OF JUSTICE

### Parole Commission

### Public Announcement; Pursuant to the Government in the Sunshine Act; (Pub. L. 94–409) [5 U.S.C. Section 552b]

**AGENCY HOLDING MEETING:** Department of Justice, United States Parole Commission.

**DATE AND TIME:** 11:30 p.m., Thursday, May 6, 2010.

**PLACE:** U.S. Parole Commission, 5550 Friendship Boulevard 4th Floor, Chevy Chase, Maryland 20815.

**STATUS:** Closed.

**MATTERS CONSIDERED:** The following matter will be considered during the closed meeting: Consideration of two original jurisdiction cases pursuant to 28 CFR 2.27.

**AGENCY CONTACT:** Patricia W. Moore, Staff Assistant to the Chairman, United States Parole Commission, (301) 492–5933.

Dated: April 27, 2010.

**Rockne Chickinell,**

*General Counsel, U.S. Parole Commission.*

[FR Doc. 2010–10437 Filed 5–5–10; 8:45 am]

**BILLING CODE 4410–31–M**

## DEPARTMENT OF JUSTICE

### Antitrust Division

### Notice Pursuant to the National Cooperative Research and Production Act of 1993—Intellegere Foundation

Notice is hereby given that, on April 7, 2010, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* ("the Act"), Intellegere Foundation has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing (1) the identities of the parties to the venture and (2) the nature and objectives of the venture. The notifications were filed for the purpose of invoking the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances.

Pursuant to Section 6(b) of the Act, the identities of the parties to the venture are: Intellegere Foundation, Oak Hill, VA; ManTech International Corporation, Fairmont, WV; and West Virginia University, Morgantown, WV. The general area of Intellegere Foundation's planned activity is (a) to facilitate scientific collaboration by addressing challenges of national security; (b) to promote participation of non-traditional private sector and academic enterprises; (c) to support the spectrum of R&D and life cycle needs of armament systems; (d) to engage and involve capable small/medium size enterprises; (e) to work together as a joint government-industry-academia team; (f) to leverage government expertise/knowledge with private sector/academic abilities; to address technical issues of national importance.

**Patricia A. Brink,**

*Deputy Director of Operations, Antitrust Division.*

[FR Doc. 2010–10457 Filed 5–5–10; 8:45 am]

**BILLING CODE 4410–11–M**

## DEPARTMENT OF JUSTICE

### Antitrust Division

### Notice Pursuant to the National Cooperative Research and Production Act of 1993—Advanced Media Workflow Association, Inc.

Notice is hereby given that, on March 18, 2010, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* ("the Act"), Advanced Media Workflow Association, Inc. has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, Chime Media, Weston, MA; Chyron Corporation, Melville, NY; DVS Digital Video, Burbank, CA; Library of Congress, Washington, DC; Quantum, Englewood, CO; and Gwynne McConkey (individual member), Leonia, NJ, have been added as parties to this venture. Also, BroadView Software, Toronto, Ontario, CANADA; Grass Valley/Thomson, Beaverton, OR; Panasonic Broadcast, Secaucus, NJ; Video Communications, Inc., Springfield, MA; and Grant Hammond (individual member), London, UNITED KINGDOM, have withdrawn as parties to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and Advanced Media Workflow Association, Inc. intends to file additional written notifications disclosing all changes in membership.

On March 28, 2000, Advanced Media Workflow Association, Inc. filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on June 29, 2000 (65 FR 40127). The last notification was filed with the Department on December 18, 2009. A notice was published in the **Federal Register** pursuant to Section 6(b) of the Act on January 26, 2010 (75 FR 4107).

**Patricia A. Brink,**

*Deputy Director of Operations, Antitrust Division.*

[FR Doc. 2010–10444 Filed 5–5–10; 8:45 am]

**BILLING CODE 4410–11–M**

## DEPARTMENT OF JUSTICE

### Antitrust Division

### Notice Pursuant to the National Cooperative Research and Production Act of 1993—Cooperative Research Group on High Efficiency Dilute Gasoline Engine II

Notice is hereby given that, on March 22, 2010, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* ("the Act"), Southwest Research Institute—Cooperative Research Group on High-Efficiency Dilute Gasoline Engine II, ("HEDGE II") has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, Deere & Company, Waterloo, IA, and Chery Automobile Co., LTD. Anhui, PEOPLE'S REPUBLIC OF CHINA, have been added as partis to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and HEDGE II intends to file additional written notifications disclosing all changes in membership.

On February 19, 2009, HEDGE II filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on April 2, 2009 (74 FR 15003).

The last notification was filed with the department on February 18, 2010. A notice was published in the **Federal Register** pursuant to Section 6(b) of the Act on March 24, 2010 (75 FR 14192)

**Patricia A. Brink,**

*Deputy Director of Operations, Antitrust Division.*

[FR Doc. 2010–10447 Filed 5–5–10; 8:45 am]

**BILLING CODE 4410–11–M**

## DEPARTMENT OF JUSTICE

### Antitrust Division

### Notice Pursuant to the National Cooperative Research and Production Act of 1993—Network Centric Operations Industry Consortium, Inc.

Notice is hereby given that, on April 6, 2010, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* ("the Act"), Network Centric Operations Industry Consortium, Inc. ("NCOIC") has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, Computer Sciences Corporation, Rockville, MD; MEDA Holdings SAS, Le Plessis, FRANCE; NJVC LLC, Vienna, VA; and Center for Netcentric Product Research, East Hartford, CT have been added as parties to this venture. Also, Innerwall, Inc., Colorado Springs, CO; John Hopkins University Applied Physics Laboratory, Laurel, MD; and INDRA Sistemas S.A., Madrid, SPAIN, have withdrawn as parties to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and NCOIC intends to file additional written notifications disclosing all changes in membership.

On November 19, 2004, NCOIC filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on February 2, 2005 (70 FR 5486).

The last notification was filed with the Department on January 11, 2010. A notice was published in the **Federal Register** pursuant to Section 6(b) of the Act on February 23, 2010 (75 FR 8116).

**Patricia A. Brink,**

*Deputy Director of Operations, Antitrust Division.*

[FR Doc. 2010–10451 Filed 5–5–10; 8:45 am]

**BILLING CODE 4410–11–M**

## DEPARTMENT OF JUSTICE

### Antitrust Division

### Notice Pursuant to the National Cooperative Research and Production Act of 1993—Nanotechnology Enterprise Consortium

Notice is hereby given that, on April 1, 2010, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* ("the Act"), the NanoTechnology Enterprise Consortium ("NTEC") has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing (1) the identities of the parties to the venture and (2) the nature and objectives of the venture. The notifications were filed for the purpose of invoking the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances.

Pursuant to Section 6(b) of the Act, the identities of the parties to the venture are: Nanotechnology Enterprise, Inc. Columbia, MO; The Boeing Company, Chicago, IL; CertTech, LLC, Overland Park, KS; DefEar Systems, LLC, Salem, MO; EaglePitcher Technologies, LLC, Joplin, MO; Nanos Technologies, LLC, Columbia, MO; Nanoparticle BioChem, Inc., Columbia, MO; NEMS/MEMS Works, LLC, Chesterfiels, MO; ThermAvant Technolgies, LLC, Columbia, MO; University of Missouri-Columbia, Columbia, MO; and University of Missouri-St. Louis, St. Louis, MO. The general area of NTEC'S planned activity is to help small, medium, and large member companies, university researchers, and government and private funders to collaborate on applying nanotechnology to create innovation products for commercial and military use, including the defense, biomedical, energy, and agriculture sectors.

**Patricia A. Brink,**

*Deputy Director of Operations, Antitrust Division.*

[FR Doc. 2010–10449 Filed 5–5–10; 8:45 am]

**BILLING CODE 4410–11–M**

## DEPARTMENT OF JUSTICE

### Antitrust Division

### Notice Pursuant to the National Cooperative Research and Production Act of 1993 ODVA, Inc. (Formerly Open Devicenet Vendor Association, Inc.)

Notice is hereby given that, on March 17, 2010, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* ("the Act"), Open DeviceNet Vendor Association, Inc. ("ODVA") has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Open DeviceNet Vendor Association, Inc. has changed its name to ODVA, Inc. ("ODVA"). In addition, ICES, Seoul, REPUBLIC OF KOREA; Hesmor GrnbH, Aachen, NRW, GERMANY; Wittenstein

AG, Igersheim, BadenWurttemberg, GERMANY; Kunbus GmbH Industrial Communication, Denhendorf, BW, GERMANY; Azbil North America, Inc. (formerly Yamatake Sensing Control), Phoenix, AZ; LS Cable, Anyang-Si, Gyeonggi-do, REPUBLIC OF KOREA; VAT Vacuum Valves AG, Haag, St. Gallen, SWITZERLAND; Caron Engineering, Inc., Wells, ME; Spang Power Electronics, Pittsburgh, PA; Alstom Transport, LevalloisPerret, FRANCE; Endress+Hauser, Reinach, SWITZERLAND; Panasonic Corporation/Motor Company, Daito City, Osaka, JAPAN; Control Concepts Inc., Chanhassen, MN; Exlar Corporation, Chanhassen, MN; Hermary Opto Electronics Inc., Coquitlam, British Columbia, CANADA; Kaijo Corporation, Hamura City, Tokyo, JAPAN; and Procon Engineering Limited, Sevenoaks, Kent, England, UNITED KINGDOM, have been added as parties to this venture.

Also, Semtorq Inc., Aurora, OH; Real Time Objects & Systems, LLC, Brookfield, WI; Ross Controls, Troy, MI; RuggedCom Inc., Concord, Ontario, CANADA; Rockwell Automation/Reliance Electric, Greenville, SC; DAIDEN Co., Ltd., Kurume City, JAPAN; CommScope, Inc., Claremont, NC; Graco Inc., Minneapolis, MN; DDK Ltd., Tokyo, JAPAN; Souriau, York, PA; BOC Edwards, Crawley, West Sussex, UNITED KINGDOM; Yaskawa Eshed Technology Ltd., Rosh Ha'ayin, ISRAEL; Automationdirect.com, Curnming, GA; Comau S.p.A. Robotics & Final Assembly Division, Torino, ITALY; MettlerToledo, Greifensee, SWITZERLAND; Ten X Technology, Inc., Austin, TX; Cervis Inc., Warrendale, PA; IDEC IZUNI Corporation, Osaka, JAPAN; National Semiconductor, Santa Clara, CA; MISCO Refractometer, Cleveland, OH; Banner Engineering Corporation, Minneapolis, MN; ASI Advanced Semiconductor Instruments GrnbH, Berlin, GERMANY; AGM Electronics, Inc., Tuscon, AZ; Symbol Technologies, Inc., Holtsville, NY; Tyco Electronics, Schaffhausen, SWITZERLAND; NT International, an Entegris Company, Minneapolis, MN; LEONI Special Cables GrnbH, Friesoythe, GERMANY; HanYang System, Shihung-Shi, REPUBLIC OF KOREA; INNOBIS, CheonanSi, REPUBLIC OF KOREA; S–Net Automation Co., Ltd., Seoul, REPUBLIC OF KOREA; LinkBASE, Seoul, REPUBLIC OF KOREA; KELK, Toronto, Ontario, CANADA; TPC Mechatronics, Co., Ltd., Seoul, REPUBLIC OF KOREA; Robostar Co., Ltd., Ansan City, REPUBLIC OF KOREA; Hanyoung Nux, Incheon, REPUBLIC OF KOREA; Kuroda Pneumatics Ltd., Kawasaki, Kanagawa, JAPAN; S0ftDEL Systems Limited, Mumbai, INDIA; Elettro Stemi S.R.L., Altavilla Vicentina, ITALY; Welding Technology Corporation (WTC), Carol Stream, IL; KVC Co. Ltd., Bucheon-Si, REPUBLIC OF KOREA; Northern Network Solutions, LLC, Cottage Grove, MI; Hitachi Industrial Equipment Systems Co., Ltd., Tokyo, JAPAN; Seoil Electric Co., Ltd., Namyang-Si, REPUBLIC OF KOREA; Kun Hung Electric Co., Ltd., Seoul, REPUBLIC OF KOREA; Dynisco Instruments LLC, Franklin, MA; Electro-Sensors, Inc., Minnetonka, NN; Contrex Inc., Maple Grove, bIN; Korenix Technology Co. Ltd., Taipei, TAIWAN; Arlington Laboratory, Burlington, MA; Matsushita Electric Industrial Co., Ltd., Osaka, JAPAN; and Phoenix Digital Corporation, Scottsdale, AZ, have withdrawn as parties to this venture.

The following members have changed their names: Parker Hannif in Corp. (Veriflo Division) to Parker Hannif in Corporation, Cleveland, OH; Kistler-Morse Corporation to Kistler-Morse, Spartanburg, SC; Showa Electric Wire & Cable Co. to SWCC Showa Cable Systems Co., Ltd., Aomori-City, JAPAN; ARO Controls S.A.S. to ARO Welding Technologies S.A.S., Chateau du Loir, FRANCE; Komatsu Electronics Inc. to KELK, Hiratsuka, JAPAN; Hirschmann to Hirschmann, a Belden brand, Neckartenzlingen, GERMANY; Lumberg, Inc. to Lumberg, a Belden brand, Schalksmühle, GERMANY; Toshiba International Corporation to Toshiba Corporation, Tokyo, JAPAN; Sola/Heavy Duty to SolaHD, Rosemont, IL; Kuroda Precision Industries Ltd. to Kuroda Pneumatics Ltd., Kawasaki, Kanagawa, JAPAN; and MTT Company Ltd. to MTT Corporation, Hyogo, JAPAN.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and ODVA intends to file additional written notifications disclosing all changes in membership.

On June 21, 1995, ODVA filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on February 15, 1996 (61 FR 6039).

The last notification was filed with the Department on April 10, 2009. A notice was published in the **Federal Register** pursuant to Section 6(b) of the Act on May 21, 2009 (73 FR 23884).

**Patricia A. Brink,**

*Deputy Director of Operations, Antitrust Division.*

[FR Doc. 2010–10445 Filed 5–5–10; 8:45 am]

**BILLING CODE 4410–11–M**

## DEPARTMENT OF JUSTICE

### Antitrust Division

### Notice Pursuant to the National Cooperative Research and Production Act of 1993—Advanced Coatings for Infrastructure Joint Venture Agreement

Notice is hereby given that, on March 10, 2010, pursuant to section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* ("the Act"), Advanced Coatings for Infrastructure Joint Venture Agreement ("Advanced Coatings") has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing (1) the identities of the parties and (2) the nature and objectives of the venture. The notifications were filed for the purpose of invoking the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances.

Pursuant to Section 6(b) of the Act, the identities of the parties to the venture are: MesoCoat Inc., Euclid, OH; Polythermics LLC, Kirkland, WA; and EMTEC, The Edison Materials Technology Center, Dayton, OH.

The general area of Advanced Coatings' planned activity is to develop a new innovative method for applying corrosion and wear resistant coatings to infrastructure.

**Patricia A. Brink,**

*Deputy Director of Operations, Antitrust Division.*

[FR Doc. 2010–10443 Filed 5–5–10; 8:45 am]

**BILLING CODE 4410–11–M**

## DEPARTMENT OF JUSTICE

### Antitrust Division

### United States v. Baker Hughes Inc., et al.

Notice is hereby given pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b)–(h), that a proposed Final Judgment, Hold Separate Stipulation and Order, and Competitive Impact Statement have been filed with the United States District Court for the District of Columbia in *United States* v.

*Baker Hughes Inc., et al.,* Civil Action No. 1:10–cv–00659. On April 27, 2010, the United States filed a Complaint alleging that the proposed acquisition by Baker Hughes, Inc. ("Baker Hughes") of BJ Services Company ("BJ") would violate Section 7 of the Clayton Act, 15 U.S.C. 18, by substantially lessening competition in the market for vessel stimulation services in the United States Gulf of Mexico. The proposed Final Judgment, filed the same time as the Complaint, requires the Defendants to create a new competitor for vessel stimulation services by divesting their interests in two specially equipped stimulation vessels, Baker Hughes' HR Hughes and BJ's Blue Ray, as well as certain other tangible and intangible assets.

Copies of the Complaint, proposed Final Judgment, and Competitive Impact Statement are available for inspection at the Department of Justice, Antitrust Division, Antitrust Documents Group, 450 Fifth Street, NW., Suite 1010, Washington, DC 20530 (telephone 202–514–2481), on the Department of Justice's Web site at *http://www.usdoj.gov/atr,* and at the Office of the Clerk of the United States District Court for the District of Columbia. Copies of these materials may be obtained from the Antitrust Division upon request and payment of the copying fee set by Department of Justice regulations.

Public comment is invited within 60 days of the date of this notice. Such comments, and responses thereto, will be published in the **Federal Register** and filed with the Court. Comments should be directed to Donna Kooperstein, Chief, Transportation, Energy and Agriculture Section, Antitrust Division, Department of Justice, Washington, DC 20530, (telephone: 202–307–6349).

**Patricia A. Brink,**

*Deputy Director of Operations and Civil Enforcement.*

## United States District Court for the District of Columbia

*United States of America, Antitrust Division, 450 5th Street NW., Suite 8000, Washington, DC 20530,* Plaintiff, v. *Baker Hughes Incorporated, 2929 Allen Parkway, Suite 2100, Houston, Texas 77019,* and *BJ Services Company, 4601 Westway Park Blvd., Houston, Texas 77041,* Defendants.

Case: 1:10-cv-00659
Assigned to: Kessler, Gladys
Assign. Date: 04/27/2010
Description: Antitrust

## Complaint

The United States of America ("United States"), acting under the direction of the Attorney General of the United States, brings this civil action against Baker Hughes Incorporated ("Baker Hughes") and BJ Services Company ("BJ Services") to enjoin Baker Hughes' proposed merger with BJ Services, and to obtain other equitable relief. The United States complains and alleges as follows:

### I. Nature of the Action

1. Baker Hughes' merger with BJ Services would combine two of only four companies that compete with specially equipped vessels to provide oil and gas companies with pumping services ("vessel stimulation services") necessary to enable and stimulate oil and gas production in the U.S. Gulf of Mexico ("Gulf"). These vessel stimulation services are used in the vast majority of offshore wells in the Gulf.

2. Baker Hughes and BJ Services compete head-to-head to provide vessel stimulation services in the Gulf, each with two vessels. This competition will be lost if this transaction is allowed to proceed. The merged firm, and the two other firms providing vessel stimulation services in the Gulf, will likely compete less aggressively, leading to higher prices and a reduction in service quality.

3. Absent the merger, Baker Hughes and BJ Services each need two vessels in the Gulf to compete effectively. With this transaction, the merged firm gains the incentive and ability to remove one or more stimulation vessels from the region in order to reduce the available supply of vessels and raise the price of vessel stimulation services in the Gulf. This will cause customers to pay more for vessel stimulation services.

4. Accordingly, the proposed merger would substantially lessen competition for vessel stimulation services in the Gulf and violates Section 7 of the Clayton Act, as amended, 15 U.S.C. 18.

### II. The Parties and the Transaction

5. Baker Hughes is a Delaware corporation headquartered in Houston. A major supplier of products and services for drilling, formation evaluation, completion and production to the worldwide oil and natural gas industry, Baker Hughes reported total revenues of approximately $9.7 billion in 2009. Baker Hughes supports its two stimulation vessels in the Gulf with facilities in Louisiana and Texas.

6. BJ Services is a Delaware corporation headquartered in Houston. Also a leading worldwide provider of products and services to the oilfield industry, BJ Services reported revenues of $4.1 billion for fiscal year 2009. It supports its two stimulation vessels in the Gulf with facilities in Louisiana and Texas.

7. Baker Hughes proposes to acquire 100% of BJ Services' stock in exchange for newly issued shares of Baker Hughes stock and cash, valued at approximately $5.5 billion at the time the merger agreement was signed.

### III. Jurisdiction and Venue

8. This action is filed by the United States under Section 15 of the Clayton Act, as amended, 15 U.S.C. 25, which invests the Court with jurisdiction to prevent and restrain violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18.

9. Baker Hughes and BJ Services provide vessel stimulation services in the flow of interstate commerce and their activities in the development and sale of these services substantially affect interstate commerce. This Court has subject matter jurisdiction over this action pursuant to Section 15 of the Clayton Act, 15 U.S.C. 25, and 28 U.S.C. 1331, 1337(a), and 1345.

10. The defendants have consented to venue and personal jurisdiction in this judicial district.

### IV. Trade and Commerce

*A. Background*

1. Overview of Drilling and Completion Process

11. Offshore development of oil and natural gas resources in the Gulf involves several stages. An oil and gas company leases the exploration rights to a specific block from a state or the federal government, determines that it is seismically and economically feasible to drill for oil or gas in that block, and drills an exploratory well. Wells in the Gulf may be located in inland waters (generally 50 feet or less), on the shelf (50 to 1000 feet), in deepwater (1000 feet or greater), and in ultradeepwater (greater than 3500 feet of water).

12. After drilling the exploratory well, if the oil and gas company decides to extract the oil and natural gas, the well must be "completed," or prepared for production. The completion process is designed to enable and control the flow of oil and gas from the formation through the wellbore and to the surface.

13. During the completion process the oil and gas company installs cement casing that lines the wellbore and tubing through which the oil and gas will flow. Completion tools, such as packers, are installed at the bottom of the well to create a seal. Explosives punch holes through the casing into the formation so that the oil and gas can flow from the formation into the wellbore. Wells in the Gulf also generally require sand

control and stimulation services, described in greater detail below, which involve the installation of equipment and the pumping of fluids and other proppants downhole under high pressure, as part of the completion process.

14. Drilling and completing a well is extremely costly, particularly in deepwater. It can take months or longer to drill and complete an offshore well. The daily costs for the drilling rig and other assets often exceed $100,000 for wells on the shelf and may be as much as $1 million or more for wells in deepwater. A drilling rig and other assets remain at the drilling site while stimulation services are performed and throughout the completion process.

2. Sand Control and Stimulation Services

15. Due to the soft rock formations in the Gulf, nearly all wells require some form of sand control to prevent the formation sand from entering the wellbore and interfering with the flow of oil. Some wells also require a stimulation service known as acidizing, in which acid is pumped into the formation to repair damage on existing wells. Each reservoir of oil and gas deposits may require a customized sand control or stimulation service (referred to here interchangeably or collectively as "stimulation services") because it may have distinct rock formation, depth, temperature, pressure, and other characteristics.

16. There are a number of types of sand control and stimulation services. In a "gravel pack," screens, packers and other equipment, known as "sand control tools," are installed downhole in the production zone of the wellbore. A slurry of coarse sand mixed with brine is then pumped downhole at a pressure that does not fracture the formation. Because the diameter of the sand pumped downhole is larger than the diameter of the sand in the formation, these larger "pumped" grains of sand and the sand control screen serve as a two stage filter to block the formation sand from entering the wellbore. Another type of sand control, called a "high-rate water pack," is similar to a gravel pack except that it uses a different type of fluid and the pumping takes place at a pressure that will create minor fractures in formation.

17. The most common form of sand control service performed offshore in the Gulf is a "frac pack." After installation of the sand control tools, viscous fluids are pumped into the well under pressure high enough to produce fractures in the formation thirty feet or more from the wellbore. Various substances called proppants (such as sand, bauxite or other materials) are then pumped into the cracks to prop them open to facilitate the flow of oil or gas. Frac packs are highly effective in stimulating oil and gas production as well as preventing sand from migrating into the well. Performance of a frac pack is a complex engineering job that requires large amounts of fluid and proppants to be pumped under high pressure.

18. Stimulation vessels, on which pumps and other equipment are installed, perform most stimulation services in the Gulf. Oil and gas companies need the pumping portion of the job, performed by the stimulation vessel, to be completed promptly after the installation of the downhole sand control tools. Stimulation services represent a very small percentage of the total cost of completing a well. However, no other completion work can be performed if the vessel is late or unavailable, and any "down time" at the well site is extremely costly due to huge daily rig and other costs.

19. Stimulation vessels in the Gulf are designed for the specific purpose of performing stimulation services. The vessels are typically well over 200 feet in length and are equipped with high pressure pumps, blenders, and storage tanks to hold large quantities of fluid and proppant. Critical vessel specifications include its storage capacity and the horsepower and barrels per minute at which it can pump. A vessel is also equipped with a computer controlled system, called a dynamic positioning or DP system, that maintains a ship's position by using the vessel's own propellers and thrusters. These dynamic positioning systems are installed so that the vessels do not need to hold position by using anchors and chains or by being tied to the rig.

20. Stimulation service providers typically lease vessels under multi-year contracts from shipbuilders that design, construct or modify a vessel to meet the provider's specific criteria. Capital costs for the vessel and equipment can exceed $30 million, and the contracts have day rates that often exceed $20,000 per day.

21. To operate in the Gulf, a stimulation service vessel must comply with a federal law known as the "Jones Act." That Act requires that a vessel be built in the United States, bear a United States flag, and be staffed with a United States crew. Only a limited number of stimulation service vessels worldwide, in addition to those presently located in the Gulf, are Jones Act compliant, and these vessels are all operated by the same four firms that provide vessel stimulation service in the Gulf.

22. Stimulation service providers have their own experienced crews to operate a vessel's pumping and stimulation equipment. Stimulation service providers also rely extensively on technical support from engineers and scientists, who customize the stimulation job for the specific formation and conduct research to improve, develop and test stimulation services, fluids, sand control tools and other equipment.

23. Each of the four firms currently providing vessel stimulation services in the Gulf operates two stimulation vessels in that region. The companies bid both for annual or multi-year contracts, in which they often compete to be designated as a customer's primary supplier, as well as for specific jobs. For greater assurance that a vessel will be available when needed, customers completing wells in the deepwater often require that a vessel stimulation provider have two vessels in its fleet. Even when designated a customer's primary supplier, a stimulation service provider may not have a vessel available at the precise time that a customer needs the work. In that case, the customer will not wait for that supplier's vessel to be available because the downtime on the rig is so costly, but will call another provider of vessel stimulation services in the Gulf.

*B. Relevant Market*

24. The provision of vessel stimulation services for wells located in the Gulf is a line of commerce and a relevant market within the meaning of Section 7 of the Clayton Act.

25. Oil and gas companies have no economical alternatives to sand control or stimulation services and need these services on the great majority of offshore wells in the Gulf. While some offshore stimulation services, such as acidizing, simple gravel pack or water pack operations, may be provided by pumps that are mounted on skids rather than vessels, these skid-mounted pumps cannot perform most stimulation services in the Gulf. Skid-mounted pumps are not feasible for stimulation services such as frac packs, which require high horsepower and significant storage. Nearly all frac pack jobs in the Gulf must be done with vessels. Logistical and safety concerns also cause some customers to prefer vessels even when skid-mounted pumps are technically capable of performing a particular job. The relevant product is vessel stimulation services.

26. Oil and gas companies procuring vessel stimulation services for wells located in the Gulf require a provider to have stimulation service vessels capable

of providing the service in the region as well as facilities, engineers, sales and other staff to support the operation. The relevant geographic region is the Gulf. This region is defined based on the locations of customers.

27. A small but significant, non-transitory increase in the price of vessel stimulation services for wells located in the Gulf would not cause oil and gas company customers to turn to skid-mounted pumps or to any other type of service, or to vessel stimulation services provided outside the Gulf, or to otherwise reduce purchases of vessel stimulation services, in volumes sufficient to make such a price increase unprofitable.

*C. Market Participants*

28. The four vessel stimulation service providers in the Gulf are now the only significant vessel stimulation service providers operating anywhere in the world and the only providers with vessels that comply with the Jones Act. Thus, there are no other providers of vessel stimulation service to which an oil and gas company in the Gulf could turn if faced with a small but significant, non-transitory increase in the price of vessel stimulation services in the Gulf.

**V. Likely Anticompetitive Effects of the Transaction**

29. Baker Hughes' merger with BJ Services would leave only three firms to perform vessel stimulation services in the Gulf. Based on 2008 revenues for vessel stimulation services in the Gulf, BJ Services accounted for approximately twenty percent of all vessel stimulation service revenues and Baker Hughes accounted for approximately fifteen percent. The other two firms providing vessel stimulation services in the Gulf accounted for all other revenues. Using a measure of market concentration called the Herfindahl-Hirschman Index ("HHI") (defined and explained in Appendix A), the transaction will increase the HHI by over 500 points, resulting in a post-merger HHI of approximately 3300 points.

30. This transaction will eliminate the head-to-head competition between Baker Hughes and BJ Services to provide vessel stimulation services in the Gulf. Baker Hughes and BJ Services have competed on price, terms of sale and service quality, and have spurred each other's efforts to develop and improve products, performance and technology. Customers have benefitted from this competition.

31. Baker Hughes and BJ Services are relatively close substitutes in the provision of vessel stimulation services. They charge similar prices for similar types of jobs and provide vessel stimulation services in the same water depths and at many of the same geological locations. Baker Hughes and BJ Services have ranked first and second in terms of numerous customers' total annual expenditures on vessel stimulation services in the Gulf.

32. The merger would remove the constraint the parties impose on each other's pricing. Post merger, Baker Hughes will likely find it profitable to raise the price of vessel stimulation services. Customers now differentiate among vessel stimulation service providers on the basis of reputation, service quality, equipment, and other factors. Those customers that viewed Baker Hughes and BJ Services as their first and second choices for vessel stimulation services will lose their next-best alternative for these services. The merged firm will have the incentive and ability to raise its price, since it will now capture some of the sales that would have been lost to BJ Services had Baker Hughes raised price pre-merger. The value of these diverted sales is likely to be high because both firms currently earn high price-variable cost margins. Baker Hughes' incentive to raise price post-merger will likely be recognized by the two other firms providing vessel stimulation services in the Gulf, leading them to bid less aggressively. As a result, customers will likely experience higher prices for vessel stimulation services and a reduction in service quality.

33. This transaction is also likely to reduce the number of stimulation vessels in the Gulf, leading to higher prices for vessel stimulation services. Absent the transaction, neither Baker Hughes nor BJ Services would have the incentive to move any of its stimulation vessels out of the Gulf because a firm needs two vessels in the region to compete effectively. By consolidating the firms' four vessels under one company's ownership, the transaction may present a profitable opportunity to remove one or two vessels from the Gulf, an opportunity Baker Hughes had recognized. With fewer vessels committed to provide service in the Gulf, utilization of the remaining vessels will likely increase, along with the likelihood that a vessel will be unavailable at any particular time. As a consequence, given customers' need for vessels to arrive at a precise time, firms providing vessel stimulation services in the Gulf will likely be able to increase prices.

34. The proposed transaction, therefore, is likely to lessen competition substantially in the provision of vessel stimulation services in the Gulf.

**VI. Entry**

35. Successful entry into the provision of vessel stimulation services in the Gulf is difficult, costly and time consuming. A provider of vessel stimulation services must obtain or build stimulation service vessels that are Jones Act compliant, and develop a reputation and establish its reliability before an oil and gas company will consider using its products or services. A problem with the vessel stimulation service not only causes delay, which is extremely costly; it can also damage the well, jeopardizing the customer's investment and its access to the oil-producing formation. With so much at stake, customers may require that the provider of vessel stimulation services demonstrate a track record of several years or undergo lengthy and expensive qualification inspections before being included in bids.

36. Most customers in the Gulf also require that a stimulation service provider have two capable vessels to ensure that a vessel is available to perform their work at the precise time required even if one of the provider's vessels is out of service or busy on another job. Building even one stimulation vessel for the Gulf takes a long time and requires large capital expenditures.

37. A provider of vessel stimulation services in the Gulf must support its operation with onshore facilities, such as technology centers. A strong technical team, including experienced engineers and scientists, is also essential.

38. A provider of vessel stimulation services may have a difficult time growing its business if it does not also offer a line of sand control tools. Many customers prefer obtaining sand control tools from the same company that provides the vessel stimulation service. This reduces the number of companies with which a customer must deal, often results in a discount in the price of the services and products, and also eliminates the possibility of "finger-pointing" between the providers in the event that there is a problem or delay with the sand control tools or stimulation services. All four providers of vessel stimulation services in the Gulf sell sand control tools in addition to stimulation services.

39. For these reasons, entry by an additional vessel stimulation service provider would not be timely, likely, and sufficient to prevent the substantial lessening of competition caused by the

elimination of BJ Services as an independent competitor.

**VII. The Proposed Merger Violates Section 7 of the Clayton Act**

40. Each and every allegation in paragraphs 1 through 39 of this Complaint is here realleged with the same force and effect as though said paragraphs were here set forth in full.

41. The proposed merger of BJ Services by Baker Hughes is likely to lessen competition substantially in violation of Section 7 of the Clayton Act in the provision of vessel stimulation services in the Gulf.

42. Baker Hughes's merger of BJ Services likely will have the following effects:

a. Actual and potential competition between Baker Hughes and BJ Services in the provision of vessel stimulation services in the Gulf will be eliminated;

b. Competition generally in the provision of vessel stimulation services in the Gulf will be lessened substantially; and

c. Prices paid by customers for vessel stimulation services in the Gulf will likely increase.

43. Unless restrained, the proposed merger will violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18.

**VIII. Requested Relief**

44. Plaintiff requests that this Court:

a. Adjudge and decree Baker Hughes' proposed merger with BJ Services to be unlawful and in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18;

b. Preliminarily and permanently enjoin and restrain Defendants and all persons acting on their behalf from consummating the proposed merger of BJ Services, or from entering into or carrying out any other agreement, plan, or understanding by which Baker Hughes would acquire, be acquired by, or merge with BJ Services;

c. Award the United States its costs for this action; and

d. Award the United States such other and further relief as the Court deems just and proper.

Dated: April 27, 2010.

Respectfully submitted,

/s/

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**Appendix A**

**Definition of HHI**

The term "HHI" means the Herfindahl-Hirschman Index, a commonly accepted measure of market concentration. The HHI is calculated by squaring the market share of each firm competing in the market and then summing the resulting numbers. For example, for a market consisting of four firms with shares of 30, 30, 20, and 20%, the HHI is 2,600 ($30^2 + 30^2 + 20^2 + 20^2 = 2{,}600$). The HHI takes into account the relative size distribution of the firms in a market. It approaches zero when a market is occupied by a large number of firms of relatively equal size and reaches its maximum of 10,000 points when a market is controlled by a single firm. The HHI increases both as the number of firms in the market decreases and as the disparity in size between those firms increases.

Markets in which the HHI is between 1,000 and 1,800 points are considered to be moderately concentrated, and markets in which the HHI is in excess of 1,800 points are considered to be highly concentrated. *See Horizontal Merger Guidelines* ¶ 1.51 (revised Apr. 8, 1997). Transactions that increase the HHI by more than 100 points in highly concentrated markets presumptively raise antitrust concerns under the *Horizontal Merger Guidelines* issued by the Department of Justice and the Federal Trade Commission. *See id.*

**United States District Court for the District of Columbia**

*United States of America,* Plaintiff, v. *Baker Hughes Incorporated* and *BJ Services Company,* Defendants.

Civil Action No.:
Filed:
Judge:

Date Stamped:

**Proposed Final Judgment**

*Whereas,* Plaintiff United States of America ("United States") filed its Complaint on April 27, 2010, the United States and defendants Baker Hughes Incorporated and BJ Services Company, by their respective attorneys, have consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law, and without this Final Judgment constituting any evidence against or admission by any party regarding any issue of fact or law;

*And whereas,* Defendants agree to be bound by the provisions of this Final Judgment pending its approval by the Court;

*And Whereas,* the essence of this Final Judgment is the prompt and certain divestiture of certain rights or assets by Defendants to assure that competition is not substantially lessened;

*And whereas,* the United States requires Defendants to make certain divestitures for the purpose of remedying the loss of competition alleged in the Complaint;

*And whereas,* Defendants have represented to the United States that the divestitures required below can and will be made and that Defendants will later raise no claim of hardship or difficulty as grounds for asking the Court to modify any of the divestiture provisions contained below;

*Now therefore,* before any testimony is taken, without trial or adjudication of any issue of fact or law, and upon consent of the parties, it is *ordered, adjudged, and decreed:*

**I. Jurisdiction**

This Court has jurisdiction over the subject matter of and each of the parties to this action. The Complaint states a claim upon which relief may be granted against Defendants under Section 7 of the Clayton Act, as amended (15 U.S.C. 18).

**II. Definitions**

As used in this Final Judgment:

A. "Acquirer" means the entity to whom Defendants divest the Divestiture assets.

B. "Baker Hughes" means defendant Baker Hughes Incorporated, a Delaware corporation headquartered in Houston, Texas, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships and joint ventures, and their directors, officers, managers, agents, and employees.

C. "BJ" or "BJ Services" means defendant BJ Services Company, a Delaware corporation headquartered in

Houston, Texas, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships and joint ventures, and their directors, officers, managers, agents, and employees.

D. "Blue Ray" means the marine stimulation vessel named the Blue Ray currently leased and operated by BJ in the Gulf, and any equipment installed on or used to operate the Blue Ray as of March 1, 2010.

E. "BrineStar Intangible Assets" means Patent Application Nos. 12/030,614 and 12/365,673 and associated Intangible Assets primarily used in connection with the design, development, testing, production, quality control, marketing, servicing, sale, installation, or distribution of BJ's BrineStar and BrineStar II products.

F. "Diamond Fraq Intangible Assets" means Patent Nos. 7,052,901; 7,343,972; 7,595,284; 7,645,724; 7,655,603; 7,347,266; 7,615,517; 7,530,393; 7,550,413; 7,543,644; 7,544,643; 7,527,102; 7,527,103; and associated Intangible Assets primarily used in connection with the design, development, testing, production, quality control, marketing, servicing, sale, installation, or distribution of Baker Hughes' Diamond Fraq products.

G. "Divestiture Assets" means the real property and Tangible and Intangible Assets listed in Schedules A through C. Divestiture Assets shall not be interpreted to include (a) any equipment installed on stimulation vessels other than the Blue Ray or HR Hughes; (b) BJ Services' ownership or leasehold interest in skids or non-vessel based pumping equipment; or (c) the Tangible or Intangible Assets primarily used in connection with the design, development, testing, production, quality control, marketing, servicing, sale, installation, or distribution of Baker Hughes' Sand Control Tools or BJ Services' Stimulation Fluids other than (i) those BJ Stimulation Fluids assets specifically set forth in Schedule C and (ii) any information, data, or documents relating to any Divestiture Assets.

H. "Gulf" means the United States Gulf of Mexico.

I. "HR Hughes" means the marine stimulation vessel named the HR Hughes currently leased and operated by Baker Hughes in the Gulf, and any equipment installed on or used to operate the HR Hughes as of March 1, 2010.

J. "Intangible Asset" means any asset other than a Tangible Asset, including, but not limited to:

(1) Patents or patent applications, licenses and sublicenses, copyrights, trademarks, trade secrets, trade names, service marks, and service names, but excluding the following trade names: BJ, Baker Oil Tools, and Baker Hughes.

(2) Know-how, including recipes, formulas, machine settings, drawings, blueprints, designs, design protocols, design tools, simulation capability, specifications for materials, specifications for parts and devices,

(3) Computer software (*e.g.* vessel communication and remote monitoring software), databases (*e.g.* databases containing technical job histories) and related documentation;

(4) Procedures and processes related to operations, quality assurance and control, and health, safety and environment;

(5) Data concerning historic and current research and development, including, but not limited to, designs of experiments, and the results of successful and unsuccessful designs and experiments;

(6) All contractual rights; and

(7) All authorizations, permits, licenses, registrations, or other forms of permission, consent, or authority issued, granted, or otherwise made available by or under the authority of any governmental authority.

K. "Latest Generation MST Intangible Assets" means Patent Nos. 7,490,669; 7,543,647; 6,397,949; 6,722,440; 7,124,824; 7,198,109; 7,201,232; 7,152,678; RE40648; 6,405,800; 7,021,389; 7,150,326; 7,497,265, and associated Intangible Assets primarily used in connection with the design, development, testing, production, quality control, marketing, servicing, sale, installation, or distribution of BJ's Multi-Zone Single Trip Well Completion System.

L. "Relevant Employees" means the employees listed in Schedule D.

M. "Sand Control Tools" means those tools used or installed in connection with the performance of Stimulation Services at or below the zones in which hydrocarbons are located; including but not limited to, the components of sump packer assemblies, frac pack assemblies, and high rate water pack assemblies; screens; fluid loss valves; blank pipe; isolation tubing; production seals; and service tools.

N. "Stimulation Fluids" means acids, proppants, gels, or other fluids or additives used to provide Stimulation Services.

O. "Stimulation Services" means acidizing, gravel packs, frac packs, high rate water packs, or hydraulic fracturing services performed from vessels or skid-mounted pumping equipment.

P. "Tangible Asset" means any physical asset (excluding real property or marine stimulation vessels not specifically identified as part of the Divestiture Assets), including, but not limited to:

(1) All machinery, equipment, hardware, spare parts, tools, dies, jigs, molds, patterns, gauges, fixtures (including production fixtures), business machines, computer hardware, other information technology assets, furniture, laboratories, supplies, materials, vehicles, spare parts in respect of any of the foregoing and other tangible personal property;

(2) Improvements, fixed assets, and fixtures pertaining to the real property identified as part of the Divestiture Assets;

(3) All inventories, raw materials, work-in-process, finished goods, supplies, stock, parts, packaging materials and other accessories related thereto; and

(4) Business records including financial records, accounting and credit records, tax records, governmental licenses and permits, bid records, customer lists, customer contracts, supplier contracts, service agreements; operations records including vessel logs, calendars, and schedules; job records, research and development records, health, environment and safety records, repair and performance records, training records, and all manuals and technical information Defendants provide to their own employees, customers, suppliers, agents or licensees.

Q. "Transaction" means Baker Hughes' proposed merger with BJ Services, which was the subject of Hart-Scott-Rodino Report No. 2009–0748, filed with the Federal Trade Commission and the U.S. Department of Justice on September 14, 2009.

**III. Applicability**

A. This Final Judgment applies to Baker Hughes and BJ Services, as defined above, and all other persons in active concert or participation with any of them who receive actual notice of this Final Judgment by personal service or otherwise.

B. If, prior to complying with Section IV and VI of this Final Judgment, Defendants sell or otherwise dispose of all or substantially all of their assets or of lesser business units that include the Divestiture Assets, they shall require the acquirer to be bound by the provisions of this Final Judgment. Defendants need not obtain such an agreement from the Acquirer of the assets divested pursuant to this Final Judgment.

C. Defendants shall require, as a condition of the sale of the Divestiture Assets, that the Acquirer agree to be bound by Section XI of this Final Judgment.

**IV. Divestitures**

A. Defendants are ordered and directed, within sixty (60) calendar days after the filing of the Complaint in this matter, or five (5) calendar days after notice of the entry of this Final Judgment by the Court, whichever is later, to divest the Divestiture Assets in a manner consistent with this Final Judgment to an Acquirer acceptable to the United States, in its sole discretion. The United States, in its sole discretion, may agree to one or more extensions of this time period not to exceed sixty (60) calendar days in total, and shall notify the Court in such circumstances. Defendants agree to divest the Divestiture Assets as expeditiously as possible.

B. In accomplishing the divestitures ordered by this Final Judgment, Defendants promptly shall make known widely the availability of the Divestiture Assets. Defendants shall inform any person making inquiry regarding a possible purchase of the Divestiture Assets that they are being divested pursuant to this Final Judgment and provide that person with a copy of this Final Judgment. Defendants shall offer to furnish to all prospective Acquirers, subject to customary confidentiality assurances, all information and documents relating to the Divestiture Assets customarily provided in a due diligence process, except such information or documents subject to the attorney-client privilege or work-product doctrine. Defendants shall make available such information to the United States at the same time that such information is made available to any other person.

C. Defendants shall permit prospective Acquirers of the Divestiture Assets to have reasonable access to personnel and to make inspections of the physical facilities associated with the Divestiture Assets; access to any and all environmental, zoning, and other permit documents and information; and access to any and all financial, operational, or other documents and information customarily provided as part of a due diligence process.

D. Defendants shall warrant to the Acquirer that each asset will be operational on the date of sale. Defendants shall maintain and enforce all intellectual property rights licensed to the Acquirer pursuant to the proposed Final Judgment.

E. Defendants shall not take any action that will impede in any way the permitting, operation, use, or divestiture of the Divestiture Assets.

F. Defendants shall warrant to the Acquirer that there are no material defects in the environmental, zoning or other permits pertaining to the operation of each asset, and that following the sale of the Divestiture Assets, Defendants will not undertake, directly or indirectly, any challenges to the environmental, zoning, or other permits relating to the operation of the Divestiture Assets.

G. Defendants shall take all necessary steps to accomplish the transfer of all interests the Defendants have in the HR Hughes, the Blue Ray, and any other Divestiture Asset in which the Defendants have an ownership or leasehold interest, including, but not limited to, obtaining authorization from Edison Chouest Offshore and Hornbeck Offshore Services LLC to assign Defendants' leasehold interests in the HR Hughes and the Blue Ray, respectively. Defendants agree to take all necessary steps, including paying all costs, to install the same communication, stimulation and instrumentation control software on the HR Hughes that is on the Blue Ray, or vice versa, at the preference of the Acquirer. Defendants will provide to the Acquirer copies of all manuals and training materials relating to the communication, stimulation and instrumentation control software on the HR Hughes and the Blue Ray and rights to training or service under any agreements Defendants have with third parties.

H. Except for assets discussed in IV G. above, Defendants shall use commercially reasonable efforts to obtain any necessary consent to assign contractual rights that are included in the Divestiture Assets, including, but not limited to, contractual rights to provide Stimulation Services, Sand Control Tools, or Stimulation Fluids for wells located in the Gulf, and contractual rights to purchase any inputs or components to those Services, Tools, or Fluids.

I. Where the Acquirer has the option to acquire specific facilities but chooses not to exercise that option:

(1) Defendants shall bear the expense of relocating to the location of the Acquirer's choice Tangible Assets that are part of the Divestiture Assets from any of those facilities.

(2) If the Acquirer chooses not to purchase the entire Completion Tool Technology Center of BJ (see Schedule B), Defendants shall, at the option of the Acquirer, make structural changes, at Defendants' expense, to Building E at the Completion Tool Technology Center, or to another location of the Acquirer's choosing, to enable the Acquirer to conduct testing of sand control tools. The structural changes will include the construction of up to two test cells that will be the equivalent in size, capabilities, technology, and rating of the test cells currently located at the Completion Tool Technology Center. Until the test cells are completed, and upon two business days notice, the purchaser will have the right to exclusive use, at no charge, of Building A at the Completion Tool Technology Center (in which test cells are currently located) for up to 14 days in any calendar month.

(3) If the Acquirer chooses not to purchase BJ's Southpark facility in Lafayette, Louisiana, Defendants shall add to the Completion Tool Technology Center, or to another location of the Acquirer's choosing, a sand control laboratory equivalent to Defendant Baker Hughes' sand control laboratory at its Lafayette Supercenter.

J. Unless the United States otherwise consents in writing, the divestiture pursuant to Section IV, or by the trustee appointed pursuant to Section VI, of the Final Judgment, shall include all of the Divestiture Assets, and the divestiture shall be accomplished in such a way as to satisfy the United States, in its sole discretion, that the Divestiture Assets can and will be used by the Acquirer as part of a viable, ongoing business engaged in the design, development, production, marketing, servicing, distribution, and sale of the Stimulation Services, Sand Control Tools, and Stimulation Fluids for wells located in the Gulf, and that such divestiture will remedy the competitive harm alleged in the Complaint. The divestiture, whether pursuant to Section IV or Section VI of this Final Judgment:

(1) Shall be made to an Acquirer that, in the United States' sole judgment, has the intent and capability (including the necessary managerial, operational, technical and financial capability) of competing effectively as a supplier of Stimulation Services, Sand Control Tools, and Stimulation Fluids for customers in the Gulf; and

(2) Shall be accomplished so as to satisfy the United States, in its sole discretion, that none of the terms of any agreement between the Acquirer and Defendants give Defendants the ability unreasonably to raise the Acquirer's costs, to lower the Acquirer's efficiency, or otherwise to interfere in the ability of the Acquirer to compete effectively.

**V. Right To Hire**

A. To enable the Acquirer to make offers of employment, Defendants shall provide the Acquirer and the United States with organization charts and information relating to Relevant Employees, including name, job title,

responsibilities as of March 1, 2010, training and educational history, relevant certifications, and, to the extent permissible by law, job performance evaluations, and current salary and benefits information.

B. Upon request, Defendants shall make Relevant Employees available for interviews with the Acquirer during normal business hours at a mutually agreeable location and will not interfere with any negotiations by the Acquirer to employ Relevant Employees. Interference with respect to this paragraph includes, but is not limited to, offering to increase the salary or benefits of Relevant Employees other than as a part of a company-wide increase in salary or benefits granted in the ordinary course of business.

C. For Relevant Employees who elect employment by the Acquirer, Defendants shall waive all noncompete agreements and all nondisclosure agreements, except as specified in V D. below, vest all unvested pension and other equity rights, and provide all benefits to which the Relevant Employees would generally be provided if transferred to a buyer of an ongoing business.

D. Nothing in this Section shall prohibit Defendants from maintaining any reasonable restrictions on the disclosure by an employee who accepts an offer of employment with the Acquirer of the Defendants' proprietary non-public information that is (1) not otherwise required to be disclosed by this Final Judgment, (2) related solely to the Defendants' businesses and clients, and (3) unrelated to the Divestiture Assets.

**VI. Appointment of Trustee**

A. If Defendants have not divested the Divestiture Assets within the time period specified in Section IVA. of this Final Judgment, Defendants shall notify the United States of that fact in writing. Upon application of the United States, the Court shall appoint a trustee selected by the United States and approved by the Court to effect the divestiture of the Divestiture Assets.

B. After the appointment of a trustee becomes effective, only the trustee shall have the right to sell the Divestiture Assets. The trustee shall have the power and authority to accomplish the divestiture to an Acquirer acceptable to the United States at such price and on such terms as are then obtainable upon reasonable effort by the trustee, subject to the provisions of Sections IV, V, and VI of this Final Judgment, and shall have such other powers as this Court deems appropriate. Subject to Section VI D. of this Final Judgment, the trustee may hire at the cost and expense of Defendants any investment bankers, attorneys, accountants or other agents, who shall be solely accountable to the trustee, reasonably necessary in the trustee's judgment to assist in the divestiture.

C. Defendants shall not object to a sale by the trustee on any ground other than the trustee's malfeasance. Any such objections by Defendants must be conveyed in writing to the United States and the trustee within ten (10) calendar days after the trustee has provided the notice required under Section VII.

D. The trustee shall serve at the cost and expense of Defendants, on such terms and conditions as the United States approves. The trustee shall account for all monies derived from the sale of the assets sold by the trustee and all costs and expenses so incurred. After payment of fees for the trustee's services and those of investment bankers, attorneys, accountants or other agents retained by it, all remaining money shall be paid to Defendants. After the trustee submits its final report, including the final accounting, to the court, the trust shall then be terminated. The compensation of the trustee and any professionals and agents retained by the trustee shall be reasonable in light of the value of the Divestiture Assets and based on a fee arrangement providing the trustee with an incentive based on the price and terms of the divestiture and the speed with which it is accomplished, but timeliness is paramount. Defendants shall expeditiously reach agreement with the trustee on the trustee's fee arrangement.

E. Defendants shall use their best efforts to assist the trustee in accomplishing the required divestitures. The trustee and any consultants, accountants, attorneys, and other persons retained by the trustee shall have full and complete access to the personnel, books, records, and facilities of the Divestiture Assets, and Defendants shall develop financial and other information relevant to the Divestiture Assets as the trustee may reasonably request, subject to reasonable protection for trade secret or other confidential research, development, or commercial information. Defendants shall take no action to interfere with, delay, or impede the trustee's accomplishment of the divestitures.

F. After its appointment, the trustee shall file monthly reports with the United States setting forth the trustee's efforts to accomplish the divestitures ordered under this Final Judgment. Such reports shall include the name, address, and telephone number of each person who, during the preceding month, made an offer to acquire, expressed an interest in acquiring, entered into negotiations to acquire, or was contacted or made an inquiry about acquiring, any interest in the Divestiture Assets, and shall describe in detail each contact with any such person. The trustee shall maintain full records of all efforts made to divest the Divestiture Assets.

G. If the trustee has not accomplished the divestitures ordered under this Final Judgment within six (6) months after his or her appointment, the trustee shall promptly file with the Court a report setting forth: (1) The trustee's efforts to accomplish the required divestitures; (2) the reasons, in the trustee's judgment, why the required divestitures have not been accomplished; and (3) the trustee's recommendations. To the extent such reports contain information that the trustee deems confidential, such reports shall not be filed in the public docket of the Court. The trustee shall at the same time furnish such report to the United States, which shall have the right to make additional recommendations consistent with the purpose of the trust. The Court thereafter shall enter such orders as it shall deem appropriate to carry out the purpose of the Final Judgment, which may, if necessary, include extending the trust and the term of the trustee's appointment by a period requested by the United States.

**VII. Notice of Proposed Divestiture**

A. Within two (2) business days following execution of a definitive divestiture agreement, Defendants shall notify the United States of any proposed divestiture required by Section IV of this Final Judgment. Within two (2) business days following execution of a definitive divestiture agreement, the trustee shall notify the United States and Defendants of any proposed divestiture required by Section VI of this Final Judgment. The notice provided to the United States shall set forth the details of the proposed divestiture and list the name, address, and telephone number of each person not previously identified who offered or expressed an interest in or desire to acquire any ownership interest in the Divestiture Assets, together with full details of the same.

B. Within fifteen (15) calendar days of receipt by the United States of such notice, the United States may request from Defendants, the proposed Acquirer, any other third party, or the trustee, if applicable, additional information concerning the proposed divestiture, the proposed Acquirer, and any other potential Acquirer.

Defendants and the trustee shall furnish any additional information requested within fifteen (15) calendar days of the receipt of the request, unless the parties shall otherwise agree.

C. Within forty-five (45) calendar days after receipt of the notice or within thirty (30) calendar days after the United States has been provided the additional information requested from Defendants, the proposed Acquirer, any third party, and the trustee, whichever is later, the United States shall provide written notice to Defendants and the trustee, if there is one, stating whether or not it objects to the proposed divestiture. If the United States provides written notice that it does not object, the divestiture may be consummated, subject only to Defendants' limited right to object to the sale under Section VI C. of this Final Judgment. Absent written notice that the United States does not object to the proposed Acquirer or upon objection by the United States, a divestiture proposed under Section IV or Section VI shall not be consummated. Upon objection by Defendants under Section VI C., a divestiture proposed under Section VI shall not be consummated unless approved by the Court.

**VIII. Financing**

Defendants shall not finance all or any part of any purchase made pursuant to Section IV or VI of this Final Judgment.

**IX. Hold Separate**

Until the divestitures required by this Final Judgment have been accomplished, Defendants shall take all steps necessary to comply with the Hold Separate Stipulation and Order entered by this Court. Defendants shall take no action that would jeopardize the divestitures ordered by this Court.

**X. Affidavits**

A. Within twenty (20) calendar days of the filing of the Complaint in this matter, and every thirty (30) calendar days thereafter until the divestitures have been completed under Section IV or VI, Defendants shall deliver to the United States an affidavit as to the fact and manner of their compliance with Section IV or VI of this Final Judgment. Each such affidavit shall include the name, address, and telephone number of each person who, during the preceding thirty (30) calendar days, made an offer to acquire, expressed an interest in acquiring, entered into negotiations to acquire, or was contacted or made an inquiry about acquiring, any interest in the Divestiture Assets, and shall describe in detail each contact with any such person during that period. Each such affidavit shall also include a description of the efforts Defendants have taken to solicit buyers for the Divestiture Assets, and to provide required information to prospective Acquirers, including the limitations, if any, on such information. Assuming the information set forth in the affidavit is true and complete, any objection by the United States to information provided by Defendants, including limitations on information, shall be made within fourteen (14) calendar days of receipt of such affidavit.

B. Within twenty (20) calendar days of the filing of the Complaint in this matter, Defendants shall deliver to the United States an affidavit that describes in reasonable detail all actions Defendants have taken and all steps Defendants have implemented on an ongoing basis to comply with Section IX of this Final Judgment. Defendants shall deliver to the United States an affidavit describing any changes to the efforts and actions outlined in Defendants' earlier affidavits filed pursuant to this Section within fifteen (15) calendar days after the change is implemented.

C. Defendants shall keep all records of all efforts made to preserve and divest the Divestiture Assets until one year after such divestiture has been completed.

**XI. Conditions Placed Upon the Acquirer**

A. For five years from the entry of this Final Judgment, unless such transaction is otherwise subject to the reporting and waiting period requirements of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended, 15 U.S.C. 18a (the "HSR Act"), the Acquirer, without providing advance notification to the Antitrust Division, shall not directly or indirectly sell any of the Divestiture Assets or any interest (including, but not limited to, any financial, security, loan, equity, or management interest) in any of the Divestiture Assets to Halliburton Company or Schlumberger Ltd. Such notification shall be provided to the Antitrust Division in the same format as, and per the instructions relating to the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended. Notification shall be provided at least thirty (30) calendar days prior to completion of any such transaction, and shall include, beyond what may be required by the applicable instructions, the names of the principal representatives of the parties to the agreement who negotiated the agreement, and any management or strategic plans discussing the proposed transaction. If within the 30-day period after notification, representatives of the Antitrust Division make a written request for additional information, the Acquirer shall not consummate the proposed transaction or agreement until thirty (30) calendar days after submitting all such additional information. Early termination of the waiting periods in this paragraph may be requested and, where appropriate, granted in the same manner as is applicable under the requirements and provisions of the HSR Act and rules promulgated thereunder. This Section shall be broadly construed and any ambiguity or uncertainty regarding the filing of notice under this Section shall be resolved in favor of filing notice.

B. The Acquirer shall not move the HR Hughes or the Blue Ray out of the Gulf for two years from the entry of this Final Judgment without the prior written consent of the Antitrust Division.

**XII. Compliance Inspection**

A. For the purposes of determining or securing compliance with this Final Judgment, or of determining whether the Final Judgment should be modified or vacated, and subject to any legally recognized privilege, from time to time authorized representatives of the United States Department of Justice Antitrust Division, including consultants and other persons retained by the United States, shall, upon written request of an authorized representative of the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to Defendants, be permitted:

(1) Access during Defendants' office hours to inspect and copy, or at the option of the United States, to require Defendants to provide hard copy or electronic copies of, all books, ledgers, accounts, records, data, and documents in the possession, custody, or control of Defendants, relating to any matters contained in this Final Judgment; and

(2) to interview, either informally or on the record, Defendants' officers, employees, or agents, who may have their individual counsel present, regarding such matters. The interviews shall be subject to the reasonable convenience of the interviewee and without restraint or interference by Defendants.

B. Upon the written request of an authorized representative of the Assistant Attorney General in charge of the Antitrust Division, Defendants shall submit written reports or responses to written interrogatories, under oath if requested, relating to any of the matters

contained in this Final Judgment as may be requested.

C. No information or documents obtained by the means provided in this Section shall be divulged by the United States to any person other than an authorized representative of the executive branch of the United States, except in the course of legal proceedings to which the United States is a party (including grand jury proceedings), for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

D. If, at the time information or documents are furnished by Defendants to the United States, Defendants represent and identify in writing the material in any such information or documents to which a claim of protection may be asserted under Rule 26(c)(1)(G) of the Federal Rules of Civil Procedure, and Defendants mark each pertinent page of such material, "Subject to claim of protection under Rule 26(c)(1)(G) of the Federal Rules of Civil Procedure," then the United States shall give Defendants ten (10) calendar days notice prior to divulging such material in any legal proceeding (other than a grand jury proceeding).

**XIII. No Reacquisition**

Defendants may not reacquire an ownership interest in any part of the Divestiture Assets during the term of this Final Judgment.

**XIV. Retention of Jurisdiction**

This Court retains jurisdiction to enable any party to this Final Judgment to apply to this Court at any time for further orders and directions as may be necessary or appropriate to carry out or construe this Final Judgment, to modify any of its provisions, to enforce compliance, and to punish violations of its provisions.

**XV. Expiration of Final Judgment**

Unless this Court grants an extension, this Final Judgment shall expire ten (10) years from the date of its entry.

**XVI. Public Interest Determination**

Entry of this Final Judgment is in the public interest. The parties have complied with the requirements of the Antitrust Procedures and Penalties Act, 15 U.S.C. 16, including making copies available to the public of this Final Judgment, the Competitive Impact Statement, and any comments thereon and the United States' responses to comments. Based upon the record before the Court, which includes the Competitive Impact Statement and any comments and responses to comments filed with the Court, entry of this Final Judgment is in the public interest.

Date: Court approval subject to procedures of Antitrust Procedures and Penalties Act, 15 U.S.C. § 16

United States District Judge

**Schedule A**

*Stimulation Services*

BJ Services Assets

1. *BJ Tangible Assets and Real Property:*

a. BJ's ownership and leasehold interest in the Blue Ray.

b. At the option of the Acquirer, BJ's ownership and leasehold interest in one or more of the following facilities:

i. BJ's Crowley facility at West Highway 90 and Roller Road in Crowley, Louisiana 70526.

ii. BJ's Sales Offices at 1515 Poydras Street, Suite 2000, New Orleans, Louisiana 70508;

iii. BJ's Sales Offices at 5005 Mitchelldale Street, Suite 250, Houston, Texas 77092.

c. All Tangible Assets owned, leased or licensed by BJ that are used in connection with the design, development, testing, production, quality control, marketing, servicing, sale, installation, or provision of Stimulation Services for wells located in the Gulf.

2. *BJ Intangible Assets:*

a. All Intangible Assets owned, leased or licensed by BJ that are used in connection with the design, development, testing, production, quality control, marketing, servicing, sale, installation, or provision of Stimulation Services for wells located in the Gulf.

b. *Exclusions:*

i. Excluded from this Schedule A is BJ's proprietary communication, stimulation, or instrumentation control software used in connection with the operation of the Blue Ray, *provided* that, if the Acquirer elects pursuant to Section IV G. to have Defendants install the same communication, stimulation and instrumentation control software on the HR Hughes that is installed on the Blue Ray, Defendants shall provide to Acquirer a non-exclusive right to such software, including,

(1) A worldwide, royalty-free, non-exclusive, perpetual, transferable license to all patents, trademarks, trade secrets, and other Intangible Assets in which Defendants assert intellectual property rights; such license shall grant the Acquirer the right (a) to make, have made, use, sell or offer for sale, copy, create derivative works, modify, improve, display, perform, and enhance the licensed Intangible Assets; and (b) to own any Intangible Assets the Acquirer generates pursuant to this license; and (c) to have end-user customers of the Acquirer enjoy the benefit of the Intangible Assets provided by the Acquirer pursuant to this license; and

(2) a right to obtain copies of, assignment of, or other effective transfer of all other Intangible Assets.

Baker Hughes Assets

1. *Baker Hughes Tangible Assets and Real Property:*

a. Baker Hughes' ownership and leasehold interest in the HR Hughes.

b. Baker Hughes' ownership and leasehold interest in the marine vessel stimulation dock facility located at Port Fourchon, Louisiana.

c. Baker Hughes' ownership and leasehold interest in any mooring buoy(s) located in or around Port Fourchon, Louisiana.

d. At the option of the Acquirer, Baker Hughes' ownership and leasehold interest in skids and non-vessel based pumping equipment that are used to perform Stimulation Services in the Gulf.

e. All Tangible Assets owned, leased or licensed by Baker Hughes that are used in connection with the assets, facilities and real property identified in 1(a)–1(d).

2. *Baker Hughes Intangible Assets:*

a. All Intangible Assets owned, leased or licensed by Baker Hughes that are primarily used in connection with or necessary for the use of the assets, facilities and real property identified in 1(a)–1(d).

b. With respect to Intangible Assets that are not included in paragraph 2(a) but that are used in connection with the assets, facilities and real property identified in 1(a)–1(d), Defendants shall provide to Acquirer a non-exclusive right to such Intangible Assets for the design, development, testing, production, quality control, marketing, servicing, sale, installation, and provision of Stimulation Services, including:

i. A worldwide, royalty-free, non-exclusive, perpetual, transferable license to all patents, trademarks, trade secrets, and other Intangible Assets in which Defendants assert intellectual property rights; such license shall grant the Acquirer the right (a) to make, have made, use, sell or offer for sale, copy, create derivative works, modify, improve, display, perform, and enhance the licensed Intangible Assets; (b) to own any Intangible Assets the Acquirer generates pursuant to this license; and (c) to have end-user customers of the

Acquirer enjoy the benefit of Stimulation Services provided by the Acquirer pursuant to this license; and

ii. A right to obtain copies of, assignment of, or other effective transfer of all other Intangible Assets.

**Schedule B**

*Sand Control Tools*

BJ Services Assets

1. *BJ Tangible Assets and Real Property:*

a. At the option of the Acquirer, BJ's ownership and leasehold interest in one of the following:

i. The entire Completion Tool Technology Center located at 16610 Aldine Westfield, Houston, Texas 77073;

ii. A portion of the Completion Tool Technology Center located at 16610 Aldine Westfield, Houston, Texas 77073 consisting of the real property associated with Buildings D and E; or

iii. A portion of the Completion Tool Technology Center located at 16610 Aldine Westfield, Houston, Texas 77073 consisting of the real property associated with Building E.

b. At the option of the Acquirer, BJ's ownership and leasehold interest in the Southpark facility located at 203 Commission Blvd., Lafayette, Louisiana 70508.

c. At the option of the Acquirer, all Tangible Assets owned, leased or licensed by BJ that are used in connection with the design, development, testing, production, quality control, marketing, servicing, sale, installation, or distribution of Sand Control Tools for wells located in the Gulf, except that Defendants have the right to retain one-half of the inventory of each of BJ's MST-related service tools and parts, and one-half of the inventory of BJ's MST-related consummables, located in the Gulf as of March 1, 2010.

2. *BJ Intangible Assets:*

a. All Intangible Assets owned, leased or licensed by BJ that are used in connection with the design, development, testing, production, quality control, marketing, servicing, sale, installation, or distribution of Sand Control Tools for wells located in the Gulf.

b. *Exclusions:*

i. Excluded from this Schedule B are the Latest Generation MST Intangible Assets, *provided* that Defendants shall provide to Acquirer a non-exclusive right to the Latest Generation MST Intangible Assets for the design, development, testing, production, quality control, marketing, servicing, sale, installation, and distribution of Sand Control Tools, including,

(1) A worldwide, royalty-free, non-exclusive, perpetual, transferable license to all patents, trademarks, trade secrets, and other Intangible Assets in which Defendants assert intellectual property rights; such license shall grant the Acquirer the right (a) to make, have made, use, sell or offer for sale, copy, create derivative works, modify, improve, display, perform, and enhance the licensed Intangible Assets; (b) to own any Intangible Assets the Acquirer generates pursuant to this license; and (c) to have end-user customers of the Acquirer enjoy the benefit of Sand Control Tools provided by the Acquirer pursuant to this license; and

(2) a right to obtain copies of, assignment of, or other effective transfer of all other Intangible Assets (*e.g.* data, drawings, and other materials in BJ's drawing vault and engineering design request files).

**Schedule C**

*Stimulation Fluids*

Baker Hughes Asset

1. *Baker Hughes Tangible Assets:*

a. All Tangible Assets owned, leased or licensed by Baker Hughes that are used in connection with the design, development, testing, production, quality control, marketing, servicing, sale, installation, or distribution of Stimulation Fluids for wells located in the Gulf.

2. *Baker Hughes Intangible Assets:*

a. All Intangible Assets owned, leased or licensed by Baker Hughes that are primarily used in connection with or necessary for Baker Hughes' design, development, testing, production, quality control, marketing, servicing, sale, installation, or distribution of Stimulation Fluids for wells located in the Gulf, but not including the Diamond Fraq Intangible Assets.

b. With respect to Intangible Assets that are not included in paragraph 2(a) but that are used in connection with the design, development, testing, production, quality control, marketing, servicing, sale, installation, or distribution of Stimulation Fluids for wells located in the Gulf (including but not limited to the Diamond Fraq Intangible Assets), Defendants shall provide to Acquirer a non-exclusive right to such Intangible Assets for the design, development, testing, production, quality control, marketing, servicing, sale, installation, and distribution of Stimulation Fluids, including,

i. A worldwide, royalty-free, non-exclusive, perpetual, transferable license to all patents, trademarks, trade secrets, and other Intangible Assets in which Defendants assert intellectual property rights; such license shall grant the Acquirer the right (a) to make, have made, use, sell or offer for sale, copy, create derivative works, modify, improve, display, perform, and enhance the licensed Intangible Assets; (b) to own any Intangible Assets the Acquirer generates pursuant to this license; and (c) to have end-user customers of the Acquirer enjoy the benefit of Stimulation Fluids provided by the Acquirer pursuant to this license, and;

ii. A right to obtain copies of, assignment of, or other effective transfer of all other Intangible Assets (*e.g.,* lab reports, lab notebooks, project books, mixing manuals, and technical papers).

BJ Services Assets

1. *BJ Tangible Assets:*

a. At the option of the Acquirer, Defendant BJ's ownership and leasehold interest in any trucks and tanks used by BJ to transport Stimulation Fluids for sale, distribution or installation for wells located in the Gulf.

2. *BJ Intangible Assets:*

a. With respect to the BrineStar Intangible Assets, Defendants shall convey to Acquirer a non-exclusive right to the BrineStar Intangible Assets for the design, development, testing, production, quality control, marketing, servicing, sale, installation, and distribution of Stimulation Fluids, including,

i. A worldwide, royalty-free, non-exclusive, perpetual, transferable license to all patents, trademarks, trade secrets, and other Intangible Assets in which Defendants assert intellectual property rights; such license shall grant the Acquirer the right (a) to make, have made, use, sell or offer for sale, copy, create derivative works, modify, improve, display, perform, and enhance the licensed Intangible Assets; (b) to own any Intangible Assets the Acquirer generates pursuant to this license; and (c) to have end-user customers of the Acquirer enjoy the benefit of Stimulation Fluids provided by the Acquirer pursuant to this license, and;

ii. A right to obtain copies of, assignment of, or other effective transfer of all other Intangible Assets (*e.g.* data, files, and other materials in BJ's drawing vault and engineering design request files).

**Schedule D**

*Relevant Employees*

1. *Relevant Employees means:*

a. All BJ employees whose job responsibilities as of March 1, 2010 included the design, development, testing, production, quality control,

marketing, servicing, sale, and/or provision of Stimulation Services for wells in the Gulf; but not including the vessel-based crews of stimulation vessels other than the Blue Ray;

b. All Baker Hughes employees whose job responsibilities as of March 1, 2010 included the provision of Stimulation Services using the HR Hughes and/or skid-based equipment for wells located in the Gulf; including all vessel-based and skid-based crews and related land-based support personnel;

c. All BJ employees whose job responsibilities as of March 1, 2010 included the design, development, testing, production, quality control, marketing, servicing, sale, installation, and/or distribution of Sand Control Tools for wells located in the Gulf; and

d. All Baker Hughes employees whose job responsibilities as of March 1, 2010 included the design, development, testing, production, quality control, marketing, servicing, sale, installation, and/or distribution of Stimulation Fluids for wells located in the Gulf.

2. Relevant Employees otherwise described in this Schedule D shall not include:

a. All Baker Hughes employees who, as of March 1, 2010, had a title of Vice President or higher;

b. A maximum of four BJ employees, to be selected by Defendants and identified to the United States and to the Acquirer, whose responsibilities are primarily related to the research and development of the Latest Generation MST Intangible Assets;

c. A maximum of one Baker Hughes employee, to be selected by Defendants and identified to the United States and to the Acquirer, whose responsibilities are primarily related to the research and development of Baker Hughes' Diamond Fraq Intangible Assets; and the individual who on March 1, 2010 held the position at BJ of Gulf Coast Region Sales Manager.

**United States District Court for the District of Columbia**

*United States of America,* Plaintiff, v. *Baker Hughes Incorporated* and *BJ Services Company,* Defendants.

Civil Action No.:
Case: 1:10–cv–00659
Assigned to: Kessler, Gladys
Assign. Date: 04/27/2010
Description: Antitrust

**Competitive Impact Statement**

Plaintiff United States of America ("United States"), pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act ("APPA" or "Tunney Act"), 15 U.S.C. 16(b)–(h), files this Competitive Impact Statement relating to the proposed Final Judgment submitted for entry in this civil antitrust proceeding.

**I. Nature and Purpose of the Proceeding**

Defendants Baker Hughes Incorporated ("Baker Hughes") and BJ Services Company ("BJ Services" or "BJ") entered into a merger agreement pursuant to which Baker Hughes would acquire 100% of BJ's stock for Baker Hughes stock then valued at approximately $5.5 billion. The United States today filed a civil antitrust Complaint seeking to enjoin the proposed transaction because its likely effect would be to lessen competition substantially for vessel stimulation services in the United States Gulf of Mexico ("Gulf") in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18. This loss of competition would likely result in higher prices and reduced service quality in the Gulf vessel stimulation services market.

At the same time the Complaint was filed, the United States also filed a Hold Separate Stipulation and Order ("Hold Separate") and a proposed Final Judgment, which are designed to eliminate the anticompetitive effects of the proposed merger. Under the proposed Final Judgment, the terms of which are explained more fully below, Defendants are required to create a new competitor for vessel stimulation services by divesting their interests in two specially-equipped stimulation vessels, Baker Hughes' HR Hughes and BJ's Blue Ray, and other assets used to support their offshore stimulation services operations, including Baker Hughes' dock facilities at Port Fourchon, Louisiana, Baker Hughes' Gulf stimulation fluids assets, and BJ's sand control tools assets. Also included in the divestiture package is an expansive right to hire key personnel from both companies.

The United States and Defendants have stipulated that the proposed Final Judgment may be entered after compliance with the APPA. Entry of the proposed Final Judgment would terminate this action, except that the Court would retain jurisdiction to construe, modify, or enforce the provisions of the Final Judgment and to punish violations thereof.

**II. Description of the Events Giving Rise to the Alleged Violation**

*A. The Defendants and the Industry*

Baker Hughes is a major supplier of products and services for drilling, formation evaluation, completion, and production to the worldwide oil and natural gas industry. In 2009, Baker Hughes reported total revenues of approximately $9.7 billion. BJ Services is also a leading worldwide provider of products and services to the oil and gas industry. BJ Services reported revenues of $4.1 billion for the 2009 fiscal year.

Oil and gas companies lease offshore exploration rights from the state or federal government. After drilling a well to evaluate the formation, the company decides if it will be profitable to produce oil from that well. If so, the well will be "completed," or prepared for production. The completion process is designed to enable and control the flow of oil and gas from the formation through the wellbore and to the surface.

Due to the soft rock formations in the Gulf, virtually all wells require stimulation services as part of the completion process. These services generally encompass sand control, which is designed to prevent formation sand from clogging the well and enhance oil and gas production. Most stimulation services on the shelf (less than 1000 feet water depth) and virtually all stimulation services in deepwater are performed by specially-equipped stimulation vessels.[1] Stimulation vessels are typically well over 200 feet in length and are equipped with high pressure pumps, blenders, storage tanks and other equipment necessary to provide these services. To operate in the Gulf, a stimulation vessel must comply with a federal law known as the "Jones Act," which requires vessels to be U.S. flagged, U.S. built, and U.S. crewed.

Baker Hughes and BJ Services are two of only four firms in the Gulf that supply stimulation services with vessels to offshore oil and gas wells. The other two firms are Schlumberger and Halliburton. These four companies are the only significant vessel stimulation service providers in the world, and operate the only Jones Act compliant stimulation vessels. Each of these companies provides stimulation services in the Gulf with two stimulation vessels. Baker Hughes supplies stimulation services in the Gulf with the HR Hughes and the RC Baker, and BJ utilizes the Blue Dolphin and the Blue Ray.

Drilling and completing a well is extremely costly, particularly in deepwater, and the demand for stimulation vessel services is inelastic

[1] While some offshore stimulation services are performed by pumps that are mounted on skids rather than vessels, skid-mounted pumps are not feasible for most stimulation services in the Gulf. Even when a job could technically be performed by skid-mounted equipment, oil and gas companies often use a vessel due to safety and logistical concerns.

and time-sensitive. The daily costs for the drilling rig and other assets often exceed $100,000 for wells on the shelf, and may be $1 million or more for wells in deepwater. These assets remain at the drilling site while vessel stimulation services are performed and throughout the completion process. If a stimulation vessel is not available at the precise time its services are needed, the oil and gas company will incur the very high costs associated with the rig and other supporting assets while it waits for a vessel to arrive at the well site. To avoid this, many oil and gas customers in the Gulf require a vessel stimulation service provider to maintain two vessels in its fleet for greater assurance that a vessel will be available when needed.

Oil and gas companies in the Gulf obtain pricing for vessel stimulation services in two basic ways. They solicit bids for specific wells or projects, and they enter into annual or multi-year contracts that generally establish a discount off of list prices published by the stimulation service provider. Some oil and gas companies prefer to use one approach or the other, but most employ a combination of the two. Under the project approach, the pricing for a specific well or project may be established months or days before the stimulation service is provided. Under the contract approach, the discounts are generally established long before the stimulation service is rendered and are not tied to a particular well or project.[2] Generally, both approaches involve a bidding process in which the technical capabilities, reputation, and prices of multiple vessel stimulation service providers are evaluated, and preferred providers are chosen.

Demand for vessel stimulation services in the Gulf rises and falls with overall drilling levels and seasonal variation. During periods of sustained high demand, stimulation vessels are busier, and operators are forced to pay higher prices to ensure vessel availability, utilize less preferred suppliers, or even incur expensive rig-costs while waiting for a vessel.[3]

[2] Generally, these contracts do not guarantee vessel stimulation service providers a certain amount of stimulation services business, nor do they guarantee oil and gas customers the availability of a vessel for particular jobs or projects. They merely establish discounts that customers may invoke when they call on the supplier to provide services.

[3] During even generally "slow" seasons, vessels may be occupied with other jobs at the precise times a customer requires their services. Having available capacity "most of the month" is of little value to a customer whose operations require a vessel's services on a specific day.

*B. The Market for Vessel Stimulation Services in the Gulf of Mexico*

The United States has alleged in the Complaint that the provision of vessel stimulation services for wells located in the Gulf is a line of commerce and a relevant market within the meaning of Section 7 of the Clayton Act.

Oil and gas companies have no economical alternatives to sand control or stimulation services and need these services for the great majority of offshore wells in the Gulf. While some offshore stimulation services may be performed by pumps that are mounted on skids rather than vessels, skid-mounted pumping equipment is not feasible for most stimulation services in the Gulf, including frac packs—the most commonly used stimulation service in the Gulf—which require high horsepower and significant fluid and proppant storage. Oil and gas companies procuring these vessel stimulation services for wells located in the Gulf require a provider to have stimulation service vessels capable of providing the service in the region as well as the facilities, engineers, sales and other staff necessary to support the vessels. The relevant geographic region is the Gulf. This region is defined based on the locations of customers.

A small but significant, non-transitory increase in the price of vessel stimulation services for wells located in the Gulf would not cause customers to turn to skid-mounted pumps or to any other type of service, or to vessel simulation services provided outside the Gulf, or to otherwise reduce purchases of vessel stimulation services, in volumes sufficient to make such a price increase unprofitable.

*C. The Anticompetitive Effects of the Proposed Transaction*

1. The Market Is Highly Concentrated

The market for vessel stimulation services in the Gulf is highly concentrated, with just four firms competing to perform these services. Based on 2008 revenues for vessel stimulation services in the Gulf, BJ accounted for nearly twenty percent of all vessel stimulation service revenues and Baker Hughes accounted for nearly fifteen percent. The other two firms providing vessel stimulation services in the Gulf account for all other revenues. Using an accepted economic measure of market concentration called the Herfindahl-Hirschman Index ("HHI"), described in Appendix A to the Complaint, the premerger HHI is 2801, making the market highly concentrated. By eliminating BJ as a competitor, the transaction would significantly increase concentration levels, resulting in a post-merger HHI of 3390. These high concentration levels create an economic and legal presumption that the proposed transaction is likely to significantly reduce competition in the market for vessel stimulation services.

2. Baker Hughes' Acquisition of BJ Is Likely To Result in Higher Prices for Vessel Stimulation Services in the Gulf

a. The Reduction in Bidders Is Likely To Result in Higher Prices

Absent entry of the proposed Final Judgment, the transaction would eliminate BJ as an independent competitor and reduce, from four to three, the number of bidders for vessel stimulation services in the Gulf. The loss of BJ as a bidder would likely lead to increases in prices.

Today, Baker Hughes and BJ are close competitors. BJ and Baker Hughes not only ranked first and second the past two years in terms of total expenditure on vessel stimulation services in the Gulf for numerous customers, the two share many of the same characteristics with one another. They charge similar prices for similar types of jobs and provide vessel stimulation services in the same water depths and at many of the same geological locations. This suggests that their products, while differentiated in some dimensions and facing competition from other providers, are relatively close substitutes for one another.

Pre-merger, an attempt by Baker Hughes to raise prices would cause disaffected customers for whom BJ is the next best alternative to shift business to BJ. But post merger, Baker Hughes could raise prices without concern of losing customers that viewed BJ as their next best choice. Given the closeness between BJ's and Baker Hughes' services, the diversion ratio between the two (the diversion ratio being the fraction of unit sales lost by one of the firms in response to a price increase that would be diverted to the other) is likely significant. Where that is the case, a merger likely provides the merged firm with the incentive to raise its prices as it recaptures sales it would have lost had it raised price absent the merger. And where, as is also the case here, the value of diverted sales between the merging firms is likely high (as evidenced by the high price-variable cost margins that both firms earn currently), a significant price increase will most likely be profitable for the merged firm.

Moreover, as firms in the market face intermittent or recurring capacity constraints, Halliburton and

Schlumberger could not likely expand supply easily or rapidly to serve customers in response to a post-merger price increase from Baker Hughes. In fact, Halliburton and Schlumberger would likely bid less aggressively because they would recognize that the merger gives Baker Hughes the incentive to raise prices.

The combination of Baker Hughes and BJ is also likely to lead to higher prices because, absent entry of the proposed Final Judgment, the merged firm would control four of the eight stimulation vessels in the Gulf. The anticompetitive effect of reducing the number of vessels controlled by its rivals would be particularly pronounced for project-specific bids, which may be requested by customers just days or weeks in advance. Instead of factoring in the availability of six rival vessels for these stimulation services projects, as each of the Defendants does currently when pricing its services, the merged firm would confront only four potentially available vessels. Thus, not only would the merger reduce the number of rival bidders, it would substantially increase the likelihood that the merged firm would be the sole supplier with available capacity on any given day. This would allow it to exercise greater pricing power.

b. The Merger May Also Result in a Reduction in Capacity Leading to Higher Prices

The transaction may also result in a reduction in the number of stimulation vessels in the Gulf, which would also lead to higher prices.[4] Today, because each company needs two vessels to remain competitive, neither Baker Hughes nor BJ Services has the incentive to move any of its stimulation vessels out of the Gulf. Absent entry of the proposed Final Judgment, the merged firm will have four vessels in the Gulf, giving it the opportunity, which Baker Hughes recognized, to remove one or more vessels without sacrificing the redundancy required by customers. With fewer vessels in the Gulf, utilization of the remaining vessels will increase, as will the likelihood that a vessel will be unavailable at any particular time. Given the highly time-sensitive nature of the stimulation services business in the Gulf, the importance of these services to oil and gas production, and the fact that these services represent a very small percentage of the overall costs associated with drilling and completing a well, oil and gas customers in the Gulf will likely pay higher prices to ensure a vessel is available when needed. Moreover, in periods of high demand, reduced vessel availability would likely mean that some oil and gas customers would be forced to accept delays in scheduling vessel stimulation services, resulting in significant rig expenses and opportunity costs.

3. The Anticompetitive Effects Are Not Likely To Be Prevented by Entry or Repositioning

Successful entry into the provision of vessel stimulation services in the Gulf is difficult, costly, and time consuming, requiring vessels and an array of supporting onshore assets relating to engineering, research and development, testing, performance, and marketing. A strong technical team, including experienced engineers and scientists, is essential. Additionally, customers want a supplier with a proven track record for reliable and successful performance and may require prospective bidders to undergo a lengthy and expensive qualification process. Many customers also require stimulation service providers to have two vessels as a measure of redundancy.

A provider of vessel stimulation services may have a difficult time growing its business if it does not also offer a line of sand control tools, increasing the difficulty of entry and competitive expansion. Producing sand control tools requires special skills and intellectual property. Sand control tools are installed in the well prior to performance of the stimulation services. Many customers prefer obtaining sand control tools from the same company that provides the vessel stimulation services. This reduces the number of companies with which a customer must deal, often results in a discount in the price of the services and products, and also eliminates the possibility of "finger-pointing" between the providers in the event that there is a problem or delay with the sand control tools or stimulation services. All four providers of vessel stimulation services in the Gulf sell sand control tools. Entry by an additional vessel stimulation service provider would not be timely, likely, and sufficient to prevent the substantial lessening of competition caused by the elimination of BJ Services as an independent competitor.

It is also unlikely that a small but significant non-transitory increase in prices on vessel stimulation services in the Gulf would cause competitors to reposition vessels from other geographic regions. The four companies currently servicing customers in the Gulf are the only significant providers operating anywhere in the world and the only providers with vessels that comply with the Jones Act. There are just three Jones Act compliant stimulation service vessels outside of the Gulf, and only one of them has the sophisticated dynamic positioning capability required by customers for deepwater stimulation projects in the Gulf. Moreover, all three vessels are under contract to provide stimulation services internationally, and are therefore unable to service customers in the Gulf in the near term. It is therefore unlikely that repositioning of vessels into the Gulf would offset the likely harm from the transaction.

## III. Explanation of the Proposed Final Judgment

The divestiture required by Section IV of the proposed Final Judgment will eliminate the anticompetitive effects of the merger in the market for vessel stimulation services in the Gulf by establishing a new, independent and economically viable competitor. The package of divestiture assets includes all of the types of assets that Baker Hughes and BJ Services currently use to compete in this market, including: two stimulation vessels; operations, production and sales facilities; and tangible and intangible assets relating to the provision of stimulation services and the production and sale of sand control tools and stimulation fluids in the Gulf. In addition, because experienced personnel are critical to success in the vessel stimulation services business—and will be even more important to a new entrant seeking to secure the trust and business of risk-adverse customers—the divestiture package provides the acquirer with an expansive right to hire relevant personnel without interference from the merged firm.

The overriding goal of the proposed Final Judgment is to provide the acquirer of the divestiture assets with everything needed to replace the competition that would otherwise be lost as a result of the transaction. Where possible, the United States favors the divestiture of an existing business entity that has already demonstrated its ability to compete in the relevant market. In this case, however, neither Defendant's Gulf vessel stimulation services business operates as a stand-alone business. Moreover, the accompanying

[4] From the perspective of the merged firm, removing one or two vessels from the Gulf may have two potential advantages over a reduction in capacity that does not involve removing vessels. First, removing one or two vessels might credibly demonstrate to rival vessel stimulation providers that the merged firm will not compete aggressively in the Gulf in the near future. Second, the reduction in stimulation service capacity to which the merged firm would commit by such a movement (and the associated likely price increase) would be relatively large.

stimulation fluids and sand control tools operations are likewise intertwined with other businesses.[5] To ensure that the acquirer will have all assets necessary to be an effective, long-term competitor, while minimizing disruption to Defendants' broader operations, the proposed Final Judgment requires divestiture of assets from each of the merging parties' operations. The proposed Final Judgment also provides maximum flexibility to the acquirer by providing it with the option to buy some of the assets, depending on whether it needs such assets given its existing operations.

The "Divestiture Assets" are fully described in schedules to the proposed Final Judgment and fall into three major categories: Stimulation Services, Sand Control Tools, and Stimulation Fluids. The assets in these categories are described generally below.

*A. Stimulation Services*

The Divestiture Assets related to Defendants' provision of vessel stimulation services in the Gulf include: (1) Two stimulation vessels—Baker Hughes' HR Hughes and BJ's Blue Ray—and all equipment installed on the vessels; (2) Baker Hughes' dock and mooring facilities at Port Fourchon, Louisiana; (3) the option to acquire Baker Hughes' skids and non-vessel pumping equipment used to perform Gulf stimulation services; [6] (4) tangible and intangible assets used in connection with BJ's stimulation services for wells located in the Gulf; (5) the option to acquire BJ's vessel operations facility in Crowley, Louisiana; and (6) the option to acquire BJ's sales offices in New Orleans, Louisiana and Houston, Texas.

As explained above, all four competitors in the Gulf vessel stimulation services market compete with two vessels because many customers require redundancy. Thus, the divestiture package includes two vessels. These vessels have established track records, and are capable of performing stimulation services for virtually all wells in the Gulf. Both vessels are outfitted with sophisticated dynamic positioning systems (*i.e.,* DP–2 capability), which allow the vessel to hold its position using the vessel's own thrusters as opposed to an anchor or chains. This capability is a critical requirement for deepwater stimulation jobs in the Gulf, and many oil and gas customers require stimulation service providers to maintain two deepwater-capable vessels in the Gulf in order to be considered for such projects. Having two deepwater-capable vessels will position the acquirer to compete for these projects.

The divestiture package also requires divestiture of tangible and intangible assets associated with the vessels and with BJ's provision of stimulation services for wells located in the Gulf. These assets will provide the acquirer with the physical tools (*e.g.,* equipment, inventory and business records), and the bank of knowledge and rights (*e.g.,* job history databases, design know-how and contractual rights) needed to create an independent stimulation services business equivalent to one of Defendants' current operations.

*B. Sand Control Tools*

The Divestiture Assets related to Defendants' production and sale of sand control tools include: (1) Intangible assets used in connection with BJ's sand control tools for wells located in the Gulf; (2) the option to acquire tangible assets used in connection with BJ's sand control tools for wells located in the Gulf; (3) the option to acquire BJ's Southpark facility located in Lafayette, Louisiana, where BJ conducts assembly, sales, and support for its sand control tools; and (4) the option to acquire all or part of BJ's Completion Tool Technology Center in Houston Texas, where BJ's sand control tools are researched, tested, and manufactured.[7]

Baker Hughes and BJ produce and sell a full line of sand control tools, which are used in conjunction with the provision of stimulation services. Many oil and gas companies prefer to purchase these tools from the same company that provides the vessel stimulation service. To ensure that the acquirer can compete effectively in the vessel stimulation services market (and to avoid the competitive disadvantage that likely would result if the acquirer could not provide these complementary products), the divestiture requires Defendants to divest intangible assets associated with BJ's sand control tool business, including patents, designs and other know-how.[8] The acquirer will also have the option to acquire the tangible assets associated with certain of BJ's facilities, as well as BJ's tangible assets associated with the production and sale of sand control tools, including production and testing equipment and inventory.

*C. Stimulation Fluids*

The Divestiture Assets related to Defendants' production and sale of stimulation fluids in the Gulf include: (1) Tangible and intangible assets primarily used in connection with or necessary for Baker Hughes' stimulation fluids for wells located in the Gulf; and (2) the option to acquire BJ's trucks and tanks used to transport stimulation fluids in the Gulf.

In performing vessel stimulation services in the Gulf, the Defendants use a variety of acids, proppants, gels and other fluids and additives which are pumped downhole under pressure to stimulate the production of oil and gas. Although many of these fluids and additives are manufactured by third-parties, each vessel stimulation service provider in the Gulf has its own unique set of "recipes" and know-how relating to the blending and use of these fluids. These recipes and know-how represent an important qualitative aspect of the stimulation services provided by the Defendants. To ensure that the acquirer will be equipped with the necessary recipes and know-how, the divestiture package includes intangible assets used in connection with relating to Baker Hughes' stimulation fluids business.[9]

[5] For example, BJ's research and development for stimulation fluids for vessel stimulation services in the Gulf is intertwined with its extensive onshore fluids business.

[6] While the Complaint alleges that stimulation services performed with pumping equipment on skids is not in the same product market with vessel stimulation services, skid-based equipment is included in the divestiture package to ensure that the acquirer will be able to offer the full range of offshore stimulation services, as all competitors do now. The divestiture package is designed to not only preserve the competition that would be lost from the merger, but also to ensure the viability of the acquirer.

[7] BJ's Completion Tool Technology Center is located on 22 acres of land in Houston, Texas. There are five buildings on the property, as well as associated parking lots that are reached by three entrances. Pursuant to Schedule B of the proposed Final Judgment, the acquirer will have the option of acquiring the entire facility, or a portion of the property consisting of one or two buildings.

[8] The proposed Final Judgment requires total divestiture of intangible assets used in connection with the design, development, testing, production, quality control, marketing, servicing, sale, installation, or distribution of BJ's sand control tools for wells located in the Gulf. Defendants, however, will retain BJ's patents and other intangible assets associated with BJ's Multi-Zone Single Trip tool—which was developed by BJ in conjunction with a customer, and for which Baker Hughes has no comparable tool. Defendants will provide a worldwide royalty-free non-exclusive license to the acquirer for these patents and other intangible assets.

[9] The proposed Final Judgment requires (1) a total divestiture (with one exception discussed below) of intangible assets that are primarily used in connection with or necessary to the design, development, testing, production, quality control, marketing, servicing, sale, installation, or distribution of Baker Hughes' stimulation fluids for wells located in the Gulf; and (2) a royalty-free, worldwide license to all other intangible assets used in connection with Baker Hughes' stimulation fluids for wells located in the Gulf. The exception relates to Baker Hughes' specialized heavyweight frac fluid—Diamond Fraq. Defendants will retain Baker Hughes' patents and associated intangible assets primarily used in connection with Diamond Fraq, and will provide the acquirer with a license

Continued

Defendants will also divest tangible assets used in connection with Baker Hughes' stimulation fluids for wells located in the Gulf, as well as BJ's trucks and tanks used to transport stimulation fluids in the Gulf.

## IV. Implementation of the Final Judgment

The Divestiture Assets must be divested in such a way as to satisfy the United States in its sole discretion that these assets can and will be operated by the acquirer as a viable, ongoing business that can compete effectively in the design, development, production, marketing, servicing, distribution or sale of vessel stimulation services, sand control tools and stimulation fluids in the Gulf. Defendants must take all reasonable steps necessary to accomplish the divestitures quickly and shall cooperate with prospective purchasers.

The proposed Final Judgment requires Defendants to accomplish the divestiture within sixty (60) days after the filing of the Complaint, or five (5) days after notice of the entry of the Final Judgment of the Court, whichever is later. The United States, in its sole discretion, may agree to one or more extensions of this time period not to exceed sixty (60) calendar days in total, and shall notify the Court in such circumstances.

In the event that Defendants do not accomplish the divestiture within the periods prescribed in the proposed Final Judgment, the proposed Final Judgment provides that the Court will appoint a trustee selected by the United States to effect the divestiture. If a trustee is appointed, the proposed Final Judgment provides that Baker Hughes will pay all costs and expenses of the trustee. The trustee's commission will be structured so as to provide an incentive for the trustee based on the price and terms obtained and the speed with which the divestiture is accomplished. After the trustee's appointment becomes effective, the trustee will provide monthly reports to the United States setting forth his or her efforts to accomplish the divestiture. At the end of six (6) months, if the divestiture has not been accomplished, the trustee and the United States will make recommendations to the Court, which shall enter such orders as appropriate, in order to carry out the purpose of the trust, including extending the trust or the term of the trustee's appointment.

The divestiture provisions of the proposed Final Judgment will eliminate the anticompetitive effects of the merger by enabling the acquirer to compete with the merged firm, and with Halliburton and Schlumberger, in the provision of vessel stimulation services in the Gulf, including the provision of fluids and sand control tools.

The proposed Final Judgment imposes certain obligations on the acquirer given the mobility of certain of the assets and the likelihood that a transaction involving their sale would be below Hart-Scott-Rodino reporting thresholds. Section XI requires the acquirer to keep the vessels in the Gulf for two years, unless it obtains consent otherwise from the Antitrust Division. This provision ensures that the acquirer gains experience in the Gulf to compete effectively there. Section XI also imposes a five-year requirement for the acquirer to provide the Antitrust Division notice prior to the sale or transfer of any of the divestiture assets to Halliburton or Schlumberger, should such a transaction not otherwise meet HSR thresholds. Given the limited number of competitors in the market today, the Antitrust Division would likely object to either Halliburton or Schlumberger as the proposed acquirer of the divestiture assets as such a divestiture would not likely remedy the competitive harm alleged in the Complaint. (See proposed Final Judgment, Sections IV J. & VII.) The notice provision will allow the Antitrust Division to determine whether a future sale of the divestiture assets by the acquirer to Halliburton or Schlumberger would frustrate the proposed Final Judgment's goal of preserving competition in the Gulf.

## V. Remedies Available to Potential Private Litigants

Section 4 of the Clayton Act, 15 U.S.C. 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages the person has suffered, as well as costs and reasonable attorneys' fees. Entry of the proposed Final Judgment will neither impair nor assist the bringing of any private antitrust damage action. Under the provisions of Section 5(a) of the Clayton Act, 15 U.S.C. 16(a), the proposed Final Judgment has no prima facie effect in any subsequent private lawsuit that may be brought against Defendants.

## VI. Procedures Available for Modification of the Proposed Final Judgment

The United States and Defendants have stipulated that the proposed Final Judgment may be entered by the Court after compliance with the provisions of the APPA, provided that the United States has not withdrawn its consent. The APPA conditions entry upon the Court's determination that the proposed Final Judgment is in the public interest.

The APPA provides a period of at least sixty (60) days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Final Judgment. Any person who wishes to comment should do so within sixty (60) days of the date of publication of this Competitive Impact Statement in the **Federal Register**, or the last date of publication in a newspaper of the summary of this Competitive Impact Statement, whichever is later. All comments received during this period will be considered by the United States Department of Justice, which remains free to withdraw its consent to the proposed Final Judgment at any time prior to the Court's entry of judgment. The comments and the response of the United States will be filed with the Court and published in the **Federal Register**.

Written comments should be submitted to: Donna N. Kooperstein, Chief, Transportation, Energy & Agriculture Section, Antitrust Division, 450 5th Street, NW., Suite 8000, Washington, DC 20530.

## VII. Alternatives to the Proposed Final Judgment

The United States considered, as an alternative to the proposed Final Judgment, a full trial on the merits against Defendants. The United States could have continued the litigation and sought preliminary and permanent injunctions preventing Baker Hughes, Inc from acquiring BJ Services. The United States is satisfied, however, that the divestiture of the assets described in the proposed Final Judgment will preserve competition for the design, development, and sale of vessel stimulation services in the United States Gulf of Mexico. Thus, the proposed Final Judgment would achieve all or substantially all of the relief the United States would have obtained through litigation, but avoids the time, expense, and uncertainty of a full trial on the merits of the Complaint.

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to those patents and assets, as well as to BJ's BrineStar/BrineStar II heavyweight frac fluids, which use a different technology than Diamond Fraq.

**VIII. Standard of Review Under the APPA for the Proposed Final Judgment**

The Clayton Act, as amended by the APPA, requires that proposed consent judgments in antitrust cases brought by the United States be subject to a sixty-day comment period, after which the court shall determine whether entry of the proposed Final Judgment "is in the public interest." 15 U.S.C. 16(e)(1). In making that determination, the court, in accordance with the statute as amended in 2004, is required to consider:

> (A) The competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and
>
> (B) the impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. 16(e)(1)(A) & (B). In considering these statutory factors, the court's inquiry is necessarily a limited one as the government is entitled to "broad discretion to settle with the defendant within the reaches of the public interest." *United States v. Microsoft Corp.,* 56 F.3d 1448, 1461 (DC Cir. 1995); *see generally United States v. SBC Commc'ns, Inc.,* 489 F. Supp. 2d 1 (D.DC 2007) (assessing public interest standard under the Tunney Act).[10]

As the United States Court of Appeals for the District of Columbia Circuit has held, under the APPA a court considers, among other things, the relationship between the remedy secured and the specific allegations set forth in the government's complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. *See Microsoft,* 56 F.3d at 1458–62. With respect to the adequacy of the relief secured by the decree, a court may not "engage in an unrestricted evaluation of what relief would best serve the public." *United States v. BNS, Inc.,* 858 F.2d 456, 462 (9th Cir. 1988) (citing *United States v. Bechtel Corp.,* 648 F.2d 660, 666 (9th Cir. 1981)); *see also Microsoft,* 56 F.3d at 1460–62; *United States v. Alcoa, Inc.,* 152 F. Supp. 2d 37, 40 (D.DC 2001). Courts have held that:

> [t]he balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is "*within the reaches of the public interest.*" More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.

*Bechtel,* 648 F.2d at 666 (emphasis added) (citations omitted).[11] In determining whether a proposed settlement is in the public interest, a district court "must accord deference to the government's predictions about the efficacy of its remedies, and may not require that the remedies perfectly match the alleged violations." *SBC Commc'ns,* 489 F. Supp. 2d at 17; *see also Microsoft,* 56 F.3d at 1461 (noting the need for courts to be "deferential to the government's predictions as to the effect of the proposed remedies"); *United States v. Archer-Daniels-Midland Co.,* 272 F. Supp. 2d 1, 6 (D.DC 2003) (noting that the court should grant due respect to the United States' prediction as to the effect of proposed remedies, its perception of the market structure, and its views of the nature of the case).

Courts have greater flexibility in approving proposed consent decrees than in crafting their own decrees following a finding of liability in a litigated matter. "[A] proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is 'within the reaches of public interest.'" *United States v. Am. Tel. & Tel. Co.,* 552 F. Supp. 131, 151 (D.DC 1982) (citations omitted) (quoting *United States v. Gillette Co.,* 406 F. Supp. 713, 716 (D. Mass. 1975)), *aff'd sub nom. Maryland v. United States,* 460 U.S. 1001 (1983); *see also United States v. Alcan Aluminum Ltd.,* 605 F. Supp. 619, 622 (W.D. Ky. 1985) (approving the consent decree even though the court would have imposed a greater remedy). To meet this standard, the United States "need only provide a factual basis for concluding that the settlements are reasonably adequate remedies for the alleged harms." *SBC Commc'ns,* 489 F. Supp. 2d at 17.

Moreover, the court's role under the APPA is limited to reviewing the remedy in relationship to the violations that the United States has alleged in its Complaint, and does not authorize the court to "construct [its] own hypothetical case and then evaluate the decree against that case." *Microsoft,* 56 F.3d at 1459. Because the "court's authority to review the decree depends entirely on the government's exercising its prosecutorial discretion by bringing a case in the first place," it follows that "the court is only authorized to review the decree itself," and not to "effectively redraft the complaint" to inquire into other matters that the United States did not pursue. *Id.* at 1459–60. As this Court recently confirmed in *SBC Communications,* courts "cannot look beyond the complaint in making the public interest determination unless the complaint is drafted so narrowly as to make a mockery of judicial power." *SBC Commc'ns,* 489 F. Supp. 2d at 15.

In its 2004 amendments, Congress made clear its intent to preserve the practical benefits of utilizing consent decrees in antitrust enforcement, adding the unambiguous instruction that "[n]othing in this section shall be construed to require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene." 15 U.S.C. 16(e)(2). The language wrote into the statute what Congress intended when it enacted the Tunney Act in 1974, as Senator Tunney explained: "[t]he court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process." 119 Cong. Rec. 24,598 (1973) (statement of Senator Tunney). Rather, the procedure for the public interest determination is left to the discretion of the court, with the recognition that the court's "scope of review remains sharply proscribed by precedent and the nature

[10] The 2004 amendments substituted "shall" for "may" in directing relevant factors for court to consider and amended the list of factors to focus on competitive considerations and to address potentially ambiguous judgment terms. *Compare* 15 U.S.C. 16(e) (2004), *with* 15 U.S.C. 16(e)(1) (2006); *see also SBC Commc'ns,* 489 F. Supp. 2d at 11 (concluding that the 2004 amendments "effected minimal changes" to Tunney Act review).

[11] *Cf. BNS,* 858 F.2d at 464 (holding that the court's "ultimate authority under the [APPA] is limited to approving or disapproving the consent decree"); *United States v. Gillette Co.,* 406 F. Supp. 713, 716 (D. Mass. 1975) (noting that, in this way, the court is constrained to "look at the overall picture not hypercritically, nor with a microscope, but with an artist's reducing glass"). *See generally Microsoft,* 56 F.3d at 1461 (discussing whether "the remedies [obtained in the decree are] so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest' ").

of Tunney Act proceedings." *SBC Commc'ns,* 489 F. Supp. 2d at 11.[12]

**IX. Determinative Documents**

There are no determinative materials or documents within the meaning of the APPA that were considered by the United States in formulating the proposed Final Judgment.

Dated: April 27, 2010

Respectfully submitted,

__/s/__

Angela L. Hughes, (DC Bar #3034210), Trial Attorney, U.S. Department of Justice, Antitrust Division, Transportation, Energy, and, Agriculture, 450 5th Street, NW; Suite 8000, Washington, DC 20530, Telephone: 202/307–6410, Facsimile: 202/307–2784, E-mail: *angela.hughes@usdoj.gov*

[FR Doc. 2010–10474 Filed 5–5–10; 8:45 am]

**BILLING CODE P**

## DEPARTMENT OF LABOR

### Employment and Training Administration

### Proposed Information Collection for the Evaluation of the Community-Based Job Training Grants; Comment Request

**AGENCY:** Employment and Training Administration.

**ACTION:** Notice.

**SUMMARY:** The Department of Labor, as part of its continuing effort to reduce paperwork and respondent burden conducts a pre-clearance consultation program to provide the general public and federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA95) [44 U.S.C. 3506(c)(2)(A)]. This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. Currently, the Employment and Training Administration is soliciting comments on a new data collection for the Evaluation of the Community-Based Job Training Grants.

A copy of the proposed information collection request can be obtained by contacting the office listed below in the addressee section of this notice or by accessing: *http://www.doleta.gov/OMBCN/OMBControlNumber.cfm.*

**DATES:** Written comments must be submitted to the office listed in the addressee's section below on or before July 6, 2010.

**ADDRESSES:** Submit written comments to the Employment and Training Administration, Room N–5641, 200 Constitution Avenue, NW., Washington, DC 20210, *Attention:* Garrett Groves, Telephone number: 202–693–3684 (this is not a toll-free number), *Fax number:* 202–693–2766. *E-mail: Groves.Garrett@DOL.gov.*

**SUPPLEMENTARY INFORMATION:**

**I. Background**

The Community-Based Job Training Grants (CBJTG) program is sponsored by ETA as an investment in building the capacity of community colleges to train workers in the skills required to succeed in high-growth, high-demand industries. CBJTG provides grants for the development and implementation of industry-specific job training programs at community colleges to meet the workforce needs of industry, including health care, energy, and advanced manufacturing, among others. Over 200 grants were issued from 2005 through 2008 in three rounds of grant competition, with a fourth round of grants awarded in early 2009. Grant recipients are primarily community and technical colleges, although in the later rounds of grants, some community college districts, State community college systems and organizations and agencies within the public workforce investment system were awarded grants.

ETA has contracted with the Urban Institute, a non-profit, non-partisan, research organization based in Washington, DC, to conduct an evaluation of the CBJTG program. The evaluation will mainly be based on data collected through a survey of grant recipients as well as a review of grant documents and exploratory site visits to a small number of grant projects. The survey data collected through this effort are the main data source for this study and will provide a comprehensive picture of the different grant-funded projects and identify grant implementation issues to date.

The survey will be administered to all grantees receiving awards in the first three rounds. To reduce respondent burden, the survey will be administered in a Web-based format that allows for automatic skip patterns. Grantees will also have the option to complete and return a paper version. Survey data will be complemented by data collected through ETA's existing quarterly reporting system to avoid any duplication and further reduce reporting burden for respondents. The survey will gather data on grantee organization type, size, and structure, project design and objectives, recruitment efforts and target populations, training and other program activities, capacity-building activities, partners' contributions and activities, and plans for sustaining programming and leveraging resources.

**II. Review Focus**

The Department of Labor is particularly interested in comments which:

* Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

* Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

* Enhance the quality, utility, and clarity of the information to be collected; and

* Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submissions of responses.

**III. Current Actions**

*Type of Review:* New.

*Agency:* Employment and Training Administration.

*Title:* Evaluation of the Community-Based Job Training Grants.

*OMB Number:* 1205–0NEW.

*Record Keeping:* N/A.

*Affected Public:* Community-Based Job Training Grantees.

*Total Respondents:* 190.

*Frequency:* Once.

*Total Annual Responses:* 190.

*Average Time per Response:* 40 minutes.

[12] *See United States v. Enova Corp.,* 107 F. Supp. 2d 10, 17 (D.DC 2000) (noting that the "Tunney Act expressly allows the court to make its public interest determination on the basis of the competitive impact statement and response to comments alone"); *United States v. Mid-Am. Dairymen, Inc.,* 1977–1 Trade Cas. (CCH) ¶ 61,508, at 71,980 (W.D. Mo. 1977) ("Absent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should * * * carefully consider the explanations of the government in the competitive impact statement and its responses to comments in order to determine whether those explanations are reasonable under the circumstances."); S. Rep. No. 93–298, 93d Cong., 1st Sess., at 6 (1973) ("Where the public interest can be meaningfully evaluated simply on the basis of briefs and oral arguments, that is the approach that should be utilized.").

*Estimated Total Burden Hours:* 126.67 hours.

*Total Burden Cost:* The estimated total burden cost is $4,862.89 as shown below:

| Category | Estimated number of respondents | Total hours | Median hourly wage | Total annualized cost |
|---|---|---|---|---|
| Postsecondary education administrators (95.3 percent of respondents) | 181 | 120.67 | $38.79 | $4,680.79 |
| Local government social and community service managers (4.7 percent of respondents) | 9 | 6.00 | 30.35 | 182.10 |
| Total | | 126.67 | | 4,862.89 |

Comments submitted in response to this comment request will be summarized and/or included in the request for Office of Management and Budget approval of the information collection request; they will also become a matter of public record.

Signed: At Washington, DC this 30th day of April, 2010.

**Jane Oates,**

*Assistant Secretary, Employment and Training Administration.*

[FR Doc. 2010–10603 Filed 5–5–10; 8:45 am]

**BILLING CODE 4510–FN–P**

## NUCLEAR REGULATORY COMMISSION

**[Docket No.: 70–1257; License No.: SNM–1227; EA–09–272]**

## In the Matter of AREVA NP, Inc.; Confirmatory Order (Effective Immediately) [NRC–2010–0172]

**I**

AREVA NP, Inc. (AREVA or Licensee) is the holder of Materials License No. SNM–1227 issued by the Nuclear Regulatory Commission (NRC or Commission) pursuant to 10 CFR Part 70. The license in effect at the time of the incident described below was most recently amended via Amendment 49, issued on July 9, 2007. The NRC renewed Materials License No. SNM–1227, effective April 24, 2009. The license authorizes the operation of the AREVA NP facility in accordance with the conditions specified therein. The facility is located at the AREVA site in Richland, Washington.

This Confirmatory Order is the result of an agreement reached during an alternative dispute resolution (ADR) mediation session conducted on March 9, 2010.

**II**

On September 23, 2009, the NRC's Office of Investigations (OI) completed an investigation (OI Case No. 2–2009–025) regarding activities at the AREVA facility located in Richland, Washington. Based on the evidence developed during the investigation, the NRC staff concluded that on April 21, 2009, Item Relied On For Safety (IROFS) 1111, an electronic eye sensor known as the vacuum wand interlock, was deliberately bypassed by an employee and made to work by using tape. These actions violated Standard Operating Procedure (SOP) 40486, "Richland Operations General Rules," Version 16.0, Section 7.0 which states that "interlocks, limit switches and any other safety-related equipment are never to be bypassed, made to work by using tape or other material, or adjusted by anyone except for a defined purpose and in accordance with an approved procedure." As a result, IROFS 1111 was not available and reliable as required by 10 CFR 70.61(e).

**III**

On March 9, 2010, the NRC and AREVA met in an ADR session mediated by a professional mediator, which was arranged through Cornell University's Institute on Conflict Resolution. ADR is a process in which a neutral mediator with no decision-making authority assists the parties in reaching an agreement or resolving any differences regarding their dispute. This confirmatory order is issued pursuant to the agreement reached during the ADR process. The elements of the agreement consist of the following:

1. The NRC and AREVA agreed that the incident that occurred on April 21, 2009, as described in NRC's January 6, 2010, letter, constituted a violation of SOP 40486, and that the operator's actions were deliberate. The NRC and AREVA also agreed that, although the vacuum wand interlock IROFS was disabled, sufficient system IROFS remained in service to perform the intended safety function for identified accident scenarios.

2. Based on AREVA's review of the incident and NRC concerns associated with precluding recurrence of the violation, AREVA completed the following corrective actions and enhancements:

a. The equipment was returned to normal operation and safety function was verified;

b. The employee was immediately relieved of duties pending an investigation;

c. A charter was established and a root cause investigation was performed;

d. Although not reportable, AREVA notified the NRC of the incident in a timely manner;

e. Disciplinary action was administered in accordance with company policies;

f. AREVA Richland management held stand down meetings with all Richland employees to reinforce obligations with respect to willful misconduct, procedural compliance, potential event repercussions, personal accountability, problem reporting, open communications, opportunities for employees to raise issues and other discussion topics;

g. Lessons learned from this incident were communicated internally and to all other AREVA U.S. Special Nuclear Material (SNM) licensed facilities within the AREVA U.S. fuel organization;

h. AREVA conducted an extent of condition review with operators in all product centers and determined that the incident was isolated; and

i. Safety Conscious Work Environment (SCWE) training was conducted for employees at all AREVA SNM licensed facilities within the AREVA U.S. fuel organization.

3. In addition to the actions completed by AREVA as discussed above, AREVA agreed to additional corrective actions and enhancements, as fully delineated below in Section V of this Confirmatory Order.

4. AREVA agreed to complete the items listed in Section V within 12 months of issuance of this Confirmatory Order.

5. Within three months of completion of the terms of this Confirmatory Order, AREVA will provide the NRC with a letter discussing its basis for concluding

that this Confirmatory Order has been satisfied.

6. The NRC and AREVA agreed that: (1) The actions referenced in Section III.2 and Section V will be incorporated into a Confirmatory Order; and (2) the resulting Confirmatory Order will be considered by the NRC for any assessment of AREVA, as appropriate.

7. In consideration of the completed corrective actions delineated in Section III.2 and the Commitments delineated in Section V of this Confirmatory Order, the NRC agrees to refrain from proposing a civil penalty or issuing a Notice of Violation for the matter discussed in the NRC's letter to AREVA of January 6, 2010 (EA–09–272).

8. This agreement is binding upon successors and assigns of AREVA NP Inc.

On April 14, 2010, AREVA consented to issuance of this Confirmatory Order with the commitments, as described in Section V below. AREVA further agreed that this Confirmatory Order is to be effective upon issuance and that it has waived its right to a hearing.

**IV**

Since AREVA has completed the actions as delineated in Section III.2, and agreed to take the actions as set forth in Section V, the NRC has concluded that its concerns can be resolved through issuance of this Confirmatory Order.

I find that AREVA's commitments as set forth in Section V are acceptable and necessary and conclude that with these commitments, the public health and safety are reasonably assured. In view of the foregoing, I have determined that public health and safety require that AREVA's commitments be confirmed by this Confirmatory Order. Based on the above and AREVA's consent, this Confirmatory Order is immediately effective upon issuance.

**V**

Accordingly, pursuant to Sections 51, 53, 161b, 161i, 161o, 182 and 186 of the Atomic Energy Act of 1954, as amended, and the Commission's regulations in 10 CFR 2.202 and 10 CFR Part 70, *it is hereby ordered, effective immediately, that license No. SNM–1227 be modified as follows:*

a. AREVA will incorporate lessons learned from this incident, including enhanced SCWE training, into General Employee Training for new employees and annual refresher training for all AREVA Richland employees;

b. AREVA will implement a management observation program at Richland for the purpose of reinforcing task performance standards and work practices;

c. AREVA Richland Site Operations will perform a survey to determine the results of efforts to increase supervisor availability in the work area;

d. AREVA will develop a presentation and offer to present the detail of this incident and lessons learned with regard to work practices to a future industry forum such as the annual Fuel Cycle Information Exchange.

e. AREVA agrees to complete the above items within 12 months of issuance of this Confirmatory Order.

f. Within three months of completion of the terms of this Confirmatory Order, AREVA will provide the NRC with a letter discussing its basis for concluding that this Confirmatory Order has been satisfied.

The Regional Administrator, NRC Region II, may relax or rescind, in writing, any of the above conditions upon a showing by AREVA of good cause.

**VI**

Any person adversely affected by this Confirmatory Order, other than the Licensee, may request a hearing within 20 days of its publication in the **Federal Register**. Where good cause is shown, consideration will be given to extending the time to request a hearing. A request for extension of time must be directed to the Director, Office of Enforcement, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, and include a statement of good cause for the extension.

All documents filed in NRC adjudicatory proceedings, including a request for hearing, a petition for leave to intervene, any motion or other document filed in the proceeding prior to the submission of a request for hearing or petition to intervene, and documents filed by interested governmental entities participating under 10 CFR 2.315(c), must be filed in accordance with the NRC E-Filing rule (72 FR 49139, August 28, 2007). The E-Filing process requires participants to submit and serve all adjudicatory documents over the Internet, or in some cases to mail copies on electronic storage media. Participants may not submit paper copies of their filings unless they seek an exemption in accordance with the procedures described below.

To comply with the procedural requirements of E–Filing, at least ten (10) days prior to the filing deadline, the participant should contact the Office of the Secretary by e-mail at *hearing.docket@nrc.gov,* or by telephone at (301) 415–1677, to request (1) a digital ID certificate, which allows the participant (or its counsel or representative) to digitally sign documents and access the E–Submittal server for any proceeding in which it is participating; and (2) advise the Secretary that the participant will be submitting a request or petition for hearing (even in instances in which the participant, or its counsel or representative, already holds an NRC-issued digital ID certificate). Based upon this information, the Secretary will establish an electronic docket for the hearing in this proceeding if the Secretary has not already established an electronic docket.

Information about applying for a digital ID certificate is available on NRC's public Web site at *http://www.nrc.gov/site-help/e-submittals/apply-certificates.html.* System requirements for accessing the E–Submittal server are detailed in NRC's "Guidance for Electronic Submission," which is available on the agency's public Web site at *http://www.nrc.gov/site-help/e-submittals.html.* Participants may attempt to use other software not listed on the Web site, but should note that the NRC's E-Filing system does not support unlisted software, and the NRC Meta System Help Desk will not be able to offer assistance in using unlisted software.

If a participant is electronically submitting a document to the NRC in accordance with the E-Filing rule, the participant must file the document using the NRC's online, Web-based submission form. In order to serve documents through the Electronic Information Exchange (EIE), users will be required to install a Web browser plug-in from the NRC Web site. Further information on the Web-based submission form, including the installation of the Web browser plug-in, is available on the NRC's public Web site at *http://www.nrc.gov/site-help/e-submittals.html.*

Once a participant has obtained a digital ID certificate and a docket has been created, the participant can then submit a request for hearing or petition for leave to intervene. Submissions should be in Portable Document Format (PDF) in accordance with NRC guidance available on the NRC public Web site at *http://www.nrc.gov/site-help/e-submittals.html.* A filing is considered complete at the time the documents are submitted through the NRC's E-Filing system. To be timely, an electronic filing must be submitted to the E-Filing system no later than 11:59 p.m. Eastern Time on the due date. Upon receipt of a transmission, the E-Filing system time-stamps the document and sends

the submitter an e-mail notice confirming receipt of the document. The E-Filing system also distributes an e-mail notice that provides access to the document to the NRC Office of the General Counsel and any others who have advised the Office of the Secretary that they wish to participate in the proceeding, so that the filer need not serve the documents on those participants separately. Therefore, applicants and other participants (or their counsel or representative) must apply for and receive a digital ID certificate before a hearing request/petition to intervene is filed so that they can obtain access to the document via the E-Filing system.

A person filing electronically using the agency's adjudicatory E-Filing system may seek assistance by contacting the NRC Meta System Help Desk through the "Contact Us" link located on the NRC Web site at *http://www.nrc.gov/site-help/e-submittals.html,* by e-mail at *MSHD.Resource@nrc.gov,* or by a toll-free call at (866) 672–7640. The NRC Meta System Help Desk is available between 8 a.m. and 8 p.m., Eastern Time, Monday through Friday, excluding government holidays.

Participants who believe that they have a good cause for not submitting documents electronically must file an exemption request, in accordance with 10 CFR 2.302(g), with their initial paper filing requesting authorization to continue to submit documents in paper format. Such filings must be submitted by: (1) First class mail addressed to the Office of the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemaking and Adjudications Staff; or (2) courier, express mail, or expedited delivery service to the Office of the Secretary, Sixteenth Floor, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852, Attention: Rulemaking and Adjudications Staff. Participants filing a document in this manner are responsible for serving the document on all other participants. Filing is considered complete by first-class mail as of the time of deposit in the mail, or by courier, express mail, or expedited delivery service upon depositing the document with the provider of the service. A presiding officer, having granted an exemption request from using E-Filing, may require a participant or party to use
E-Filing if the presiding officer subsequently determines that the reason for granting the exemption from use of E-Filing no longer exists.

Documents submitted in adjudicatory proceedings will appear in NRC's electronic hearing docket which is available to the public at *http://ehd.nrc.gov/EHD_Proceeding/home.asp,* unless excluded pursuant to an order of the Commission, or the presiding officer. Participants are requested not to include personal privacy information, such as social security numbers, home addresses, or home phone numbers in their filings, unless an NRC regulation or other law requires submission of such information. With respect to copyrighted works, except for limited excerpts that serve the purpose of the adjudicatory filings and would constitute a Fair Use application, participants are requested not to include copyrighted materials in their submission.

If a person other than the Licensee requests a hearing, that person shall set forth with particularity the manner in which his interest is adversely affected by this Confirmatory Order and shall address the criteria set forth in 10 CFR 2.309(d) and (f).

If the hearing is requested by a person whose interest is adversely affected, the Commission will issue an order designating the time and place of any hearing. If a hearing is held, the issue to be considered at such hearing shall be whether this Confirmatory Order should be sustained.

**VII**

In the absence of any request for hearing, or written approval of an extension of time in which to request a hearing, the provisions specified in Section V above shall be final 20 days from the date this Confirmatory Order is published in the **Federal Register** without further order or proceedings. If an extension of time for requesting a hearing has been approved, the provisions specified in Section V shall be final when the extension expires if a hearing request has not been received. *A request for hearing shall not stay the immediate effectiveness of this confirmatory order.*

Dated this 26th day of April 2010.

For the Nuclear Regulatory Commission.

**Victor M. McCree,**

*Deputy Regional Administrator for Operations.*

[FR Doc. 2010–10678 Filed 5–5–10; 8:45 am]

**BILLING CODE 7590–01–P**

## NUCLEAR REGULATORY COMMISSION

**[Docket No. 52–011; NRC–2008–0252]**

## Southern Nuclear Operating Company; Notice of Consideration of Issuance of Amendment to Early Site Permit, Proposed No Significant Hazards Consideration Determination, and Opportunity for a Hearing

**AGENCY:** Nuclear Regulatory Commission.

**ACTION:** Notice of license amendment request, opportunity to comment, and opportunity to request a hearing.

**DATES:** Submit comments by May 20, 2010. Requests for a hearing or leave to intervene must be filed by July 6, 2010.

**FOR FURTHER INFORMATION CONTACT:** Chandu Patel, Project Manager, AP1000 Projects Branch 1, Division of New Reactors Licensing, Office of New Reactors, U.S. Nuclear Regulatory Commission, Washington, DC 20555–001. *Telephone:* (301) 415–3025; *fax number:* (301) 415–6350; *e-mail: Chandu.Patel@nrc.gov.*

**ADDRESSES:** You may submit comments by any one of the following methods. Please include Docket ID NRC–2008–0252 in the subject line of your comments. Comments submitted in writing or in electronic form will be posted on the NRC Web site and on the Federal rulemaking Web site *Regulations.gov.* Because your comments will not be edited to remove any identifying or contact information, the NRC cautions you against including any information in your submission that you do not want to be publicly disclosed.

The NRC requests that any party soliciting or aggregating comments received from other persons for submission to the NRC inform those persons that the NRC will not edit their comments to remove any identifying or contact information, and therefore, they should not include any information in their comments that they do not want publicly disclosed.

You may submit comments by any one of the following methods.

*Federal Rulemaking Web site:* Go to *http://www.regulations.gov* and search for documents filed under Docket ID NRC–2008–0252. Address questions about NRC dockets to Carol Gallagher 301–492–3668; e-mail *Carol.Gallagher@nrc.gov.*

*Mail comments to:* Chief, Rulemaking, Announcements and Directives Branch (RADB), Office of Administration, *Mail Stop:* TWB–05–B01M, U.S. Nuclear Regulatory Commission, Washington,

DC 20555–0001, or by fax to RADB at (301) 492–3446.

You can access publicly available documents related to this notice using the following methods:

*NRC's Public Document Room (PDR):* The public may examine and have copied for a fee publicly available documents at the NRC's PDR, Room O1 F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland.

*NRC's Agencywide Documents Access and Management System (ADAMS):* Publicly available documents created or received at the NRC are available electronically at the NRC's Electronic Reading Room at *http://www.nrc.gov/reading-rm/adams.html.* From this page, the public can gain entry into ADAMS, which provides text and image files of NRC's public documents. If you do not have access to ADAMS or if there are problems in accessing the documents located in ADAMS, contact the NRC's PDR reference staff at 1–800–397–4209, 301–415–4737, or by e-mail to *pdr.resource@nrc.gov.* The application dated April 20, 2010, as supplemented on April 23, 2010 and April 28, 2010 is available electronically under ADAMS Accession Numbers ML101120089 and ML101160531.

*Federal Rulemaking Web site:* Public comments and supporting materials related to this notice can be found at *http://www.regulations.gov* by searching on Docket ID: NRC–2008–0252.

**SUPPLEMENTARY INFORMATION:**

**1. Introduction**

The U.S. Nuclear Regulatory Commission (the Commission) is considering issuance of an amendment to Early Site Permit (ESP) No-004, issued to Southern Nuclear Operating Company (SNC), for Vogtle Electric Generating Plant (VEGP) Units 3 and 4 site located in Burke County, Georgia.

The proposed amendment would change the Vogtle Electric Generating Plant Units 3 and 4 ESP site safety analysis report (SSAR) to allow the use and placement of Category 1 and 2 backfill from onsite borrow areas not specifically identified in the VEGP Units 3 and 4 SSAR. In accordance with Title 10 of the *Code of Federal Regulations* (10 CFR) Section 52.39(e) changes to the ESP SSAR require prior Commission approval through an amendment to the ESP.

As discussed in the licensee's application dated April 20, 2010, SNC requested that the proposed amendment be processed by the NRC on an exigent basis in accordance with the provisions in 10 CFR 50.91(a)(6) because safety-related construction activities will be halted when available deposits of Category 1 and 2 backfill material is exhausted by May 23, 2010. SNC requested approval of the proposed amendment by May 14, 2010. SNC also stated that suspension of backfill operations prior to reaching the 180 feet msl elevation could have potential adverse effects on safety and the environment due to the potential for erosion and other environmental damage for delays in operations. In addition, SNC stated the following:

In addition, the inability to use backfill from the additional areas could cause a disruption in the construction schedule for the project. Vogtle 3 and 4 operations are supporting a staff of over 900 people. Any significant delays would require curtailing operations and reinitiating operations at a later time. There are significant economic costs associated with the schedule and staffing impacts.

On April 23, 2010, the licensee provided the following additional information regarding the exigent circumstances:

Once backfill activities have started, a protracted interruption in backfill activities could result in the following impacts to the construction project:

1. Backfill rework—The upper layers of compacted fill material would experience some erosive channeling, loss of fines, and possible contamination from materials washed down from the side slopes. These effects could be mitigated to some extent by protecting the surface with other materials, but significant rainfall events can result in flooding or failure of the surface water control features. Upon restart of backfill activities, it is expected that the fill to some depth (2–3 feet) would need to be removed and the surface reworked as deemed necessary, and new material brought in for compaction. Locally, repairs could be deeper than the top several feet.

2. Loss of available qualified fill—Any material removed as described above would likely be spoiled due to the hydraulic effects of erosion and sedimentation on the material's gradation, and possibly due to contamination from material from the side slopes. Also, any stockpiles of material will experience some loss of material during prolonged construction delays. For Vogtle, this adds to the Category 1 & 2 backfill shortage discussed during the NRC public meeting on April 6.

3. Backfill Efficiency—Backfill is a time-sensitive activity that is most efficiently accomplished without interruption. This is partly due to the impacts of delays discussed above, but also due to the lost opportunity to complete activities during periods of favorable weather. A single severe rain event can cause considerable delay and rework, and a series of well-timed storms can bring backfill activities to a standstill for weeks. Prolonged delays increase the exposure time for weather-caused delays and repairs.

It should be noted that such a delay was experienced during construction of Vogtle Units 1 and 2. A heavy storm in November 1979 resulted in some erosion of Seismic Category 1 backfill around and to a minor extent beneath the edges of the Seismic Category 1 buildings under construction at the time of the significant rain event. This resulted in the Nuclear Regulatory Commission stopping certain backfill work for about six months and for a short period stopping all construction work in the power block area while the impacts on the backfill were evaluated.

4. Environmental impacts—Delays in backfill activities will result in some of the permitted disturbed areas around the site remaining open longer than necessary. SNC has permitted the construction site as a series of separately permitted disturbed areas with the intention of restoring and closing areas upon completion of the associated work. An extended delay in backfill will result in some areas remaining open longer than necessary. While the stormwater control features are designed to protect the environment, it is prudent to minimize the time these features are relied upon to control stormwater and the effects of erosion on the site and siltation on the local streams and the Savannah River.

Based on the above information the staff intends to process the amendment following the exigent notice provisions of 10 CFR 50.91(a)(6). Before issuance of the proposed license amendment, the Commission will have made findings required by the Atomic Energy Act of 1954, as amended (the Act) and the Commission's regulations.

Pursuant to 10 CFR 50.91(a)(6) for amendments to be granted under exigent circumstances, the NRC staff must also determine that the amendment request involves no significant hazards consideration. Under the Commission's regulations in 10 CFR 50.92, this means that continuation of construction activities at VEGP Units 3 and 4 site in accordance with the proposed amendment would not (1) involve a significant increase in the probability or consequences of an accident previously evaluated; or (2) create the possibility of a new or different kind of accident from any accident previously evaluated; or (3) involve a significant reduction in a margin of safety. As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed amendment involve a significant increase in the probability or consequences of an accident previously evaluated?

*Response:* No.

The proposed SSAR change does not significantly increase the probability or consequences of an accident previously evaluated in the SSAR. An evaluation was performed to show that the proposed addition of borrow areas to the SSAR does not affect seismic analysis or hydrologic analysis. Category 1 and 2 backfill from areas

on the VEGP site not specifically identified in the SSAR is from the same geological formations, and possesses the same properties as backfill obtained from the three areas originally identified in the SSAR. Additionally, the backfill material meets the requirements of SSAR Section 2.5.4.5.3 and will be excavated and placed following the requirements of SSAR Section 2.5.4.5.5. Based on the above, the use of qualified Category 1 and 2 backfill material from areas of the VEGP site not specifically identified in the SSAR does not affect the Vogtle site-specific seismic analyses including the site response for the Ground Motion Response Spectra (GMRS) and the Vogtle site-specific SASSI seismic analyses of the Nuclear Island (NI). Because the backfill material from the additional onsite borrow areas is from the same geological deposit assumed in the analysis and meets the requirements of SSAR Section 2.5.4.5.3 and will be extracted and placed using the requirements of SSAR Section 2.5.4.5.5, the hydrological analysis will be unaffected. As such, the use of Category 1 and 2 backfill material from the VEGP site not specifically identified in the SSAR does not affect the accidental radiation release to groundwater evaluated in the SSAR. Therefore, the proposed SSAR change does not significantly increase the probability or consequences of an accident previously evaluated.

2. Does the proposed amendment create the possibility of a new or different kind of accident from any accident previously evaluated?

*Response:* No.

The proposed SSAR change does not create the possibility of a new or different kind of accident than any accident already evaluated in the SSAR. Category 1 and 2 backfill from areas on the VEGP site not specifically identified in the SSAR is from the same geological formations, and possesses the same properties as backfill obtained from the three areas originally identified in the SSAR, meets the requirements of SSAR Section 2.5.4.5.3 and will be excavated and placed following the requirements of SSAR Section 2.5.4.5.5. As the backfill material from additional onsite borrow locations will meet all of the criteria contained in the ESP, no new accident scenarios, failure mechanisms or limiting single failures are introduced as a result of the proposed changes. The changes have no adverse effects on any safety-related system and do not challenge the performance or integrity of any safety-related system. Therefore, all accident analyses criteria continue to be met and these changes do not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. Does the proposed amendment involve a significant reduction in a margin of safety?

*Response:* No.

The proposed SSAR change does not involve a reduction in a margin of safety. Category 1 and 2 backfill from areas on the VEGP site not specifically identified in the SSAR is from the same geological formation, possesses the same properties as backfill obtained from the three areas originally identified in the SSAR, meets the requirements of SSAR Section 2.5.4.5.3 and will be excavated and placed following the requirements of SSAR Section 2.5.4.5.5. All evaluations for the use of Category 1 and 2 materials from the VEGP site show that there is no effect on the SSAR's reported foundation bearing capacities, calculated settlements, GMRS, or Foundation Input Response Spectra (FIRS). The evaluations and analyses results demonstrate applicable acceptance criteria are met. Therefore, the proposed changes do not involve a reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

The Commission is seeking public comments on this proposed determination. Any comments received within 14 days after the date of publication of this notice will be considered in making any final determination.

Before issuing the amendment, regardless of whether a hearing is requested, the Commission will make a final determination on the issue of no significant hazards consideration. The final determination will serve to decide when the hearing is held, if one is requested. If the final determination is that the amendment request involves no significant hazards consideration, the Commission may issue the amendment and make it immediately effective, notwithstanding the request for a hearing. Any hearing held would take place after issuance of the amendment. If the final determination is that the amendment request involves a significant hazards consideration, any hearing held would take place before the issuance of any amendment.

## II. Opportunity To Request a Hearing

Requirements for hearing requests and petitions for leave to intervene are found in 10 CFR 2.309, "Hearing requests, Petitions to Intervene, Requirements for Standing, and Contentions." Interested persons should consult 10 CFR part 2, section 2.309, which is available at the NRC's Public Document Room (PDR), located at O1 F21, One White Flint North, 11555 Rockville Pike, Rockville, MD 20852 (or call the PDR at (800) 397–4209 or (301) 415–4737). NRC regulations are also accessible electronically from the NRC's Electronic Reading Room on the NRC Web site at *http://www.nrc.gov.*

## III. Petitions for Leave To Intervene

Within 60 days of this notice, any person whose interest may be affected by this amendment and who wishes to participate as a party in the proceeding must file a written petition for leave to intervene. As required by 10 CFR 2.309, a petition for leave to intervene shall set forth with particularity the interest of the petitioner in the proceeding and how that interest may be affected by the results of the proceeding. The petition must provide the name, address, and telephone number of the petitioner and specifically explain the reasons why intervention should be permitted with particular reference to the following factors: (1) The nature of the petitioner's right under the Act to be made a party to the proceeding; (2) the nature and extent of the petitioner's property, financial, or other interest in the proceeding; and (3) the possible effect of any order that may be entered in the proceeding on the petitioner's interest.

A petition for leave to intervene must also include a specification of the contentions that the petitioner seeks to have litigated in the hearing. For each contention, the petitioner must provide a specific statement of the issue of law or fact to be raised or controverted, as well as a brief explanation of the basis for the contention. Additionally, the petitioner must demonstrate that the issue raised by each contention is within the scope of the proceeding and is material to the findings the NRC must make to support the granting of a license amendment in response to the application. The petition must also include a concise statement of the alleged facts or expert opinions which support the position of the petitioner and on which the petitioner intends to rely at hearing, together with references to the specific sources and documents on which the petitioner intends to rely. Finally, the petition must provide sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact, including references to specific portions of the application for amendment that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application for amendment fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief.

Those permitted to intervene become parties to the proceeding, subject to any limitations in the order granting leave to intervene, and have the opportunity to participate fully in the conduct of the hearing. The Licensing Board will set the time and place for any prehearing conferences and evidentiary hearings, and the appropriate notices will be provided.

Non-timely petitions for leave to intervene and contentions, amended petitions, and supplemental petitions will not be entertained absent a determination by the Commission, the Licensing Board or a Presiding Officer that the petition should be granted and/or the contentions should be admitted based upon a balancing of the factors specified in 10 CFR 2.309(c)(1)(i)–(viii).

A State, county, municipality, Federally-recognized Indian Tribe, or agencies thereof, may submit a petition to the Commission to participate as a party under 10 CFR 2.309(d)(2). The petition should be submitted to the Commission by July 6, 2010. The petition must be filed in accordance with the filing instructions in section IV of this document, and should meet the requirements for petitions for leave to intervene set forth in this section, except that State and Federally-recognized Indian tribes do not need to address the standing requirements in 10 CFR 2.309(d)(1) if the facility is located within its boundaries. The entities listed above could also seek to participate in a hearing as a nonparty pursuant to 10 CFR 2.315(c).

Any person who does not wish, or is not qualified, to become a party to this proceeding may request permission to make a limited appearance pursuant to the provisions of 10 CFR 2.315(a). A person making a limited appearance may make an oral or written statement of position on the issues, but may not otherwise participate in the proceeding. A limited appearance may be made at any session of the hearing or at any prehearing conference, subject to such limits and conditions as may be imposed by the Licensing Board.

**IV. Electronic Submissions (E-Filing)**

All documents filed in NRC adjudicatory proceedings, including a request for hearing, a petition for leave to intervene, any motion or other document filed in the proceeding prior to the submission of a request for hearing or petition to intervene, and documents filed by interested governmental entities participating under 10 CFR 2.315(c), must be filed in accordance with the NRC E-Filing rule (72 FR 49139, August 28, 2007). The E-Filing process requires participants to submit and serve all adjudicatory documents over the internet, or in some cases to mail copies on electronic storage media. Participants may not submit paper copies of their filings unless they seek an exemption in accordance with the procedures described below.

To comply with the procedural requirements of E-Filing, at least ten (10) days prior to the filing deadline, the participant should contact the Office of the Secretary by e-mail at *hearing.docket@nrc.gov,* or by telephone at (301) 415–1677, to request (1) a digital ID certificate, which allows the participant (or its counsel or representative) to digitally sign documents and access the E-Submittal server for any proceeding in which it is participating; and (2) advise the Secretary that the participant will be submitting a request or petition for hearing (even in instances in which the participant, or its counsel or representative, already holds an NRC-issued digital ID certificate). Based upon this information, the Secretary will establish an electronic docket for the hearing in this proceeding if the Secretary has not already established an electronic docket.

Information about applying for a digital ID certificate is available on NRC's public Web site at *http://www.nrc.gov/site-help/e-submittals/apply-certificates.html.* System requirements for accessing the E-Submittal server are detailed in NRC's "Guidance for Electronic Submission," which is available on the agency's public Web site at *http://www.nrc.gov/site-help/e-submittals.html.* Participants may attempt to use other software not listed on the Web site, but should note that the NRC's E-Filing system does not support unlisted software, and the NRC Meta System Help Desk will not be able to offer assistance in using unlisted software.

If a participant is electronically submitting a document to the NRC in accordance with the E-Filing rule, the participant must file the document using the NRC's online, Web-based submission form. In order to serve documents through EIE, users will be required to install a Web browser plug-in from the NRC Web site. Further information on the Web-based submission form, including the installation of the Web browser plug-in, is available on the NRC's public Web site at *http://www.nrc.gov/site-help/e-submittals.html.*

Once a participant has obtained a digital ID certificate and a docket has been created, the participant can then submit a request for hearing or petition for leave to intervene. Submissions should be in Portable Document Format (PDF) in accordance with NRC guidance available on the NRC public Web site at *http://www.nrc.gov/site-help/e-submittals.html.* A filing is considered complete at the time the documents are submitted through the NRC's E-Filing system. To be timely, an electronic filing must be submitted to the E-Filing system no later than 11:59 p.m. Eastern Time on the due date. Upon receipt of a transmission, the E-Filing system time-stamps the document and sends the submitter an e-mail notice confirming receipt of the document. The E-Filing system also distributes an e-mail notice that provides access to the document to the NRC Office of the General Counsel and any others who have advised the Office of the Secretary that they wish to participate in the proceeding, so that the filer need not serve the documents on those participants separately. Therefore, applicants and other participants (or their counsel or representative) must apply for and receive a digital ID certificate before a hearing request/petition to intervene is filed so that they can obtain access to the document via the E-Filing system.

A person filing electronically using the agency's adjudicatory E-Filing system may seek assistance by contacting the NRC Meta System Help Desk through the "Contact Us" link located on the NRC Web site at *http://www.nrc.gov/site-help/e-submittals.html,* by e-mail at *MSHD.Resource@nrc.gov,* or by a toll-free call at (866) 672–7640. The NRC Meta System Help Desk is available between 8 a.m. and 8 p.m., Eastern Time, Monday through Friday, excluding government holidays.

Participants who believe that they have a good cause for not submitting documents electronically must file an exemption request, in accordance with 10 CFR 2.302(g), with their initial paper filing requesting authorization to continue to submit documents in paper format. Such filings must be submitted by: (1) First class mail addressed to the Office of the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemaking and Adjudications Staff; or (2) courier, express mail, or expedited delivery service to the Office of the Secretary, Sixteenth Floor, One White Flint North, 11555 Rockville Pike, Rockville, Maryland, 20852, *Attention:* Rulemaking and Adjudications Staff. Participants filing a document in this manner are responsible for serving the document on all other participants. Filing is considered complete by first-class mail as of the time of deposit in the mail, or by courier, express mail, or expedited delivery service upon depositing the document with the provider of the service. A presiding officer, having granted an exemption request from using E-Filing, may require a participant or party to use E-Filing if the presiding officer subsequently

determines that the reason for granting the exemption from use of E-Filing no longer exists.

Documents submitted in adjudicatory proceedings will appear in NRC's electronic hearing docket which is available to the public at *http://ehd.nrc.gov/EHD_Proceeding/home.asp,* unless excluded pursuant to an order of the Commission, or the presiding officer. Participants are requested not to include personal privacy information, such as social security numbers, home addresses, or home phone numbers in their filings, unless an NRC regulation or other law requires submission of such information. With respect to copyrighted works, except for limited excerpts that serve the purpose of the adjudicatory filings and would constitute a Fair Use application, participants are requested not to include copyrighted materials in their submission.

Petitions for leave to intervene must be filed no later than 60 days from May 6, 2010. Non-timely filings will not be entertained absent a determination by the presiding officer that the petition or request should be granted or the contentions should be admitted, based on a balancing of the factors specified in 10 CFR 2.309(c)(1)(i)–(viii).

Dated at Rockville, Maryland this 30th day of April 2010.

For the Nuclear Regulatory Commission.

**Chandu Patel,**

*Project Manager, AP 1000 Projects Branch 1, Division of New Reactor Licensing, Office of New Reactors.*

[FR Doc. 2010–10676 Filed 5–5–10; 8:45 am]

**BILLING CODE 7590–01–P**

## NUCLEAR REGULATORY COMMISSION

**[Docket Nos. 50–266 and 50–301; NRC–2010–0173]**

## FPL Energy Point Beach, LLC; Point Beach Nuclear Plant, Units 1 and 2; Environmental Assessment and Finding of No Significant Impact

The U.S. Nuclear Regulatory Commission (NRC) is considering issuance of an amendment for Renewed Facility Operating License Nos. DPR–24 and DPR–27, issued to FPL Energy Point Beach, LLC (the licensee), for operation of the Point Beach Nuclear Plant, Units 1 and 2, located in Town of Two Creeks, Manitowoc County, Wisconsin. Therefore, as required by 10 CFR 51.21, the NRC is issuing this environmental assessment and finding of no significant impact.

**Environmental Assessment**

*Identification of the Proposed Action*

The proposed action would change the legal name of the Licensee and Owner from "FPL Energy Point Beach, LLC" to "NextEra Energy Point Beach, LLC." The proposed action would also make an administrative change to correct an error in the license by changing "FPLE Group Capital" to "FPL Group Capital."

The proposed action is in accordance with the licensee's application dated April 17, 2009, as supplemented by letter dated January 19, 2010.

*The Need for the Proposed Action*

The proposed action is necessary to reflect the legal change of name of the Licensee and Owner on April 16, 2009. Also, the proposed action is necessary to correct a typographical error in Appendix C which incorrectly labels the parent company.

*Environmental Impacts of the Proposed Action*

The NRC has concluded in its safety evaluation of the proposed action that since this action is for a name change and error correction only that (1) there is a reasonable assurance that the health and safety of the public will not be endangered by operation in the proposed manner, (2) such activities will be conducted in compliance with the Commission's regulations, and (3) the issuance of the amendments will not be inimical to the common defense and security or to the health and safety of the public.

The details of the NRC staff's review of the proposed amendment will be provided in the Safety Evaluation document supporting the license amendment.

The proposed action will not significantly increase the probability or consequences of accidents. No changes are being made in the types of effluents that may be released offsite. There is no significant increase in the amount of any effluent released offsite. There is no significant increase in individual or cumulative occupational radiation exposure. Therefore, there are no significant radiological environmental impacts associated with the proposed action.

With regard to potential non-radiological impacts, the proposed action does not have a potential to affect any historic sites. It does not affect non-radiological plant effluents and has no other environmental impact. Therefore, there are no significant non-radiological environmental impacts associated with the proposed action.

Accordingly, the NRC concludes that there are no significant environmental impacts associated with the proposed action.

*Environmental Impacts of the Alternatives to the Proposed Action*

As an alternative to the proposed action, the staff considered denial of the proposed action (*i.e.,* the "no-action" alternative). Denial of the application would result in no change in current environmental impacts. The environmental impacts of the proposed action and the alternative action are similar.

*Alternative Use of Resources*

The action does not involve the use of any different resources than those previously considered in the Final Environmental Statement for Point Beach Nuclear Plant, Units 1 and 2, dated May 1972 and in NUREG–1437, Supplement 23, "Generic Environmental Impact Statement for License Renewal of Nuclear Plants [regarding Point Beach Nuclear Plant, Units 1 and 2]," dated August 2005.

*Agencies and Persons Consulted*

In accordance with its stated policy, on October 22, 2009, and April 14, 2010, the staff consulted with the Wisconsin State official, Jeff Kitsembel, regarding the environmental impact of the proposed action. The State official had no comment.

**Finding of No Significant Impact**

On the basis of the environmental assessment, the NRC concludes that the proposed action will not have a significant effect on the quality of the human environment. Accordingly, the NRC has determined not to prepare an environmental impact statement for the proposed action.

For further details with respect to the proposed action, see the licensee's letter dated April 17, 2009, as supplemented by letter dated January 19, 2010. Documents may be examined, and/or copied for a fee, at the NRC's Public Document Room (PDR), located at One White Flint North, Public File Area O1 F21, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible electronically from the Agencywide Documents Access and Management System (ADAMS) Public Electronic Reading Room on the Internet at the NRC Web site, *http://www.nrc.gov/reading-rm/adams.html.* Persons who do not have access to ADAMS or who encounter problems in accessing the documents located in ADAMS should contact the NRC PDR Reference staff by telephone

at 1–800–397–4209 or 301–415–4737, or send an e-mail to *pdr.resource@nrc.gov*.

Dated at Rockville, Maryland, this 29th day of April 2010.

For the Nuclear Regulatory Commission.

**Peter S. Tam,**

*Senior Project Manager, Plant Licensing Branch III–1, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.*

[FR Doc. 2010–10675 Filed 5–5–10; 8:45 am]

**BILLING CODE 7590–01–P**

## NUCLEAR REGULATORY COMMISSION

**[Docket No. 72–62; EA–2010–048]**

## In the Matter of Florida Power and Light Company: Turkey Point Nuclear Plant; Independent Spent Fuel Installation Order Modifying License (Effective Immediately) [NRC–2010–0171]

**AGENCY:** U.S. Nuclear Regulatory Commission.

**ACTION:** Issuance of Order for Implementation of Additional Security Measures and Fingerprinting for Unescorted Access to Florida Power and Light Company.

**FOR FURTHER INFORMATION CONTACT:** L. Raynard Wharton, Senior Project Manager, Licensing and Inspection Directorate, Division of Spent Fuel Storage and Transportation, Office of Nuclear Material Safety and Safeguards (NMSS), U.S. Nuclear Regulatory Commission (NRC), Rockville, MD 20852. *Telephone:* (301) 492–3316; *fax number:* (301) 492–3348; *e-mail: Raynard.Wharton@nrc.gov.*

**SUPPLEMENTARY INFORMATION:**

### I. Introduction

Pursuant to 10 CFR 2.106, NRC (or the Commission) is providing notice, in the matter of Turkey Point Nuclear Plant Independent Spent Fuel Storage Installation (ISFSI) Order Modifying License (Effective Immediately).

### II. Further Information

*I*

NRC has issued a general license to Florida Power and Light Company (FPL), authorizing the operation of an ISFSI, in accordance with the Atomic Energy Act of 1954, as amended, and Title 10 of the *Code of Federal Regulations* (10 CFR) Part 72. This Order is being issued to FPL because it has identified near-term plans to store spent fuel in an ISFSI under the general license provisions of 10 CFR Part 72. The Commission's regulations at 10 CFR 72.212(b)(5), 10 CFR 50.54(p)(1), and 10 CFR 73.55(c)(5) require licensees to maintain safeguards contingency plan procedures to respond to threats of radiological sabotage and to protect the spent fuel against the threat of radiological sabotage, in accordance with 10 CFR Part 73, Appendix C. Specific physical security requirements are contained in 10 CFR 73.51 or 73.55, as applicable.

Inasmuch as an insider has an opportunity equal to, or greater than, any other person, to commit radiological sabotage, the Commission has determined these measures to be prudent. Comparable Orders have been issued to all licensees that currently store spent fuel or have identified near-term plans to store spent fuel in an ISFSI.

*II*

On September 11, 2001, terrorists simultaneously attacked targets in New York, NY, and Washington, DC, using large commercial aircraft as weapons. In response to the attacks and intelligence information subsequently obtained, the Commission issued a number of Safeguards and Threat Advisories to its licensees, to strengthen licensees' capabilities and readiness to respond to a potential attack on a nuclear facility. On October 16, 2002, the Commission issued Orders to the licensees of operating ISFSIs, to place the actions taken in response to the Advisories into the established regulatory framework and to implement additional security enhancements that emerged from NRC's ongoing comprehensive review. The Commission has also communicated with other Federal, State, and local government agencies and industry representatives to discuss and evaluate the current threat environment in order to assess the adequacy of security measures at licensed facilities. In addition, the Commission has conducted a comprehensive review of its safeguards and security programs and requirements.

As a result of its consideration of current safeguards and security requirements, as well as a review of information provided by the intelligence community, the Commission has determined that certain additional security measures (ASMs) are required to address the current threat environment, in a consistent manner throughout the nuclear ISFSI community. Therefore, the Commission is imposing requirements, as set forth in Attachments 1 and 2 of this Order, on all licensees of these facilities. These requirements, which supplement existing regulatory requirements, will provide the Commission with reasonable assurance that the public health and safety, the environment, and common defense and security continue to be adequately protected in the current threat environment. These requirements will remain in effect until the Commission determines otherwise.

The Commission recognizes that licensees may have already initiated many of the measures set forth in Attachments 1 and 2 to this Order, in response to previously issued advisories, or on their own. It also recognizes that some measures may not be possible or necessary at some sites, or may need to be tailored to accommodate the specific circumstances existing at FPL's facility, to achieve the intended objectives and avoid any unforeseen effect on the safe storage of spent fuel.

Although the ASMs implemented by licensees in response to the Safeguards and Threat Advisories have been sufficient to provide reasonable assurance of adequate protection of public health and safety, in light of the continuing threat environment, the Commission concludes that these actions must be embodied in an Order, consistent with the established regulatory framework.

To provide assurance that licensees are implementing prudent measures to achieve a consistent level of protection to address the current threat environment, licenses issued pursuant to 10 CFR 72.210 shall be modified to include the requirements identified in Attachments 1 and 2 to this Order. In addition, pursuant to 10 CFR 2.202, I find that, in light of the common defense and security circumstances described above, the public health, safety, and interest require that this Order be effective immediately.

*III*

Accordingly, pursuant to Sections 53, 103, 104, 147, 149, 161b, 161i, 161o, 182, and 186 of the Atomic Energy Act of 1954, as amended, and the Commission's regulations in 10 CFR 2.202 and 10 CFR Parts 50, 72, and 73, *it is hereby ordered,* **Effective Immediately**, *that your general license is modified as follows:*

A. FPL shall comply with the requirements described in Attachments 1 and 2 to this Order, except to the extent that a more stringent requirement is set forth in the Turkey Point Nuclear Plant's physical security plan. FPL shall complete implementation of the requirements in Attachments 1 and 2 to the Order **no later than 365 days from the date of this Order or 90 days before the first day that spent fuel is initially**

**placed in the ISFSI**, whichever is earlier. Additionally, FPL must receive written verification that the ASMs have been adequately implemented before initially placing spent fuel in the ISFSI.

B. 1. FPL shall, within **twenty (20) days** of the date of this Order, notify the Commission: (1) If it is unable to comply with any of the requirements described in Attachments 1 and 2; (2) if compliance with any of the requirements is unnecessary, in its specific circumstances; or (3) if implementation of any of the requirements would cause FPL to be in violation of the provisions of any Commission regulation or the facility license. The notification shall provide FPL's justification for seeking relief from, or variation of, any specific requirement.

2. If FPL considers that implementation of any of the requirements described in Attachments 1 and 2 to this Order would adversely impact the safe storage of spent fuel, FPL must notify the Commission, within **twenty (20) days** of this Order, of the adverse safety impact, the basis for its determination that the requirement has an adverse safety impact, and either a proposal for achieving the same objectives specified in Attachments 1 and 2 requirements in question, or a schedule for modifying the facility, to address the adverse safety condition. If neither approach is appropriate, FPL must supplement its response, to Condition B.1 of this Order, to identify the condition as a requirement with which it cannot comply, with attendant justifications, as required under Condition B.1.

C. 1. FPL shall, within **twenty (20) days** of this Order, submit to the Commission, a schedule for achieving compliance with each requirement described in Attachments 1 and 2.

2. FPL shall report to the Commission when it has achieved full compliance with the requirements described in Attachments 1 and 2.

D. All measures implemented or actions taken in response to this Order shall be maintained until the Commission determines otherwise.

FPL's response to Conditions B.1, B.2, C.1, and C.2, above, shall be submitted in accordance with 10 CFR 72.4. In addition, submittals and documents produced by FPL as a result of this order, that contain Safeguards Information as defined by 10 CFR 73.22, shall be properly marked and handled, in accordance with 10 CFR 73.21 and 73.22.

The Director, Office of Nuclear Material Safety and Safeguards, may, in writing, relax or rescind any of the above conditions, for good cause.

*IV*

In accordance with 10 CFR 2.202, FPL must, and any other person adversely affected by this Order may, submit an answer to this Order within 20 days of its publication in the **Federal Register**. In addition, FPL and any other person adversely affected by this Order may request a hearing on this Order within 20 days of its publication in the **Federal Register**. Where good cause is shown, consideration will be given to extending the time to answer or request a hearing. A request for extension of time must be made, in writing, to the Director, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, and include a statement of good cause for the extension.

The answer may consent to this Order. If the answer includes a request for a hearing, it shall, under oath or affirmation, specifically set forth the matters of fact and law on which FPL relies and the reasons as to why the Order should not have been issued. If a person other than FPL requests a hearing, that person shall set forth with particularity the manner in which his/her interest is adversely affected by this Order and shall address the criteria set forth in 10 CFR 2.309(d).

All documents filed in NRC adjudicatory proceedings, including a request for hearing, a petition for leave to intervene, any motion or other document filed in the proceeding prior to the submission of a request for hearing or petition to intervene, and documents filed by interested governmental entities participating under 10 CFR 2.315(c), must be filed in accordance with the NRC E-Filing rule (72 FR 49139, August 28, 2007). The E-Filing process requires participants to submit and serve all adjudicatory documents over the internet, or in some cases to mail copies on electronic storage media. Participants may not submit paper copies of their filings unless they seek an exemption in accordance with the procedures described below.

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Once a participant has obtained a digital ID certificate and a docket has been created, the participant can then submit a request for hearing or petition for leave to intervene. Submissions should be in Portable Document Format (PDF) in accordance with NRC guidance available on the NRC public Web site at *http://www.nrc.gov/site-help/e-submittals.html.* A filing is considered complete at the time the documents are submitted through the NRC's E-Filing system. To be timely, an electronic filing must be submitted to the E-Filing system no later than 11:59 p.m. Eastern Time on the due date. Upon receipt of a transmission, the E-Filing system time-stamps the document and sends the submitter an e-mail notice confirming receipt of the document. The E-Filing system also distributes an e-mail notice that provides access to the document to the NRC Office of the General Counsel and any others who

have advised the Office of the Secretary that they wish to participate in the proceeding, so that the filer need not serve the documents on those participants separately. Therefore, applicants and other participants (or their counsel or representative) must apply for and receive a digital ID certificate before a hearing request/petition to intervene is filed so that they can obtain access to the document via the E-Filing system.

A person filing electronically using the agency's adjudicatory E-Filing system may seek assistance by contacting the NRC Meta System Help Desk through the "Contact Us" link located on the NRC Web site at *http://www.nrc.gov/site-help/e-submittals.html,* by e-mail at *MSHD.Resource@nrc.gov,* or by a toll-free call at (866) 672–7640. The NRC Meta System Help Desk is available between 8 a.m. and 8 p.m., Eastern Time, Monday through Friday, excluding government holidays.

Participants who believe that they have a good cause for not submitting documents electronically must file an exemption request, in accordance with 10 CFR 2.302(g), with their initial paper filing requesting authorization to continue to submit documents in paper format. Such filings must be submitted by: (1) First class mail addressed to the Office of the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, *Attention:* Rulemaking and Adjudications Staff; or (2) courier, express mail, or expedited delivery service to the Office of the Secretary, Sixteenth Floor, One White Flint North, 11555 Rockville Pike, Rockville, Maryland, 20852, *Attention:* Rulemaking and Adjudications Staff. Participants filing a document in this manner are responsible for serving the document on all other participants. Filing is considered complete by first-class mail as of the time of deposit in the mail, or by courier, express mail, or expedited delivery service upon depositing the document with the provider of the service. A presiding officer, having granted an exemption request from using E-Filing, may require a participant or party to use E-Filing if the presiding officer subsequently determines that the reason for granting the exemption from use of E-Filing no longer exists.

Documents submitted in adjudicatory proceedings will appear in NRC's electronic hearing docket which is available to the public at *http://ehd.nrc.gov/EHD_Proceeding/home.asp,* unless excluded pursuant to an order of the Commission, or the presiding officer. Participants are requested not to include personal privacy information, such as social security numbers, home addresses, or home phone numbers in their filings, unless an NRC regulation or other law requires submission of such information. With respect to copyrighted works, except for limited excerpts that serve the purpose of the adjudicatory filings and would constitute a Fair Use application, participants are requested not to include copyrighted materials in their submission.

If a hearing is requested by FPL or a person whose interest is adversely affected, the Commission will issue an Order designating the time and place of any hearing. If a hearing is held, the issue to be considered at such hearing shall be whether this Order should be sustained.

Pursuant to 10 CFR 2.202(c)(2)(i), FPL may, in addition to requesting a hearing, at the time the answer is filed or sooner, move the presiding officer to set aside the immediate effectiveness of the Order on the grounds that the Order, including the need for immediate effectiveness, is not based on adequate evidence, but on mere suspicion, unfounded allegations, or error.

In the absence of any request for hearing, or written approval of an extension of time in which to request a hearing, the provisions as specified in Section III shall be final twenty (20) days from the date of this Order, without further Order or proceedings. If an extension of time for requesting a hearing has been approved, the provisions as specified in Section III, shall be final when the extension expires, if a hearing request has not been received. *An answer or a request for hearing shall not stay the immediate effectiveness of this order.*

Dated at Rockville, Maryland, this 26th day of April, 2010.

For the Nuclear Regulatory Commission.

**Michael F. Weber,**

*Director, Office of Nuclear Material Safety and Safeguards.*

## Attachment 1—Additional Security Measures (ASMs) for Physical Protection of Dry Independent Spent Fuel Storage Installations (ISFSIs)

contains Safeguards Information and is not included in the **Federal Register** Notice

## Attachment 2—Additional Security Measures for Access Authorization and Fingerprinting at Independent Spent Fuel Storage Installations, Dated December 19, 2007

*A. General Basis Criteria*

1. These additional security measures (ASMs) are established to delineate an independent spent fuel storage installation (ISFSI) licensee's responsibility to enhance security measures related to authorization for unescorted access to the protected area of an ISFSI in response to the current threat environment.

2. Licensees whose ISFSI is collocated with a power reactor may choose to comply with the U.S. Nuclear Regulatory Commission (NRC)-approved reactor access authorization program for the associated reactor as an alternative means to satisfy the provisions of sections B through G below. Otherwise, licensees shall comply with the access authorization and fingerprinting requirements of section B through G of these ASMs.

3. Licensees shall clearly distinguish in their 20-day response which method they intend to use in order to comply with these ASMs.

*B. Additional Security Measures for Access Authorization Program*

1. The licensee shall develop, implement and maintain a program, or enhance its existing program, designed to ensure that persons granted unescorted access to the protected area of an ISFSI are trustworthy and reliable and do not constitute an unreasonable risk to the public health and safety for the common defense and security, including a potential to commit radiological sabotage.

a. To establish trustworthiness and reliability, the licensee shall develop, implement, and maintain procedures for conducting and completing background investigations, prior to granting access. The scope of background investigations must address at least the past three years and, as a minimum, must include:

i. Fingerprinting and a Federal Bureau of Investigation (FBI) identification and criminal history records check (CHRC). Where an applicant for unescorted access has been previously fingerprinted with a favorably completed CHRC, (such as a CHRC pursuant to compliance with orders for access to safeguards information) the licensee may accept the results of that CHRC, and need not submit another set of fingerprints, provided the CHRC was completed not more than three years from the date of the application for unescorted access.

ii. Verification of employment with each previous employer for the most recent year from the date of application.

iii. Verification of employment with an employer of the longest duration during any calendar month for the remaining next most recent two years.

iv. A full credit history review.

v. An interview with not less than two character references, developed by the investigator.

vi. A review of official identification (*e.g.,* driver's license; passport; government identification; state-, province-, or country-of-birth issued certificate of birth) to allow comparison of personal information data provided by the applicant. The licensee shall maintain a photocopy of the identifying document(s) on file, in accordance with "Protection of Information," in Section G of these ASMs.

vii. Licensees shall confirm eligibility for employment through the regulations of the U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services, and shall verify and ensure, to the extent possible, the accuracy of the provided social security number and alien registration number, as applicable.

b. The procedures developed or enhanced shall include measures for confirming the term, duration, and character of military service for the past three years, and/or academic enrollment and attendance in lieu of employment, for the past five years.

c. Licensees need not conduct an independent investigation for individuals employed at a facility who possess active "Q" or "L" clearances or possess another active U.S. Government-granted security clearance (i.e., Top Secret, Secret, or Confidential).

d. A review of the applicant's criminal history, obtained from local criminal justice resources, may be included in addition to the FBI CHRC, and is encouraged if the results of the FBI CHRC, employment check, or credit check disclose derogatory information. The scope of the applicant's local criminal history check shall cover all residences of record for the past three years from the date of the application for unescorted access.

2. The licensee shall use any information obtained as part of a CHRC solely for the purpose of determining an individual's suitability for unescorted access to the protected area of an ISFSI.

3. The licensee shall document the basis for its determination for granting or denying access to the protected area of an ISFSI.

4. The licensee shall develop, implement, and maintain procedures for updating background investigations for persons who are applying for reinstatement of unescorted access. Licensees need not conduct an independent reinvestigation for individuals who possess active "Q" or "L" clearances or possess another active U.S. Government granted security clearance, *i.e.,* Top Secret, Secret or Confidential.

5. The licensee shall develop, implement, and maintain procedures for reinvestigations of persons granted unescorted access, at intervals not to exceed five years. Licensees need not conduct an independent reinvestigation for individuals employed at a facility who possess active "Q" or "L" clearances or possess another active U.S. Government granted security clearance, *i.e.,* Top Secret, Secret or Confidential.

6. The licensee shall develop, implement, and maintain procedures designed to ensure that persons who have been denied unescorted access authorization to the facility are not allowed access to the facility, even under escort.

7. The licensee shall develop, implement, and maintain an audit program for licensee and contractor/vendor access authorization programs that evaluate all program elements and include a person knowledgeable and practiced in access authorization program performance objectives to assist in the overall assessment of the site's program effectiveness.

*C. Fingerprinting Program Requirements*

1. In a letter to the NRC, the licensee must nominate an individual who will review the results of the FBI CHRCs to make trustworthiness and reliability determinations for unescorted access to an ISFSI. This individual, referred to as the "reviewing official," must be someone who requires unescorted access to the ISFSI. The NRC will review the CHRC of any individual nominated to perform the reviewing official function. Based on the results of the CHRC, the NRC staff will determine whether this individual may have access. If the NRC determines that the nominee may not be granted such access, that individual will be prohibited from obtaining access.[1] Once the NRC approves a reviewing official, the reviewing official is the only individual permitted to make access determinations for other individuals who have been identified by the licensee as having the need for unescorted access to the ISFSI, and have been fingerprinted and have had a CHRC in accordance with these ASMs. The reviewing official can only make access determinations for other individuals, and therefore cannot approve other individuals to act as reviewing officials. Only the NRC can approve a reviewing official. Therefore, if the licensee wishes to have a new or additional reviewing official, the NRC must approve that individual before he or she can act in the capacity of a reviewing official.

2. No person may have access to Safeguards Information (SGI) or unescorted access to any facility subject to NRC regulation, if the NRC has determined, in accordance with its administrative review process based on fingerprinting and an FBI identification and CHRC, that the person may not have access to SGI or unescorted access to any facility subject to NRC regulation.

3. All fingerprints obtained by the licensee under this Order, must be submitted to the Commission for transmission to the FBI.

4. The licensee shall notify each affected individual that the fingerprints will be used to conduct a review of his/her criminal history record and inform the individual of the procedures for revising the record or including an explanation in the record, as specified in the "Right to Correct and Complete Information," in section F of these ASMs.

5. Fingerprints need not be taken if the employed individual (*e.g.,* a licensee employee, contractor, manufacturer, or supplier) is relieved from the fingerprinting requirement by 10 CFR 73.61, has a favorably adjudicated U.S. Government CHRC within the last five (5) years, or has an active Federal security clearance. Written confirmation from the Agency/employer who granted the Federal security clearance or reviewed the CHRC must be provided to the licensee. The licensee must retain this documentation for a period of three years from the date the individual no longer requires access to the facility.

*D. Prohibitions*

1. A licensee shall not base a final determination to deny an individual unescorted access to the protected area of an ISFSI solely on the basis of information received from the FBI involving: An arrest more than one (1) year old for which there is no information of the disposition of the case, or an arrest that resulted in dismissal of the charge, or an acquittal.

2. A licensee shall not use information received from a CHRC obtained pursuant to this Order in a manner that would infringe upon the rights of any individual under the First Amendment to the Constitution of the United States, nor shall the licensee use the information in any way that would discriminate among individuals on the basis of race, religion, national origin, sex, or age.

*E. Procedures for Processing Fingerprint Checks*

1. For the purpose of complying with this Order, licensees shall, using an appropriate method listed in 10 CFR 73.4, submit to the NRC's Division of Facilities and Security, Mail Stop T–6E46, one completed, legible standard fingerprint card (Form FD–258, ORIMDNRCOOOZ) or, where practicable, other fingerprint records for each individual seeking unescorted access to an ISFSI, to the Director of the Division of Facilities and Security, marked for the attention of the Division's Criminal History Check Section. Copies of these forms may be obtained by writing the Office of Information Services, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, by calling (301) 415–5877, or by e-mail to *forms@nrc.gov.* Practicable alternative formats are set forth in 10 CFR 73.4. The licensee shall establish procedures to ensure that the quality of the fingerprints taken results in minimizing the rejection rate of fingerprint cards because of illegible or incomplete cards.

2. The NRC will review submitted fingerprint cards for completeness. Any Form FD–258 fingerprint record containing omissions or evident errors will be returned to the licensee for corrections. The fee for processing fingerprint checks includes one re-submission if the initial submission is returned by the FBI because the fingerprint impressions cannot be classified. The one free re-submission must have the FBI Transaction Control Number reflected on the re-submission. If additional submissions are necessary, they will be treated as initial

[1] The NRC's determination of this individual's unescorted access to the ISFSI, in accordance with the process, is an administrative determination that is outside the scope of the Order.

submittals and will require a second payment of the processing fee.

3. Fees for processing fingerprint checks are due upon application. The licensee shall submit payment of the processing fees electronically. To be able to submit secure electronic payments, licensees will need to establish an account with Pay.Gov (*https://www.pay.gov*). To request an account, the licensee shall send an e-mail to *det@nrc.gov*. The e-mail must include the licensee's company name, address, point of contact (POC), POC e-mail address, and phone number. The NRC will forward the request to Pay.Gov, who will contact the licensee with a password and user lD. Once the licensee has established an account and submitted payment to Pay.Gov, they shall obtain a receipt. The licensee shall submit the receipt from Pay.Gov to the NRC along with fingerprint cards. For additional guidance on making electronic payments, contact the Facilities Security Branch, Division of Facilities and Security, at (301) 415–7739. Combined payment for multiple applications is acceptable. The application fee (currently $36) is the sum of the user fee charged by the FBI for each fingerprint card or other fingerprint record submitted by the NRC on behalf of a licensee, and an NRC processing fee, which covers administrative costs associated with NRC handling of licensee fingerprint submissions. The Commission will directly notify licensees who are subject to this regulation of any fee changes.

4. The Commission will forward to the submitting licensee all data received from the FBI as a result of the licensee's application(s) for CHRCs, including the FBI fingerprint record.

*F. Right To Correct and Complete Information*

1. Prior to any final adverse determination, the licensee shall make available to the individual the contents of any criminal history records obtained from the FBI for the purpose of assuring correct and complete information. Written confirmation by the individual of receipt of this notification must be maintained by the licensee for a period of one (1) year from the date of notification.

2. If, after reviewing the record, an individual believes that it is incorrect or incomplete in any respect and wishes to change, correct, or update the alleged deficiency, or to explain any matter in the record, the individual may initiate challenge procedures. These procedures include either direct application by the individual challenging the record to the agency (*i.e.,* law enforcement agency) that contributed the questioned information, or direct challenge as to the accuracy or completeness of any entry on the criminal history record to the Assistant Director, Federal Bureau of Investigation Identification Division, Washington, DC 20537–9700 (as set forth in 28 CFR 16.30 through 16.34). In the latter case, the FBI forwards the challenge to the agency that submitted the data and requests that agency to verify or correct the challenged entry. Upon receipt of an official communication directly from the agency that contributed the original information, the FBI Identification Division makes any changes necessary in accordance with the information supplied by that agency. The licensee must provide at least 10 days for an individual to initiate an action challenging the results of a FBI CHRC after the record is made available for his/her review. The licensee may make a final access determination based on the criminal history record only upon receipt of the FBI's ultimate confirmation or correction of the record. Upon a final adverse determination on access to an ISFSI, the licensee shall provide the individual its documented basis for denial. Access to an ISFSI shall not be granted to an individual during the review process.

*G. Protection of Information*

1. The licensee shall develop, implement, and maintain a system for personnel information management with appropriate procedures for the protection of personal, confidential information. This system shall be designed to prohibit unauthorized access to sensitive information and to prohibit modification of the information without authorization.

2. Each licensee who obtains a criminal history record on an individual pursuant to this Order shall establish and maintain a system of files and procedures, for protecting the record and the personal information from unauthorized disclosure.

3. The licensee may not disclose the record or personal information collected and maintained to persons other than the subject individual, his/her representative, or to those who have a need to access the information in performing assigned duties in the process of determining suitability for unescorted access to the protected area of an ISFSI. No individual authorized to have access to the information may re-disseminate the information to any other individual who does not have the appropriate need to know.

4. The personal information obtained on an individual from a CHRC may be transferred to another licensee if the gaining licensee receives the individual's written request to re-disseminate the information contained in his/her file, and the gaining licensee verifies information such as the individual's name, date of birth, social security number, sex, and other applicable physical characteristics for identification purposes.

5. The licensee shall make criminal history records, obtained under this section, available for examination by an authorized representative of the NRC to determine compliance with the regulations and laws.

[FR Doc. 2010–10680 Filed 5–5–10; 8:45 am]

**BILLING CODE 7590–01–P**

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. IC–29263]**

## Notice of Applications for Deregistration Under Section 8(f) of the Investment Company Act of 1940

April 30, 2010.

The following is a notice of applications for deregistration under section 8(f) of the Investment Company Act of 1940 for the month of April, 2010. A copy of each application may be obtained via the Commission's Web site by searching for the file number, or an applicant using the Company name box, at *http://www.sec.gov/search/search.htm* or by calling (202)551–8090. An order granting each application will be issued unless the SEC orders a hearing. Interested persons may request a hearing on any application by writing to the SEC's Secretary at the address below and serving the relevant applicant with a copy of the request, personally or by mail. Hearing requests should be received by the SEC by 5:30 p.m. on May 25, 2010, and should be accompanied by proof of service on the applicant, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Secretary, U.S. Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

**FOR FURTHER INFORMATION CONTACT:** Diane L. Titus at (202) 551–6810, SEC, Division of Investment Management, Office of Investment Company Regulation, 100 F Street, NE., Washington, DC 20549–4041.

### Dreyfus/KLS National Municipal Fund

[File No. 811–22262]

*Summary:* Applicant seeks an order declaring that it has ceased to be an investment company. Applicant has never made a public offering of its securities and does not propose to make a public offering or engage in business of any kind.

*Filing Dates:* The application was filed on September 25, 2009, and amended on March 25, 2010.

*Applicant's Address:* c/o The Dreyfus Corporation, 200 Park Ave., New York, NY 10166.

### Nuveen Floating Rate Fund

[File No. 811–9553]

*Summary:* Applicant, a closed-end investment company, seeks an order declaring that it has ceased to be an investment company. On May 28, 2003, applicant made a liquidating distribution to its shareholders, based on net asset value. Applicant incurred no expenses in connection with the liquidation.

*Filing Dates:* The application was filed on January 27, 2010, and amended on April 20, 2010.

*Applicant's Address:* 333 West Wacker Dr., Chicago, IL 60606.

**Edward Jones Tax-Free Money Market Fund**

[File No. 811–10291]

**Cash Trust Series**

[File No. 811–10583]

*Summary:* Each applicant seeks an order declaring that it has ceased to be an investment company. Applicants have never made a public offering of their securities and do not propose to make a public offering or engage in business of any kind.

*Filing Dates:* The applications were filed on December 21, 2009, and amended on April 28, 2010.

*Applicants' Address:* Federated Investors Funds, 4000 Ericsson Dr., Warrendale, PA 15086–7561.

**Excelsior Venture Investors III, LLC**

[File No. 811–9973]

*Summary:* Applicant, a closed-end investment company, seeks an order declaring that it has ceased to be an investment company. On December 31, 2009, applicant made a final liquidating distribution to its shareholders, based on net asset value. Expenses of $66,231 incurred in connection with the liquidation were paid by applicant.

*Filing Dates:* The application was filed on January 11, 2010 and amended on March 22, 2010.

*Applicant's Address:* 225 High Ridge Rd., Stamford, CT 06905.

**Columbia Funds Institutional Trust**

[File No. 811–5857]

*Summary:* Applicant seeks an order declaring that it has ceased to be an investment company. On November 23, 2009, applicant transferred its assets to CMG Ultra Short Term Bond Fund, a series of Columbia Funds Series Trust I, based on net asset value. Expenses of $20,000 incurred in connection with the reorganization were paid by Columbia Management Advisors, LLC, applicant's investment adviser.

*Filing Date:* The application was filed on April 14, 2010.

*Applicant's Address:* One Financial Center, Boston, MA 02111.

**ACM Managed Dollar Income Fund, Inc.**

[File No. 811–7964]

*Summary:* Applicant, a closed-end investment company, seeks an order declaring that it has ceased to be an investment company. On September 25, 2009, applicant transferred its assets to AllianceBernstein Global High Income Fund, Inc. and each holder of applicant's shares received shares of the surviving fund having an aggregate net asset value equal to the net asset value of the holder's shares in applicant. Expenses of $251,004 incurred in connection with the reorganization were paid by applicant and AllianceBernstein L.P., applicant's investment adviser.

*Filing Date:* The application was filed on March 18, 2010.

*Applicant's Address:* 1345 Avenue of the Americas, New York, NY 10105.

**Dreyfus Premier Equity Funds, Inc.**

[File No. 811–2488]

*Summary:* Applicant seeks an order declaring that it has ceased to be an investment company. On January 9, 2009, applicant made a liquidating distribution to its shareholders, based on net asset value. Expenses of $4,500 incurred in connection with the liquidation were paid by The Dreyfus Corporation, applicant's investment adviser.

*Filing Date:* The application was filed on March 30, 2010.

*Applicant's Address:* The Dreyfus Corporation, 200 Park Ave, New York, NY 10166.

**Dreyfus Premier Value Equity Funds**

[File No. 811–4688]

*Summary:* Applicant seeks an order declaring that it has ceased to be an investment company. On March 21, 2007, applicant transferred its assets to Dreyfus Premier Strategic Value Fund, a series of Advantage Funds, Inc., based on net asset value. Expenses of $81,000 incurred in connection with the reorganization were paid by The Dreyfus Corporation, applicant's investment adviser.

*Filing Date:* The application was filed on March 30, 2010.

*Applicant's Address:* c/o The Dreyfus Corporation, 200 Park Ave., New York, NY 10166.

**Dreyfus Intermediate Municipal Income Fund**

[File No. 811–21536]

*Summary:* Applicant, a closed-end investment company, seeks an order declaring that it has ceased to be an investment company. Applicant has never made a public offering of its securities and does not propose to make a public offering or engage in business of any kind.

*Filing Date:* The application was filed on March 12, 2010.

*Applicant's Address:* c/o The Dreyfus Corporation, 200 Park Ave., New York, NY 10166.

**Federated High Yield Municipal Income Fund**

[File No. 811–21505]

*Summary:* Applicant, a closed-end investment company, seeks an order declaring that it has ceased to be an investment company. Applicant has never made a public offering of its securities and does not propose to make a public offering or engage in business of any kind.

*Filing Date:* The application was filed on March 25, 2010.

*Applicant's Address:* Federated Investors Funds, 4000 Ericsson Dr., Warrendale, PA 15086–7561.

**Lou Holland Trust**

[File No. 811–7533]

*Summary:* Applicant seeks an order declaring that it has ceased to be an investment company. On January 29, 2010, applicant transferred its assets to Lou Holland Growth Fund, a series of Forum Funds, based on net asset value. Expenses of $80,281 incurred in connection with the reorganization were paid by Holland Capital Management LLC, applicant's investment adviser, and Atlantic Fund Management, LLC, the administrator of the surviving fund.

*Filing Date:* The application was filed on April 14, 2010.

*Applicant's Address:* One North Wacker Drive, Suite 700, Chicago, IL 60606.

**Premier Strategic Growth Fund**

[File No. 811–5001]

*Summary:* Applicant seeks an order declaring that it has ceased to be an investment company. On December 27, 1996, applicant transferred its assets to Dreyfus Premier Aggressive Growth Fund, a series of Dreyfus Premier Equity Funds, Inc., based on net asset value. Expenses of $48,500 incurred in connection with the reorganization were paid by applicant and the surviving fund.

*Filing Date:* The application was filed on March 30, 2010.

*Applicant's Address:* c/o The Dreyfus Corporation, 200 Park Ave., New York, NY 10166.

**Credit Suisse Alternative Capital Multi-Strategy Master Fund, LLC**

[File No. 811–21737]

*Summary:* Applicant, a closed-end investment company, seeks an order declaring that it has ceased to be an investment company. Applicant made a private offering of its securities from April 2005 until November 2009, at which time its board of managers determined to cease such offer. Applicant serves as a master fund for

two feeder funds, each of which is solely owned by an affiliate of applicant's investment adviser. Applicant's business activities consist solely of holding investments that cannot be immediately liquidated. Applicant is not presently making an offer of securities and does not propose to make any offering of securities. Applicant will continue to operate in reliance of section 3(c)(1) of the Act.

*Filing Date:* The application was filed on February 24, 2010.

*Applicant's Address:* 11 Madison Ave., 13th Floor, New York, NY 10010.

**Credit Suisse Alternative Capital Long/Short Equity Master Fund, LLC**

[File No. 811–21739]

*Summary:* Applicant, a closed-end investment company, seeks an order declaring that it has ceased to be an investment company. Applicant made a private offering of its securities from April 2005 until November 2009, at which time its board of managers determined to cease such offer. Applicant serves as a master fund for two feeder funds, each of which is solely owned by an affiliate of applicant's investment adviser. Applicant's business activities consist solely of holding investments that cannot be immediately liquidated. Applicant is not presently making an offer of securities and does not propose to make any offering of securities. Applicant will continue to operate in reliance of section 3(c)(1) of the Act.

*Filing Date:* The application was filed on February 24, 2010.

*Applicant's Address:* 11 Madison Ave., 13th Floor, New York, NY 10010.

**Separate Account VA WM**

[File No. 811–21961]

*Summary:* Applicant seeks an order declaring that it has ceased to be an investment company. Applicant requests deregistration based on abandonment of registration. Applicant is not now engaged, or intending to engage, in any business activities other than those necessary for winding up its affairs.

*Filing Date:* The application was filed on February 25, 2010.

*Applicant's Address:* 4333 Edgewood Road NE, Cedar Rapids, IA 52499–0001.

**Separate Account VA Z**

[File No. 811–22063]

*Summary:* Applicant seeks an order declaring that it has ceased to be an investment company. Applicant requests deregistration based on abandonment of registration. Applicant is not now engaged, or intending to engage, in any business activities other than those necessary for winding up its affairs.

*Filing Date:* The application was filed on February 25, 2010.

*Applicant's Address:* 4333 Edgewood Road NE, Cedar Rapids, IA 52499–0001.

**Separate Account VA GNY**

[File No. 811–22064]

*Summary:* Applicant seeks an order declaring that it has ceased to be an investment company. Applicant requests deregistration based on abandonment of registration. Applicant is not now engaged, or intending to engage, in any business activities other than those necessary for winding up its affairs.

*Filing Date:* The application was filed on February 25, 2010.

*Applicant's Address:* 4 Manhattanville Road, Purchase, NY 10577.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

**Florence E. Harmon,**

*Deputy Secretary.*

[FR Doc. 2010–10651 Filed 5–5–10; 8:45 am]

**BILLING CODE 8011–01–P**

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–62000; File No. 4–596]**

## Program for Allocation of Regulatory Responsibilities Pursuant to Rule 17d–2; Order Approving and Declaring Effective a Plan for the Allocation of Regulatory Responsibilities Between the International Securities Exchange, LLC and the Financial Industry Regulatory Authority, Inc. Concerning Ballista Securities LLC

April 29, 2010.

Notice is hereby given that the Securities and Exchange Commission ("Commission") has issued an Order, pursuant to Sections 17(d)[1] and 11A(a)(3)(B)[2] of the Securities Exchange Act of 1934 ("Act"), approving and declaring effective a plan for the allocation of regulatory responsibilities ("17d–2 Plan") that was filed pursuant to Rule 17d–2[3] under the Act by the International Securities Exchange, LLC ("ISE") and the Financial Industry Regulatory Authority, Inc. ("FINRA") (together with ISE, the "Parties").

Accordingly, FINRA shall assume, in addition to the regulatory responsibility it has under the Act, the regulatory responsibilities allocated to it under the Plan. At the same time, ISE is relieved of those regulatory responsibilities allocated to FINRA under the Plan.

### I. Introduction

Section 19(g)(1)[4] of the Act, among other things, requires every self-regulatory organization ("SRO") registered as either a national securities exchange or registered securities association to examine for, and enforce compliance by, its members and persons associated with its members with the Act, the rules and regulations thereunder, and the SRO's own rules, unless the SRO is relieved of this responsibility pursuant to Section 17(d)[5] or 19(g)(2)[6] of the Act. Section 17(d)(1)[7] of the Act was intended, in part, to eliminate unnecessary multiple examinations and regulatory duplication for those broker-dealers that maintain memberships in more than one SRO ("common members"). With respect to a common member, Section 17(d)(1) authorizes the Commission, by rule or order, to relieve an SRO of the responsibility to receive regulatory reports, to examine for and enforce compliance with applicable statutes, rules, and regulations, or to perform other specified regulatory functions.

To implement Section 17(d)(1), the Commission adopted two rules: Rule 17d–1 and Rule 17d–2 under the Act. Rule 17d–2[8] permits SROs to propose joint plans for the allocation of regulatory responsibilities, other than financial responsibility rules, with respect to their common members. Under paragraph (c) of Rule 17d–2, the Commission may declare such a plan effective if, after providing for notice and comment, it determines that the plan is necessary or appropriate in the public interest and for the protection of investors, to foster cooperation and coordination among the SROs, to remove impediments to, and foster the development of, a national market system and a national clearance and settlement system, and is in conformity with the factors set forth in Section 17(d) of the Act. Upon effectiveness of a plan filed pursuant to Rule 17d–2, an SRO is relieved of those regulatory responsibilities for common members that are allocated by the plan to another SRO.

[1] 15 U.S.C. 78q(d).

[2] 15 U.S.C. 78k–1(a)(3)(B).

[3] 17 CFR 240.17d–2.

[4] 15 U.S.C. 78s(g)(1).

[5] 15 U.S.C. 78q(d).

[6] 15 U.S.C. 78s(g)(2).

[7] 15 U.S.C. 78q(d)(1).

[8] 17 CFR 240.17d–1 and 17 CFR 240.17d–2, respectively.

## II. Ballista Securities LLC

On June 5, 2009, ISE Holdings, Inc. ("ISE Holdings"), the parent of ISE, entered into a Membership Purchase Agreement with Optifreeze LLC ("Optifreeze"). ISE Holdings acquired membership interests in Optifreeze by contributing cash to the capital of Optifreeze. As a result of the purchase, ISE Holdings has an 8.57% membership interest in Optifreeze, which wholly-owns and operates an Electronic Access Member of the ISE, Ballista Securities LLC ("Ballista"). The ownership interest of ISE Holdings in Ballista is subject to the conditions set forth in the Commission's approval order relating to ISE Holdings' purchase of Optifreeze.[9]

Recognizing that the Commission has previously expressed concern regarding (1) the potential for conflicts of interest in instances where an exchange is affiliated with one of its members, and (2) the potential for informational advantages that could place an affiliated member of an exchange at a competitive advantage vis-à-vis the other non-affiliated members, the ISE submitted a proposed rule change to amend ISE Rule 312 to permit the proposed affiliation subject to several conditions and limitations, including that a condition that the Exchange enter into a plan with a non-affiliated self-regulatory organization to regulate and oversee the activities of Ballista, pursuant to Rule 17d–2 under the Act.[10]

On March 19, 2010, the Parties submitted the proposed 17d–2 Plan to the Commission. On April 13, 2010, the Commission published notice of the Plan filed by ISE and FINRA in the **Federal Register.**[11] The Commission received no comments on the Plan. The text of the Plan allocates regulatory responsibilities among the Parties with respect to Ballista, which is a common member. Included in the Plan is an attachment (the "ISE Rules Certification for 17d–2 Agreement with FINRA," referred to herein as the "Certification") that lists every ISE rule and federal securities law and rule and regulation thereunder for which, under the Plan, FINRA would bear responsibility for examining, and enforcing compliance by, Ballista.

## III. Discussion

The Commission finds that the proposed Plan is consistent with the factors set forth in Section 17(d)[12] of the Act and Rule 17d–2(c)[13] thereunder in that the proposed Plan is necessary or appropriate in the public interest and for the protection of investors, fosters cooperation and coordination among SROs, and removes impediments to and fosters the development of the national market system. Among other things, the Commission believes that the proposed Plan should reduce unnecessary regulatory duplication by allocating to FINRA certain responsibilities for Ballista, a common member, that would otherwise be performed by both ISE and FINRA. Accordingly, the proposed Plan promotes efficiency by reducing costs to Ballista. Furthermore, because FINRA will be responsible for regulating Ballista instead of ISE, the plan should promote investor protection and help avoid any potential conflicts of interest that could arise if ISE was primarily responsible for regulating Ballista, with which ISE is affiliated.

The Commission notes that, under the Plan, FINRA would assume examination and enforcement responsibility relating to compliance by Ballista and persons associated therewith, with all applicable rules. Specifically, FINRA would assume examination and enforcement responsibility relating to compliance by Ballista and persons associated therewith, with the rules of ISE that are substantially similar to the rules of FINRA, as well as any provisions of the federal securities laws and the rules and regulations thereunder delineated in the Exhibit 1 to the 17d–2 Plan ("Common Rules"). In addition, under the Plan, FINRA would assume regulatory responsibility, with respect to Ballista, for all other ISE rules that do not qualify as Common Rules, as discussed below, on account of Ballista's status as an "Inbound Router Member."

Under the 17d–2 Plan, ISE would retain full responsibility for surveillance, examination, investigation, and enforcement with respect to trading activities or practices involving ISE's own marketplace; registration pursuant to its unique rules (*i.e.,* registration rules that are not Common Rules); its duties as a Designated Examining Authority pursuant to Rule 17d–1 under the Act; and any rules that are not substantially similar to the rules of FINRA, except for ISE rules for any ISE member that acts as an inbound router for ISE and is a member of both ISE and FINRA ("Inbound Router Member").[14] For purposes of the proposed 17d–2 Plan, Ballista would meet the definition of the term "Inbound Router Member" as it is used in the plan.[14a] The effect of these provisions is that regulatory oversight and enforcement responsibilities for Ballista would be vested with FINRA. These provisions should help avoid any potential conflicts of interest that could arise if ISE was primarily responsible for regulating Ballista, with which ISE is affiliated.

## IV. Conclusion

This Order gives effect to the Plan filed with the Commission in File No. 4–596. The Parties shall notify all members affected by the Plan of their rights and obligations under the Plan.

*It is therefore ordered,* pursuant to Sections 17(d) of the Act, that the Plan in File No. 4–596, between ISE and FINRA, filed pursuant to Rule 17d–2 under the Act, is approved and declared effective.

*It is therefore ordered* that ISE is relieved of those responsibilities allocated to FINRA under the Plan in File No. 4–596.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[15]

**Florence E. Harmon,**

*Deputy Secretary.*

[FR Doc. 2010–10596 Filed 5–5–10; 8:45 am]

**BILLING CODE 8011–01–P**

[9] *See* Securities Exchange Act Release No. 60598 (September 1, 2009), 74 FR 46280 (September 8, 2009).

[10] *See* Securities Exchange Act Release No. 60382 (July 24, 2009), 74 FR 38068 (July 30, 2009).

[11] *See* Securities Exchange Act Release No. 61853 (April 6, 2010), 75 FR 18925 (April 13, 2010).

[12] 15 U.S.C. 78q(d).

[13] 17 CFR 240.17d–2(c).

[14] Apparent violations of such ISE rules by any Inbound Router Member will be processed by, and enforcement proceedings will be conducted by, FINRA.

[14a] ISE's other Inbound Router Member, Direct Edge ECN LLC, is not addressed by this 17d–2 Plan, but is instead addressed in a similar manner under a separate, stand-alone plan. *See* Securities Exchange Act Release No. 59134 (December 22, 2008), 73 FR 79943 (December 30, 2008) (File No. 4–574) (order declaring effective the 17d–2 plan concerning Direct Edge ECN LLC).

[15] 17 CFR 200.30–3(a)(34).

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–61990; File No. SR–NYSEArca–2010–25]**

## Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing of Proposed Rule Change Amending the Listing and Trading of ETFS Palladium Trust and ETFS Platinum Trust

April 27, 2010.

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 April 8, 2010, NYSE Arca, Inc. ("NYSE Arca" or the "Exchange") filed with the Securities and Exchange Commission (the

[1] 15 U.S.C.78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

"Commission") the proposed rule change as described in Items I, II, and III 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 amend certain rules in order to enable the listing and trading on the Exchange of options on the ETFS Palladium Trust and the ETFS Platinum Trust. The text of the proposed rule change is available on the Commission's Web Site at *http://www.sec.gov.* A copy of this filing is available on the Exchange's Web site at *http://www.nyse.com,* at the Exchange's principal office and at the Commission's Public Reference Room.

**II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change**

In its filing with the Commission, the 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 the Statutory Basis for, the Proposed Rule Change*

1. Purpose

Recently, the U.S. Securities and Exchange Commission ("SEC" or "Commission") authorized the Exchange to list and trade options on the SPDR Gold Trust ("GLD")[4] and on the iShares COMEX Gold Trust ("IAU") and the iShares Silver Trust ("SLV"),[5] the ETFS Silver Trust ("SIVR") and the ETFS Gold Trust ("SGOL").[6] Now, the Exchange proposes to list and trade options on the ETFS Palladium Trust ("PALL") and the ETFS Platinum Trust ("PPLT").

Currently, Rule 5.3 deems appropriate for options trading Exchange-Traded Fund Shares ("ETFs" or "Fund Shares" or "Units") that are traded on a national securities exchange and are defined as an "NMS stock" in Rule 600(b)(47) of Regulation NMS and that represent (i) interests in registered investment companies (or series thereof) organized as open-end management investment companies, unit investment trusts or similar entities that hold portfolios of securities and/or financial instruments including, but not limited to, options on securities and indexes, equity caps, collars and floors, swap agreements, forward contracts, repurchase agreements and reverse purchase agreements (the "Financial Instruments"), and money market instruments, including, but not limited to, U.S. government securities and repurchase agreements (the "Money Market Instruments") comprising or otherwise based on or representing investments in indexes or portfolios of securities and/or Financial Instruments and Money Market Instruments (or that hold securities in one or more other registered investment companies that themselves hold such portfolios of securities and/or Financial Instruments and Money Marker Instruments); or (ii) interests in a trust or similar entity that holds a specified non-U.S. currency deposited with the trust or similar entity when aggregated in some specified minimum number may be surrendered to the trust by the beneficial owner to receive the specified non-U.S. currency, and pays the beneficial owner interest and other distributions on deposited non-U.S. currency, if any, declared and paid by the trust; or (iii) commodity pool interests principally engaged, directly or indirectly, in holding and/or managing portfolios or baskets of securities, commodity futures contracts, options on commodity futures contracts, swaps, forward contracts and/or options on physical commodities and/or non-U.S. currency ("Commodity Pool Units"), or (iv) represent interests in the SPDR Gold Trust, are eligible as underlying securities for options traded on the Exchange or (iv) represent interests in the SPDR Gold Trust, or (v) represent interests in the iShares COMEX Gold Trust, or (vi) represent interests in the iShares Silver Trust, or, (vii) represents an interest in a registered investment company ("Investment Company") organized as an open-end management investment company or similar entity, that invests in a portfolio of securities selected by the Investment Company's investment adviser consistent with the Investment Company's investment objectives and policies, which is issued in a specified aggregate minimum number in return for a deposit of a specified portfolio of securities and/or a cash amount with a value equal to the next determined net asset value ("NAV"), and when aggregated in the same specified minimum number, may be redeemed at a holder's request, which holder will be paid a specified portfolio of securities and/or cash with a value equal to the next determined NAV ("Managed Fund Share") or, (viii) represents interest in the ETFS Silver Trust or the ETFS Gold Trust.[7] This rule change proposes to expand the types of ETFs that may be approved for options trading on the Exchange to include the ETFS Palladium Trust and the ETFS Platinum Trust.

Apart from allowing the ETFS Palladium Trust and ETFS Platinum Trust to be underlyings for options traded on the Exchange as described above, the listing standards for ETFs will remain unchanged from those that apply under current Exchange rules. ETFs on which options may be listed and traded must still be listed and traded on a national securities exchange and must satisfy the other listing standards set forth in Rule 5.3(g).

Specifically, in addition to satisfying the aforementioned listing requirements, Units must meet either (1) the criteria and guidelines under Rule 5.3(a) and (b) or (2) they must be available for creation or redemption each business day from or through the issuer in cash or in kind at a price related to net asset value, and the issuer must be obligated to issue Units in a specified aggregate number even if some or all of the investment assets required to be deposited have not been received by the issuer, subject to the condition that the person obligated to deposit the investments has undertaken to deliver the investment assets as soon as possible and such undertaking is secured by the delivery and maintenance of collateral consisting of cash or cash equivalents satisfactory to the issuer, as provided in the respective prospectus.

The Exchange states that the current continued listing standards for options on ETFs will apply to options on the ETFS Palladium Trust and ETFS Platinum Trust. Specifically, under Rule 5.4(k), options on Units may be subject to the suspension of opening transactions as follows: (1) Following the initial twelve-month period beginning upon the commencement of trading of the Units, there are fewer than 50 record and/or beneficial holders of the Units for 30 or more consecutive

[4] *See* Securities Exchange Act Release No. 57894 (May 30, 2008), 73 FR 32061 (June 5, 2008) (order approving SR–NYSEArca–2008–52).

[5] *See* Securities Exchange Act Release No. 59055 (December 4, 2008), 73 FR 238 [sic] (December 10, 2008) (order approving SR–NYSEArca–2008–66).

[6] *See* Securities Exchange Act Release No. 61483 (February 3, 2010), 75 FR 6753 (February 10, 2010).

[7] *See* Rule 5.3(g).

trading days; (2) the value of the underlying silver or underlying gold [sic] is no longer calculated or available; or (3) such other event occurs or condition exists that in the opinion of the Exchange makes further dealing on the Exchange inadvisable.

Additionally, the ETFS Palladium Trust and ETFS Platinum Trust shall not be deemed to meet the requirements for continued approval, and the Exchange shall not open for trading any additional series of option contracts of the class covering the ETFS Palladium Trust or the ETFS Platinum Trust, respectively, if the ETFS Palladium Trust or the ETFS Platinum Trust ceases to be an "NMS stock" as provided for in Rule 5.4(b)(5) or the ETFS Palladium Trust or the ETFS Platinum Trust is halted from trading on its primary market.

The addition of the ETFS Palladium Trust and ETFS Platinum Trust to Rule 5.3(g) will not have any effect on the rules pertaining to position and exercise limits [8] or margin.[9]

The Exchange represents that its surveillance procedures applicable to trading in options on the ETFS Palladium Trust and ETFS Platinum Trust will be similar to those applicable to all other options on other ETFs currently traded on the Exchange. Also, the Exchange may obtain information from the New York Mercantile Exchange, Inc. ("NYMEX") (a member of the Intermarket Surveillance Group) related to any financial instrument traded there that is based, in whole or part, upon an interest in or performance of silver or gold [sic].

2. Statutory Basis

The proposed rule change is consistent with Section 6(b) [10] of the Securities Exchange Act of 1934 (the "Act"), in general, and furthers the objectives of Section 6(b)(5) [11] in particular in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, and to remove impediments to and perfect the mechanisms of a free and open market and a national market system.

*B. Self-Regulatory Organization's Statement on Burden on Competition*

The Exchange does not believe that the proposed rule 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**

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) by order approve the proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

**IV. Solicitation of Comments**

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the 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–NYSEArca–2010–25 on the subject line.

*Paper Comments*

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File No. SR–NYSEArca–2010–25. 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 Web site viewing and printing 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 NYSE Arca. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File No. SR–NYSEArca–2010–25 and should be submitted on or before May 27, 2010.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[12]

**Florence E. Harmon,**

*Deputy Secretary.*

[FR Doc. 2010–10592 Filed 5–5–10; 8:45 am]

**BILLING CODE 8011–01–P**

[8] *See* Rule 6.8 regarding positions limits, and Rule 6.9 regarding exercise limits.

[9] *See* Rules 4.15 and 4.16 regarding margins.

[10] 15 U.S.C. 78f(b).

[11] 15 U.S.C. 78f(b)(5).

[12] 17 CFR 200.30–3(a)(12).

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–61999; File No. SR–NYSEArea–2010–15]**

## Self-Regulatory Organizations; NYSE Arca, Inc.; Order Approving a Proposed Rule Change Amending Its Schedule of Fees and Charges for Exchange Services

April 29, 2010.

**I. Introduction**

On March 5, 2010, NYSE Arca, Inc. ("NYSE Arca" or the "Exchange") filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),[1] and Rule 19b–4 thereunder,[2] a proposed rule change relating to co-location services and related fees. The proposed rule change was published for comment in the **Federal Register** on March 26, 2010.[3] The Commission received no comment letters on the proposal. This order approves the proposed rule change.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 61748 (March 19, 2010), 75 FR 14644 ("Notice").

## II. Description

In its proposal, NYSE Arca described certain co-location services offered by the Exchange, and proposed to amend its Schedules of Fees and Charges for Exchange Services for both its equities and options platforms (the "Schedules") in order to identify fees pertaining to such co-location services.

*Co-Location Services*

The Exchange offers its Users [4] the opportunity to rent space on premises controlled by the Exchange so that they may locate their electronic servers in close physical proximity to the Exchange's trading and execution systems. These co-location services are currently provided at a data center operated by a private third-party vendor located in New Jersey, and Users may rent space ranging from half cabinets up to two full cabinets, with different power usage capabilities ranging from 2 kilowatts up to 8 kilowatts. The services provided include equipment installation, cross connections, and miscellaneous post-installation services (including cable installation, equipment racking and "remote-hands" maintenance). In the proposal, the Exchange represents that the fees assessed for the services and space generally reflect the amount of space used and power required.

NYSE Arca further represents that Users that receive co-location services from NYSE Arca do not receive any means of access to the Exchange's trading and execution systems that is separate from or superior to that of Users that do not receive co-location services. NYSE Arca further represents that all orders sent to the Exchange enter the Exchange's trading and execution systems through the same order gateway, regardless of whether the sender is co-located in the Exchange's data center or not. In addition, the Exchange represents that co-located Users do not receive any market data or data service product that is not available to all Users. Finally, NYSE Arca notes that although Users that receive co-location services normally would expect reduced latencies when sending orders to the Exchange and receiving market data from the Exchange, NYSE Arca believes that other than these reduced latencies, there are no material differences in terms of access to the Exchange between Users that choose to co-locate and those that do not.

In the proposal, the Exchange explained that it offers co-location space based on availability, and believes that it has sufficient space to accommodate current demand on an equitable basis. In addition, according to the Exchange, any difference among the positions of the cabinets within the data center does not create any material difference among co-location Users in terms of access to the Exchange.

*Co-Location Fees*

The Exchange's proposed co-location fees, which, in part, reflect power usage priced at $1000 per kilowatt ("kW") per month, are reflected below.

| | |
|---|---|
| Half cabinet (up to 2 kW) | $2,000 per month.<br>$2,500 one time installation fee. |
| Full cabinet (up to 2.5 kW) | $2,500 per month.<br>$5,000 one time installation fee. |
| Full cabinet (up to 4 kW) | $4,000 per month.<br>$5,000 one time installation fee. |
| Full cabinet (up to 8 kW) | $8,000 per month.<br>$5,000 one time installation fee. |
| Miscellaneous services post installation (including cable installation services, equipment racking services, and ongoing remote-hands maintenance). | $200 per hour. |
| Fiber cross connections (local and interfloor) | $600 per month.<br>$950 one time installation fee. |
| Less than half cabinet [5] | $150 per Rack Unit. |

## III. Discussion and Commission's Findings

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.[6] In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(4) of the Act,[7] which requires that the rules of a national securities exchange provide for the equitable allocation of reasonable dues, fees and other charges among its members and issuers and other persons using its facilities, and with Section 6(b)(5) of the Act,[8] which requires, among other things, that the rules of a national securities 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, and not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Commission believes that the proposed co-location fees are equitably allocated insofar as they are applied on the same terms to similarly-situated market participants. In addition, the Commission believes that the co-location services described in the proposed rule change are not unfairly discriminatory because: (1) Co-location services are offered to all Users who request them and pay the appropriate fees; (2) the Exchange has represented that Users receiving co-location services do not receive any means of access to the Exchange's trading and execution systems that is separate from or superior to that of Users that do not receive co-location services; (3) the Exchange has represented that there are no material differences in terms of access to the Exchange between Users that choose to co-locate and those that do not, other than co-located Users' reduced latencies due to proximity; and (4) the Exchange has stated that it has sufficient space to accommodate current demand for co-location services on an equitable basis.

[4] The term "User" means any ETP Holder or Sponsored Participant who is authorized to obtain access to the NYSE Arca Marketplace pursuant to Rule 7.29, and any OTP Holder, OTP Firm or Sponsored Participant that is authorized to obtain access to OX pursuant to Rule 6.2A. *See* NYSE Arca Equities Rule 1.1(yy) and NYSE Arca Options Rule 6.1A(a)(19).

[5] The Exchange represents that it supports existing arrangements to provide Users with less than a half cabinet, but it does not offer that option to new co-location Users.

[6] In approving this proposal, the commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[7] 15 U.S.C. 78f(b)(4).

[8] 15 U.S.C. 78f(b)(5).

## IV. Conclusion

*It is therefore ordered,* pursuant to Section 19(b)(2) of the Act,[9] that the proposed rule change (SR–NYSEArca–2010–15) be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[10]

**Florence E. Harmon,**

*Deputy Secretary.*

[FR Doc. 2010–10595 Filed 5–5–10; 8:45 am]

**BILLING CODE 8011–01–P**

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–62003; File No. SR–NYSEArca–2010–32]**

## Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Rule Change Amending Its Fee Schedule

April 29, 2010.

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 April 21, 2010, NYSE Arca, Inc. ("NYSE Arca" or the "Exchange") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I, II, and III 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 amend its Schedule of Fees and Charges for Exchange Services (the "Schedule"). Changes to the Schedule pursuant to this proposal will become operative on April 21, 2010. The text of the proposed rule change is available on the Exchange's Web site at *http://www.nyse.com,* at the Exchange's principal office, on the Commission's Web site at *http://www.sec.gov* 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 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 the Statutory Basis for, the Proposed Rule Change*

1. Purpose

The Exchange proposes to change the pricing for Mid-Point Passive Liquidity ("MPL") Orders. Currently the rebate for MPL Orders that provide liquidity in Tape A and Tape C securities is $0.002 per share, and the rebate for MPL Order that provide liquidity in Tape B securities is $0.001 per share. There is currently no fee for MPL Orders that remove liquidity across all Tapes. Under this proposal, MPL Orders will receive a rebate of $0.0010 per share for orders that provide liquidity and a fee of $0.0010 for orders that take liquidity in Tape A, Tape B, and Tape C securities. These changes apply to all pricing levels.

The proposed changes to the Schedule are part of the Exchange's continued effort to attract and enhance participation on the Exchange by offering attractive rates for removing liquidity and rebates for providing liquidity. The Exchange believes the proposed fees are reasonable and equitable in that they apply uniformly to all ETP Holders. The proposed changes will become operative on April 21, 2010.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Securities Exchange Act of 1934 (the "Act"),[4] in general, and Section 6(b)(4) of the Act,[5] in particular, in that it is designed to provide for the equitable allocation of reasonable dues, fees, and other charges among its members and other persons using its facilities. The proposed changes to the Schedule are part of the Exchange's continued effort to attract and enhance participation on the Exchange by offering attractive rates for removing liquidity and rebates for providing liquidity to the Exchange. The proposed changes to the Schedule are reasonable and equitable in that they apply uniformly to all ETP Holders.

*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

The foregoing rule change is effective upon filing pursuant to Section 19(b)(3)(A)[6] of the Act and subparagraph (f)(2) of Rule 19b–4[7] thereunder, because it establishes a due, fee, or other charge imposed by NYSE Arca on its members.

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

### IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

*Electronic Comments*

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–NYSEArca–2010–32 on the subject line.

*Paper Comments*

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission,

[9] 15 U.S.C. 78s(b)(2).

[10] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C.78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] 15 U.S.C. 78f(b).

[5] 15 U.S.C. 78f(b)(4).

[6] 15 U.S.C. 78s(b)(3)(A).

[7] 17 CFR 240.19b–4(f)(2).

100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSEArca–2010–32. 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 Web site viewing and printing in the Commission's Public Reference Section, 100 F Street, NE., Washington, DC 20549–1090 on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing will also be available for inspection and copying at NYSE Arca's principal office and on its Internet Web site at *http://www.nyse.com.* 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–NYSEArca–2010–32 and should be submitted on or before May 27, 2010.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[8]

**Florence E. Harmon,**

*Deputy Secretary.*

[FR Doc. 2010–10598 Filed 5–5–10; 8:45 am]

**BILLING CODE 8011–01–P**

[8] 17 CFR 200.30–3(a)(12).

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–62010; File No. SR–SCCP–2010–01]**

## Self-Regulatory Organizations; Stock Clearing Corporation of Philadelphia; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Regarding Amendments to the By-Laws of The NASDAQ OMX Group, Inc.

April 30, 2010.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),[1] notice is hereby given that on April 9, 2010, the Stock Clearing Corporation of Philadelphia ("SCCP") filed with the Securities and Exchange Commission ("Commission") the proposed rule change described in Items I, II, and III below, which items have been prepared primarily by SCCP. SCCP filed the proposal pursuant to Section 19(b)(3)(A)(iii) of the Act[2] and Rule 19b–4(f)(6)[3] thereunder so that the proposal was effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the rule change from interested parties.

### I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

SCCP is filing the proposed rule change relating to amendments to the By-Laws of its parent corporation The NASDAQ OMX Group, Inc. ("NASDAQ OMX").[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, SCCP 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. SCCP has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of these statements.[5]

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78s(b)(3)(A)(iii).

[3] 17 CFR 240.19b–4(f)(6).

[4] Article Eighth, Paragraph B of the Restated Certificate of Incorporation of NASDAQ OMX and Section 11.3 of the By-Laws provides that proposed amendments to the By-Laws are to be reviewed by the Board of Directors of each regulatory subsidiary of NASDAQ OMX and under certain circumstances be filed with the Commission.

[5] The Commission has modified the text of the summaries prepared by SCCP.

*(A) Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change*

1. Purpose

NASDAQ OMX has proposed making certain amendments to its By-Laws to make improvements in its governance. In SR–NASDAQ–2010–025, The NASDAQ Stock Market LLC ("NASDAQ Exchange") sought and received Commission approval to adopt these By-Laws changes as part of the rules of NASDAQ Exchange.[6] SCCP is now submitting this filing regarding these By-Law changes. The text of the changes to the By-Laws of NASDAQ OMX can be viewed at *http://nasdaqomxphlx.cchwallstreet.com/NASDAQOMXPHLX/pdf/sccp-filings/2010/SR–SCCP–2010–01.pdf.*

The NASDAQ OMX By-Laws previously provided that each director receiving a plurality of the votes at any election of directors at which a quorum was present was duly elected to the board of directors ("Board"). Under Corporate Governance Guidelines adopted by the Board, however, any director in an uncontested election who received a greater number of votes "withheld" from his or her election than votes "for" such election was required to tender his or her resignation promptly following receipt of the certification of the stockholder vote. The NASDAQ OMX Nominating & Governance Committee ("Nominating & Governance Committee") then considered the resignation offer and recommended to the Board whether or not to accept it. Within 90 days after the certification of the election results, the Board determined whether to accept or reject the resignation. Promptly thereafter, the Board announced its decision by means of a press release. In a contested election (*i.e.,* where the number of nominees exceeded the number of directors to be elected), the unqualified plurality standard controlled.

*Uncontested Election:*

NASDAQ OMX recently amended its by-laws to adopt a majority vote standard. Specifically By-Law Article IV, Section 4.4 was amended to provide that in an uncontested election, directors shall be elected by holders of a majority of the votes cast at any meeting for the election of directors at which a quorum is present.[7] Under the majority voting standard, a nominee

[6] Securities Exchange Act Release No. 61876 (April 8, 2010), 75 FR 19436 (April 14, 2010) (SR–NASDAQ–2010–025).

[7] NASDAQ OMX also amended its Corporate Governance Guidelines to reflect the majority vote standard for uncontested director elections.

who fails to receive the requisite vote will not be duly elected to the Board. The By-Laws also now require that any incumbent director nominee, as a condition to his or her nomination for reelection to the Board, must submit in writing an irrevocable resignation, the effectiveness of which is conditioned upon the director's failure to receive the requisite vote in any uncontested election and the Board's acceptance of the resignation. Acceptance of the resignation by the Board shall be in accordance with the policies and procedures adopted by the Board for such purpose.

*Contested Election:*

NASDAQ OMX codified its process for a contested election. The directors will continue to be elected by a plurality vote in a contested election. There is no change to the process for contested elections because if a majority voting standard were to apply in a contested election, the likelihood of a "failed election" (*i.e.,* a situation in which no director receives the requisite vote) would be more pronounced. Moreover, the rationale underpinning the majority voting policy does not apply in contested elections where stockholders are offered a choice among competing candidates. Directors are elected by a plurality of votes present in person or represented by proxy at a meeting convened for that purpose. The directors who receive the greatest number of votes cast will be elected.

*General Election Requirements:*

The following requirements apply to elections of directors and were not amended. Each share of common stock has one vote,[8] subject to the voting limitation in NASDAQ OMX's certificate of incorporation that generally prohibits a holder from voting in excess of 5% of the total voting power of NASDAQ OMX.[9] In addition, each note holder is entitled to the number of votes equal to the number of shares of common stock into which such note could be converted on the record date, subject to the 5% voting limitation contained in the certificate of incorporation.

At a meeting to elect directors, the presence of holders of a majority (greater than 50%) of NASDAQ OMX voting securities constitutes a quorum. Presence may be in-person or by proxy. Any securities not voted will not impact the vote.

2. Statutory Basis

SCCP believes that the proposed rule change is consistent with Section 17A of the Act,[10] as amended, and with Section 17A(b)(3)(A) of the Act,[11] in particular, because it is designed to ensure that SCCP is so organized and has the capacity to be able to facilitate the prompt and accurate clearance and settlement of securities transactions and to enforce compliance by its participants with the rules of the clearing agency.

*(B) Self-Regulatory Organization's Statement on Burden on Competition*

SCCP 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 were not and are not intended to be solicited or received. SCCP will notify the Commission of any written comments received by SCCP.

**III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

The foregoing proposed rule change has become effective upon filing pursuant to Section 19(b)(3)(A)(iii) of the Act[12] and Rule 19b–4(f)(6)[13] thereunder because the proposed rule change does not (i) significantly affect the protection of investors or the public interest; (ii) does not impose any significant burden on competition; and (iii) by its terms, does not become operative for 30 days after the date of filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest. At any time within sixty days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

**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–SCCP–2010–01 on the subject line.

*Paper Comments*

- Send paper comments in triplicate to Secretary, Elizabeth M. Murphy, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–SCCP–2010–01. 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 web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 am and 3 pm. Copies of such filings also will be available for inspection and copying at the principal office of SCCP and on SCCP's Web site at *http://nasdaqomxphlx.cchwallstreet.com/NASDAQOMXPHLX/pdf/sccp-filings/2010/SR–SCCP–2010–01.pdf.*

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–SCCP–2010–01 and should be submitted on or before May 27, 2010.

[8] NASDAQ OMX Certificate of Incorporation at Article IV, C.1(a).

[9] NASDAQ OMX Certificate of Incorporation at Article IV, C.1(b)2.

[10] 15 U.S.C. 78q–1.

[11] 15 U.S.C. 78q–1(b)(3)(A).

[12] 15 U.S.C. 78s(b)(3)(A)(iii).

[13] 17 CFR 240.19b–4(f)(6).

For the Commission by the Division of Trading and Markets, pursuant to delegated authority.[14]

**Florence E. Harmon,**

*Deputy Secretary.*

[FR Doc. 2010–10646 Filed 5–5–10; 8:45 am]

**BILLING CODE 8011–01–P**

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–62011; File No. SR–BSECC–2010–001]**

## Self-Regulatory Organizations; Boston Stock Exchange Clearing Corporation; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Regarding Amendments to the By-Laws of The NASDAQ OMX Group, Inc.

April 30, 2010.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),[1] notice is hereby given that on April 9, 2010, the Boston Stock Exchange Clearing Corporation ("BSECC") filed with the Securities and Exchange Commission ("Commission") the proposed rule change described in Items I, II, and III below, which items have been prepared primarily by BSECC. BSECC filed the proposal pursuant to Section 19(b)(3)(A)(iii) of the Act[2] and Rule 19b–4(f)(6)[3] thereunder so that the proposal was effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the rule change from interested parties.

### I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

BSECC is filing the proposed rule change relating to amendments to the By-Laws of its parent corporation The NASDAQ OMX Group, Inc. ("NASDAQ OMX").[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, BSECC 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. BSECC has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of these statements.[5]

*(A) Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change*

1. Purpose

NASDAQ OMX has proposed making certain amendments to its By-Laws to make improvements in its governance. In SR–NASDAQ–2010–025, The NASDAQ Stock Market LLC ("NASDAQ Exchange") sought and received Commission approval to adopt these By-Laws changes as part of the rules of NASDAQ Exchange.[6] BSECC is now submitting this filing regarding these By-Law changes. The text of the changes to the By-Laws of NASDAQ OMX can be viewed at *http://nasdaqomxbx.cchwallstreet.com/NASDAQOMXBX/pdf/bsecc-filings/2010/SR-BSECC-2010-001.pdf.*

The NASDAQ OMX By-Laws previously provided that each director receiving a plurality of the votes at any election of directors at which a quorum was present was duly elected to the board of directors ("Board"). Under Corporate Governance Guidelines adopted by the Board, however, any director in an uncontested election who received a greater number of votes "withheld" from his or her election than votes "for" such election was required to tender his or her resignation promptly following receipt of the certification of the stockholder vote. The NASDAQ OMX Nominating & Governance Committee ("Nominating & Governance Committee") then considered the resignation offer and recommended to the Board whether or not to accept it. Within 90 days after the certification of the election results, the Board determined whether to accept or reject the resignation. Promptly thereafter, the Board announced its decision by means of a press release. In a contested election (*i.e.,* where the number of nominees exceeded the number of directors to be elected), the unqualified plurality standard controlled.

*Uncontested Election:*

NASDAQ OMX recently amended its by-laws to adopt a majority vote standard. Specifically By-Law Article IV, Section 4.4 was amended to provide that in an uncontested election, directors shall be elected by holders of a majority of the votes cast at any meeting for the election of directors at which a quorum is present.[7] Under the majority voting standard, a nominee who fails to receive the requisite vote will not be duly elected to the Board. The By-Laws also now require that any incumbent director nominee, as a condition to his or her nomination for reelection to the Board, must submit in writing an irrevocable resignation, the effectiveness of which is conditioned upon the director's failure to receive the requisite vote in any uncontested election and the Board's acceptance of the resignation. Acceptance of the resignation by the Board shall be in accordance with the policies and procedures adopted by the Board for such purpose.

*Contested Election:*

NASDAQ OMX codified its process for a contested election. The directors will continue to be elected by a plurality vote in a contested election. There is no change to the process for contested elections because if a majority voting standard were to apply in a contested election, the likelihood of a "failed election" (*i.e.,* a situation in which no director receives the requisite vote) would be more pronounced. Moreover, the rationale underpinning the majority voting policy does not apply in contested elections where stockholders are offered a choice among competing candidates. Directors are elected by a plurality of votes present in person or represented by proxy at a meeting convened for that purpose. The directors who receive the greatest number of votes cast will be elected.

*General Election Requirements:*

The following requirements apply to elections of directors and were not amended. Each share of common stock has one vote,[8] subject to the voting limitation in NASDAQ OMX's certificate of incorporation that generally prohibits a holder from voting in excess of 5% of the total voting power of NASDAQ OMX.[9] In addition, each note holder is entitled to the number of votes equal to the number of shares of common stock into which such note could be converted on the record date, subject to the 5% voting

[14] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78s(b)(3)(A)(iii).

[3] 17 CFR 240.19b–4(f)(6).

[4] Article Eighth, Paragraph B of the Restated Certificate of Incorporation of NASDAQ OMX and Section 11.3 of the By-Laws provides that proposed amendments to the By-Laws are to be reviewed by the Board of Directors of each regulatory subsidiary of NASDAQ OMX and under certain circumstances be filed with the Commission.

[5] The Commission has modified the text of the summaries prepared by BSECC.

[6] Securities Exchange Act Release No. 61876 (April 8, 2010), 75 FR 19436 (April 14, 2010) (SR–NASDAQ–2010–025).

[7] NASDAQ OMX also amended its Corporate Governance Guidelines to reflect the majority vote standard for uncontested director elections.

[8] NASDAQ OMX Certificate of Incorporation at Article IV, C.1(a).

[9] NASDAQ OMX Certificate of Incorporation at Article IV, C.1(b)2.

limitation contained in the certificate of incorporation.

At a meeting to elect directors, the presence of holders of a majority (greater than 50%) of NASDAQ OMX voting securities constitutes a quorum. Presence may be in-person or by proxy. Any securities not voted will not impact the vote.

2. Statutory Basis

BSECC believes that the proposed rule change is consistent with Section 17A of the Act,[10] as amended, and with Section 17A(b)(3)(A) of the Act,[11] in particular, because it is designed to ensure that BSECC is so organized and has the capacity to be able to facilitate the prompt and accurate clearance and settlement of securities transactions and to enforce compliance by its participants with the rules of the clearing agency.

*(B) Self-Regulatory Organization's Statement on Burden on Competition*

BSECC 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 were not and are not intended to be solicited or received. BSECC will notify the Commission of any written comments received by BSECC.

**III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

The foregoing proposed rule change has become effective upon filing pursuant to Section 19(b)(3)(A)(iii) of the Act [12] and Rule 19b–4(f)(6) [13] thereunder because the proposed rule change does not (i) significantly affect the protection of investors or the public interest; (ii) does not impose any significant burden on competition; and (iii) by its terms, does not become operative for 30 days after the date of filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest. At any time within sixty days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

**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–BSECC–2010–001 on the subject line.

*Paper Comments*

- Send paper comments in triplicate to Secretary, Elizabeth M. Murphy, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–BSECC–2010–001. 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 web site viewing and printing 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 filings also will be available for inspection and copying at the principal office of BSECC and on BSECC's Web site at *http://nasdaqomxbx.cchwallstreet.com/NASDAQOMXBX/pdf/bsecc-filings/2010/SR-BSECC-2010-001.pdf.*

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–BSECC–2010–001 and should be submitted on or before May 27, 2010.

For the Commission by the Division of Trading and Markets, pursuant to delegated authority.[14]

**Florence E. Harmon,**

*Deputy Secretary.*

[FR Doc. 2010–10645 Filed 5–5–10; 8:45 am]

**BILLING CODE 8011–01–P**

[10] 15 U.S.C. 78q–1.

[11] 15 U.S.C. 78q–1(b)(3)(A).

[12] 15 U.S.C. 78s(b)(3)(A)(iii).

[13] 17 CFR 240.19b–4(f)(6).

[14] 17 CFR 200.30–3(a)(12).

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–62004; File No. SR–NYSEArca–2010–27]**

## Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending Its Mid-Point Passive Liquidity Order

April 29, 2010.

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 April 21, 2010, NYSE Arca, Inc. ("NYSE Arca" or the "Exchange") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I, II, and III 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 amend the operation of its Mid-Point Passive Liquidity Order ("MPL Order"). The text of the proposed rule change is available on the Exchange's Web site at *http://www.nyse.com,* at the Exchange's principal office, on the Commission's Web site at *http://www.sec.gov* 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

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

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 the Statutory Basis for, the Proposed Rule Change*

1. Purpose

Currently, pursuant to NYSE Arca Equities Rule 7.31(h)(5), when the market is locked, an MPL Order will trade at the locked price, but where the market is crossed, the MPL Order will wait for the market to uncross before becoming eligible to trade again. By this proposal, the Exchange seeks to have MPL Orders wait to execute while the market is locked, before becoming eligible to trade again when the market is no longer locked. The Exchange believes that this change, based on feedback from customers, is a minor adjustment to an existing order type.

2. Statutory Basis

The proposed rule change is consistent with Section 6(b)[4] of the Securities Exchange Act of 1934 (the "Act"), in general, and furthers the objectives of Section 6(b)(5)[5] in particular in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, and to remove impediments to and perfect the mechanism of a free and open market and a national market system. Specifically, the proposed rule change is a minor adjustment to an existing order type.

*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.

[4] 15 U.S.C. 78f(b).

[5] 15 U.S.C. 78f(b)(5).

**III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

The Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act[6] and Rule 19b–4(f)(6) thereunder.[7] Because the proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative prior to 30 days from the date on which it was filed, 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[8] and Rule 19b–4(f)(6)(iii) thereunder.[9]

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–NYSEArca–2010–27 on the subject line.

*Paper Comments*

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSEArca–2010–27. 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 Web site viewing and printing in the Commission's Public Reference Section, 100 F Street, NE., Washington, DC 20549–1090 on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing will also be available for inspection and copying at NYSE Arca's principal office and on its Internet Web site at *http://www.nyse.com.* 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–NYSEArca–2010–27 and should be submitted on or before May 27, 2010.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[10]

**Florence E. Harmon,**

*Deputy Secretary.*

[FR Doc. 2010–10599 Filed 5–5–10; 8:45 am]

**BILLING CODE 8011–01–P**

[6] 15 U.S.C. 78s(b)(3)(A)(iii).

[7] 17 CFR 240.19b–4(f)(6).

[8] 15 U.S.C. 78s(b)(3)(A).

[9] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires the Exchange to give the Commission written notice of the Exchange's 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. The Exchange has satisfied the pre-filing requirement.

[10] 17 CFR 200.30–3(a)(12).

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–62001; File No. SR–BX–2010–027]**

## Self-Regulatory Organizations; NASDAQ OMX BX, Inc.; Notice of Filing of Proposed Rule Change To Establish New Fee for TotalView Service Available to Non-Professionals and To Establish an Optional Non-Display Usage Cap for Internal Distributors of TotalView

April 29, 2010.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")[1] and Rule 19b–4 thereunder,[2]

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

notice is hereby given that on April 23, 2010, NASDAQ OMX BX, Inc. (the "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 Exchange. 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 establish a $1 per month fee for non-professional use of real-time quotation and order information from the BX Market Center quoting and trading of The NASDAQ Stock Market LLC ("Nasdaq"), The New York Stock Exchange LLC ("NYSE"), NYSE Amex LLC ("Amex") and other regional exchange-listed securities; and (ii) to approve the creation of an optional non-display usage cap of $16,000 per month for internal distributors of BX TotalView.

The text of the proposed rule change is below. Proposed new language is in italics and proposed deletions are in brackets.

* * * * *

7023. BX TotalView

(a) BX TotalView Entitlement

The BX TotalView entitlement allows a subscriber to see all individual NASDAQ OMX BX Equities System participant orders and quotes displayed in the system [as well as] the aggregate size of such orders and quotes at each price level, *and the trade data for executions that occur within* [in the execution functionality of] the NASDAQ OMX BX Equities System.

(1) Except as provided *elsewhere in this rule,* [in (a)(2)], for the BX TotalView entitlement there shall be a $20 monthly charge for each Subscriber *of BX TotalView for Nasdaq issues and a $20 monthly charge for each Subscriber of BX TotalView for NYSE and regional issues.*

(2) *As an alternative to (a)(1), a market participant may purchase an enterprise license at a rate of $16,000 per month for internal use of non-display data. The enterprise license entitles a distributor to provide BX TotalView to an unlimited number of non-display devices within its firm.*

*(3)* Free-Trial Offers

(A)–(B) No change.

(b) *Non-Professional Services*

(1) *The charge to be paid by non-professional subscribers for access to TotalView Service through an authorized vendor shall be $1.00 per interrogation device per month.*

(2) *A "non-professional" is a natural person who is neither:*

*(A) registered or qualified in any capacity with the Commission, the Commodities Futures Trading Commission, any state securities agency, any securities exchange or association, or any commodities or futures contract market or association;*

*(B) engaged as an "investment adviser" as that term is defined in Section 201(11) of the Investment Advisors Act of 1940 (whether or not registered or qualified under that Act); nor*

*(C) employed by a bank or other organization exempt from registration under federal or state securities laws to perform functions that would require registration or qualification if such functions were performed for an organization not so exempt.*

*(c)* No change.

* * * * *

**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 Exchange proposes: (i) To establish a $1 per month fee for non-professional use of real-time quotation and order information from the BX Market Center quoting and trading of Nasdaq-, NYSE-, Amex- and other regional exchange-listed securities; and (ii) to approve the creation of an optional non-display usage cap of $16,000 per month for internal distributors of BX TotalView.

*BX TotalView $1 Fee for Non-Professional Subscribers:*

The Exchange proposes to establish a new fee for its BX TotalView data product that is similar to that of Nasdaq. Like Nasdaq TotalView, BX TotalView provides all displayed quotes and orders in the market, with attribution to the relevant market participant, at every price level, as well as total displayed anonymous interest at every price level.

To encourage more competition in the trading and quoting of U.S. exchange-listed stocks, as well as to encourage subscribership to Exchange full-depth products, the Exchange is proposing Rule 7023(b) to establish a $1 per month fee for non-professional subscribers to BX TotalView.[3] BX TotalView consists of real-time market participant quotation information regarding the Exchange's trading of Nasdaq-, NYSE-, Amex- and other exchange-listed stocks.

The Commission has previously only approved a fee of $20 per month for both BX TotalView for Nasdaq and NYSE and all other regional exchange-listed issues combined. BX intended to establish these as separate fees and charged users beginning in January of 2010 a fee of $20 per month for BX TotalView and an additional fee of $20 for NYSE and all other regional exchange-listed issues. Therefore, Rule 7023(a)(1) is being amended to correct this inadvertent error since the existing rule language does not clearly establish a fee of $20 per month for BX TotalView for Nasdaq issues and a separate fee of $20 per month for BX TotalView for NYSE and all other regional exchange-listed issues, as intended. All such fees exceeding the $20 combined fee as currently stated in the rulebook are being refunded and BX will continue to assess a single $20 fee until this proposed rule change is approved. The Exchange notes that it operates in a highly competitive market in which market participants can readily switch to competing venues if they deem fee levels at a particular venue to be excessive. The Exchange believes that its fees continue to be reasonable and equitably allocated.

The Exchange believes that establishing a $1 per month fee for non-professional subscribers to BX TotalView will promote wider distribution of data and benefit investors wishing to use that data in making investment decisions. The establishment of non-professional fees is a well-established practice of the network processors that distribute real-time consolidated data for Nasdaq, NYSE, and Amex stocks. As such, non-professional fees have been determined to be consistent with the Act and also

[3] Both NYSE Arca, Inc. and the New York Stock Exchange LLC offer full-depth products. *See, e.g.,* Securities Exchange Act Release No. 53469 (March 10, 2006), 71 FR 14045 (March 20, 2006) (SR–PCX–2006–24) and Securities Exchange Act Release No. 44138 (December 7, 2001), 66 FR 64895 (December 14, 2001) (SR–NYSE–2001–42), respectively.

to be in the best interests of investors and the public.

The fees are not unreasonably discriminatory, since the fees for non-professionals are uniform for all non-professionals. The fees are fair and reasonable in that they compare favorably to fees charged by other exchanges for comparable products.

Rule 7023(a) is also being amended to clarify the data that is included in the BX TotalView Entitlement specifically includes trade data for executions that occur within the NASDAQ OMX Equities System. The data included remains consistent with what has always been included in the BX TotalView Entitlement, as well as the data included in the Nasdaq TotalView Entitlement. This revision is intended for clarification purposes only.

*BX TotalView Enterprise License:*

The Exchange is proposing to amend Exchange Rule 7023 and establish an optional $16,000 per month non-display BX TotalView fee cap for internal distributors, which would encompass both BX TotalView for Nasdaq issues and BX TotalView for NYSE and regional issues. The BX TotalView fee cap would *not* include distributor fees. By providing this non-display usage cap, firms will have more administrative flexibility in their consumption of BX TotalView information.

Currently, the Exchange requires that internal distributors count and report each server and display device that processes BX TotalView-ITCH data as a professional BX TotalView user. Some firms report upwards of 500 devices, while other firms report as few as one non-display device using BX TotalView-ITCH data.

The Exchange proposes to permit a market participant to purchase an enterprise license at a rate of $16,000 per month for non-display usage in a firm. As the number of devices increase, so does the administrative burden on the end customer of counting these devices. For firms that feel they are near the capped amount, this new enterprise license helps relieve this administrative burden. Additionally, firms would purchase this optional enterprise license to reduce fees so no firms would experience a fee increase as a result of this filing. The Exchange's filing is substantially similar to a recent Nasdaq filing.[4]

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,[5] in general, and with Sections 6(b)(4) and 6(b)(5) of the Act,[6] in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility or system which the Exchange operates or controls and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

Specifically, the BX TotalView fee for non-professional subscribers, the Exchange makes all services and products subject to these fees available on a non-discriminatory basis to similarly situated recipients. All fees are structured in manner comparable to corresponding fees of Nasdaq already in effect. The proposed fees for BX TotalView are equitably allocated since the fees for non-professionals are uniform for all non-professionals. The fees are fair and reasonable in that they compare favorably to fees charged by other exchanges for comparable products.

The Exchange proposes to increase the existing $20 combined fee for both BX TotalView for Nasdaq and NYSE and all other regional exchange-listed issues by charging two separate $20 fees per month. One $20 fee would be charged for BX TotalView for Nasdaq and the other $20 fee would be charged for NYSE and all other regional exchange-listed issues. The $20 increase per month for subscribers is modest. Additionally, the Exchange notes that it operates in a highly competitive market in which market participants can readily switch to competing venues if they deem fee levels at a particular venue to be excessive. The Exchange believes that its fees continue to be reasonable and equitably allocated.

The Exchange's competitive response to pricing pressures in a competitive marketplace is consistent with what the Commission has described as "the clear intent of Congress in adopting Section 11A of the Exchange Act that, whenever possible, competitive forces should dictate the services and practices that constitute the U.S. national market system for trading equity securities."[7] Specifically with respect to pricing of non-core data products, the Commission has stated that "[t]he Exchange Act and its legislative history strongly support the Commission's reliance on competition, whenever possible, in meeting its regulatory responsibilities."[8] A price reduction in response to competitive forces, such as the proposal here, is the essence of competition.

The Exchange believes that it is neither inequitable nor unfairly discriminatory to provide volume-based discounts to members that contribute to the success of both the transaction execution and data businesses, in light of the link between these businesses that the Commission has recognized. In doing so, the Exchange not only acknowledges the multiple contributions of such customers to its profitability and the value it provides to other customers, but also provides incentives for other firms to increase their use of the Exchange's services across these business lines.

Discounts based on a member's aggregate volumes of usage have routinely been adopted by exchanges (and by participants in many other industries), even though a member that reduces its volumes by trading in other markets may no longer qualify for the discount. For example, Nasdaq has volume pricing discounts for transaction executions and data currently in effect under Rules 7018 and 7023. A member that opts to provide high volumes of liquidity and distribute TotalView to large numbers of subscribers under an enterprise license currently receives favorable pricing for both executions and data, based on the aggregate volume of business that it brings to the exchange. If the member opts to direct order flow to another exchange or distribute other data products in lieu of TotalView, the discount will no longer be available—not because the member is being penalized, but simply because its consumption of products has dropped to a level that no longer justifies discounted pricing.

As the Commission has found, market data and execution services are effectively a joint product—one in which market data is both an input to, and a byproduct of, trade execution.[9] Accordingly, the Exchange believes that it is entirely appropriate that the benefits to the Exchange when a member provides liquidity and consumes and distributes data should be shared with the customers that provide those benefits. Notably, the Act does not prohibit all distinctions among customers, but rather discrimination that is unfair. And, as the Commission has recognized, "[i]f competitive forces are operative, the self-interest of the exchanges themselves will work powerfully to constrain unreasonable or

[4] *See* Securities Exchange Act Release No. 61700 (March 12, 2010), 75 FR 13172 (March 18, 2010) (SR–NASDAQ–2010–034).

[5] 15 U.S.C. 78f.

[6] 15 U.S.C. 78f(b)(4), (5).

[7] Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770 (December 9, 2008) (SR–NYSEArca-2006–21).

[8] *Id.*

[9] *Id.*

unfair behavior." [10] Accordingly, "the existence of significant competition provides a substantial basis for finding that the terms of an exchange's fee proposal are equitable, fair, reasonable, and not unreasonably or unfairly discriminatory." [11] The proposal here was made not only in the presence of competition, but it is a direct product of competitive forces.

*B. Self-Regulatory Organization's Statement on Burden on Competition*

The Exchange does not believe that the proposed rule change will result in any burden on competition. To the contrary, the Exchange's proposed price reduction in response to competitive pricing offers is the essence of competition. As the Supreme Court has recognized, "cutting prices in order to increase business often is the very essence of competition." *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.,* 475 U.S. 574, 594 (1986).

If competitors lose business to the Exchange because the Exchange offers more attractive pricing, that is not a reduction of competition. Rather, it is a result of competition. As the Supreme Court has recognized:

> When a firm * * * lowers prices but maintains them above predatory levels, the business lost by rivals cannot be viewed as an "anticompetitive" consequence of the claimed violation. A firm complaining about the harm it suffers from nonpredatory price competition "is really claiming that it [is] unable to raise prices." This is not *antitrust* injury; indeed, "cutting prices in order to increase business often is the very essence of competition." The antitrust laws were enacted for "the protection of *competition,* not *competitors.*"

*Atlantic Richfield Co.* v. *USA Petroleum Co.,* 495 U.S. 328, 337–38 (1990) (emphasis in original; citations omitted).

Likewise with respect to the Exchange Act, Congress has "expressed its preference for the Commission to rely on competition" with respect to market information.[12] Accordingly, in circumstances analogous to those here, the Commission has stated that "reliance on competitive forces is the most appropriate and effective means to assess whether terms for the distribution of non-core data are equitable, fair and reasonable, and not unreasonably discriminatory. If competitive forces are operative, the self-interest of the exchanges themselves will work powerfully to constrain unreasonable or unfair behavior." [13]

As the Commission recently recognized,[14] the market for transaction execution and routing services is highly competitive, and the market for proprietary data products is complementary to it, since the ultimate goal of such products is to attract further order flow to an exchange. Thus, exchanges lack the ability to set fees for executions or data at inappropriately high levels. Order flow is immediately transportable to other venues in response to differences in cost or value. Similarly, if data fees are set at inappropriate levels, customers that control order flow will not make use of the data and will be more inclined to send order flow to exchanges providing data at fees they consider more reasonable.

The market for proprietary data products is currently competitive and inherently contestable because there is fierce competition for the inputs necessary to the creation of proprietary data and strict pricing discipline for the proprietary products themselves. Numerous exchanges compete with each other for listings, trades, and market data itself, providing virtually limitless opportunities for entrepreneurs who wish to produce and distribute their own market data. This proprietary data is produced by each individual exchange, as well as other entities, in a vigorously competitive market.

With regard to the market for executions, broker-dealers currently have numerous alternative venues for their order flow, including multiple competing self-regulatory organization ("SRO") markets, as well as broker-dealers ("BDs") and aggregators such as the Direct Edge and LavaFlow electronic communications networks ("ECNs"). Each SRO market competes to produce transaction reports via trade executions, and FINRA-regulated Trade Reporting Facilities ("TRFs") compete to attract internalized transaction reports. It is common for BDs to further and exploit this competition by sending their order flow and transaction reports to multiple markets, rather than providing them all to a single market.

Competitive markets for order flow, executions, and transaction reports provide pricing discipline for the inputs of proprietary data products. The large number of SROs, TRFs, and ECNs that currently produce proprietary data or are currently capable of producing it provides further pricing discipline for proprietary data products. Each SRO, TRF, ECN and BD is currently permitted to produce proprietary data products, and many currently do or have announced plans to do so, including NASDAQ, NYSE, NYSEArca, BATS, and Direct Edge.

Any ECN or BD can combine with any other ECN, broker-dealer, or multiple ECNs or BDs to produce jointly proprietary data products. Additionally, non-BDs such as order routers like LAVA, as well as market data vendors can facilitate single or multiple broker-dealers' production of proprietary data products. The potential sources of proprietary products are virtually limitless.

The fact that proprietary data from ECNs, BDs, and vendors can by-pass SROs is significant in two respects. First, non-SROs can compete directly with SROs for the production and distribution of proprietary data products, as Archipelago and BATS

Trading did prior to registering as SROs. Second, because a single order or transaction report can appear in an SRO proprietary product, a non-SRO proprietary product, or both, the data available in proprietary products is exponentially greater than the actual number of orders and transaction reports that exist in the marketplace writ large.

Market data vendors provide another form of price discipline for proprietary data products because they control the primary means of access to end users. Although their business models may differ, vendors exercise pricing discipline because they can simply refuse to purchase any proprietary data product that fails to provide sufficient value. The Exchange and other producers of proprietary data products must understand and respond to these varying business models and pricing disciplines in order to successfully market proprietary data products.

In addition to the competition and price discipline described above, the market for proprietary data products is also highly contestable because market entry is rapid, inexpensive, and profitable. The history of electronic trading is replete with examples of entrants that swiftly grew into some of the largest electronic trading platforms and proprietary data producers: Archipelago, Bloomberg Tradebook, Island, RediBook, Attain, TracECN, BATS Trading, and Direct Edge. Today, BATS publishes its data at no charge on its website in order to attract order flow, and it uses market data revenue rebates from the resulting executions to maintain low execution charges for its users.[15] Several ECNs have existed

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] However, on April 9, 2010 the Commission approved BATS proposed rule change to begin

Continued

profitably for many years with a minimal share of trading, including Bloomberg Tradebook and LavaFlow.

The proposed rule change is a direct response to this competition. It recognizes the concern that the order flow and data product use that such firms currently bring to the Exchange may migrate elsewhere if their contributions are not appropriately recognized. At the same time, if other customers determine that their fees are too high in comparison to those paid by firms qualifying for the discount, they will take their business to other venues. Thus, the proposal must strike a balance between growing and retaining the business of actual and potential firms and the business of firms that lack the volume of business to become eligible. In light of the highly competitive nature of these markets, the Exchange's revenues and market share are likely to be diminished by the proposal if it strikes this balance in the wrong way.[16]

Finally, the concern identified by the Commission with respect to "an exchange proposal that seeks to penalize market participants for trading in markets other than the proposing exchange" is inapplicable here.[17] It is important that the Commission avoid stifling competition on the merits—including competition on price—out of a concern for protecting competitors from pricing pressure. Indeed, the Supreme Court has cautioned that "mistaken inferences in cases" involving alleged harm to competitors from low prices "are especially costly, because they chill the very conduct the antitrust laws are designed to protect." *Matsushita,* 475 U.S. at 594.

A concern that access to market data could be used to "penalize" market participants for trading in other markets may be plausible only if (a) the market data of the exchange in question is so essential to customers that the exchange has market power by virtue of the data, (b) the exchange requires customers to trade on its platform in exchange for access to the market data, and (c) competition on the merits is thwarted by the conditioning. None of those conditions is met here. As noted above, there is robust competition for market data, and customers can and do switch among various providers of market data. It would thus be implausible to suggest that the Exchange has any market power by virtue of its market data. Second, the Exchange has not attempted to condition access to market data on a customer's refusal to use a competitor's platform. Nor has the Exchange attempted to impose a "penalty" on anyone—to the contrary, it is proposing a price reduction to respond to competitive offers. And, as noted above, the price reduction proposed here is the essence of competition, rather than an effort to thwart competition on the merits.

*C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others*

Written comments were neither solicited nor received.

## III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

A. By order approve such proposed rule change, or

B. Institute proceedings to determine whether the proposed rule change should be disapproved.

## IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change 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–BX–2010–027 on the subject line.

*Paper Comments*

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–BX–2010–027. 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 Web site viewing and printing 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–BX–2010–027 and should be submitted on or before May 27, 2010.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[18]

**Florence E. Harmon,**

*Deputy Secretary.*

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**BILLING CODE 8011–01–P**

offering and charging for three new data products, which include BATS Last Sale Feed, BATS Historical Data Products, and a data product called BATS Market Insight. *See* Securities Exchange Act Release No.61885 (April 9, 2010), 75 FR 20018 (April 16, 2010).

[16] The Commission has recognized that an exchange's failure to strike this balance correctly will only harm the exchange. "[M]any market participants would be unlikely to purchase the exchange's data products if it sets fees that are inequitable, unfair, unreasonable, or unreasonably discriminatory * * *. For example, an exchange's attempt to impose unreasonably or unfairly discriminatory fees on a certain category of customers would likely be counter-productive for the exchange because, in a competitive environment, such customers generally would be able to respond by using alternatives to the exchanges data." *Id.*

[17] *Id.*

[18] 17 CFR 200.30–3(a)(12).

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–62006; File No. SR–NYSEArca–2010–36]**

## Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by NYSE Arca, Inc. To Make a Technical Adjustment to Its Rules To Allow Sub-Penny Quoting of Certain Securities

April 29, 2010.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act")[1] and Rule 19b–4 thereunder,[2] notice is hereby given that, on April 23, 2010, NYSE Arca, Inc. ("NYSE Arca" 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 Exchange. 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 make a technical adjustment to its rules to allow sub-penny quoting of certain securities priced less than $1.00. The text of the proposed rule change is available on the Exchange's Web site at *http://www.nyse.com,* at the Exchange's principal office, on the Commission's Web site at *http://www.sec.gov,* 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 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 the Statutory Basis for, the Proposed Rule Change*

1. Purpose

The Exchange proposes to make a technical adjustment its rules to allow sub-penny quoting of Investment Company Units, Portfolio Depositary Receipts, and Managed Fund Shares. Currently, NYSE Arca Equities Rule 5.2(j)(3) Commentaries .01(e) and .02(e), NYSE Arca Equities Rule 7.6 Commentary .03, Rule 8.100 Commentaries .01(e) and .02(e), and NYSE Arca Equities Rule 8.600 Commentary .03 restrict the minimum price variation for quoting and order entry to $0.01. Consistent with Regulation NMS Rule 612, the Exchange proposes to remove these provisions to allow these securities to be quoted in a minimum pricing increment of $0.0001 for securities priced less than $1.00. The Exchange notes that it has not had any of the aforementioned securities quote below a dollar nor does it anticipate such an occurrence in the reasonably foreseeable future. The Exchange simply seeks to harmonize the minimum price variation in the aforementioned products with all other equity securities traded on the Exchange.

Moreover, the Exchange notes that this approach is substantially similar to BATS Rule 11.11 and Nasdaq Rule 4613(a)(1)(B).

2. Statutory Basis

The proposed rule change is consistent with Section 6(b)[3] of the Securities Exchange Act of 1934 (the "Exchange Act"), in general, and furthers the objectives of Section 6(b)(5)[4] in particular in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, and to remove impediments to and perfect the mechanism of a free and open market and a national market system. The Exchange believes that the proposed amendment is consistent with the goal of removing impediments to a free and open market because the changes proposed herein will substantially harmonize NYSE Arca's sub-penny quoting policy with Rule 612 of Regulation NMS which allows a minimum pricing increment of $0.0001 for securities priced less than $1.00.

*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 proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, 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[5] and Rule 19b–4(f)(6) thereunder.[6]

The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest, because the proposal is consistent with Rule 612 of Regulation NMS and the rules of other self-regulatory organizations previously approved by the Commission.[7] For these reasons, the Commission designates the proposed rule change as operative upon filing.[8]

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

[1] 15 U.S.C.78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78f(b).

[4] 15 U.S.C. 78f(b)(5).

[5] 15 U.S.C. 78s(b)(3)(A).

[6] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6) requires the Exchange to give the Commission written notice of the Exchange's 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. The Exchange has satisfied the pre-filing requirement.

[7] *See* BATS Rule 11.11 and Nasdaq Rule 4613(a)(1)(B).

[8] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

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–NYSEArca–2010–36 on the subject line.

*Paper Comments*

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSEArca–2010–36. 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 Web site viewing and printing 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–NYSEArca–2010–36 and should be submitted on or before May 27, 2010.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[9]

**Florence E. Harmon,**

*Deputy Secretary.*

[FR Doc. 2010–10600 Filed 5–5–10; 8:45 am]

**BILLING CODE 8011–01–P**

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–61997; File No. SR–FINRA–2010–017]**

## Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Allow FINRA Members To Use the OTC Reporting Facility To Transfer Transaction Fees Charged by One Member to Another Member

April 28, 2010.

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 April 12, 2010, the Financial Industry Regulatory Authority, Inc. ("FINRA") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by FINRA. FINRA has designated the proposed rule change as constituting a "non-controversial" rule change under Section 19(b)(3)(A) of the Act[3] and Rule 19b–4(f)(6) thereunder,[4] which renders the proposal effective upon receipt of this filing by the Commission. Additionally, FINRA has designated the proposed rule change as "establishing or changing a due, fee or other charge" under Section 19(b)(3)(A) of the Act[5] and Rule 19b–4(f)(2) thereunder,[6] which renders the proposal effective upon receipt of this filing by the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

**I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change**

FINRA is proposing to (1) adopt FINRA Rule 7330(i) to permit FINRA members to use the OTC Reporting Facility (the "ORF") to transfer transaction fees charged by one member to another member on trades reported to the ORF; and (2) amend FINRA Rule 7710 to establish the fee to be charged by the ORF for use of the transaction fee transfer service.

The text of the proposed rule change is available on FINRA's Web site at *http://www.finra.org,* on the Commission's Web site at *http://www.sec.gov,* at the principal office of FINRA 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, FINRA 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. FINRA 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

*Background:*

Rule 7230A(h) permits FINRA members to agree in advance to transfer a transaction fee charged by one member to another member on a transaction in NMS stocks effected otherwise than on an exchange through the submission of a clearing report to the FINRA/Nasdaq Trade Reporting Facility ("FINRA/Nasdaq TRF"). Prior to the adoption of Rule 7230A(h) in 2007,[7] there was no mechanism for members to charge each other commissions or other explicit transaction fees through the FINRA trade reporting and clearance submission process. Generally, members wanting to charge other members an explicit transaction fee either billed and collected those fees directly from the other member outside the transaction reporting and clearing process or traded on a "net" basis.[8] Rule 7230A(h)

[9] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A).

[4] 17 CFR 240.19b–4(f)(6).

[5] 15 U.S.C. 78s(b)(3)(A).

[6] 17 CFR 240.19b–4(f)(2).

[7] *See* Securities Exchange Act Release No. 56007 (July 3, 2007), 72 FR 37807 (July 11, 2007) (Notice of Filing and Immediate Effectiveness of File No. SR–NASD–2007–046). SR–NASD–2007–046 proposed to adopt paragraph (h) of NASD Rule 6130. Pursuant to SR–FINRA–2008–021, NASD Rule 6130 was renumbered as FINRA Rule 7230A. *See* Securities Exchange Act Release No. 58643 (September 25, 2008), 73 FR 57174 (October 1, 2008) (Order Approving File No. SR–FINRA–2008–021).

[8] Trading on a "net basis" means that the broker-dealer's compensation is implicitly included in the execution price disseminated to the tape and reported for clearance and settlement to the

provides members with another alternative by permitting the transfer of a transaction fee as part of a clearing report submitted to the FINRA/Nasdaq TRF.

*Proposed Amendments Relating to Transfer of Transaction Fees in Clearing Reports Submitted to the ORF:*

The proposed rule change would adopt a provision identical to Rule 7230A(h) for purposes of transferring transaction fees between members as part of a clearing report submitted to the ORF. Specifically, pursuant to proposed Rule 7330(i), members would be required to provide in reports submitted to the ORF, in addition to all other information required to be submitted by any other rule, a total per share or contract price amount, inclusive of the transaction fee. As a result, members would submit two price amounts as part of their report to the ORF: one price including the transaction fee, which would be submitted by the ORF to NSCC for clearance and settlement; and one price exclusive of the transaction fee, which would be publicly disseminated. For example, if B/D 1 purchases from B/D 2 at $10.00 and B/D 1 and B/D 2 agree to a transaction fee of $.001 per share, the trade price that would be publicly disseminated would be $10.00, while the trade would be cleared and settled by NSCC at $10.001.[9] The parties to the trade would know both prices—the price reported for public dissemination and the clearance/settlement price.

Proposed Rule 7330(i) provides that both members and their respective clearing firms, as applicable, must execute an agreement, as specified by FINRA, permitting the facilitation of the transfer of the transaction fee through the ORF, as well as any other applicable agreement, such as a give up agreement.[10] Such agreement must be executed and submitted to the ORF before the members can transfer any transaction fee under the proposed rule. Among other things, the form of agreement specified by FINRA would expressly provide that the acceptance and processing by the ORF of the transaction fee as part of a trade report shall not constitute an estoppel as to FINRA or bind FINRA in any subsequent administrative, civil or disciplinary proceeding with respect to the transaction fee transferred. In other words, processing of a transaction fee by the ORF should not be taken to mean that FINRA approved that transaction fee or its amount or its appropriateness under FINRA rules or federal securities laws. The mere fact that the transaction fee flowed through a FINRA facility will not be a defense to any action taken by FINRA relating to the fee. The proposed rule also provides that the relevant agreements are considered member records for purposes of NASD Rule 3110(a) and must be made and preserved by both members in conformity with applicable FINRA rules.

Furthermore, the proposed rule expressly provides that it shall not relieve a member from its obligations under FINRA rules and federal securities laws, including but not limited to, NASD Rule 2230 (Confirmations) and SEA Rule 10b–10. To the extent that any transaction fee is passed onto the customer, members should review their customer confirmation obligations to ensure that they are disclosing such fees in compliance with all applicable rules and regulations, as well as other FINRA rules, including but not limited to, NASD Rules 2320 (Best Execution and Interpositioning) and 2440 (Fair Prices and Commissions).

The proposed rule relates solely to transaction fees charged by one FINRA member to another FINRA member. Members would not be able to use the ORF to facilitate the transfer of fees for transactions with a customer (*i.e.,* clients that are not brokers or dealers) or a non-member. In addition, the ORF can only be used to facilitate the transfer of transaction fees. Members would not be able to use the ORF to transfer access fees or rebates on transactions.

FINRA also is proposing to amend Rule 7330(d) to require that for any transaction for which the ORF is used to transfer a transaction fee between two members, the trade report must comply with the requirements of proposed Rule 7330(i). Thus, while use of the ORF to transfer transaction fees between members is voluntary, members that opt to use this service must comply with the requirements of proposed Rule 7330(i), as well as all other applicable FINRA rules.

*Proposed Fee for Use of Transaction Fee Transfer Service:*

In this filing, FINRA also is proposing to establish the fee to be charged by the ORF for use by members of the transaction fee transfer service. Pursuant to Rule 7710, the fee will be $0.03 per side for each clearing report submitted to the ORF to transfer a transaction fee. This fee is in addition to any other fee applicable to the transaction. The amount of this fee is identical to the fee charged by the FINRA/Nasdaq TRF under Rule 7620A for the same transaction fee transfer service.

FINRA has filed the proposed rule change for immediate effectiveness. The operative date will be June 1, 2010.

2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,[11] which requires, among other things, that FINRA rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. FINRA believes that by automating and improving transaction fee transfers between members as a value-added service, the proposed rule change will enhance market transparency.

Additionally, FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(5) of the Act,[12] which requires, among other things, that FINRA rules provide for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility or system that FINRA operates or controls. FINRA believes that the proposed fee for the service is reasonably allocated among members based on their usage of the functionality to transfer transaction fees between members and is generally consistent with other fees charged by the ORF and other FINRA trade reporting facilities.

*B. Self-Regulatory Organization's Statement on Burden on Competition*

FINRA does not believe that the proposed rule change will result in any burden on competition that is not

National Securities Clearing Corporation ("NSCC"). For example, broker-dealer 1 (B/D 1) purchases a security at $10 and sells the security to broker-dealer 2 (B/D 2) "net" at a price of $10.001. Because $10.001 is the reported trade price, the transaction fee is included as part of the trade and is transferred as part of the clearance and settlement process.

[9] If the parties were trading on a net basis with the fee incorporated in the trade price, the transaction at a price of $10.001 would be reported to the tape and also submitted to NSCC.

[10] FINRA also is proposing to adopt paragraph (h) of Rule 6622, which would provide expressly that members may enter into "give up" arrangements whereby one member reports to the ORF on behalf of another member, provided that both members have executed and submitted to the ORF the appropriate documentation. The proposed provision is identical to the current rules relating to the FINRA/Nasdaq Trade Reporting Facility and the FINRA/NYSE Trade Reporting Facility and codifies current practice and guidance with respect to reporting to the FINRA Facilities. *See* Rules 6380A(h) and 6380B(g); *Member Alert: Notice to All TRF, ADF and Other NASD Facility Participants Regarding AGU and QSR Relationships* (January 25, 2007).

[11] 15 U.S.C. 78*o*–3(b)(6).

[12] 15 U.S.C. 78*o*–3(b)(5).

necessary or appropriate in furtherance of the purposes of the Act.

*C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others*

Written comments were neither solicited nor received.

**I. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act [13] and Rule 19b–4(f)(6) thereunder.[14] Additionally, the foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act [15] and paragraph (f)(2) of Rule 19b–4 thereunder.[16]

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.

**II. 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–FINRA–2010–017 on the subject line.

*Paper Comments*

• Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–FINRA–2010–017. 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 Web site viewing and printing 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 FINRA. 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–FINRA–2010–017 and should be submitted on or before May 27, 2010.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[17]

**Florence E. Harmon,**

*Deputy Secretary.*

[FR Doc. 2010–10594 Filed 5–5–10; 8:45 am]

**BILLING CODE 8011–01–P**

[13] 15 U.S.C. 78s(b)(3)(A).

[14] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires the Exchange to give the Commission written notice of the Exchange's intent to file the proposed rule change, along with a brief description and the 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. The Exchange has satisfied the pre-filing requirement.

[15] 15 U.S.C. 78s(b)(3)(A).

[16] 17 CFR 240.19b–4(f)(2).

[17] 17 CFR 200.30–3(a)(12).

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–61994; File No. SR–Phlx-2010–58]**

## Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by NASDAQ OMX PHLX, Inc. To Amend the By-Laws of The NASDAQ OMX Group, Inc.

April 27, 2010.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act") [1], and Rule 19b–4 [2] thereunder, notice is hereby given that on April 9, 2010, NASDAQ OMX PHLX, Inc. ("Phlx" or "Exchange") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

**I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change**

The Exchange proposes to file a proposed rule change relating to the By-Laws of its parent corporation, The NASDAQ OMX Group, Inc. ("NASDAQ OMX"). The text of the proposed rule change is available on the Exchange's Web site at *http://www.nasdaqtrader.com/micro.aspx?id=PHLXRulefilings,* at the principal office of the Exchange, on the Commission's Web site at *http://www.sec.gov,* and at the Commission's Public Reference Room.

**II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change**

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. 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

NASDAQ OMX has proposed making certain amendments to its By-Laws to make improvements in its governance. In SR–NASDAQ–2010–025, The NASDAQ Stock Market LLC ("NASDAQ Exchange") sought Commission approval to adopt these By-Laws changes as part of the rules of NASDAQ Exchange, and the Commission granted approval to these changes in an order dated April 8, 2010.[3] The Exchange is

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 61876 (April 8, 2010), 75 FR 19436 (April 14, 2010) (SR–NASDAQ–2010–025).

now submitting this filing on an immediately effective basis to adopt the same By-Law changes as rules of the Exchange.

The NASDAQ OMX By-Laws previously provided that each director receiving a plurality of the votes at any election of directors at which a quorum is present is duly elected to the Board. Under Corporate Governance Guidelines adopted by the Board, however, any director in an uncontested election who received a greater number of votes "withheld" from his or her election than votes "for" such election was required to tender his or her resignation promptly following receipt of the certification of the stockholder vote. The NASDAQ OMX Nominating & Governance Committee then considered the resignation offer and recommended to the Board whether to accept it. Within 90 days after the certification of the election results, the Board determined whether to accept or reject the resignation. Promptly thereafter, the Board announced its decision by means of a press release. In a contested election (i.e., where the number of nominees exceeds the number of directors to be elected), the unqualified plurality standard controls.

*Uncontested Election:*

NASDAQ OMX recently amended its By-Laws to adopt a majority vote standard, specifically By-Law Article IV, Section 4.4 of the By-Laws was amended to provide that, in an uncontested election, directors shall be elected by holders of a majority of the votes cast at any meeting for the election of directors at which a quorum is present.[4] Under the majority voting standard, a nominee who fails to receive the requisite vote will not be duly elected to the Board. The By-Laws require that any incumbent nominee, as a condition to his or her nomination for election, must submit in writing an irrevocable resignation, the effectiveness of which is conditioned upon the director's failure to receive the requisite vote in any uncontested election and the Board's acceptance of the resignation. The resignation will be considered by the Nominating & Governance Committee and acted upon by the Board in the same manner described above.[5] Acceptance of that resignation by the Board shall be in accordance with the policies and procedures adopted by the Board for such purpose. NASDAQ OMX specifies its policies and procedures pertaining to the election of its directors in its By-Laws. Specifically, the policies and procedures for the acceptance of the resignation of a director, by the Board, are proposed to be specified in By-Law Article IV, Section 4.4. There are no additional policies and procedures other than what is indicated in the By-Laws. In the event that NASDAQ OMX proposes to further amend its By-Laws with respect to the election of directors, including the adoption of any policies and procedures with respect to such election, NASDAQ OMX shall file a proposed rule change with the Commission to seek approval of those amendments.

*Contested Election:*

NASDAQ OMX codified its process for a contested election. The directors will continue to be elected by a plurality vote in a contested election. There is no change to the process for contested elections because if a majority voting standard were to apply in a contested election, the likelihood of a "failed election" (*i.e.,* a situation in which no director receives the requisite vote) would be more pronounced. Moreover, the rationale underpinning the majority voting policy does not apply in contested elections where stockholders are offered a choice among competing candidates. Directors are elected by a plurality of votes present in person or represented by proxy at a meeting. The directors who receive the greatest number of votes cast for election of directors at the meeting will be elected.

*General Election Requirements:*

The following applies to elections of directors and were not amended. Each share of common stock has one vote,[6] subject to the voting limitation in NASDAQ OMX's certificate of incorporation that generally prohibits a holder from voting in excess of 5% of the total voting power of NASDAQ OMX.[7] In addition, each note holder is entitled to the number of votes equal to the number of shares of common stock into which such note could be converted on the record date, subject to the 5% voting limitation contained in the certificate of incorporation.

The presence of owners of a majority (greater than 50%) of the votes entitled to be cast by holder of NASDAQ OMX voting securities constitutes a quorum. Presence may be in person or by proxy. Any securities not voted, by abstention, will not impact the vote.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,[8] in general, and with Sections 6(b)(1) and (b)(5) of the Act,[9] in particular, in that the proposal enables the Exchange to be so organized as to have the capacity to be able to carry out the purposes of the Act and to comply with and enforce compliance by members and persons associated with members with provisions of the Act, the rules and regulations thereunder, and self-regulatory organization rules, and is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. The proposed amendments adopting a majority vote standard would enable the directors to be elected in a manner reflective of the desires of shareholders and provide a mechanism to protect against the election of directors by less than a majority vote of the shareholders.

*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 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 either solicited or received.

**III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days after the date of the filing, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, it has become effective pursuant to 19(b)(3)(A)

[4] NASDAQ OMX also amended its Corporate Governance Guidelines to reflect the majority vote standard for uncontested director elections.

[5] *See* NASDAQ OMX By-Law Article IV, Section 4.5.

[6] *See* NASDAQ OMX Certificate of Incorporation at Article IV, C.1(a).

[7] *See* NASDAQ OMX Certificate of Incorporation at Article IV, C.1(b)2.

[8] 15 U.S.C. 78f.

[9] 15 U.S.C. 78f(b)(2)[sic], (5).

of the Act [10] and Rule 19b–4(f)(6) [11] thereunder.

The Exchange has noted that the proposed rule change is identical to a proposed rule change recently approved by the Commission with respect to the NASDAQ Exchange [12] and has requested that the Commission waive the 30-day operative delay to ensure that NASDAQ OMX is able to implement the proposed rule change without undue delay. The Commission has determined that waiving the 30-day operative delay is consistent with the protection of investors and the public interest because such waiver will enable NASDAQ OMX to implement the proposed rule change without undue delay in a manner consistent with a proposed rule change previously approved by the Commission.[13] Therefore, the Commission designates the proposal operative upon filing.[14]

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–Phlx–2010–58 on the subject line.

*Paper Comments*

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–Phlx–2010–58. 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 Web site viewing and printing 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–Phlx–2010–58 and should be submitted on or before May 27, 2010.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[15]

**Florence E. Harmon,**

*Deputy Secretary.*

[FR Doc. 2010–10593 Filed 5–5–10; 8:45 am]

**BILLING CODE 8011–01–P**

[10] 15 U.S.C. 78s(b)(3)(A).

[11] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file 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. The Exchange has satisfied this requirement.

[12] *See* Securities Exchange Act Release No. 61876 (April 8, 2010), 75 FR 19436 (April 14, 2010) (SR–NASDAQ–2010–025).

[13] *Id.*

[14] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[15] 17 CFR 200.30–3(a)(12).

## DEPARTMENT OF STATE

**[Public Notice: 6989]**

### 30-Day Notice of Proposed Information Collection: DS–5501, Electronic Diversity Visa Entry Form, OMB Control Number 1405–0153

**ACTION:** Notice of request for public comment and submission to OMB of proposed collection of information.

**SUMMARY:** The Department of State has submitted the following information collection request to the Office of Management and Budget (OMB) for approval in accordance with the Paperwork Reduction Act of 1995.

- *Title of Information Collection:* Electronic Diversity Visa Entry Form.
- *OMB Control Number:* 1405–0153.
- *Type of Request:* Extension of Currently Approved Collection.
- *Originating Office:* Bureau of Consular Affairs, Office of Visa Services (CA/VO).
- *Form Number:* DS–5501.
- *Respondents:* Aliens entering the Diversity Visa Lottery.
- *Estimated Number of Respondents:* 6,000,000.
- *Estimated Number of Responses:* 6,000,000.
- *Average Hours Per Response:* 30 minutes.
- *Total Estimated Burden:* 3,000,000 hours.
- *Frequency:* Once per entry.
- *Obligation to Respond:* Required to Obtain Benefits.

**DATES:** Submit comments to the Office of Management and Budget (OMB) for up to 30 days from May 6, 2010.

**ADDRESSES:** Direct comments to the Department of State Desk Officer in the Office of Information and Regulatory Affairs at the Office of Management and Budget (OMB). You may submit comments by the following methods:

- *E-mail: oira_submission@omb.eop.gov.* You must include the DS form number, information collection title, and OMB control number in the subject line of your message.
- *Fax:* 202–395–5806. Attention: Desk Officer for Department of State.

**FOR FURTHER INFORMATION CONTACT:** You may obtain copies of the proposed information collection and supporting documents from Stefanie Claus, of the Office of Visa Services, U.S. Department of State, 2401 E. Street, NW., L–603, Washington, DC 20522, who may be reached on 202–663–2910.

**SUPPLEMENTARY INFORMATION:** We are soliciting public comments to permit the Department to:

- Evaluate whether the proposed information collection is necessary to properly perform our functions.
- Evaluate the accuracy of our estimate of the burden of the proposed collection, including the validity of the methodology and assumptions used.
- Enhance the quality, utility, and clarity of the information to be collected.
- Minimize the reporting burden on those who are to respond,

*Abstract of proposed collection:*

The Department of State utilizes the Electronic Diversity Visa Lottery (EDV) Entry Form to elicit information

necessary to ascertain the applicability of the legal provisions of the diversity program. Primary requirements are that the applicant is from a low admission country, is a high school graduate, or has two years of experience in a job that requires two years of training. The individuals complete the electronic entry forms and then applications are randomly selected for participation in the program.

*Methodology:*

The EDV Entry Form is available online at *http://www.dvlottery.state.gov* and can only be submitted electronically during the annual registration period.

Dated: April 19, 2010.

**Edward J. Ramotowski,**

*Deputy Assistant Secretary, Acting Bureau of Consular Affairs, Department of State.*

[FR Doc. 2010–10710 Filed 5–5–10; 8:45 am]

**BILLING CODE 4710–06–P**

## DEPARTMENT OF STATE

**[Public Notice: 6988]**

### 60–Day Notice of Proposed Information Collection: Exchange Programs Alumni Web Site Registration, DS–7006

**ACTION:** Notice of request for public comments.

**SUMMARY:** The Department of State is seeking Office of Management and Budget (OMB) approval for the information collection described below. The purpose of this notice is to allow 60 days for public comment in the **Federal Register** preceding submission to OMB. We are conducting this process in accordance with the Paperwork Reduction Act of 1995.

- *Title of Information Collection:* Exchange Programs Alumni Web site Registration.
- *OMB Control Number:* None.
- *Type of Request:* Existing collection in use without OMB control number.
- *Originating Office:* Bureau of Educational and Cultural Affairs, ECA–IIP/EX.
- *Form Number:* DS–7006.
- *Respondents:* Exchange program alumni and current participants of U.S. government-sponsored exchange programs, Americans who hosted or programmed an exchange participant, or employees of a program agency administering an exchange program.
- *Estimated Number of Respondents:* 15,000.
- *Estimated Number of Responses:* 15,000.
- *Average Hours Per Response:* 10 minutes.
- *Total Estimated Burden:* 2,500 hours.
- *Frequency:* One-time per registrant.
- *Obligation to Respond:* Required to Obtain or Retain a Benefit.

**DATES:** The Department will accept comments from the public up to 60 days from May 6, 2010.

**ADDRESSES:** You may submit comments by any of the following methods:

- E-mail: *quizonmd@state.gov.*
- *Mail (paper, disk, or CD–ROM submissions):*

Bureau of Educational and Cultural Affairs; U.S. Department of State; SA–5, Room 4–V01; Washington, DC 20522–0504

You must include the DS form number (if applicable), information collection title, and OMB control number in any correspondence.

**FOR FURTHER INFORMATION CONTACT:** Direct requests for additional information regarding the collection listed in this notice, including requests for copies of the proposed information collection and supporting documents, to Michael Quizon, Program Analyst, ECA–IIP/EX; State Department; SA–5, Room 4–V01; Washington, DC 20522–0504; 202–632–3357; *quizonmd@state.gov.*

**SUPPLEMENTARY INFORMATION:** We are soliciting public comments to permit the Department to:

- Evaluate whether the proposed information collection is necessary for the proper performance of our functions.
- Evaluate the accuracy of our estimate of the burden of the proposed collection, including the validity of the methodology and assumptions used.
- Enhance the quality, utility, and clarity of the information to be collected.
- Minimize the reporting burden on those who are to respond, including the use of automated collection techniques or other forms of technology.

*Abstract of proposed collection:*

The State Alumni Web site requires information to process users' voluntary request for participation in the State Alumni Web site. Other than contact information, which is required for Web site registration, all other information is provided on a voluntary basis. Participants also have the option of restricting access to their information.

Respondents to this registration form include: U.S. government-sponsored exchange program participants and alumni, hosts, and guests. Alumni Affairs collects data from users to not only verify their status or participation in a program, but to also connect alumni with other alumni and aid embassy staff in their alumni outreach.

*Methodology:*

Information provided for registration is collected electronically via the Alumni Web site, *alumni.state.gov.*

*Additional Information:*

The registration form is dynamic, presenting certain questions according to the user type. State Alumni is also a secure, encrypted Web site.

Dated: January 25, 2010.

**Leslie High,**

*Acting Director, Office of Policy and Evaluation, Bureau of Educational and Cultural Affairs, U.S. Department of State.*

**Editorial Note:** This document was received in the Office of the Federal Register on Monday May 3, 2010.

[FR Doc. 2010–10719 Filed 5–5–10; 8:45 am]

**BILLING CODE 4710–05–P**

## DEPARTMENT OF STATE

**[Public Notice 6985]**

### Bureau of Educational and Cultural Affairs (ECA) Request for Grant Proposals: U.S. Professional Development Program for EducationUSA Advisers

*Announcement Type:* New Cooperative Agreement.

*Funding Opportunity Number:* ECA/A/S/A–11–05.

*Catalog of Federal Domestic Assistance Number:* 19.432.

*Key Dates:* October 1, 2010 to December 31, 2011.

*Application Deadline:* Wednesday, July 7, 2010.

*Executive Summary:* The Educational Information and Resources Branch of the Office of Global Educational Programs in the Bureau of Educational and Cultural Affairs announces an open competition for the U.S. Professional Development Program for EducationUSA Advisers in Fiscal Year 2011. Public and private non-profit organizations meeting the provisions described in Internal Revenue Code Section 26 USC 501(c)(3) may submit proposals to cooperate with the Bureau in the administration of this program, which will focus on short-term professional development in the United States for EducationUSA advisers.

EducationUSA is the network of advising centers supported by the U.S. Department of State. These centers operate in a wide variety of institutional settings around the world, including binational Fulbright Commissions, Public Affairs Sections of U.S. Embassies, independent binational centers, foreign universities, and the

overseas offices of U.S. non-government organizations. The support of the Bureau of Educational and Cultural Affairs for these centers varies by center and region, and ranges from support for educational resources and the professional development of advising staffs, to, in a limited number of locations, direct support for office operations. In addition, all EducationUSA centers receive specialized, highly tailored advice from Bureau-supported regional and country educational advising coordinators who are based in fourteen locations in every world region.

EducationUSA centers are catalysts for the enrollment in U.S. colleges and universities of students and scholars sponsored by the U.S. government and by other sponsors as well as students and scholars seeking U.S. study opportunities independently. The advising staffs at EducationUSA centers provide comprehensive, balanced advice about the complex range of higher educational opportunities in the United States to international students, parents, scholars, and foreign government officials. EducationUSA centers also assist U.S. institutions of higher education in their overseas outreach efforts. In addition, the EducationUSA network encourages study abroad by Americans and the development of study abroad opportunities by U.S. universities. EducationUSA advisers provide comprehensive information to foreign audiences about opportunities to study at accredited U.S. educational institutions, enabling prospective students and professionals to select appropriate U.S. educational programs. More information on the network and a current EducationUSA center list is located at *http://www.educationusa.state.gov.*

Professional development for EducationUSA advisers is a critical component of the Department of State's support for EducationUSA and includes a range of opportunities designed to deepen the advisers' understanding of U.S. higher education and of their role in U.S. public diplomacy. Advisers need to understand the complex offerings of the various sectors of U.S. higher education system, as well as the public diplomacy context for their work. The Department provides a continuum of professional development opportunities that include an on-line course for newly hired advisers, systematic mentoring by regional and country educational advising coordinators and regular access to their guidance, as well as periodic regional workshops that bring together advisers from each world region for sessions with Regional Coordinators, Bureau staff, representatives of U.S. colleges, universities, and educational associations, and other U.S. educational experts.

The U.S. Professional Development Program for EducationUSA Advisers will provide a series of professional development opportunities in the United States, which should complement opportunities that are offered overseas. Applicant organizations are encouraged to propose creative, innovative strategies for all components of the Program. More detailed information is provided under the Funding Opportunity Description, which follows.

**I. Funding Opportunity Description**

*Authority:* Overall grant making authority for this program is contained in the Mutual Educational and Cultural Exchange Act of 1961, Public Law 87–256, as amended, also known as the Fulbright-Hays Act. The purpose of the Act is "to enable the Government of the United States to increase mutual understanding between the people of the United States and the people of other countries * * *; to strengthen the ties which unite us with other nations by demonstrating the educational and cultural interests, developments, and achievements of the people of the United States and other nations * * * and thus to assist in the development of friendly, sympathetic and peaceful relations between the United States and the other countries of the world." The funding authority for the program above is provided through legislation.

*Purpose:* To expand the ability of EducationUSA advisers to facilitate the flow of international students to the United States, as well as their ability to expand the participation of U.S. students in academically sound study abroad programs in a widening range of international locations. The work of EducationUSA centers is critical to the Bureau's pursuit of these objectives, and the U.S. Professional Development Program for EducationUSA Advisers should equip advisers with skills and perspectives that will increase their effectiveness in their professional employment at EducationUSA centers around the world.

*1. Participants*

Participants will be nominated by the Public Affairs Sections of U.S. Embassies overseas, with the approval of the participants' employing organizations, and will be selected by the Bureau's program office in consultation with Regional Educational Advising Coordinators. They will be currently employed at a State Department-supported EducationUSA advising center and will have demonstrated competency in analyzing and discussing the U.S. and home country educational systems; the application processes that lead to individual enrollments in U.S. higher educational institutions; cross-cultural communication skills; and office management skills in an EducationUSA center. In addition, each participant will have demonstrated leadership and a commitment to the educational advising profession.

*2. Program Design*

Proposals should outline creative, innovative strategies for developing and adapting four traditional program models that have been implemented in the past for EducationUSA advisers, with a sharpened focus on current issues in higher education and on the role of educational advising in public diplomacy. For each program component, proposals should include an overall project framework that identifies objectives, outlines an implementation plan and that anticipates measurable, specific outcomes. The amount that will be available for this program in FY2011 resources cannot be determined until FY2011 funds are appropriated. However, for planning purposes applicant organizations may submit program budgets, not including administrative expenses, that do not exceed the approximate amounts noted below.

*Component A: For advisers with at least two years' experience in their positions:* Two workshops each lasting approximately ten days to two weeks. Proposals must include a draft curriculum for each workshop, including topics of current concern. The curriculum should also include at least two full days of briefings by representatives of the Department of State. Final curricula will be subject to approval by the Bureau's program office. Funding not to exceed approximately $300,000 is anticipated for a total of two sessions of ten days to two weeks each, with each session accommodating approximately 20 to 25 participants.

*Component B: For advisers with at least four years' experience in their positions:* A seminar of approximately ten days to enable senior advisers to pursue projects that will enable them to serve more effectively as professional resources with specialized expertise. Proposals should illustrate how participants will gain access to specialized advice about a wide range of topics. At the seminar, participants will

discuss their interests and approaches with one another in addition to engaging in specialized research and consultations. Provision should be made for on-going follow-up consultations with relevant experts after the seminar participants return to their EducationUSA workplaces and for enabling participants to share project results throughout the EducationUSA network and with relevant educational advising professionals outside the network. This seminar combines features of the Professional Advising Leadership (PAL) and the Professional Advising Leadership Expansion (PEP) programs. Funding not to exceed approximately $150,000 is anticipated for one session accommodating a total of approximately ten to fifteen participants.

*Component C: For advisers who are new in their positions and who lack previous experience at a U.S. college or university:* An orientation lasting two weeks, in which the advisers attend international student orientation sessions and experience campus life as an arriving international student at a specific host institution and consult with the international student affairs staff. Traditionally, this program component has been known as the Explore Program. Anticipated funding for one session for up to ten participants is $50,000.

*Component D: For advisers with special interest in specific educational topics:* Support for participating in relevant U.S. educational conferences or workshops of approximately ten days. To the extent possible, support will be provided to advisers who will make presentations at these events. Proposals should outline strategies for providing support and mentoring to ensure the active engagement of EducationUSA adviser participants with professional counterparts at these events. Anticipated funding for approximately 75 participants is $300,000.

In addition, the conferences or workshops should provide opportunities for active participation in sessions addressing issues of current interest to international educators and overseas advisers with strong emphasis on networking with other educational advising professionals.

The Bureau anticipates making one award for the administration of all components of this program.

*3. Logistics*

The recipient will be responsible for international and domestic travel arrangements for all participants, lodging and local transportation arrangements, orientation and debriefing sessions, preparing support material, identifying and providing honoraria to guest presenters and expert consultants, and identifying host institutions where participants will observe the operations of relevant educational offices through direct involvement in the administration of institutional practices and policies.

*4. Evaluation/Follow-Up*

The proposal must include a detailed evaluation and follow-up plan. Special emphasis should be given to designing a program which incorporates outcome measurement strategies that assess ultimate effectiveness.

*5. Visa/Insurance/Tax Requirements*

The program must comply with applicable visa regulations. Participant health and accident insurance will be provided to the EducationUSA adviser participants in all components except component D, who will obtain insurance through another mechanisms; the recipient organization will be responsible for enrolling participants in the Bureau's insurance program and providing any necessary assistance should medical care be needed. Administration of the program must be in compliance with reporting and withholding regulations for federal, state, and local taxes as applicable. Applicant organizations should demonstrate tax regulation adherence in the proposal narrative and budget.

*6. Printed Materials*

Drafts of all printed materials developed for this program should be submitted to the Bureau's program office for review and approval. All official documents should highlight the U.S. government's role as program sponsor and funding source. The Bureau requires that it receive the copyright use and reserves the right to distribute the copyrighted material.

**II. Award Information**

*Type of Award: Cooperative Agreement*

In a Cooperative Agreement, the Bureau's program office is substantially involved in program activities above and beyond routine grant monitoring. The Bureau's activities and responsibilities for this program are as follows:

- Selection of program participants in coordination with Regional Educational Advising Coordinators and Public Affairs Sections at U.S. embassies and consulates overseas;
- approval of adviser projects;
- active participation in the design and direction of program activities;
- approval of curriculum and program content;
- conducting professional development sessions for which program office staff has appropriate expertise;
- organization of meetings with Department of State representatives;
- approval of program plans and agendas;
- approval of key personnel;
- approval of staffing requirements, travel plans, budgets, and policy guidance and direction;
- guidance in the execution of all program components;
- approval of all program publicity;
- approval of host institutions and associations;
- approval of decisions related to special circumstances and problems;
- assistance with participant emergencies.

*Fiscal Year Funds: FY2011.*

*Approximate Total Funding: $1,100,000 pending availability of FY2011 resources.*

*Approximate Number of Awards: 1.*

*Approximate Average Award: $1,100,000.*

*Anticipated Award Date:* Pending availability of funds, October 1, 2010.

*Anticipated Project Completion Date: December 30, 2011.*

*Additional Information:*

Pending successful implementation of this program and the availability of funds in subsequent fiscal years, it is ECA's intent to renew this Cooperative Agreement for two additional fiscal years, before openly competing it again.

**III. Eligibility Information**

*III.1. Eligible applicants:* Applications may be submitted by public and private non-profit organizations meeting the provisions described in Internal Revenue Code section 26 U.S.C. 501(c)(3).

*III.2. Cost Sharing or Matching Funds:* There is no minimum or maximum percentage required for this competition. However, the Bureau encourages applicants to provide maximum levels of cost sharing and funding in support of its programs.

When cost sharing is offered, it is understood and agreed that the applicant must provide the amount of cost sharing as stipulated in its proposal and later included in an approved agreement. Cost sharing may be in the form of allowable direct or indirect costs. For accountability, you must maintain written records to support all costs which are claimed as your contribution, as well as costs to be paid by the Federal government. Such records are subject to audit. The basis

for determining the value of cash and in-kind contributions must be in accordance with OMB Circular A–110, (Revised), Subpart C.23—Cost Sharing and Matching. In the event you do not provide the minimum amount of cost sharing as stipulated in the approved budget, ECA's contribution will be reduced in like proportion.

*III.3. Other Eligibility Requirements:*

(a.) Bureau grant guidelines require that organizations with less than four years experience in conducting international exchanges be limited to $60,000 in Bureau funding. ECA anticipates making one award in an amount over $60,000 to support program and administrative costs required to implement this exchange program. Therefore, organizations with less than four years experience in conducting international exchanges are ineligible to apply under this competition. The Bureau encourages applicants to provide maximum levels of cost sharing and funding in support of its programs.

## IV. Application and Submission Information

**Note:** Please read the complete announcement before sending inquiries or submitting proposals. Once the RFGP deadline has passed, Bureau staff may not discuss this competition with applicants until the proposal review process has been completed.

*IV.1. Contact Information to Request an Application Package:*

Please contact the Educational Information and Resources Branch, ECA/A/S/A, SA–5, 4th Floor, U.S. Department of State, 2200 C Street, NW., Washington, DC 20522–0504, telephone (202) 632–6347, Fax: (202) 202–632–9478; e-mail *DanzCB@state.gov* or *MoraDD@state.gov* to request a Solicitation Package. Please refer to the Funding Opportunity Number ECA/A/S/A–11–05 located at the top of this announcement when making your request. Alternatively, an electronic application package may be obtained from *grants.gov.* Please see section IV.3f for further information.

The Solicitation Package contains the Proposal Submission Instruction (PSI) document which consists of required application forms, and standard guidelines for proposal preparation.

It also contains the Project Objectives, Goals and Implementation (POGI) document, which provides specific information, award criteria and budget instructions tailored to this competition.

Please specify Bureau Branch Chief Caryn Danz and Program Officer Dorothy Mora and refer to the Funding Opportunity Number ECA/A/S/A–11–05 located at the top of this announcement on all other inquiries and correspondence.

*IV.2. To Download a Solicitation Package Via Internet:* The entire Solicitation Package may be downloaded from the Bureau's Web site at *http://exchanges.state.gov/grants/open2.html,* or from the Grants.gov Web site at *http://www.grants.gov.*

Please read all information before downloading.

*IV.3. Content and Form of Submission:* Applicants must follow all instructions in the Solicitation Package. The application should be submitted per the instructions under IV.3f. "Application Deadline and Methods of Submission" section below.

IV.3a. You are required to have a Dun and Bradstreet Data Universal Numbering System (DUNS) number to apply for a grant or cooperative agreement from the U.S. Government. This number is a nine-digit identification number, which uniquely identifies business entities. Obtaining a DUNS number is easy and there is no charge. To obtain a DUNS number, access *http://www.dunandbradstreet.com* or call 1–866–705–5711. Please ensure that your DUNS number is included in the appropriate box of the SF–424 which is part of the formal application package.

IV.3b. All proposals must contain an executive summary, proposal narrative and budget.

Please Refer to the Solicitation Package. It contains the mandatory Proposal Submission Instructions (PSI) document and the Project Objectives, Goals and Implementation (POGI) document for additional formatting and technical requirements.

IV.3c. You must have nonprofit status with the IRS at the time of application.

**Please note:** Effective January 7, 2009, all applicants for ECA federal assistance awards must include in their application the names of directors and/or senior executives (current officers, trustees, and key employees, regardless of amount of compensation). In fulfilling this requirement, applicants must submit information in one of the following ways:

(1) Those who file Internal Revenue Service Form 990, "Return of Organization Exempt From Income Tax," must include a copy of relevant portions of this form.

(2) Those who do not file IRS Form 990 must submit information above in the format of their choice.

In addition to final program reporting requirements, award recipients will also be required to submit a one-page document, derived from their program reports, listing and describing their grant activities. For award recipients, the names of directors and/or senior executives (current officers, trustees, and key employees), as well as the one-page description of grant activities, will be transmitted by the State Department to OMB, along with other information required by the Federal Funding Accountability and Transparency Act (FFATA), and will be made available to the public by the Office of Management and Budget on its USASpending.gov Web site as part of ECA's FFATA reporting requirements.

If your organization is a private nonprofit which has not received a grant or cooperative agreement from ECA in the past three years, or if your organization received nonprofit status from the IRS within the past four years, you must submit the necessary documentation to verify nonprofit status as directed in the PSI document. Failure to do so will cause your proposal to be declared technically ineligible.

IV.3d. Please take into consideration the following information when preparing your proposal narrative: The following is included for informational purposes only:

*IV.3d.1 Adherence to All Regulations Governing the J Visa:*

The Bureau of Educational and Cultural Affairs places critically important emphases on the security and proper administration of the Exchange Visitor (J visa) Programs and adherence by award recipients and sponsors to all regulations governing the J visa. Therefore, proposals should demonstrate the applicant's capacity to meet all requirements governing the administration of the Exchange Visitor Programs as set forth in 22 CFR 62, including the oversight of Responsible Officers and Alternate Responsible Officers, screening and selection of program participants, provision of pre-arrival information and orientation to participants, monitoring of participants, proper maintenance and security of forms, record-keeping, reporting and other requirements. ECA will be responsible for issuing DS–2019 forms to participants in this program.

A copy of the complete regulations governing the administration of Exchange Visitor (J) programs is available at *http://exchanges.state.gov* or from: United States Department of State, Office of Exchange Coordination and Designation, Office of Designation, ECA/EC/D, SA–5, Floor C2, Department of State, Washington, DC 20522–0582.

Please refer to Solicitation Package for further information.

*IV.3d.2 Diversity, Freedom and Democracy Guidelines:* Pursuant to the

Bureau's authorizing legislation, programs must maintain a non-political character and should be balanced and representative of the diversity of American political, social, and cultural life. "Diversity" should be interpreted in the broadest sense and encompass differences including, but not limited to ethnicity, race, gender, religion, geographic location, socio-economic status, and disabilities. Applicants are strongly encouraged to adhere to the advancement of this principle both in program administration and in program content. Please refer to the review criteria under the 'Support for Diversity' section for specific suggestions on incorporating diversity into your proposal. Public Law 104–319 provides that "in carrying out programs of educational and cultural exchange in countries whose people do not fully enjoy freedom and democracy," the Bureau "shall take appropriate steps to provide opportunities for participation in such programs to human rights and democracy leaders of such countries." Public Law 106–113 requires that the governments of the countries described above do not have inappropriate influence in the selection process. Proposals should reflect advancement of these goals in their program contents, to the full extent deemed feasible.

*IV.3d.3. Program Monitoring and Evaluation:*

Proposals must include a plan to monitor and evaluate the project's success, both as the activities unfold and at the end of the program. The Bureau recommends that your proposal include a draft survey questionnaire or other technique plus a description of a methodology to use to link outcomes to original project objectives. The Bureau expects that the recipient organization will track participants or partners and be able to respond to key evaluation questions, including satisfaction with the program, learning as a result of the program, changes in behavior as a result of the program, and effects of the program on institutions (institutions in which participants work or partner institutions). The evaluation plan should include indicators that measure gains in mutual understanding as well as substantive knowledge.

Successful monitoring and evaluation depend heavily on setting clear goals and outcomes at the outset of a program. Your evaluation plan should include a description of your project's objectives, your anticipated project outcomes, and how and when you intend to measure these outcomes (performance indicators). The more that outcomes are "smart" (specific, measurable, attainable, results-oriented, and placed in a reasonable time frame), the easier it will be to conduct the evaluation. You should also show how your project objectives link to the goals of the program described in this RFGP.

Your monitoring and evaluation plan should clearly distinguish between program *outputs* and *outcomes*. *Outputs* are products and services delivered, often stated as an amount. Output information is important to show the scope or size of project activities, but it cannot substitute for information about progress towards outcomes or the results achieved. Examples of outputs include the number of people trained or the number of seminars conducted. *Outcomes,* in contrast, represent specific results a project is intended to achieve and is usually measured as an extent of change. Findings on outputs and outcomes should both be reported, but the focus should be on outcomes.

We encourage you to assess the following four levels of outcomes, as they relate to the program goals set out in the RFGP (listed here in increasing order of importance):

1. Participant satisfaction with the program and exchange experience.

2. Participant learning, such as increased knowledge, aptitude, skills, and changed understanding and attitude. Learning includes both substantive (subject-specific) learning and mutual understanding.

3. Participant behavior, concrete actions to apply knowledge in work or community; greater participation and responsibility in civic organizations; interpretation and explanation of experiences and new knowledge gained; continued contacts between participants, community members, and others.

4. Institutional changes, such as increased collaboration and partnerships, policy reforms, new programming, and organizational improvements.

**Please note:** Consideration should be given to the appropriate timing of data collection for each level of outcome. For example, satisfaction is usually captured as a short-term outcome, whereas behavior and institutional changes are normally considered longer-term outcomes.

Overall, the quality of your monitoring and evaluation plan will be judged on how well it (1) specifies intended outcomes; (2) gives clear descriptions of how each outcome will be measured; (3) identifies when particular outcomes will be measured; and (4) provides a clear description of the data collection strategies for each outcome (*i.e.,* surveys, interviews, or focus groups). (Please note that evaluation plans that deal only with the first level of outcomes [satisfaction] will be deemed less competitive under the present evaluation criteria.)

Recipient organizations will be required to provide reports analyzing their evaluation findings to the Bureau in their regular program reports. All data collected, including survey responses and contact information, must be maintained for a minimum of three years and provided to the Bureau upon request.

*IV.3e. Please take the following information into consideration when preparing your budget:*

IV.3e.1. Applicants must submit SF–424A—"Budget Information—Non-Construction Programs" along with a comprehensive budget for the entire program. There must be a summary budget as well as breakdowns reflecting both administrative and program budgets. Applicants may provide separate sub-budgets for each program component, phase, location, or activity to provide clarification.

IV.3e.1. Applicants must submit a comprehensive budget for the entire program. There must be a summary budget as well as breakdowns reflecting both administrative and program budgets. Applicants may provide separate sub-budgets for each program component, phase, location, or activity to provide clarification.

IV.3e.2. Allowable costs for the program include the following:

(1) Salaries and fringe benefits; travel and per diem;

(2) Other direct costs, inclusive of rent, utilities, *etc.;*

(3) Indirect expenses (except against participant program expenses), auditing costs;

(4) Participant program costs; *i.e.,* international/domestic travel, visas, per diem, conference attendance.

(5) USBT Adviser Web site and support activities.

(6) Advising coordinator expenses for pre-conference campus visits.

(7) Campus coordinator costs for advising center visits; *i.e.,* international/domestic travel, visas, per diem.

Please refer to the Solicitation Package for complete budget guidelines and formatting instructions.

*IV.3f. Application Deadline and Methods of Submission:*

*Application Deadline Date:* Friday, July 9, 2010.

*Reference Number:* ECA/A/S/A–11–05.

*Methods of Submission:*

Applications may be submitted in one of two ways:

(1) In hard-copy, via a nationally recognized overnight delivery service

(*i.e.,* Federal Express, UPS, Airborne Express, or U.S. Postal Service Express Overnight Mail, *etc.*), or

(2.) electronically through *http://www.grants.gov*.

Along with the Project Title, all applicants must enter the above Reference Number in Box 11 on the SF–424 contained in the mandatory Proposal Submission Instructions (PSI) of the solicitation document.

*IV.3f.1 Submitting Printed Applications:*

Applications must be shipped no later than the above deadline. Delivery services used by applicants must have in-place, centralized shipping identification and tracking systems that may be accessed via the Internet and delivery people who are identifiable by commonly recognized uniforms and delivery vehicles. Proposals shipped on or before the above deadline but received at ECA more than seven days after the deadline will be ineligible for further consideration under this competition. Proposals shipped after the established deadlines are ineligible for consideration under this competition. ECA will *not* notify you upon receipt of application. It is each applicant's responsibility to ensure that each package is marked with a legible tracking number and to monitor/confirm delivery to ECA via the Internet. Delivery of proposal packages *may not* be made via local courier service or in person for this competition. Faxed documents will not be accepted at any time. Only proposals submitted as stated above will be considered.

**Important note:** When preparing your submission please make sure to include one extra copy of the completed SF–424 form and place it in an envelope addressed to "ECA/EX/PM".

The original and eight copies of the application should be sent to: Program Management Division, ECA–IIP/EX/PM, Ref.: ECA/A/S/A–11–05 SA–5, Floor 4, Department of State, 2200 C Street, NW., Washington, DC 20522–0504.

*IV.3f.2 Submitting Electronic Applications*:

Applicants have the option of submitting proposals electronically through Grants.gov (*http://www.grants.gov*). Complete solicitation packages are available at Grants.gov in the "Find" portion of the system.

**Please Note:** ECA bears no responsibility for applicant timeliness of submission or data errors resulting from transmission or conversion processes for proposals submitted via Grants.gov.

Please follow the instructions available in the "Get Started" portion of the site (*http://www.grants.gov/GetStarted*).

Several of the steps in the Grants.gov registration process could take several weeks. Therefore, applicants should check with appropriate staff within their organizations immediately after reviewing this RFGP to confirm or determine their registration status with Grants.gov.

Once registered, the amount of time it can take to upload an application will vary depending on a variety of factors including the size of the application and the speed of your internet connection. In addition, validation of an electronic submission via Grants.gov can take up to two business days.

*Therefore, we strongly recommend that you not wait until the application deadline to begin the submission process through Grants.gov.*

The Grants.gov Web site includes extensive information on all phases/aspects of the Grants.gov process, including an extensive section on frequently asked questions, located under the "For Applicants" section of the Web site. ECA strongly recommends that all potential applicants review thoroughly the Grants.gov Web site, well in advance of submitting a proposal through the Grants.gov system. ECA bears no responsibility for data errors resulting from transmission or conversion processes.

Direct all questions regarding Grants.gov registration and submission to: Grants.gov Customer Support, Contact Center Phone: 800–518–4726, Business Hours: Monday–Friday, 7 a.m.–9 p.m. Eastern Time, E-mail: *support@grants.gov.*

Applicants have until midnight (12 a.m.), Washington, DC time of the closing date to ensure that their entire application has been uploaded to the Grants.gov site. *There are no exceptions to the above deadline. Applications uploaded to the site after midnight of the application deadline date will be automatically rejected by the grants.gov system, and will be technically ineligible.*

Please refer to the Grants.gov Web site, for definitions of various "application statuses" and the difference between a submission receipt and a submission validation. Applicants will receive a validation e-mail from grants.gov upon the successful submission of an application. Again, validation of an electronic submission via Grants.gov can take up to two business days. *Therefore, we strongly recommend that you not wait until the application deadline to begin the submission process through Grants.gov.* ECA will *not* notify you upon receipt of electronic applications.

*It is the responsibility of all applicants submitting proposals via the Grants.gov web portal to ensure that proposals have been received by Grants.gov in their entirety, and ECA bears no responsibility for data errors resulting from transmission or conversion processes.*

*IV.3g. Intergovernmental Review of Applications:* Executive Order 12372 does not apply to this program.

## V. Application Review Information

*V.1. Review Process*

The Bureau will review all proposals for technical eligibility. Proposals will be deemed ineligible if they do not fully adhere to the guidelines stated herein and in the Solicitation Package. All eligible proposals will be reviewed by the program office, as well as the Public Diplomacy section overseas, where appropriate. Eligible proposals will be subject to compliance with Federal and Bureau regulations and guidelines and forwarded to Bureau grant panels for advisory review. Proposals may also be reviewed by the Office of the Legal Adviser or by other Department elements. Final funding decisions are at the discretion of the Department of State's Assistant Secretary for Educational and Cultural Affairs. Final technical authority for cooperative agreements resides with the Bureau's Grants Officer.

## VI. Award Administration Information

*VI.1a. Award Notices*

Final awards cannot be made until funds have been appropriated by Congress, allocated and committed through internal Bureau procedures. Successful applicants will receive a Federal Assistance Award (FAA) from the Bureau's Grants Office. The FAA and the original proposal with subsequent modifications (if applicable) shall be the only binding authorizing document between the recipient and the U.S. Government. The FAA will be signed by an authorized Grants Officer, and mailed to the recipient's responsible officer identified in the application.

Unsuccessful applicants will receive notification of the results of the application review from the ECA program office coordinating this competition.

*VI.2 Administrative and National Policy Requirements*

Terms and Conditions for the Administration of ECA agreements include the following:

Office of Management and Budget Circular A–122, "Cost Principles for Nonprofit Organizations."

Office of Management and Budget Circular A–21, "Cost Principles for Educational Institutions."

OMB Circular A–87, "Cost Principles for State, Local and Indian Governments."

OMB Circular No. A–110 (Revised), Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, and other Nonprofit Organizations.

OMB Circular No. A–102, Uniform Administrative Requirements for Grants-in-Aid to State and Local Governments.

OMB Circular No. A–133, Audits of States, Local Government, and Non-profit Organizations.

Please reference the following Web sites for additional information: *http://www.whitehouse.gov/omb/grants. http://fa.statebuy.state.gov.*

*VI.3. Reporting Requirements*

You must provide ECA with a hard copy original plus two copies of the following reports:

(1) A final program and financial report no more than 90 days after the expiration of the award;

(2) A concise, one-page final program report summarizing program outcomes no more than 90 days after the expiration of the award. This one-page report will be transmitted to OMB, and be made available to the public via OMB's USAspending.gov Web site—as part of ECA's Federal Funding Accountability and Transparency Act (FFATA) reporting requirements.

(3) A SF–PPR, "Performance Progress Report" Cover Sheet with all program reports.

Award recipients will be required to provide reports analyzing their evaluation findings to the Bureau in their regular program reports. (Please refer to IV. Application and Submission Instructions (IV.3.d.3) above for Program Monitoring and Evaluation information.)

All data collected, including survey responses and contact information, must be maintained for a minimum of three years and provided to the Bureau upon request.

*All reports must be sent to the ECA Grants Officer and ECA Program Officer listed in the final assistance award document.*

*Optional Program Data Requirements:*

Award recipients will be required to maintain specific data on program participants and activities in an electronically accessible database format that can be shared with the Bureau as required. As a minimum, the data must include the following:

(1) Name, address, contact information and biographic sketch of all persons who travel internationally on funds provided by the agreement or who benefit from the award funding but do not travel.

(2) Itineraries of international and domestic travel, providing dates of travel and cities in which any exchange experiences take place. Final schedules for in-country and U.S. activities must be received by the ECA Program Officer at least three work days prior to the official opening of the activity.

**VII. Agency Contacts**

For questions about this announcement, contact: ECA/A/S/A Branch Chief Caryn Danz or Program Officer Dorothy Mora, U.S. Department of State, Educational Information and Resources Branch, ECA/A/S/A, SA–5, 4th Floor, ECA/A/S/A–11–05, 2200 C Street, NW., Washington, DC 20522–0503. Telephone for Caryn Danz is (202) 632–6353; E-mail address: *DanzCB@state.gov.* Telephone for Dorothy Mora is (202) 632–6347; E-mail address: *MoraDD@state.gov.* Fax: 202–632–9478.

All correspondence with the Bureau concerning this RFGP should reference the above title and number ECA/A/S/A–11–05.

Please read the complete announcement before sending inquiries or submitting proposals. Once the RFGP deadline has passed, Bureau staff may not discuss this competition with applicants until the proposal review process has been completed.

**VIII. Other Information**

*Notice*

The terms and conditions published in this RFGP are binding and may not be modified by any Bureau representative. Explanatory information provided by the Bureau that contradicts published language will not be binding. Issuance of the RFGP does not constitute an award commitment on the part of the Government. The Bureau reserves the right to reduce, revise, or increase proposal budgets in accordance with the needs of the program and the availability of funds. Awards made will be subject to periodic reporting and evaluation requirements per section VI.3 above.

Dated: April 27, 2010.

**Maura M. Pally,**

*Acting Assistant Secretary for Educational and Cultural Affairs, U.S. Department of State.*

[FR Doc. 2010–10725 Filed 5–5–10; 8:45 am]

BILLING CODE 4710–05–P

## DEPARTMENT OF STATE

**[Public Notice 6987]**

### Culturally Significant Objects Imported for Exhibition Determinations: "Tiffany: Color and Light"

**SUMMARY:** Notice is hereby given of the following determinations: Pursuant to the authority vested in me by the Act of October 19, 1965 (79 Stat. 985; 22 U.S.C. 2459), Executive Order 12047 of March 27, 1978, the Foreign Affairs Reform and Restructuring Act of 1998 (112 Stat. 2681, *et seq.;* 22 U.S.C. 6501 note, *et seq.*), Delegation of Authority No. 234 of October 1, 1999, Delegation of Authority No. 236 of October 19, 1999, as amended, and Delegation of Authority No. 257 of April 15, 2003 [68 FR 19875], I hereby determine that the object to be included in the exhibition "Tiffany: Color and Light," imported from abroad for temporary exhibition within the United States, is of cultural significance. The object is imported pursuant to a loan agreement with the foreign owner or custodian. I also determine that the exhibition or display of the exhibit object at the Virginia Museum of Fine Arts, Richmond, VA, from on or about May 29, 2010, until on or about August 15, 2010, and at possible additional exhibitions or venues yet to be determined, is in the national interest. I have ordered that Public Notice of these Determinations be published in the **Federal Register.**

**FOR FURTHER INFORMATION CONTACT:** For further information, including a list of the exhibit object, contact Julie Simpson, Attorney-Adviser, Office of the Legal Adviser, U.S. Department of State (telephone: 202–632–6467). The mailing address is U.S. Department of State, SA–5, L/PD, Fifth Floor (Suite 5H03), Washington, DC 20522–0505.

Dated: April 29, 2010.

**Maura M. Pally,**

*Deputy Assistant Secretary for Professional and Cultural Exchanges, Bureau of Educational and Cultural Affairs, Department of State.*

[FR Doc. 2010–10721 Filed 5–5–10; 8:45 am]

BILLING CODE 4710–05–P

## DEPARTMENT OF STATE

**[Public Notice: 6986]**

### Biennial Review of the Progress of Cooperation Under the United States-Singapore Memorandum of Intent on Cooperation in Environmental Matters and Suggestions for 2011–2012 U.S.-Singapore Plan of Action for Environmental Cooperation

**ACTION:** Notice of a meeting for the Biennial Review of the progress of cooperation under the U.S.-Singapore Memorandum of Intent on Cooperation on Environmental Matters and solicitation of suggestions for the 2011–2012 U.S.-Singapore Plan of Action for Environmental Cooperation.

**SUMMARY:** The Department of State is providing notice that the United States and Singapore intend to hold a Biennial Review of the progress of cooperation under the U.S.-Singapore Memorandum of Intent on Cooperation on Environmental Matters (MOI) in Washington, DC, on May 13, 2010. This biennial meeting to review the status of cooperation is consistent with the intent of the two Governments as set forth in Section 3 of the MOI. A public information session will be held on May 13th, at 1:30 p.m., in room 1105 at the U.S. Department of State, 2201 C Street, NW., Washington, DC 20520. If you would like to attend the session, please send the following information to Jacqueline Tront at the fax number or e-mail address listed below under the heading **ADDRESSES**: (1) Your name, (2) your date of birth, and (3) the number of a valid identification card that a government has issued to you.

The purpose of the Biennial Review is detailed below under **SUPPLEMENTARY INFORMATION.**

The meeting agenda will include an overview of progress in implementing selected projects under the 2008–2010 Plan of Action pursuant to the MOI, and the presentation of a new MOI Plan of Action. The Department of State invites interested organizations and members of the public to submit written comments or suggestions regarding agenda items and to attend the public session.

Pursuant to the MOI, the United States and Singapore will discuss and agree upon the 2011–2012 Plan of Action for Environmental Cooperation. The Department of State is soliciting ideas and suggestions for environmental cooperation projects between the United States and Singapore. The MOI outlines broad areas for environmental cooperation with the objective of "identify[ing] environmental issues of mutual interest to the two governments, and establishing a mechanism through which the two governments can pursue cooperative environmental efforts in those areas." In addition, in the Environment Chapter of the U.S.-Singapore Free Trade Agreement (FTA) (Chapter 18), "[t]he Parties recognize the importance of strengthening capacity to protect the environment and to promote sustainable development in concert with strengthening of trade and investment relations between them. The Parties shall, as appropriate, pursue cooperative environmental activities, including those pertinent to trade and investment and to strengthening environmental performance * * * under a Memorandum of Intent on Cooperation in Environmental Matters. During 2011–2012, the United States and Singapore intend to continue to build upon the cooperative work initiated in the 2008–2010 Plan of Action, and to continue to follow up on the themes reflected in the Environment Chapter of the FTA.

The Department of State invites government agencies and the public, including NGOs, educational institutions, private sector enterprises and other interested persons, to submit written comments or suggestions regarding items for the Plan of Action and implementation of environmental cooperation activities. In preparing such comments or suggestions, we encourage submitters to refer to: (1) The U.S.-Singapore MOI, (2) the U.S.-Singapore 2008–2010 Plan of Action on Environmental Cooperation, (3) the U.S.-Singapore FTA Environment Chapter, and (4) the Environmental Review of the FTA. (Documents are available at: *http://www.state.gov/g/oes/env/trade/singapore/index.htm*).

**DATES:** The meeting is to be held: May 13, 2010, 1:30 p.m. to 4:45 p.m., Washington, DC.

To be assured of timely consideration, comments are requested no later than May 10, 2010.

**ADDRESSES:** Written comments or suggestions should be submitted to: Jacqueline Tront, Office of Environmental Policy, Bureau of Oceans, International Environmental, and Scientific Affairs, U.S. Department of State, by electronic mail at *trontjm@state.gov* with the subject line "U.S.-Singapore Biennial Review" or by fax to (202) 647–5947. If you have access to the Internet you can view this Notice and make comments by going to *http://www.regulations.gov/search/Regs/home.html#home.*

**FOR FURTHER INFORMATION, CONTACT:** Jacqueline Tront, Telephone (202) 647–4750.

**SUPPLEMENTARY INFORMATION:** In Section 3 of the U.S.-Singapore MOI, the Governments stated that they plan to meet biennially to review the status of cooperation under the MOI and to develop and update, as appropriate, a Plan of Action for Environmental Cooperation. The Plan of Action is a tool which identifies and outlines agreed upon environmental cooperation priorities, on-going efforts and possibilities for future cooperation. The United States-Singapore FTA entered into force on January 1, 2004. Chapter 18 of the FTA committed the Parties to entering into a Memorandum of Intent on Cooperation in Environmental Matters (MOI) and to pursue cooperative environmental activities, including those pertinent to trade and investment and to strengthening environmental performance, such as information reporting, enforcement capacity, and environmental management systems. The last Biennial Review was held on October 10, 2008 in Singapore. The Parties discussed implementation of the 2005–2007 Plan of Action, and elaboration of the 2008–2010 Plan of Action. Regional environmental initiatives, "green" technologies, and reducing air and water pollution were high on the list of future activities discussed during the 2008 Biennial review and TRAFFIC described its work in the Region to combat illegal wildlife trafficking and logging.

At the upcoming Biennial Review in Washington, DC on May 13, 2010, the Parties will receive reports on progress of implementing the 2008–2010 Plan of Action and review and approve the 2011–2012 Plan of Action. The Parties will also consider recommendations for future bilateral cooperation during the Biennial Review.

The mutually identified goals of cooperation under the 2008 to 2010 Plan of Action are: (1) Encouraging the bilateral and regional use of innovative and climate-friendly environmental technology and pollution management techniques; (2) participating in regional initiatives on environmentally sustainable cities and sustainable management and trade in sustainably managed resources; and (3) further improving capacity to implement and enforce environmental laws, including further enhancing efforts of countries in the region to combat illegal trade in environmentally sensitive goods through bilateral and regional cooperative activities. We anticipate continuing to work to achieve these goals in the 2011 to 2012 plan and are seeking ideas and suggestions for activities that can be included in the Plan of Action consistent with them.

Ongoing environmental cooperation work includes: Participation in regional workshops to combat illegal trade in environmentally sensitive goods, technical exchanges on water systems and water pollution management, participation in regional initiatives on sustainable management and trade in sustainably managed resources, promotion of energy efficiency projects and partnerships, cooperating through the Pacific Ports Initiative and combining efforts under the Sustainable Cities Program. The listed activities and additional cooperative activities were outlined in previous Environmental Cooperation Action Plans and discussed during previous Biennial Review meetings. Additional information can be found on the website listed above.

In carrying out this cooperative work, the United States and Singapore intend to explore the development of partnerships with private sector and civil society organizations, to build upon and complement ongoing bilateral cooperative work in other fora, and to explore opportunities for mutual collaboration in these priority areas with other countries in the region.

*Disclaimer:* This Public Notice is a request for comments and suggestions, and is not a request for applications. No granting or money is directly associated with this request for suggestions for the 2011–2012 Plan of Action. There is no expectation of resources or funding associated with any comments or suggestions provided for the 2011–2012 Plan of Action.

Dated: April 23, 2010.

**Willem H. Brakel,**

*Director, Office of Environmental Policy, Department of State.*

[FR Doc. 2010–10724 Filed 5–5–10; 8:45 am]

**BILLING CODE 4710–09–P**

## DEPARTMENT OF TRANSPORTATION

### National Highway Traffic Safety Administration

**[U.S. DOT Docket No. NHTSA–2010–0049]**

### Reports, Forms, and Recordkeeping Requirements

**AGENCY:** National Highway Traffic Safety Administration (NHTSA), DOT.

**ACTION:** Request for public comment on proposed collection of information.

**SUMMARY:** Before a Federal agency can collect certain information from the public, it must receive approval from the Office of Management and Budget (OMB). Under procedures established by the Paperwork Reduction Act of 1995, before seeking OMB approval, Federal agencies must solicit public comment on proposed collections of information, including extensions and reinstatements of previously approved collections.

This document describes one collection of information for which NHTSA intends to seek OMB approval.

**DATES:** Comments must be received on or before July 6, 2010.

**ADDRESSES:** Direct all written comments to U.S. Department of Transportation Dockets, 1200 New Jersey Avenue, SE., Washington, DC 20590. Docket No. NHTSA–2010–0049

**FOR FURTHER INFORMATION CONTACT:** Dr. Maria Vegega, Chief, Behavioral Research Division, Office of Behavioral Safety Research (NTI–131), National Highway Traffic Safety Administration, 1200 New Jersey Avenue, SE., W44–302, Washington, DC 20590. Dr. Vegega's phone number is 202–366–2668 and her e-mail address is *Maria.Vegega@dot.gov.*

**SUPPLEMENTARY INFORMATION:** Under the Paperwork Reduction Act of 1995, before an agency submits a proposed collection of information to OMB for approval, it must publish a document in the **Federal Register** providing a 60-day comment period and otherwise consult with members of the public and affected agencies concerning each proposed collection of information. The OMB has promulgated regulations describing what must be included in such a document. Under OMB's regulations (at 5 CFR 1320.8(d)), an agency must ask for public comment on the following:

(i) 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) 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) how to enhance the quality, utility, and clarity of the information to be collected; and

(iv) how 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, *e.g.,* permitting electronic submission of responses.

In compliance with these requirements, NHTSA asks public comment on the following proposed collection of information:

**Focus Group Review of Advanced Alcohol Detection Technology**

*Type of Request*—New information collection requirement.

*OMB Clearance Number*—None.

*Form Number*—This collection of information uses no standard forms.

*Requested Expiration Date of Approval*—September 30, 2013.

*Summary of the Collection of Information*—NHTSA proposes to conduct a total of 24 focus groups in two stages. The first set of focus groups (12 focus groups) will obtain information on public perceptions and attitudes concerning in-vehicle alcohol detection technology designed to prevent alcohol-impaired driving. Information from this phase of the project will be used to provide greater clarity to the technology under investigation. Then, a second set of 12 focus groups will be conducted to gauge driver reaction to technology prototypes, obtain input on alternative prototype features, and obtain guidance on strategies for introduction. Participation in the focus groups will be voluntary. Participants will be asked about current and future in-vehicle safety technologies for detecting alcohol.

The focus groups will be audio taped using electronic equipment and augmented by handwritten notes taken during the discussions. No videotaping will occur. During the focus group discussion, participants will be identified solely by first name. Last names, telephone numbers, and any other personally identifiable information obtained during recruitment of the focus group participants will be separated from the collected information. Summarization and any reporting of the collected information will use generic categories rather than first names to further preserve anonymity of participants.

*Description of the Need for the Information and Proposed Use of the Information*—The National Highway Traffic Safety Administration's (NHTSA's) mission is to save lives, prevent injuries, and reduce healthcare and other economic costs associated with motor vehicle crashes. In 2008, almost 12,000 people died in vehicle crashes due to alcohol-impaired driving. In a continuing effort to reduce the adverse consequences of alcohol-impaired driving, NHTSA in conjunction with the Automotive Coalition for Traffic Safety is undertaking research and development to explore the feasibility of, and public policy challenges associated with, use of in-vehicle alcohol detection technology.

The agency believes that use of vehicle-based, alcohol detection technologies could help to significantly reduce the number of alcohol-impaired driving crashes, deaths and injuries by preventing drivers from driving while impaired by alcohol.

As technology development progresses and decisions are being made about how to integrate such devices into the vehicle, NHTSA needs a better understanding of public preferences with respect to in-vehicle alcohol detection devices. Optimization of technology will depend on the extent to which public attitudes are taken into account during the development process. Thus NHTSA seeks input from drivers to:

- Gauge public perceptions of advanced in-vehicle alcohol detection technology;
- Guide the technology design; and
- Guide a strategy for introduction of this technology.

NHTSA believes that focus groups with licensed drivers are the appropriate method for obtaining information to address the above topics.

*Description of the Likely Respondents (Including Estimated Number, and Proposed Frequency of Response to the Collection of Information)*—Under this proposed effort, the Contractor will conduct a total of 24 focus groups in two stages. A set of three focus group meetings will be held in each of eight locations across the country; four sets of focus groups will occur in each phase of the research. NHTSA will select the locations to obtain responses in various regions of the country and to represent different State approaches to managing drunk driving. As indicated above, all participants will be licensed drivers. In each location, one focus group will be conducted with non-drinkers, one focus group will be conducted with social drinkers, and one focus group will be conducted with heavy episodic drinkers. The average number of participants will be eight per focus group, for a total of 192 focus group participants. Each participant will attend one focus group.

*Estimate of the Total Annual Reporting and Record Keeping Burden Resulting from the Collection of Information*—NHTSA estimates that the duration of each focus group will be one and one-half hours, or a total of 288 hours for the 192 focus group participants. The participants will not incur any reporting cost from the information collection. The participants also will not incur any record keeping burden or record keeping cost from the information collection. They will receive a small stipend under standard procedures for focus groups.

**Authority:** 44 U.S.C. Section 3506(c)(2)(A).

**Jeff Michael,**

*Associate Administrator, Research and Program Development.*

[FR Doc. 2010–10625 Filed 5–5–10; 8:45 am]

**BILLING CODE 4910–59–P**

## DEPARTMENT OF TRANSPORTATION

### National Highway Traffic Safety Administration

**[U.S. DOT Docket No. NHTSA–2009–0192]**

### Reports, Forms, and Record Keeping Requirements

**AGENCY:** National Highway Traffic Safety Administration (NHTSA), DOT.

**ACTION:** Request for public comment on proposed collection of information.

**SUMMARY:** In compliance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), this notice announces that the Information Collection Request (ICR) abstracted below has been forwarded to the Office of Management and Budget (OMB) for review and comment. The ICR describes the nature of the information collection and the expected burden. The **Federal Register** Notice with a 60-day comment period was published on February 24, 2010 (75 FR 8426–8472).

**DATES:** Comments must be submitted on or before June 7, 2010.

**ADDRESSES:** Send comments regarding this information collection request to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 Seventeenth Street, NW., Washington, DC 20503; *Attention:* NHTSA Desk Officer. Comments may also be sent via e-mail to OMB at the following address: *oira_submissions@omb.eop.gov.*

**FOR FURTHER INFORMATION CONTACT:** Scott Roberts, PhD, Contracting Officer's Technical Representative, Office of Behavioral Safety Research (NTI–132), National Highway Traffic Safety Administration, 1200 New Jersey Ave., SE., W46–495, Washington, DC 20590. Dr. Roberts' phone number is 202–366–5594 and his e-mail address is *Scott.Roberts@dot.gov.*

**SUPPLEMENTARY INFORMATION:**

*Title:* Focus Groups for Traffic and Motor Vehicle Safety Programs and Activities.

*Type of Request:* New generic information collection request.

*Requested Expiration Date of Approval:* May 31, 2013.

*Abstract:* The National Highway Traffic Safety Administration (NHTSA) anticipates the need to periodically conduct focus group sessions to define its efforts to reduce traffic injuries and fatalities. Session participation would be voluntary and compensated with, on average, a $75 honorarium. Focus group topics will include: Strategic messaging (*e.g.,* slogans or advertisement concepts concerning seat belt use, impaired driving, driver distraction or tire pressure monitoring), problem identification (*e.g.,* discussions with high-risk groups on beliefs, attitudes, driving behaviors, or reactions to interventions and countermeasures), and resource development (*e.g.,* testing materials designed to communicate essential information about traffic safety issues such as vehicle or equipment performance rating systems). The purpose of the generic clearance request is to obtain approval for NHTSA's general approach to conducting focus group research. NHTSA will submit an individual Information Collection Request (ICR), detailing the specific nature and methodology of planned focus group sessions, to the Office of Management and Budget (OMB) prior to any collection activity covered under this generic clearance.

*Description of the Need for the Information and Proposed Use of the Information*—The National Highway Traffic Safety Administration (NHTSA) was authorized by the Highway Safety Act of 1966 to carry out a Congressional mandate to reduce the mounting number of deaths, injuries and economic losses resulting from motor vehicle crashes on our Nation's highways. In support of this mission, NHTSA anticipates the occasional need to conduct focus group sessions in order to develop and define effective interventions and countermeasures.

NHTSA will use the findings from focus group sessions to help focus current programs, interventions and countermeasures in order to achieve the greatest benefit in decreasing crashes and resulting injuries and fatalities, and provide informational support to States, localities, and law enforcement agencies that will aid them in their efforts to reduce traffic crashes.

*Description of the Likely Respondents* (Including Estimated Number, and Proposed Frequency of Response to the Collection of Information)—Each year NHTSA anticipates conducting 19 Focus Group Studies. Likely respondents are licensed drivers 18 years of age and older who have not participated in a previous focus group session.

*Estimate of the Total Annual Reporting and Record Keeping Burden Resulting from the Collection of Information*—Each of the 19 Studies will consist of approximately 11 focus groups of nine participants and last approximately 80 minutes. Individuals will be recruited via advertisement, intercept, or randomly dialed telephone calls and screened based on the desired criteria. The recruiting and screening process is estimated to take no more than 10 minutes per person. Therefore, the estimated annual burden is 2822 hours. The respondents would not incur any reporting cost from the information collection. The respondents also would not incur any record keeping burden or record keeping cost from the information collection.

*Comments are invited on the following:*

(i) 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) 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) How to enhance the quality, utility, and clarity of the information to be collected; and

(iv) How 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, e.g., permitting electronic submission of responses.

A comment to OMB is most effective if OMB receives it within 30 days of publication.

**Authority:** 44 U.S.C. Section 3506(c)(2)(A).

**Jeff Michael,**

*Associate Administrator, Research and Program Development.*

[FR Doc. 2010–10627 Filed 5–5–10; 8:45 am]

**BILLING CODE 4910–59–P**


Federal Register

**Thursday,**
**May 6, 2010**

## Part II

# Environmental Protection Agency

**40 CFR Part 745**

**Lead; Clearance and Clearance Testing Requirements for the Renovation, Repair, and Painting Program; Proposed Rule**

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 745

**[EPA–HQ–OPPT–2005–0049; FRL–8823–5]**

**RIN 2070–AJ57**

## Lead; Clearance and Clearance Testing Requirements for the Renovation, Repair, and Painting Program

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

**ACTION:** Proposed rule.

**SUMMARY:** EPA is proposing several revisions to the 2008 Lead Renovation, Repair, and Painting Program (RRP) rule that established accreditation, training, certification, and recordkeeping requirements as well as work practice standards for persons performing renovations for compensation in most pre-1978 housing and child-occupied facilities. EPA is particularly concerned about dust-lead hazards generated by renovations because of the well-documented toxicity of lead, especially to younger children. This proposal includes additional requirements designed to ensure that lead-based paint hazards generated by renovation work are adequately cleaned after renovation work is finished and before the work areas are re-occupied. Specifically, EPA is proposing to require dust wipe testing after many renovations covered by the RRP rule. For a subset of jobs involving demolition or removal of plaster through destructive means or the disturbance of paint using machines designed to remove paint through high-speed operation, such as power sanders or abrasive blasters, this proposal would also require the renovation firm to demonstrate, through dust wipe testing, that dust-lead levels remaining in the work area are below regulatory levels.

**DATES:** Comments must be received on or before July 6, 2010.

**ADDRESSES:** Submit your comments, identified by docket identification (ID) number EPA–HQ–OPPT–2005–0049, by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Mail:* Document Control Office (7407M), Office of Pollution Prevention and Toxics (OPPT), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.
- *Hand Delivery:* OPPT Document Control Office (DCO), EPA East Bldg., Rm. 6428, 1201 Constitution Ave., NW., Washington, DC. Attention: Docket ID Number EPA–HQ–OPPT–2005–0049. The DCO is open from 8 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The telephone number for the DCO is (202) 564–8930. Such deliveries are only accepted during the DCO's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

*Instructions:* Direct your comments to docket ID number EPA–HQ–OPPT–2005–0049. EPA's policy is that all comments received will be included in the docket without change and may be made available online 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 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 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, will be publicly available only in hard copy. Publicly available docket materials are available electronically at *http://www.regulations.gov,* or, if only available in hard copy, at the OPPT Docket. The OPPT Docket is located in the EPA Docket Center (EPA/DC) at Rm. 3334, EPA West Bldg., 1301 Constitution Ave., NW., Washington, DC. The EPA/DC Public Reading Room hours of operation are 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number of the EPA/DC Public Reading Room is (202) 566–1744, and the telephone number for the OPPT Docket is (202) 566–0280. Docket visitors are required to show photographic identification, pass through a metal detector, and sign the EPA visitor log. All visitor bags are processed through an X-ray machine and subject to search. Visitors will be provided an EPA/DC badge that must be visible at all times in the building and returned upon departure.

**FOR FURTHER INFORMATION CONTACT:** *For general information contact:* Colby Lintner, Regulatory Coordinator, Environmental Assistance Division (7408M), Office of Pollution Prevention and Toxics, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (202) 554–1404; e-mail address: *TSCA–Hotline@epa.gov.*

*For technical information contact:* Cindy Wheeler, National Program Chemicals Division, Office of Pollution Prevention and Toxics, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (202) 566–0484; e-mail address: *wheeler.cindy@epa.gov*.

**SUPPLEMENTARY INFORMATION:**

### I. General Information

*A. Does this action apply to me?*

You may be potentially affected by this action if you perform renovations of target housing or child-occupied facilities for compensation, dust sampling, or dust testing. You may also be affected by this action if you perform lead-based paint inspections, lead hazard screens, risk assessments or abatements in target housing or child-occupied facilities or if you operate a training program for individuals who perform any of these activities. "Target housing" is defined in section 401 of TSCA as any housing constructed prior to 1978, except housing for the elderly or persons with disabilities (unless any child under age 6 resides or is expected to reside in such housing) or any 0-bedroom dwelling. Under this rule, a child-occupied facility is a building, or a portion of a building, constructed prior to 1978, visited regularly by the same child, under 6 years of age, on at least 2 different days within any week (Sunday through Saturday period), provided that each day's visit lasts at least 3 hours and the combined weekly visits last at least 6 hours, and the combined annual visits last at least 60 hours. Potentially-affected entities may include, but are not limited to:

- Building construction (NAICS code 236), *e.g.,* single family housing

construction, multi-family housing construction, residential remodelers.

- Specialty trade contractors (NAICS code 238), *e.g.,* plumbing, heating, and air-conditioning contractors, painting and wall covering contractors, electrical contractors, finish carpentry contractors, drywall and insulation contractors, siding contractors, tile and terrazzo contractors, glass and glazing contractors.
- Real estate (NAICS code 531), *e.g.,* lessors of residential buildings and dwellings, residential property managers.
- Child day care services (NAICS code 624410).
- Elementary and secondary schools (NAICS code 611110), *e.g.,* elementary schools with kindergarten classrooms.
- Other technical and trade schools (NAICS code 611519), *e.g.,* training providers.
- Engineering services (NAICS code 541330) and building inspection services (NAICS code 541350), *e.g.,* dust sampling technicians.
- Lead abatement professionals (NAICS code 562910), *e.g.,* firms and supervisors engaged in lead-based paint activities.

This listing is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. Other types of entities not listed in this unit could also be affected. The North American Industrial Classification System (NAICS) codes have been provided to assist you and others in determining whether this action might apply to certain entities. If you have any questions regarding the applicability of this action to a particular entity, consult the technical person listed under **FOR FURTHER INFORMATION CONTACT**.

*B. What should I consider as I prepare my comments for EPA?*

1. *Submitting CBI.* Do not submit this information to EPA through regulations.gov or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD–ROM that you mail to EPA, mark the outside of the disk or CD–ROM 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. Introduction

*A. What action is the agency taking?*

EPA is proposing several revisions to the 2008 Lead Renovation, Repair, and Painting Program (RRP) rule (Ref. 1) that established accreditation, training, certification, and recordkeeping requirements as well as work practice standards for persons performing renovations for compensation in most pre-1978 housing and child-occupied facilities. EPA is particularly concerned about dust-lead hazards generated by renovations because of the well-documented toxicity of lead, especially to younger children. This proposal includes additional requirements designed to ensure that lead-based paint hazards generated by renovation work are adequately cleaned after renovation work is finished and before the areas are re-occupied. Specifically, EPA is proposing to require dust wipe testing after many renovations covered by the RRP rule. For a subset of jobs involving demolition or removal of plaster through destructive means or the disturbance of paint using machines designed to remove paint through high-speed operation, such as power sanders or abrasive blasters, this proposal would also require the renovation firm to demonstrate, through dust wipe testing, that dust-lead levels remaining in the work area are below regulatory levels. EPA is not, however, reopening other aspects of the work practices required by the 2008 RRP rule.

EPA is also proposing various minor amendments to the regulations concerning applications for training provider accreditation, amending accreditations, course completion certificates, record keeping, State and Tribal program requirements, and grandfathering (i.e., taking a refresher training in lieu of the initial training). In addition, the proposed amendments intend to clarify that certain requirements apply to the RRP rule as well as the Lead-Based Paint Activities (abatement) regulations, that the prohibitions and restrictions on work practices in the RRP rule apply to the disturbance of any painted surface, that certified renovators need only provide on-the-job training to other renovation workers in the work practices required by the rule, that a certified inspector or risk assessor can act as a dust sampling technician, which hands-on training topics are required for renovator and dust sampling technician courses, and requirements for States and Tribes that apply to become authorized to implement the RRP program. Again, EPA is not reopening for consideration any aspects of the existing regulations, except as provided in today's proposal.

*B. What is the agency's authority for taking this action?*

These work practice requirements for dust wipe testing and clearance, training, certification and accreditation requirements, and State, Territorial and Tribal authorization provisions are being promulgated under the authority of sections 402(c)(3), 404, and 407 of the Toxic Substances Control Act (TSCA), 15 U.S.C. 2682(c)(3), 2684, and 2687.

*C. Background*

1. *Health effects of lead exposure.* This Unit describes some of the more significant health effects of lead exposure and the routes of exposure associated with lead in paint. Much more information is available in the preamble to the 2008 Lead Renovation, Repair, and Painting (RRP) Rule (Ref. 1) and the Air Quality Criteria for Lead document (Ref. 2).

Lead has been known throughout the ages for its useful properties, having been commonly used in the production of paint, batteries, pipes, solder, pottery, and gasoline. Lead is also known for its "broad array of deleterious effects on multiple organ systems via widely diverse mechanisms of action." (Ref. 2) This array of health effects includes heme biosynthesis and related

functions; neurological development and function; reproduction and physical development; kidney function; cardiovascular function; and immune function. There is also some evidence of lead carcinogenicity, primarily from animal studies, together with limited human evidence of suggestive associations.

Of particular interest to EPA during the RRP rulemaking was the delineation of lowest observed effect levels for those lead-induced effects that are most clearly associated with blood lead levels of less than 10 micrograms per deciliter (µg/dL) in children and adults (Ref. 2, at 8–60). As is evident from the Criteria Document, neurotoxic effects in children and cardiovascular effects in adults are among those best substantiated as occurring at blood-lead concentrations as low as 5 to 10 µg/dL (or possibly lower), so these categories of effects would result in the greatest public health concern. Other newly demonstrated immune and renal system effects among general population groups are also emerging as low-level lead-exposure effects of potential public health concern (Ref. 2, at 8–60).

Among the wide variety of health endpoints associated with lead exposures, there is general consensus that the developing nervous system in children is among the, if not the, most sensitive. While blood lead levels in U.S. children have decreased notably since the late 1970s, newer studies have investigated and reported associations of effects on the neurodevelopment of children with these more recent blood lead levels (Ref. 2, chapter 6). Functional manifestations of lead neurotoxicity during childhood include sensory, motor, cognitive, and behavioral impacts. Numerous epidemiological studies have reported neurocognitive, neurobehavioral, sensory, and motor function effects in children with blood lead levels below 10 µg/dL (Ref. 2, sections 6.2 and 8.4. [FN 7. Further, neurological effects in general include behavioral effects, such as delinquent behavior (Ref. 2, sections 6.2.6 and 8.4.2.2), sensory effects, such as those related to hearing and vision (Ref. 2, sections 6.2.7 and 8.4.2.3), and deficits in neuromotor function (Ref. 2, p. 8–36).] As discussed in the Criteria Document, "extensive experimental laboratory animal evidence has been generated that (a) substantiates well the plausibility of the epidemiologic findings observed in human children and adults and (b) expands our understanding of likely mechanisms underlying the neurotoxic effects" (Ref. 2, p. 8–25; section 5.3).

Cognitive effects associated with lead exposures that have been observed in epidemiological studies have included decrements in intelligence test results, such as the widely used IQ score, and in academic achievement as assessed by various standardized tests as well as by class ranking and graduation rates (Ref. 2, section 6.2.16 and pp. 8–29 to 8–30). As noted in the Criteria Document with regard to the latter, "Associations between lead exposure and academic achievement observed in the above-noted studies were significant even after adjusting for IQ, suggesting that lead-sensitive neuropsychological processing and learning factors not reflected by global intelligence indices might contribute to reduced performance on academic tasks" (Ref. 2, pp. 8–29 to 8–30).

With regard to potential implications of lead effects on IQ, the Criteria Document recognizes the "critical" distinction between population and individual risk, identifying issues regarding declines in IQ for an individual and for the population. The Criteria Document further states that a "point estimate indicating a modest mean change on a health index at the individual level can have substantial implications at the population level" (Ref. 2, p. 8–77). [FN 8. As an example, the Criteria Document states, "although an increase of a few mm Hg in blood pressure might not be of concern for an individual's well-being, the same increase in the population mean might be associated with substantial increases in the percentages of individuals with values that are sufficiently extreme that they exceed the criteria used to diagnose hypertension" (Ref. 2, p. 8–77).] A downward shift in the mean IQ value is associated with both substantial decreases in percentages achieving very high scores and substantial increases in the percentage of individuals achieving very low scores (Ref. 2, p. 8–81). [FN 9. For example, for a population mean IQ of 100 (and standard deviation of 15), 2.3% of the population would score above 130, but a shift of the population to a mean of 95 results in only 0.99% of the population scoring above 130 (Ref. 2, pp. 8–81 to 8–82).] For an individual functioning in the low IQ range due to the influence of developmental risk factors other than lead, a lead-associated IQ decline of several points might be sufficient to drop that individual into the range associated with increased risk of educational, vocational, and social failure (Ref. 2, p. 8–77).

Other cognitive effects observed in studies of children have included effects on attention, executive functions, language, memory, learning, and visuospatial processing (Ref. 2, sections 5.3.5, 6.2.5, and 8.4.2.1), with attention and executive function effects associated with lead exposures indexed by blood lead levels below 10 µg/dL (Ref. 2, section 6.2.5 and pp. 8–30 to 8–31). The evidence for the role of lead in this suite of effects includes experimental animal findings (Ref. 2, section 8.4.2.1; p. 8–31), which provide strong biological plausibility of lead effects on learning ability, memory and attention (Ref. 2, section 5.3.5), as well as associated mechanistic findings.

The persistence of such lead-induced effects is described in the proposal and the Criteria Document (e.g., Ref. 2, sections 5.3.5, 6.2.11, and 8.5.2). The persistence or irreversibility of such effects can be the result of damage occurring without adequate repair offsets or of the persistence of lead in the body (Ref. 2, section 8.5.2). It is additionally important to note that there may be long-term consequences of such deficits over a lifetime. Poor academic skills and achievement can have "enduring and important effects on objective parameters of success in real life," as well as increased risk of antisocial and delinquent behavior (Ref. 2, section 6.2.16).

Multiple epidemiologic studies of lead and child development have demonstrated inverse associations between blood lead concentrations and children's IQ and other cognitive-related outcomes at successively lower lead exposure levels over the past 30 years (Ref. 2, section 6.2.13). For example, the overall weight of the available evidence, described in the Criteria Document, provides clear substantiation of neurocognitive decrements being associated in children with mean blood lead levels in the range of 5 to 10 µg/dL, and some analyses indicate lead effects on intellectual attainment of children for which population mean blood lead levels in the analysis ranged from 2 to 8 µg/dL (Ref. 2, sections 6.2, 8.4.2, and 8.4.2.6). Thus, while blood lead levels in U.S. children have decreased notably since the late 1970s, newer studies have investigated and reported associations of effects on the neurodevelopment of children with blood lead levels similar to the more recent, lower blood lead levels (Ref. 2, chapter 6).

Paint that contains lead can pose a health threat through various routes of exposure. House dust is the most common exposure pathway through which children are exposed to lead-based paint hazards. Dust created during normal lead-based paint wear (especially around windows and doors)

can create an invisible film over surfaces in a house. Children, particularly younger children, are at risk for high exposures of lead-based paint dust via hand-to-mouth exposure, and may also ingest lead-based paint chips from flaking paint on walls, windows, and doors. Lead from exterior house paint can flake off or leach into the soil around the outside of a home, contaminating children's play areas. Cleaning and renovation activities may actually increase the threat of lead-based paint exposure by dispersing lead dust particles in the air and over accessible household surfaces. In turn, depending on the levels of lead in the dust, both adults and children can receive hazardous exposures by inhaling the dust or by ingesting lead-based paint dust during hand-to-mouth activities.

EPA's Wisconsin Childhood Blood-Lead Study, described more fully in Unit III.C.1.c. of the preamble to the 2006 Proposal, provides ample evidence of a link between renovation activities and elevated blood lead levels in resident children (Ref. 3). This peer-reviewed study concluded that general residential renovation and remodeling is associated with an increased risk of elevated blood lead levels in children and that specific renovation and remodeling activities are also associated with an increase in the risk of elevated blood lead levels in children. In particular, removing paint (using open flame torches, using heat guns, using chemical paint removers, and wet scraping/sanding) and preparing surfaces by sanding or scraping significantly increased the risk of elevated blood lead levels.

Three studies from New York support the findings of the Wisconsin Childhood Blood-Lead Study. In 1995, the New York State Department of Health assessed lead exposure among children resulting from home renovation and remodeling in 1993–1994. A review of the health department records of children with blood lead levels equal to or greater than 20 µg/dL identified 320, or 6.9%, with elevated blood lead levels that were attributable to renovation and remodeling (Ref. 4). An update to that study with data from environmental investigations conducted during 2006–2007 in New York State (excluding New York City) identified renovation, repair, and painting activities as the probable source of lead exposure in 14% of 972 children with blood lead levels equal to or exceeding 20 µg/dL (Ref. 5). The authors concluded that children living in housing undergoing renovation, repair, and painting that was built before 1978, and particularly before 1950, when concentrations of lead in paint were higher, are at high risk for elevated blood lead levels. The final study was a case-control study that assessed the association between elevated blood lead levels in children younger than 5 years and renovation or repair activities in homes in New York City (Ref. 6). EPA notes that the authors show that when dust and debris was reported (by respondents via telephone interviews) to be "everywhere" following a renovation, the blood lead levels were significantly higher than children at homes that did not report remodeling work. On the other hand, when the respondent reported either "no visible dust and debris" or that "dust and debris was limited to the work area," there was no statistically significant effect on blood lead levels relative to homes that did not report remodeling work. Although the study found only a weak and nonsignificant link between a report of any renovation activity and the likelihood that a resident child had an elevated blood-lead level, the link to the likelihood of an elevated blood-lead level was statistically significant for surface preparation by sanding and for renovation work that spreads dust and debris beyond the work area. The researchers noted the consistency of their results with EPA's Wisconsin Childhood Blood-Lead Study (Ref. 6, at 509).

Children in minority populations and children whose families are poor have an increased risk of exposure to harmful lead levels (Ref. 7, at e376). Analysis of the National Health and Nutrition Examination Surveys (NHANES) data from 1988 through 2004 shows that the prevalence of blood lead levels equal to or exceeding 10 µg/dL in children aged 1 to 5 years has decreased from 8.6% in 1988–1991 to 1.4% in 1999–2004, which is an 84% decline (Ref. 7, at e377). However, the NHANES data from 1999–2004 indicates that non-Hispanic black children aged 1 to 5 years had higher percentages of blood lead levels equal to or exceeding 10 µg/dL (3.4%) than white children in the same age group (1.2%) (Ref. 7). In addition, among children aged 1 to 5 years over the same period, the geometric mean blood lead level was significantly higher for non-Hispanic blacks (2.8 µg/dL), compared with Mexican Americans (1.9 µg/dL) and non-Hispanic whites (1.7 µg/dL) (Ref. 7, at e377). For children aged 1 to 5 years from families with low income, the geometric mean blood lead level was 2.4 µg/dL (Ref. 7, at e377). Further, the incidences of blood-lead levels greater than 10 µg/dL and greater than or equal to 5 µg/dL were higher for non-Hspanic blacks (14% and 3.4% respectively) than for Mexican Americans (4.7% and 1.2%, respectively) and non-Hispanic whites (4.4% and 1.2%, respectively). (Ref. 7, at e377). The analysis "indicates that residence in older housing, poverty, age, and being non-Hispanic black are still major risk factors for higher lead levels" (Ref. 7, at e376).

2. *Prior EPA rulemakings under TSCA Sections 402(a) and 403.* TSCA section 402(a) directs EPA to promulgate regulations covering lead-based paint activities, such as abatement, to ensure persons performing these activities are properly trained, that training programs are accredited, and that contractors performing these activities are certified. These regulations must contain standards for performing lead-based paint activities, taking into account reliability, effectiveness, and safety. On August 29, 1996, EPA promulgated final regulations under TSCA section 402(a) that govern lead-based paint inspections, lead hazard screens, risk assessments, and abatements in target housing and child-occupied facilities (also referred to as the Lead-based Paint Activities Regulations) (Ref. 8). These regulations, codified at 40 CFR part 745, subpart L, contain an accreditation program for training providers and training and certification requirements for lead-based paint inspectors, risk assessors, project designers, abatement supervisors, and abatement workers. Work practice standards for lead-based paint activities are included. Pursuant to TSCA section 404, provision was made for interested States, Territories, and Indian Tribes to apply for and receive authorization to administer their own lead-based paint activities programs. The regulations applicable to State, Territorial, and Tribal programs are codified at 40 CFR part 745, subpart Q.

The work practice standards for abatements in the Lead-based Paint Activities Regulations are essentially performance standards. They give a trained and certified abatement contractor some discretion in determining how best to ensure that an abatement is performed safely, so long as the contractor can demonstrate that the abatement has been properly completed and that no lead-based paint hazards remain. Certain high dust generating practices are prohibited and contractors are required to prepare occupant protection plans specifically describing the procedures to be followed on each job to protect occupants from exposures to lead-based paint hazards. In most cases, residents relocate until the abatement has been

completed. Although these additional procedures are not specified in the regulations, abatement supervisor and worker courses provide comprehensive training in the specialized techniques these individuals can use to contain work areas, remove, enclose, or encapsulate lead-based paint and lead-based paint hazards, and clean up after the job is finished. The regulations are much more detailed in describing the procedures that must be followed to ensure that the abatement has been properly completed and that the work area is ready for re-occupancy. These procedures, typically referred to as "clearance," must be performed by a certified inspector or risk assessor. First, a visual inspection must be performed to determine whether deteriorated painted surfaces or visible amounts of dust, debris, or residue are still present. If so, these conditions must be eliminated before the clearance procedures may continue. An exterior abatement project is considered complete after a successful visual inspection. Following a successful visual inspection after an interior abatement project, the inspector or risk assessor must collect dust wipe samples from floors, windowsills, and window troughs in the work area and have them analyzed by a laboratory accredited under the National Lead Laboratory Accreditation Program (NLLAP) for dust lead analysis. After the sampling results are received, the inspector or risk assessor must compare them with the established clearance standards for lead in dust. If all of the samples are below the clearance standards, the abatement is complete and the area may be re-occupied. If any samples are above the standards, the components represented by those samples must be re-cleaned and the clearance process must be repeated until all samples are below the clearance standards. For example, if any interior window sills fail clearance, all of the unsampled window sills, as well as the failed window sills, must be recleaned and retested. If the abatement was conducted in multiple dwelling units, and units were selected for random testing, the window sills in the unsampled units would also have to be recleaned and retested.

TSCA section 403 directs EPA to promulgate regulations that identify, for the purposes of Title X and Title IV of TSCA, dangerous levels of lead in paint, dust, and soil. These regulations were promulgated on January 5, 2001 and codified at 40 CFR part 745, subpart D (Ref. 9). These hazard standards define lead-based paint hazards in target housing and child-occupied facilities as paint-lead, dust-lead, and soil-lead hazards. A paint-lead hazard is defined as any damaged or deteriorated lead-based paint, any chewable lead-based painted surface with evidence of teeth marks, or any lead-based paint on a friction surface if lead dust levels underneath the friction surface exceed the dust-lead hazard standards. A dust-lead hazard is surface dust that contains a mass-per-area concentration of lead equal to or exceeding 40 micrograms per square foot (μg/ft$^2$) on floors or 250 μg/ft$^2$ on interior windowsills based on wipe samples. A soil-lead hazard is bare soil that contains total lead equal to or exceeding 400 parts per million (ppm), equivalent to 400 micrograms per gram (μg/g), in a play area or average of 1,200 ppm of bare soil in the rest of the yard based on soil samples.

The TSCA section 403 rulemaking also amended the Lead-based Paint Activities Regulations to incorporate new dust-lead clearance standards for abatements. These standards are 40 μg/ft$^2$ on floors, 250 μg/ft$^2$ on interior windowsills, and 400 μg/ft$^2$ on window troughs, based on wipe samples.

On August 10, 2009, EPA received a petition requesting that EPA lower the regulatory dust-lead hazard standard and modify the regulatory definition of lead-based paint. After careful consideration, EPA decided to grant the request and accordingly intends to begin the appropriate proceedings. Although EPA granted the request, the Agency did not commit to either a specific rulemaking outcome or a certain date for promulgation of a final rule. EPA's primary reason for granting the request was based on recent epidemiological studies that indicate the current hazard standards are insufficiently protective. The request was granted under section 553(e) of the Administrative Procedures Act (APA). Additionally, because the Secretary of the Department of Housing and Urban Development (HUD) was given the statutory authority to establish a lower level of lead in paint for purposes of the definition of lead-based paint in target housing, EPA plans to work with HUD on this aspect of the request.

3. *The 2008 Renovation, Repair, and Painting Rule.* TSCA section 402(c) addresses renovation and remodeling. Specifically, TSCA section 402(c)(2) directs EPA to study the extent to which persons engaged in various types of renovation and remodeling activities are exposed to lead during such activities or create a lead-based paint hazard regularly or occasionally. EPA conducted this study in four phases. Phase I, the Environmental Field Sampling Study (EFSS) (Ref. 10), evaluated the amount of leaded dust released by the following activities:

- Paint removal by abrasive sanding.
- Removal of large structures, including demolition of interior plaster walls.
- Window replacement.
- Carpet removal.
- HVAC repair or replacement, including duct work.
- Repairs resulting in isolated small surface disruptions, including drilling and sawing into wood and plaster.

Phase II, the Worker Characterization and Blood Lead Study (Ref. 11), involved collecting data on blood lead and renovation and remodeling activities from workers. Phase III, the Wisconsin Childhood Blood Lead Study (Ref. 3), was a retrospective study focused on assessing the relationship between renovation and remodeling activities and children's blood-lead levels. Phase IV, the Worker Characterization and Blood-Lead Study of R&R Workers Who Specialize in Renovations of Old or Historic Homes (Ref. 12), was similar to Phase II, but focused on individuals who worked primarily in old historic buildings. More information on the results of these peer-reviewed studies can be found in Unit III.C.1. of the preamble to the 2006 Lead; Renovation, Repair, and Painting Program Proposed Rule ("2006 Proposal") (Ref. 13).

TSCA section 402(c)(3) further directs EPA to revise the Lead-based Paint Activities Regulations to apply to renovation or remodeling activities that create lead-based paint hazards. Accordingly, EPA issued the 2006 Proposal, proposing to conclude that any renovation activity that disturbs lead-based paint can create significant amounts of leaded dust, that most activities created lead-based paint hazards, and that some activities can be reasonably anticipated to create lead-based paint hazards (Ref. 13). This proposed finding was largely based on the results of the studies conducted under TSCA section 402(c)(2).

After the 2006 Proposal was issued, EPA conducted a field study (Characterization of Dust Lead Levels after Renovation, Repair, and Painting Activities) (the "Dust Study") to better characterize dust lead levels resulting from various renovation, repair, and painting activities (Ref. 14). This study, completed in January, 2007, was designed to compare environmental lead levels at appropriate stages after various types of renovation, repair, and painting preparation activities were performed on the interiors and exteriors of target housing units and child-

occupied facilities. The renovation activities were conducted by local professional renovation firms, using personnel who received lead safe work practices training. The activities conducted represented a range of activities that would have been permitted under the 2006 Proposal, including work practices that are restricted or prohibited under the final RRP rule. Of particular interest was the impact of using specific work practices that renovation firms would be required to use under the proposed rule, such as the use of plastic to contain the work area and a multi-step cleaning protocol, as opposed to more typical work practices.

The final RRP rule was published in the **Federal Register** issue of April 22, 2008 (Ref. 1). The final RRP rule, codified in 40 CFR part 745, subparts E, L, and Q, addresses lead-based paint hazards created by renovation, repair, and painting activities that disturb painted surfaces in target housing and child-occupied facilities. "Target housing" is defined in TSCA section 401 as any housing constructed before 1978, except housing for the elderly or persons with disabilities (unless any child under age 6 resides or is expected to reside in such housing) or any 0-bedroom dwelling. Under the final RRP rule, a child-occupied facility is a building, or a portion of a building, constructed prior to 1978, visited regularly by the same child, under 6 years of age, on at least two different days within any week (Sunday through Saturday period), provided that each day's visit lasts at least 3 hours and the combined weekly visits last at least 6 hours, and the combined annual visits last at least 60 hours. Child-occupied facilities may be located in public or commercial buildings or in target housing.

In the final RRP rule, EPA issued its determination that renovation, repair, and painting activities that disturb lead-based paint create lead-based paint hazards. This finding was based on evidence from the TSCA section 402(c)(2) study and the Dust Study that all such activities in the presence of lead-based paint create lead-based paint hazards. Having made this finding, TSCA section 402(c)(3) then directs EPA to revise the Lead-based Paint Activities regulations to apply to such renovations. In the final RRP rule, EPA did not interpret its statutory mandate to require application of the existing TSCA section 402(a) regulations to renovations without change. EPA stated its belief that Congress, by using the word "revise," and creating a separate subsection of the statute for renovation, intended that EPA make revisions to those existing regulations to adapt them to a different set of actions and a very different regulated community. As discussed in the preamble to the final RRP rule, there are significant differences between renovations and abatements (Ref. 1). For example, performing abatement is a highly specialized skill that workers and supervisors must learn in accredited training courses. However, painters, plumbers and carpenters already know how to perform renovation work, so accredited renovator training courses are designed to teach renovators how to incorporate principles of lead safety into their typical work. Accordingly, the rule did not merely expand the scope of the current abatement requirements to cover renovation and remodeling activities. Instead, EPA considered the elements of the existing abatement regulations and revised them as necessary to craft a rule that is practical for renovation, remodeling and painting businesses and their customers, taking into account reliability, effectiveness, and safety as directed by TSCA section 402(a).

The final RRP rule establishes requirements for training renovators, other renovation workers, and dust sampling technicians; for certifying renovators, dust sampling technicians, and renovation firms; for accrediting providers of renovation and dust sampling technician training; for renovation work practices; and for recordkeeping. Interested States, Territories, and Indian Tribes may apply for and receive authorization to administer and enforce all of the elements of these new renovation requirements.

The final RRP rule created two new training disciplines in the field of lead-based paint: renovator and dust sampling technician. Persons who successfully complete renovator training from an accredited renovation training provider are certified renovators. Certified renovators are responsible for ensuring that renovations to which they are assigned are performed in compliance with the work practice requirements set out in 40 CFR 745.85. Persons who successfully complete dust sampling technician training from an accredited training provider are certified dust sampling technicians. Certified dust sampling technicians may be called upon to collect dust wipe samples after renovation activities have been completed. While the training disciplines, the work practice standards, and the recordkeeping requirements of the final RRP rule differ from those established in the lead-based paint activities regulations, EPA determined that the accreditation requirements imposed on persons providing lead-based paint activities training would also be effective for persons providing renovation training. Therefore, the final RRP rule amended 40 CFR 745.225 to cover persons who provide or wish to provide renovation training for the purposes of the final RRP rule.

As amended, 40 CFR 745.225 requires training providers who wish to provide lead-based paint activities or renovation training for the purposes of the EPA's lead-based paint programs to be accredited by EPA. The requirements for each course of study are described in detail at 40 CFR 745.225 as are the operational requirements for training programs and the process for obtaining accreditation.

Under the final RRP rule, covered renovations in target housing and child-occupied facilities must be performed by certified renovation firms. A certified firm must ensure that persons who perform renovations on behalf of the firm are properly trained and that the work practice requirements are followed. Renovations must be performed or directed by certified renovators, who are also responsible for compliance with the RRP rule's requirements. The final RRP rule contains a number of work practice requirements that must be followed for every covered renovation. These requirements pertain to warning signs and work area containment, the restriction or prohibition of certain practices (*e.g.,* high heat gun, torch, power sanding, power planing), waste handling, cleaning, and post-renovation cleaning verification. In contrast, the RRP rule did not apply the same performance standard of an abatement-style clearance requirement to demonstrate that lead-based paint hazards created by the renovation have been eliminated. Instead, the RRP rule sets forth the steps that must be taken to isolate and contain the work area before work begins and the cleaning protocol that must be followed after the renovation has been completed.

A final step in the process for interior renovations is cleaning verification. After the RRP rule's specific cleaning protocol has been followed, a visual inspection for visible dust and debris is performed. If no dust or debris is found, a certified renovator must wipe the interior windowsills and uncarpeted floors with wet disposable cleaning cloths and compare each to a cleaning verification card developed and distributed by EPA. If the cloth matches or is lighter than the image on the card, the surface represented by the cloth has passed the post-renovation cleaning

verification. If the cloth is darker than the image on the card, the surface represented by the cloth must be re-cleaned and then wiped with a new wet cloth, which is then compared to the cleaning verification card. If the cloth is still darker than the image on the card, the surface must be allowed to dry for at least an hour. At that time, the surface is wiped with a dry electrostatic cleaning cloth, which completes the cleaning verification process for that surface. When all surfaces in the work area have completed cleaning verification, the renovation has been completed and the work area may be re-occupied.

Shortly after the final RRP rule was promulgated, several petitions were filed challenging the rule. These petitions were consolidated in the Circuit Court of Appeals for the District of Columbia Circuit. On August 26, 2009, EPA signed an agreement with the environmental and children's health advocacy groups in settlement of their petitions. In this agreement EPA committed to propose several changes to the RRP rule, including the changes discussed in this notice.

Throughout this notice, EPA will use several different terms to describe the proposed requirements. EPA will use the term "dust wipe testing" to mean collecting wipe samples of dust on floors and windowsills and in window troughs, analyzing the samples for lead content, and reporting the results of the analysis to the owners and occupants of the building being renovated. Although the term "dust wipe sampling" was used in the settlement agreement to describe these activities, EPA is using "dust wipe testing" in this notice to signal that sample analysis may be performed off-site in a traditional laboratory setting or on-site by a portable laboratory, so long as the entity performing the analysis is accredited or recognized by the National Lead Laboratory Accreditation Program (NLLAP). In this notice, EPA will use the term "dust wipe sampling" to refer to the specific activity of collecting the wipe samples, not to the analysis or reporting of results. EPA will use the term "clearance" to mean demonstrating, through dust wipe testing, that the floors, windowsills, and window troughs in the renovation work area are below the regulatory clearance standards that have been established for the abatement program and codified at 40 CFR 745.227(e)(8). This includes re-cleaning where necessary to achieve the clearance standards.

## III. Provisions of This Proposal

### *A. Dust Wipe Testing and Clearance*

1. *Background.* One of the most significant issues arising out of the RRP rulemaking was the issue of how to determine whether a renovation had been properly completed. The Lead-based Paint Activities Rule requires clearance to be achieved in an abatement work area before the abatement is considered complete. As previously discussed, the abatement clearance process involves a visual inspection, dust wipe sampling of floors, windowsills, and window troughs in the work area, analysis by an NLLAP-accredited laboratory, and comparison of the results to the clearance standards. If the sample results are below the clearance standards, clearance has been achieved and the work area may be re-occupied. If the sample results are at or above the standards, the work area must be re-cleaned and the clearance process must begin again. For this reason, abatement projects often include coating floors with a sealant. According to the U.S. Department of Housing and Urban Development's "Guidelines For the Evaluation and Control of Lead-Based Paint Hazards in Housing" (HUD Guidelines), the purpose of sealing floors is not to trap leaded dust underneath the sealant, but to provide a surface that can be cleaned effectively by the resident (Ref. 15). Although achieving clearance is not the main reason for sealing floors, the process typically results in a surface than can achieve clearance and be kept clean by the resident. This is a sensible approach for abatements, because the goal of abatement is to permanently eliminate lead-based paint and lead-based paint hazards. The clearance process ensures that no lead-based paint or lead-based paint hazards remain in the work area.

However, EPA recognized that there are many differences between renovations and abatements. As discussed in the preamble to the final RRP rule, renovations are different from abatements in intent, implementation, type of workforce, funding, and goal (Ref. 1). One of the biggest challenges that faced EPA in revising the TSCA section 402(a) Lead-based Paint Activities Regulations was how to effectively bridge the differences between abatement and renovation and remodeling while acknowledging that many of the activities employed in both (e.g., window replacement) are the same and generate the same amount of dust. Abatements are generally performed in three circumstances. First, abatements may be performed in the residences of children who have been found to have elevated blood lead levels. Second, abatements are performed in certain housing receiving financial assistance from HUD when required by HUD's Lead-Safe Housing Rule, codified at 24 CFR part 35 (see §§ 35.630 and 35.930(d)). Third, state and local laws and regulations may require abatements in certain situations associated with rental housing, or when abatement orders have been issued when resident young children, typically under age 6, have blood lead levels at or above specified values. Typically, when an abatement is performed, the housing is either unoccupied or the occupants are temporarily relocated to lead-safe housing until the abatement has been demonstrated to have been properly completed through dust clearance testing. Carpet in the housing is usually removed as part of the abatement because it is harder to clean. Uncarpeted floors that have not been replaced during the abatement may need to be refinished or sealed in order to achieve clearance. Abatements have only one purpose—to permanently eliminate lead-based paint or lead-based paint hazards.

On the other hand, renovations are performed for myriad reasons that may have nothing to do with lead-based paint. Renovations involve activities designed to update, maintain, or modify all or part of a building. Renovations may be performed while the property is occupied or unoccupied. If the renovation is performed while the property is occupied, the occupants do not typically relocate pending the completion of the project.

EPA also recognized that dust wipe testing and clearance as required after abatements can be expensive. The costs can be attributed to two major factors: the cost of trained personnel to collect the samples and the cost of the laboratory analysis. EPA preliminarily estimated the cost of three dust wipe samples to be $160 to collect and analyze (Ref. 13). If EPA had required dust wipe testing and clearance after every renovation project, it would have made up a significant portion of the cost of smaller projects. In addition, laboratory results may not be available for several days. If EPA had required traditional abatement-style clearance after renovations, the work area would not be able to be re-occupied while waiting for the laboratory results.

In addition, EPA was also concerned that requiring clearance after every renovation job could, in some instances, result in the renovation firm being held responsible for abating all dust-lead hazards, including such hazards that

may have existed in the area before the renovation commenced. During the stakeholder input opportunities provided by EPA before issuing the 2006 Proposal, contractors suggested that, if post-renovation dust wipe testing were required, the contractors would have to protect themselves by collecting pre-renovation dust wipe samples, to ensure that they would not be held liable for pre-existing hazards.

To address these various concerns, EPA began looking for an alternative to dust wipe testing and clearance that would be quick, inexpensive, reliable, and easy to perform. EPA conducted a series of studies using commercially available disposable cleaning cloths to determine whether variations of a "white glove" test could serve as an effective alternative to clearance. Based on the favorable final report of these studies, entitled "Electrostatic Cloth and Wet Cloth Field Study in Residential Housing" (Disposable Cleaning Cloth Study) (Ref. 16), EPA's 2006 Proposal included a cleaning verification protocol using wet and dry disposable cleaning cloths.

Unlike the earlier Disposable Cleaning Cloth Study, the Dust Study was not designed specifically to evaluate the cleaning verification in isolation from the rest of the work practices. However, the Dust Study did serve as a valuable field test of the cleaning verification protocol. The Dust Study involved actual renovations performed by local renovation contractors who received instruction in how to perform cleaning verification using wet and dry disposable cleaning cloths and then were left alone to determine whether the cleaning cloths matched or were lighter than the cleaning verification card developed by the EPA. In order to maximize the information collected about cleaning verification in the Dust Study, cleaning verification was conducted after each experiment, not just those experiments that were being conducted in accordance with the proposed rule requirements for containment and cleaning.

EPA received numerous comments on this aspect of the RRP rulemaking. While some commenters supported the proposed work practices, including cleaning verification, many others thought that renovation work areas ought to be tested and cleared for re-occupancy in the same way that abatement work areas are cleared through the clearance process, including dust wipe testing. Many commenters believed that renovation firms should be required to demonstrate that no dust-lead hazards had been left behind in the work area. These commenters contended that the only reliable, safe, and effective way to do this was through dust wipe testing and clearance.

These commenters contended that the unreliability of cleaning verification made it an unsuitable substitute for dust wipe testing and clearance. They pointed to the sentence in the conclusion section of EPA's Dust Study that states that the cleaning verification protocol was not always accurate in identifying the presence of levels above EPA standards for floors and sills. Some commenters also noted the Dust Study report's discussion of factors that affected the effectiveness of cleaning verification, such as floor condition, contractor performance, job type, and dust particle characteristics. One commenter observed that while all interior experiments resulted in final passed cleaning cloths for all floor zones and for all windowsills, nearly half of the experiments in the study ended with average work room floor lead levels above EPA's dust-lead hazard standard for floors of 40 $\mu g/ft^2$. The Clean Air Scientific Advisory Committee, who was asked to review the underlying analysis for the estimation of the effect of the RRP rule on children's blood lead levels, stated that in the Dust Study cleaning verification did not provide sufficiently reliable results, leading to an inaccurate assessment of cleaning efficiency.

EPA agreed with the commenters who argued that cleaning verification was not a suitable substitute for dust wipe testing and clearance. EPA noted in the preamble to the final RRP rule that even though the Disposable Cleaning Cloth Study showed that the cleaning verification cloths that reached "white glove" were approximately 91% to 97% likely to be below the regulatory hazard standard, EPA believes the greater variability seen in the Dust Study, particularly in the experiments where the complete suite of proposed work practices were not used, does not support the characterization of cleaning verification as a direct substitute for clearance testing. Cleaning verification, in itself, is not a substitute for quantitative dust wipe testing. However, EPA continues to believe that the Dust Study supports the validity of cleaning verification as an effective component of the RRP rule's work practices. The cleaning and feedback aspects of cleaning verification are important to its contribution to the effectiveness of the work practices (Ref. 1).

In the Dust Study, for renovations not involving practices restricted or prohibited by the final RRP rule, cleaning verification in combination with the other required work practices were effective at reducing dust lead levels on surfaces to or below the dust-lead hazard standards, regardless of the condition of the floor. Of the 10 experiments performed in compliance with the RRP rule's work practices, final average lead-based paint dust levels were at or below the regulatory hazard standard (taking into account the accepted level of uncertainty, i.e., within plus or minus 20%, which is the performance criteria for the National Lead Laboratory Accreditation Program). For the experiments not performed according to the RRP rule's work practices, the use of cleaning verification after cleaning reduced, often significantly, the amount of lead dust remaining. EPA determined that there is sufficient consistency in the Dust Study data to support the use of cleaning verification as an effective component of the RRP rule's work practices.

Commenters also expressed concern about the subjectivity of the cleaning verification process. They noted that the effectiveness of cleaning verification relies upon the certified renovator's understanding and application of the protocol, ability to define the floor sampling area or areas, and use of the cleaning verification card to determine whether a surface has been adequately cleaned. Some commenters speculated that the certified renovator's accuracy in comparing the cleaning cloth to the verification card could depend on factors such as his or her visual acuity, the lighting in the room, or simply differences in judgment among certified renovators. The issue of a person (*i.e.,* the certified renovator on the project) verifying cleaning of a project that he or she has worked on also raised concerns about actual or potential conflict of interest, which might, even unconsciously, affect the person's judgment. One thought that the lack of corrections for surface conditions, the experience of the person conducting the visual assessment, or pre-existing conditions might bias the results of testing.

EPA agreed that the visual comparison of a cleaning cloth to a cleaning verification card has an element of subjectivity because the visual comparison of cloth to card requires some exercise of judgment on the part of the person doing the comparing. However, EPA did not agree that this necessarily makes the comparison suspect. The Dust Study represented a real-world test of the ability of renovators to learn how to do cleaning verification and to apply it in the field. Although one Dust Study participant expressed concern about subjectivity, cleaning verification was

successfully performed by the renovation contractors in all of the experiments performed in compliance with the work practices in the final RRP rule. In addition, cleaning verification was predictive of whether renovators had cleaned-up the lead-based paint hazards created during the renovation activity to the dust-lead standard, particularly when the proposed work practices were used. The cleaning verifications performed during the Dust Study were conducted by various persons in various lighting conditions and on various surface conditions.

Other commenters did not support dust wipe testing and clearance. One reason cited by these commenters was the cost of dust wipe testing, especially if required to be performed by independent certified inspectors or risk assessors. Some also contended that dust clearance testing is time consuming and an obstacle to completing the renovation job. One commenter noted that a major component of the cost of performing clearance is due to the fact that the portion of the premises affected by the renovation would have to remain unoccupied. Another commenter noted that it is not uncommon for the abatement clearance process to be conducted up to three times on a home to make sure that lead levels are sufficiently low. Again, commenters expressed the concern that a requirement for dust wipe testing and clearance would have the effect of holding renovation firms responsible for pre-existing dust-lead hazards.

Based on the weight of the evidence in the rulemaking record, primarily from the Disposable Cleaning Cloth Study and the Dust Study, EPA determined that, once certain high dust generating practices were prohibited or restricted, the full suite of work practice requirements, including containment, cleaning, and cleaning verification, was effective at minimizing exposure to lead-based paint hazards created by renovation, repair, and painting activities. At the same time, EPA recognizes that cleaning verification is an imperfect check on whether the dust-lead hazard standard has been achieved. Among other things, as commenters pointed out, there is an element of subjectivity to cleaning verification, which is not present in dust wipe testing.

In the final RRP rule, EPA gave significant weight to the cost, timing, and liability concerns expressed by commenters. In balancing the various considerations, EPA concluded that cleaning verification, as part of the full suite of work practices, was an appropriate check on the effectiveness of the work practices. EPA has continued to balance these considerations in today's proposal, but has preliminarily concluded that, for certain jobs, the additional benefits of dust wipe testing, and in some cases clearance, warrant imposing these additional requirements.

2. *Proposed requirements for dust wipe testing after certain renovations.* This proposal contains dust wipe testing requirements for many renovations. In most of these situations, the renovation firm will only be required to provide the dust wipe testing results to the building owners and occupants. However, as discussed more fully in Unit III.A.3. of this preamble below, after two types of renovations, this proposal would also require renovation firms to achieve clearance.

EPA has evaluated the value of the information that would be available to renovation firms and building owners and occupants through such testing. EPA expects two kinds of benefits to flow from proposed dust wipe testing requirements. The first are the direct benefits of the information to the owners and occupants, the pure value of the information on dust lead levels remaining in the renovation work area, including leaded dust that may have been generated during the renovation activity. For building owners and occupants, this information is likely to improve their understanding and awareness of dust-lead hazards. It will also greatly improve their ability to make further risk management decisions. This information is particularly critical where dust lead levels approach or exceed the regulatory hazard standards. One commenter on the 2008 RRP rule described the value of dust wipe testing results in this way: "Because the white glove test does not provide a numeric result, a family is given limited information from which to make informed decisions and worse yet, may be given a false sense of security." (Ref. 17) The commenter then argued that, "although the federal floor dust standard is set at 40 $\mu g/ft^2$, there is sufficient evidence to suggest that floors well below this standard may endanger children. Property owners and residents should be provided quantitative information so they can choose what actions to take based on those levels." The commenter believed that in instances where floor dust wipe test results are just below the EPA regulatory standard, the owners or occupants may want to undertake additional cleaning. The value of this information has new significance in light of recent epidemiological studies that indicate the current lead-based hazard standards are insufficiently protective.

In addition, in enacting the Residential Lead-based Paint Hazard Reduction Act of 1992, Congress recognized that there is a value in providing information to property owners and occupants. Section 1018 of the Act requires the disclosure of information on lead-based paint and lead-based paint hazards to purchasers and tenants of target housing. Even if no specific information on the housing to be sold or rented is available, the seller or landlord must provide a lead hazard information pamphlet to the purchaser or tenant. Similarly, TSCA section 406(b) requires renovators or their firms to provide a lead hazard information pamphlet to the owners and occupants of target housing before beginning a renovation in the housing. The information provided by dust wipe testing after renovations is a different and more targeted benefit, i.e., a more accurate check on whether the hazard standard has been met at completion of the job, but it is in line with the broader statutory emphasis on disclosure of information related to possible lead-based paint hazards. This information is beneficial in the same way that disclosure of known lead-based paint and lead-based paint hazards is beneficial to purchasers and tenants under Section 1018.

The other benefits that EPA expects to flow from a dust wipe testing requirement are the benefits that may result from changed behavior on the part of renovation firms. EPA believes that dust wipe testing results will also provide valuable feedback to renovation firms on how well they are cleaning up after renovations. In its Evaluation of the HUD Lead-Based Paint Hazard Control Grant Program (Ref. 18), HUD noted that the rate of passing initial clearance was associated with repetition of lead hazard control activities. As renovation firms become more familiar with the performance requirements for cleaning on projects covered by the RRP rule, their projects are more likely to require fewer cleaning cycles.

It is also likely that having to provide to owners and occupants the specific dust lead levels contained in dust wipe testing results will increase renovation firm cleaning efficiency. Renovation firms will be incentivized to lower the dust lead levels remaining after renovation jobs, even if the levels are at or near the regulatory standards. In particular, firms that might otherwise be inclined to be less than thorough in the use of the disposable cleaning cloths in order to avoid darkening the cloths will be incentivized to perform cleaning

verification thoroughly. Because proper cleanup plays such a vital role in the minimization of dust-lead hazards created by renovations, providing information on dust lead levels remaining after renovations to building owners and occupants will serve as an incentive for firms to perform post-renovation cleaning efficiently, thoroughly, and correctly so that the benefits of the RRP rule may be fully realized.

EPA is therefore proposing to require that dust wipe testing be performed after many renovation jobs. EPA has determined that dust wipe testing results will provide a valuable check on the performance of cleaning verification and the other work practices for most of the paint-disturbing renovations covered by the Dust Study (Ref. 14). In reviewing the data from the Dust Study, EPA believes that, of the jobs performed in the Dust Study, the additional safeguard of dust wipe testing is warranted where the floor dust-lead levels changed markedly from pre-work to post-cleaning to post-cleaning verifications. The only jobs where this did not occur were the renovations involving cut-outs, which also created significantly less dust than most other renovations.

Accordingly, today's proposal would require dust wipe testing on uncarpeted floors, windowsills, and window troughs in the work area after the following types of interior renovations:

- Use of a heat gun at temperatures below 1100 degrees Fahrenheit.
- Removal or replacement of window or door frames.
- Scraping 60 ft$^2$ or more of painted surfaces.
- Removing more than 40 ft$^2$ of trim, molding, cabinets, or other fixtures.

These jobs represent all of the experiments conducted in the Dust Study other than those involving cut-outs or practices prohibited or restricted by the final RRP rule. The experiments labeled "kitchen gut" in the Dust Study mostly involved the removal of kitchen cabinets and kitchen fixtures. The scraping experiments involved the scraping of approximately 60 ft$^2$ or more of lead-based paint, so EPA is proposing to limit the dust wipe testing requirement to renovations during which at least that much painted surface is scraped. EPA requests comment, information, or data on whether the threshold for dust wipe testing after renovations involving scraping should be lowered to 6 ft$^2$, which is the minor maintenance threshold, or to some other number. Likewise, the trim and molding removal experiments all involved the removal of more than 40 ft$^2$ of trim or molding, so EPA is proposing to limit the dust wipe testing requirement to renovations during which at least that much trim or molding is removed. EPA also requests comment, information, or data on whether the threshold for dust wipe testing after trim, molding, cabinet, or fixture removal should be lowered. EPA acknowledges that the benefits identified above of dust wipe testing would apply for these smaller jobs, as well as the larger jobs covered by today's proposal. At the same time, in order to ensure a program that is practical for renovation activities, EPA has tried in this proposal to maintain some proportionality between the complexity and cost of the proposed requirements on one hand, and the size and cost of the renovation job on the other.

EPA wishes to clarify that the size thresholds for scraping painted surfaces and removing trim, molding, cabinets, or other fixtures would be calculated on a per-job basis. This is in contrast to the minor repair and maintenance exception, which is calculated on a per-room basis for interior projects.

EPA is also requesting comment on whether dust wipe testing should be required in situations where a surface fails the cleaning verification process twice, *i.e.,* when the second wet disposable cleaning cloth is darker than the cleaning verification card. In that case, the surface must be allowed to dry for at least an hour, after which the certified renovator must wipe the surface with a dry electrostatic cleaning cloth. In the Dust Study, only four surfaces failed cleaning verification twice, representing two of the sixty experiments. In one experiment involving cut-outs, a vinyl floor in poor condition failed cleaning verification twice. The average dust-lead level on the floor after the second wet disposable cleaning cloth was 61.5 μg/ft$^2$, and after the dry electrostatic cleaning cloth, the level was 57.2 μg/ft$^2$. However, this floor was in such poor condition that after two pre-cleanings, the cleanings done before any experiments were conducted, the floor dust lead levels were still 95 μg/ft$^2$. Thus, the floor was cleaner than when it started, even though it failed cleaning verification twice. In the other experiment, a kitchen gut performed on a tile floor in fair condition, three floor sections failed the second cleaning verification. After the second wet disposable cleaning cloth, the average dust lead levels on two of the three failed sections were less than 10 μg/ft$^2$, while the other was significantly higher at 150 μg/ft$^2$. Nevertheless, after the dry electrostatic cleaning cloth wipe, the dust lead levels for all floor sections averaged 41.4 μg/ft$^2$, which is within the accepted level of uncertainty, *i.e.,* within plus or minus 20%, for the National Lead Laboratory Accreditation Program (NLLAP).

The dust wipe testing would have to be performed in a manner similar to the abatement clearance sampling requirements at 40 CFR 745.227(e)(8). After the cleaning required by 40 CFR 745.85(a)(5) has been performed, a certified inspector, certified risk assessor, or certified dust sampling technician would be required to perform a visual inspection to ensure that the work area is free of visible dust, debris or residue. EPA is proposing to require this second visual inspection, in addition to the one performed by the certified renovator before cleaning verification, because, in many cases, the person performing the dust wipe testing will not be the same person who performed the cleaning verification. In addition, there may be a delay between the completion of cleaning verification and the beginning of dust wipe testing. EPA believes that the requirement for a visual inspection immediately prior to dust wipe testing will give the certified inspector, risk assessor, or dust sampling technician a means to address any concerns they may have as to the cleanliness of the work area. The locations for dust wipe samples would be dependent on the number of rooms, hallways, or stairwells within the work area. If there is more than 1 room, hallway, or stairwell within the work area, the following samples would have to be collected:

- 1 windowsill sample, 1 window trough sample, and 1 floor sample within each room, hallway, or stairwell (no more than 4 rooms, hallways, or stairwells need be sampled).
- 1 floor sample adjacent to the work area, but not in an area that has been cleaned.

If the work area is a single room, hallway, or stairwell, or a smaller area, the following samples would have to be collected:

- 1 windowsill sample, 1 window trough sample, and 1 floor sample.
- 1 floor sample adjacent to the work area, but not in an area that has been cleaned.

If there are no uncarpeted floors in the work area, then no floor samples would need to be collected. The same would be true for windows and windowsill or trough samples. Dust wipe samples would be collected in accordance with the protocol in "Residential Sampling for Lead: Protocols for Dust and Soil Sampling" (Ref. 19).

HUD's Lead Safe Housing Rule, at 24 CFR 35.1340(g), requires the sample

adjacent to the work area to be collected within 5 feet of the work area in an area that is connected to the work area. This specifically precludes samples from being collected from rooms separated from the work area by a solid wall. EPA requests comment on whether these provisions should be incorporated into this rulemaking.

EPA also requests comment on whether this protocol is sufficient to determine dust lead levels remaining on floors, windowsills, and window troughs. This protocol has been used for more than a decade in clearance examinations after lead abatements and HUD interim lead hazard control work. However, one test per surface may not always be enough to accurately characterize the dust lead levels over the entire surface. While the physical variability of dust loadings and lead concentrations across a room has not been thoroughly investigated, several studies including EPA's EFSS have found high variability in side-by-side samples collected before and after various activities (Ref. 10). EPA requests comment on whether more tests should be required, and, if so, what protocol should be followed in determining the number and location of additional tests. For example, one option would be to follow the ASTM International "Standard Practice for Clearance Examinations Following Lead Hazard Reduction Activities in Dwellings, and Other Child-Occupied Facilities." This document says that for rooms that exceed 500 $ft^2$, the floor should be divided into two or more equal parts of 500 $ft^2$ or less and a sample collected in each part (Ref. 20).

EPA requests comment on whether the provision for random clearance sampling in multi-unit buildings in the Lead-based Paint Activities regulations at 40 CFR 745.227(e)(9) should be incorporated into this regulation. This would permit random testing of individual housing units after renovations affecting multiple individual housing units in a multi-family dwelling with similarly constructed and maintained residences. Consistent with 40 CFR 745.227(e)(9), to take advantage of this provision, the certified renovators and other trained persons who renovate or clean the individual housing units would not know in advance which units would be selected for random testing. In addition, the dust wipe testing would have to be performed by a certified inspector or certified risk assessor and the number of residential units selected for dust wipe testing would have to be sufficient to provide a 95 percent level of confidence such that, if clearance were required, no more than 5 percent or 50 of the residential units (whichever is smaller) in the randomly-sampled population would exceed the applicable clearance levels. This is the standard for random clearance sampling after abatement projects and this particular requirement would be designed to allow certified inspectors and certified risk assessors to use the training they have already received on random clearance sampling after abatement projects to decide which units to test after a renovation in a multi-family dwelling.

Although random dust wipe testing has the potential to reduce costs for a large multi-unit renovation project, it may not be appropriate for this rule, given that an important purpose for the proposed dust wipe testing requirements is the provision of information to building owners and occupants. However, random sampling is already accepted by EPA and HUD for disclosure of information on lead-based paint inspections, risk assessments and abatement clearances under the Disclosure Rule (Ref. 21), and for notification after activities other than abatement under HUD's Lead Safe Housing Rule at 24 CFR 35.125(b) and 35.1340(b)(2)(i). EPA also requests comment on whether a random sampling provision should be incorporated, but limited to situations where the HUD rule applies or to situations where the housing is completely vacant, e.g., an entire apartment building is vacant and being renovated.

In addition, the current requirements for dust sampling technician courses do not include random sampling, so dust sampling technicians would not be able to select the units and locations for random dust wipe testing. Dust sampling technicians could perform the actual sampling or testing, so long as the locations for testing were selected by a certified inspector or risk assessor. EPA requests comment on whether EPA should modify the dust sampling technician course requirements to include random testing in multi-family buildings so that dust sampling technicians would be able to select units randomly as do certified inspectors and certified risk assessors. EPA also requests comment on whether this could be done and still allow the course to be taught within a single 8-hour day.

Dust wipe testing results would have to be provided by an entity accredited or recognized under the NLLAP. EPA established the NLLAP in accordance with TSCA section 405(b) to assure the public that analytical laboratories recognized by the EPA have demonstrated that they are capable of accurately analyzing for lead in paint chip, dust, and soil samples. In January 2008, the Agency announced in the **Federal Register** changes to NLLAP that expand the opportunity to participate in the NLLAP to all lead testing service providers (Ref. 22). These providers include:

- Fixed-site operations that perform analytical lead testing at a permanent location under controlled environmental conditions;
- Mobile facilities, or transportable, self-contained operations that can perform analytical lead testing under controlled environmental conditions; and
- Field sampling and measurement organizations (FSMOs), or operations that perform on-site sampling and lead testing using portable testing technologies.

Portable testing technologies that might be employed by FSMOs, once accredited or recognized, include devices such as an x-ray fluorescence (XRF) analyzer, an anodic stripping voltammetry (ASV) analyzer, or any other portable technology that has been shown to accurately and verifiably measure lead content in dust, paint chip, or soil. EPA believes these NLLAP changes remove barriers and provide a process so that all types of lead testing service providers may participate in the NLLAP. This can make the NLLAP more efficient and cost-effective while maintaining the high standard of quality, science and technology for those who purchase analytical services related to lead hazard identification and control. The ability for portable dust testing technologies to become accredited under NLLAP is particularly relevant to this rulemaking, because EPA believes that this will make dust wipe testing less expensive and time-consuming.

EPA requests comment on additional technologies that may be available for sampling or testing for lead in dust. EPA is seeking information on what technologies are available, along with information on the research or evaluations that may have been conducted on these technologies. EPA is also interested in research or other information on technologies that show promise for commercial development.

Persons performing visual inspections, collecting dust wipe samples, or analyzing dust wipe samples would not be required to be third parties independent of the firm performing the renovation. This is consistent with the final RRP rule and EPA's abatement regulations. EPA has historically not required independent

third parties to perform testing for two reasons. The first is the cost savings and convenience of being able to hire just one firm to perform all necessary lead-based paint activities. The second is the potential regional scarcity of firms to perform the work. As discussed in the preamble to the final RRP rule, these considerations are also likely to be applicable to the renovation sector (Ref. 1, at 21711). EPA does recommend, however, that the renovation firm comply with the HUD's prohibition against the same person performing both the renovation activity and the clearance process. (*See* 24 CFR 35.1340(f)). EPA requests comment on whether EPA should impose the same prohibition or a similar prohibition with perhaps an exception for single person firms.

Under this proposal, dust wipe testing would be performed after cleaning verification, not instead of it. Cleaning verification is useful because it combines fine cleaning properties with feedback to the certified renovator on the effectiveness of the post-renovation cleaning process. As discussed in the preamble to the final RRP rule, the Dust Study demonstrated that cleaning verification is quite often needed to minimize exposure to dust-lead hazards created during renovations (Ref. 1, at 21744). In 4 of the 10 experiments performed in accordance with the final RRP rule requirements for containment, cleaning, and cleaning verification, the average post-cleaning floor dust lead levels were above the clearance standards. In those experiments, cleaning verification was needed to reduce average dust lead levels below the standards. In addition, dust wipe testing only tests part of the surface, and, as discussed above, leaded dust may not be distributed uniformly over the entire surface. In contrast, cleaning verification provides feedback on cleaning effectiveness over the entire surface so variability in distribution presents fewer challenges. EPA remains concerned that if dust wipe testing were allowed instead of cleaning verification, without an accompanying requirement that the renovation firm re-clean until clearance is achieved, the RRP rule would actually be less protective because the surfaces in the work area could be left less clean than if cleaning verification were performed. Accordingly, dust wipe testing would be performed after cleaning verification has been performed in accordance with the existing protocol. After the dust wipe samples have been collected, the renovation would be considered complete, the warning signs could be removed, and the work area could be re-occupied. Re-occupancy would not have to wait until the results of the testing were available.

However, because re-occupancy can occur immediately after the dust wipe samples are collected, it is important to ensure that the results of the dust wipe testing be communicated to owners and occupants as soon as practicable. Accordingly, this proposal requires the certified inspector, certified risk assessor, or certified dust sampling technician to prepare a dust wipe testing report and provide it to the renovation firm within 3 days of the date that the results are obtained. If the dust wipe testing results are to be determined by a fixed-site laboratory, the samples would have to be sent to the laboratory within 1 business day of the date that they are collected. The dust wipe testing report would include the name and signature of each certified person collecting the samples or performing the testing, the name and address of each certified firm employing the person(s) conducting the sampling or testing, the start and completion dates of the renovation, a brief written description of the renovation, the results of the visual inspection, a detailed written description of the specific sampling or testing locations or a detailed drawing that clearly identifies the location of each sample or test, the name of the NLLAP-recognized entity analyzing the results, the results of each sample or test, and the clearance standard that is applicable to each sample or test. EPA does not expect long, involved narrative descriptions in these reports. The results of the visual inspection could be as simple as "no dust, debris, or residue was visible in the work area," while the brief written description of the renovation could be as simple as "replaced all of the windows in the upstairs bedrooms." The report should be organized and presented in such a way that the recipients of the report will be able to easily understand the information presented. The report must be a single document, with clearly-identifiable attachments, such as analytical reports from NLLAP laboratories, where appropriate. If a significant number of tests are involved, the certified individual preparing the report should incorporate an executive summary presenting the overall results, with particular attention given to those results that exceeded the applicable clearance standards.

The renovation firm would be required to provide this report to the owner of renovated target housing or child-occupied facilities within 3 days of the date that the renovation firm receives the report. The renovation firm would also have to provide the report within 3 days of receipt to the occupants of individual housing units that have been renovated, if the housing units are not owner-occupied. Similarly, the report would have to be provided within 3 days to the proprietor of renovated child-occupied facilities if they are not operated by the building owner. If the renovation firm has chosen to notify each individual housing unit affected by a renovation in a common area of target housing, or each parent or guardian of a child under age 6 using a renovated child-occupied facility, the renovation firm would also have to provide these persons with the dust wipe testing report within 3 days of the date that the renovation firm receives the report. In cases where the renovation firm has chosen to post signs to notify tenants affected by common area renovations, or parents and guardians of children under age 6 using a child-occupied facility, the renovation firm would have to provide the dust wipe testing report upon request. EPA requests comment on whether the renovation firm should be required to provide the dust wipe testing report to the building owner and occupants with the final invoice or within 3 days of the date that the report is received, whichever is earlier.

3. *Clearance.* For two types of renovations that can create large amounts of difficult-to-clean dust, EPA remains concerned about the possibility that dust lead levels remaining, even after cleaning verification, may substantially exceed the clearance standards. These are renovations that disturb paint using machines designed to remove paint through high speed operation, such as power sanders or abrasive blasting, when equipped with high-efficiency particulate air (HEPA) exhaust controls and the demolition, or removal, through destructive means, of plaster and lath walls, ceilings or other building components. If renovation firms choose to utilize these methods, EPA is also proposing to require that renovation firms demonstrate, through dust wipe testing, that they have met the clearance standards before the renovation will be considered completed.

EPA's Dust Study demonstrated that machines that remove paint through high-speed operation, in the absence of HEPA exhaust control, create enormous amounts of leaded dust that is particularly difficult to clean up. In the Dust Study, the geometric mean post-work floor dust lead levels after experiments involving power planing

were 201,902 μg/ft². That was the only type of power tool experiment done indoors during the Dust Study. However, two additional high speed tool experiments were done on exteriors, power sanding and needle gun. In these cases, using the Dust Study results from the surface of the plastic containment required by the rule, the geometric mean post-work floor dust lead levels that could be expected from work done using these types of tools without HEPA exhaust control are 591,491 μg/ft² for power sanding, and 195,372 μg/ft² for the needle gun.

In the Dust Study, the work practices required by the final RRP rule, containment, specialized cleaning, and cleaning verification, were, in most cases, unable to reduce the dust lead levels remaining on the work area floors after power planing to anything close to the clearance standard of 40 μg/ft². Accordingly, EPA banned the use of machines that remove lead-based paint through high speed operation without HEPA exhaust control.

EPA did not perform any experiments in the Dust Study with power tools equipped with HEPA exhaust control. However, EPA has subsequently reviewed 14 published studies that examined the effectiveness of HEPA exhaust control on power tools (Ref. 23). These 14 studies reported reductions in airborne dust levels ranging from 70 to 99 percent. However, most studies (9) reported reductions in airborne dust levels between 90 and 95 percent. Applying a 90 to 95 percent reduction to the post-work dust lead levels generated by the power tools in the Dust Study results in dust-lead levels of 20,190 μg/ft² to 10,095 μg/ft² for door planing, 59,149 μg/ft² to 29,575 μg/ft² for power sanding, and 19,537 μg/ft² to 9,769 μg/ft² for needle gun use. It is likely that the work practices required by the final RRP rule will be unable to reduce these levels to anything approximating the clearance level of 40 μg/ft² at the end of the job because of the quantity of the dust generated and the particular characteristics of this dust that make it hard to clean up.

In addition, in order to achieve 90 to 95 percent effectiveness, the HEPA exhaust control must be maintained properly and used correctly. Any lapse in either maintenance or use could result in much higher dust lead levels remaining after a renovation. For example, when sanding a mantle, if the renovation worker moves half of the sander off the edge of the mantle, the HEPA exhaust control will not be operating at maximum collection efficiency. The same problem would occur any time that the entire sander is not in contact with the surface, such as when sanding a curved surface.

With respect to the demolition of plaster, EPA did not perform any experiments involving that kind of renovation activity in the Dust Study. However, demolition of several different plaster walls was studied in the EFSS. The EFSS measured worker exposures by personal air monitoring, and estimated occupant exposures by dust wipe sampling. Dust wipe sampling in the EFSS was done from stainless steel dustfall collectors placed at various locations adjacent to and at varying distances from the activity. The estimated lead loading over a 6 ft² area resulting from the demolition of a plaster wall was 19,500 μg, the highest loading for any of the typical activities studied. However, according to the EFSS, no collectors were placed adjacent to demolition activities "due to the large amount of debris." (Ref. 10, at 9–10) EPA was able to determine the functional relationship between settled dust and distance for the demolition activity, but the relationship "does not take into account the amount of lead that settles at a location directly adjacent to the activity. Since the settled dust samples associated with the demolition were all located at a distance from the activity space, the estimated 6-foot by 1-foot gradient lead loading in the demolition activity is interpreted as being the amount of lead found in the 6-foot by 1-foot region that was airborne in dust and smaller particles, rather than the total amount of lead disturbed." (Ref. 10, at 9–10)

In the EFSS, EPA also reviewed data on plaster wall demolition available from OSHA (Ref. 10). The study monitored the demolition of interior plaster walls and ceilings in a home using hammers and claw-bars. This study involved only personal air monitoring, not settled dust sampling. The geometric mean worker exposure for the demolition activities studied by the EFSS was 107 μg/m³, while the geometric mean worker exposure for the OSHA study was 166 μg/m³. Because of the length of time involved in demolishing a plaster wall, both of these activities are likely to substantially exceed the OSHA permissible exposure limit of 50 μg/m³ as an 8-hour time-weighted average.

These studies demonstrate that plaster wall demolition creates large amounts of lead-contaminated dust. EPA also believes that this dust is particularly difficult to clean up, because of the qualities of plaster and the way in which such demolition is typically done through destructive means such as sledgehammers. The dust created by this activity is likely to consist of very fine particles. EPA is concerned that, like the dust produced by machines that remove paint through high speed operation, the large quantities of dust created by plaster wall demolition will overwhelm the containment, specialized cleaning, and cleaning verification processes and result in renovation work areas being re-occupied with lead-based paint hazards created by the renovation still in place.

Given these concerns, EPA is proposing to require renovation firms to follow a clearance process similar to that performed after abatement projects after renovations involving the disturbance of paint using machines designed to remove paint through high speed operation or the demolition, or removal, through destructive means, of more than 6 ft² of plaster and lath building component. After the cleaning required by 40 CFR 745.85(a)(5) and the cleaning verification required by 40 CFR 745.85(b)(1), dust wipe testing would have to be performed in exactly the same way that it would be required after the renovations discussed in Unit III.A.2. of this preamble. If any of the test results equal or exceed the regulatory clearance standards in 40 CFR 745.85(b)(4), the renovation firm would be required to re-clean the surfaces represented by those tests in accordance with 40 CFR 745.85(a)(5)(ii). Those surfaces would have to be re-tested, and the results compared to the clearance standards.

With respect to plaster removal, the clearance requirement would apply only to walls, ceilings constructed of plaster and lath, not gypsum drywall finished with plaster. The experiments performed and reviewed in the EFSS involved plaster and lath walls, not drywall. In this country, interior walls were commonly constructed of plaster and lath until the 1950's, when drywall began to replace the lath and plaster construction method. Again, this clearance requirement would only apply to plaster removal done through destructive means, such as sledgehammers.

This proposal would not allow renovation firms to skip the cleaning verification step when they are required to perform clearance. The Dust Study demonstrates that cleaning verification is an important part of the cleaning process. Of the 10 experiments completed in the Dust Study in accordance with the final RRP rule requirements, 4 required the additional cleaning provided by cleaning verification to reach an average floor dust lead level below 40 μg/ft² (Ref. 14).

The additional cleaning resulting from cleaning verification was particularly dramatic in the window replacement experiments, where the dust lead levels on the floor were cut nearly in half by cleaning verification. EPA is specifically requesting comment on cleaning verification requirements for surfaces that fail clearance due to high dust wipe test results. While the Dust Study shows that cleaning verification is a very effective cleaning method, EPA recognizes that there is a cost associated with multiple cleaning verification passes over a surface, particularly if the surface fails the wet disposable cleaning cloth phase and must be allowed to dry for an hour before using a dry electrostatic disposable cleaning cloth. Although not specifically studied, the Dust Study suggests that it would be unlikely for a surface that had been cleaned and had gone through the cleaning verification process to fail another round of cleaning verification. Sixty interior experiments were performed in the Dust Study; only 3 work room floors failed all rounds of cleaning verification. Two of those were performed using only baseline work practices, no containment or specialized cleaning, on a vinyl floor in poor condition that EPA's contractor had difficulty pre-cleaning to below 40 μg/ft$^2$ before beginning the study. The third was on a tile floor in fair condition, with plastic containment but no specialized cleaning. In addition, of the 4 experiments in the Dust Study performed in accordance with the final RRP rule that needed cleaning verification to reduce average floor dust lead levels below 40 μg/ft$^2$, failed cleaning verification cloths were only seen in 1. The reductions in dust lead levels seen in the window replacement experiments occurred after only 1 pass with a wet disposable cleaning cloth. In light of these results, this proposal would require surfaces failing clearance due to high dust wipe test results to be recleaned in accordance with the RRP rule, HEPA vacuuming followed by wet wiping or mopping, followed by one round of cleaning verification using a wet disposable cleaning cloth. This cloth would not have to be compared to the cleaning verification card, the renovation firm could conduct additional dust wipe testing for clearance purposes on the surface as soon as it has dried.

EPA is also proposing to eliminate the existing provision that allows renovation firms to perform clearance in lieu of cleaning verification when another Federal, State, or local law or regulation, or the contract between the renovation firm and the property owner, requires the renovation firm to use qualified entities to perform dust wipe testing and requires the renovation firm to achieve clearance. Because cleaning verification has been shown to be such an important part of the post-renovation cleaning process, and because that provision would be inconsistent with this proposal, EPA believes that it should be eliminated. Rather, this proposal would require cleaning verification to be performed in the same way it would have to be performed after jobs involving demolition or removal of plaster through destructive means or the disturbance of paint using machines designed to remove paint through high-speed operation.

The renovation would not be considered complete, and the warning signs would have to remain in place, until the renovation firm can demonstrate through a dust wipe testing report that it has met the clearance standards. The certified inspector, certified risk assessor, or certified dust sampling technician performing the sampling or testing would be required to prepare a clearance report. The clearance report would include the start and completion dates of the renovation; a brief written description of the renovation; the name and address of each certified firm employing each certified inspector, certified risk assessor, or certified dust sampling technician performing the clearance procedures; the name and signature of each certified inspector, certified risk assessor, or certified dust sampling technician performing the clearance procedures and the dates that the clearance procedures were performed; the results of the visual inspection; a detailed written description of the specific sampling or testing locations or a detailed drawing that clearly identifies the location of each sample or test; the results for each dust wipe sample or test; whether or not clearance was achieved; and the name of each recognized entity that conducted the analyses. As with the dust testing report, EPA does not expect long, involved narrative descriptions in these reports. The results of the visual inspection could be as simple as "no dust, debris, or residue was visible in the work area," while the brief written description of the renovation could be as simple as "replaced all of the windows in the upstairs bedrooms." However, the report should be organized and presented in such a way that the recipients of the report will be able to easily understand the information presented. The report must be a single document, with clearly-identifiable attachments, such as analytical reports from NLLAP laboratories, where appropriate. If a significant number of tests are involved, the certified individual preparing the report should incorporate an executive summary presenting the overall results, with particular attention to those results that exceeded the applicable clearance standards.

The certified inspector, certified risk assessor, or certified dust sampling technician would be required to provide a copy of this report to the renovation firm within 3 days of the date that the dust wipe testing results are obtained. If the dust wipe testing results are to be determined by a fixed-site laboratory, the samples would have to be sent to the laboratory within 1 business day of the date that they are collected. The renovation firm would be required to provide this report to the owner of renovated target housing or child-occupied facilities within 3 days of the date that the renovation firm receives the report. The renovation firm would also have to provide the report within 3 days of receipt to the occupants of individual housing units that have been renovated, if the housing units are not owner-occupied. Similarly, the report would have to be provided within 3 days to the proprietor of renovated child-occupied facilities if they are not operated by the building owner. If the renovation firm has chosen to notify each individual housing unit affected by a renovation in a common area of target housing, or each parent or guardian of a child under age 6 using a renovated child-occupied facility, the renovation firm would also have to provide these persons with the dust wipe testing report within 3 days of the date that the renovation firm receives the results. In cases where the renovation firm has chosen to post signs to notify tenants affected by common area renovations, or parents and guardians of children under age 6 using a child-occupied facility, the renovation firm would have to provide the dust wipe testing report when requested.

In most cases, renovation firms will be able to avoid using the work practices that would require clearance afterwards. Sanding or scraping could be done by hand instead of by power tool. Many plaster removal jobs can be performed by using non-destructive means such as saws and pry-bars to remove sections of plaster and lath wall. At the same time, EPA also understands that renovation firms may encounter floors, windowsills, and window troughs that are in such poor condition that clearance may not be possible. As

discussed previously, the HUD Guidelines recommend using a sealant on floors if necessary to achieve clearance (Ref. 15). The Guidelines suggest that, if any surface fails two clearance tests, the "property owner should consider additional hazard control measures and/or further sealing of the surface" (Ref. 15, at 15–10). EPA's own experience with the Dust Study confirms that surface condition may be a problem, at least in some instances. After several encounters with work room floors that could not be cleaned to the clearance standards in preparation for a new experiment, the Dust Study contractors began using a sealant before testing floors in preparation for beginning work (Ref. 24). When this occurred with windowsills, the contractors used dust collection trays instead of the sill surface for sampling.

Various studies have shown that dust lead levels on surfaces are directly correlated with the condition of the surface. That is, a surface, such as a floor, in poor condition tends to have higher dust lead levels than a floor in fair to good condition. An evaluation of the HUD Lead-Based Paint Hazard Control Grant Program found that the "effect of the condition of the wiped surface at clearance was significant in all analyses. The surfaces in better condition at clearance had lower clearance dust lead loadings and lower failure rates" (Ref. 18, at 7–20). EPA's Dust Study also found that floors in poor condition had higher dust lead levels across the post-work, post-cleaning, and post-cleaning verification sampling stages than floors in better condition, although this could have been due to higher-intensity work (Ref. 14, at 6–14). EPA requests comment on whether this correlation should affect clearance or dust wipe testing requirements, and if, so, in what way. EPA is interested in suggestions on how to address the fact that some floors will be more difficult to clean than others.

In particular, EPA has wrestled with the issue of how to reconcile a clearance requirement when floors are in such poor condition that achieving clearance would require the renovation firm to expand the scope of the original job to include additional remedial action such as refinishing the floor. In part, this situation raises the concern that renovation firms might be required to remediate lead hazards that existed prior to the renovation. To address the situation where achieving lead levels below the lead hazard standards would require expanding the scope of the renovation job, EPA is proposing an exception to the requirement to achieve clearance. Specifically, EPA proposes to allow renovation firms to stop after the second failed clearance test, regardless of the result, if the renovation firm did not agree to refinish the surface that is failing clearance as part of the renovation contract. For example, if a renovation firm is hired to remove plaster and lath wall sections that partially separate a living and dining room, and repaint the walls (including the windows) in both rooms, then the renovation firm would be required to ensure that the windowsills in the work area achieve clearance, no matter how many times the sills must be re-cleaned and re-tested. However, if the renovation firm was not hired to refinish the floor, the renovation firm would only have to re-clean and re-test the floor once if it failed clearance the first time, no matter what the second dust wipe testing result is. EPA believes that such a provision is necessary, given that renovation firms may encounter floors, windowsills, and window troughs that are in such poor condition that clearance may not be possible.

EPA is also requesting comment on whether renovation firms ought to be allowed to perform pre-renovation dust wipe testing on surfaces in the work area that are in poor condition to help demonstrate that they are not leaving behind dust-lead hazards that they created. In this option, the renovation firm would only have to demonstrate that, for surfaces in poor condition in the work area, the dust-lead levels on these surfaces (which could be windowsills and/or floors) after the renovation are no higher than 150 $\mu g/ft^2$. This would ensure that renovation firms are not unduly held accountable for pre-existing lead-based paint hazards. EPA believes that 150 $\mu g/ft^2$ is an appropriate upper limit, given that EPA's contractor was able to clean all of the floors encountered in the buildings used for the Dust Study to this level or below (Ref. 14). EPA requests comment on whether there is an appropriate alternate upper limit that should be considered and the available data to support this alternate limit. Any pre-renovation testing option would also include a requirement to provide both the pre-renovation dust wipe testing report as well as the post-renovation report to the building owners and occupants. As part of its consideration, EPA requests comment on how "poor condition" should be defined for this approach.

EPA believes that window troughs are particularly likely to harbor pre-existing dust lead levels at or above the clearance standards. They are also particularly likely to be difficult to clean. Therefore, EPA is requesting comment on whether EPA should allow renovation firms to close windows in the work area that are not being worked on and cover them with taped-down plastic or other impermeable material to avoid the requirement to ensure that the window troughs achieve clearance standards. EPA would still require renovation firms to test both the sills and troughs of closed and covered windows, and report the results to the building owners and occupants, but firms would only need to ensure that the sills achieve the clearance standards.

EPA is also requesting comment on whether clearance should be required in other situations. In particular, EPA is interested in comment on whether clearance should be required after any of the activities for which EPA is proposing a dust wipe testing requirement. EPA is also interested in comment on whether clearance should be required in rental properties after renovations for which EPA is proposing a dust wipe testing requirement, especially if the renovation firm has been informed that the renovation is being performed to remedy a violation of federal, state, or local laws or regulations or to comply with a federal, state, or local government order, such as an order to correct building code violations, or an abatement order in response to an elevated blood lead level. In this case, EPA is also interested in comment on whether EPA should require renovation firms to affirmatively ask whether the work is being performed to remedy a violation or comply with an order, and whether renovation firms should provide this information to owners and occupants after the renovation. Finally, EPA requests comment on whether dust wipe testing or clearance should be required in any other situations not discussed specifically in this proposal, including situations where a surface has failed cleaning verification twice.

4. *Additional requests for comment on dust wipe testing or clearance.*

EPA is seeking comment on whether there are other regulatory options for dust wipe testing or clearance that maximize the potential benefits by targeting those activities that are most likely to exceed the clearance standards. For example, should different size thresholds be used for some or all of the renovations affected by this proposal? As discussed, the proposed thresholds for dust wipe testing are taken from the Dust Study. Does the data from the Dust Study, or data from another source, support larger thresholds for some or all of these jobs? Although EPA is concerned about potential confusion

with the definition of minor maintenance and repair, does the data from the Dust Study support applying these proposed thresholds on a per-room basis?

Another potential option would be to apply dust wipe testing or clearance requirements only in homes where pregnant women or children under age 6 reside or in any building that meets the definition of child-occupied facility. EPA requests comment on this option, which does target particularly vulnerable populations but provides no protections for older children, adults and family pets.

EPA also requests comment on whether dust wipe testing should only be required when a surface fails the first round of cleaning verification, and, if dust wipe testing is done, whether the second round of cleaning verification should then be performed. In the Dust Study, if a surface failed the first round of cleaning verification, no dust wipe samples were collected before the surface was cleaned and cleaning verification performed again (Ref. 14). This occurred in 17 of the 60 interior experiments performed. Three of those surfaces also failed the second round of cleaning verification. In each of those 3 cases, at least one surface was also demonstrated to be above the regulatory clearance standards by dust wipe testing. Since no dust wipe samples were collected after the first round of cleaning verification, it is not possible to determine, for certain, what additional reductions in dust lead levels were attributable to the second round of cleaning verification. However, some insight is provided by the reductions in dust lead levels made by the first round of cleaning verification. In many of the experiments that passed the first round of cleaning verification, the cleaning verification step resulted in significant dust lead reductions between the samples taken post-cleaning and the samples taken post-cleaning verification. Thus, the Dust Study demonstrates that the cleaning verification protocol in the 2008 RRP rule is an integral part of the cleaning regimen. Because the second round of cleaning verification likely contributes significantly to the total reduction in dust lead levels attributable to cleaning verification, EPA continues to believe that the second round of cleaning verification is a necessary step in the process, regardless of whether dust wipe samples are collected or not.

Another possible regulatory option would be to require clearance for renovations involving the demolition of plaster or the use of high-speed machines designed to remove paint, or a larger set of renovation types, or smaller renovation size thresholds, and not require dust wipe testing in the absence of a clearance requirement. EPA requests comment on these options and suggestions for other regulatory options that may be less burdensome but still justifiable based on the available data.

*B. Test Kits for Lead in Paint*

EPA has worked with test kit vendors to develop kits that can more accurately identify the presence of regulated lead-based paint. Through its Environmental Technology Verification (ETV) program, EPA is currently reviewing five test kits that have been submitted by vendors. More information on this process can be found at *http://www.epa.gov/lead/pubs/testkit.htm#recognize.*

EPA is also proposing to give certified renovators another option for determining whether lead-based paint is present on components to be affected by a renovation. This proposal would permit certified renovators to collect paint chip samples from components to be affected by a renovation instead of using test kits to test the paint on the components. When utilizing this option, the certified renovator would be required to send the samples to a recognized NLLAP laboratory. Because renovator training courses are already required to include training in how and where to use test kits, EPA believes that it would take very little additional time to also provide renovators with training in how to collect a chip sample such that all paint layers are present with a minimal amount of substrate included in the sample, and how to submit these samples to an NLLAP laboratory for analysis. Such an option would not make a certified renovator the equivalent of a certified lead-based paint inspector. Certified renovators would still have to test each affected component, they would not be permitted to exclude components based on similar painting histories or perform random paint sampling in multi-unit buildings. EPA is proposing to allow certified renovators to collect paint chip samples instead of using test kits in order to provide maximum flexibility for certified renovators and renovation firms.

*C. Training Provider Accreditation*

Training providers who wish to provide renovator, dust sampling technician, or lead-based paint activities training for Federal certification purposes must apply for and receive accreditation from EPA. To become accredited, a provider must employ a training program manager as well as principal instructor(s) who meet certain education, training and work experience requirements. The training provider must indicate on its application for accreditation that the training program manager and principal instructor(s) meet these requirements; however, currently, no documentation (*e.g.,* resumes) regarding the qualifications of these individuals must be submitted to EPA. The Agency believes it is important to review this information when determining whether to approve a training provider application. When EPA reviews applications for accreditation, it is common for the Agency to request this documentation from training providers in order to verify that the training program manager and principal instructor(s) have the proper qualifications. Requesting this information takes time and can delay the review of an application. Therefore, the Agency is proposing to require that training providers submit documentation regarding the qualifications of the education, training and work experience of training managers and principal instructors with their applications for accreditation.

EPA is also proposing to clarify the role of principal instructors in teaching courses. The current regulation, at 40 CFR 745.227(c)(3), states that principal instructors are responsible for the organization of their courses and oversight of the teaching of all course material. The regulations also define "principal instructor" as "the individual who has the primary responsibility for organizing and teaching a particular course." Nonetheless, the rule also allows training program managers to designate experts in a particular field (*e.g.,* doctors or lawyers) as guest instructors, on an as needed basis, to teach discrete portions of the course. EPA interprets these provisions to require a principal instructor to be present and primarily responsible for teaching the course, although guest instructors may be used to teach some portion(s) of the course. Principal instructors are also responsible for the quality of the instruction delivered by the guest instructors. To ensure that the regulation is clear on this point, EPA is proposing to amend 40 CFR 745.227(c)(3) to state that principal instructor(s) are primarily responsible for teaching the course materials and must be present to provide instruction (or oversight of portions of the course taught by guest instructors) for the course for which he has been designated the principal instructor.

The final RRP rule included requirements for amending the certification of a renovation firm. Firms must submit an amendment within 90

days of the date that a change occurs to information in its most recent application for certification or re-certification. Examples of amendments include a change in the firm's name without transfer of ownership, or a change of address or other contact information. To amend its certification, a firm must submit an application, noting on the form that it was submitted as an amendment. The firm must complete the sections of the application pertaining to the new information, and sign and date the form. EPA has interpreted the training provider accreditation regulations to require accredited training providers to submit amended applications whenever there is a change to the information provided in the training provider's most recent application for accreditation or re-accreditation, including information regarding the training manager and any principal instructor(s) teaching courses offered by the training provider. However, the existing regulations do not specify a time limit for submitting an amendment. Therefore, the Agency is proposing to require training providers to submit amendments within 90 days of the date a change occurs to information in each provider's most recent application. If the training provider does not amend its most recent accreditation application within the 90-day time period, it must stop providing training until the accreditation application is amended. The Agency is also proposing to approve or disapprove amendments for a new training manager, any new or additional principal instructors, or any new permanent training location within 30 days of the date EPA receives the amendment. This 30-day time period will give EPA sufficient time to check the qualifications of the training manager(s) or principal instructor(s) before the training manager begins managing or the principal instructor begins teaching a course. This 30-day time period would also give EPA sufficient time to verify the suitability of a new permanent training location by visiting the location. The training provider would not be permitted to provide training under the new training manager or offer courses taught by any new principal instructor(s) or at the new training location until EPA either approves the amendment or 30 days has passed. Finally, this proposal would also clarify that no fee will be charged for accreditation application or certification amendments.

To become accredited, a training provider must submit a copy of its training course materials with its application for accreditation for review by the Agency. If a training provider chooses to use the model course developed by EPA or a course approved by an authorized State or Indian Tribe, then it is not currently required to submit the course materials with its application. Instead the training provider indicates on its application that it will use the EPA model course or a course approved by an authorized State or Indian Tribe. Authorized States and Indian Tribes can have renovation or abatement programs that are significantly different from the EPA-administered program which would be reflected in their approved course materials. In these instances, a training course approved by the State or Indian Tribe may not be sufficient for the purposes of training someone on the requirements of the federal program. Therefore, the Agency is proposing to require training providers who apply to EPA for accreditation and wish to use a course approved by an authorized State or Indian Tribe to submit the course materials for EPA review. This will give the Agency the opportunity to identify and address any significant differences between the requirements of EPA and the authorized program that may appear in the course so the Agency can ensure that EPA-accredited training providers are using appropriate course materials. Training providers wishing to use the EPA model courses would not be required to submit those materials with their applications.

As a matter of clarification, Web-based training and other types of alternative training delivery are permitted. In fact, EPA has developed a model on-line renovator course that could be used to deliver the classroom portion of the renovator course. While such alternative training delivery options cannot be used to deliver required hands-on training, EPA encourages training providers to make use of such options where appropriate to increase access to training and make it more affordable. Web-based training courses are considered separate courses and a separate application fee is required for each. This is because EPA must review not only the content of the course, but the mechanics of the delivery of the course.

EPA's model electronic training courses contain certain basic administration and delivery requirements. These include assigning a unique identifier to each student, to allow the training provider to track student course progress and completion. In addition, there are knowledge checks for each chapter, which must be completed before the student can go on to the next chapter, and a final test for the electronic learning portion which consists of at least 20 questions. Finally, students must be able to save or print an uneditable copy of a record showing completion of the electronic learning portion of the course. Under this proposal, these requirements would be explicitly incorporated into 40 CFR 745.225 to ensure that all training providers wishing to use electronic learning for the classroom portions of lead-based paint courses are aware of these requirements and plan their course development accordingly. EPA requests comment on the specifics of these requirements, such as whether a course test of 20 questions is sufficient and whether a student should be required to score at least 80 percent on the course test in order to pass the classroom portion of the renovator course. EPA also requests comment on whether a final test for the electronic portion of the course is necessary, given that trainees must pass a hands-on skills assessment and the course test in order to receive a course completion certificate. EPA also requests comment on whether other requirements should likewise be incorporated into the regulations.

EPA is requesting comment on whether training providers should be allowed to provide a combined Abatement Worker/Renovator refresher course or a combined Abatement Supervisor/Renovator refresher course or both. After the RRP rule was promulgated, EPA received input from the regulated community and others that indicates that many abatement contractors are likely to also become certified renovation firms. If this is the case, it would be advantageous for such firms to be able to send their employees to combined refreshers so that the employees would more readily be able to keep up their dual certifications. EPA requests comment on the likelihood that this will be the case, and, if combined refreshers are desirable, whether the different certification time periods for individual abatement certification (3 years) and individual renovator certification (5 years) should be harmonized and, if so, how.

Finally, EPA is proposing to require training providers to maintain renovator and dust sampling technician training records for a period of 5 years. Under the existing regulations, training providers must keep training records for 3 years and 6 months. This length of time was chosen because of the length of individual certification periods for lead-based paint activities, which can be as long as 3 years and 6 months including interim certification.

However, the renovator and dust sampling technician certification periods are 5 years, with no interim certification. Therefore, in order to ensure that the training records from the previous training course are available for certified renovators and dust sampling technicians taking refresher courses, the recordkeeping period applicable to these disciplines would be increased to 5 years.

*D. State, Territorial, and Tribal Program Authorization*

Interested States, Territories, and Indian Tribes may apply for, and receive authorization to, administer and enforce all of the elements of the RRP program. The regulations for the State and Tribal program requirements are found in 40 CFR 745.326. Under this proposed rule EPA is clarifying several parts of this section. First, the Agency is amending the regulations to make it clear that State and Tribal programs do not need to include requirements for the accreditation of dust sampling technicians if they are going to require dust sampling to be performed by a certified inspector or risk assessor. Second, the Agency is proposing to amend the regulations to reflect that both individuals and firms must receive certification. Finally, EPA is proposing to require State and Tribal renovation programs to include procedures and requirements for on-the-job training of renovation workers that do not receive accredited training.

Strong enforcement of the lead-based paint regulations by authorized State and Tribal programs is critical to ensuring the safety of the occupants of target housing and child occupied facilities undergoing lead abatement, renovation, repair or painting. The State and Tribal program authorization requirements at 40 CFR 745.327 include provisions for approval of compliance and enforcement programs. Specifically, State and Tribal programs must have adequate compliance monitoring and enforcement authorities. Section 745.327(b)(3)(ii) requires "[a]dministrative or civil actions including penalty authority * * *;" but the rule does not establish a minimum penalty level or other requirements for enforcement authorities comparable to EPA authorities under TSCA. To remedy this, EPA is proposing that in order to be authorized for any of the lead certification programs, State or Tribal programs demonstrate that: (1) The State or Tribe be able to sue to obtain penalties, (2) civil and criminal penalties are assessable for each instance of violation, (3) if violations are continuous, the penalties are assessable up to the maximum amount for each day of violation, and (4) the burden of proof and degree of knowledge or intent of the respondent is no greater than it is for EPA under TSCA. EPA is also requesting comment on whether a minimum penalty level for civil and criminal fines ought to be established, and, if so, what the minimum level for each should be. States and Tribes may be authorized to administer a number of EPA programs; some of these programs have minimum penalty requirements for State and Tribal programs and some do not. For example, under the Clean Air Act implementing regulations at 40 CFR 70.11(a)(3) and the Resource Conservation and Recovery Act implementing regulations at 40 CFR 271.16(a)(3), State programs must have the authority to assess civil and criminal fines of at least $10,000 per day per violation. Other programs have established lower minimum penalty requirements. The implementing regulations for the Safe Drinking Water Act require State programs to have the authority to impose a penalty of at least $1,000 per day per violation on public water systems serving a population of more than 10,000 individuals. Some EPA programs have set no minimum penalty authority requirements for States and Tribes; these programs include the Asbestos Hazard Emergency Response Act program and the State pesticide applicator certification program under the Federal Insecticide, Fungicide, and Rodenticide Act. EPA is proposing that in order to become authorized, State and Tribal lead-based paint programs must have minimum civil and criminal penalty authorities of at least $10,000 per violation per day. EPA requests comment on whether proposing minimum levels for the maximum civil penalty and criminal fine recoverable under a State or Tribal program is necessary to ensure that enforcement is adequate and, if so, whether $10,000 should be the minimum level. EPA also requests comment on whether such a minimum requirement would appropriately promote consistency across authorized State and Tribal programs. In addition, EPA is requesting comment on whether these minimum levels should also be adjusted periodically to account for inflation, as required for Federal penalties under Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. 2461 note, as amended by the Debt Collection Improvement Act of 1996, 31 U.S.C. 3701 note. One way of doing this would be to require State and Tribal programs to have minimum civil penalty authority of 40% of the Federal maximum penalty authority under TSCA section 16, as adjusted for inflation, at the time the State or Tribe is authorized. However, this approach would result in different requirements for States and Tribes depending upon when they apply for authorization. Another way of accomplishing inflation adjustments would be to require State and Tribal authorized programs to have their own established mechanism for adjusting penalties to account for inflation. By requiring all authorized programs to make adjustments for inflation, this approach might be more likely to promote enforcement consistency across programs. Also in the interests of promoting national enforcement consistency, EPA requests comment on what criteria States or Tribes should consider, such as the size of a respondent's business, ability to remain in business, enforcement history, or risk posed by the respondent's actions, in establishing or mitigating penalties.

*E. Other Proposed Amendments to the Final RRP Rule*

1. *Containment.* EPA is proposing to be more specific about the vertical containment requirements for exterior projects. Under this proposal, the rule would specifically state that vertical containment is required for exterior renovation projects that are covered by the rule and that affect painted surfaces within 10 feet of the property line. In such cases, vertical containment is necessary to ensure that adjacent buildings or properties are not contaminated by leaded dust or debris generated by the renovation. The rule would also note that vertical containment may be required in other situations, such as windy conditions, to prevent contamination of other buildings, other areas of the property, or adjacent buildings or properties. Finally, to clarify what is meant by the term "containment," this proposal would add a definition of the term that is based on the definition of "Worksite preparation level" from the HUD Guidelines. The definition includes additional information on what constitutes vertical containment.

2. *Prohibited or restricted practices.* EPA is proposing to clarify that the prohibitions and restrictions on work practices in 40 CFR 745.85(a)(3), *e.g.,* the prohibition on open flame burning or torching, apply to all painted surfaces, not just surfaces where the presence of lead-based paint has been confirmed. The term "lead-based paint" was incorrectly and inadvertently used in this subsection, making it inconsistent with the rest of the RRP

rule, which applies in the presence of known lead-based paint as well as paint that has not been tested for lead content. This proposal would replace the term "lead-based paint" with "painted surfaces" in this subsection. Of course, if the painted surface has been tested and found to be free of lead-based paint, the prohibitions and restrictions on work practices in the final RRP rule do not apply. In addition, EPA wishes to clarify that the restriction on the use of machines that remove paint through high speed operation applies where painted surfaces are being disturbed by such machines. The restriction is not limited to situations where all of the paint is removed by such machines. Finally, EPA has received several requests for clarification on what is meant by HEPA exhaust control. In order to better express what is required when machines designed to remove paint through high speed operation are used, EPA is using terminology from the Occupational Safety and Health Administration's Technical Manual (Ref. 25). The use of shrouded tools to remove lead-based paint is discussed in Chapter 3 of Section V, entitled "Controlling Lead Exposures in the Construction Industry: Engineering and Work Practice Controls." Therefore, this proposal would amend 40 CFR 745.85(a)(3)(ii) to read, "The use of machines designed to remove paint through high speed operation such as sanding, grinding, power planing, needle gun, abrasive blasting, or sandblasting, is prohibited on painted surfaces unless such machines are used shrouded and equipped with a HEPA vacuum attachment to collect dust and debris at the point of generation."

3. *HEPA vacuums.* EPA is proposing to clarify that vacuums qualifying as HEPA vacuums for the purposes of this rule must be operated and maintained in accordance with the manufacturer's instructions in order to continue to qualify as HEPA vacuums. This includes following the manufacturer's filter change interval recommendations. EPA would also like to clarify that the standard for HEPA filters, that they be capable of capturing particles of 0.3 microns with 99.97% efficiency, means that the filters must have a Minimum Efficiency Reporting Value (MERV) of 17 or greater (Ref. 26). EPA recommends that renovation firms have information from the manufacturer that the particular model of vacuum that the renovation firm intends to use, or the vacuum's HEPA filter, has been tested in accordance with an applicable test method, such as ASTM F1471–09, "Standard Test Method for Air Cleaning Performance of a High-Efficiency Particulate Air-Filter System," and has been determined to meet this standard (Ref. 27).

4. *On-the-job training.* EPA is proposing to clarify that the RRP rule requires certified renovators to train other renovation workers in only the work practices required by the RRP rule that the workers will be using in performing their assigned tasks. EPA did not intend to require training in any other subjects, such as how to paint or how to connect pipes. Therefore, EPA is proposing to amend 40 CFR 745.90(b)(2) and (b)(4) to refer specifically to the work practice requirements in 40 CFR 745.85(a).

5. *Grandfathering.* Under the final RRP rule, individuals who successfully completed an accredited abatement worker or supervisor course, and individuals who successfully completed the HUD, EPA, or the joint EPA/HUD model renovation training courses may take an accredited refresher renovation training course in lieu of the initial renovation training to become a certified renovator. In addition, individuals who have successfully completed an accredited lead-based paint inspector or risk assessor course, but are not currently certified in the discipline, may take an accredited refresher dust sampling technician course in lieu of the initial training to become a certified dust sampling technician. EPA inadvertently did not address a time limit in the RRP rule for taking the initial course in lieu of the refresher. Many of the commenters who addressed the issue of grandfathering contended that there should be restrictions based on how much time elapsed since the training was taken. Further, under the lead-based paint activities regulations at 40 CFR 745.226, EPA allowed a similar grandfathering provision but only for a limited time. In today's notice, EPA is proposing to set a limit on when an individual can take advantage of the grandfathering provision under the RRP rule. Under today's proposal, renovators and dust sampling technicians who take the appropriate prerequisite course before July 31, 2011, may take an accredited refresher training course in lieu of the initial training. This time frame is consistent with some of the time limitations suggested in comments on the RRP rule (Ref. 1 at 21724).

6. *Hands-on requirements.* 40 CFR 745.225 includes requirements and procedures that training programs must follow to become accredited in order to provide instruction in lead-based paint courses. Minimum requirements for training curricula are found in this section, which list course topics that must be included in the different training courses with an indication of the topics that require hands-on instruction. However, EPA inadvertently omitted indicating which course topics required hands-on training for the renovator and dust sampling technician disciplines. Under this proposed rule, EPA identifies in 40 CFR 745.227(d) which topics in the renovator and dust sampling technician courses require hands-on training. For further clarification, EPA is proposing to add a sentence to 40 CFR 745.227(e)(2) stating that refresher courses for all disciplines except project designer must include a hands-on component.

7. *Dust sampling technicians.* Individuals who successfully complete an accredited lead-based paint inspector or risk assessor course, but are not currently certified in the discipline, may take an accredited refresher dust sampling technician course in lieu of the initial training before April 22, 2011 to become a certified dust sampling technician. Inspectors and risk assessors who are certified by EPA or an authorized state program are qualified to perform dust sampling as part of lead hazard screens, risk assessments, or abatements. Therefore, it would be unnecessary for a certified inspector or risk assessor to seek certification as a dust sampling technician. The regulations promulgated in the RRP rule explained who is eligible to take the refresher dust sampling technician course in lieu of the initial training. However, the regulations did not explicitly say that a certified inspector or risk assessor could perform dust sampling. In order to clarify the intent of the regulation, EPA is proposing to amend 40 CFR 745.90(a)(3) to specifically state that a certified inspector or risk assessor may act as a dust sampling technician.

8. *Trainee photographs.* Accredited training programs are required to issue a course completion certificate for each person who passes a training course. A variety of information is required to be on the certificate including the name of the course, the name and address of the student, and contact information for the training program. Course certificates for renovators or dust sampling technicians must include a photograph of the student. Since publishing the RRP rule, the Agency has been asked if there is a minimum size for the photograph. Currently, there are no size requirements or other specifications for the photograph on a course completion certificate. Nonetheless, EPA believes that it would be beneficial to have such requirements to ensure that the person in the photograph is recognizable. Thus,

EPA is proposing to require that the photographs on course completion certificates be an accurate and recognizable image of the trainee and at least one square inch in size. EPA is requesting comments on whether the image quality requirements should be more specific, *e.g.,* more quantitative.

9. *Training requirements.* As stated previously, 40 CFR 745.225 includes requirements and procedures that training programs must follow to become accredited in order to provide instruction in renovator, dust sampling technician, and lead-based paint activities courses. The final RRP rule amended Section 745.225 to cover persons who provide or wish to provide renovator or dust sampling technician training for the purposes of the final RRP rule. There are some instances where the regulations do not specifically mention the renovator or dust sampling technician courses even though the regulations apply to those courses. For example, 40 CFR 745.225(c)(14) explains the requirements which a training provider must follow when submitting notification to EPA after the completion of a training. However, the conforming changes, i.e., to replace "lead-based paint activities courses" with "renovator, dust sampling technician, and lead-based paint activities courses," were not made to every subparagraph even though all the requirements of that section apply to those courses. Consequently, EPA is proposing to clarify that the requirements in 40 CFR 745.225 apply to renovator and dust sampling technician courses in addition to lead-based paint activities courses. These changes do not alter the requirements but merely clarify them.

## IV. References

As indicated under **ADDRESSES**, a docket has been established for this rulemaking under docket ID number EPA–HQ–OPPT–2005–0049. The following is a listing of the documents that are specifically referenced in this document. The docket includes these documents and other information considered by EPA, including documents that are referenced within the documents that are included in the docket, even if the referenced document is not physically located in the docket. For assistance in locating these other documents, please consult the technical contact listed under **FOR FURTHER INFORMATION CONTACT**.


1. U.S. Environmental Protection Agency (EPA). Lead; Renovation, Repair, and Painting Program; Final Rule. **Federal Register** (73 FR 21692, April 22, 2008) (FRL–8355–7).
2. EPA. Air Quality Criteria for Lead (October 2006).
3. EPA. Lead Exposure Associated With Renovation and Remodeling Activities: Phase III, Wisconsin Childhood Blood-Lead Study (EPA 747–R–99–002, March 1999).
4. U.S. Department of Health and Human Services (HHS), U.S. Public Health Service (PHS), Centers for Disease Control and Prevention (CDC). Children with Elevated Blood Lead Levels Attributed to Home Renovation and Remodeling Activities—New York, 1993–1994. Morbidity and Mortality Weekly Report (45(51); 1120–1123, January 3, 1997).
5. HHS, PHS, CDC. Children with Elevated Blood Lead Levels Related to Home Renovation, Repair, and Painting Activities—New York State, 2006–2007. Morbidity and Mortality Weekly Report (58(03); 55–58, January 30, 2009).
6. Reissman, Dori B., Thomas D. Matte, Karen L. Gurnite, Rachel B. Kaufmann, and Jessica Leighton. "Is Home Renovation or Repair a Risk Factor for Exposure to Lead Among Children Residing in New York City?" Journal of Urban Health: Bulletin of the New York Academy of Medicine. Vol. 79, No. 4, 502–511, December 2005.
7. Jones, Robert L., David M. Homa, Pamela A. Meyer, Debra J. Brody, Kathleen L. Caldwell, James L. Pirkle, and Mary Jean Brown. "Trends in Blood Lead Levels and Blood Lead Testing Among U.S. Children Aged 1 to 5 Years, 1988–2004." Pediatrics: Official Journal of the American Academy of Pediatrics. Vol. 123, No. 3, pp. e376–e385, March 2009.
8. EPA. Lead; Requirements for Lead-based Paint Activities; Final Rule. **Federal Register** (61 FR 45778), August 29, 1996).
9. EPA. Lead; Identification of Dangerous Levels of Lead; Final Rule. **Federal Register** (66 FR 1206, January 5, 2001).
10. EPA. Lead Exposure Associated With Renovation and Remodeling Activities: Phase I, Environmental Field Sampling Study (EPA 747–R–96–007, May 1997).
11. EPA. Lead Exposure Associated With Renovation and Remodeling Activities: Phase II, Worker Characterization and Blood-Lead Study (EPA 747–R–96–006, May 1997).
12. EPA. Exposure Associated With Renovation and Remodeling Activities: Phase IV, Worker Characterization and Blood-Lead Study of R&R Workers Who Specialize in Renovation of Old or Historic Homes (EPA 747–R–99–001, March 1999).
13. EPA. Lead; Renovation, Repair, and Painting Program; Proposed Rule. **Federal Register** (71 FR 1588, January 10, 2006) (FRL–8355–7).
14. EPA. Characterization of Dust Lead Levels After Renovation, Repair, And Painting Activities. (November 13, 2007).
15. U.S. Department of Housing and Urban Development (HUD). Guidelines for the Evaluation and Control of Lead-Based Paint Hazards in Housing (June 1995).
16. EPA. Electrostatic Cloth and Wet Cloth Field Study in Residential Housing (September 2005).
17. Rx Solutions International/BTS Laboratories Inc. Comment on EPA's Proposed Renovation, Remodeling, and Painting Program. EPA–HQ–OPPT–2005–0049–0483. May 22, 2006.
18. HUD. Evaluation of the HUD Lead-Based Paint Hazard Control Grant Program: Final Report. May 1, 2004. *http://www.hud.gov/offices/lead/library/misc/NatEval.pdf*.
19. EPA. Residential Sampling for Lead: Protocols for Dust and Soil Sampling, March 1995 (EPA 747–R–95–001).
20. ASTM International. Standard Practice for Clearance Examinations Following Lead Hazard Reduction Activities in Single-Family Dwellings and Child-Occupied Facilities (E 2271–05a).
21. EPA and HUD. Lead; Requirements for Disclosure of Information Concerning Lead-Based Paint in Housing; Final Rule. **Federal Register** (61 FR 9064, March 6, 1996).
22. EPA. National Lead Laboratory Accreditation Program (NLLAP); Notice of Availability of Revisions to the NLLAP; Notice of Availability (73 FR 3967 January 23, 2008).
23. EPA. Reviewed Studies Pertaining to HEPA Shroud Effectiveness. 2009.
24. Battelle Memorial Institute. Encapsulation Treatment of Dust Study Floors. January 2010.
25. U.S. Department of Labor, Occupational Safety and Health Administration (OSHA). Technical Manual TED 01–00–015 [TED 1–0.15A]. Revised June 24, 2008.
26. American Society of Heating, Refrigerating and Air-Conditioning Engineers (ASHRAE). Standard 52.2–2007—Method of Testing General Ventilation Air-Cleaning Devices for Removal Efficiency by Particle Size (ANSI/ASHRAE Approved) 2007.
27. ASTM International. Standard Test Method for Air Cleaning Performance of a High-Efficiency Particulate Air-Filter System (F1471–09).
28. EPA. Office of Pollution Prevention and Toxics (OPPT). Economic Analysis of the Proposed Dust Testing and Clearance Amendments to the TSCA Lead Renovation, Repair, and Painting Program for Target Housing and Child-Occupied Facilities. April 2010.
29. EPA. Proposed Clearance Rule ICR Addendum for the rulemaking entitled Lead; Clearance and Clearance Testing Requirements for the Renovation, Repair, and Painting Program; Proposed Rule. April 2010.
30. EPA. Initial Regulatory Flexibility Analysis for the Clearance and Clearance Testing Requirements for the Lead Renovation, Repair, and Painting Program; Proposed Rule. April 2010.
31. EPA. Report of the Small Business Advocacy Review Panel on the Lead-based Paint Certification and Training; Renovation and Remodeling Requirements. March 3, 2000.
32. EPA. Unfunded Mandates Reform Act Statement; Lead; Clearance and Clearance Testing Requirements for the Renovation, Repair, and Painting Program; Proposed Rule. April 2010.

33. ASTM International. Standard Practice for Collection of Settled Dust Samples Using Wipe Sampling Methods for Subsequent Lead Determination (E1728–03).
34. ASTM International. Standard Specification for Wipe Sampling Materials for Lead in Surface Dust (E1792–03).
35. ASTM International. Standard Practice for Record Keeping and Record Preservation for Lead Hazard Activities (E2239–04).

## V. Statutory and Executive Order Reviews

EPA has prepared an analysis of the potential costs and benefits associated with this rulemaking. This analysis is contained in the "Economic Analysis of the Proposed Dust Testing and Clearance Amendments to the TSCA Lead Renovation, Repair, and Painting Program for Target Housing and Child-Occupied Facilities" (Economic Analysis, Ref. 26), which is available in the docket for this action and is briefly summarized here, and in more detail later in this Unit.

| Category | Description |
|---|---|
| Benefits | Benefits are not monetized or quantified, although there may be benefits through:<br>(1) Information on lead-dust levels remaining in the renovation work area, including lead-dust that may have been generated during the renovation activity.<br>(2) Changed behavior on the part of renovation firms, owners, and occupants which may prevent adverse health effects attributable to lead exposure from renovations in pre-1978 buildings.<br>EPA has estimated the size of the population affected by this rule, but does not have sufficient information to estimate the value of information to consumers about lead-dust risks, or the decrease in exposure to lead-dust from renovations in target housing and child-occupied facilities. |
| Costs | $272 million annualized (3% discount rate).<br>$293 million annualized (7% discount rate). |

### *A. Executive Order 12866*

Under section 3(f)(1) of Executive Order 12866, entitled "Regulatory Planning and Review" (58 FR 51735, October 4, 1993), this action is an "economically significant regulatory action" because EPA estimates that it will have an annual effect on the economy of $100 million or more. Accordingly, this action was submitted to the Office of Management and Budget (OMB) for review under Executive Order 12866 and any changes made based on OMB recommendations have been documented in the public docket for this rulemaking as required by section 6(a)(3)(E) of the Executive Order.

The following is a summary of the Economic Analysis (Ref. 28), which is available in the docket for this action.

1. *Options evaluated.* The Economic Analysis analyzes several options. In addition to the proposed rule option, the Economic Analysis includes options with lower and higher thresholds (in terms of the amount of lead-based paint disturbed) for renovations which require dust wipe testing or clearance. In the proposed rule, the renovation events for which clearance is required (use of high speed machines to remove paint, and the demolition or destructive removal of plaster) have a threshold of 6 $ft^2$ of lead-based paint disturbed. The thresholds in the proposed rule for the renovation events that require the use of dust wipe testing without necessarily achieving clearance vary from 6 to 60 $ft^2$, depending on the type of renovation (use of a heat gun; scraping painted surfaces; removing trim, molding, cabinets, or other fixtures; etc.). In the low threshold option, the thresholds are 6 $ft^2$ for all of the affected renovations. In the high threshold option, the thresholds for the events where clearance is required are 60 $ft^2$, while the thresholds for the renovations events that require the use of dust wipe testing without necessarily achieving clearance vary from 60 to 120 $ft^2$, depending on the type of renovation. The Economic Analysis also includes three options that use the same threshold sizes as the proposed rule but apply different requirements to them. There is an option that requires dust wipe testing for all of the renovation events covered by the proposed rule without requiring clearance for any of them, as well as an option that requires clearance for all of these events. Finally, there is an option that applies to the same dust wipe testing and clearance events and thresholds as the proposed rule but that requires renovation firms to have the dust wipe sampling performed by an independent third party.

2. *Number of facilities and renovations.* There are approximately 18.7 million renovation events per year covered by EPA's renovation, repair, and painting program in the 78 million target housing units and child-occupied facilities. The number of renovations affected by this proposed rule depends on the option selected. The low threshold option affects an estimated 1.8 million dust wipe testing only events and 69,000 clearance events per year. The proposed rule is estimated to affect 1.5 million dust wipe testing only events and 69,000 clearance events a year. The high threshold option affects an estimated 1.2 million dust wipe testing only events and 58,000 clearance events per year. The remaining three options (only dust wipe testing is required for all renovations covered by the proposed rule, clearance is required for all renovations covered by the proposed rule, and third-party dust wipe sampling is required for all renovations covered by the proposed rule) all affect an estimated 1.6 million events per year.

3. *Benefits.* The benefits of the rule result from the prevention of adverse health effects attributable to lead exposure from renovations in pre-1978 buildings. These health effects include impaired cognitive function in children and several illnesses in children and adults, such as increased adverse cardiovascular outcomes (including increased blood pressure, increased incidence of hypertension, cardiovascular morbidity and mortality) and decreased kidney function.

The proposed rule will generate benefits by providing greater assurance that dust-lead hazards created by renovations are adequately cleaned up, primarily by requiring renovation firms to provide building owners and occupants with information on dust lead levels remaining in the work area after many renovation projects, but also by requiring renovation firms to demonstrate that they have achieved regulatory clearance levels after some of the dustiest renovations. These changes will protect individuals residing in target housing or attending a child-occupied facility where these renovation events are performed. It will also protect individuals who move into target housing after such a renovation is performed, or who visit a friend, relative, or caregiver's house where such a renovation is performed.

EPA has estimated the number of individuals residing in target housing units or attending COFs where renovation events are performed. The proposed rule will benefit 809,000 children under the age of 6 and 7,547,000 individuals age 6 and older (including 96,000 pregnant women) per year by minimizing their exposure to lead dust generated by renovations. The low threshold option would protect 882,000 children under the age of 6 and 8,193,000 individuals age 6 and older, including 105,000 pregnant women. The high threshold option protects 706,000 children and 6,590,000 individuals age 6 and older, including 83,000 pregnant women. The remaining three alternative options (dust wipe testing only, clearance only, and third party dust wipe testing) would affect the same number of individuals as the proposed rule, although the amount of protection provided to some of those individuals may differ from the proposed rule.

4. *Costs.* Firms performing the renovation events covered by the proposed rule will incur costs associated with having a third party perform dust wipe sampling and testing (or with having a firm staff member trained as a dust sampling technician so that they can take their own dust wipe samples and send them to a lab). For jobs subject to the clearance requirements in the proposed rule, firms may incur re-cleaning costs if dust wipe testing after clean-up yields results that exceed the clearance standards. Firms will also incur small costs to provide the dust wipe testing results to owners and occupants of the target housing units and child-occupied facilities where the renovations are performed.

EPA's updated estimate is that the average cost for a renovation firm to hire a third-party lead evaluation firm to take four dust samples, send them to a lab for analysis, and provide a short report is slightly over $260. However, many renovation firms may find it more cost effective to have a staff member trained and certified as a dust sampling technician rather than hiring a third party to take the samples.

Renovation firms would incur the same dust wipe testing costs for renovations where achieving clearance is required. If dust levels exceed the clearance standards after cleaning verification, the renovation firm will incur additional costs for re-cleaning the work area up to two times. These re-cleaning costs vary from job to job, depending on the size of the space that must be cleaned.

Annualized costs for the rule options are calculated using both a 3% and a 7% discount rate. Total annualized costs for the proposed rule are $272 million per year using a 3% discount rate and $293 million per year using a 7% discount rate. Under the low threshold option, costs are $312 million per year with a 3% discount rate and $336 million per year with a 7% rate. Under the high threshold option, costs are $224 million per year with a 3% discount rate and $242 million per year with a 7% discount rate. The option that only requires dust wipe testing costs $268 million per year with a 3% discount rate and $288 million per year with a 7% discount rate. The option requiring clearance for all renovations covered by the proposed rule costs $367 million with a 3% discount rate and $394 million with a 7% discount rate. The option requiring the use of a third party for dust wipe sampling costs $431 million per year with a 3% discount rate and $459 million per year with a 7% discount rate.

*B. Paperwork Reduction Act*

The information collection requirements contained in this proposed 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.,* EPA has prepared an Information Collection Request (ICR) document to amend an existing approved ICR. The ICR document, referred to as the Proposed Clearance Rule ICR Addendum and identified under EPA ICR No. 2381.01 and OMB Control Number 2070–NEW, has been placed in the docket for this proposed rule (Ref. 29). The information collection requirements are not enforceable until OMB approves them.

Burden under the PRA means the total time, effort, or financial resources expended by persons to generate, maintain, retain, disclose, or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

The information collection activities contained in this proposed rule are designed to assist the Agency in meeting the core objectives of TSCA section 402. EPA has carefully tailored the recordkeeping requirements so they will permit the Agency to achieve statutory objectives without imposing an undue burden on those firms that choose to be involved in renovation, repair, and painting activities.

This proposed rule requires renovation firms to provide owners and occupants with a report including the results of the dust wipe testing. Although firms have the option of choosing to engage in the covered activities, once a firm chooses to do so, the information collection activities become mandatory for that firm. The rule may result in an increase in the number of individuals becoming trained as dust sampling technicians, resulting in additional paperwork requirements for training providers.

The ICR document provides a detailed presentation of the estimated paperwork burden and costs resulting from this proposed rule. The burden to firms engaged in renovation, repair, and painting activities and to training providers are summarized in this unit.

The requirement for renovation firms to provide a dust wipe testing report for the renovations covered by the rule will impact about 224,000 firms. The additional burden for these firms arising from the proposed rule is estimated to average nearly 13 hours per firm annually, resulting in a total burden of approximately 2,867,000 hours per year for these firms.

Many certified renovators may become trained and certified as dust sampling technicians so that they can take their own dust wipe samples and send them to a lab for analysis. This will increase the paperwork burden for training providers, since they must submit records to EPA (or an authorizing State, Tribe, or Territory) pertaining to each student attending a training course to become a dust sampling technician. Around 170 training providers are estimated to incur an average burden of about 82 hours, resulting in an increase of approximately 14,000 hours per year in training provider burden as a result of the proposed rule.

Total respondent burden for renovation firms and training providers is estimated to average approximately 2.9 million hours per year during the 3 year period covered by the ICR.

The proposed rule may also result in additional government costs to administer the program (to process the additional training provider notifications and to administer and enforce the program). States, Tribes, and Territories are allowed, but are under no obligation, to apply for and receive authorization to administer these requirements. EPA will directly

administer programs for States, Tribes, and Territories that do not become authorized. Because the number of States, Tribes, and Territories that will become authorized is not known, administrative costs are estimated assuming that EPA will administer the program everywhere. To the extent that other government entities become authorized, EPA's administrative costs will be lower.

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 codified in chapter 40 of the CFR, after appearing in the preamble of the final rule, 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. When the 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 the final rule.

To comment on the Agency's need for this information, the accuracy of the provided burden estimates, and any suggested methods for minimizing respondent burden, EPA has established a docket for this proposed rule, which includes this ICR, under docket ID number EPA–HQ–OPPT–2005–0049. Submit any comments related to the ICR to EPA and OMB. *See* **ADDRESSES** for where to submit comments to EPA. Send comments to OMB at the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th St., NW., Washington, DC 20503, Attention: Desk Office for EPA. Since OMB is required to make a decision concerning the ICR between 30 and 60 days after May 6, 2010, a comment to OMB is best assured of having its full effect if OMB receives it by June 7, 2010. The final rule will respond to any OMB or public comments on the information collection requirements contained in this proposed rule.

*C. Regulatory Flexibility Act*

The Regulatory Flexibility Act (RFA), 5 U.S.C. 601 *et seq.,* 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 proposed rule on small entities, small entity is defined in accordance with section 601 of the RFA as:

(1) A small business as defined by the Small Business Administration's (SBA) regulations at 13 CFR 121.201.

(2) A small governmental jurisdiction that is a government of a city, county, town, school district, or special district with a population of less than 50,000.

(3) A small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

As required by section 603 of the RFA, EPA has prepared an initial regulatory flexibility analysis (IRFA) for this proposed rule. The IRFA is available for review in the docket and is summarized in this unit (Ref. 30).

1. *Reasons why action by the Agency is being considered.* The Agency believes it is in the best interest of the public to require dust wipe testing for many types of renovations (and to require renovation firms to achieve clearance for certain types of renovations). EPA expects two kinds of benefits to flow from the proposed dust wipe testing requirements. The first are the direct benefits of the information to the owners and occupants, the pure value of the information on dust lead levels remaining in the renovation work area. For building owners and occupants, this information is likely to improve their understanding and awareness of dust-lead hazards. It will also greatly improve their ability to make further risk management decisions, especially in light of mounting evidence suggesting that the current dust-lead hazard standards are too high. This information is particularly critical where dust lead levels approach or exceed the regulatory hazard standards. The other benefits that EPA expects to flow from a dust wipe testing requirement are the benefits that may result from changed behavior on the part of renovation firms. EPA believes that dust wipe testing results will also provide valuable feedback to renovation firms on how well they are cleaning up after renovations. It is likely that the specific dust lead levels contained in dust wipe testing results will increase renovation firm cleaning efficiency. Renovation firms will be incentivized to lower the dust lead levels remaining after renovation jobs, even if the levels are at or near the regulatory standards. For two types of renovations that can create large amounts of difficult-to-clean dust, EPA remains concerned about the possibility that dust lead levels remaining, even after cleaning verification, may substantially exceed the clearance standards. If renovation firms choose to utilize these methods, the firms would be required to demonstrate, through dust wipe testing, that they have met the clearance standards before the renovation will be considered completed.

2. *Legal basis and objectives for this proposed rule.* These work practice requirements for dust wipe testing and clearance, training, certification and accreditation requirements, and State, Territorial and Tribal authorization provisions are being promulgated under the authority of TSCA sections 402(c)(3), 404, and 407, 15 U.S.C. 2682(c)(3), 2684, and 2687. A central objective of this proposed rule is to provide greater assurance that dust-lead hazards created by renovations are adequately cleaned up, primarily by requiring renovation firms to provide building owners and occupants with information on dust lead levels remaining in the work area after many renovation projects, but also by requiring renovation firms to demonstrate that they have achieved regulatory clearance levels after some of the dustiest renovations.

3. *Potentially affected small entities.* Small entities include small businesses, small organizations, and small governmental jurisdictions. The small entities that are potentially directly regulated by this proposed rule include: Small businesses (such as renovation contractors and property owners and managers); small nonprofits (certain childcare centers and private schools); and small governments (school districts which operate pre-schools, kindergartens and certain child care centers).

In determining the number of small businesses affected by the proposed rule, the Agency applied U.S. Economic Census data to the SBA's definition of small business. However, applying the U.S. Economic Census data requires either under- or overestimating the number of small businesses affected by the proposed rule. For example, for many construction establishments, the SBA defines small businesses as having revenues of less than $14 million. With respect to those establishments, the U.S. Economic Census data groups all establishments with revenues of $10 million or more into one revenue bracket. On the one hand, using data for the entire industry would overestimate the number of small businesses affected by the proposed rule and would defeat the purpose of estimating impacts on small business. It would also

underestimate the proposed rule's impact on small businesses because the impacts would be calculated using the revenues of large businesses in addition to small businesses. On the other hand, applying the closest, albeit lower, revenue bracket would underestimate the number of small businesses affected by the proposed rule while at the same time overestimating the impacts. Similar issues arose in estimating the fraction of property owners and managers that are small businesses. EPA has concluded that a substantial number of small businesses will be affected by the rule. Consequently, EPA has chosen to be more conservative in estimating the cost impacts of the rule by using the closest, albeit lower, revenue bracket for which U.S. Economic Census data is available. For other sectors (nonprofits operating childcare centers or private schools), EPA assumed that all affected firms are small, which may overestimate the number of small entities affected by the proposed rule.

The vast majority of entities in the industries affected by this proposed rule are small. Using EPA's estimates, these revisions to the renovation, repair, and painting program will affect over 203,000 small entities per year.

4. *Potential economic impacts on small entities.* EPA evaluated two factors in its analysis of the proposed rule's requirements on small entities, the number of firms that would experience the impact, and the size of the impact. Average annual compliance costs as a percentage of average annual revenues were used to assess the potential average impacts of the rule on small businesses and small governments. This ratio is a good measure of entities' ability to afford the costs attributable to a regulatory requirement, because comparing compliance costs to revenues provides a reasonable indication of the magnitude of the regulatory burden relative to a commonly available measure of economic activity. Where regulatory costs represent a small fraction of a typical entity's revenues, the financial impacts of the regulation on such entities may be considered as not significant. For non-profit organizations, impacts were measured by comparing rule costs to annual expenditures. When expenditure data were not available, however, revenue information was used as a proxy for expenditures. It is appropriate to calculate the impact ratios using annualized costs, because these costs are more representative of the continuing costs entities face to comply with the proposed rule.

The cost of the proposed rule to a typical small business averages approximately $1,200 per year. This represents 0.4% to 1.1% of revenues depending on the industry sector. Overall, an estimated 203,000 small renovation contractors would be affected by the proposed rule, with average impacts of 0.5% of revenues. Approximately 100 small governments per year would incur a cost of about $800, resulting in an average impact of less than 0.01%. And around 200 small non-profits per year would incur a cost of about $600, resulting in an impact of approximately 0.1%.

Some of the small renovation contractors subject to the rule have employees while others are non-employers. The non-employers typically perform fewer jobs than firms with employees, and thus have lower work practice compliance costs. However, they also have lower average revenues than entities with employees, so their impacts (measured as costs divided by revenues) can be higher. Impact estimates for non-employers should be interpreted with caution, as some non-employers may have significant issues related to understatement of income, which would tend to exaggerate the average impact ratio for this class of small entities. There are 151,000 non-employer renovation contractors estimated to be affected by the proposed rule. The average cost to these contractors is estimated to be approximately $700 apiece. This represents 0.7% to 2.6% of reported revenues, depending on the industry sector.

5. *Relevant Federal rules.* The requirements in this proposed rule will fit within an existing framework of other Federal regulations that address lead-based paint. Notably, the Pre-Renovation Education Rule, 40 CFR 745.85, requires renovation firms to distribute a lead hazard information pamphlet to owners and occupants before conducting a renovation in target housing and child-occupied facilities. This proposed rule's requirement that renovation firms provide owners and occupants with dust wipe testing and clearance reports complements the existing pre-renovation education requirements. Another such Federal regulation is HUD's Lead Safe Housing Rule, 24 CFR part 35, subparts B–R, which requires firms conducting interim controls of lead-based paint hazards (a category which includes RRP work) to provide owners and occupants with dust wipe testing and clearance reports.

6. *Skills needed for compliance.* Under the lead renovation, repair, and painting program requirements, renovators and dust sampling technicians working in target housing and child-occupied facilities have to take courses to learn the proper techniques for accomplishing the tasks (including dust sampling, preparing a report with the results, and performing specialized cleaning) they will perform during renovations. These courses are intended to provide them with the information they would need to comply with the rule based on the skills they already have. Other renovation workers that have not been formally trained and certified must receive training on the work practices they will be using in performing their assigned tasks from a certified renovator, and a certified renovator must regularly direct work being performed by other renovation workers to ensure that the work practices are being followed, including maintaining the integrity of the containment barriers and ensuring that dust or debris does not spread beyond the work area.

7. *Small Business Advocacy Review Panel.* EPA has been concerned with potential small entity impacts since the earliest stages of planning for the RRP program under section 402(c)(3) of TSCA. EPA conducted outreach to small entities and, pursuant to section 609 of the RFA, convened a Small Business Advocacy Review Panel (the Panel) in 1999 to obtain advice and recommendations of representatives of the regulated small entities. EPA identified eight key elements of a potential renovation and remodeling regulation for the Panel's consideration. These elements were: applicability and scope, firm certification, individual training and certification, accreditation of training courses, work practice standards, prohibited practices, exterior clearance, and interior clearance.

Details on the Panel and its recommendations are provided in the Panel Report (Ref. 31). Information on how EPA implemented the Panel's recommendations in the development of the RRP program is available in Unit VIII.C. of the preamble to the 2006 proposed rule (Ref. 13) and in Unit V.C. of the preamble to the 2008 final rule (Ref. 1). EPA believes that the conclusions it made in 2008 regarding these recommendations are applicable to this proposal. Indeed, EPA has considered input from the 1999 Panel process in this rule precisely because it is so closely related that EPA considers it an extension of the 2008 RRP rulemaking. (See 5 U.S.C. 605(c))

8. *Alternatives considered.* EPA considered alternatives to this proposed rule that could affect the economic impacts of the proposed rule on small entities. These alternatives would have applied to both small and large entities,

but given the number of small entities in the affected industries, these alternatives would primarily affect small entities. For the reasons described in this unit, EPA believes these alternatives are not consistent with the objectives of the rule.

i. *Higher thresholds.* EPA considered an option under which the size thresholds for determining whether renovation jobs would need to perform dust wipe testing or achieve clearance would be higher than those in the proposed rule. By reducing the number of renovations where dust wipe testing or clearance are required, this option would reduce the costs of the rule and thus the estimated small entity impacts. However, higher thresholds would result in more jobs where occupants do not have information on the dust lead levels they are exposed to, or where they are exposed to dust lead levels above the hazard standard. EPA believes that the proposed rule provides the best balance between the benefits of the rule (the value of information from dust wipe testing and the benefits of reduced exposure to lead dust from achieving clearance) compared to the costs (and resulting small business impacts) of dust wipe testing, re-cleaning, and the other requirements of the proposed rule. Therefore, EPA believes that an option with higher thresholds is not consistent with the stated objectives of the proposed rule.

ii. *Dust testing only.* EPA considered an option that would require dust wipe testing but not clearance for any of these renovation events. EPA remains concerned that renovations that disturb paint using machines designed to remove lead-based paint through high speed operation (such as power sanders or abrasive blasting) can create large amounts of difficult-to-clean dust, creating the possibility that dust lead levels may substantially exceed the clearance standards even after cleaning verification. The same is true for the demolition or removal through destructive means of plaster and lath walls, ceilings or other building components with lead-based paint. Therefore, EPA believes that this option is not consistent with the stated objectives of the proposed rule.

As required by section 212 of Small Business Regulatory Enforcement Fairness Act (SBREFA), Public Law 104–121, EPA issued a Small Entity Compliance Guide (the Guide) in December 2008 to help small entities comply with the RRP rule. The Guide is available at: *http://www.epa.gov/lead/pubs/sbcomplianceguide.pdf* or from the National Lead Information Center by calling 1(800) 424–LEAD [5323]. EPA will revise the Guide, as necessary, to reflect this rulemaking activity.

EPA invites comments on all aspects of the proposal and its impact on small entities.

*D. Unfunded Mandates Reform Act*

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1531–1538, requires Federal agencies, unless otherwise prohibited by law, to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. This rule contains a Federal mandate that may result in expenditures of $100 million or more by the private sector in any 1 year, but it will not result in such expenditures by State, local, and Tribal governments in the aggregate. Accordingly, EPA has prepared under section 202 of the UMRA a written statement (Ref. 32) which is summarized below. Consistent with section 205 of the UMRA, EPA has identified and considered a reasonable number of regulatory alternatives, also summarized below.

1. *Authorizing legislation.* This proposed rule is issued under the authority of TSCA sections 402(c)(3), 404, and 407 (15 U.S.C. 2682(c)(3), 2684, and 2687).

2. *Cost-benefit analysis.* EPA has prepared an analysis of the costs and benefits associated with this proposed rule, a copy of which is available in the docket for this proposed rule (Ref. 28). The Economic Analysis presents the costs of this proposed rule as well as various regulatory options and is summarized in Unit V.A. EPA has estimated the total annualized costs of this proposed rule are $272 million per year using a 3% discount rate and $293 million per year using a 7% discount rate.

The benefits of the proposed rule result from the prevention of adverse health effects attributable to lead exposure from renovations in pre-1978 buildings. These health effects include impaired cognitive function in children and several illnesses in children and adults, such as increased adverse cardiovascular outcomes (including increased blood pressure, increased incidence of hypertension, cardiovascular morbidity and mortality) and decreased kidney function.

3. *State, local, and Tribal government input.* EPA has sought input from State, local and Tribal government representatives throughout the development of the renovation, repair, and painting program. EPA's experience in administering the existing lead-based paint activities program under TSCA section 402(a) suggests that these governments will play a critical role in the successful implementation of a national program to reduce exposures to lead-based paint hazards associated with renovation, repair, and painting activities. Consequently, as discussed in Unit III.C.2. of the preamble to the 2006 proposed rule (Ref. 13), the Agency has met with State, local, and Tribal government officials on numerous occasions to discuss renovation issues.

4. *Least burdensome option.* EPA has considered a wide variety of options for addressing the risks presented by renovation activities where lead-based paint is present. As part of the development of the renovation, repair, and painting program, EPA considered different options for the scope of the proposed rule, various combinations of training and certification requirements for individuals who perform renovations, various combinations of work practice requirements, and various methods for ensuring that no lead-based paint hazards are left behind by persons performing renovations. The Economic Analysis for this proposed rule analyzed several additional options for the scope of the work practices required, in terms of the size threshold and whether dust wipe testing or clearance is required. As described in Unit V.C., EPA has preliminarily concluded that the options for reducing the scope would result in an unacceptable number of jobs where occupants do not have information on the dust lead levels they are exposed to, or where they are exposed to dust lead levels above the hazard standard.

Currently, EPA believes that the preferred option is the least burdensome option available that achieves a central objective of this proposed rule, which is to provide greater assurance that dust-lead hazards created by renovations are adequately cleaned up, primarily by requiring renovation firms to provide building owners and occupants with information on dust lead levels remaining in the work area after many renovation projects, but also by requiring renovation firms to demonstrate that they have achieved regulatory clearance levels after some of the dustiest renovations.

This rule is not subject to the requirements of section 203 of UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments. Based on the definition of "small government jurisdiction" in RFA section 601, 5 U.S.C. 601, no State governments can be considered small. Small Territorial or Tribal governments may apply for authorization to administer and enforce this program, which would

entail costs, but these small jurisdictions are under no obligation to do so. Small governments operate schools that are child-occupied facilities. If these governments perform renovations in these facilities, they may incur additional costs to perform dust wipe testing or achieve clearance, and to provide residents, parents or guardians with copies of the report documenting the dust wipe testing results. EPA generally measures a significant impact under UMRA as being expenditures, in the aggregate, of more than 1% of small government revenues in any 1 year. As explained in Unit V.C.4., the proposed rule is expected to result in small government impacts well under 1% of revenues. So EPA has determined that the rule does not significantly affect small governments. Nor does the rule uniquely affect small governments, as the proposed rule is not targeted at small governments, does not primarily affect small governments, and does not impose a different burden on small governments than on other entities that operate child-occupied facilities.

*E. Executive Order 13132*

Pursuant to Executive Order 13132, entitled "Federalism" (64 FR 43255, August 10, 1999), EPA has determined that this proposed rule does not have "federalism implications," because it will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. Thus, Executive Order 13132 does not apply to this proposed rule. States are able to apply for, and receive authorization to administer the lead renovation, repair, and painting program requirements, but are under no obligation to do so. In the absence of a State authorization, EPA will administer the requirements. Nevertheless, in the spirit of the objectives of this Executive Order, and consistent with EPA policy to promote communications between the Agency and State and local governments, EPA consulted with representatives of State and local governments in developing the renovation, repair, and painting program. These consultations were described in the preamble to the 2006 Proposal (Ref. 13).

*F. Executive Order 13175*

This action does not have tribal implications, as specified in Executive Order 13175 (65 FR 67249, November 9, 2000). EPA has determined that this proposed rule does not have Tribal implications because it will not have substantial direct effects on Tribal governments, on the relationship between the Federal government and the Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes, as specified in the Order. Tribes are able to apply for and receive authorization to administer the lead renovation, repair, and painting program on Tribal lands, but Tribes are under no obligation to do so. In the absence of a Tribal authorization, EPA will administer these requirements. While Tribes may operate public housing or child-occupied facilities covered by the rule such as kindergartens, pre-kindergartens, and daycare facilities, EPA has determined that this rule would not have substantial direct effects on the Tribal governments that operate these facilities.

Thus, Executive Order 13175 does not apply to this proposed rule. Although Executive Order 13175 does not apply, EPA consulted with Tribal officials and others by discussing potential renovation regulatory options for the renovation, repair, and painting program at several national lead program meetings hosted by EPA and other interested Federal agencies. EPA specifically solicits additional comment on this proposed action from tribal officials.

*G. Executive Order 13045*

This action is subject to Executive Order 13045, entitled "Protection of Children from Environmental Health Risks and Safety Risks" (62 FR 19885, April 23, 1997), because it is an "economically significant regulatory action" as defined by Executive Order 12866, and because the environmental health or safety risk addressed by this action may have a disproportionate effect on children.

A central purpose of this proposed rule is to provide greater assurance that dust-lead hazards created by renovations are adequately cleaned up, primarily by requiring renovation firms to provide building owners and occupants with information on dust lead levels remaining in the work area after many renovation projects, but also by requiring renovation firms to demonstrate that they have achieved regulatory clearance levels after some of the dustiest renovations. In the absence of this regulation, owners and occupants would not have information on the dust lead levels remaining following these renovation events, and dust lead levels may substantially exceed the clearance standards for certain renovations that can create large amounts of difficult-to-clean dust.

The proposed rule will protect children who reside in housing units or attend child-occupied facilities where such renovations occur; who visit a friend, relative, or caregiver's house where such renovations are performed; or who move into such housing when their family purchases it after such a renovation has been performed.

*H. Executive Order 13211*

This proposed rule is not a "significant energy action" as defined in Executive Order 13211, entitled "Actions concerning Regulations that Significantly Affect Energy Supply, Distribution, or Use" (66 FR 28355, May 22, 2001) because it is not likely to have any adverse effect on the supply, distribution, or use of energy.

*I. National Technology Transfer and Advancement Act of 1995*

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 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 proposed rulemaking involves technical standards. EPA proposes to use the government-unique technical standards described in Unit III of this preamble. EPA has identified several potentially-applicable voluntary consensus standards developed by ASTM International (formerly the American Society for Testing and Materials) that address dust wipe sampling, recordkeeping, and clearance procedures. These standards are: "Standard Practice for Collection of Settled Dust Samples Using Wipe Sampling Methods for Subsequent Lead Determination," "Standard Specification for Wipe Sampling Materials for Lead in Surface Dust," "Standard Practice for Record Keeping and Record Preservation for Lead Hazard Activities," and "Standard Practice for Clearance Examinations Following Lead Hazard Reduction Activities in Single-Family Dwellings and Child-Occupied Facilities" (Refs. 33, 34, 35, 20). Each of

these ASTM documents represents state-of-the-art knowledge regarding the performance of these particular aspects of lead-based paint hazard evaluation and control practices and EPA recommends the use of these documents where appropriate. EPA believes that the proposed amendments to the RRP rule as well as EPA's model training courses for lead-based paint inspectors, risk assessors, and dust sampling technicians are consistent with these ASTM standards. However, because each of these documents is extremely detailed and encompasses many circumstances beyond the scope of this rulemaking, EPA determined that it would be impractical to incorporate these voluntary consensus standards into the rule.

In addition, EPA has identified a potentially-applicable voluntary consensus standard developed by ASTM International for evaluating the performance of HEPA filtration systems, the "Standard Test Method for Air Cleaning Performance of a High-Efficiency Particulate Air-Filter System" (Ref. 27). EPA does recommend that renovation firms in the market for a HEPA vacuum verify that the filter has been tested in accordance with the ASTM standard or an equivalent test method. However, EPA has determined that it would be impractical to incorporate this test method into the rule.

EPA welcomes comments on this aspect of the proposed rulemaking and, specifically, invites the public to identify potentially-applicable voluntary consensus standards and to explain why such standards should be used in this regulation.

Executive Order 12898

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

EPA has determined that this proposed rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it increases the level of environmental protection for all affected populations without having any disproportionately high and adverse human health or environmental effects on any population, including any minority or low-income population. EPA has assessed the potential impact of this proposed rule on minority and low-income populations. The results of this assessment are presented in the Economic Analysis, which is available in the docket for this proposed rule (Ref. 28).

**List of Subjects in 40 CFR Part 745**

Environmental protection, Child-occupied facility, Housing renovation, Lead, Lead-based paint, Renovation, Reporting and recordkeeping requirements.

Dated: April 22, 2010.

**Lisa P. Jackson,**

*Administrator.*

Therefore, it is proposed that 40 CFR chapter I be amended as follows:

1. The authority citation for part 745 would continue to read as follows:

**Authority:** 15 U.S.C. 2605, 2607, 2681–2692 and 42 U.S.C. 4852d.

2. In § 745.82, add a new paragraph (a)(3) to read as follows.

**§ 745.82 Applicability.**

(a) * * *

(3) Renovations in target housing or child-occupied facilities in which a certified renovator has collected a paint chip sample from each painted component affected by the renovation and a laboratory recognized by EPA pursuant to section 405(b) of TSCA as being capable of performing analyses for lead compounds in paint chip samples has determined that the samples are free of paint or other surface coatings that contain lead equal to or in excess of 1.0 mg/cm$^2$ or 0.5% by weight. If the components make up an integrated whole, such as the individual stair treads and risers of a single staircase, the renovator is required to test only one of the individual components, unless the individual components appear to have been repainted or refinished separately.

* * * * *

3. In § 745.83, add the definition "Containment" in alphabetical order to read as follows:

**§ 745.83 Definitions.**

* * * * *

*Containment* means a set of measures designed to protect residents and the environment from leaded dust, paint chips, or other forms of lead contamination created by renovations through the erection of barriers and warning signs and the establishment of access control, modifications to heating, ventilation, and air conditioning systems, and other strategies. Vertical containment, required for some exterior renovations, is a vertical barrier consisting of plastic sheeting over scaffolding or a wood or metal frame, or an equivalent system.

* * * * *

4. Section 745.85 is amended as follows:

a. Revise paragraph (a)(2)(ii)(D);

b. Revise paragraph (a)(3);

c. Remove paragraph (c);

d. Redesignate paragraphs (b) and (d) as paragraphs (c) and (e) respectively;

e. Add new paragraphs (b) and (d);

f. Revise newly-redesignated paragraph (e);

The revisions and additions read as follows:

**§ 745.85 Work practice standards.**

(a) * * *

(2) * * *

(ii) * * *

(D) If the renovation will affect surfaces within 10 feet of the property line, the renovation firm must erect vertical containment to ensure that dust and debris from the renovation does not contaminate adjacent buildings or migrate to adjacent properties. Vertical containment may also be necessary in other situations, such as in windy conditions, in order to prevent contamination of other buildings, other areas of the property, or adjacent buildings or properties.

(3) *Prohibited and restricted practices.* The work practices listed below are prohibited or restricted during a renovation as follows:

(i) Open-flame burning or torching of painted surfaces is prohibited.

(ii) The use of machines designed to remove paint through high speed operation such as sanding, grinding, power planing, needle gun, abrasive blasting, or sandblasting, is prohibited on painted surfaces unless such machines are shrouded and equipped with a HEPA vacuum attachment to collect dust and debris at the point of generation.

(iii) Operating a heat gun on painted surfaces is permitted only at temperatures below 1,100 degrees Fahrenheit.

* * * * *

(b) *Clearance*—(1) *Mandatory clearance.* Clearance is required after renovations involving the demolition, or removal through destructive means, of more than 6 ft$^2$ of plaster and lath building component, or the disturbance

of paint using machines designed to remove paint through high-speed operation, such as sanding, grinding, power planning, needle gun, abrasive blasting or sandblasting. When clearance is required, the following clearance procedures must be performed:

(i) A certified inspector, certified risk assessor, or certified dust sampling technician must perform a visual inspection to determine whether dust, debris or residue is still present in the renovation work area. If dust, debris or residue is present, these conditions must be removed by re-cleaning and another visual inspection must be performed.

(ii) A certified inspector, certified risk assessor, or certified dust sampling technician must collect dust wipe samples in accordance with EPA's "Residential Sampling for Lead: Protocols for Dust and Soil Sampling, EPA–747–R–95–001" or an equivalent protocol that incorporates adequate quality control procedures. Samples must be collected in the following locations:

(A) If there is more than one room, hallway, or stairwell within the work area, the following samples must be collected:

(*1*) One windowsill sample, one window trough sample, and one floor sample within each room, hallway, or stairwell in the work area. If there are more than four rooms, hallways, or stairwells within the work area, only four rooms, hallways, or stairwells must be sampled.

(*2*) One floor sample adjacent to the work area, but not in an area that has been cleaned.

(B) If the work area is a single room, hallway, stairwell, or smaller area, the following samples must be collected:

(*1*) One windowsill sample, one window trough sample, and one floor sample.

(*2*) One floor sample adjacent to the work area, but not in an area that has been cleaned.

(C) No window sill or trough samples must be collected if there are no windows in the work area.

(iii) Dust wipe samples must be analyzed by a laboratory or other entity recognized by EPA pursuant to section 405(b) of the Toxic Substances Control Act as being capable of performing analyses for lead compounds in dust samples. If a fixed-site laboratory is to be used, the dust wipe samples must be mailed or otherwise transmitted to the laboratory within 1 business day of the date that they are collected.

(iv) A certified inspector, certified risk assessor, or certified dust sampling technician must compare the residual lead level reported by the EPA-recognized laboratory for each dust sample or test with the applicable clearance level. If the residual lead level in a particular dust sample or test equals or exceeds the applicable clearance level, the components represented by the failed sample or test shall be re-cleaned and re-tested. The applicable clearance levels are:

(A) 40 μg/ft$^2$ for floors.

(B) 250 μg/ft$^2$ for interior window sills.

(C) 400 μg/ft$^2$ for window troughs.

(v) For surfaces in poor condition that the renovation firm did not specifically agree to refinish in the renovation contract, the renovation firm may stop re-cleaning and re-testing after the second failed dust wipe test on that surface.

(vi) The certified inspector, certified risk assessor, or certified dust sampling technician performing the clearance procedures must prepare a clearance report and provide it to the renovation firm within 3 days of the date that the final dust wipe testing results are obtained. The report must be a single document, with attachments, and must include the following information:

(A) Start and completion dates of the renovation.

(B) A brief written description of the renovation.

(C) The name and address of the certified firm employing the certified inspector, certified risk assessor, or certified dust sampling technician performing the clearance procedures.

(D) The name and signature of each certified inspector, certified risk assessor, or certified dust sampling technician performing clearance procedures and the date(s) that clearance procedures were performed.

(E) The results of the visual inspection.

(F) A detailed written description of the specific sampling or testing locations or a detailed drawing that clearly identifies the location of each sample or test.

(G) The results for each dust wipe sample or test, whether or not clearance was achieved, and the name of each recognized laboratory or other entity that conducted the analyses.

(2) *Optional clearance.* Renovation firms that choose to comply with all of the requirements of this paragraph (745.85(b)) need not comply with the requirements of paragraph (d) of this section.

* * * * *

(d) *Dust wipe testing.* (1) Dust wipe testing must be performed after all renovations involving:

(i) Use of a heat gun at temperatures below 1,100 degrees Fahrenheit.

(ii) Removal or replacement of window or door frames.

(iii) Scraping 60 ft$^2$ or more of painted surfaces.

(iv) Removing more than 40 ft$^2$ of trim, molding, cabinets, or other fixtures.

(2) After cleaning verification has been performed in accordance with paragraph (c) of this section, a certified inspector, certified risk assessor, or certified dust sampling technician must collect dust wipe samples in accordance with EPA's "Residential Sampling for Lead: Protocols for Dust and Soil Sampling, EPA–747–R–95–001" or an equivalent protocol that incorporates adequate quality control procedures. Samples must be collected in the following locations:

(i) If there is more than one room, hallway, or stairwell within the work area, the following samples must be collected:

(A) One windowsill sample, one window trough sample, and one floor sample within each room, hallway, or stairwell in the work area. If there are more than four rooms, hallways, or stairwells within the work area, only four rooms, hallways, or stairwells must be sampled.

(B) One floor sample adjacent to the work area, but not in an area that has been cleaned.

(ii) If the work area is a single room, hallway, stairwell, or smaller area, the following samples must be collected:

(A) One windowsill sample, one window trough sample, and one floor sample.

(B) One floor sample adjacent to the work area, but not in an area that has been cleaned.

(iii) No window sill or trough samples must be collected if there are no windows in the work area.

(3) Dust wipe samples must be analyzed by a laboratory or other entity recognized by EPA pursuant to section 405(b) of the Toxic Substances Control Act as being capable of performing analyses for lead compounds in dust samples. If a fixed-site laboratory is to be used, the dust wipe samples must be mailed or otherwise transmitted to the laboratory within 1 business day of the date that they are collected.

(4) The certified inspector, certified risk assessor, or certified dust sampling technician performing the dust wipe testing must prepare a dust wipe testing report and provide it to the renovation firm within 3 days of the date that the dust wipe testing results are obtained. The report must be a single document,

with attachments, and must include the following information:

(i) Start and completion dates of the renovation.

(ii) A brief written description of the renovation.

(iii) The name and address of the certified firm employing the certified inspector, certified risk assessor, or certified dust sampling technician performing the dust wipe testing.

(iv) The name and signature of each certified inspector, certified risk assessor, or certified dust sampling technician performing sampling or testing and the date(s) that samples were collected or testing performed.

(v) The results of the visual inspection.

(vi) A detailed written description of the specific sampling or testing locations or a detailed drawing that clearly identifies the location of each sample or test.

(vii) The results for each dust wipe test, a statement of whether or not all samples analyzed were below the applicable clearance standards, and the name of each recognized laboratory or other entity that conducted the analyses.

(viii) The clearance standard from paragraph (b)(1)(iv) of this section that is applicable to each dust wipe test and, if one or more final dust wipe tests equals or exceeds the applicable clearance standards, a statement that any dust lead levels that equal or exceed the clearance standards will demonstrate that a lead-based paint hazard is present after the work is completed..

(e) *Activities conducted after post-renovation clearance, dust wipe testing, or cleaning verification.* Activities that do not disturb paint, such as applying paint to walls that have already been prepared, are not regulated by this subpart if they are conducted after post-renovation clearance, dust wipe testing, or cleaning verification has been performed.

5. In § 745.86, revise paragraph (d) to read as follows:

**§ 745.86 Recordkeeping and reporting requirements.**

* * * * *

(d) If clearance or dust wipe testing is performed in accordance with § 745.85, the renovation firm must provide, within 3 days of the date the renovation firm receives the report, a copy of the clearance or dust wipe testing report to:

(1) The owner of the building; and, if different,

(2) An adult occupant of the residential dwelling, if the renovation took place within a residential dwelling, or an adult representative of the child-occupied facility, if the renovation took place within a child-occupied facility.

6. Section 745.90 is amended as follows:

a. By revising paragraphs (a)(2) and (a)(3).

b. By revising paragraphs (b)(2), (b)(4), and (b)(8).

**§ 745.90 Renovator certification and dust sampling technician certification.**

(a) * * *

(2) Individuals who have successfully completed an accredited abatement worker or supervisor course, or individuals who successfully completed an EPA, HUD, or EPA/HUD model renovation training course may take an accredited refresher renovator training course before April 22, 2011 in lieu of the initial renovator training course to become a certified renovator.

(3) Individuals who have successfully completed an accredited lead-based paint inspector or risk assessor course may take an accredited refresher dust sampling technician course before April 22, 2011 in lieu of the initial training to become a certified dust sampling technician. Individuals who are currently certified as lead-based paint inspectors or risk assessors may act as dust sampling technicians without further training.

* * * * *

(b) * * *

(2) Must provide training to workers on the work practices required by § 745.85(a) that they will be using in performing their assigned tasks.

* * * * *

(4) Must regularly direct work being performed by other individuals to ensure that the work practices required by § 745.85(a) are being followed, including maintaining the integrity of the containment barriers and ensuring that dust or debris does not spread beyond the work area.

* * * * *

(8) Must prepare the records required by § 745.86(b)(1) and (6).

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7. In § 745.92, add paragraph (b)(3) to read as follows:

**§ 745.92 Fees for the accreditation of renovation and dust sampling technician training and the certification of renovation firms.**

* * * * *

(b) * * *

(3) *Accreditation or certification amendments.* No fee will be charged for accreditation or certification amendments.

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8. Revise § 745.225 to read as follows:

**§ 745.225 Accreditation of training programs: target housing and child-occupied facilities.**

(a) *Scope.* (1) A training program may seek accreditation to offer courses in any of the following disciplines: Inspector, risk assessor, supervisor, project designer, abatement worker, renovator, and dust sampling technician. A training program may also seek accreditation to offer refresher courses for each of the above listed disciplines.

(2) Training programs may first apply to EPA for accreditation of their lead-based paint activities courses or refresher courses pursuant to this section on or after August 31, 1998. Training programs may first apply to EPA for accreditation of their renovator or dust sampling technician courses or refresher courses pursuant to this section on or after April 22, 2009.

(3) A training program must not provide, offer, or claim to provide EPA-accredited lead-based paint activities courses without applying for and receiving accreditation from EPA as required under paragraph (b) of this section on or after March 1, 1999. A training program must not provide, offer, or claim to provide EPA-accredited renovator or dust sampling technician courses without applying for and receiving accreditation from EPA as required under paragraph (b) of this section on or after June 23, 2008.

(b) *Application process.* The following are procedures a training program must follow to receive EPA accreditation to offer lead-based paint activities courses, renovator courses, or dust sampling technician courses:

(1) A training program seeking accreditation shall submit a written application to EPA containing the following information:

(i) The training program's name, address, and telephone number.

(ii) A list of courses for which it is applying for accreditation. For the purposes of this section, courses taught in different languages and electronic learning courses are considered different courses, and each must independently meet the accreditation requirements.

(iii) The name and documentation of the qualifications of the training program manager.

(iv) The name(s) and documentation of qualifications of any principal instructor(s).

(v) A statement signed by the training program manager certifying that the training program meets the requirements established in paragraph (c) of this section. If a training program uses EPA-recommended model training

materials, or training materials approved by a State or Indian Tribe that has been authorized by EPA under subpart Q of this part, the training program manager shall include a statement certifying that, as well.

(vi) If a training program does not use EPA-recommended model training materials, its application for accreditation shall also include:

(A) A copy of the student and instructor manuals, or other materials to be used for each course.

(B) A copy of the course agenda for each course.

(C) When applying for accreditation of a course in a language other than English, a signed statement from a qualified, independent translator that they had compared the course to the English language version and found the translation to be accurate.

(vii) All training programs shall include in their application for accreditation the following:

(A) A description of the facilities and equipment to be used for lecture and hands-on training.

(B) A copy of the course test blueprint for each course.

(C) A description of the activities and procedures that will be used for conducting the assessment of hands-on skills for each course.

(D) A copy of the quality control plan as described in paragraph (c)(9) of this section.

(2) If a training program meets the requirements in paragraph (c) of this section, then EPA shall approve the application for accreditation no more than 180 days after receiving a complete application from the training program. In the case of approval, a certificate of accreditation shall be sent to the applicant. In the case of disapproval, a letter describing the reasons for disapproval shall be sent to the applicant. Prior to disapproval, EPA may, at its discretion, work with the applicant to address inadequacies in the application for accreditation. EPA may also request additional materials retained by the training program under paragraph (i) of this section. If a training program's application is disapproved, the program may reapply for accreditation at any time.

(3) A training program may apply for accreditation to offer courses or refresher courses in as many disciplines as it chooses. A training program may seek accreditation for additional courses at any time as long as the program can demonstrate that it meets the requirements of this section.

(4) A training program applying for accreditation must submit the appropriate fees in accordance with § 745.238.

(c) *Requirements for the accreditation of training programs.* For a training program to obtain accreditation from EPA to offer lead-based paint activities courses, renovator courses, or dust sampling technician courses, the program must meet the following requirements:

(1) The training program shall employ a training manager who has:

(i) At least 2 years of experience, education, or training in teaching workers or adults; or

(ii) A bachelor's or graduate degree in building construction technology, engineering, industrial hygiene, safety, public health, education, business administration or program management or a related field; or

(iii) Two years of experience in managing a training program specializing in environmental hazards; and

(iv) Demonstrated experience, education, or training in the construction industry including: Lead or asbestos abatement, painting, carpentry, renovation, remodeling, occupational safety and health, or industrial hygiene.

(2) The training manager shall designate a qualified principal instructor for each course who has:

(i) Demonstrated experience, education, or training in teaching workers or adults; and

(ii) Successfully completed at least 16 hours of any EPA-accredited or EPA-authorized State or Tribal-accredited lead-specific training; and

(iii) Demonstrated experience, education, or training in lead or asbestos abatement, painting, carpentry, renovation, remodeling, occupational safety and health, or industrial hygiene.

(3) The principal instructor shall be responsible for the organization of the course, course delivery, and oversight of the teaching of all course material. The training manager may designate guest instructors as needed for a portion of the course to provide instruction specific to the lecture, hands-on activities, or work practice components of a course. However, the principal instructor is primarily responsible for teaching the course materials and must be present to provide instruction (or oversight of portions of the course taught by guest instructors) for the course for which he has been designated the principal instructor.

(4) The following documents shall be recognized by EPA as evidence that training managers and principal instructors have the education, work experience, training requirements or demonstrated experience, specifically listed in paragraphs (c)(1) and (c)(2) of this section. This documentation must be submitted with the accreditation application and retained by the training program as required by the recordkeeping requirements contained in paragraph (i) of this section. Those documents include the following:

(i) Official academic transcripts or diploma as evidence of meeting the education requirements.

(ii) Re´sume´s, letters of reference, or documentation of work experience, as evidence of meeting the work experience requirements.

(iii) Certificates from train-the-trainer courses and lead-specific training courses, as evidence of meeting the training requirements.

(5) The training program shall ensure the availability of, and provide adequate facilities for, the delivery of the lecture, course test, hands-on training, and assessment activities. This includes providing training equipment that reflects current work practices and maintaining or updating the equipment and facilities as needed.

(6) To become accredited in the following disciplines, the training program shall provide training courses that meet the following training requirements:

(i) The inspector course shall last a minimum of 24 training hours, with a minimum of 8 hours devoted to hands-on training activities. The minimum curriculum requirements for the inspector course are contained in paragraph (d)(1) of this section.

(ii) The risk assessor course shall last a minimum of 16 training hours, with a minimum of 4 hours devoted to hands-on training activities. The minimum curriculum requirements for the risk assessor course are contained in paragraph (d)(2) of this section.

(iii) The supervisor course shall last a minimum of 32 training hours, with a minimum of 8 hours devoted to hands-on activities. The minimum curriculum requirements for the supervisor course are contained in paragraph (d)(3) of this section.

(iv) The project designer course shall last a minimum of 8 training hours. The minimum curriculum requirements for the project designer course are contained in paragraph (d)(4) of this section.

(v) The abatement worker course shall last a minimum of 16 training hours, with a minimum of 8 hours devoted to hands-on training activities. The minimum curriculum requirements for the abatement worker course are contained in paragraph (d)(5) of this section.

(vi) The renovator course must last a minimum of 8 training hours, with a minimum of 2 hours devoted to hands-on training activities. The minimum curriculum requirements for the renovator course are contained in paragraph (d)(6) of this section.

(vii) The dust sampling technician course must last a minimum of 8 training hours, with a minimum of 2 hours devoted to hands-on training activities. The minimum curriculum requirements for the dust sampling technician course are contained in paragraph (d)(7) of this section.

(viii) Electronic learning and other alternative course delivery methods are permitted for the classroom portion of renovator, dust sampling technician, or lead-based paint activities courses but not the hands-on portion of these courses. Electronic learning courses must comply with the following requirements:

(A) A unique identifier must be assigned to each student for them to use to launch and re-launch the course.

(B) The training provider must track each student's course log-ins, launches, progress, and completion, and maintain these records in accordance with paragraph (i) of this section.

(C) The course must include knowledge checks for each module, which must be successfully completed before the student can go on to the next module.

(D) There must be a test of at least 20 questions at the end of the electronic learning portion of the course, of which 80% must be answered correctly by the student for successful completion of the electronic learning portion of the course.

(E) Each student must be able to save or print an uneditable copy of an electronic learning course completion certificate.

(7) For each course offered, the training program shall conduct either a course test at the completion of the course, and if applicable, a hands-on skills assessment, or in the alternative, a proficiency test for that discipline. Each individual must successfully complete the hands-on skills assessment and receive a passing score on the course test to pass any course, or successfully complete a proficiency test.

(i) The training manager is responsible for maintaining the validity and integrity of the hands-on skills assessment or proficiency test to ensure that it accurately evaluates the trainees' performance of the work practices and procedures associated with the course topics contained in paragraph (d) of this section.

(ii) The training manager is responsible for maintaining the validity and integrity of the course test to ensure that it accurately evaluates the trainees' knowledge and retention of the course topics.

(iii) The course test shall be developed in accordance with the test blueprint submitted with the training accreditation application.

(8) The training program shall issue unique course completion certificates to each individual who passes the training course. The course completion certificate shall include:

(i) The name, a unique identification number, and address of the individual.

(ii) The name of the particular course that the individual completed.

(iii) Dates of course completion/test passage.

(iv) For initial inspector, risk assessor, project designer, supervisor, or abatement worker course completion certificates, the expiration date of interim certification, which is 6 months from the date of course completion.

(v) The name, address, and telephone number of the training program.

(vi) The language in which the course was taught.

(vii) For renovator and dust sampling technician course completion certificates, a photograph of the individual. The photograph must be an accurate and recognizable image of the individual. As reproduced on the certificate, the photograph must not be smaller than 1 square inch.

(9) The training manager shall develop and implement a quality control plan. The plan shall be used to maintain and improve the quality of the training program over time. This plan shall contain at least the following elements:

(i) Procedures for periodic revision of training materials and the course test to reflect innovations in the field.

(ii) Procedures for the training manager's annual review of principal instructor competency.

(10) Courses offered by the training program must teach the work practice standards contained in § 745.85 or § 745.227, as applicable, in such a manner that trainees are provided with the knowledge needed to perform the renovations or lead-based paint activities they will be responsible for conducting.

(11) The training manager shall be responsible for ensuring that the training program complies at all times with all of the requirements in this section.

(12) The training manager shall allow EPA to audit the training program to verify the contents of the application for accreditation as described in paragraph (b) of this section.

(13) The training manager must provide notification of renovator, dust sampling technician, or lead-based paint activities courses offered.

(i) The training manager must provide EPA with notification of all renovator, dust sampling technician, or lead-based paint activities courses offered. The original notification must be received by EPA at least 7 business days prior to the start date of any renovator, dust sampling technician, or lead-based paint activities course.

(ii) The training manager must provide EPA updated notification when renovator, dust sampling technician, or lead-based paint activities courses will begin on a date other than the start date specified in the original notification, as follows:

(A) For renovator, dust sampling technician, or lead-based paint activities courses beginning prior to the start date provided to EPA, an updated notification must be received by EPA at least 7 business days before the new start date.

(B) For renovator, dust sampling technician, or lead-based paint activities courses beginning after the start date provided to EPA, an updated notification must be received by EPA at least 2 business days before the start date provided to EPA.

(iii) The training manager must update EPA of any change in location of renovator, dust sampling technician, or lead-based paint activities courses at least 7 business days prior to the start date provided to EPA.

(iv) The training manager must update EPA regarding any course cancellations, or any other change to the original notification. Updated notifications must be received by EPA at least 2 business days prior to the start date provided to EPA.

(v) Each notification, including updates, must include the following:

(A) Notification type (original, update, cancellation).

(B) Training program name, EPA accreditation number, address, and telephone number.

(C) Course discipline, type (initial/refresher), and the language in which instruction will be given.

(D) Date(s) and time(s) of training.

(E) Training location(s) telephone number, and address.

(F) Principal instructor's name.

(G) Training manager's name and signature.

(vi) Notification must be accomplished using any of the following methods: Written notification, or electronically using the Agency's

Central Data Exchange (CDX). Written notification of lead-based paint activities course schedules can be accomplished by using either the sample form titled "Lead-Based Paint Training Notification" or a similar form containing the information required in paragraph (c)(13)(v) of this section. All written notifications must be delivered by U.S. Postal Service, fax, commercial delivery service, or hand delivery (persons submitting notification by U.S. Postal Service are reminded that they should allow 3 additional business days for delivery in order to ensure that EPA receives the notification by the required date). Instructions and sample forms can be obtained from the NLIC at 1–800–424–LEAD(5323), or on the Internet at *http://www.epa.gov/lead.*

(vii) Renovator, dust sampling technician, or lead-based paint activities courses must not begin on a date, or at a location other than that specified in the original notification unless an updated notification identifying a new start date or location is submitted, in which case the course must begin on the new start date and/or location specified in the updated notification.

(viii) No training program shall provide renovator, dust sampling technician, or lead-based paint activities courses without first notifying EPA of such activities in accordance with the requirements of this paragraph.

(14) The training manager must provide notification following completion of renovator, dust sampling technician, or lead-based paint activities courses.

(i) The training manager must provide EPA notification after the completion of any lead-based paint activities course. This notice must be received by EPA no later than 10 business days following course completion.

(ii) The notification must include the following:

(A) Training program name, EPA accreditation number, address, and telephone number.

(B) Course discipline and type (initial/refresher).

(C) Date(s) of training.

(D) The following information for each student who took the course:

(*1*) Name.

(*2*) Address.

(*3*) Date of birth.

(*4*) Course completion certificate number.

(*5*) Course test score.

(*6*) For renovator or dust sampling technician courses, a digital photograph of the student.

(E) Training manager's name and signature.

(iii) Notification must be accomplished using any of the following methods: Written notification, or electronically using the Agency's Central Data Exchange (CDX). Written notification following renovator, dust sampling technician, or lead-based paint activities training courses can be accomplished by using either the sample form titled "Lead-Based Paint Training Course Follow-up" or a similar form containing the information required in paragraph (c)(14)(ii) of this section. All written notifications must be delivered by U.S. Postal Service, fax, commercial delivery service, or hand delivery (persons submitting notification by U.S. Postal Service are reminded that they should allow 3 additional business days for delivery in order to ensure that EPA receives the notification by the required date). Instructions and sample forms can be obtained from the NLIC at 1–800–424–LEAD(5323), or on the Internet at *http://www.epa.gov/lead.*

(d) *Minimum training curriculum requirements.* To become accredited to offer lead-based paint courses in the specific disciplines listed below, training programs must ensure that their courses of study include, at a minimum, the following course topics.

(1) *Inspector.* Instruction in the topics described in paragraphs (d)(1)(iv), (v), (vi), and (vii) of this section must be included in the hands-on portion of the course.

(i) Role and responsibilities of an inspector.

(ii) Background information on lead and its adverse health effects.

(iii) Background information on Federal, State, and local regulations and guidance that pertains to lead-based paint and lead- based paint activities.

(iv) Lead-based paint inspection methods, including selection of rooms and components for sampling or testing.

(v) Paint, dust, and soil sampling methodologies.

(vi) Clearance standards and testing, including random sampling.

(vii) Preparation of the final inspection report.

(viii) Recordkeeping.

(2) *Risk assessor.* Instruction in the topics described in paragraphs (d)(2)(iv), (vi), and (vii) of this section must be included in the hands-on portion of the course.

(i) Role and responsibilities of a risk assessor.

(ii) Collection of background information to perform a risk assessment.

(iii) Sources of environmental lead contamination such as paint, surface dust and soil, water, air, packaging, and food.

(iv) Visual inspection for the purposes of identifying potential sources of lead-based paint hazards.

(v) Lead hazard screen protocol.

(vi) Sampling for other sources of lead exposure.

(vii) Interpretation of lead-based paint and other lead sampling results, including all applicable State or Federal guidance or regulations pertaining to lead-based paint hazards.

(viii) Development of hazard control options, the role of interim controls, and operations and maintenance activities to reduce lead-based paint hazards.

(ix) Preparation of a final risk assessment report.

(3) *Supervisor.* Instruction in the topics described in paragraphs (d)(3)(v), (vii), (viii), (ix), and (x) of this section must be included in the hands-on portion of the course.

(i) Role and responsibilities of a supervisor.

(ii) Background information on lead and its adverse health effects.

(iii) Background information on Federal, State, and local regulations and guidance that pertain to lead-based paint abatement.

(iv) Liability and insurance issues relating to lead-based paint abatement.

(v) Risk assessment and inspection report interpretation.

(vi) Development and implementation of an occupant protection plan and abatement report.

(vii) Lead-based paint hazard recognition and control.

(viii) Lead-based paint abatement and lead-based paint hazard reduction methods, including restricted practices.

(ix) Interior dust abatement/cleanup or lead-based paint hazard control and reduction methods.

(x) Soil and exterior dust abatement or lead-based paint hazard control and reduction methods.

(xi) Clearance standards and testing.

(xii) Cleanup and waste disposal.

(xiii) Recordkeeping.

(4) *Project designer.* (i) Role and responsibilities of a project designer.

(ii) Development and implementation of an occupant protection plan for large-scale abatement projects.

(iii) Lead-based paint abatement and lead-based paint hazard reduction methods, including restricted practices for large-scale abatement projects.

(iv) Interior dust abatement/cleanup or lead hazard control and reduction methods for large-scale abatement projects.

(v) Clearance standards and testing for large scale abatement projects.

(vi) Integration of lead-based paint abatement methods with modernization and rehabilitation projects for large scale abatement projects.

(5) *Abatement worker.* Instruction in the topics described in paragraphs (d)(5)(iv), (v), (vi), and (vii) of this section must be included in the hands-on portion of the course.

(i) Role and responsibilities of an abatement worker.

(ii) Background information on lead and its adverse health effects.

(iii) Background information on Federal, State and local regulations and guidance that pertain to lead-based paint abatement.

(iv) Lead-based paint hazard recognition and control.

(v) Lead-based paint abatement and lead-based paint hazard reduction methods, including restricted practices.

(vi) Interior dust abatement methods/cleanup or lead-based paint hazard reduction.

(vii) Soil and exterior dust abatement methods or lead-based paint hazard reduction.

(6) *Renovator.* Instruction in the topics described in paragraphs (d)(6)(iv), (v), (vi), (vii), and (viii) of this section must be included in the hands-on portion of the course.

(i) Role and responsibility of a renovator.

(ii) Background information on lead and its adverse health effects.

(iii) Background information on EPA, HUD, OSHA, and other Federal, State, and local regulations and guidance that pertains to lead-based paint and renovation activities.

(iv) Procedures for using acceptable test kits to determine whether paint is lead-based paint.

(v) Procedures for collecting a paint chip sample and sending it to a laboratory recognized by EPA under section 405(b) of TSCA.

(vi) Renovation methods to minimize the creation of dust and lead-based paint hazards.

(vii) Interior and exterior containment and cleanup methods.

(viii) Methods to ensure that the renovation has been properly completed, including cleaning verification and clearance testing.

(ix) Waste handling and disposal.

(x) Providing on-the-job training to other workers.

(xi) Record preparation.

(7) *Dust sampling technician.* Instruction in the topics described in paragraphs (d)(6)(iv) and (vi) of this section must be included in the hands-on portion of the course.

(i) Role and responsibility of a dust sampling technician.

(ii) Background information on lead and its adverse health effects.

(iii) Background information on Federal, State, and local regulations and guidance that pertains to lead-based paint and renovation activities.

(iv) Dust sampling methodologies.

(v) Clearance standards and testing.

(vi) Report preparation.

(e) *Requirements for the accreditation of refresher training programs.* A training program may seek accreditation to offer refresher training courses in any of the following disciplines: Inspector, risk assessor, supervisor, project designer, abatement worker, renovator, and dust sampling technician. To obtain EPA accreditation to offer refresher training, a training program must meet the following minimum requirements:

(1) Each refresher course shall review the curriculum topics of the full-length courses listed under paragraph (d) of this section, as appropriate. In addition, to become accredited to offer refresher training courses, training programs shall ensure that their courses of study include, at a minimum, the following:

(i) An overview of current safety practices relating to lead-based paint in general, as well as specific information pertaining to the appropriate discipline.

(ii) Current laws and regulations relating to lead-based paint in general, as well as specific information pertaining to the appropriate discipline.

(iii) Current technologies relating to lead-based paint in general, as well as specific information pertaining to the appropriate discipline.

(2) Refresher courses for inspector, risk assessor, supervisor, and abatement worker must last a minimum of 8 training hours. Refresher courses for project designer, renovator, and dust sampling technician must last a minimum of 4 training hours. Refresher courses for all disciplines except project designer must include a hands-on component.

(3) For each course offered, the training program shall conduct a hands-on assessment (for all courses except project designer), and at the completion of the course, a course test.

(4) A training program may apply for accreditation of a refresher course concurrently with its application for accreditation of the corresponding training course as described in paragraph (b) of this section. If so, EPA shall use the approval procedure described in paragraph (b) of this section. In addition, the minimum requirements contained in paragraphs (c) (except for the requirements in paragraph (c)(6)), and (e)(1), (e)(2) and (e)(3) of this section shall also apply.

(5) A training program seeking accreditation to offer refresher training courses only shall submit a written application to EPA containing the following information:

(i) The refresher training program's name, address, and telephone number.

(ii) A list of courses for which it is applying for accreditation.

(iii) The name and documentation of the qualifications of the training program manager.

(iv) The name(s) and documentation of the qualifications of the principal instructor(s).

(v) A statement signed by the training program manager certifying that the refresher training program meets the minimum requirements established in paragraph (c) of this section, except for the requirements in paragraph (c)(6) of this section. If a training program uses EPA-developed model training materials, or training materials approved by a State or Indian Tribe that has been authorized by EPA under § 745.324 to develop its refresher training course materials, the training manager shall include a statement certifying that, as well.

(vi) If the refresher training course materials are not based on EPA-developed model training materials, the training program's application for accreditation shall include:

(A) A copy of the student and instructor manuals to be used for each course.

(B) A copy of the course agenda for each course.

(vii) All refresher training programs shall include in their application for accreditation the following:

(A) A description of the facilities and equipment to be used for lecture and hands-on training.

(B) A copy of the course test blueprint for each course.

(C) A description of the activities and procedures that will be used for conducting the assessment of hands-on skills for each course (if applicable).

(D) A copy of the quality control plan as described in paragraph (c)(9) of this section.

(viii) The requirements in paragraphs (c)(1) through (c)(5), and (c)(7) through (c)(14) of this section apply to refresher training providers.

(ix) If a refresher training program meets the requirements listed in this paragraph, then EPA shall approve the application for accreditation no more than 180 days after receiving a complete application from the refresher training program. In the case of approval, a certificate of accreditation shall be sent to the applicant. In the case of disapproval, a letter describing the reasons for disapproval shall be sent to the applicant. Prior to disapproval, EPA may, at its discretion, work with the applicant to address inadequacies in the application for accreditation. EPA may

also request additional materials retained by the refresher training program under paragraph (i) of this section. If a refresher training program's application is disapproved, the program may reapply for accreditation at any time.

(f) *Re-accreditation of training programs.* (1) Unless re-accredited, a training program's accreditation, including refresher training accreditation, shall expire 4 years after the date of issuance. If a training program meets the requirements of this section, the training program shall be re-accredited.

(2) A training program seeking re-accreditation shall submit an application to EPA no later than 180 days before its accreditation expires. If a training program does not submit its application for re-accreditation by that date, EPA cannot guarantee that the program will be re-accredited before the end of the accreditation period.

(3) The training program's application for re-accreditation shall contain:

(i) The training program's name, address, and telephone number.

(ii) A list of courses for which it is applying for re- accreditation.

(iii) The name and qualifications of the training program manager.

(iv) The name(s) and qualifications of the principal instructor(s).

(v) A description of any changes to the training facility, equipment or course materials since its last application was approved that adversely affects the students' ability to learn.

(vi) A statement signed by the program manager stating:

(A) That the training program complies at all times with all requirements in paragraphs (c) and (e) of this section, as applicable; and

(B) The recordkeeping and reporting requirements of paragraph (i) of this section shall be followed.

(vii) A payment of appropriate fees in accordance with § 745.238.

(4) Upon request, the training program shall allow EPA to audit the training program to verify the contents of the application for re- accreditation as described in paragraph (f)(3) of this section.

(g) *Suspension, revocation, and modification of accredited training programs.* (1) EPA may, after notice and an opportunity for hearing, suspend, revoke, or modify training program accreditation, including refresher training accreditation, if a training program, training manager, or other person with supervisory authority over the training program has:

(i) Misrepresented the contents of a training course to EPA and/or the student population.

(ii) Failed to submit required information or notifications in a timely manner.

(iii) Failed to maintain required records.

(iv) Falsified accreditation records, instructor qualifications, or other accreditation-related information or documentation.

(v) Failed to comply with the training standards and requirements in this section.

(vi) Failed to comply with Federal, State, or local lead-based paint statutes or regulations.

(vii) Made false or misleading statements to EPA in its application for accreditation or re-accreditation which EPA relied upon in approving the application.

(2) In addition to an administrative or judicial finding of violation, execution of a consent agreement in settlement of an enforcement action constitutes, for purposes of this section, evidence of a failure to comply with relevant statutes or regulations.

(h) *Procedures for suspension, revocation or modification of training program accreditation.* (1) Prior to taking action to suspend, revoke, or modify the accreditation of a training program, EPA shall notify the affected entity in writing of the following:

(i) The legal and factual basis for the suspension, revocation, or modification.

(ii) The anticipated commencement date and duration of the suspension, revocation, or modification.

(iii) Actions, if any, which the affected entity may take to avoid suspension, revocation, or modification, or to receive accreditation in the future.

(iv) The opportunity and method for requesting a hearing prior to final EPA action to suspend, revoke or modify accreditation.

(v) Any additional information, as appropriate, which EPA may provide.

(2) If a hearing is requested by the accredited training program, EPA shall:

(i) Provide the affected entity an opportunity to offer written statements in response to EPA's assertions of the legal and factual basis for its proposed action, and any other explanations, comments, and arguments it deems relevant to the proposed action.

(ii) Provide the affected entity such other procedural opportunities as EPA may deem appropriate to ensure a fair and impartial hearing.

(iii) Appoint an official of EPA as Presiding Officer to conduct the hearing. No person shall serve as Presiding Officer if he or she has had any prior connection with the specific matter.

(3) The Presiding Officer appointed pursuant to paragraph (h)(2) of this section shall:

(i) Conduct a fair, orderly, and impartial hearing within 90 days of the request for a hearing.

(ii) Consider all relevant evidence, explanation, comment, and argument submitted.

(iii) Notify the affected entity in writing within 90 days of completion of the hearing of his or her decision and order. Such an order is a final agency action which may be subject to judicial review.

(4) If EPA determines that the public health, interest, or welfare warrants immediate action to suspend the accreditation of any training program prior to the opportunity for a hearing, it shall:

(i) Notify the affected entity of its intent to immediately suspend training program accreditation for the reasons listed in paragraph (g)(1) of this section. If a suspension, revocation, or modification notice has not previously been issued pursuant to paragraph (g)(1) of this section, it shall be issued at the same time the emergency suspension notice is issued.

(ii) Notify the affected entity in writing of the grounds for the immediate suspension and why it is necessary to suspend the entity's accreditation before an opportunity for a suspension, revocation or modification hearing.

(iii) Notify the affected entity of the anticipated commencement date and duration of the immediate suspension.

(iv) Notify the affected entity of its right to request a hearing on the immediate suspension within 15 days of the suspension taking place and the procedures for the conduct of such a hearing.

(5) Any notice, decision, or order issued by EPA under this section, any transcripts or other verbatim record of oral testimony, and any documents filed by an accredited training program in a hearing under this section shall be available to the public, except as otherwise provided by section 14 of TSCA or by 40 CFR part 2. Any such hearing at which oral testimony is presented shall be open to the public, except that the Presiding Officer may exclude the public to the extent necessary to allow presentation of information which may be entitled to confidential treatment under section 14 of TSCA or 40 CFR part 2.

(6) The public shall be notified of the suspension, revocation, modification or reinstatement of a training program's accreditation through appropriate mechanisms.

(7) EPA shall maintain a list of parties whose accreditation has been suspended, revoked, modified or reinstated.

(i) *Training program recordkeeping requirements.* (1) Accredited training programs shall maintain, and make available to EPA, upon request, the following records:

(i) All documents specified in paragraph (c)(4) of this section that demonstrate the qualifications listed in paragraphs (c)(1) and (c)(2) of this section of the training manager and principal instructors.

(ii) Current curriculum/course materials and documents reflecting any changes made to these materials.

(iii) The course test blueprint.

(iv) Information regarding how the hands-on assessment is conducted including, but not limited to:

(A) Who conducts the assessment.

(B) How the skills are graded.

(C) What facilities are used.

(D) The pass/fail rate.

(v) The quality control plan as described in paragraph (c)(9) of this section.

(vi) Results of the students' hands-on skills assessments and course tests, and a record of each student's course completion certificate.

(vii) Any other material not listed above in paragraphs (i)(1)(i) through (i)(1)(vi) of this section that was submitted to EPA as part of the program's application for accreditation.

(viii) For renovator refresher and dust sampling technician refresher courses, a copy of each trainee's prior course completion certificate showing that each trainee was eligible to take the refresher course.

(ix) For course modules delivered in an electronic format, a record of each student's log-ins, launches, progress, and completion, and a copy of the electronic learning completion certificate for each student.

(2) The training program must retain records pertaining to lead-based paint activities courses at the address specified on the training program accreditation application (or as modified in accordance with paragraph (i)(3) of this section) for a minimum of 3 years and 6 months. Records pertaining to renovator or dust sampling technician courses must be retained at the address specified on the training program accreditation application (or as modified in accordance with paragraph (i)(3) of this section) for a minimum of 5 years.

(3) The training program shall notify EPA in writing within 30 days of changing the address specified on its training program accreditation application or transferring the records from that address.

(j) *Amendment of accreditation.* (1) A training program must amend its accreditation within 90 days of the date a change occurs to information included in the program's most recent application. If the training program fails to amend its accreditation within 90 days of the date the change occurs, the program may not provide renovator, dust sampling technician, or lead-based paint activities training until its accreditation is amended.

(2) To amend an accreditation, a training program must submit a completed "Accreditation Application for Training Providers," signed by an authorized agent of the training provider, noting on the form that it is submitted as an amendment and indicating the information that has changed.

(3) If the amendment includes a new training program manager, any new or additional principal instructor(s), or any new permanent training location(s), the training provider is not permitted to provide training under the new training manager or offer courses taught by any new principal instructor(s) or at the new training location(s) until EPA either approves the amendment or 30 days have elapsed, whichever occurs earlier.

9. In § 745.238, add paragraph (c)(5) to read as follows:

**§ 745.238 Fees for accreditation and certification of lead-based paint activities.**

* * * * *

(c) * * *

(5) No fee will be charged for accreditation amendments.

* * * * *

10. In § 745.326, revise paragraphs (a)(2)(i), (a)(2)(ii), (d), (e)(1), and (e)(3), and add paragraph (f) to read as follows:

**§ 745.326 Renovation: State and Tribal program requirements.**

(a) * * *

(2) * * *

(i) Procedures and requirements for the accreditation of renovation and dust sampling technician training programs. (**Note:** a State and Tribal program is not required to include procedures and requirements for the dust sampling technician training discipline if the State or Tribal program requires dust sampling to be performed by a certified lead-based paint inspector or risk assessor.)

(ii) Procedures and requirements for accredited initial and refresher training for renovators and dust sampling technicians and on-the-job training for other individuals who perform renovations.

* * * * *

(d) *Certification of individuals and/or renovation firms.* To be considered at least as protective as the Federal program, the State or Tribal program must:

(1) Establish procedures and requirements that ensure that individuals who perform or direct renovations are properly trained. These procedures and requirements must include:

(i) A requirement that renovations be performed and directed by at least one individual who has been trained by an accredited training program.

(ii) Procedures and requirements for accredited refresher training for these individuals.

(iii) Procedures and requirements for certified renovators to provide on-the-job training for those individuals who perform renovations but do not receive accredited training.

(2) Establish procedures and requirements for the formal certification and re-certification of either individuals or renovation firms.

(3) Establish procedures for the suspension, revocation, or modification of certifications.

(e) * * *

(1) Renovations must be conducted only by certified individuals and/or certified renovation firms.

* * * * *

(3) Certified individuals and/or renovation firms must retain appropriate records.

(f) *Revisions to renovation program requirements.* If EPA revises the renovation program requirements contained in subparts E and L of this part:

(1) A State or Tribe with a renovation program approved before the effective date of the revisions must demonstrate that it meets the requirements of this section no later than the first report that it submits pursuant to § 745.324(h) no later than one year after the effective date of the revisions.

(2) A State or Tribe with an application for approval of a renovation program submitted but not approved before the effective date of the revisions must demonstrate that it meets the requirements of this section either by amending its application or in the first report that it submits pursuant to § 745.324(h) no later than one year after the effective date of the revisions.

(3) A State or Indian Tribe submitting its application for approval of a renovation program on or after the effective date of the revisions must

demonstrate in its application that it meets the requirements of this section.

11. In § 745.327, revise paragraphs (b)(1), (b)(2), (b)(3), and (c)(2) to read as follows:

**§ 745.327 State or Indian Tribal lead-based paint compliance and enforcement programs.**

* * * * *

(b) * * *

(1) *Lead-based paint activities or renovation requirements.* State or Tribal lead-based paint compliance and enforcement programs will be considered adequate if the State or Indian Tribe demonstrates, in its application at § 745.324(b)(2), that it has established a lead-based paint program that contains all of the elements specified in § 745.325 or § 745.326, or both, as applicable.

(2) *Authority to enter.* State or Tribal officials must be able to enter, through consent, warrant, or other authority, premises or facilities where lead-based paint violations may occur for purposes of conducting inspections.

(i) State or Tribal officials must be able to enter premises or facilities where those engaged in training for lead-based paint activities or renovations conduct business.

(ii) For the purposes of enforcing a renovation program, State or Tribal officials must be able to enter a firm's place of business or work site.

(iii) State or Tribal officials must have authority to take samples and review records as part of the lead-based paint inspection process.

(3) *Flexible remedies.* A State or Tribal lead-based paint compliance and enforcement program must provide for a diverse and flexible array of enforcement statutory and regulatory authorities and remedies. At a minimum, these authorities and remedies, which must also be reflected in an enforcement response policy, must include the following:

(i) The authority to issue warning letters, Notices of Noncompliance, Notices of Violation, or the equivalent;

(ii) The authority to assess administrative or civil fines, including a maximum penalty authority for any violation in an amount no less than $10,000 per violation per day;

(iii) The authority to assess the maximum penalties or fines for each instance of violation and, if the violation is continuous, the authority to assess penalties or fines up to the maximum amount for each day of violation, with all penalties assessed or collected being appropriate for the violation after consideration of the size or viability of the business, enforcement history, risks to human health or the environment posed by the violation, and other similar factors;

(iv) The authority to commence an administrative proceeding or to sue in courts of competent jurisdiction to recover penalties;

(v) The authority to suspend, revoke, or modify the accreditation of any training provider or the certification of any individual or firm;

(vi) The authority to commence an administrative proceeding or to sue in courts of competent jurisdiction to enjoin any threatened or continuing violation of any program requirement, without the necessity of a prior suspension or revocation of a trainer's accreditation or a firm's or individual's certification;

(vii) The authority to apply criminal sanctions, including recovering fines; and

(viii) The authority to enforce its authorized program using a burden of proof standard, including the degree of knowledge or intent of the respondent that is no greater than it is for EPA under TSCA.

* * * * *

(c) * * *

(2) *Compliance assistance.* A State or Tribal lead-based paint compliance and enforcement program must provide compliance assistance to the public and the regulated community to facilitate awareness and understanding of and compliance with State or Tribal requirements governing the conduct of lead-based paint activities or renovations. The type and nature of this assistance can be defined by the State or Indian Tribe to achieve this goal.

* * * * *

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Federal Register

**Thursday,**
**May 6, 2010**

## Part III

# Department of Agriculture

**Rural Business-Cooperative Service**

**Notice of Funds Availability (NOFA) Inviting Applications for Biorefineries; Notice**

## DEPARTMENT OF AGRICULTURE

### Rural Business-Cooperative Service

### Notice of Funds Availability (NOFA) Inviting Applications for Biorefineries

**AGENCY:** Rural Business-Cooperative Service, USDA.

**ACTION:** Notice.

**SUMMARY:** This notice announces the acceptance of applications for funds available under the BioRefinery Assistance Program (the "Program") to provide guaranteed loans for the development and construction of commercial-scale biorefineries or for the retrofitting of existing facilities using eligible technology for the development of advanced biofuels. Applications will be accepted for biorefineries that produce transportation fuels that meet the Renewable Fuel Standard or are currently undergoing an appeal to the U.S. Environmental Protection Agency for inclusion in the Renewable Fuel Standard, or that produce non-transportation renewable energy that results in a reduction in greenhouse gases. There will only be one application window under this Notice.

**DATES:** Applications for participating in this Program for Fiscal Year 2010 must be received between May 6, 2010 and August 4, 2010.

**ADDRESSES:** Applications and forms may be obtained from:

• *U.S. Department of Agriculture, Rural Development, Energy Branch, Attention:* BioRefinery Assistance Program, 1400 Independence Avenue, SW., STOP 3225, Washington, DC 20250–3225.

• *Agency Web site: http://www.rurdev.usda.gov.* Follow instructions for obtaining the application and forms.

Submit an original completed application with two copies to USDA's Rural Development National Office: Energy Branch, Attention: BioRefinery Assistance Program, 1400 Independence Avenue, SW., STOP 3225, Washington, DC 20250–3225.

**FOR FURTHER INFORMATION CONTACT:** Energy Branch, Attention: BioRefinery Assistance Program, 1400 Independence Avenue, SW., Mail Stop 3225, Washington, DC 20250–3225. Telephone: 202–720–1400.

**SUPPLEMENTARY INFORMATION:**

#### Programs Affected

This Program is listed in the Catalog of Federal Domestic Assistance under Number 10.865.

#### Paperwork Reduction Act

In accordance with the Paperwork Reduction Act (PRA), the paperwork burden associated with this Notice of Funds Availability (NOFA) has been approved by the Office of Management and Budget (OMB) under OMB Control Number 0570–0055.

The PRA burden associated with the original Notice, published on November 20, 2008, was approved by OMB, with an opportunity to comment on the burden associated with the program.

Biorefineries seeking funding under this Notice have to submit applications that include specified information, certifications, and agreements. All of the forms, information, certifications, and agreements required to apply for this program under this Notice have been authorized under OMB Control Number 0570–0055.

#### E-Government Act Compliance

Rural Development is committed to complying with the E-Government Act, to provide increased opportunities for citizen to access Government information and services electronically.

#### I. Background

Section 9003 of the Food, Conservation, and Energy Act of 2008 (2008 Farm Bill) is intended to assist in the development and construction of commercial-scale biorefineries and the retrofitting of existing facilities using eligible technology for the development of advanced biofuels. Consistent with Congressional intent, preference will be given to projects where first-of-a-kind technology will be deployed at the commercial scale. To that end, the program will promote the development of the first commercial scale biorefineries that do not rely on corn kernel starch as the feedstock or standard biodiesel technology.

The Agency will make guarantees available on loans for eligible projects that will provide for the development, construction, and/or retrofitting of commercial biorefineries using eligible technology. Eligible technology is:

(a) Any technology that is being adopted in a viable commercial-scale operation of a biorefinery that produces an advanced biofuel, and

(b) Any technology not described in paragraph (a) above that has been demonstrated to have technical and economic potential for commercial application in a biorefinery that produces an advanced biofuel.

Over the life of the program, it is likely that guarantees will be awarded to projects that are first-of-a-kind and that may include projects with commercial applications that are expanded to new regions, modified to utilize different feedstocks, or substantially improved such that they represent a significant technological risk.

*A. Guaranteed Loan Funding*

This NOFA provides up to $150 million in mandatory budget authority for this Program in Fiscal Year 2010 to support loan guarantees.

The maximum principal amount of a loan guaranteed under this Program is $250 million; there is no minimum amount. The amount of a loan guaranteed under this Program will be reduced by the amount of other direct Federal funding that the eligible borrower receives for eligible project costs.

The maximum guarantee under this Program is 80 percent of the principal and interest due on a loan guaranteed under this Program if the loan amount is equal to or less than $80 million. If the loan amount is more than $80 million and less than $125 million, the maximum guarantee is 70 percent for the amount in excess of $80 million. If the loan amount is equal to or more than $125 million, the maximum guarantee is 60 percent for the entire loan amount.

The amount of a loan guaranteed for a project under this Program will not exceed 80 percent of total eligible project costs. Thus, the amount of guaranteed loan funds that may be made available to an applicant for an eligible project will not exceed 64 percent of the total eligible project costs.

The interest rate for the guaranteed loan will be negotiated between the lender and the applicant and shall be in line with interest rates on other similar government guaranteed loan programs. The interest rate may be either fixed or variable, as long as it is a legal rate, and shall be fully amortizing. The interest rate for both the guaranteed and unguaranteed portions of the loan must be of the same type (*i.e.,* both fixed or both variable). The interest rate charged will be subject to Agency review and approval.

The length of a loan guaranteed under this Program would be for a period of no more than 20 years or 85 percent of the useful life of the project, as determined by the lender and confirmed by the Agency, whichever is less. The length of the loan term would be required to be the same for both the guaranteed and unguaranteed portion of the loan.

*B. Eligibility Requirements for Guarantee Assistance*

This Notice contains eligibility requirements for borrowers, projects, and lenders, as discussed below.

Borrower Eligibility

*To be eligible to receive a guaranteed loan under this Program, a borrower must be one of the following:*

- Individual,
- Indian tribe,
- Unit of State or local government,
- Corporation,
- Farm cooperative,
- Farmer cooperative organization,
- Association of agricultural producers,
- National Laboratory,
- Institution of higher education,
- Rural electric cooperative,
- Public power entity, or
- Consortium of any of those entities.

Project Eligibility

*Projects eligible for loan guarantees under this Notice must be located in a rural area and be for either:*

- The development and construction of commercial-scale biorefineries that produce transportation fuels that meet the Renewable Fuel Standard or are currently undergoing an appeal to the U.S. Environmental Protection Agency for inclusion in the Renewable Fuel Standard, or that produce non-transportation renewable energy that will result in a reduction in greenhouse gases using eligible technology, or
- The retrofitting of existing facilities that produce transportation fuels that meet the Renewable Fuel Standard or are currently undergoing an appeal to the U.S. Environmental Protection Agency for inclusion in the Renewable Fuel Standard, or that produce non-transportation renewable energy that will result in a reduction in greenhouse gases using eligible technology.

*Eligible technology is defined as either:*

- A technology that is being adopted in a viable commercial-scale operation of a biorefinery that produces an advanced biofuel; or
- A technology not described in the previous paragraph that has been demonstrated to have technical and economic potential for commercial application in a biorefinery that produces an advanced biofuel.

Lender Eligibility

Regulated or supervised lenders that meet the requirements specified in this Notice (see section I) may be eligible to participate in this Program.

*C. Applications*

The lender must submit a separate application for each project for which a loan guarantee is sought under this Notice. It is recommended that applicants refer to the application guide for this program ("Instructions for Application for Loan Guarantee—Section 9003 BioRefinery Assistance Loan Guarantees"), which can be found on the Agency's Web site at *http://www.rurdev.usda.gov/rbs/busp/baplg9003.htm.*

Because of factors of cost and complexity for eligible projects under this Program, the lender must include with the application a project-specific feasibility study, as defined in this Notice. The feasibility study must be prepared by a qualified consultant. The feasibility study must address, in part, both the technical and economic feasibility of the project.

As noted previously, the Agency intends to accept applications during Fiscal Year 2010 from May 6, 2010 and August 4, 2010.

Ineligible or incomplete applications will be returned to the applicant. If an application is determined to be ineligible for any reason, the Agency will inform the lender, in writing, of the reasons and provide any applicable appeal rights. The denial or rejection of an application under the Program may be appealed as provided in this Notice.

*D. Evaluation of Guaranteed Loan Applications*

Submission of an application neither reserves funding nor ensures funding. The Agency will evaluate each application and make a determination as to whether the borrower is eligible, whether the lender is eligible, whether the proposed project is eligible, the credit-worthiness and technical merit of the project, and whether the proposed funding request complies with all applicable statutes and regulations. The evaluation will be based on the information provided by the lender and on other sources of information, such as recognized industry experts in the applicable technology field, as necessary.

The Agency will score each application in order to prioritize each proposed project. The evaluation criteria that the Agency will use to score these projects are:

- Whether the borrower has established a market for the advanced biofuel and the byproducts produced.
- Whether the area in which the borrower proposes to place the biorefinery has other similar advanced biofuel facilities.
- Whether the borrower is proposing to use a feedstock not previously used in the production of advanced biofuels.
- Whether the borrower is proposing to work with producer associations or cooperatives.
- The level of financial participation by the borrower, including support from non-Federal and private sources. Such financial participation may take the form of direct financial support, technical support, and contributions of in-kind resources including such kinds of support from state government. Any direct Federal funding for eligible project costs from other sources will reduce the amount of the loan that may be guaranteed under this program.
- Whether the borrower has established that the adoption of the process proposed in the application will have a positive impact on resource conservation, public health, and the environment.
- Whether the borrower can establish that, if adopted, the biofuels production technology proposed in the application will not have any significant negative impacts on existing manufacturing plants or other facilities that use similar feedstocks.
- The potential for rural economic development, including the number of local jobs created and inclusion of local banks or other capital sources in any proposed debt syndication.
- The level of local ownership proposed in the application.
- Whether the project can be replicated.
- The extent to which the project converts cellulosic biomass feedstocks into advanced biofuel.
- Whether the project is a first-of-a-kind technology, system, or process.

**II. Provisions for BioRefinery Assistance Loan Guarantees**

All guaranteed loan requests for this Program are subject to the provisions of this Notice as laid out in this section of the Notice.

*A. Definitions*

The following definitions are applicable to this Notice.

*Advanced biofuel.* Fuel derived from renewable biomass, other than corn kernel starch to include:

(1) Biofuel derived from cellulose, hemicellulose, or lignin;

(2) Biofuel derived from sugar and starch (other than ethanol derived from corn kernel starch);

(3) Biofuel derived from waste material, including crop residue, other vegetative waste material, animal waste, food waste, and yard waste;

(4) Diesel-equivalent fuel derived from renewable biomass, including vegetable oil and animal fat;

(5) Biogas (including landfill gas and sewage waste treatment gas) produced through the conversion of organic matter from renewable biomass;

(6) Butanol or other alcohols produced through the conversion of organic matter from renewable biomass; or

(7) Other fuel derived from cellulosic biomass.

*Agency.* The Rural Business-Cooperative Service or successor Agency assigned by the Secretary of Agriculture to administer the BioRefinery Assistance Program. References to the National Office, Finance Office, State Office or other Agency offices or officials should be read as prefaced by "Agency" or "Rural Development" as applicable.

*Association of agricultural producers.* An organization that represents independent producers directly engaged in the production of agricultural products, including crops (including farming); livestock (including ranching); forestry products; hydroponics; nursery stock; or aquaculture, whereby 50 percent or greater of their gross income is derived from the operations; and whose mission includes working on behalf of such producers and the majority of whose membership and board of directors are comprised of agricultural producers.

*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.

*Biofuel.* A fuel derived from renewable biomass.

*Biogas.* Biomass converted to gaseous fuels.

*Biorefinery.* A facility (including equipment and processes) that converts renewable biomass into biofuels and biobased products and may produce electricity.

*Borrower.* The person that borrows, or seeks to borrow, money from the lender, including any party or parties liable for the guaranteed loan.

*Business plan.* A comprehensive document that:

(1) Describes clearly the borrower's ownership structure and management, including experience and succession planning;

(2) Discusses, if applicable, the borrower's parent, affiliates, and subsidiaries, including their names and a description of the relationship;

(3) Discusses how the borrower will operate the proposed project, including, at a minimum, a description of:

(i) The business and its strategy;

(ii) Possible vendors and models of major system components;

(iii) The products and services to be provided;

(iv) The availability of the resources (*e.g.,* labor, raw materials, supplies) necessary to provide those products and services;

(v) Site location and its relation to product distribution (*e.g.,* rail lines or highways) and any land use or other permits necessary to operate the facility; and

(vi) The market for the product and its competition, including any and all competitive threats and advantages;

(4) Presents pro forma financial statements, including:

(i) Balance sheet and income and expense for a period of not less than 3 years of stabilized operation, and

(ii) Cash flows for the life of the project; and

(5) Describes the proposed use of funds.

*Collateral.* The asset(s) pledged by the borrower in support of the loan.

*Conditional Commitment.* An Agency-approved form provided to the lender indicating the loan guarantee it has requested has been approved subject to the completion of all conditions and requirements contained therein.

*Deficiency balance.* The balance remaining on a loan after all collateral has been liquidated.

*Deficiency judgment.* A monetary judgment rendered by a court of competent jurisdiction after foreclosure and liquidation of all collateral securing the loan.

*Eligible borrower.* An individual, Indian tribe, or unit of State or local government, including a corporation, farm cooperative, farmer cooperative organization, association of agricultural producers, National Laboratory, institution of higher education, rural electric cooperative, public power entity, or consortium of any of those entities.

*Eligible project costs.* Those expenses approved by the Agency for the project as identified in paragraphs (g)(3)(i) through (ix) of Section Q of this Notice.

*Eligible technology.*

(1) A technology that is being adopted in a viable commercial-scale operation of a biorefinery that produces an advanced biofuel; or

(2) A technology not described in paragraph (1) of this definition that has been demonstrated to have technical and economic potential for commercial application in a biorefinery that produces an advanced biofuel.

*Fair market value.* The price that could reasonably be expected for an asset in an arm's-length transaction under ordinary economic and business conditions.

*Farm cooperative.* A farmer or rancher owned and controlled business from which benefits are derived and distributed equitably on the basis of use by each of the farmer or rancher owners.

*Farmer Cooperative Organization.* A cooperative organization is a cooperative or an entity, not chartered as a cooperative, that operates as a cooperative in that it is owned and operated for the benefit of its members, including the manner in which it distributes its dividends and assets.

*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.

*Finance Office.* The office which maintains the Agency financial accounting records located in St. Louis, Missouri.

*Future recovery.* Any funds collected by lender associated with a defaulted project, after final loss claim has been paid by USDA.

*Guaranteed loan.* A loan made and serviced by a lender for which the Agency has issued a Loan Note Guarantee.

*Holder.* A person or entity, other than the lender, who owns all or part of the guaranteed portion of the loan with no servicing responsibilities. When the single note option is used and the lender assigns a part of the guaranteed note to an assignee, the assignee becomes a holder only when the Agency receives notice and the transaction is completed through use of Form RD 4279–6, "Assignment Guarantee Agreement," or predecessor form.

*Immediate family.* Individuals who are closely related by blood, marriage, or adoption, or live within the same household, such as a spouse, parent, child, brother, sister, aunt, uncle,

grandparent, grandchild, niece, or nephew.

*Indian tribe.* This term has the meaning given it in section 4 of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450b).

*Institution of higher education.* This term has the meaning given it in section 102(a) of the Higher Education Act of 1965 (20 U.S.C. 1002(a)).

*Intellectual property.* Any and all intangible assets that consists of human knowledge and ideas including, without limitation, patents, copyrights, trademarks, service marks, and trade secrets.

*Lender.* A regulated or supervised lender that meets the criteria specified in Section I of this Notice.

*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.

*Liquidation value.* A monetary value given to property that is sold or exchanges hands under forced or limiting conditions, such as bankruptcy.

*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 Note Guarantee.* The Agency approved form containing the terms and conditions of the guarantee of an identified loan.

*Loan-to-cost.* The ratio of the dollar amount of a loan to the dollar value of the actual eligible project cost adjusted for other debt, project obligations, or other factors as determined by USDA.

*Loan-to-value.* The ratio of the dollar amount of a loan to the dollar value of the collateral pledged as security for the loan.

*Market value.* The amount for which property would sell for its highest and best use in an arm's length transaction.

*Negligent loan servicing.*

(1) The failure of a lender to perform those services that a reasonably prudent lender would perform in originating, servicing, and liquidating its own portfolio of unguaranteed loans; or

(2) The failure of the lender to perform its origination and servicing responsibilities in accordance with its origination and 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.

*Offtake agreement.* The terms and conditions governing the sale and transportation of biofuels, biobased products, and electricity produced by the borrower to another party.

*Parity.* A lien position whereby two or more lenders share a security interest of equal priority in collateral. In the event of default, each lender will be affected on a *pro rata* basis.

*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.

*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.

*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.

*Qualified Intellectual Property.* Any intellectual property included on current (within one year) audited balance sheets for which an audit opinion has been received that states the financial reports fairly represent the values therein and the reported value has been arrived at in accordance with Generally Accepted Accounting Principles (GAAP) standards for valuing intellectual property. The supporting work papers must be satisfactory to the Administrator.

*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 biomass agreement.* The terms and conditions governing the sale and transportation of the renewable biomass to the borrower by another party.

*Retrofitting.* The modification of a building or equipment to incorporate functions not included in the original design that allow for the production of advanced biofuels.

*Rural or rural area.* 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. 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. 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.

*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.

*Subordination.* An agreement between the lender and borrower whereby lien priorities on certain assets pledged to secure payment of the guaranteed loan will be reduced to a position junior to, or on parity with, the lien position of another loan (see paragraph (h)(1) in section O).

*Technical and economic potential.* A technology not described in paragraph (1) of the definition of "eligible technology" is considered to have demonstrated "technical and economic potential" for commercial application in a biorefinery that produces an advanced biofuel if each of the following conditions is met:

(1) The advanced biofuel biorefinery's likely financial and production success is evidenced in a thorough evaluation including, but not limited to:

(i) Feedstocks;

(ii) Process engineering;

(iii) Siting;

(iv) Technology;

(v) Energy production; and

(vi) Financial and sensitivity review using an banking industry software analysis program with appropriate industry standards.

(2) The evaluation in paragraph (1) of this definition is completed by an independent third-party expert in a feasibility study, technical report, or other analysis, each of which must be satisfactory to the Agency, that demonstrates the success of the project.

(3) The advanced biofuel technology has a least a 12-month (four season) operating cycle at semi-work scale.

*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.

*Viable commercial-scale.* An operation is considered to a viable commercial-scale operation if it meets each of the following conditions:

(1) Evidence that a proposed project's revenue will be sufficient to recover the full cost of the project over the term of the guaranteed loan, service debt, and result in an anticipated annual rate of return sufficient to encourage investors or lenders to provide funding for the project.

(2) Such proposed project will be able to operate profitably without public and private sector subsidies upon completion of construction (volumetric excise tax is not included as a subsidy).

(3) Contracts for feedstocks are adequate to address proposed off-take from the biorefinery.

(4) The proposed project demonstrates the ability to achieve market entry, suitable infrastructure to transport the advanced biofuel to its market is available, and general market competitiveness of the advanced biofuel technology and related products.

(5) The project must demonstrate that it can be easily replicated and that replications can be sited at multiple facilities across a wide geographic area based on the proposed deployment plan.

(6) The advanced biofuel technology has at least a 12-month (four season) operating history at semi-work scale, which demonstrates the ability to operate at a commercial scale.

*B. Exception Authority*

Except as specified in paragraphs (a) through (d) of this section, the Administrator may, on a case-by-case basis, make exceptions to any requirement or provision of this Notice only when such an exception is in the best financial interests of the Federal Government and is otherwise not in conflict with applicable law.

(a) *Lender and borrower eligibility.* No exception to lender or borrower eligibility can be made.

(b) *Project eligibility.* No exception to project eligibility can be made.

(c) *Term length.* No exception to the maximum length of the loan term can be made with respect to loan originations.

(d) *Rural area definition.* No exception to the definition of rural area, as defined in this Notice, can be made.

*C. Review or Appeals*

A person has review or appeal rights in accordance with 7 CFR part 11.

*D. Conflicts of Interest*

No conflict of interest or appearance of conflict of interest will be allowed. For purposes of this Notice, conflict of interest includes, but is not limited to, distribution or payment of guaranteed loan funds or award of project contracts to an individual owner, partner, stockholder, or beneficiary of the lender or borrower or an immediate family member of such an individual.

*E. 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 the provisions in this Notice. Such oversight and monitoring will include, but is not limited to, reviewing lender records and meeting with lenders.

(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) During construction, the lender will submit quarterly construction progress reports to the Agency. These reports will contain, at a minimum, construction milestone attainment, loan advances, and personnel hiring, training, and retention.

(2) Periodic reports, to be submitted quarterly unless otherwise specified in the Conditional Commitment, 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.

(3) Monthly default reports, including borrower payment history, for each loan in monetary default using a form approved by the Agency.

(4) Notification within 15 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 change in the loan classification of any loan made under this Notice.

(5) 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.

*F. Forms, Regulations, and Instructions*

Copies of all forms, regulations, and instructions referenced in this Notice may be obtained through the Agency.

**Basic Eligibility Requirements**

*G. Borrower Eligibility*

To be eligible for a guaranteed loan under this Program, a borrower must meet each of the conditions specified in the following paragraphs, as applicable.

(a) The borrower must be one of the following:

(1) An individual;

(2) An Indian tribe;

(3) A unit of State or local government;

(4) A corporation;

(5) A farm cooperative;

(6) A farmer cooperative organization;

(7) An association of agricultural producers;

(8) A National Laboratory;

(9) An institution of higher education;

(10) A rural electric cooperative;

(11) A public power entity; or

(12) A consortium of any of the above entities.

(b) Individual borrowers must either:

(1) 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

(2) Reside in the U.S. after legal admittance for permanent residence.

(c) Entities other than individuals must be at least 51 percent owned by persons who are either citizens as identified above or legally admitted permanent residents residing in the U.S. When an entity owns an interest in the borrower, its citizenship will be determined by the citizenship of the individuals who own an interest in the entity or any sub-entity based on their ownership interest.

(d) 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.

(e) A borrower will be considered ineligible for a guarantee under this Program if either the borrower or any owner with more than 20 percent ownership interest in the borrower

(i) Has an outstanding judgment obtained by the U.S. in a Federal Court (other than U.S. Tax Court),

(ii) Is delinquent on the payment of Federal income taxes,

(iii) Is delinquent on Federal debt, or

(iv) Is debarred or suspended from receiving Federal assistance.

*H. Project Eligibility*

Projects eligible for loan guarantees under this Program must meet the criteria specified in this section.

(a) The project must be located in a rural area.

(b) The project must be for either:

(1) The development and construction of commercial-scale biorefineries using eligible technology or

(2) The retrofitting of existing facilities, including, but not limited to, wood products facilities and sugar mills, with eligible technology.

(c) The project must be for the production of advanced biofuels that are either:

(1) Transportation fuels that meet the Renewable Fuel Standard or are currently undergoing an appeal to the U.S. Environmental Protection Agency for inclusion in the Renewable Fuel Standard, or

(2) Non-transportation renewable energy that will result in a reduction in greenhouse gases.

(d) The project must meet the financial metric criteria specified in paragraphs (d)(1) through (d)(3) of this section. These financial metric criteria shall be calculated from the realistic information in the pro forma statements or borrower financial statements of a typical operating year after the project is completed and stabilized.

(1) A debt coverage ratio of 1.0 or higher;

(2) A debt-to-tangible net worth ratio of 4:1 or lower for start-up businesses and of 9:1 or lower for existing businesses.

(3) A loan-to-value ratio of no more than 1.0.

*I. Lender Eligibility*

To be eligible to participate in this Program under this Notice, a lender must be a regulated or supervised lender and must maintain at all times the following minimum acceptable levels of capital:

- Total Risk-Based Capital ratio of 10 percent or higher;
- Tier 1 Risk-Based Capital ratio of 6 percent or higher; and
- Tier 1 Leverage Capital ratio of 5 percent or higher.

If the regulated or supervised lender is a commercial bank or thrift, these levels would be based on those reflected in Call Reports and Thrift Financial Reports.

Further, the Agency will approve loan guarantees only for lenders with adequate experience with similar projects and the expertise to make, secure, service, and collect loans approved under this Notice. Lenders debarred from other Federal credit programs will not be eligible under this program.

**Basic Application Provisions**

*J. Loan Applications*

Applications for loan guarantees, which are to be filed with the USDA Rural Development National Office's Energy Branch as shown under **ADDRESSES**, must contain the items identified in the paragraphs (b)(1) through (18), organized pursuant to a Table of Contents in a chapter format.

(a) *Table of Contents.*

(b) *Project Summary.* Provide a concise summary of the proposed project and application information, project purpose and need, and project goals, including the following:

(1) *Title.* Provide a descriptive title of the project.

(2) *Borrower eligibility.* Describe how the borrower meets the eligibility criteria identified in Section II.G of this Notice.

(3) *Project eligibility.* Describe how the project meets the eligibility criteria identified in Section II.H of this Notice. This description is to provide the reader with a frame of reference for reviewing the rest of the application. Clearly state whether the application is for the construction and development of a biorefinery or for the retrofitting of an existing facility and provide a brief description of the project. Provide results from demonstration or pilot facilities that prove the technology proposed to be used meets the definition of eligible technology. Additional project description information will be needed later in the application.

(4) *Matching funds.* Submit a spreadsheet identifying sources, amounts, and status of matching funds. The spreadsheet must also include a directory of matching funds source contact information. Attach any applications, correspondence, or other written communication between applicant and matching fund source.

(5) *Application for Loan Guarantee.* Completed Form RD 4279–1, "Application for Loan Guarantee" (or successor form).

(6) *Environmental information.* Form RD 1940–20, "Request for Environmental Information;" omit the attachments specified in the instructions to the form; and attach an environmental information document completed pursuant to 7 CFR part 1940, subpart G, Exhibit H.

(i) *Civil Rights Impact Analysis.* The Agency is responsible for ensuring that all requirements of RD Instruction 2006–P, "Civil Rights Impact Analysis," with the addition of Executive Order 12898, Environmental Justice, are met and will complete the appropriate level

of review in accordance with that instruction. When guaranteed loans are proposed, Agency employees will conduct a Civil Rights Impact Analysis (CRIA) with regard to environmental justice. The CRIA must be conducted and the analysis documented utilizing Form RD 2006–38, "Civil Rights Impact Analysis Certification." This must be done prior to loan approval, obligation of funds, or other commitments of agency resources, including issuance of a Conditional Commitment, whichever occurs first.

(ii) *Intergovernmental consultation.* Intergovernmental consultation comments in accordance with RD Instruction 1940–J and 7 CFR, part 3015, subpart V.

(7) *Credit reports.*

(i) A personal credit report from an acceptable credit reporting company for a proprietor (owner), each partner, officer, director, key employee, and stockholder owning 20 percent or more interest in the applicant, except for those corporations listed on a major stock exchange. Credit reports are not required for elected and appointed officials when the applicant is a public body.

(ii) Commercial credit reports obtained by the lender on the borrower and any parent, affiliate, and subsidiary firms.

(8) *Appraisals.* Appraisals, accompanied by a copy of a Phase I Environmental Site Assessment (ESA) in accordance with ASTM standards. If the appraisal has not been completed when the application is filed, an estimated appraisal must be submitted with the application. In all cases, a completed appraisal consistent with paragraph (c) in section N must be submitted prior to the loan being closed.

(9) *Financial information.* For all businesses, a current (not more than 90 days old) balance sheet; a *pro forma* balance sheet at startup; projected balance sheets and income and expense statements for a period of not less than 3 years of stabilized operation; and cash flow statements for the life of the project. Projections should be supported by a list of assumptions showing the basis for the projections.

(10) *Credit rating.* For loans of $125 million or more, an evaluation and credit rating of the total project's indebtedness, without consideration for a government guarantee, from a nationally-recognized rating agency.

(11) *Lender's analysis.* Lender's complete written analysis of the project, including:

(i) A summary of the technology to be used in the project;

(ii) The viability of such technology for the particular project application;

(iii) Whether the project is retrofit or Greenfield;

(iv) Borrower's management;

(v) Repayment ability (including a cash-flow analysis);

(vi) Sponsor's history of debt repayment;

(vii) Necessity of any debt refinancing;

(viii) The credit reports of the borrower, its principals, and any parent, affiliate, or subsidiary; and

(ix) The credit analysis specified in Section II.N of this Notice.

(12) *Loan Agreement.* A proposed loan agreement or a sample loan agreement with an attached list of the proposed loan agreement provisions. The loan agreement must be executed by the lender and borrower before the Agency issues a Loan Note Guarantee. The following requirements must be addressed in the loan agreement:

(i) Prohibition against assuming liabilities or obligations of others;

(ii) Restriction on dividend payments;

(iii) Limitation on the purchase or sale of equipment and fixed assets;

(iv) Limitation on compensation of officers and owners;

(v) Financial covenants regarding working capital or current ratio requirement, and maximum debt-to-net worth ratio;

(vi) Borrower change of control;

(vii) Repayment and amortization of the loan;

(viii) List of collateral and lien priority for the loan;

(ix) Type and frequency of financial statements to be required for the duration of the loan.

(x) A section for the later insertion of any additional requirements imposed by the Agency in its Conditional Commitment; and

(xi) A section for the later insertion of any necessary mitigation measures by the borrower to avoid or reduce adverse environmental impacts from this proposal's construction or operation.

(13) *Business plan.* Submit a business plan. Any or all of the requirements in the business plan may be omitted if the information is included in the feasibility study.

(14) *Feasibility study.* Submit a feasibility study on the proposed project. Elements in an acceptable feasibility study include, but are not limited to, the elements outlined in Table 1. In addition, as part of the feasibility study, both a technical assessment and economic analysis of the project are required. These two assessments are discussed in detail in paragraphs (d) and (e) of this section.

TABLE 1—FEASIBILITY STUDY COMPONENTS

| |
|---|
| (A) Executive Summary: |
| Introduction/Project Overview (Brief general overview of project location, size, etc.) |
| Economic feasibility determination. |
| Technical feasibility determination. |
| Market feasibility determination. |
| Financial feasibility determination. |
| Management feasibility determination. |
| Recommendations for implementation. |
| (B) Economic Feasibility: |
| Information regarding project site. |
| Availability of trained or trainable labor. |
| Availability of infrastructure, including utilities, and rail, air and road service to the site. |
| Feedstock: |
| Feedstock source management. |
| Estimates of feedstock volumes and costs. |
| Collection, Pre-Treatment, Transportation, and Storage. |
| Document that any and all woody biomass feedstock cannot be used as a higher value wood-based product. |
| Impacts on existing manufacturing plants or other facilities that use similar feedstock if the applicant's proposed biofuel production technology is adopted. |
| Project impact on resource conservation, public health, and the environment. |
| Overall economic impact of the project including any additional markets created for agricultural and forestry products and agricultural waste material and potential for rural economic development. |

TABLE 1—FEASIBILITY STUDY COMPONENTS—Continued

Feasibility/plans of project to work with producer associations or cooperatives including estimated amount of annual feedstock and biofuel and byproduct dollars from producer associations and cooperatives.

(C) Market Feasibility:
- Information on the sales organization and management.
- Nature and extent of market and market area.
- Marketing plans for sale of projected output—principle products and by-products.
- Extent of competition including other similar facilities in the market area.
- Commitments from customers or brokers—principle products and by-products.
- Risks Related to the Advanced Biofuel Industry, including industry status.

(D) Technical Feasibility:
- Suitability of the selected site for the intended use including the information documents Form RD 1940–20 and required narrative in the 7 CFR part 1940, subpart G Exhibit H format.
- Report shall be based upon verifiable data and contain sufficient information and analysis so that a determination may be made on the technical feasibility of achieving the levels of income or production that are projected in the financial statements. Describe the scale of development for which the process technology has been proven, *i.e.* lab (or bench), pilot, or demonstration scale; and the specific volume of the process (expressed either as volume of feedstock processed—tons per unit of time, or as product—gallons per unit of time).
- Report shall also identify any constraints or limitations in these financial projections and any other facility or design-related factors which might affect the success of the enterprise.
- Report shall also identify and estimate project operation and development costs and specify the level of accuracy of these estimates and the assumptions on which these estimates have been based.
- The Project engineer or architect is considered an independent party provided neither the principal of the firm nor any individual of the firm who participates in the technical feasibility report has a financial interest in the project if no other individual or firm with the expertise necessary to make such a determination is reasonably available to perform the function, an individual or firm that is not independent may be used.
- Ability of the proposed system to be Commercially Replicated.
- Supports the Renewable Fuel Standards of the U.S. Environmental Protection Agency.
- Risks Related to:
  - Construction of the Advanced Biofuel Plant,
  - Advanced Biofuel Production, and
  - Regulation and Governmental Action.

(E) Financial Feasibility:
- Reliability of the financial projections and assumptions on which the financial statements are based including all sources of project capital both private or public, such as Federal funds. Three Years (minimum) projected Balance Sheets and Income Statements. Cash Flow projections for the life of the project.
- Ability of the business to achieve the projected income and cash flow.
- Assessment of the cost accounting system.
- Availability of short-term credit or other means to meet seasonable business costs.
- Adequacy of raw materials and supplies.
- Sensitivity Analysis—including feedstock and energy costs, product/co-product prices.
- Risks Related to:
  - The Project,
  - Applicant Financing Plan,
  - The operational units, and
  - Tax Issues.

(F) Management Feasibility:
- Continuity and adequacy of management.
- Projected total supply from members and non-members.
- Projected competitive demand for raw materials.
- Procurement plan and projected procurement costs.
- Form of commitment of raw materials (marketing agreements, etc.).
- Identify applicant and/or management's previous experience concerning the receipt of federal financial assistance, including amount of funding, date received, purpose, and outcome.
  - Risks Related to:
  - Applicant as a Company (*i.e.* Development-Stage) and Conflicts of Interest.

(G) Qualifications:
- A resume or statement of qualifications of the author of the feasibility study, including prior experience, should be submitted.

(15) *Lender certifications.*

(i) A certification by the lender stating that it has completed a comprehensive analysis of the proposal, the borrower is eligible, the loan is for an eligible project, and there is reasonable assurance of repayment ability based on the borrower's history, projections and equity, and the collateral to be obtained.

(ii) A certification by the lender that the proposed project will be in compliance with all applicable State and Federal environmental laws and regulations.

(16) *DUNS Number.* A Dun and Bradstreet Universal Numbering System (DUNS) number.

(17) *Bioenergy experience.* Identify applicant, including principals, prior experience in bioenergy projects and the receipt of Federal financial assistance, including amount of funding, date received, purpose, and outcome, for such projects.

(18) Each applicant must provide documentation from an Agency-approved recognized published source quantifying the reduction in greenhouse gas emissions that results from the displacement of fossil fuels.

(19) *Other.* Any additional information required by the Agency.

(c) *Form modifications.* The BioRefinery Assistance Program will be using the same forms as the Business and Industry and Section 9006 programs with the understanding that:

(1) All references in those forms to the Business and Industry program or the Section 9006 program in whatever

manner, and whether referenced singularly or jointly, shall be deemed to be references to the BioRefinery Assistance Program described in this Notice, and

(2) All references to the Business and Industry or Section 9006 regulations in those forms in whatever manner, whether general or specific, whether singularly or jointly, and whether or not specific Code of Federal Regulation citations are used, shall be deemed to be a reference to the requirements of the BioRefinery Assistance Program described in this Notice. In addition, the following modifications are to be used for this Program.

(i) Application for Loan Guarantee (Form RD 4279–1) is modified as described below.

(A) Part A, Block 10, Type of Borrower, do not fill out if your entity is not listed.

(B) Part A, Block 11. Instead of the Standard Industrial Classification (SIC) Code, fill in your North American Industry Classification System (NAICS).

(C) Part A, Block 22 is not applicable.

(D) Part A, Block 29, Financial Statements. Comply with the financial statement requirements in this Notice rather than in Block 29.

(E) Part A, Block 30, which deals with guarantors, is not applicable.

(F) Part A, Block 33, Technical Report. Replace Technical Report with Feasibility Study, which will include a technical assessment of the project.

(G) Part B, Block 17, which addresses equity. Do not fill in this block, but instead provide similar information according to the equity requirements contained in this Notice.

(H) Part B, Block 22, which addresses the lender's analysis. Attach the lender's analysis as described in this Notice.

(3) Lender's Agreement (Form RD 4279–4), Section I, Item B, is applicable with the addition that negligent servicing includes any instance where a lender fails to ensure that all environmental laws are being complied with by any person receiving guaranteed loan funds under this Program.

(4) Loan Note Guarantee (Form RD 4279–5), Section 3, Full Faith and Credit, under Conditions of Guarantee is applicable with the addition that negligent servicing includes any instance where a lender fails to ensure that all environmental laws are being complied with by a person receiving guaranteed loan funds under this Program.

(d) *Technical Assessment.* As part of the feasibility study, a detailed technical assessment is required for each project. The technical assessment must demonstrate that the project design, procurement, installation, startup, operation and maintenance of the project will operate or perform as specified over its useful life in a reliable and a cost effective manner, and must identify what the useful life of the project is. The technical assessment must also identify all necessary project agreements, demonstrate that those agreements will be in place on or before the time of loan closing, and demonstrate that necessary project equipment and services will be available over the useful life. All technical information provided must follow the format specified in paragraphs (d)(1) through (9) below. Supporting information may be submitted in other formats. Design drawings and process flow charts are encouraged as exhibits. A discussion of each topic identified in paragraphs (d)(1) through (9) is not necessary if the topic is not applicable to the specific project. Questions identified in the Agency's technical review of the project must be answered to the Agency's satisfaction before the application will be approved. All projects require the services of a professional engineer (PE).

(1) *Qualifications of project team.* The project team will vary according to the complexity and scale of the project. The project team must have demonstrated expertise in similar advanced biofuel technology development, engineering, installation, and maintenance. Authoritative evidence that project team service providers have the necessary professional credentials or relevant experience to perform the required services for the development, construction, and retrofitting, as applicable, of technology for producing advanced biofuels must be provided. In addition, authoritative evidence that vendors of proprietary components can provide necessary equipment and spare parts for the biorefinery to operate over its useful life must be provided. The application must:

(i) Discuss the proposed project delivery method. Such methods include a design, bid, build where a separate engineering firm may design the project and prepare a request for bids and the successful bidder constructs the project at the borrower's risk, and a design build method, often referred to as turnkey, where the borrower establishes the specifications for the project and secures the services of a developer who will design and build the project at the developer's risk;

(ii) Discuss the advanced biofuels technology equipment manufacturers of major components being considered in terms of the length of time in business and the number of units installed at the capacity and scale being considered;

(iii) Discuss the project team members' qualifications for engineering, designing, and installing advanced biofuels refineries including any relevant certifications by recognized organizations or bodies. Provide a list of the same or similar projects designed, installed, or supplied and currently operating and with references if available; and

(iv) Describe the advanced biofuels refinery operator's qualifications and experience for servicing, operating, and maintaining such equipment or projects. Provide a list of the same or similar projects designed, installed, or supplied and currently operating and with references if available.

(2) *Agreements and permits.* All necessary agreements and permits required for the project and the status and schedule for securing those agreements and permits, including the items specified in paragraphs (2)(i) through (vi), must be identified in the application.

(i) Advanced biofuels refineries must be installed in accordance with applicable local, State, and national codes and regulations. Identify zoning and code issues, and required permits and the schedule for meeting those requirements and securing those permits.

(ii) Identify licenses where required and the schedule for obtaining those licenses.

(iii) Identify land use agreements required for the project and the schedule for securing the agreements and the term of those agreements.

(iv) Identify any permits or agreements required for solid, liquid, and gaseous emissions or effluents and the schedule for securing those permits and agreements.

(v) Identify available component warranties for the specific project location and size.

(vi) Identify all environmental issues, including environmental compliance issues, associated with the project.

(3) *Resource assessment.* Adequate and appropriate evidence of the availability of the feedstocks required for the advanced biofuels refinery to operate as designed must be provided in the application. Indicate the type and quantity of the feedstock including storage, where applicable. Indicate shipping or receiving method and required infrastructure for shipping, and other appropriate transportation mechanisms. For proposed projects with an established resource, provide a summary of the resource.

(4) *Design and engineering.* Authoritative evidence that the advanced biofuels refinery will be designed and engineered so as to meet its intended purposes, will ensure public safety, and will comply with applicable laws, regulations, agreements, permits, codes, and standards must be provided in the application. Projects shall be engineered by a qualified entity. Biorefineries must be engineered as a complete, integrated facility. The engineering must be comprehensive including site selection, systems and component selection, and systems monitoring equipment. Biorefineries must be constructed by a qualified entity.

(i) The application must include a concise but complete description of the project including location of the project; resource characteristics, including the kind and amount of feedstocks; biorefinery specifications; kind, amount, and quality of the output; and monitoring equipment. Address performance on a monthly and annual basis. Describe the uses of or the market for the advanced biofuels produced by the biorefinery. Discuss the impact of reduced or interrupted feedstock availability on the biorefinery's operations.

(ii) The application must include a description of the project site and address issues such as site access, foundations, backup equipment when applicable, and the environmental information documents Form RD 1940–20 and required narrative in the 7 CFR part 1940, subpart G, Exhibit H format. Identify any unique construction and installation issues.

(iii) Sites must be controlled by the eligible borrower for at least the proposed project life or for the financing term of any associated federal loans or loan guarantees.

(5) *Project development schedule.* Each significant task, its beginning and end, and its relationship to the time needed to initiate and carry the project through startup and shakedown must be provided in the application. Provide a detailed description of the project timeline including resource assessment, project and site design, permits and agreements, equipment procurement, and project construction from excavation through startup and shakedown.

(6) *Equipment procurement.* A demonstration that equipment required by the biorefinery is available and can be procured and delivered within the proposed project development schedule must be provided in the application. Biorefineries may be constructed of components manufactured in more than one location. Provide a description of any unique equipment procurement issues such as scheduling and timing of component manufacture and delivery, ordering, warranties, shipping, receiving, and on-site storage or inventory.

(7) *Equipment installation.* A full description of the management of and plan for site development and systems installation, details regarding the scheduling of major installation equipment needed for project construction, and a description of the startup and shakedown specification and process and the conditions required for startup and shakedown for each equipment item individually and for the biorefinery as a whole must be provided in the application.

(8) *Operations and maintenance.* The operations and maintenance requirements of the biorefinery necessary for the biorefinery to operate as designed over the useful life must be provided in the application. The application must also include:

(i) Information regarding available biorefinery and component warranties and availability of spare parts;

(ii) A description of the routine operations and maintenance requirements of the proposed biorefinery, including maintenance schedule for the mechanical, piping, and electrical systems and system monitoring and control requirements, as well as provision of information that supports expected useful life of the biorefinery and timing of major component replacement or rebuilds;

(iii) A discussion of the costs and labor associated with operations and maintenance of the biorefinery and plans for in-sourcing or outsourcing. A description of the opportunities for technology transfer for long term project operations and maintenance by a local entity or owner/operator; and

(iv) Provision and discussion of the risk management plan for handling large, unanticipated failures of major components.

(9) *Decommissioning.* When uninstalling or removing the project, a description of the decommissioning process. A description of any issues, requirements, and costs for removal and disposal of the biorefinery.

(e) *Economic Analysis.* The feasibility study must also contain a detailed economic analysis of the project. The economic analysis must describe the costs and revenues of the proposed project to demonstrate the financial performance of the project by:

(1) Providing a detailed analysis and description of project costs including project management, resource assessment, project design, project permitting, land agreements, equipment, site preparation, systems installation, startup and shakedown, warranties, insurance, financing, professional services, and operations and maintenance costs;

(2) Providing a detailed analysis and description of annual project revenues and expenses over the useful life of the project;

(3) Providing a detailed description of applicable investment incentives, productivity incentives, loans, and grants; and

(4) Identifying any other project authorities and subsidies that affect the project.

*K. Evaluation of Guaranteed Loan Applications*

(a) *General review.* The Agency will utilize a panel of reviewers, including Rural Development field staff and U.S. Department of Energy staff, to review each application. Each application will be evaluated to confirm that both the borrower and project are eligible, the project has technical merit, there is reasonable assurance of repayment, there is sufficient collateral and equity, and the proposed project complies with all applicable statutes and regulations.

(1) If the Agency determines it is unable to guarantee the loan, the lender will be informed in writing. Such notification will include the reasons for denial of the guarantee.

(2) In the case where an Agency receives an application that is undergoing an appeal before the U.S. Environmental Protection Agency for inclusion in the Renewable Fuel Standard, the Agency will be unable to finalize processing of the application until the appeal has been completed.

(b) *Ineligible applications.* If the borrower, lender, or the project is determined to be ineligible for any reason, the Agency will inform the lender, in writing, of the reasons and provide any applicable appeal rights. No further evaluation of the application will occur.

(c) *Incomplete applications.* If the application is incomplete, the Agency will identify those parts of the application that are incomplete and return it, with a written explanation, to the lender for possible future resubmission. Upon receipt of a complete application, if submitted within the proper deadlines noted in this Notice, the Agency will complete its evaluation.

(d) *Technical merit determination.* The Agency's determination of a project's technical merit will be based on the information in the application.

The Agency may engage the services of other government agencies or recognized industry experts in the applicable technology field, at its discretion, to evaluate and rate the application. The Agency may use this evaluation and rating to determine the level of technical merit of the proposed project. Projects determined by the Agency to be without technical merit will not be selected for funding.

(e) *Evaluation criteria.* The Agency will score each eligible application that meets the minimum requirements for financial and technical feasibility, based on the evaluation criteria identified below. A minimum score of 40 points is required in order to be considered for a guarantee. The Agency will give priority to those applications with the highest scores above the minimum threshold. A maximum of 100 points is possible.

(1) Whether the borrower has established a market for the advanced biofuel and the byproducts produced. A maximum of 5 points can be awarded. Points to be awarded will be determined as follows:

(i) If the business has less than or equal to a 50 percent commitment for feedstocks, marketing agreements for the advanced biofuel, and the byproducts produced, 0 points will be awarded.

(ii) If the business has a greater than 50 percent commitment for feedstocks, marketing agreements for the advanced biofuel and the byproducts produced, 5 points will be awarded.

(2) Whether the area in which the borrower proposes to place the biorefinery has other similar advanced biofuel facilities. A maximum of 5 points can be awarded. Points to be awarded will be determined as follows:

(i) If the biorefinery will be located in a trade area that has other advanced biofuel facilities, with area defined as "within the area supplying the feedstock," 0 points will be awarded.

(ii) If the biorefinery will be located in a trade area that does not have other advanced biofuel facilities, with area defined as "within the area supplying the feedstock," 5 points will be awarded.

(3) Whether the borrower is proposing to use a feedstock not previously used in the production of advanced biofuels. A maximum of 14 points can be awarded. Points to be awarded will be determined as follows:

(i) If the borrower proposes to use a feedstock previously used in the production of advanced biofuels in a commercial facility, 0 points will be awarded.

(ii) If the borrower proposes to use a feedstock not previously used in production of advanced biofuels in a commercial facility, 14 points will be awarded.

(4) Whether the borrower is proposing to work with producer associations or cooperatives. A maximum of 5 points can be awarded. Points to be awarded will be determined as follows:

(i) If the borrower procurement or marketing agreements amount to less than or equal to 50 percent of annual feedstock and biofuel and byproduct dollars with producer associations or cooperatives, 0 points will be awarded.

(ii) If the borrower procurement or marketing agreements amount to more than 50 percent of annual feedstock and biofuel and byproduct dollars with producer associations or cooperatives, 5 points will be awarded.

(5) The level of financial participation by the borrower, including support from non-Federal and private sources. Such financial participation may take the form of direct financial support, technical support, and contributions of in-kind resources including financial or other support from state or local government. A maximum of 20 points can be awarded. Other Direct Federal funding will not be considered as part of the borrower's cash equity participation. Points to be awarded will be determined as follows:

(i) If the borrower's cash equity injection plus other sources is equal to or greater than 30 percent, but less than 40 percent, tangible balance sheet equity, 10 points will be awarded.

(ii) If the borrower's cash equity injection plus other sources is equal to or greater than 40 percent tangible balance sheet equity, 20 points will be awarded.

(iii) If a project uses other Federal direct funding, 10 points will be deducted.

(6) Whether the borrower has established that the adoption of the process proposed in the application will have a positive impact on resource conservation, public health, and the environment. A maximum of 9 points can be awarded. Points to be awarded will be determined as follows:

(i) If process adoption will have a positive impact on resource conservation, 3 points will be awarded.

(ii) If process adoption will have a positive impact on public health, 3 points will be awarded.

(iii) If process adoption will have a positive impact on environment, 3 points will be awarded.

(7) Whether the borrower can establish that, if adopted, the biofuels production technology proposed in the application will not have any significant negative impacts on existing manufacturing plants or other facilities that use similar feedstocks. A maximum of 5 points can be awarded. Points to be awarded will be determined as follows:

(i) If the borrower has not established, through an independent third party, that the biofuels production technology proposed in the application, if adopted, will not have any significant negative impacts on existing manufacturing plants or other facilities that use similar feed stocks, 0 points will be awarded.

(ii) Applicant has established, through an independent third party, that the biofuels production technology proposed in the application, if adopted, will not have any significant negative impacts on existing manufacturing plants or other facilities that use similar feed stocks, 5 points will be awarded.

(8) The potential for rural economic development. If the business creates jobs with an average wage that exceeds both the State and County median household wages, 3 points will be awarded.

(9) The level of local ownership proposed in the application. A maximum of 13 points can be awarded. Points to be awarded will be determined as follows:

(i) If local ownership is greater than 20 percent, with area defined as "within the area supplying the feedstock," up to 6 points will be awarded.

(ii) If local ownership is greater than 50 percent, with area defined as "within the area supplying the feedstock," 13 points will be awarded.

(10) Whether the project can be replicated. A maximum of 5 points can be awarded. Points to be awarded will be determined as follows:

(i) If the project can be commercially replicated regionally (*e.g.,* Northeast, Southwest, etc.), 2 points will be awarded.

(ii) If the project can be commercially replicated nationally, up to 5 points will be awarded.

(11) The extent to which the project converts cellulosic biomass feedstocks into advanced biofuels. A maximum of 6 points can be awarded.

(i) If 50% or less of the amount of advanced biofuels produced by the project is derived from cellulosic renewable biomass feedstocks, then 0 points will be awarded.

(ii) If more than 50% of the amount of advanced biofuels produced by the project is from cellulosic renewable biomass feedstocks, then 6 points will be awarded.

(12) If the project is a first-of-a-kind technology, system, or process, 10 points will be awarded.

*L. Loan Approval and Obligating Funds*

(a) *Environmental review.* The Agency has reviewed the types of applicant proposals that may qualify for assistance under this section and has determined, in accordance with 7 CFR Part 1940–G, that all proposals shall be reviewed as a Class II Environmental Assessment (EA) as the development of new and emerging technologies would not meet the classification of a Categorical Exclusion (CE) in accordance with 7 CFR Part 1940.310 or a Class I EA in accordance with 7 CFR Part 1940.311. Furthermore, if after Agency review of proposals the Agency has determined that the proposal could result in significant environmental impacts on the quality of the human environment, an Environmental Impact Statement may be required pursuant to 7 CFR Part 1940.313.

(b) *Conditional Commitment.* Upon approval of a loan guarantee, the Agency will issue a Conditional Commitment to the lender containing conditions, including all applicable regulatory, statutory, and other requirements, under which a Loan Note Guarantee will be issued. One of the conditions shall be that the project receiving guaranteed loan funds under this Program will be in compliance with all applicable State and Federal environmental laws and regulations. The Conditional Commitment is a binding obligation by the Agency. However, if the terms of the Conditional Commitment are not satisfied, the Commitment is no longer binding on the Agency.

(c) *Alternate conditions.* If certain conditions of the Conditional Commitment cannot be met, the lender and applicant may propose alternate conditions. Within the requirements of the applicable regulations and instructions and prudent lending practices, the Agency may negotiate with the lender and the applicant regarding any proposed changes to the Conditional Commitment.

(d) *Wage rates.* As a condition of receiving a loan guaranteed under this Program, each borrower shall ensure that all laborers and mechanics employed by contractors or subcontractors in the performance of construction work financed in whole or in part with Guaranteed Loan Funds under this Notice shall be paid wages at rates not less than those prevailing on similar construction in the locality as determined by the Secretary of Labor in accordance with sections 3141 through 3144, 3146, and 3147 of title 40, U.S.C. Awards under this Notice are further subject to the relevant regulations contained in title 29 of the Code of Federal Regulations.

*M. Lender's Functions and Responsibilities—General*

All lenders requesting or obtaining a loan guarantee under this Notice are responsible for:

(a) Processing applications for guaranteed loans;

(b) Developing and maintaining adequately documented loan files;

(c) Recommending only loan proposals that are eligible and financially feasible;

(d) Obtaining valid evidence of debt and collateral in accordance with sound lending practices;

(e) Supervising construction;

(f) Distribution of loan funds;

(g) Servicing guaranteed loans in a prudent manner, including liquidation if necessary;

(h) Following Agency regulations; and

(i) Obtaining Agency approvals or concurrence as required.

*N. Lender's Functions and Responsibilities—Origination*

(a) *Credit evaluation.* The lender must determine credit quality of the borrower, including the following:

(1) The lender must address all of the elements of credit quality in a written credit analysis, including cash flow, collateral, and adequacy of equity.

(i) *Cash flow.* All efforts will be made to structure debt so that the business has adequate debt coverage and the ability to accommodate expansion.

(ii) *Collateral.* Collateral must have documented value sufficient to protect the interest of the lender and the Agency, as determined by the Agency.

(iii) *Equity.* Borrowers shall demonstrate evidence of cash equity injection in the project of not less than 20 percent of eligible project costs. The fair market value of equity in real property that is to be pledged as collateral for the loan may be substituted in whole or in part to meet the cash equity requirement. However, the appraisal completed to establish the fair market value of the real property must not be more than 1 year old and must meet Agency appraisal standards. Otherwise, cash equity injection must be in the form of cash.

(2) The credit analysis must also include spreadsheets of the balance sheets and income statements of the borrower for the 3 previous years (for existing businesses), pro forma balance sheets at startup, and projected yearend balance sheets and income statements for a period of not less than 3 years of stabilized operation, with appropriate ratios and comparisons with industrial standards (such as Dun & Bradstreet or Robert Morris Associates) to the extent available.

(3) All data must be shown in total dollars and also in common size form, obtained by expressing all balance sheet items as a percentage of assets and all income and expense items as a percentage of sales.

(b) *Lien priorities.* 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 or be secured by separate collateral. The guarantee will be secured by a first lien on all collateral necessary to run the project in the event of the borrower's default including, without limitation, all real property, contracts and permits, and all furnishings, fixtures, and equipment of the project. In addition, the lender and the Agency should be shown as an additional insured on insurance policies (or other risk sharing instruments) that benefit the project and must be able to assume any contracts that are material to running the project including any feedstock or offtake agreements.

(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.

(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.

(3) A complete self-contained appraisal must be conducted.

(4) Lenders must complete, for all applications, a Phase I Environmental Site Assessment (ESA) in accordance with ASTM standards, which should be provided to the appraiser for completion of the self-contained appraisal. Lenders shall use specialized appraisers.

(d) *Construction planning and performing development.*

(1) *Design Policy.* The lender must ensure that all project facilities will be designed utilizing accepted architectural and engineering practices and must conform to applicable Federal, state, and local codes and requirements. The lender will also ensure that the project will be completed using the available funds and, once completed, will be used for its intended purpose

and produce products in the quality and quantity proposed in the completed application approved by the Agency.

(2) *Project Control.* The lender will monitor the progress of construction and undertake the reviews and inspections necessary to ensure that construction conforms to applicable Federal, state, and local code requirements; proceeds are used in accordance with the approved plans, specifications, and contract documents; and that funds are used for eligible project costs. The lender will provide a resident inspector.

(3) *Changes or cost overruns.* The borrower shall be responsible for any changes or cost overruns. If any such change or cost overrun occurs, then any change order must be expressly approved by the Agency which approval shall not be unreasonably withheld, and neither the lender nor borrower will divert funds from purposes identified in the guaranteed loan application to pay for any such change or cost overrun without the express written approval of the Agency. In no event will the current loan be modified or a subsequent guaranteed loan be approved to cover any such changes or costs. Failure to comply with the terms of this paragraph will be considered a material adverse change in the borrower's financial condition, and the lender must address this matter, in writing, to the Agency's satisfaction. In the event any of the aforementioned increases in costs and/or expenses are incurred by the borrower, the borrower must provide for such increases in a manner that there is no diminution of the borrower's operating capital.

(4) *New draws.* The following two certifications are required for each new draw:

(i) Certification by the project engineer to the lender that the work referred to in the draw has been successfully completed; and

(ii) Certification from the lender that all debts have been paid and all mechanics' liens have been waived.

(e) *Laws that contain other compliance requirements.* Each lender and borrower must comply with:

(1) *Equal Credit Opportunity Act.* In accordance with title V of Public Law 93–495, the Equal Credit Opportunity Act, with respect to any aspect of a credit transaction, neither the lender nor the Agency will discriminate against any applicant on the basis of race, color, religion, national origin, sex, marital status or age (providing the applicant has the capacity to contract), or because all or part of the applicant's income derives from a public assistance program, or because the applicant has, in good faith, exercised any right under the Consumer Protection Act. The lender will comply with the requirements of the Equal Credit Opportunity Act as contained in the Federal Reserve Board's Regulation implementing that Act (see 12 CFR part 202). Such compliance will be accomplished prior to loan closing.

(2) *Equal opportunity.* For all construction contracts in excess of $10,000, the contractor must comply with Executive Order 11246, "Equal Employment Opportunity," as amended by Executive Order 11375, and as supplemented by applicable Department of Labor regulations (41 CFR part 60). The borrower and lender are responsible for ensuring that the contractor complies with these requirements.

(3) *Americans with Disabilities Act (ADA).* Guaranteed loans that involve the construction of or addition to facilities that accommodate the public and commercial facilities, as defined by the ADA, must comply with the ADA. The lender and borrower are responsible for compliance.

(4) *Environmental analysis.* Each lender and borrower must comply with the environmental analysis identified in 7 CFR part 1940, subpart G, which outlines environmental procedures and requirements for this Notice. Each proposal will be evaluated to determine the proper level of National Environmental Policy Act (NEPA) review on a case-by-case basis by the Agency's environmental staff. The lender's borrower will cooperate with the Agency in the preparation of the environmental review. Prospective borrowers are advised to contact the Agency to determine environmental requirements as soon as practicable after they decide to pursue any form of financial assistance directly or indirectly available through the Agency.

(i) Any required environmental review must be completed by the Agency prior to the Agency obligating any funds.

(ii) The borrower will be notified of all specific compliance requirements, including, but not limited to, the publication of public notices, and consultation with State Historic Preservation Offices and the U.S. Fish and Wildlife Service.

(iii) A site visit by the Agency may be scheduled, if necessary, to determine the scope of the review.

(iv) A borrower taking any actions or incurring any obligations prior to or during application review and processing that would either limit the range of alternatives to be considered or that would have an adverse effect on the environment, such as the initiation of construction, may result in project ineligibility.

(f) *Environmental responsibilities.* Lenders have a responsibility to become familiar with Federal environmental requirements; to consider, in consultation with the prospective borrower, the potential environmental impacts of their proposals at the earliest planning stages; and to develop proposals that minimize the potential to adversely impact the environment. Lenders must alert the Agency to any controversial environmental issues related to a proposed project or items that may require extensive environmental review at the time of the application as well as after the loan closes if unforeseen events take place. Lenders must ensure that their borrowers complete Form RD 1940–20; omit the attachments specified in the instructions to the form; and attach an environmental information document completed pursuant to 7 CFR part 1940, subpart G, Exhibit H; assist in the collection of additional data when the Agency needs such data to complete its environmental review of the proposal; and assist in the resolution of environmental problems.

(g) *Loan closing.* The lender or its designated representative is responsible for loan closings. At the closing, the lender will ensure that all the conditions in the Agency's Conditional Commitment have been met.

*O. Lender's Functions and Responsibilities—Servicing*

General

(a) *Routine servicing.* The lender is responsible for servicing the entire loan and for taking all servicing actions that a prudent lender would perform in servicing its own portfolio of loans that are not guaranteed.

(1) The lender must service the entire loan and must remain mortgagee and secured party of record notwithstanding the fact that another party may hold a portion of the loan.

(2) The Loan Note Guarantee is unenforceable by the lender to the extent any loss is occasioned by violation of usury laws, use of loan funds for unauthorized purposes, negligent servicing, or failure to obtain the required security interest regardless of the time at which the Agency acquires knowledge of the foregoing. This responsibility includes, but is not limited to, the collection of payments, obtaining compliance with the covenants and provisions in the loan agreement, obtaining and analyzing financial statements, checking on payment of taxes and insurance

premiums, and maintaining liens on collateral.

(b) *Loan classification.* Within 90 days of receipt of the Loan Note Guarantee, the lender must notify the Agency of the loan's classification or rating under its regulatory standards. Should the classification be changed at a future time, the Agency must be notified within 15 days.

(c) *Insurance requirements.* The lender must ensure that the borrower has obtained, and will maintain for the life of the guaranteed loan, all necessary insurance coverage appropriate to the proposed project, in accordance with the lender's loan origination policies and procedures or what a reasonably prudent lender requires, whichever is more stringent.

(d) *Financial reports.* The lender must obtain and forward to the Agency the financial statements required by the loan agreement or the Conditional Commitment.

(1) The lender must submit to the Agency:

(i) Quarterly financial statements within 45 days of the end of each quarter and

(ii) Annual audited financial statements within 120 days of the end of the borrower's fiscal year.

(2) 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, and other indications of the financial condition of the borrower. Spreadsheets of the new financial statements must be included.

(e) *Requirements after construction.*

(1) *Reports.* In addition to complying with the requirements for loan servicing, once the project has been constructed, the lender must provide the Agency periodic reports from the borrower commencing the first full calendar year following the year in which project construction was completed and continuing for the life of the guaranteed loan. The borrower's reports will include, but not be limited to, the information specified in the following paragraphs, as applicable.

(i) The actual amount of advanced biofuels produced to assess whether project goals are being met.

(ii) If applicable, documentation that identified health and/or sanitation problem has been solved.

(iii) A summary of the cost of operating and maintaining the facility.

(iv) Description of any maintenance or operational problems associated with the facility.

(v) Demonstration that the project is and has been in compliance with all applicable State and Federal environmental laws and regulations.

(vi) The number of jobs created.

(vii) A description on the status of the project's feedstock including, but not limited to, the feedstock being used, outstanding feedstock contracts, feedstock changes and interruptions, and quality of the feedstock.

(2) *Inspections.* The lender shall conduct annual inspections of the project for the life of the guaranteed loan.

(f) *Release of collateral.*

(1) All releases of collateral with a value exceeding $100,000 must be supported by a current appraisal on the collateral released. The appraisal will be at the expense of the borrower and must meet the appraisal requirements contained in this Notice. The remaining collateral must be sufficient to provide for repayment of the Agency's guaranteed loan. The Agency may, at its discretion, require an appraisal of the remaining collateral in cases where it is determined that the Agency may be adversely affected by the release of collateral. Sale or release of collateral must be based on an arm's-length transaction.

(2) Within the parameters of the paragraph (f)(1):

(i) Lenders may, over the life of the guaranteed loan, release collateral with a cumulative value of up to 20 percent of the original loan amount without Agency concurrence if the proceeds generated are used to reduce the guaranteed loan or to buy replacement collateral.

(ii) Release of collateral with a cumulative value in excess of 20 percent of the original loan or when the proceeds will not be used to reduce the guaranteed loan or to buy replacement collateral, must be requested, in writing, by the lender and concurred by the Agency, in writing, in advance of the release. A written evaluation will be completed by the lender to justify the release.

(g) *Loan transfer and assumption.*

(1) Subject to approval by the lender and the Agency and the payment to the Agency of a one percent fee, loans are assumable. Assumption shall be deemed to occur in the event of a change in the control of the borrower. For purposes of the loan, change of control means the merger, sale of all or substantially all of the assets of the borrower, or the sale of more than 25 percent of the stock or other equity interest of either the borrower or its corporate parent.

(2) All loan transfers and assumptions must comply with the following:

(i) *Documentation of request.* All transfers and assumptions must be approved, in writing, by the Agency and must be to eligible borrowers.

(ii) *Terms.* Loan terms must not be changed unless the change is approved, in writing, by the Agency with the concurrence of any holder and the transferor, if they have not been or will not be released from liability. Any new loan terms must be within the terms authorized by this Notice. The Agency cannot approve deals unless all statutory, regulatory, and budgetary requirements are met. The lender's request for approval of new loan terms will be supported by an explanation of the reasons for the proposed change in loan terms. The Agency will not approve any change in terms that results in an increase in the cost of the loan guarantee, unless the Agency can secure any additional budget authority that would be required.

(iii) *Release of liability.* The transferor 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 has no reasonable debt-paying ability considering their assets and income in the foreseeable future.

(iv) *Proceeds.* Any proceeds received from the sale of collateral before a transfer and assumption will be credited to the transferor's guaranteed loan debt in inverse order of maturity before the transfer and assumption are closed.

(v) *Additional loans.* Loans to provide additional funds in connection with a transfer and assumption must be considered as a new loan application under the provisions of this Notice.

(vi) *Credit quality.* The lender must make a complete credit analysis of the proposed borrower and the project which is subject to Agency review and approval.

(vii) *Documents.* Prior to Agency approval, the lender must advise the Agency, in writing, that the transaction can be properly and legally transferred, and the conveyance instruments will be filed, registered, or recorded as appropriate.

(A) The assumption will be done on the lender's form of assumption agreement and will contain the Agency case number of the transferor and transferee. The lender will provide the Agency with a copy of the transfer and assumption agreement. The lender must ensure that all transfers and

assumptions are noted on all original Loan Note Guarantees.

(B) The lender will provide to the Agency a written certification that the transfer and assumption is valid, enforceable, and complies with all Agency regulations.

(viii) *Loss resulting from transfer.* If a loss should occur upon consummation of a complete transfer and assumption for less than the full amount of the debt and the transferor is released from liability, the lender, if it holds the guaranteed portion, may file Form RD 449–30, "Loan Note Guaranteed Report of Loss," to recover its pro rata share of the actual loss. If a holder owns any of the guaranteed portion, such portion must be repurchased by the lender or the Agency in accordance with the provisions of this Notice. In completing the report of loss the amount of the debt assumed will be entered as net collateral (recovery). Approved protective advances and accrued interest thereon made during the arrangement of a transfer and assumption will be included in the calculations.

(ix) *Related party.* If the transferor and transferee are affiliated or related parties, any transfer and assumption must be for the full amount of the debt.

(x) *Cash downpayment.* When the transferee will be making a cash downpayment as part of the transfer and assumption:

(A) The lender must have an appropriate appraiser, acceptable to both the transferee and transferor and currently authorized to perform appraisals, determine the value of the collateral securing the loan. The appraisal fee and any other costs will not be paid by the Agency.

(B) The market value of the collateral, plus any additional property the transferee proposes to offer as collateral, must be adequate to secure the balance of the guaranteed loans, as determined by the Agency.

(C) Cash downpayments may be paid directly to the transferor provided:

(*1*) The lender recommends that the cash be released, and the Agency concurs prior to the transaction being completed. The lender may wish to require that an amount be retained for a defined period of time as a reserve against future defaults. Interest on such account may be paid periodically to the transferor or transferee as agreed;

(*2*) The lender determines that the transferee has the repayment ability to meet the obligations of the assumed guaranteed loan as well as any other indebtedness;

(*3*) Any payments by the transferee to the transferor will not suspend the transferee's obligations to continue to meet the guaranteed loan payments as they come due under the terms of the assumption; and

(*4*) The transferor agrees not to take any action against the transferee in connection with the assumption without prior written approval of the lender and 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, in writing, by the Agency in advance of the subordination. Agency concurrence requires that:

(1) The subordination be in the best financial interests of the Federal government;

(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 does not extend the term of the guaranteed loan, and in no event exceeds more than 3 years.

(i) *Repurchase from holder.*

(1) *Repurchase by lender.* A lender has the option to repurchase the unpaid guaranteed portion of the loan from a holder within 30 days of written demand by the holder when the borrower is in default not less than 60 days on principal or interest due on the loan; or the lender has failed to remit to the holder its pro rata share of any payment made by the borrower within 30 days of the lender's receipt thereof. The repurchase by the lender will be for an amount equal to the unpaid guaranteed portion of principal and accrued interest less the lender's servicing fee. The holder must concurrently send a copy of the demand letter to the Agency. The 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 to the lender requesting the repurchase. The lender will accept an assignment without recourse from the holder upon repurchase. The lender is encouraged to repurchase the loan to facilitate the accounting of funds, resolve the problem, and prevent default, where and when reasonable. The lender will notify the holder and the Agency of its decision.

(2) *Agency purchase.*

(i) If the lender does not repurchase the unpaid guaranteed portion of the loan as provided in paragraph (1) of this section, the Agency will purchase from the holder the unpaid principal balance of the guaranteed portion together with accrued interest to the date of repurchase, less the lender's servicing fee, within 30 days after written demand to the Agency from the holder. (This is in addition to the copy of the written demand on the lender.) The guarantee will not cover the note interest to the holder on the guaranteed loan accruing after 90 days from the date of the original demand letter of the holder to the lender requesting the repurchase.

(ii) The holder's demand to the Agency must include a copy of the written demand made upon the lender. The holder must also include evidence of its right to require payment from the Agency. Such evidence will consist of either the original of the Loan Note Guarantee properly endorsed to the Agency or the original of the Assignment Guarantee Agreement properly assigned to the Agency without recourse including all rights, title, and interest in the loan. The holder must include in its demand the amount due including unpaid principal, unpaid interest to date of demand, and interest subsequently accruing from date of demand to proposed payment date. The Agency will be subrogated to all rights of the holder.

(iii) The Agency will notify the lender of its receipt of the holder's demand for payment. The lender must promptly provide the Agency with the information necessary for the Agency to determine the appropriate amount due the holder. Upon request by the Agency, the lender will furnish a current statement certified by an appropriate authorized officer of the lender of the unpaid principal and interest then owed by the borrower on the loan and the amount then owed to any holder. Any discrepancy between the amount claimed by the holder and the information submitted by the lender must be resolved between the lender and the holder before payment will be approved. Such conflict will suspend the running of the 30 day payment requirement.

(iv) Purchase by the Agency neither changes, alters, nor modifies any of the lender's obligations to the Agency arising from the loan or guarantee nor does it waive any of Agency's rights against the lender. The Agency will have the right to set off against the lender all rights inuring to the Agency as the holder of the instrument against the Agency's obligation to the lender under the guarantee.

(3) *Repurchase 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 must sell the guaranteed portion of the loan to the lender for an amount equal to the unpaid principal and interest on such portion less the lender's servicing fee. The 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. The lender must not repurchase from the holder for arbitrage or other purposes to further its own financial gain. Any repurchase must only be made after the lender obtains the Agency's written approval. If the lender does not repurchase the portion from the holder, the Agency may, at its option, purchase such guaranteed portion for servicing purposes.

(j) *Additional loans.* The lender may make additional expenditures or new loans to a borrower with an outstanding loan guaranteed under this Notice only with prior written Agency approval. The Agency will only approve additional expenditures or new loans to the extent such actions where the expenditure or loan will not violate one or more of the loan covenants of the borrower's loan agreement. In all instances, the lender must notify the Agency when they make any additional expenditures or new loans. In all cases, any additional expenditure or loan made by the lender must be junior in priority to the loan guaranteed hereunder.

(k) *Default by borrower.*

(1) The lender must notify the Agency when a borrower is 30 days past due on a payment or is otherwise in default of the loan agreement. Form RD 1980–44, "Guaranteed Loan Borrower Default Status," will be used and the lender will continue to submit this form bimonthly until such time as the loan is no longer in default. If a monetary default exceeds 60 days, the lender will arrange a meeting with the Agency and the borrower to resolve the problem.

(2) In considering options, the prospect for providing a permanent cure without adversely affecting the risk to the Agency and the lender is the paramount objective.

(i) Curative actions include but are not limited to:

(A) Deferment of principal (subject to rights of any holder);

(B) An additional unguaranteed loan by the lender to bring the account current;

(C) Reamortization of or rescheduling the payments on the loan (subject to rights of any holder);

(D) Transfer and assumption of the loan in accordance with the provisions in this Notice;

(E) Reorganization;

(F) Liquidation;

(G) Subsequent loan guarantees; and

(H) Changes in interest rates with the Agency's, the lender's, and holder's approval, provided that the interest rate is adjusted proportionately between the guaranteed and unguaranteed portion of the loan.

(ii) In the event a deferment, rescheduling, reamortization, or moratorium is accomplished, it will be limited to the remaining life of the collateral or remaining limits as contained in the loan term provisions in this Notice, whichever is less.

(l) *Protective advances.* Protective advances are advances made by the lender for the purpose of preserving and protecting the collateral where the debtor has failed to, will not, or cannot meet its obligations. Sound judgment must be exercised in determining that the protective advance preserves collateral and recovery is actually enhanced by making the advance. Protective advances will not be made in lieu of additional loans.

(1) The maximum loss to be paid by the Agency will never exceed the original principal plus accrued interest regardless of any protective advances made.

(2) 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.

(3) Protective advances must constitute an indebtedness of the borrower to the lender and be secured by the security instruments. Agency written authorization is required when cumulative protective advances exceed $200,000.

(m) *Liquidation.* In the event of one or more incidents of default or third-party actions that the borrower cannot or will not cure or eliminate within a reasonable period of time, liquidation may be considered. If the lender concludes that liquidation is necessary, it must request the Agency's concurrence. The lender will liquidate the loan unless the Agency, at its option, carries out liquidation. When the decision to liquidate is made, if the loan has not already been repurchased, provisions will be made for repurchase in accordance with the repurchase from holder provisions in this Notice.

(1) *Decision to liquidate.* A decision to liquidate shall be made when it is determined that the default cannot be cured through actions identified in this Notice or it has been determined that it is in the best financial interest of the Federal government and the lender to liquidate. The decision to liquidate or continue with the borrower must be made as soon as possible when any of the following exist:

(i) A loan has been delinquent 90 days and the lender and borrower have not been able to cure the delinquency through one of the actions identified in this Notice.

(ii) It has been determined that delaying liquidation will jeopardize full recovery on the loan.

(iii) The borrower or lender has been uncooperative in resolving the problem and the Agency or the lender has reason to believe the borrower is not acting in good faith, and it would enhance the position of the guarantee to liquidate immediately.

(2) *Liquidation by the Agency.* The Agency may require the lender to assign the security instruments to the Agency if the Agency, at its option, decides to liquidate the loan. When the Agency liquidates, reasonable liquidation expenses will be assessed against the proceeds derived from the sale of the collateral. Form RD 1980–45, "Notice of Liquidation Responsibility," will be forwarded to the Finance Office when the Agency liquidates the loan.

(3) *Submission of liquidation plan.* The lender will, within 30 days after a decision to liquidate, submit to the Agency, in writing, its proposed detailed method of liquidation. Upon approval by the Agency of the liquidation plan, the lender will commence liquidation.

(4) *Lender's liquidation plan.* The liquidation plan must include, but is not limited to, the following:

(i) Such proof as the Agency requires to establish the lender's ownership of the guaranteed loan promissory note and related security instruments and a copy of the payment ledger if available which reflects the current loan balance and accrued interest to date and the method of computing the interest.

(ii) A full and complete list of all collateral.

(iii) The recommended liquidation methods for making the maximum collection possible on the indebtedness and the justification for such methods, including recommended action for acquiring and disposing of all collateral.

(iv) Necessary steps for preservation of the collateral.

(v) Copies of the borrower's latest available financial statements.

(vi) An itemized list of estimated liquidation expenses expected to be incurred along with justification for each expense.

(vii) A schedule to periodically report to the Agency on the progress of liquidation.

(viii) Estimated protective advance amounts with justification.

(ix) Proposed protective bid amounts on collateral to be sold at auction and a breakdown to show how the amounts were determined.

(x) If a voluntary conveyance is considered, the proposed amount to be credited to the guaranteed debt.

(xi) Legal opinions, if needed.

(xii) The lender will obtain an independent appraisal report meeting the requirements of appraisal requirements in this Notice on all collateral securing the loan which will reflect the fair market value and potential liquidation value. In order to formulate a liquidation plan which maximizes recovery, collateral must be evaluated for the release of hazardous substances, petroleum products, or other environmental hazards which may adversely impact the market value of the collateral. Both the estimate and the appraisal shall consider this aspect. The independent appraiser's fee, including the cost of a Phase I Environmental Site Assessment (ESA) in accordance with ASTM standards, will be shared equally by the Agency and the lender.

(5) *Approval of liquidation plan.* The Agency will inform the lender, in writing, whether it concurs in the lender's liquidation plan. Should the Agency and the lender not agree on the liquidation plan, negotiations will take place between the Agency and the lender to resolve the disagreement. When the liquidation plan is approved by the Agency, the lender will proceed expeditiously with liquidation.

(i) A transfer and assumption of the borrower's operation can be accomplished before or after the loan goes into liquidation. However, if the collateral has been purchased through foreclosure or the borrower has conveyed title to the lender, no transfer and assumption is permitted.

(ii) A protective bid may be made by the lender, with prior Agency written approval, at a foreclosure sale to protect the lender's and the Agency's interest. The protective bid will not exceed the amount of the loan, including expenses of foreclosure, and should be based on the liquidation value considering estimated expenses for holding and reselling the property. These expenses include, but are not limited to, expenses for resale, interest accrual, length of time necessary for resale, maintenance, guard service, weatherization, and prior liens.

(iii) Under no circumstances will the Agency pay more than 90 days of additional accrued interest once the liquidation plan is approved.

(6) *Acceleration.* The lender, or the Agency if it liquidates, will proceed to accelerate the indebtedness as expeditiously as possible when acceleration is necessary including giving any notices and taking any other legal actions required. A copy of the acceleration notice or other acceleration document will be sent to the Agency (or lender if the Agency liquidates). The guaranteed loan will be considered in liquidation once the loan has been accelerated and a demand for payment has been made upon the borrower.

(7) *Filing an estimated loss claim.* When the lender is conducting the liquidation and owns any or all of the guaranteed portion of the loan, the lender will file an estimated loss claim once a decision has been made to liquidate if the liquidation will exceed 90 days. The estimated loss payment will be based on the liquidation value of the collateral. For the purpose of reporting and loss claim computation, the lender will discontinue interest accrual on the defaulted loan in accordance with Agency procedures, and the loss claim will be promptly processed in accordance with applicable Agency regulations.

(8) *Accounting and reports.* When the lender conducts liquidation, it will account for funds during the period of liquidation and will provide the Agency with reports at least quarterly on the progress of liquidation including disposition of collateral, resulting costs, and additional procedures necessary for successful completion of the liquidation.

(9) *Transmitting payments and proceeds to the Agency.* When the Agency is the holder of a portion of the guaranteed loan, the lender will transmit to the Agency its pro rata share of any payments received from the borrower; liquidation; or other proceeds using Form RD 1980–43, "Lender's Guaranteed Loan Payment to USDA."

(10) *Abandonment of collateral.* There may be instances when the cost of liquidation would exceed the potential recovery value of the collection. The lender, with proper documentation and concurrence of the Agency, may abandon the collateral in lieu of liquidation. A proposed abandonment will be considered a servicing action requiring the appropriate environmental review by the Agency in accordance with subpart G of part 1940 of this title. Examples where abandonment may be considered include, but are not limited to:

(i) The cost of liquidation is increased or the value of the collateral is decreased by environmental issues;

(ii) The collateral is functionally or economically obsolete;

(iii) The collateral has deteriorated; or

(iv) The collateral is specialized and there is little or no demand for it.

(11) *Recovery and deficiency judgments.* The lender should take action to maximize recovery from all collateral. The lender will seek a deficiency judgment when there is a reasonable chance of future collection of the judgment. The lender must make a decision whether or not to seek a deficiency judgment when:

(i) A borrower voluntarily liquidates the collateral, but the sale fails to pay the guaranteed indebtedness;

(ii) The collateral is voluntarily conveyed to the lender; or

(iii) A liquidation plan is being developed for forced liquidation.

(12) *Compromise settlement.* A compromise settlement may be considered at any time.

(i) The lender and the Agency must receive complete financial information on all parties obligated for the loan and must be satisfied that the statements reflect the true and correct financial position of the debtor including all assets. Adequate consideration must be received before a release from liability is issued. Adequate consideration includes money, additional security, or other benefit to the goals and objectives of the Agency.

(ii) Once the Agency and the lender agree on a reasonable amount that is fair and adequate, the lender can proceed to effect the compromise settlement.

(iii) A compromise will only be accepted if it is in the best financial interest of the Federal government.

(n) *Determination of loss and payment.* In all liquidation cases, final settlement 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 will have the right to recover losses paid under the guarantee from any party which may be liable.

(1) *Report of loss form.* Form RD 449–30 will be used for calculations of all estimated and final loss determinations. Estimated loss payments may only be approved by the Agency after the Agency has approved a liquidation plan.

(2) *Estimated loss.* In accordance with the requirements of 7 CFR part 4287, an estimated loss claim based on liquidation appraisal value will be prepared and submitted by the lender.

(i) The estimated loss payment shall be applied as of the date of such payment. The total amount of the loss payment remitted by the Agency will be applied by the lender on the guaranteed portion of the loan debt. Such application does not release the borrower from liability.

(ii) An estimated loss will be applied first to reduce the principal balance on the guaranteed loan and the balance, if any, to accrued interest. Interest accrual

on the defaulted loan will be discontinued.

(iii) A protective advance claim will be paid only at the time of the final report of loss payment, except in certain transfer and assumption situations as specified in 7 CFR part 4287.

(3) *Final loss.* Within 30 days after liquidation of all collateral is completed, a final report of loss must be prepared and submitted by the lender 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 approval by the Agency of any final loss report, the lender must account for all funds during the period of liquidation, disposition of the collateral, all costs incurred, and any other information necessary for the successful completion of liquidation. Upon receipt of the final accounting and report of loss, the Agency may audit all applicable documentation to determine the final loss. The lender will make its records available and otherwise assist the Agency in making any investigation. The documentation accompanying the report of loss must support the amounts shown on Form RD 449–30.

(i) The lender must document that all of the collateral has been accounted for and properly liquidated and that liquidation proceeds have been properly accounted for and applied correctly to the loan.

(ii) The lender will show a breakdown of any protective advance amount as to the payee, purpose of the expenditure, date paid, and evidence that the amount expended was proper and that payment was actually made.

(iii) The lender will show a breakdown of liquidation expenses as to the payee, purpose of the expenditure, date paid, and evidence that the amount expended was proper and that payment was actually made. Liquidation expenses are recoverable only from collateral proceeds. Attorney fees may be approved as liquidation expenses provided the fees are reasonable and cover legal issues pertaining to the liquidation that could not be properly handled by the lender and its in-house counsel.

(iv) Accrued interest will be supported by documentation as to how the amount was accrued. If the interest rate was a variable rate, the lender will include documentation of changes in both the selected base rate and the loan rate.

(v) Loss payments will be paid by the Agency within 60 days after the review of the final loss report and accounting of the collateral.

(4) *Loss limit.* The amount payable by the Agency to the lender cannot exceed the limits set forth in the Loan Note Guarantee.

(5) *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.

(6) *Liquidation costs.* Liquidation costs will be deducted from the proceeds of the disposition of collateral. If changed circumstances after submission of the liquidation plan require a substantial revision of liquidation costs, the lender will procure the Agency's written concurrence prior to proceeding with the proposed changes. No in-house expenses of the lender will be allowed. In-house expenses include, but are not limited to, employee's salaries, staff lawyers, travel, and overhead.

(7) *Payment.* When the Agency finds the final report of loss to be proper in all respects, it will approve Form RD 449–30 and proceed as follows:

(i) If the loss is greater than any estimated loss payment, the Agency will pay the additional amount owed by the Agency to the lender.

(ii) 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 payment.

(iii) If the Agency has conducted the liquidation, it will pay the lender in accordance with the Loan Note Guarantee.

(o) *Future recovery.* After a loan has been liquidated and a final loss has been paid by the Agency, any future funds which may be recovered by the lender will be pro-rated between the Agency and the lender based on the original percentage of guarantee.

(p) *Bankruptcy.* The lender is responsible for protecting the guaranteed loan and all collateral securing the loan in bankruptcy proceedings.

(1) *Lender's responsibilities.* It is the lender's responsibility to protect the guaranteed loan debt and all of the collateral securing it in bankruptcy proceedings. These responsibilities include, but are not limited to, the following:

(i) The lender will file a proof of claim where necessary and all the necessary papers and pleadings concerning the case.

(ii) The lender will attend and, where necessary, participate in meetings of the creditors and all court proceedings.

(iii) When permitted by the Bankruptcy Code, the lender will request modification of any plan of reorganization whenever it appears that additional recoveries are likely.

(iv) The Agency will be kept adequately and regularly informed, in writing, of all aspects of the proceedings.

(v) In a Chapter 11 reorganization, if an independent appraisal of collateral is necessary in the Agency's opinion, the Agency and the lender will share such appraisal fee equally.

(2) *Reports of loss during bankruptcy.* When the loan is involved in reorganization proceedings, payment of loss claims may be made as provided in this section. For a liquidation proceeding, only paragraphs (p)(2)(iii) and (v) of this section are applicable.

(i) *Estimated loss payments.*

(A) If a borrower has filed for protection under Chapter 11 of the United States Code for a reorganization (but not Chapter 13) and all or a portion of the debt has been discharged, the lender will request an estimated loss payment of the guaranteed portion of the accrued interest and principal discharged by the court. Only one estimated loss payment is allowed during the reorganization. All subsequent claims of the lender during reorganization will be considered revisions to the initial estimated loss. A revised estimated loss payment may be processed by the Agency, at its option, in accordance with any court-approved changes in the reorganization plan. Once the reorganization plan has been completed, the lender is responsible for submitting the documentation necessary for the Agency to review and adjust the estimated loss claim to reflect any actual discharge of principal and interest and to reimburse the lender for any court-ordered interest-rate reduction under the terms of the reorganization plan.

(B) The lender will use Form RD 449–30 to request an estimated loss payment and to revise any estimated loss payments during the course of the reorganization plan. The estimated loss claim, as well as any revisions to this claim, will be accompanied by documentation to support the claim.

(C) Upon completion of a reorganization plan, the lender will complete a Form RD 1980–44 and forward this form to the Finance Office.

(ii) *Interest loss payments.*

(A) Interest losses sustained during the period of the reorganization plan will be processed in accordance with paragraph (p)(2)(i) of this section.

(B) Interest losses sustained after the reorganization plan is completed will be processed annually when the lender sustains a loss as a result of a permanent interest rate reduction which extends

beyond the period of the reorganization plan.

(C) If an estimated loss claim is paid during the operation of the Chapter 11 reorganization plan and the borrower repays in full the remaining balance without an additional loss sustained by the lender, a final report of loss is not necessary.

(iii) *Final loss payments.* Final loss payments will be processed when the loan is liquidated.

(iv) *Payment application.* The lender must apply estimated loss payments first to the unsecured principal of the guaranteed portion of the debt and then to the unsecured interest of the guaranteed portion of the debt. In the event a bankruptcy court attempts to direct the payments to be applied in a different manner, the lender will immediately notify the Agency servicing office.

(v) *Overpayments.* Upon completion of the reorganization plan, the lender will provide the Agency with the documentation necessary to determine whether the estimated loss paid equals the actual loss sustained. If the actual loss sustained as a result of the reorganization is less than the estimated loss, the lender will reimburse the Agency for the overpayment plus interest at the note rate from the date of payment of the estimated loss. If the actual loss is greater than the estimated loss payment, the lender will submit a revised estimated loss in order to obtain payment of the additional amount owed by the Agency to the lender.

(vi) *Protective advances.* If approved protective advances were made prior to the borrower having filed bankruptcy, these protective advances and accrued interest will be considered in the loss calculations.

(3) *Legal expenses during bankruptcy proceedings.*

(i) When a bankruptcy proceeding results in a liquidation of the borrower by a trustee, legal expenses will be handled as directed by the court.

(ii) Chapter 11 pertains to a reorganization of a business contemplating an ongoing business rather than a termination and dissolution of the business where legal protection is afforded to the business as defined under Chapter 11 of the Bankruptcy Code. Consequently, expenses incurred by the lender in a Chapter 11 reorganization can never be liquidation expenses unless the proceeding becomes a Chapter 11 liquidation. If the proceeding should become a Liquidating 11, reasonable and customary liquidation expenses may be deducted from proceeds of collateral as provided in the Lender's Agreement. Chapter 7 pertains to a liquidation of the borrower's assets. If, and when, liquidation of the borrower's assets under Chapter 7 is conducted by the bankruptcy trustee, then the lender cannot claim expenses.

*P. Basic Borrower Provisions*

(a) The borrower must allow the Agency access to the project and its performance information until the loan is repaid in full and permit periodic inspection of the project by a representative of the Agency.

(b) The borrower must permit representatives of the Agency (or other agencies of the U.S.) to inspect and make copies of any records pertaining to any Agency guaranteed loan during regular office hours of the borrower or at any other time upon agreement between the borrower and the Agency, as appropriate.

*Q. Basic Guarantee and Loan Provisions*

(a) *Conditions of guarantee.* A loan guarantee under this Notice will be evidenced by a Loan Note Guarantee issued by the Agency. Each lender will execute a Lender's Agreement. If a valid Lender's Agreement already exists, it is not necessary to execute a new Lender's Agreement with each loan guarantee. The provisions of this Notice will apply to all outstanding guarantees. In the event of a conflict between the guarantee documents and this Notice as they exist at the time the documents are executed, the Notice will control. To the extent that the Agency publishes a regulation whose provisions are inconsistent with the terms of this Notice, the terms of this Notice shall control for loan guarantees entered into pursuant to this Notice.

(b) *Full faith and credit.* A guarantee under this Notice constitutes an obligation supported by the full faith and credit of the United States and is incontestable except for fraud or misrepresentation of which a lender or holder has actual knowledge at the time it becomes such lender or holder or which a lender or holder participates in or condones. The guarantee will be unenforceable to the extent that any loss is occasioned by a provision for interest on interest. In addition, the guarantee will be unenforceable by the lender to the extent any loss is occasioned by the violation of usury laws, negligent servicing, or failure to obtain the required security regardless of the time at which the Agency acquires knowledge thereof. Any losses occasioned will be unenforceable to the extent that loan funds are used for purposes other than those specifically approved by the Agency in its Conditional Commitment. The Agency will guarantee payment as follows:

(1) To any holder, 100 percent of any loss sustained by the holder on the guaranteed portion of the loan and on interest due on such portion.

(2) To the lender, the lesser of:

(i) 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

(ii) The guaranteed principal advanced to or assumed by the borrower and any interest due thereon.

(c) *Soundness of guarantee.* All loans guaranteed under this Notice must be financially sound and feasible, with reasonable assurance of repayment.

(d) *Rights and liabilities.* When a portion of the guaranteed loan is sold to a holder, the holder shall succeed to all rights of the lender under the Loan Note Guarantee to the extent of the portion purchased. The lender will remain bound to all obligations under the Loan Note Guarantee, Lender's Agreement, and the Agency program regulations. 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 has actual knowledge at the time it becomes the holder or in which the holder participates or condones.

(1) In the event of material fraud, negligence or misrepresentation by the lender or the lender's participation in or condoning of such material fraud, negligence or misrepresentation, the lender will be liable for payments made by the Agency to any holder.

(2) A lender will receive all payments of principal and interest on account of the entire loan and will promptly remit to the holder its pro rata share thereof, determined according to its respective interest in the loan, less only the lender's servicing fee.

(e) *Interest rates.*

(1) *General.* The interest rate for the guaranteed loan will be negotiated between the lender and the applicant. The interest rate charged must be in line with interest rates on other similar government guaranteed loan programs, and is subject to Agency review and approval.

(i) The interest rate may be either fixed or variable, as long as it is a legal rate, and shall be fully amortizing.

(ii) The interest rate for both the guaranteed and unguaranteed portions

of the loan must be of the same type (*i.e.,* both fixed or both variable).

(iii) The guaranteed and unguaranteed portions of the loan can bear interest at different rates, provided that the blended rate on the entire guaranteed loan shall not exceed the rate on the guaranteed portion of the loan by more than one (1) percent.

(iv) Both portions of the loan must amortize at the same rate.

(2) *Variable rates.* A variable interest rate agreed to by the lender and borrower must be based on published indices, such as the Prime Rate, applicable Treasury rate, or the London Inter Bank Offering Rate (LIBOR), and agreed to by the lender and the Agency. Variable rates should have either an internal or external interest rate cap.

(i) The variable interest rate may be adjusted at different intervals during the term of the loan, but the adjustments may not be more often than quarterly and no less than yearly to prevent negative amortization, and must be specified in the loan agreement.

(ii) Variable rate loans will not provide for negative amortization nor will they give the borrower the ability to choose its payment among various options.

(iii) The lender must incorporate, within the variable rate Promissory Note at loan closing, the provision for adjustment of payment installments coincident with an interest-rate adjustment.

(iv) The lender will ensure that the outstanding principal balance is properly amortized within the prescribed loan maturity to eliminate the possibility of a balloon payment at the end of the loan.

(3) *Interest changes.* Any change in the interest rate between the date of issuance of the Conditional Commitment and before the issuance of the Loan Note Guarantee must be approved, in writing, by the Agency approval official. Approval of such a change will be shown as an amendment to the Conditional Commitment. Such changes are subject to the restrictions set forth in the following paragraphs.

(i) *Reductions.* The borrower, lender, and holder (if any) may collectively initiate a permanent or temporary reduction in the interest rate of the guaranteed loan at any time during the life of the loan upon written agreement among these parties. The Agency must be notified by the lender, in writing, within 15 days of the change. If any of the guaranteed portion has been purchased by the Agency, then the Agency will affirm or reject interest rate change proposals in writing. The Agency will concur in such interest-rate changes only when it is demonstrated to the Agency that the change is a more viable alternative than initiating or proceeding with liquidation of the loan or continuing with the loan in its present state.

(A) Fixed rates can be changed to variable rates to reduce the borrower's interest rate only when the variable rate has a ceiling for the life of the guaranteed loan that is less than or equal to the original fixed rate.

(B) The interest rates, after adjustments, must comply with the requirements for interest rates on new loans as established under this Notice.

(C) 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.

(ii) *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.

(f) *Term length, schedule, and repayment.*

(1) The repayment term for a loan under this Notice will be for a maximum period of 20 years or 85 percent of the useful life of the project, as determined by the lender and confirmed by the Agency, whichever is less. The length of the loan term shall be the same for both the guaranteed and unguaranteed portion of the loan.

(2) The first installment of principal may be scheduled for payment after the project is operational and has begun to generate income. However, the first full installment of principal must be due and payable within 3 years from the date of the Promissory Note and be paid at least annually thereafter. Interest payments will be paid at least annually from the date of the note.

(3) 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 (*i.e.*, the loan will fully amortize over its life without any balloon payment due at maturity).

(4) The maturity of a loan will be based on the use of proceeds, the useful life of the assets being financed, and the borrower's ability to repay. The lender may apply the maximum guidelines specified above only when the loan cannot be repaid over a shorter term.

(5) Guarantees must be provided only after consideration is given to the borrower's overall credit quality and to the terms and conditions of any applicable subsidies, tax credits, and other such incentives.

(6) A principal plus interest repayment schedule is permissible.

(7) The lender will determine the particular prepayment provisions to offer, subject to concurrence by the Agency.

(g) *Guaranteed Loan Funding.*

(1) *Maximum amount.* The maximum principal amount of a loan guaranteed under this Program is $250 million. There is no minimum amount. The amount of a loan guaranteed under this Program will be reduced by the amount of other direct Federal funding that the eligible borrower receives for eligible project costs.

(2) *Maximum guarantee.* The maximum guarantee on the principal and interest due on a loan guaranteed under this Program is as follows:

(i) If the loan amount is equal to or less than $80 million, 80%;

(ii) If the loan amount is more than $80 million and less than $125 million, 80% on the first $80 million and 70% on the loan amount that is greater than $80 million; and

(iii) If the loan amount is equal to or more than $125 million, 60%.

(3) *Percentage of eligible project cost.* The amount of a loan guaranteed for a project under this Program will not exceed 80 percent of total eligible project costs. Eligible project costs are only those costs associated with the items listed in paragraphs (g)(3)(i) through (ix) below, as long as the items are an integral and necessary part of the total project.

(i) Purchase and installation of equipment (new, refurbished, or remanufactured), except agricultural tillage equipment, used equipment, and vehicles.

(ii) Construction or retrofitting, except residential.

(iii) Permit and license fees;

(iv) Professional service fees, except for application preparation;

(v) Feasibility studies;

(vi) Business plans;

(vii) Working capital;

(viii) Land acquisition; and

(ix) Cost of financing, excluding guarantee and renewal fees.

(h) *Guarantee and other fees*

(1) *Guarantee fee.* For any loan, the guarantee fee will be paid to the Agency by the lender at the time the Loan Note Guarantee is requested, and is nonrefundable.

(i) The guarantee fee will be calculated by multiplying the outstanding principal balance by the percentage of the loan that is guaranteed under this program by the guarantee fee

rate shown below. The guarantee fee rate shall be determined as follows:

(A) Two percent for guarantees on loans greater than 75 percent of eligible project cost.

(B) One and one-half percent for guarantees on loans of greater than 65 percent but less than or equal to 75 percent of eligible project cost.

(C) One percent for guarantees on loans of 65 percent or less of eligible project cost.

(ii) The guarantee fee may be passed on to the borrower.

(2) *Annual renewal fee.* The annual renewal fee will be calculated on the unpaid principal balance as of close of business on December 31 of each year. Annual renewable fees are due on January 31. For loans where the Loan Note Guarantee is issued between October 1 and December 31, the first annual renewal fee payment will not be due until the January 31st immediately following the first anniversary of the date the Loan Note Guarantee was issued.

(i) Payments not received by April 1 are considered delinquent and, at the Agency's discretion, may result in cancellation of the guarantee to the lender. Holders' rights will continue in effect as specified in the Loan Note Guarantee and Assignment Guarantee Agreement. Any delinquent annual renewal fees will bear interest at the note rate and will be deducted from any loss payment due the lender.

(ii) The annual renewal fee will be calculated by multiplying the outstanding principal balance by the percentage of the loan that is guaranteed under this program by the annual renewal fee rate shown below. The renewal fee rate shall be as follows:

(A) One hundred basis points (1 percent) for guarantees on loans that were originally greater than 75 percent of eligible project costs.

(B) Seventy five basis points (0.75 percent) for guarantees on loans that were originally greater than 65 percent but less than or equal to 75 percent of eligible project costs.

(C) Fifty basis points (0.50 percent) for guarantees on loans that were originally for 65 percent or less of eligible project costs.

(iii) The annual renewal fee will be paid to the Agency for as long as the guaranteed loan is outstanding and is payable during the construction period.

(3) *Lender fees.* The lender may charge the borrower reasonable fees as approved by the Agency.

(i) *Conditions precedent to issuance of Loan Note Guarantee.* All applicable regulatory, statutory, and other requirements must be met to issue the Loan Note Guarantee. The Secretary has the discretion to cancel a Conditional Commitment at any time. Further, the Loan Note Guarantee will not be issued until the lender certifies to 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.

(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, and conforms with applicable Federal, state, and local codes.

(3) Required hazard, flood, liability, worker compensation, and personal life insurance, when required, are in effect.

(4) Truth-in-lending requirements have been met.

(5) All equal credit opportunity requirements have been met.

(6) 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.

(7) 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.

(8) When required, the entire amount of funds for working capital has been disbursed except in cases where the Agency has approved disbursement over an extended period of time.

(9) All other 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 will be disbursed for purposes and in amounts consistent with the Conditional Commitment and Form RD 4279–1. A copy of the detailed loan settlement of the lender must be attached to support this certification.

(12) 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 address any assumptions or reservations in the requirement and must address all adverse changes of the borrower, and any parent, affiliate, or subsidiary of the borrower.

(13) None of the lender's officers, directors, stockholders, or other owners (except stockholders in an institution that has normal stockshare 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 (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.

(14) The loan agreement includes all mitigation 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.

(j) *Issuance of the guarantee.*

(1) When loan closing plans are established, the lender must notify the Agency in writing. At the same time, or immediately after loan closing, the lender must provide the following to the Agency:

(i) Lender's certifications as required by Conditions Precedent to Issuance of Loan Note Guarantee in this Notice;

(ii) An executed Form RD 4279–4, as modified; and

(iii) An executed Form RD 1980–19, "Guaranteed Loan Closing Report," and appropriate guarantee fee.

(2) When the Agency is satisfied that all conditions for the guarantee have been met, the Loan Note Guarantee, Form RD 4279–5, as modified, and the following documents, as appropriate, will be issued:

(i) *Assignment Guarantee Agreement.* If the lender assigns the guaranteed portion of the loan to a holder, the lender, holder, and the Agency must execute the Assignment Guarantee Agreement, Form RD 4279–6, as modified;

(ii) *Certificate of Incumbency.* If requested by the lender, the Agency will provide the lender with a copy of Form RD 4279–7, as modified, "Certificate of Incumbency and Signature," with the

signature and title of the Agency official responsible for signing the Loan Note Guarantee, Lender's Agreement, and Assignment Guarantee Agreement; and

(iii) *Legal documents.* Copies of legal loan documents.

(k) *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 requests, in writing, additional time and within the period allowed, the Agency may grant the request. If the lender satisfies the objections within the time allowed, the guarantee will be issued.

(l) *Replacement of document.* 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.

(m) *Alterations of loan instruments.* Under no circumstances shall the lender alter or approve any alterations of any loan instrument without the prior written approval of the Agency.

(n) *Reorganizations*

(1) *Changes in borrower.* Any changes in borrower ownership or organization prior to the issuance of the Loan Note Guarantee must meet the eligibility requirements of the Program 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.

(2) *Transfer of lenders.* The Agency may approve the substitution of a new lender in place of a former lender who holds an outstanding Conditional Commitment when the Loan Note Guarantee has not yet been issued provided, that there are no changes in the borrower's ownership or control, loan purposes, or scope of project and loan conditions in the Conditional Commitment and the loan agreement remain the same. The new lender's servicing capability, eligibility, and experience will be analyzed by the Agency prior to approval of the substitution. The original lender will provide the Agency with a letter stating the reasons it no longer desires to be a lender for the project. The substituted lender must execute a new part B of Form RD 4279–1.

(3) *Substitution of lender.* After the issuance of a Loan Note Guarantee, the lender shall not sell or transfer the entire loan without the prior written approval of the Agency. The Agency will not pay any loss or share in any costs (*i.e.,* appraisal fees, environmental studies, or other costs associated with servicing or liquidating the loan) with a new lender unless a relationship is established through a substitution of lender in accordance with paragraph (b) of this section. This includes cases where the lender has failed and been taken over by a regulatory agency such as the Federal Deposit Insurance Corporation (FDIC) and the loan is subsequently sold to another lender.

(i) The Agency may approve the substitution of a new lender if:

(A) The proposed substitute lender:

(*1*) Is an eligible lender in accordance with this Notice;

(*2*) Is able to service the loan in accordance with the original loan documents; and

(*3*) Acquires/Agrees, in writing, to acquire title to the unguaranteed portion of the loan held by the original lender and assumes all original loan requirements, including liabilities and servicing responsibilities.

(B) The substitution of the lender is requested, in writing, by the borrower, the proposed substitute lender, and the original lender if still in existence.

(ii) Where the lender has failed and been taken over by FDIC and the guaranteed loan is liquidated by FDIC rather than being sold to another lender, the Agency will pay losses and share in costs as if FDIC were an approved substitute lender.

(o) *Sale or Assignment of Guaranteed Loan.* The lender may sell all or part of the guaranteed portion of the loan on the secondary market or retain the entire loan. The guaranteed portion of the loan shall be fully transferable to any accredited investor. However, the lender shall not sell or participate any amount of the guaranteed or unguaranteed portion of the loan to the borrower or members of the borrower's immediate families, officers, directors, stockholders, other owners, or a parent, subsidiary or affiliate. If the lender desires to market all or part of the guaranteed portion of the loan at or subsequent to loan closing, such loan must not be in default. Loans made with the proceeds of any obligation the interest on which is excludable from income under 26 U.S.C. 103 (interest on State and local banks) or any successor section will not be guaranteed. The Secretary may not guarantee a loan funded with the net proceeds of a bond described in section 142(a) of the Internal Revenue Code of 1986.

(1) *Single note system.* The entire loan is evidenced by one note, and one Loan Note Guarantee is issued. The lender may assign all or part of the guaranteed portion of the loan to one or more holders by using the Agency's Assignment Guarantee Agreement. The holder, upon written notice to the lender and the Agency, may reassign the unpaid guaranteed portion of the loan sold under the Assignment Guarantee Agreement. Upon notification and completion of the assignment through the use of Form RD 4279–6, the assignee shall succeed to all rights and obligations of the holder thereunder. If this option is selected, the lender may not at a later date cause any additional notes to be issued.

(2) *Multi-note system.* Under this option the lender may provide one note for the unguaranteed portion of the loan and no more than 10 notes for the guaranteed portion. When this option is selected by the lender, the holder will receive one of the borrower's executed notes and a Loan Note Guarantee. The Agency will issue a Loan Note Guarantee for each guaranteed note to be attached to the note. An Assignment Guarantee Agreement will not be used when the multi-note option is utilized.

(3) *After loan closing.* If a loan is closed using the multinote option and at a later date additional notes are desired, the lender may cause a series of new notes, so that the total number of notes issued does not exceed the total number provided for in paragraph (b) of this section, to be issued as replacement for previously issued guaranteed notes, provided:

(i) Written approval of the Agency is obtained;

(ii) The borrower agrees and executes the new notes;

(iii) The interest rate terms remain the same as those in effect when the loan was closed;

(iv) The maturity date of the loan is not changed;

(v) The Agency will not bear or guarantee any expenses that may be incurred in reference to such reissuance of notes;

(vi) There is adequate collateral securing the notes;

(vii) No intervening liens have arisen or have been perfected and the secured lien priority is better or remains the same; and

(viii) All holders agree.

(p) *Termination of lender servicing fee.* 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 and, when applied to the guaranteed loan, will be applied on a pro rata basis.

(q) *Participation.* The lender may sell participations in the loan under its normal operating procedures; however, the lender must retain title to the notes if any of them are unguaranteed and retain the lender's interest in the collateral.

(r) *Minimum retention.* Lenders may syndicate a portion of its risk position to other eligible lenders provided that at no time during the life of the guarantee may the original lender hold less than 50 percent of their original unguaranteed position in the loan.

(s) *Termination of guarantee.* A guarantee issued under this Notice will terminate automatically upon:

(1) Full payment of the guaranteed loan;

(2) 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

(3) 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.

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Dated: April 27, 2010.

**Judith A. Canales,**

*Administrator, Rural Development, Business and Cooperative Programs.*

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**Federal Register**

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To provide for an additional temporary extension of programs under the Small Business Act and the Small Business Investment Act of 1958, and for other purposes. (Apr. 30, 2010; 124 Stat. 1129)

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