8–13–10 Friday
Vol. 75 No. 156 Aug. 13, 2010

Pages 49351–49812

# Federal Register

The **FEDERAL REGISTER** (ISSN 0097–6326) is published daily, Monday through Friday, except official holidays, by the Office of the Federal Register, National Archives and Records Administration, Washington, DC 20408, under the Federal Register Act (44 U.S.C. Ch. 15) and the regulations of the Administrative Committee of the Federal Register (1 CFR Ch. I). The Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402 is the exclusive distributor of the official edition. Periodicals postage is paid at Washington, DC.

The **FEDERAL REGISTER** provides a uniform system for making available to the public regulations and legal notices issued by Federal agencies. These include Presidential proclamations and Executive Orders, Federal agency documents having general applicability and legal effect, documents required to be published by act of Congress, and other Federal agency documents of public interest.

Documents are on file for public inspection in the Office of the Federal Register the day before they are published, unless the issuing agency requests earlier filing. For a list of documents currently on file for public inspection, see *www.federalregister.gov.*

**The seal of the National Archives and Records Administration authenticates the Federal Register** as the official serial publication established under the Federal Register Act. Under 44 U.S.C. 1507, the contents of the **Federal Register** shall be judicially noticed.

The **Federal Register** is published in paper and on 24x microfiche. It is also available online at no charge as one of the databases on GPO Access, a service of the U.S. Government Printing Office.

The online edition of the **Federal Register**, *www.gpoaccess.gov/nara,* available through GPO Access, is issued under the authority of the Administrative Committee of the Federal Register as the official legal equivalent of the paper and microfiche editions (44 U.S.C. 4101 and 1 CFR 5.10). It is updated by 6 a.m. each day the **Federal Register** is published and includes both text and graphics from Volume 59, Number 1 (January 2, 1994) forward.

For more information about GPO Access, contact the GPO Access User Support Team, call toll free 1-888-293-6498; DC area 202-512-1530; fax at 202-512-1262; or via e-mail at *gpoaccess@gpo.gov.* The Support Team is available between 7:00 a.m. and 9:00 p.m. Eastern Time, Monday–Friday, except official holidays.

The annual subscription price for the **Federal Register** paper edition is $749 plus postage, or $808, plus postage, for a combined **Federal Register, Federal Register** Index and List of CFR Sections Affected (LSA) subscription; the microfiche edition of the **Federal Register** including the **Federal Register** Index and LSA is $165, plus postage. Six month subscriptions are available for one-half the annual rate. The prevailing postal rates will be applied to orders according to the delivery method requested. The price of a single copy of the daily **Federal Register,** including postage, is based on the number of pages: $11 for an issue containing less than 200 pages; $22 for an issue containing 200 to 400 pages; and $33 for an issue containing more than 400 pages. Single issues of the microfiche edition may be purchased for $3 per copy, including postage. Remit check or money order, made payable to the Superintendent of Documents, or charge to your GPO Deposit Account, VISA, MasterCard, American Express, or Discover. Mail to: U.S. Government Printing Office—New Orders, P.O. Box 979050, St. Louis, MO 63197-9000; or call toll free 1-866-512-1800, DC area 202-512-1800; or go to the U.S. Government Online Bookstore site, see *bookstore.gpo.gov.*

There are no restrictions on the republication of material appearing in the **Federal Register.**

**How To Cite This Publication:** Use the volume number and the page number. Example: 75 FR 12345.

**Postmaster:** Send address changes to the Superintendent of Documents, Federal Register, U.S. Government Printing Office, Washington, DC 20402, along with the entire mailing label from the last issue received.

## SUBSCRIPTIONS AND COPIES

**PUBLIC**

**Subscriptions:**

| | |
|---|---|
| Paper or fiche | **202–512–1800** |
| Assistance with public subscriptions | **202–512–1806** |
| **General online information** | **202–512–1530; 1–888–293–6498** |

**Single copies/back copies:**

| | |
|---|---|
| Paper or fiche | **202–512–1800** |
| Assistance with public single copies | **1–866–512–1800 (Toll-Free)** |

**FEDERAL AGENCIES**

**Subscriptions:**

| | |
|---|---|
| Paper or fiche | **202–741–6005** |
| Assistance with Federal agency subscriptions | **202–741–6005** |

**FEDERAL REGISTER WORKSHOP**

**THE FEDERAL REGISTER: WHAT IT IS AND HOW TO USE IT**

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

WHO: Sponsored by the Office of the Federal Register.

WHAT: Free public briefings (approximately 3 hours) to present:

1. The regulatory process, with a focus on the Federal Register system and the public's role in the development of regulations.
2. The relationship between the Federal Register and Code of Federal Regulations.
3. The important elements of typical Federal Register documents.
4. An introduction to the finding aids of the FR/CFR system.

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

WHEN: Tuesday, September 14, 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

# Contents

**Federal Register**

Vol. 75, No. 156

Friday, August 13, 2010

---

**Separate Parts In This Issue**



---

**Reader Aids**
Consult the Reader Aids section at the end of this page for phone numbers, online resources, finding aids, reminders, and notice of recently enacted public laws.

To subscribe to the Federal Register Table of Contents LISTSERV electronic mailing list, go to http://listserv.access.gpo.gov and select Online mailing list archives, FEDREGTOC-L, Join or leave the list (or change settings); then follow the instructions.

## CFR PARTS AFFECTED IN THIS ISSUE

A cumulative list of the parts affected this month can be found in the Reader Aids section at the end of this issue.

**5 CFR**
532.....49351

**7 CFR**
3022.....49357

**12 CFR**
328.....49363
330.....49363
347.....49363

**Proposed Rules:**
1.....49423
16.....49423
28.....49423

**14 CFR**
39 (5 documents) .....49365, 49368, 49370, 49375, 49377

**16 CFR**
1500.....49379

**20 CFR**

**Proposed Rules:**
1.....49596
10.....49596
25.....49596

**26 CFR**
1 (2 documents) .....49380, 49394
602 (2 documents) .....49380, 49394

**Proposed Rules:**
1 (2 documents) .....49427, 49428

**29 CFR**
4022.....49407

**30 CFR**

**Proposed Rules:**
56.....49429
57.....49429

**33 CFR**
1.....49408
114.....49408
115.....49408
116.....49408
117.....49408
118.....49408
138.....49411
165.....49412

**34 CFR**

**Proposed Rules:**
222.....49432

**40 CFR**
Ch. 1.....49556
35.....49414

**Proposed Rules:**
93.....49435
704.....49656
710.....49656
711.....49656

**44 CFR**
64.....49417

**50 CFR**
648.....49420
679.....49422

**Proposed Rules:**
622.....49447

# Rules and Regulations

Federal Register
Vol. 75, No. 156
Friday, August 13, 2010



## OFFICE OF PERSONNEL MANAGEMENT

### 5 CFR Part 532

**RIN 3206–AM09**

### Prevailing Rate Systems; Nonappropriated Fund Wage and Survey Areas

**AGENCY:** U.S. Office of Personnel Management.

**ACTION:** Final rule.

**SUMMARY:** The U.S. Office of Personnel Management is issuing a final rule to correct several minor formatting, spelling, and typographical errors in appendix D to subpart B of part 532—Nonappropriated Fund (NAF) Wage and Survey Areas. This document also corrects editorial or printing errors, inconsistencies, and omissions made in previously published rules. The purpose of this rule is not to make policy changes for Federal Wage System (FWS) NAF employees but rather to ensure Appendix D accurately reflects the correct wage area definitions for NAF employees as recommended by the Federal Prevailing Rate Advisory Committee (FPRAC). FWS NAF employees will not be affected by the corrections in this final rule because the lead agency for FWS NAF surveys has followed FPRAC recommended wage area definitions when conducting wage surveys and publishing wage schedules. For the convenience of the reader, Appendix D is being reprinted in its entirety.

**DATES:** This rule is effective on September 13, 2010.

**FOR FURTHER INFORMATION CONTACT:** Madeline Gonzalez, (202) 606–2838; e-mail *pay-performance-policy@opm.gov;* or FAX: (202) 606–4264.

**SUPPLEMENTARY INFORMATION:** On April 6, 2010, the U.S. Office of Personnel Management (OPM) issued a proposed rule (75 FR 17316) to make several minor corrections to appendix D to subpart B of part 532—Nonappropriated Fund (NAF) Wage and Survey Areas. The revisions contained in this rule concern formatting, spelling, and typographical errors. This document also corrects editorial or printing errors, inconsistencies, and omissions made in previously published rules. The purpose of this rule is not to make policy changes for Federal Wage System (FWS) NAF employees but rather to ensure Appendix D accurately reflects the correct wage area definitions for NAF employees as recommended by the Federal Prevailing Rate Advisory Committee (FPRAC). FWS NAF employees are not affected by the corrections in this final rule because the lead agency for FWS NAF surveys has followed FPRAC recommended wage area definitions when conducting wage surveys and publishing wage schedules. Appendix D is being reprinted in its entirety. The proposed rule had a 30-day comment period, during which OPM received no comments. Therefore, we are adopting the proposed rule as final.

### Regulatory Flexibility Act

I certify that these regulations will not have a significant economic impact on a substantial number of small entities because they will affect only Federal agencies and employees.

### List of Subjects in 5 CFR Part 532

Administrative practice and procedure, Freedom of information, Government employees, Reporting and recordkeeping requirements, Wages.

U.S. Office of Personnel Management.

**John Berry,**

*Director.*

■ Accordingly, the U.S. Office of Personnel Management amends 5 CFR part 532 as follows:

## PART 532—PREVAILING RATE SYSTEMS

■ 1. The authority citation for part 532 continues to read as follows:

**Authority:** 5 U.S.C. 5343, 5346; § 532.707 also issued under 5 U.S.C. 552.

■ 2. Revise appendix D to subpart B to read as follows:

### Appendix D to Subpart B of Part 532—Nonappropriated Fund Wage and Survey Areas

This appendix lists the wage area definitions for NAF employees. With a few exceptions, each area is defined in terms of county units or independent cities. Each wage area definition consists of:

(1) *Wage area title.* Wage areas usually carry the title of the county or counties surveyed.

(2) *Survey area definition.* Lists each county or independent city in the survey area.

(3) *Area of application definition.* Lists each county or independent city which, in addition to the survey area, is in the area of application.

**Definitions of Wage Areas and Wage Area Survey Areas**

**ALABAMA**
**Calhoun**

*Survey Area*

Alabama:
Calhoun

*Area of Application. Survey area plus:*

Alabama:
Jefferson

**Madison**

*Survey Area*

Alabama:
Madison

*Area of Application. Survey area plus:*

Tennessee:
Coffee
Davidson
Hamilton
Rutherford

**Montgomery**

*Survey Area*

Alabama:
Montgomery

*Area of Application. Survey area plus:*

Alabama:
Dale
Dallas
Macon

**ALASKA**
**Anchorage**

*Survey Area*

Alaska: (borough)
Anchorage

*Area of Application. Survey area plus:*

Alaska: (boroughs and census areas)
Fairbanks North Star
Juneau
Kenai Peninsula
Ketchikan Gateway
Kodiak Island
Sitka
Southeast Fairbanks
Valdez-Cordova
Yukon-Koyukuk

**ARIZONA**
**Maricopa**
*Survey Area*
Arizona:
Maricopa
*Area of Application. Survey area plus:*
Arizona:
Coconino
Yavapai

**Pima**
*Survey Area*
Arizona:
Pima
*Area of Application. Survey area plus:*
Arizona:
Cochise

**Yuma**
*Survey Area*
Arizona:
Yuma
*Area of Application. Survey area plus:*
California:
Imperial

**ARKANSAS**
**Pulaski**
*Survey Area*
Arkansas:
Pulaski
*Area of Application. Survey area plus:*
Arkansas:
Jefferson
Sebastian
Washington

**CALIFORNIA**
**Kern**
*Survey Area*
California:
Kern
*Area of Application. Survey area plus:*
California:
Fresno
Kings

**Los Angeles**
*Survey Area*
California:
Los Angeles
*Area of Application. Survey area.*

**Monterey**
*Survey Area*
California:
Monterey
*Area of Application. Survey area plus:*
California:
Santa Clara

**Orange**
*Survey Area*
California:
Orange
*Area of Application. Survey area.*

**Riverside**
*Survey Area*
California:
Riverside
*Area of Application. Survey area.*

**Sacramento**
*Survey Area*
California:
Sacramento
*Area of Application. Survey area plus:*
California:
Yuba
Oregon:
Jackson
Klamath

**San Bernardino**
*Survey Area*
California:
San Bernardino
*Area of Application. Survey area.*

**San Diego**
*Survey Area*
California:
San Diego
*Area of Application. Survey area.*

**San Joaquin**
*Survey Area*
California:
San Joaquin
*Area of Application. Survey area.*

**Santa Barbara**
*Survey Area*
California:
Santa Barbara
*Area of Application. Survey area plus:*
California:
San Luis Obispo

**Solano**
*Survey Area*
California:
Solano
*Area of Application. Survey area plus:*
California:
Alameda
Contra Costa
Marin
Napa
San Francisco
Sonoma

**Ventura**
*Survey Area*
California:
Ventura
*Area of Application. Survey area.*

**COLORADO**
**Arapahoe-Denver**
*Survey Area*
Colorado:
Arapahoe
Denver
*Area of Application. Survey area plus:*
Colorado:
Mesa

**El Paso**
*Survey Area*
Colorado:
El Paso
*Area of Application. Survey area plus:*
Colorado:
Bent
Otero
Pueblo

**CONNECTICUT**
**New London**
*Survey Area*
Connecticut:
New London
*Area of Application. Survey area plus:*
Connecticut:
New Haven

**DELAWARE**
**Kent**
*Survey Area*
Delaware:
Kent
*Area of Application. Survey area plus:*
Delaware:
Sussex
Maryland:
Kent

**DISTRICT OF COLUMBIA**
**Washington, DC**
*Survey Area*
District of Columbia:
Washington, DC
*Area of Application. Survey area.*

**FLORIDA**
**Bay**
*Survey Area*
Florida:
Bay
*Area of Application. Survey area.*

**Brevard**
*Survey Area*
Florida:
Brevard
*Area of Application. Survey area.*

**Duval**
*Survey Area*
Florida:
Duval
*Area of Application. Survey area plus:*
Florida:
Alachua
Clay
Columbia
Georgia:
Camden

**Escambia**
*Survey Area*
Florida:
Escambia
*Area of Application. Survey area plus:*
Florida:
Santa Rosa

**Hillsborough**
*Survey Area*
Florida:
Hillsborough
*Area of Application. Survey area plus:*
Florida:
Pinellas
Polk

**Miami-Dade**
*Survey Area*
Florida:
Miami-Dade
*Area of Application. Survey area plus:*
Florida:
Palm Beach

**Monroe**
*Survey Area*
Florida:
Monroe

*Area of Application. Survey area.*

**Okaloosa**

*Survey Area*

Florida:
Okaloosa

*Area of Application. Survey area plus:*

Florida:
Walton

**Orange**

*Survey Area*

Florida:
Orange

*Area of Application. Survey area.*

**GEORGIA**
**Chatham**

*Survey Area*

Georgia:
Chatham

*Area of Application. Survey area plus:*

Georgia:
Glynn
Liberty

South Carolina:
Beaufort

**Clayton-Cobb-Fulton**

*Survey Area*

Georgia:
Clayton
Cobb
Fulton

*Area of Application. Survey area plus:*

Georgia:
Bartow
Clarke
De Kalb

**Columbus**

*Survey Area*

Georgia:
Columbus Consolidated Government

*Area of Application. Survey area plus:*

Georgia:
Chattahoochee

**Dougherty**

*Survey Area*

Georgia:
Dougherty

*Area of Application. Survey area.*

**Houston**

*Survey Area*

Georgia:
Houston

*Area of Application. Survey area plus:*

Georgia:
Laurens

**Lowndes**

*Survey Area*

Georgia:
Lowndes

*Area of Application. Survey area.*

**Richmond**

*Survey Area*

Georgia:
Richmond

*Area of Application. Survey area plus:*

South Carolina:
Aiken

**GUAM**
**Guam**

*Survey Area*

Guam

*Area of Application. Survey area.*

**HAWAII**
**Honolulu**

*Survey Area*

Hawaii:
Honolulu

*Area of Application. Survey area plus:*

Hawaii (counties):
Hawaii
Kauai
Maui

Pacific Islands:
Midway Islands
Johnston Atoll
American Samoa

**IDAHO**
**Ada-Elmore**

*Survey Area*

Idaho:
Ada
Elmore

*Area of Application. Survey area.*

**ILLINOIS**
**Lake**

*Survey Area*

Illinois:
Lake

*Area of Application. Survey area plus:*

Illinois:
Cook
Rock Island
Vermilion

Iowa:
Johnson

Michigan:
Dickinson
Marquette

Wisconsin:
Dane
Milwaukee

**St. Clair**

*Survey Area*

Illinois:
St. Clair

*Area of Application. Survey area plus:*

Illinois:
Madison
Williamson

Missouri: (city)
St. Louis

Missouri: (counties)
Jefferson
Pulaski

**KANSAS**
**Leavenworth/Jackson-Johnson**

*Survey Area*

Kansas:
Leavenworth

Missouri:
Jackson
Johnson

*Area of Application. Survey area plus:*

Kansas:
Shawnee

Missouri:
Boone
Camden
Cass

**Sedgwick**

*Survey Area*

Kansas:
Sedgwick

*Area of Application. Survey area plus:*

Kansas:
Geary
Saline

**KENTUCKY**
**Christian-Montgomery**

*Survey Area*

Kentucky:
Christian

Tennessee:
Montgomery

*Area of Application. Survey area.*

**Hardin-Jefferson**

*Survey Area*

Kentucky:
Hardin
Jefferson

*Area of Application. Survey area plus:*

Indiana:
Jefferson
Martin

Kentucky:
Fayette
Madison
Warren

**LOUISIANA**
**Bossier-Caddo**

*Survey Area*

Louisiana: (parishes)
Bossier
Caddo

*Area of Application. Survey area plus:*

Texas:
Bowie

**Orleans**

*Survey Area*

Louisiana: (parish)
Orleans

*Area of Application. Survey area plus:*

Louisiana: (parish)
Plaquemines

**Rapides**

*Survey Area*

Louisiana: (parish)
Rapides

*Area of Application. Survey area plus:*

Louisiana: (parish)
Vernon

**MAINE**
**Cumberland**

*Survey Area*

Maine:
Cumberland

*Area of Application. Survey area plus:*

Maine:
Aroostook
Hancock
Kennebec
Knox
Penobscot
Sagadahoc
Washington

**York**

*Survey Area*

Maine:
York

*Area of Application. Survey area plus:*

New Hampshire:
Rockingham

Vermont:
Windsor

**MARYLAND**
**Anne Arundel**

*Survey Area*

Maryland:
Anne Arundel

*Area of Application. Survey area plus:*

Maryland: (city)
Baltimore

Maryland: (county)
Baltimore

**Charles-St. Mary's**

*Survey Area*

Maryland:
Charles
St. Mary's

*Area of Application. Survey area plus:*

Maryland:
Calvert

Virginia:
King George

**Frederick**

*Survey Area*

Maryland:
Frederick

*Area of Application. Survey area plus:*

West Virginia:
Berkeley

**Harford**

*Survey Area*

Maryland:
Harford

*Area of Application. Survey area plus:*

Maryland:
Cecil

**Montgomery-Prince George's**

*Survey Area*

Maryland:
Montgomery
Prince George's

*Area of Application. Survey area.*

**MASSACHUSETTS**
**Hampden**

*Survey Area*

Massachusetts:
Hampden

*Area of Application. Survey area plus:*

Connecticut:
Hartford

Massachusetts:
Hampshire

**Middlesex**

*Survey Area*

Massachusetts:
Middlesex

*Area of Application. Survey area plus:*

Massachusetts:
Norfolk
Plymouth
Suffolk

New Hampshire:
Hillsborough

**MICHIGAN**
**Macomb**

*Survey Area*

Michigan:
Macomb

*Area of Application. Survey area plus:*

Michigan:
Alpena
Calhoun
Crawford
Grand Traverse
Huron
Iosco
Leelanau
Ottawa
Saginaw
Washtenaw
Wayne

Ohio:
Ottawa

**MINNESOTA**
**Hennepin**

*Survey Area*

Minnesota:
Hennepin

*Area of Application. Survey area plus:*

Minnesota:
Morrison
Murray
Ramsey
Stearns
St. Louis

Wisconsin:
Juneau
Monroe
Polk

**MISSISSIPPI**
**Harrison**

*Survey Area*

Mississippi:
Harrison

*Area of Application. Survey area plus:*

Alabama:
Mobile

Mississippi:
Forest
Jackson

**Lauderdale**

*Survey Area*

Mississippi:
Lauderdale

*Area of Application. Survey area plus:*

Mississippi:
Hinds
Rankin
Warren

**Lowndes**

*Survey Area*

Mississippi:
Lowndes

*Area of Application. Survey area plus:*

Alabama:
Tuscaloosa

**MONTANA**
**Cascade**

*Survey Area*

Montana:
Cascade

*Area of Application. Survey area plus:*

Montana:
Fergus
Flathead
Hill
Lewis and Clark
Valley
Yellowstone

**NEBRASKA**
**Douglas-Sarpy**

*Survey Area*

Nebraska:
Douglas
Sarpy

*Area of Application. Survey area plus:*

Iowa:
Marion
Polk
Woodbury

Nebraska:
Hall
Lancaster
Saunders

South Dakota:
Minnehaha

**NEVADA**
**Churchill-Washoe**

*Survey Area*

Nevada:
Churchill
Washoe

*Area of Application. Survey area plus:*

California:
Lassen
Mono

Nevada:
Mineral

**Clark**

*Survey Area*

Nevada:
Clark

*Area of Application. Survey area.*

**NEW JERSEY**
**Burlington**

*Survey Area*

New Jersey:
Burlington

*Area of Application. Survey area plus:*

Delaware:
New Castle

New Jersey:
Atlantic
Cape May
Ocean
Salem

**Monmouth**

*Survey Area*

New Jersey:
Monmouth

*Area of Application. Survey area.*

**Morris**

*Survey Area*

New Jersey:
Morris

*Area of Application. Survey area plus:*

New Jersey:
Somerset

Pennsylvania:
Monroe

**NEW MEXICO**
**Bernalillo**

*Survey Area*

New Mexico:
Bernalillo

*Area of Application. Survey area plus:*

New Mexico:
McKinley

**Curry**

*Survey Area*

New Mexico:
Curry

*Area of Application. Survey area plus:*

Texas:
Lubbock
Potter

**Dona Ana**

*Survey Area*

New Mexico:
Dona Ana

*Area of Application. Survey area plus:*

New Mexico:
Chaves
Otero

**NEW YORK**
**Jefferson**

*Survey Area*

New York:
Jefferson

*Area of Application. Survey area plus:*

New York:
Albany
Oneida
Onondaga
Ontario
Schenectady
Steuben

**Kings-Queens**

*Survey Area*

New York:
Kings
Queens

*Area of Application. Survey area plus:*

New Jersey:
Essex
Hudson

New York:
Bronx
Nassau
New York
Richmond
Suffolk

**Niagara**

*Survey Area*

New York:
Niagara

*Area of Application. Survey area plus:*

New York:
Erie
Genesee

Pennsylvania:
Erie

**Orange**

*Survey Area*

New York:
Orange

*Area of Application. Survey area plus:*

New York:
Dutchess
Westchester

**NORTH CAROLINA**
**Craven**

*Survey Area*

North Carolina:
Craven

*Area of Application. Survey area plus:*

North Carolina:
Carteret
Dare

**Cumberland**

*Survey Area*

North Carolina:
Cumberland

*Area of Application. Survey area plus:*

North Carolina:
Durham
Rowan

**Onslow**

*Survey Area*

North Carolina:
Onslow

*Area of Application. Survey area plus:*

North Carolina:
New Hanover

**Wayne**

*Survey Area*

North Carolina:
Wayne

*Area of Application. Survey area plus:*

North Carolina:
Halifax

**NORTH DAKOTA**
**Grand Forks**

*Survey Area*

North Dakota:
Grand Forks

*Area of Application. Survey area plus:*

North Dakota:
Cass
Cavalier
Pembina
Steele

**Ward**

*Survey Area*

North Dakota:
Ward

*Area of Application. Survey area plus:*

North Dakota:
Divide

**OHIO**
**Greene-Montgomery**

*Survey Area*

Ohio:
Greene
Montgomery

*Area of Application. Survey area plus:*

Indiana:
Allen
Grant
Marion
Miami

Ohio:
Clinton
Franklin
Hamilton
Licking
Ross

West Virginia:
Raleigh
Wayne

**OKLAHOMA**
**Comanche**

*Survey Area*

Oklahoma:
Comanche

*Area of Application. Survey area plus:*

Oklahoma:
Cotton
Jackson

**Oklahoma**

*Survey Area*

Oklahoma:
Oklahoma

*Area of Application. Survey area plus:*

Oklahoma:
Garfield
Muskogee
Pittsburg

**PENNSYLVANIA**
**Allegheny**

*Survey Area*

Pennsylvania:
Allegheny

*Area of Application. Survey area plus:*

Ohio:
Cuyahoga
Trumball

Pennsylvania:
Butler
Westmoreland

West Virginia:
Harrison

**Cumberland**

*Survey Area*

Pennsylvania:
Cumberland

*Area of Application. Survey area plus:*

Pennsylvania:
Blair
Franklin

**Montgomery**

*Survey Area*

Pennsylvania:
Montgomery

*Area of Application. Survey area plus:*

Pennsylvania:
Bucks
Chester
Luzerne
Philadelphia

**York**

*Survey Area*

Pennsylvania:
York

*Area of Application. Survey area plus:*

Pennsylvania:
Lebanon

**PUERTO RICO**
**Guaynabo-San Juan**

*Survey Area*

Puerto Rico: (municipalities)
Guaynabo
San Juan

*Area of Application. Survey area plus:*

Puerto Rico: (municipalities)
Aguadilla
Bayamon
Ceiba
Isabela
Ponce

Salinas
Toa Baja
Vieques
U.S. Virgin Islands:
St. Croix
St. Thomas

**RHODE ISLAND**
**Newport**

*Survey Area*

Rhode Island:
Newport

*Area of Application. Survey area plus:*

Massachusetts:
Barnstable
Nantucket
Rhode Island:
Providence
Washington

**SOUTH CAROLINA**
**Charleston**

*Survey Area*

South Carolina:
Charleston

*Area of Application. Survey area plus:*

South Carolina:
Berkeley
Horry

**Richland**

*Survey Area*

South Carolina:
Richland

*Area of Application. Survey area plus:*

North Carolina:
Buncombe
South Carolina:
Sumpter
Tennessee:
Washington

**SOUTH DAKOTA**
**Pennington**

*Survey Area*

South Dakota:
Pennington

*Area of Application. Survey area plus:*

Montana:
Custer
South Dakota:
Fall River
Meade
Wyoming:
Sheridan

**TENNESSEE**
**Shelby**

*Survey Area*

Tennessee:
Shelby

*Area of Application. Survey area plus:*

Arkansas:
Mississippi
Missouri:
Butler

**TEXAS**
**Bell**

*Survey Area*

Texas:
Bell

*Area of Application. Survey area plus:*

Texas:
Burnet
Coryell
Falls

**Bexar**

*Survey Area*

Texas:
Bexar

*Area of Application. Survey area plus:*

Texas:
Comal
Kerr
Travis
Val Verde

**Dallas**

*Survey Area*

Texas:
Dallas

*Area of Application. Survey area plus:*

Texas:
Fannin
Galveston
Harris

**El Paso**

*Survey Area*

Texas:
El Paso

*Area of Application. Survey area.*

**McLennan**

*Survey Area*

Texas:
McLennan

*Area of Application. Survey area.*

**Nueces**

*Survey Area*

Texas:
Nueces

*Area of Application. Survey area plus:*

Texas:
Bee
Calhoun
Kleberg
San Patricio
Webb

**Tarrant**

*Survey Area*

Texas:
Tarrant

*Area of Application. Survey area plus:*

Texas:
Cooke
Palo Pinto

**Taylor**

*Survey Area*

Texas:
Taylor

*Area of Application. Survey area.*

**Tom Green**

*Survey Area*

Texas:
Tom Green

*Area of Application. Survey area plus:*

Texas:
Howard

**Wichita**

*Survey Area*

Texas:
Wichita

*Area of Application. Survey area.*

**UTAH**
**Davis-Salt Lake-Weber**

*Survey Area*

Utah:
Davis
Salt Lake
Weber

*Area of Application. Survey area plus:*

Utah:
Box Elder
Tooele
Uintah

**VIRGINIA**
**Alexandria-Arlington-Fairfax**

*Survey Area*

Virginia: (city)
Alexandria
Virginia: (counties)
Arlington
Fairfax

*Area of Application. Survey area.*

**Chesterfield-Richmond**

*Survey Area*

Virginia: (city)
Richmond
Virginia: (county)
Chesterfield

*Area of Application. Survey area plus:*

Virginia: (cities)
Bedford
Charlottesville
Salem
Virginia: (counties)
Caroline
Nottoway
Prince George
West Virginia:
Pendleton

**Hampton-Newport News**

*Survey Area*

Virginia: (cities)
Hampton
Newport News

*Area of Application. Survey area plus:*

Virginia: (city)
Williamsburg
Virginia: (county)
York

**Norfolk-Portsmouth-Virginia Beach**

*Survey Area*

Virginia: (cities)
Norfolk
Portsmouth
Virginia Beach

*Area of Application. Survey area plus:*

North Carolina:
Pasquotank
Virginia: (cities)
Chesapeake
Suffolk
Virginia: (counties)
Accomack
Northampton

**Prince William**

*Survey Area*

Virginia:
Prince William

*Area of Application. Survey area plus:*

Virginia:

Fauquier

**WASHINGTON**
**Kitsap**

*Survey Area*

Washington:
Kitsap

*Area of Application. Survey area plus:*

Washington:
Clallam
Jefferson

**Pierce**

*Survey Area*

Washington:
Pierce

*Area of Application. Survey area plus:*

Oregon:
Clatsop
Coos
Douglas
Multnomah
Tillamook

Washington:
Clark
Grays Harbor

**Snohomish**

*Survey Area*

Washington:
Snohomish

*Area of Application. Survey area plus:*

Washington:
Island
King
Yakima

**Spokane**

*Survey Area*

Washington:
Spokane

*Area of Application. Survey area plus:*

Washington:
Adams
Walla Walla

**WYOMING**
**Laramie**

*Survey Area*

Wyoming:
Laramie

*Area of Application. Survey area.*

[FR Doc. 2010–19969 Filed 8–12–10; 8:45 am]

**BILLING CODE 6325–39–P**

## DEPARTMENT OF AGRICULTURE

### Office of the Chief Financial Officer

### 7 CFR Part 3022

**RIN 0524–AA34**

## United States Department of Agriculture Research Misconduct Regulations for Extramural Research

**AGENCY:** Office of the Chief Financial Officer, USDA.

**ACTION:** Final rule.

**SUMMARY:** The Office of the Chief Financial Officer (OCFO) is establishing U.S. Department of Agriculture (USDA) regulations implementing the Federal Policy on Research Misconduct applicable to extramural research. The regulation defines research misconduct and establishes basic USDA requirements for the conduct of fair and timely investigations of alleged or suspected infractions. The regulation also includes instructions on USDA administrative actions when research misconduct is found.

**DATES:** This rule is effective on August 13, 2010.

**FOR FURTHER INFORMATION CONTACT:** Sara Mazie, USDA Research Integrity Officer, 214W Whitten Building, Washington, DC 20250; Telephone: (202) 720–5923; E-mail: *researchintegrity@usda.gov.*

**SUPPLEMENTARY INFORMATION:** On December 6, 2000, the National Science and Technology Council, Office of Science and Technology Policy of the Executive Office of the President (OSTP), published in the **Federal Register** (65 FR 76260) the Federal Policy on Research Misconduct (OSTP Policy) as a final, government-wide policy addressing research misconduct. The purpose of the policy was to establish: (1) Uniformity among the Federal agencies' definitions of research misconduct, and (2) consistency in Federal agencies' processes for responding to allegations of research misconduct. The OSTP Policy covers both intramural research as well as extramural research.

This rule establishes U.S. Department of Agriculture (USDA or the Department) regulations to permanently implement the provisions of the OSTP Policy applicable to extramural research. An interim USDA Research Misconduct Policy was issued as a Secretary's Memorandum on Research Misconduct Policies and Procedures in July, 2006. The Secretary's Memorandum is consistent with the OSTP Policy. The substance of the regulation is the same as the policies and procedures in the Secretary's Memorandum that relate to extramural research. Accordingly, all USDA agencies that conduct or support extramural research are expected either to: (1) Establish procedures to foster integrity in research activities, respond to allegations of research misconduct, and remedy findings of research misconduct, consistent with applicable laws, regulations, the OSTP Policy, and this proposed regulation; or (2) initiate and sign a standing Memorandum of Understanding (MOU) between the agency and Research Education and Economics mission area to have another USDA agency act on its behalf in lieu of developing its own research misconduct procedures.

The regulation sets forth in Title 7 of the Code of Federal Regulations, a new part 3022 (7 CFR part 3022), referred to below as the regulation. The rule defines a number of terms that are used in new part 3022. Definitions of the following terms are set forth in § 3022.1: Adjudication; Agency Research Integrity Officer (ARIO); allegation; applied research; Assistant Inspector General for Investigations; basic research; extramural research; fabrication; falsification; finding of research misconduct; inquiry; intramural research; investigation; OIG; OSTP; plagiarism; preponderance of the evidence; research; research institution; research misconduct; research record; USDA; and USDA Research Integrity Officer (RIO).

### Summary of Comments and Recommendations

The proposed rule was published in the **Federal Register** on November 24, 2008 (73 FR 70915), requesting comments from the public. Comments were received on the proposed rule from three organizations including The Council on Government Relations (COGR), Arizona State University (ASU), and the Physicians Committee for Responsible Medicine (PCRM). ASU stated that it supported COGR's comments which are evidenced by the comments being duplicative in nature. The comments are summarized as follows:

(1) *Comment:* Concern that the proposed rule is intended only as core elements for the Department's agencies and that individual agencies within the Department can and may implement separate policies that are consistent with the proposed rule. The Department is urged to reevaluate whether this approach achieves the Federal goals of consistency and uniformity.

*Response:* The proposed rule implements the OSTP policy and serves as the core policy for the Department. The agencies may supplement the core with agency requirements. USDA's approach is similar in nature to other streamlining efforts whereas there is a standard that is supplemented with agency specifics. This approach is necessary to meet the unique mission and structure of each agency within the Department while maintaining consistency to the extent possible.

(2) *Comment:* A research institution must have the right to conduct an inquiry before reporting the allegation to the USDA. Such a provision is incorporated in the Federal Policy and common in the policies of other

Departments and agencies. The proposed rule should be changed to require notification "where an inquiry determines an investigation is necessary."

*Response:* The Federal policy states that the institution is to notify the agency when (1) an allegation involves federally funded research, AND (2) institution inquiry into an allegation warrants them moving on to an investigation. USDA modified the proposed regulation to be consistent with the Federal policy.

(3) *Comment:* § 3022.10, Reporting to USDA, should include "the institution's adjudicating official's determination and any corrective action taken or planned." A parallel change should be made to § 3022.12 addressing Remedies for Noncompliance. USDA must consider the institution's corrective action.

*Response:* The institution should include documentation along with the report to USDA of the adjudicating official's determination and any institutional corrective action taken or planned. Changes were made to § 3022.10, Reporting to USDA, to make this clear. The agency may utilize this information in determining the administrative action, if any, to take; however, USDA and the institution have different interests and the corrective action by each must take into consideration their own interests. The Federal policy identifies for agencies a number of considerations in determining an administrative action but the institution's corrective action is not identified as one.

(4) *Comment:* The USDA policy fails to include a critical part of the Federal policy in regard to institutional and agency administrative action, e.g., assessing the degree to which the misconduct was knowing, intentional or reckless, whether the event was isolated or part of a pattern of behavior, and the level of impact on the research record.

*Response:* It is agreed that the USDA policy does not include considerations that each USDA agency should contemplate in determining an administrative action. Certain considerations should be common across USDA. § 3022.12 was modified to include language for the agency, in determining an administrative action, to consider, among other things, the seriousness of the misconduct.

(5) *Comment:* Section 3022.4 should be deleted from the policy in its entirety and replaced with a simple reminder that USDA can request a copy of an awardee's policies for handling allegations of research misconduct.

*Response:* USDA's review of an institution's research misconduct policy has no bearing on the institution moving forward with its inquiry, etc. USDA's review of the institution's policy is only for USDA to determine if it will rely on the institution's efforts but it by no means is to thwart the institution's efforts.

(6) *Comment:* The commenter recognized USDA's reservation of the right to conduct a separate inquiry, investigation and/or adjudication; however, it took the position that the reasons be limited to those identified in items 1. through 3. of § 3022.5(a) and should not be open to "any other reason" USDA considers appropriate. A recommendation is made to change the additional reservation to "any other good cause justifying the USDA RIO or ARIO conducting research misconduct proceedings * * *."

*Response:* USDA reserves its right to proceed with an inquiry, investigation, and/or adjudication with any other good cause with justification. As noted in § 3022.5, when the USDA RIO or ARIO believes it is necessary for USDA to conduct its own inquiry, investigation, and adjudication concurrence must be received by the USDA Panel followed by institutional notification. Language was added to the end of § 3022.5(b) to clearly convey that the "any other reason" noted includes affirmation by the USDA Panel in moving forward with an inquiry, investigation, and/or adjudication.

(7) *Comment:* It is inappropriate for the investigators to contact the USDA directly. The USDA policy should include a requirement for the appropriate institutional official to be notified so the official can notify USDA.

*Response:* USDA does not stipulate who at the institution should notify USDA. This is up to the institution to determine and it should be included in their policies and procedures accordingly. However, everyone should be able to report an allegation whether it involves the institution where he/she works or any other institution.

(8) *Comment:* If USDA determines it will conduct a separate inquiry, investigation and/or adjudication there is concern that USDA's requirement for the "immediate" surrendering of documents related to the institutional procedures may conflict with institutional responsibilities under state law or collective bargaining agreements.

*Response:* The commenter's concern and responsibilities are recognized, therefore, "immediately provide" was replaced with "promptly provide" as suggested by the commenter.

(9) *Comment:* The proposed rule indicates that the USDA agency defers its own inquiry and investigation until the other (OIG or other agency) is complete. The proposed rule indicates that all USDA requirements must be met in addition to other agencies. It adds a significant and unnecessary burden to conduct multiple inquiries and investigations and the USDA must work in cooperation with other Federal agencies to avoid such an outcome.

*Response:* Section 3022.14 was modified to clearly state that when more than one agency is involved that USDA will work with the other agency(ies) to designate a lead. The policies and procedures of the lead agency will be followed in determining whether there is a finding of research misconduct. The section was further modified to stipulate that USDA will seek to resolve allegations jointly with the other agency or agencies when appropriate.

(10) *Comment:* The proposed regulation does not include a statement or provision for USDA to refer allegations made directly to USDA to the appropriate research institution.

*Response:* The ARIO responsibilities were modified to include notification of the research institution associated with the alleged research misconduct. In addition, a change was made to also have the ARIO notify the applicable research institution if (1) public health or safety is at risk; (2) USDA's resources, reputation, or other interests need protecting; (3) research activities should be suspended; (4) Federal action may be needed to protect the interest of a subject of the investigation or of others potentially affected; (5) a premature public disclosure of the inquiry into or investigation of the allegation may compromise the process; (6) the scientific community or the public should be informed; or (7) behavior that is or may be criminal in nature is discovered at any point during the inquiry, investigation, or adjudication phases of the research misconduct proceedings.

(11) *Comment:* We urge USDA to recognize the need for safeguarding the rights of the subject of an allegation. Protecting the position and reputation of a subject of an allegation is as important as safeguarding informants particularly if an allegation is determined to be unfounded.

*Response:* Language was added to § 3022.3 to clearly recognize the safeguarding of the rights of the subject of an allegation.

(12) *Comment:* The USDA policy should include a clear statement of confidentiality as described in the Federal Policy. The concern for

confidentiality expressed for informants is not sufficient to ensure the protection of all individuals involved in the process. As the Federal Policy must extend to the subject of the allegation and, we would add, those involved in the inquiry and investigation processes—members of committees, witnesses, etc., as well as the records related to the process.

*Response:* Language was added to the definition of ARIO and to § 3022.2 to make a clear statement of confidentiality. Other comments were received but were outside the scope of the proposed rule. For instance, one commenter requests that the definition of misconduct be expanded to include the abuse and treatment of human and animal research subjects. The OSTP policy (65 FR 76260) specifically states, "This policy addresses activity that occurs in the course of human subjects or animal research that involves research misconduct as defined by the policy. Thus, falsification, fabrication, or plagiarism that occurs during the course of human or animal research is addressed by this policy. However, other issues concerning the ethical treatment of human or animal subjects are covered under separate procedures and are not affected by this policy." No changes were made in response to comments outside the scope of the OSTP policy.

**Impact Analysis**

*Executive Order 12866*

This rule has been reviewed under Executive Order 12866. The rule has been determined to be not significant because it will not have an annual effect on the economy of $100 million or more or adversely affect a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities. This rule will not create any serious inconsistencies or otherwise interfere with any actions taken or planned by another agency. It will not materially alter the budgetary impact of entitlements, grants, user fees or loan programs and does not raise novel legal or policy issues arising out of legal mandates, the President's priorities, or principles set forth in Executive Order 12866.

*Executive Order 12372*

This program/activity is subject to Executive Order 12372, which requires intergovernmental consultation with State and local officials. (*See* 7 CFR part 3015, subpart V.)

*Executive Order 13132*

It has been determined that this rule does not have sufficient Federalism implications to warrant the preparation of a Federalism Assessment. The provisions contained in this rulemaking will not have a substantial direct effect on States or their political subdivisions. They also will not impact the distribution of power and responsibilities among the various levels of government substantially.

*Regulatory Flexibility Act*

The Regulatory Flexibility Act (5 U.S.C. 601–612) requires that an analysis be prepared for each rule with a significant economic impact on a substantial number of small entities. The analysis should describe the rule's impact on small entities and identify any significant alternatives to the rule that would minimize the economic impact on such entities. Section 605 of the Regulatory Flexibility Act allows USDA to certify a rule, in lieu of preparing an analysis, if the proposed rulemaking is not expected to have such an impact.

USDA certifies that this rule will not have a significant economic impact on a substantial number of small entities. The final rule will have a positive impact on small businesses because of the assistance these entities receive from other agencies. It will also ease the administrative requirements for USDA to offer financial assistance.

*E–Government Act Compliance*

USDA is committed to compliance with the E–Government Act to promote the use of the Internet and other information technologies, to provide increased opportunities for citizen access to government information and services, and for other purposes.

**List of Subjects in 7 CFR Part 3022**

Intramural research, Research misconduct.

■ For the reasons set forth in the preamble, Title 7 of the Code of Federal Regulations is amended by adding a new part 3022 to read as follows:

## PART 3022—RESEARCH INSTITUTIONS CONDUCTING USDA-FUNDED EXTRAMURAL RESEARCH; RESEARCH MISCONDUCT

Sec.



**Authority:** Office of Science and Technology Policy (65 FR 76260); USDA Secretary's Memorandum (SM) 2400–007; and USDA OIG, 7 CFR 2610.1(c)(4)(ix).

### § 3022.1 Definitions.

*Adjudication.* The stage in response to an allegation of research misconduct when the outcome of the investigation is reviewed, and appropriate corrective actions, if any, are determined. Corrective actions generally will be administrative in nature, such as termination of an award, debarment, award restrictions, recovery of funds, or correction of the research record. However, if there is an indication of violation of civil or criminal statutes, civil or criminal sanctions may be pursued.

*Agency Research Integrity Officer (ARIO).* The individual appointed by a USDA agency that conducts research and who is responsible for:

(1) Receiving and processing allegations of research misconduct as assigned by the USDA RIO;

(2) Informing OIG and the USDA RIO and the research institution associated with the alleged research misconduct, of allegations of research misconduct in the event it is reported to the USDA agency;

(3) Ensuring that any records, documents and other materials relating to a research misconduct allegation are provided to OIG when requested;

(4) Coordinating actions taken to address allegations of research misconduct with respect to extramural research with the research institution(s) at which time the research misconduct is alleged to have occurred, and with the USDA RIO;

(5) Overseeing proceedings to address allegations of extramurally funded research misconduct at intramural research institutions and research institutions where extramural research occurs;

(6) Ensuring that agency action to address allegations of research misconduct at USDA agencies performing extramurally funded research is performed at an

organizational level that allows an independent, unbiased, and equitable process;

(7) Immediately notifying OIG, the USDA RIO, and the applicable research institution if:

(i) Public health or safety is at risk;

(ii) USDA's resources, reputation, or other interests need protecting;

(iii) Research activities should be suspended;

(iv) Federal action may be needed to protect the interest of a subject of the investigation or of others potentially affected;

(v) A premature public disclosure of the inquiry into or investigation of the allegation may compromise the process;

(vi) The scientific community or the public should be informed; or

(vii) Behavior that is or may be criminal in nature is discovered at any point during the inquiry, investigation, or adjudication phases of the research misconduct proceedings;

(8) Documenting the dismissal of the allegation, and ensuring that the name of the accused individual and/or institution is cleared if an allegation of research misconduct is dismissed at any point during the inquiry or investigation phase of the proceedings;

(9) Other duties relating to research misconduct proceedings as assigned.

*Allegation.* A disclosure of possible research misconduct through any means of communication. The disclosure may be by written or oral statement, or by other means of communication to an institutional or USDA official.

*Applied research.* Systematic study to gain knowledge or understanding necessary to determine the means by which a recognized and specific need may be met.

*Assistant Inspector General for Investigations.* The individual in OIG who is responsible for OIG's domestic and foreign investigative operations through a headquarters office and the six regional offices.

*Basic research.* Systematic study directed toward fuller knowledge or understanding of the fundamental aspects of phenomena and of observable facts without specific applications towards processes or products in mind.

*Extramural research.* Research conducted by any research institution other than the Federal agency to which the funds supporting the research were appropriated. Research institutions conducting extramural research may include Federal research facilities.

*Fabrication.* Making up data or results and recording or reporting them.

*Falsification.* Manipulating research materials, equipment, or processes, or changing or omitting data or results such that the research is not accurately represented in the research record.

*Finding of research misconduct.* The conclusion, proven by a preponderance of the evidence, that research misconduct occurred, that such research misconduct represented a significant departure from accepted practices of the relevant research community, and that such research misconduct was committed intentionally, knowingly, or recklessly.

*Inquiry.* The stage in the response to an allegation of research misconduct when an assessment is made to determine whether the allegation has substance and whether an investigation is warranted.

*Intramural research.* Research conducted by a Federal Agency, to which funds were appropriated for the purpose of conducting research.

*Investigation.* The stage in the response to an allegation of research misconduct when the factual record is formally developed and examined to determine whether to dismiss the case, recommend a finding of research misconduct, and/or take other appropriate remedies.

*Office of Inspector General (OIG).* The Office of Inspector General of the United States Department of Agriculture.

*Office of Science and Technology Policy (OSTP).* The Office of Science and Technology Policy of the Executive Office of the President.

*Plagiarism.* The appropriation of another person's ideas, processes, results, or words without giving appropriate credit.

*Preponderance of the evidence.* Proof by information that, compared with that opposing it, leads to the conclusion that the fact at issue is more probably true than not.

*Research.* All basic, applied, and demonstration research in all fields of science, engineering, and mathematics. This includes, but is not limited to, research in economics, education, linguistics, medicine, psychology, social sciences, statistics, and research involving human subjects or animals regardless of the funding mechanism used to support it.

*Research institution.* All organizations using Federal funds for research, including, for example, colleges and universities, Federally funded research and development centers, national user facilities, industrial laboratories, or other research institutes.

*Research misconduct.* Fabrication, falsification, or plagiarism in proposing, performing, or reviewing research, or in reporting research results. Research misconduct does not include honest error or differences of opinion.

*Research record.* The record of data or results that embody the facts resulting from scientific inquiry, and includes, but is not limited to, research proposals, research records (including data, notes, journals, laboratory records (both physical and electronic)), progress reports, abstracts, theses, oral presentations, internal reports, and journal articles.

*United States Department of Agriculture.* USDA.

*USDA Research Integrity Officer (USDA RIO).* The individual designated by the Office of the Under Secretary for Research, Education, and Economics (REE) who is responsible for:

(1) Overseeing USDA agency responses to allegations of research misconduct;

(2) Ensuring that agency research misconduct procedures are consistent with this part;

(3) Receiving and assigning allegations of research misconduct reported by the public;

(4) Developing Memoranda of Understanding with agencies that elect not to develop their own research misconduct procedures;

(5) Monitoring the progress of all research misconduct cases; and

(6) Serving as liaison with OIG to receive allegations of research misconduct when they are received via the OIG Hotline.

### § 3022.2 Procedures.

Research institutions that conduct extramural research funded by USDA must foster an atmosphere conducive to research integrity. They must develop or have procedures in place to respond to allegations of research misconduct that ensure:

(a) Appropriate separations of responsibility for inquiry, investigation, and adjudication;

(b) Objectivity;

(c) Due process;

(d) Whistleblower protection;

(e) Confidentiality. To the extent possible and consistent with a fair and thorough investigation and as allowed by law, knowledge about the identity of subjects and informants is limited to those who need to know; and

(f) Timely resolution.

### § 3022.3 Inquiry, investigation, and adjudication.

A research institution that conducts extramural research funded by USDA bears primary responsibility for prevention and detection of research misconduct and for the inquiry, investigation, and adjudication of research misconduct allegations reported directly to it. The research

institution must perform an inquiry in response to an allegation, and must follow the inquiry with an investigation if the inquiry determines that the allegation or apparent instance of research misconduct has substance. The responsibilities for adjudication must be separate from those for inquiry and investigation. In most instances, USDA will rely on a research institution conducting extramural research to promptly:

(a) Initiate an inquiry into any suspected or alleged research misconduct;

(b) Conduct a subsequent investigation, if warranted;

(c) Acquire, prepare, and maintain appropriate records of allegations of extramural research misconduct and all related inquiries, investigations, and findings; and

(d) Take action to ensure the following:

(1) The integrity of research;

(2) The rights and interests of the subject of the investigation and the public are protected;

(3) The observance of legal requirements or responsibilities including cooperation with criminal investigations; and

(4) Appropriate safeguards for subjects of allegations, as well as informants (see § 3022.6). These safeguards should include timely written notification of subjects regarding substantive allegations made against them; a description of all such allegations; reasonable access to the data and other evidence supporting the allegations; and the opportunity to respond to allegations, the supporting evidence and the proposed findings of research misconduct, if any.

**§ 3022.4 USDA Panel to determine appropriateness of research misconduct policy.**

Before USDA will rely on a research institution to conduct an inquiry, investigation, and adjudication of an allegation in accordance with this part, the research institution where the research misconduct is alleged must provide the ARIO its policies and procedures related to research misconduct at the institution. The research institution has the option of providing either a written copy of such policies and procedures or a Web site address where such policies and procedures can be accessed. The ARIO to whom the policies and procedures were made available shall convene a panel comprised of the USDA RIO and ARIOs from the Forest Service, the Agricultural Research Service, and the National Institute of Food and Agriculture. The Panel will review the research institution's policies and procedures for compliance with the OSTP Policy and render a decision regarding the research institution's ability to adequately resolve research misconduct allegations. The ARIO will inform the research institution of the Panel's determination that its inquiry, investigation, and adjudication procedures are sufficient. If the Panel determines that the research institution does not have sufficient policies and procedures in place to conduct inquiry, investigation, and adjudication proceedings, or that the research institution is in any way unfit or unprepared to handle the inquiry, investigation, and adjudication in a prompt, unbiased, fair, and independent manner, the ARIO will inform the research institution in writing of the Panel's decision. An appropriate USDA agency, as determined by the Panel, will then conduct the inquiry, investigation, and adjudication of research misconduct in accordance with this part. If an allegation of research misconduct is made regarding extramural research conducted at a Federal research institution (whether USDA or not), it is presumed that the Federal research institution has research misconduct procedures consistent with the OSTP Policy. USDA reserves the right to convene the Panel to assess the sufficiency of a Federal agency's research misconduct procedures, should there be any question whether the agency's procedures will ensure a fair, unbiased, equitable, and independent inquiry, investigation, and adjudication process.

**§ 3022.5 Reservation of right to conduct subsequent inquiry, investigation, and adjudication.**

(a) USDA reserves the right to conduct its own inquiry, investigation, and adjudication into allegations of research misconduct at a research institution conducting extramural research subsequent to the proceedings of the research institution related to the same allegation. This may be necessary if the USDA RIO or ARIO believes, in his or her sound discretion, that despite the Panel's finding that the research institution in question had appropriate and OSTP-compliant research misconduct procedures in place, the research institution conducting the extramural research at issue:

(1) Did not adhere to its own research misconduct procedures;

(2) Did not conduct research misconduct proceedings in a fair, unbiased, or independent manner; or

(3) Has not completed research misconduct inquiry, investigation, or adjudication in a timely manner.

(b) Additionally, USDA reserves the right to conduct its own inquiry, investigation, and adjudication into allegations of research misconduct at a research institution conducting extramural research subsequent to the proceedings of the research institution related to the same allegation for any other reason that the USDA RIO or ARIO considers it appropriate to conduct research misconduct proceedings in lieu of the research institution's conducting the extramural research at issue. This right is subject to paragraph (c) of this section.

(c) In cases where the USDA RIO or ARIO believes it is necessary for USDA to conduct its own inquiry, investigation, and adjudication subsequent to the proceedings of the research institution related to the same allegation, the USDA RIO or ARIO shall reconvene the Panel, which will determine whether it is appropriate for the relevant USDA agency to conduct the research misconduct proceedings related to the allegation(s) of research misconduct. If the Panel determines that it is appropriate for a USDA agency to conduct the proceedings, the ARIO will immediately notify the research institution in question. The research institution must then promptly provide the relevant USDA agency with documentation of the research misconduct proceedings the research institution has conducted to that point, and the USDA agency will conduct research misconduct proceedings in accordance with the Agency research misconduct procedures.

**§ 3022.6 Notification of USDA of allegations of research misconduct.**

(a) Research institutions that conduct USDA-funded extramural research must promptly notify OIG and the USDA RIO of all allegations of research misconduct involving USDA funds when the institution inquiry into the allegation warrants the institution moving on to an investigation.

(b) Individuals at research institutions who suspect research misconduct at the institution should report allegations in accordance with the institution's research misconduct policies and procedures. Anyone else who suspects that researchers or research institutions performing federally-funded research may have engaged in research misconduct is encouraged to make a formal allegation of research misconduct to OIG.

(1) OIG may be notified using any of the following methods:

(i) Via the OIG Hotline: Telephone: (202) 690–1622, (800) 424–9121, (202) 690–1202 (TDD).

(ii) E-mail: *usda_hotline@oig.usda.gov.*

(iii) U.S. Mail: United States Department of Agriculture, Office of Inspector General, P.O. Box 23399, Washington, DC 20026–3399.

(2) The USDA RIO may be reached at: USDA Research Integrity Officer, 214W Whitten Building, Washington, DC 20250; telephone: 202–720–5923; E-mail: *researchintegrity@usda.gov.*

(c) To the extent known, the following details should be included in any formal allegation:

(1) The name of the research projects involved, the nature of the alleged misconduct, and the names of the individual or individuals alleged to be involved in the misconduct;

(2) The source or sources of funding for the research project or research projects involved in the alleged misconduct;

(3) Important dates;

(4) Any documentation that bears upon the allegation; and

(5) Any other potentially relevant information.

(d) Safeguards for informants give individuals the confidence that they can bring allegations of research misconduct made in good faith to the attention of appropriate authorities or serve as informants to an inquiry or an investigation without suffering retribution. Safeguards include protection against retaliation for informants who make good faith allegations, fair and objective procedures for the examination and resolution of allegations of research misconduct, and diligence in protecting the positions and reputations of those persons who make allegations of research misconduct in good faith. The identity of informants who wish to remain anonymous will be kept confidential to the extent permitted by law or regulation.

### § 3022.7 Notification of ARIO during an inquiry or investigation.

(a) Research institutions that conduct USDA-funded extramural research must promptly notify the ARIO should the institution become aware during an inquiry or investigation that:

(1) Public health or safety is at risk;

(2) The resources, reputation, or other interests of USDA are in need of protection;

(3) Research activities should be suspended;

(4) Federal action may be needed to protect the interest of a subject of the investigation or of others potentially affected;

(5) A premature public disclosure of the inquiry into or investigation of the allegation may compromise the process;

(6) The scientific community or the public should be informed; or

(7) There is reasonable indication of possible violations of civil or criminal law.

(b) If research misconduct proceedings reveal behavior that may be criminal in nature at any point during the proceedings, the institution must promptly notify the ARIO.

### § 3022.8 Communication of research misconduct policies and procedures.

Institutions that conduct USDA-funded extramural research are to maintain and effectively communicate to their staffs policies and procedures relating to research misconduct, including the guidelines in this part. The institution is to inform their researchers and staff members who conduct USDA-funded extramural research when and under what circumstances USDA is to be notified of allegations of research misconduct, and when and under what circumstances USDA is to be updated on research misconduct proceedings.

### § 3022.9 Documents required.

(a) A research institution that conducts USDA-funded extramural research must maintain the following documents related to an allegation of research misconduct at the research institution:

(1) A written statement describing the original allegation;

(2) A copy of the formal notification presented to the subject of the allegation;

(3) A written report describing the inquiry stage and its outcome including copies of all supporting documentation;

(4) A description of the methods and procedures used to gather and evaluate information pertinent to the alleged misconduct during inquiry and investigation stages;

(5) A written report of the investigation, including the evidentiary record and supporting documentation;

(6) A written statement of the findings; and

(7) If applicable, a statement of recommended corrective actions, and any response to such a statement by the subject of the original allegation, and/or other interested parties, including any corrective action plan.

(b) The research institution must retain the documents specified in paragraph (a) of this section for at least 3 years following the final adjudication of the alleged research misconduct.

### § 3022.10 Reporting to USDA.

Following completion of an investigation into allegations of research misconduct, the institution conducting extramural research must provide to the ARIO a copy of the evidentiary record, the report of the investigation, recommendations made to the institution's adjudicating official, the adjudicating official's determination, the institution's corrective action taken or planned, and the written response of the individual who is the subject of the allegation to any recommendations.

### § 3022.11 Research records and evidence.

(a) A research institution that conducts extramural research supported by USDA funds, as the responsible legal entity for the USDA-supported research, has a continuing obligation to create and maintain adequate records (including documents and other evidentiary matter) as may be required by any subsequent inquiry, investigation, finding, adjudication, or other proceeding.

(b) Whenever an investigation is initiated, the research institution must promptly take all reasonable and practical steps to obtain custody of all relevant research records and evidence as may be necessary to conduct the research misconduct proceedings. This must be accomplished before the research institution notifies the researcher/respondent of the allegation, or immediately thereafter.

(c) The original research records and evidence taken into custody by the research institution shall be inventoried and stored in a secure place and manner. Research records involving raw data shall include the devices or instruments on which they reside. However, if deemed appropriate by the research institution or investigator, research data or records that reside on or in instruments or devices may be copied and removed from those instruments or devices as long as the copies are complete, accurate, and have substantially equivalent evidentiary value as the data or records have when the data or records reside on the instruments or devices. Such copies of data or records shall be made by a disinterested, qualified technician and not by the subject of the original allegation or other interested parties. When the relevant data or records have been removed from the devices or instruments, the instruments or devices need not be maintained as evidence.

### § 3022.12 Remedies for noncompliance.

USDA agencies' implementation procedures identify the administrative actions available to remedy a finding of

research misconduct. Such actions may include the recovery of funds, correction of the research record, debarment of the researcher(s) that engaged in the research misconduct, proper attribution, or any other action deemed appropriate to remedy the instance(s) of research misconduct. The agency should consider the seriousness of the misconduct, including, but not limited to, the degree to which the misconduct was knowingly conducted, intentional, or reckless; was an isolated event or part of a pattern; or had significant impact on the research record, research subjects, other researchers, institutions, or the public welfare. In determining the appropriate administrative action, the appropriate agency must impose a remedy that is commensurate with the infraction as described in the finding of research misconduct.

**§ 3022.13 Appeals.**

(a) If USDA relied on an institution to conduct an inquiry, investigation, and adjudication, the alleged person(s) should first follow the institution's appeal policy and procedures.

(b) USDA agencies' implementation procedures identify the appeal process when a finding of research misconduct is elevated to the agency.

**§ 3022.14 Relationship to other requirements.**

Some of the research covered by this part also may be subject to regulations of other governmental agencies (*e.g.,* a university that receives funding from a USDA agency and also under a grant from another Federal agency). If more than one agency of the Federal Government has jurisdiction, USDA will cooperate with the other Agency(ies) in designating a lead agency. When USDA is not the lead agency, it will rely on the lead agency following its policies and procedures in determining whether there is a finding of research misconduct. Further, USDA may, in consultation with the lead agency, take action to protect the health and safety of the public, to promote the integrity of the USDA-supported research and research process, or to conserve public funds. When appropriate, USDA will seek to resolve allegations jointly with the other agency or agencies.

Dated: August 5, 2010.

Issued at Washington, DC.

**Jon M. Holladay,**

*Acting Chief Financial Officer.*

**Thomas J. Vilsack,**

*Secretary, U.S. Department of Agriculture.*

[FR Doc. 2010–20109 Filed 8–12–10; 8:45 am]

BILLING CODE 3410–90–P

## FEDERAL DEPOSIT INSURANCE CORPORATION

### 12 CFR Parts 328, 330, and 347

**RIN 3064–AD61**

## Deposit Insurance Regulations; Permanent Increase in Standard Coverage Amount; Advertisement of Membership; International Banking; Foreign Banks

August 10, 2010.

**AGENCY:** Federal Deposit Insurance Corporation (FDIC).

**ACTION:** Final rule.

**SUMMARY:** On July 21, 2010, the President signed into law the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank" Act). Section 335 of the Dodd-Frank Act made permanent the standard maximum deposit insurance ("SMDIA") amount of $250,000. The FDIC is conforming its regulations to reflect this recent congressional action.

**DATES:** *Effective Date:* August 13, 2010.

*Mandatory Compliance Date for Revision to 12 CFR Part 328 (FDIC Official Sign):* January 3, 2011.

**FOR FURTHER INFORMATION CONTACT:** Joseph A. DiNuzzo, Supervisory Counsel, Legal Division (202) 898–7349; Richard B. Foley, Counsel, Legal Division (202) 898–3784; Walter C. Siedentopf, Honors Attorney, Legal Division (703) 562–2744; or Martin W. Becker, Senior Consumer Affairs Specialist, Division of Supervision and Consumer Protection (202) 898–6644, Federal Deposit Insurance Corporation, Washington, DC 20429.

**SUPPLEMENTARY INFORMATION:**

### Overview

In this final rule, the FDIC is making conforming changes to its insurance regulations (12 CFR part 330), international banking regulations (12 CFR part 347) and advertising regulations (12 CFR part 328) to reflect Congress's action making permanent the increase in the SMDIA (from $100,000 to $250,000).

### I. Background

The Emergency Economic Stabilization Act of 2008 temporarily increased the SMDIA from $100,000 to $250,000, effective October 3, 2008, through December 31, 2009.[1] On October 17, 2008, the FDIC adopted an interim rule amending its deposit insurance regulations to reflect this temporary increase in the SMDIA.[2] Subsequent to the issuance of this interim rule, on May 20, 2009, the President signed the Helping Families Save Their Homes Act of 2009 ("Helping Families Act"), which, among other provisions, extended the temporary increase in the SMDIA from December 31, 2009, to December 31, 2013.[3] On September 17, 2009, the FDIC adopted a final rule amending its deposit insurance regulations to reflect this extension and to provide further guidance by updating its examples of deposit insurance coverage to incorporate the increased SMDIA.[4] On July 21, 2010, the President signed the Dodd-Frank Act,[5] which, among other provisions, made permanent[6] the increase in the SMDIA from $100,000 to $250,000.[7]

As implemented by part 328 of the FDIC's regulations (12 CFR part 328), section 18(a) of the Federal Deposit Insurance Act (12 U.S.C. 1828(a)) requires that insured depository institutions display an official FDIC sign, which informs depositors of their minimum amount of deposit insurance coverage and states that this insurance is backed by the full faith and credit of the United States Government. As a result of the Helping Families Act's extension of the temporary increase in the SMDIA to $250,000, on May 22, 2009, the FDIC issued a Financial Institution Letter, FIL–22–2009, encouraging institutions to post notices of the temporary increase in the deposit insurance limit through December 31, 2013. At that time, the FDIC provided an optional sign reflecting the temporary increase in deposit insurance coverage.

### II. The Final Rule

*A. Section 330.1 Definitions*

The final rule revises the FDIC's deposit insurance rules (12 CFR Part 330) to define the SMDIA as $250,000 and to remove provisions indicating that the SMDIA will return to $100,000. This change is made in response to the Dodd-Frank Act, which, among other provisions, made permanent the increase in the SMDIA from $100,000 to $250,000. The Dodd-Frank Act also

[1] Public Law 110–343 (Oct. 3, 2008).

[2] 73 FR 61658 (Oct. 17, 2008).

[3] Public Law 111–22 (May 20, 2009).

[4] 74 FR 47711 (Sept. 17, 2009).

[5] Public Law 111–203 (July 21, 2010).

[6] The SMDIA is still subject to an inflation adjustment pursuant to subparagraph (F) of section 11(a)(1) of the Federal Deposit Insurance Act (12 U.S.C. 1821(a)(1)(F)). However, this inflation adjustment will not affect the level of the SMDIA in the foreseeable future because it will not take effect until the value of $100,000, inflation adjusted since 2005, exceeds the current SMDIA.

[7] The effective date of the Dodd-Frank Act is July 22, 2010, one day after the enactment of the act.

made the increase in the SMDIA to $250,000 retroactive to January 1, 2008. This retroactivity provision only applies to a limited number of failed depository institutions, those that closed between January 1, 2008, and October 3, 2008. The FDIC will implement the retroactive application of the $250,000 SMDIA without rulemaking.

*B. Section 347.202 Definitions*

The final rule revises the FDIC's international banking rules (12 CFR Part 347) to define the SMDIA as $250,000 and to remove provisions indicating that the SMDIA will return to $100,000. This change is made in response to the Dodd-Frank Act, as discussed above.

*C. Section 328.1 Official Sign*

The final rule revises the official FDIC sign (12 CFR Part 328) to reflect the permanent increase in the SMDIA. The official sign will continue to have the same size, colors, and design. The only change is the replacement of "$100,000" with "$250,000," so that the new official sign will read "Each depositor insured to at least $250,000," instead of "Each depositor insured to at least $100,000." This change is also made in response to the Dodd-Frank Act, as discussed above.

As noted, under the Dodd-Frank Act, the $250,000 SMDIA became permanent on July 22, 2010. To ensure that depositors are accurately informed of the permanent SMDIA of $250,000, insured depository institutions should promptly obtain the new official signs and, upon receipt, display them without delay—in any event not later than January 3, 2011, the date for mandatory compliance with the final rule.

The FDIC has made hard copies and an electronic file of the new official sign available free of charge to insured depository institutions. This will facilitate prompt implementation of the new sign by all insured depository institutions, including the limited number of institutions that continue to display the $100,000 limit, which is potentially misleading to depositors. The FDIC expects that these institutions, in particular, will act expeditiously to obtain and display the new official signs.

**III. Administrative Procedure Act**

The FDIC believes that good cause exists for issuing the final rule without providing an opportunity for comment, pursuant to section 553(b)(B) of the Administrative Procedure Act ("APA"), because seeking public comment under these circumstances is "unnecessary," "impracticable," and "contrary to the public interest."[8] The FDIC also finds good cause for issuing the final rule without a 30-day delayed effective date, pursuant to section 553(d)(3) of the APA.

The Dodd-Frank Act amends section 11(a)(1)(E) of the Federal Deposit Insurance Act[9] to permanently increase the SMDIA to $250,000. The final rule makes conforming amendments to the FDIC's regulations to reflect this statutory change. None of the other regulations affecting the calculation of deposit insurance are affected by the final rule.

The final rule merely conforms the FDIC's definition of the SMDIA to the language of the revised statute and conforms the official FDIC sign to reflect this permanent increase in deposit insurance coverage. There is no agency discretion that could be informed by the APA's notice and comment process. Therefore, the FDIC finds that notice and comment procedures are "unnecessary" and that the "good cause" exception to the APA's notice-and comment requirement applies. *See, e.g., Gray Panthers Advocacy Comm.* v. *Sullivan,* 936 F.2d 1284, 1290–92 (DC Cir. 1991) (regulations that "either restate or paraphrase the detailed requirements" of a self-executing statute do not require notice and comment); *Nat'l Customs Brokers & Forwarders Ass'n* v. *United States,* 59 F.3d 1219, 1223–24 (Fed. Cir. 1995) (notice and comment unnecessary where Congress directed agency to change regulations and public would benefit from amendments).

Additionally, a finding of good cause is warranted because it would be "impracticable" and "contrary to the public interest" to delay printing and distribution of a revised official sign in order to seek public comment on the revision. Because the revision to the SMDIA was effective one day after enactment of the Dodd-Frank Act, it is in the public interest for the Corporation to take immediate steps to make depositors aware of this permanent increase in deposit insurance coverage. A delay in distribution of signs advertising the new deposit insurance limit would be detrimental to this goal, and therefore, complying with formal notice and comment procedures is "impracticable" and "contrary to the public interest."

Finally, a finding of good cause for waiving the requirement of a 30-day delayed effective date is warranted because of the need for immediate guidance to depositors, which implementation and distribution of the new official sign will provide. Also, a delayed effective date is unnecessary because the only provision of the final rule requiring institutions to take certain actions—*i.e.,* the change in the official sign—would not be enforced until January 3, 2011.

**IV. Paperwork Reduction Act**

The final rule will revise the FDIC's deposit insurance regulations. It will not involve any new collections of information pursuant to the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*). Consequently, no information collection has been submitted to the Office of Management and Budget for review.

**V. Regulatory Flexibility Act**

The Regulatory Flexibility Act requires an agency that is issuing a final rule to prepare and make available a regulatory flexibility analysis that describes the impact of the final rule on small entities. 5 U.S.C. 603(a). The Regulatory Flexibility Act provides that an agency is not required to prepare and publish a regulatory flexibility analysis if the agency certifies that the final rule will not have a significant impact on a substantial number of small entities.

The final rule implements the permanent increase in the SMDIA by the Dodd-Frank Act; the FDIC has no discretion in setting the SMDIA. Display of the official sign is required by section 18(a) of FDI Act. There would not be any compliance costs with displaying the official sign, because it would be provided by the FDIC free of charge. Insured banks have complied with similar advertising requirements for over seventy years without significant expense. Accordingly, pursuant to section 605(b) of the Regulatory Flexibility Act, the FDIC Board of Directors certifies that the final rule would not have a significant economic impact on a substantial number of small entities.

**VI. The Treasury and General Government Appropriations Act, 1999—Assessment of Federal Regulations and Policies on Families**

The FDIC has determined that the final rule will not affect family well-being within the meaning of section 654 of the Treasury and General Government Appropriations Act, enacted as part of the Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999 (Pub. L. 105–277, 112 Stat. 2681).

[8] 5 U.S.C. 553(b)(B).

[9] 12 U.S.C. 1821(a)(1)(E).

**VII. Small Business Regulatory Enforcement Fairness Act**

The Office of Management and Budget has determined that the final rule is not a "major rule" within the meaning of the relevant sections of the Small Business Regulatory Enforcement Act of 1996 ("SBREFA") (5 U.S.C. 801 *et seq.*). As required by SBREFA, the FDIC will file the appropriate reports with Congress and the General Accounting Office so that the final rule may be reviewed.

**VIII. Plain Language**

Section 722 of the Gramm-Leach-Blilely Act (Pub. L. 106–102, 113 Stat. 1338, 1471), requires the Federal banking agencies to use plain language in all proposed and final rules published after January 1, 2000. The FDIC has sought to present the final rule in a simple and straightforward manner.

**List of Subjects**

*12 CFR Part 328*

Advertising, Bank deposit insurance, Savings associations, Signs and symbols.

*12 CFR Part 330*

Bank deposit insurance, Banks, Banking, Reporting and recordkeeping requirements, Savings and loan associations, Trusts and trustees.

*12 CFR Part 347*

Bank deposit insurance, Banks, Banking, International banking; Foreign banks.

■ For the reasons stated above, the Board of Directors of the Federal Deposit Insurance Corporation hereby amends parts 328, 330, and 347 of title 12 of the Code of Federal Regulations as follows:

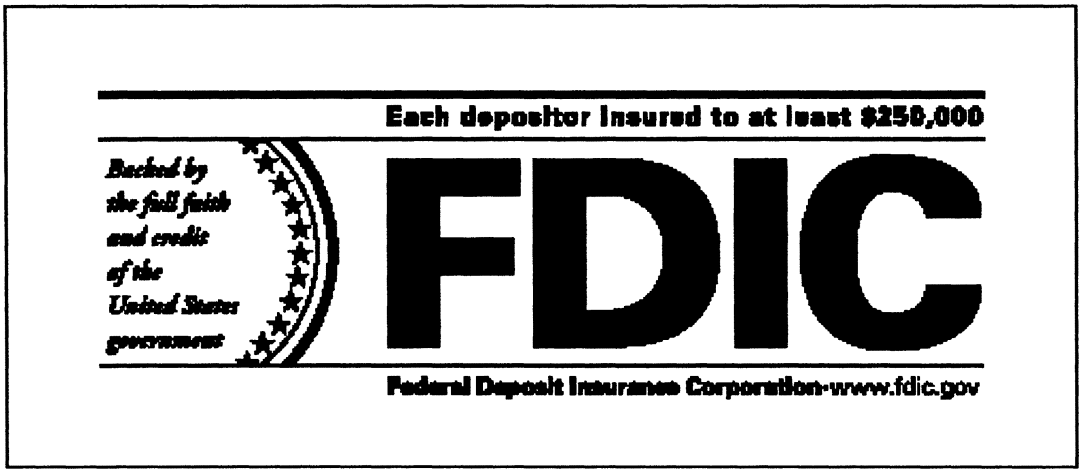
## PART 328—ADVERTISEMENT OF MEMBERSHIP

■ 1. The authority citation for part 328 continues to read as follows:

**Authority:** 12 U.S.C. 1818(a), 1813(m), 1819 (Tenth), 1828(a).

■ 2. In § 328.1, paragraph (a) is amended by revising the graphic image of the official sign to appear as follows:

(a) * * *




* * * * *

## PART 330—DEPOSIT INSURANCE COVERAGE

■ 3. The authority citation for part 330 continues to read as follows:

**Authority:** 12 U.S.C. 1813(1), 1813(m), 1817(i), 1818(q), 1819 (Tenth), 1820(f), 1821(a), 1822(c).

■ 4. In § 330.1, paragraph (n) is revised to read as follows:

**§ 330.1 Definitions.**

* * * * *

(n) *Standard maximum deposit insurance amount,* referred to as the "SMDIA" hereafter, means $250,000 adjusted pursuant to subparagraph (F) of section 11(a)(1) of the FDI Act (12 U.S.C. 1821(a)(1)(F)).

* * * * *

## PART 347—INTERNATIONAL BANKING

■ 5. The authority citation for part 347 continues to read as follows:

**Authority:** 12 U.S.C. 1813, 1815, 1817, 1819, 1820, 1828, 3103, 3104, 3105, 3108, 3109; Title IX, Pub. L. 98–181, 97 Stat. 1153.

■ 6. In § 347.202, paragraph (v) is revised to read as follows:

**§ 347.202 Definitions.**

* * * * *

(v) *Standard maximum deposit insurance amount,* referred to as the "SMDIA" hereafter, means $250,000 adjusted pursuant to subparagraph (F) of section 11(a)(1) of the FDI Act (12 U.S.C. 1821(a)(1)(F)).

* * * * *

Dated at Washington DC, this 10th day of August 2010.

By order of the Board of Directors.

Federal Deposit Insurance Corporation.

**Robert E. Feldman,**

*Executive Secretary.*

[FR Doc. 2010–20008 Filed 8–12–10; 8:45 am]

**BILLING CODE P**

## DEPARTMENT OF TRANSPORTATION

## Federal Aviation Administration

## 14 CFR Part 39

**[Docket No. FAA–2010–0434; Directorate Identifier 2009–NM–221–AD; Amendment 39–16386; AD 2010–16–09]**

**RIN 2120–AA64**

## Airworthiness Directives; BAE Systems (Operations) Limited Model BAe 146–100A and –200A Airplanes

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

**ACTION:** Final rule.

**SUMMARY:** We are adopting a new airworthiness directive (AD) for the products listed above. This AD results from mandatory continuing airworthiness information (MCAI) originated 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:

> The operation of the airbrake lever in the "airbrakes out" to "lift spoiler" range has been the subject of two occurrence reports. The lift spoilers on the BAe 146 and Avro 146–RJ aeroplanes have been designed to deploy on landing to provide aerodynamic braking and to dump lift to ensure that the wheel brakes can provide the necessary speed reduction.
>
> * * * * *
>
> The effects of deceleration and landing inertia loads can cause uncommanded movement of the airbrake selector lever from the "lift spoiler" position to the "airbrakes out" position, causing the lift spoilers to retract during the landing roll. This condition, if not corrected, would increase the landing distance, possibly resulting in a runway overrun and consequent injury to aeroplane occupants.
>
> * * * * *

We are issuing this AD to require actions to correct the unsafe condition on these products.

**DATES:** This AD becomes effective September 17, 2010.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of September 17, 2010.

**ADDRESSES:** You may examine the AD docket on the Internet at *http://www.regulations.gov* or in person at the U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC.

**FOR FURTHER INFORMATION CONTACT:** Todd Thompson, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 227–1175; fax (425) 227–1149.

**SUPPLEMENTARY INFORMATION:**

## Discussion

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to include an AD that would apply to the specified products. That NPRM was published in the **Federal Register** on April 30, 2010 (75 FR 22710). That NPRM proposed to correct an unsafe condition for the specified products. The MCAI states:

> The operation of the airbrake lever in the "airbrakes out" to "lift spoiler" range has been the subject of two occurrence reports. The lift spoilers on the BAe 146 and Avro 146–RJ aeroplanes have been designed to deploy on landing to provide aerodynamic braking and to dump lift to ensure that the wheel brakes can provide the necessary speed reduction.
>
> A review of the changing operational profile of the aeroplane type concluded that its proven short field performance has increasingly been exploited in recent years by a number of operators worldwide. Frequently, these short field operations are conducted from airports that are located in mountainous terrain or in close proximity to bodies of water, leaving fewer margins for error, e.g. landing long or at (too) high speed.
>
> The effects of deceleration and landing inertia loads can cause uncommanded movement of the airbrake selector lever from the "lift spoiler" position to the "airbrakes out" position, causing the lift spoilers to retract during the landing roll. This condition, if not corrected, would increase the landing distance, possibly resulting in a runway overrun and consequent injury to aeroplane occupants.
>
> On certain BAe 146 aeroplanes, without modifications HCM00889A and B or modifications HCM00889A and C incorporated, negligible force is required to move the airbrake lever back to the "airbrakes out" position. From 1988 onwards, modifications were introduced on the production line to incorporate a modified friction baulking device such that a force of 12 lbs must be applied to move the airbrake lever from the "lift spoiler" position to the "airbrakes out" position. These modifications were also made available as an optional in-service retrofit.
>
> For the reasons described above, this AD requires the modification of the airbrake lever detent mechanism.

You may obtain further information by examining the MCAI in the AD docket.

## Comments

We gave the public the opportunity to participate in developing this AD. We received no comments on the NPRM or on the determination of the cost to the public.

## Explanation of Change to Applicability

We have revised the applicability of the existing AD to identify model designations as published in the most recent type certificate data sheet for the affected models.

## Conclusion

We reviewed the available data, and determined that air safety and the public interest require adopting the AD with the changes described previously. We determined that these changes will not increase the economic burden on any operator or increase the scope of the AD.

## Differences Between This AD and the MCAI or Service Information

We have reviewed the MCAI and related service information and, in general, agree with their substance. But we might have found it necessary to use different words from those in the MCAI to ensure the AD is clear for U.S. operators and is enforceable. In making these changes, we do not intend to differ substantively from the information provided in the MCAI and related service information.

We might also have required different actions in this AD from those in the MCAI in order to follow our FAA policies. Any such differences are highlighted in a **Note** within the AD.

## Costs of Compliance

We estimate that this AD will affect 1 product of U.S. registry. We also estimate that it will take about 11 work-hours per product to comply with the basic requirements of this AD. The average labor rate is $85 per work-hour. Required parts will cost about $7,000 per product. Where the service information lists required parts costs that are covered under warranty, we have assumed that there will be no charge for these parts. As we do not control warranty coverage for affected parties, some parties may incur costs higher than estimated here. Based on these figures, we estimate the cost of this AD to the U.S. operator to be $7,935.

## 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 AD will not have federalism implications under Executive Order 13132. This AD 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.

*For the reasons discussed above, I certify this AD:*

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 AD and placed it in the AD docket.

**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 the NPRM, the regulatory evaluation, any comments received, and other information. The street address for the Docket Operations office (telephone (800) 647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

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

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

**Adoption of the Amendment**

■ Accordingly, under the authority delegated to me by the Administrator, the FAA amends 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:

**2010–16–09 BAE Systems (Operations) Limited:** Amendment 39–16386. Docket No. FAA–2010–0434; Directorate Identifier 2009–NM–221–AD.

**Effective Date**

(a) This airworthiness directive (AD) becomes effective September 17, 2010.

**Affected ADs**

(b) None.

**Applicability**

(c) This AD applies to BAE Systems (Operations) Limited Model BAe 146–100A and –200A airplanes, certificated in any category, serial numbers as listed in British Aerospace 146 Modification Service Bulletin 27–73–00889A&B, Revision 4, dated June 15, 1990.

**Subject**

(d) Air Transport Association (ATA) of America Code 27: Flight Controls.

**Reason**

(e) The mandatory continuing airworthiness information (MCAI) states:

The operation of the airbrake lever in the "airbrakes out" to "lift spoiler" range has been the subject of two occurrence reports. The lift spoilers on the BAe 146 and Avro 146–RJ aeroplanes have been designed to deploy on landing to provide aerodynamic braking and to dump lift to ensure that the wheel brakes can provide the necessary speed reduction.

A review of the changing operational profile of the aeroplane type concluded that its proven short field performance has increasingly been exploited in recent years by a number of operators worldwide. Frequently, these short field operations are conducted from airports that are located in mountainous terrain or in close proximity to bodies of water, leaving fewer margins for error, e.g. landing long or at (too) high speed.

The effects of deceleration and landing inertia loads can cause uncommanded movement of the airbrake selector lever from the "lift spoiler" position to the "airbrakes out" position, causing the lift spoilers to retract during the landing roll. This condition, if not corrected, would increase the landing distance, possibly resulting in a runway overrun and consequent injury to aeroplane occupants.

On certain BAe 146 aeroplanes, without modifications HCM00889A and B or modifications HCM00889A and C incorporated, negligible force is required to move the airbrake lever back to the "airbrakes out" position. From 1988 onwards, modifications were introduced on the production line to incorporate a modified friction baulking device such that a force of 12 lbs must be applied to move the airbrake lever from the "lift spoiler" position to the "airbrakes out" position. These modifications were also made available as an optional in-service retrofit.

For the reasons described above, this AD requires the modification of the airbrake lever detent mechanism.

**Compliance**

(f) You are responsible for having the actions required by this AD performed within the compliance times specified, unless the actions have already been done.

**Actions**

(g) Do the following actions.

(1) Within 12 months after the effective date of this AD, modify the airbrake lever detent mechanism, in accordance with the Accomplishment Instructions of British Aerospace 146 Modification Service Bulletin 27–73–00889A&B, Revision 4, dated June 15, 1990.

(2) Modifying the airbrake lever detent mechanism is also acceptable for compliance with paragraph (g)(1) of this AD, if done before the effective date of this AD, in accordance with the Accomplishment Instructions of British Aerospace 146 Modification Service Bulletin 27–73–00889A&B, Revision 3, dated August 1, 1989.

**FAA AD Differences**

**Note 1:** This AD differs from the MCAI and/or service information as follows: While European Aviation Safety Agency (EASA) AD 2009–0206, dated September 30, 2009, considers Revision 0, 1, or 2 of British Aerospace 146 Modification Service Bulletin 27–73–00889A&B as an acceptable method of compliance, this AD does not. However, operators may request approval of an alternative method of compliance in accordance with the procedures specified in paragraph (h)(1) of this AD.

**Other FAA AD Provisions**

(h) The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. Send information to *Attn:* Todd Thompson, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 227–1175; fax (425) 227–1149. Before using any approved AMOC on any airplane to which the AMOC applies, notify your principal maintenance inspector (PMI) or principal avionics inspector (PAI), as appropriate, or lacking a principal inspector, your local Flight Standards District Office. The AMOC approval letter must specifically reference this AD.

(2) *Airworthy Product:* For any requirement in this AD to obtain corrective actions from a manufacturer or other source, use these actions if they are FAA-approved. Corrective actions are considered FAA-approved if they are approved by the State of Design Authority (or their delegated agent). You are required to assure the product is airworthy before it is returned to service.

(3) *Reporting Requirements:* For any reporting requirement in this AD, under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), the Office of Management and Budget (OMB) has approved the information collection requirements and has assigned OMB Control Number 2120–0056.

**Related Information**

(i) Refer to MCAI EASA Airworthiness Directive 2009–0206, dated September 30, 2009; and British Aerospace 146 Modification Service Bulletin 27–73–00889A&B, Revision 4, dated June 15, 1990; for related information.

**Material Incorporated by Reference**

(j) You must use British Aerospace 146 Modification Service Bulletin 27–73–00889A&B, Revision 4, dated June 15, 1990, to do the actions required by this AD, unless the AD specifies otherwise. British Aerospace 146 Modification Service Bulletin 27–73–00889A&B, Revision 4, contains the following effective pages:

| Page No. | Revision level shown on page | Date shown on page |
|---|---|---|
| 1, 3–4, 7, 15–16, 19 | 4 | June 15, 1990. |
| 2 | 3 | August 1, 1989. |
| 5, 8–12, 17–18, 20 | 1 | August 10, 1988. |
| 6, 13–14 | 2 | June 27, 1989. |

(1) The Director of the Federal Register approved the incorporation by reference of this service information under 5 U.S.C. 552(a) and 1 CFR part 51.

(2) For service information identified in this AD, contact BAE Systems (Operations) Limited, Customer Information Department, Prestwick International Airport, Ayrshire, KA9 2RW, Scotland, United Kingdom; telephone +44 1292 675207; fax +44 1292 675704; e-mail *RApublications@baesystems.com;* Internet *http://www.baesystems.com/Businesses/RegionalAircraft/index.htm.*

(3) You may review copies of the service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington. For information on the availability of this material at the FAA, call 425–227–1221.

(4) You may also review copies of the service information that is incorporated by reference at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

Issued in Renton, Washington, on July 28, 2010.

**Ali Bahrami,**

*Manager, Transport Airplane Directorate, Aircraft Certification Service.*

[FR Doc. 2010–19329 Filed 8–12–10; 8:45 am]

**BILLING CODE 4910–13–P**

## DEPARTMENT OF TRANSPORTATION

## Federal Aviation Administration

## 14 CFR Part 39

**[Docket No. FAA–2010–0748; Directorate Identifier 2010–NE–13–AD; Amendment 39–16384; AD 2010–16–07]**

**RIN 2120–AA64**

## Airworthiness Directives; Rolls-Royce plc (RR) RB211–Trent 900 Series Turbofan Engines

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

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

**SUMMARY:** We are adopting a new airworthiness directive (AD) for the products listed above. This 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:

Wear, beyond Engine Manual limits, has been identified on the abutment faces of the splines on the Trent 900 Intermediate Pressure (IP) shaft rigid coupling on several engines during strip. The shaft to coupling spline interface provides the means of controlling the turbine axial setting and wear through of the splines would permit the IP turbine to move rearwards.

Rearward movement of the IP turbine would enable contact with static turbine components and would result in loss of engine performance with potential for in-flight shut down, oil migration and oil fire below the LP turbine discs prior to sufficient indication resulting in loss of LP turbine disc integrity.

We are issuing this AD to detect rearward movement of the IP turbine, which could result in loss of disc integrity, an uncontained failure of the engine, and damage to the airplane.

**DATES:** This AD becomes effective September 17, 2010.

We must receive comments on this AD by September 13, 2010.

The Director of the Federal Register approved the incorporation by reference of Rolls-Royce Trent 900 Series Propulsion Systems Alert Non-Modification Service Bulletin (NMSB) RB.211–72–AG329, Revision 1, dated January 13, 2010, listed in the AD as of September 17, 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:* 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.

### 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 AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Operations office (telephone (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:** Ian Dargin, Aerospace Engineer, Engine Certification Office, FAA, Engine and Propeller Directorate, 12 New England Executive Park; Burlington, MA 01803; e-mail: *ian.dargin@faa.gov;* telephone (781) 238–7178; fax (781) 238–7199.

**SUPPLEMENTARY INFORMATION:**

### Discussion

The European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Community, has issued EASA Airworthiness Directive 2010–0008, dated January 15, 2010 (referred to after this as "the MCAI"), to correct an unsafe condition for the specified products. The MCAI states:

Wear, beyond Engine Manual limits, has been identified on the abutment faces of the splines on the Trent 900 Intermediate Pressure (IP) shaft rigid coupling on several engines during strip. The shaft to coupling spline interface provides the means of controlling the turbine axial setting and wear through of the splines would permit the IP turbine to move rearwards.

Rearward movement of the IP turbine would enable contact with static turbine components and would result in loss of engine performance with potential for in-flight shut down, oil migration and oil fire below the LP turbine discs prior to sufficient indication resulting in loss of LP turbine disc integrity.

This AD requires inspection of the IP shaft coupling splines and, depending on the results, requires further repetitive inspections or corrective actions.

You may obtain further information by examining the MCAI in the AD docket.

### Relevant Service Information

Rolls-Royce plc has issued RB211 Trent 900 Series Propulsion Systems Alert NMSB RB.211–72–AG329, Revision 1, dated January 13, 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 AD**

This product has been approved by the aviation authority of the United Kingdom, and is approved for operation in the United States. Pursuant to our bilateral agreement with the United Kingdom, they have notified us of the unsafe condition described in the MCAI and service information referenced above. We are issuing this AD because we evaluated all information provided by the United Kingdom, and determined the unsafe condition exists and is likely to exist or develop on other products of the same type design.

**FAA's Determination of the Effective Date**

Since no domestic operators use this product, notice and opportunity for public comment before issuing this AD are unnecessary. Therefore, we are adopting this regulation immediately.

**Comments Invited**

This AD is a final rule that involves requirements affecting flight safety, and we did not precede it by notice and opportunity for public comment. We invite you to send any written relevant data, views, or arguments about this AD. Send your comments to an address listed under the **ADDRESSES** section. Include "Docket No. FAA–2010–0748; Directorate Identifier 2010–NE–13–AD" at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this AD. We will consider all comments received by the closing date and may amend this AD because of 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 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).

**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 AD will not have federalism implications under Executive Order 13132. This AD 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.

For the reasons discussed above, I certify this AD:

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 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.

**Adoption of the Amendment**

■ Accordingly, under the authority delegated to me by the Administrator, the FAA amends 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:

**2010–16–07 Rolls-Royce plc (RR):** Amendment 39–16384.; Docket No. FAA–2010–0748; Directorate Identifier 2010–NE–13–AD.

**Effective Date**

(a) This airworthiness directive (AD) becomes effective September 17, 2010.

**Affected ADs**

(b) None.

**Applicability**

(c) This AD applies to RR model RB211–Trent 970–84, 970B–84, 972–84, 972B–84, 977–84, 977B–84, and 980–84 turbofan engines. These engines are installed on, but not limited to, Airbus A380 series airplanes.

**Reason**

(d) European Aviation Safety Agency (EASA) AD No. 2010–0008, dated January 15, 2010, states:

Wear, beyond Engine Manual limits, has been identified on the abutment faces of the splines on the Trent 900 Intermediate Pressure (IP) shaft rigid coupling on several engines during strip. The shaft to coupling spline interface provides the means of controlling the turbine axial setting and wear through of the splines would permit the IP turbine to move rearwards.

Rearward movement of the IP turbine would enable contact with static turbine components and would result in loss of engine performance with potential for in-flight shut down, oil migration and oil fire below the LP turbine discs prior to sufficient indication resulting in loss of LP turbine disc integrity.

We are issuing this AD to detect rearward movement of the IP turbine, which could result in loss of disc integrity, an uncontained failure of the engine, and damage to the airplane.

**Actions and Compliance**

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

**On-Wing Borescope Inspection**

(1) Inspect the IP shaft coupling splines using section 3.A of RR RB211 Trent 900 Series Propulsion Systems Alert Non-Modification Service Bulletin (NMSB) RB.211–72–AG329, Revision 1, dated January 13, 2010, before accumulating 400 cycles-since-new or within 150 cycles-in-service (CIS) after the effective date of this AD, whichever occurs later.

(2) If the coupling, P/N FW33264, was replaced with a new coupling, P/N FW33264, during any shop visit, then you may use the life since that shop visit in place of engine time since new to establish the inspection threshold.

(3) Use the inspection results and actions compliance times or specified in Table 1 of this AD to disposition the engine or to determine the interval for the repetitive inspections.

TABLE 1—ON-WING BORESCOPE INSPECTION—FURTHER ACTION AND REPETITIVE INSPECTION INTERVALS

| Condition measured spline crest in accordance with section 3.A of Rolls-Royce alert NMSB RB.211–72–AG329, Revision 1, dated January 13, 2010, is: | Action | Compliance time/repetitive interval (not to exceed) flight cycles since last inspection |
|---|---|---|
| (i) Less than 0.5 mm with no material remaining | Remove the engine | Before next flight. |
| (ii) Less than 0.5 mm with some material remaining. | Remove the engine | Within 10 flight cycles. |
| (iii) Equal to or more than 0.5 mm but less than 1 mm. | Repeat inspection | Within 50 flight cycles. |
| (iv) Equal to or more than 1 mm but less than 1.5 mm. | Repeat inspection | Within 100 flight cycles. |
| (v) Equal to or more than 1.5 mm but less than 2 mm. | Repeat inspection | Within 200 flight cycles. |
| (vi) Equal to or more than 2 mm but less than 2.4 mm. | Repeat inspection | Within 300 flight cycles. |
| (vii) Equal to or more than 2.4 mm | Repeat inspection | Within 400 flight cycles. |

**Note 1:** The nominal unworn dimension of the spline crest is 2.65 mm.

**In-Shop Replacement and Inspection**

(4) At the next shop visit after the effective date of this AD perform the following:

(i) Replace any IP shaft coupling that was previously borescope inspected in accordance with paragraph (e)(1) of this AD and put on a reduced re-inspection interval in accordance with paragraphs (e)(3)(i) through (e)(3)(vii) of this AD.

(ii) Inspect all other IP shaft coupling splines using paragraphs 3.B.(2) or 3.B.(3) of RR RB211 Trent 900 Series Propulsion Systems Alert NMSB RB.211–72–AG329, Revision 1, dated January 13, 2010.

**Definitions**

(5) For the purposes of this AD, a shop visit is the induction of an engine into the shop for maintenance involving the separation of pairs of major mating engine flanges, except that the separation of engine flanges solely for the purposes of transportation without subsequent engine maintenance does not constitute an engine shop visit.

**FAA AD Differences**

(f) None.

**Other FAA AD Provisions**

(g) Alternative Methods of Compliance (AMOCs): 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 MCAI EASA Airworthiness Directive 2010–0008, dated January 15, 2010, for related information.

(i) Contact Ian Dargin, Aerospace Engineer, Engine Certification Office, FAA, Engine and Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803; e-mail: *ian.dargin@faa.gov*; telephone (781) 238–7178; fax (781) 238–7199, for more information about this AD.

**Material Incorporated by Reference**

(j) You must use Rolls-Royce RB211 Trent 900 Series Propulsion Systems Alert Non-Modification Service Bulletin RB.211–72–AG329 Revision 1, dated January 13, 2010 to do the actions required by this AD, unless the AD specifies otherwise.

(1) The Director of the Federal Register approved the incorporation by reference of this service information under 5 U.S.C. 552(a) and 1 CFR part 51.

(2) For service information identified in this AD, contact Rolls-Royce plc, P.O. Box 31, Derby, DE24 8BJ, United Kingdom; telephone 044 1332 242424; fax 044 1332 249936.

(3) You may review copies at the FAA, New England Region, 12 New England Executive Park, Burlington, MA; or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call (202) 741–6030, or go to: *http://www.archives.gov/federal-register/cfr/ibr-locations.html.*

Issued in Burlington, Massachusetts, on July 26, 2010.

**Peter A. White,**

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

[FR Doc. 2010–18730 Filed 8–12–10; 8:45 am]

**BILLING CODE 4910–13–P**

## DEPARTMENT OF TRANSPORTATION

## Federal Aviation Administration

## 14 CFR Part 39

**[Docket No. FAA–2010–0281; Directorate Identifier 2009–NM–184–AD; Amendment 39–16390; AD 2010–16–13]**

**RIN 2120–AA64**

## Airworthiness Directives; Airbus Model A300 B4–600, B4–600R, and F4–600R Series Airplanes, and Model C4–605R Variant F airplanes (Collectively Called A300–600 series airplanes); and A310 Series Airplanes

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

**ACTION:** Final rule.

**SUMMARY:** We are adopting a new airworthiness directive (AD) for the products listed above. This AD results from mandatory continuing airworthiness information (MCAI) originated 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:

Surface defects were visually detected on the rudder of an [Airbus] A319 and an A321 in-service aeroplane. Investigation has determined that the defects reported on both rudders corresponded to areas that had been reworked in production. The investigation confirmed that the defects were the result of de-bonding between the skin and honeycomb core. Such reworks were also performed on some rudders fitted on A310 and A300–600 aeroplanes.

An extended de-bonding, if not detected and corrected, may degrade the structural integrity of the rudder. The loss of the rudder leads to degradation of the handling qualities and reduces the controllability of the aeroplane.

* * * * *

We are issuing this AD to require actions to correct the unsafe condition on these products.

**DATES:** This AD becomes effective September 17, 2010. The Director of the Federal Register approved the incorporation by reference of certain publications listed in this AD as of September 17, 2010.

**ADDRESSES:** You may examine the AD docket on the Internet at *http://www.regulations.gov* or in person at the U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC.

**FOR FURTHER INFORMATION CONTACT:** Dan Rodina, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA,

1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 227–2125; fax (425) 227–1149.

**SUPPLEMENTARY INFORMATION:**

**Discussion**

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to include an AD that would apply to the specified products. That NPRM was published in the **Federal Register** on April 2, 2010 (75 FR 16685). That NPRM proposed to correct an unsafe condition for the specified products. The MCAI states:

> Surface defects were visually detected on the rudder of an [Airbus] A319 and an A321 in-service aeroplane. Investigation has determined that the defects reported on both rudders corresponded to areas that had been reworked in production. The investigation confirmed that the defects were the result of de-bonding between the skin and honeycomb core. Such reworks were also performed on some rudders fitted on A310 and A300–600 aeroplanes.
>
> An extended de-bonding, if not detected and corrected, may degrade the structural integrity of the rudder. The loss of the rudder leads to degradation of the handling qualities and reduces the controllability of the aeroplane.
>
> To address this unsafe condition [this EASA AD] requires inspections of specific areas and, depending on findings, the application of corrective actions for those rudders where production reworks have been identified.
>
> This * * * [EASA] AD * * * [also] requires for the vacuum loss hole restoration:
>
> —A local ultrasonic inspection for reinforced area instead of the local thermographic inspection, which is maintained for non-reinforced areas, and
> —additional work performance for rudders on which this thermographic inspection has been performed in the reinforced area.

The inspections include vacuum loss inspections and elasticity laminate checker inspections for defects including de-bonding between the skin and honeycomb core of the rudder, and ultrasonic inspections for rudders on which temporary restoration with resin or permanent vacuum loss hole restoration has been performed. The corrective action is contacting the manufacturer for repair instructions and doing the repair. We are considering similar rulemaking action on Model A319 and A321 airplanes. You may obtain further information by examining the MCAI in the AD docket.

**Comments**

We gave the public the opportunity to participate in developing this AD. We considered the comments received. FedEx comments that the proposed compliance times fit within their planned scheduled maintenance check.

**Request for Clarification Regarding the Requirement To Contact Airbus for New Instructions for Rudders Installed on Other Airplanes**

American Airlines requests clarification concerning the requirement to contact Airbus for new instructions if rudders are installed on other airplanes. American Airlines states that the NPRM identifies rudders by rudder serial number only and does not require verification of airplane serial number; however, Airbus All Operators Telexes (AOT) A310–55A2048 and A300–55A6047, both Revision 02, both dated October 12, 2009, request contacting Airbus for additional instructions for an affected rudder if the data in Table 1 of the referenced Technical Disposition TD/K4/S1/27583/2009, Issue E, does not match the airplane. American Airlines states that since the rudder is a removable structural component, it may be moved to a new airplane. American Airlines states that since inspections are required only on the rudder, they agree with the NPRM to not include the airplane serial numbers in Table 1 of the NPRM as there is no value in obtaining new instructions simply because the rudder has been installed on a different airplane.

We agree that clarification is needed to explain the requirement described previously. In the NPRM, we referred to the Airbus AOTs for accomplishment of the inspections. We have added notes to paragraphs (g) and (h) of this AD to state that verification of the airplane serial numbers is not required.

**Request To Change Compliance Time**

American Airlines requests that the compliance time for the initial inspections (specified in the NPRM as "within 8 months of the effective date of the AD") be revised to represent 8 months in-service time. American Airlines' fleet of Model A300–600 series airplanes has been retired from active service and is in long-term storage. American Airlines states that previous investigations of the Model A300–600/A310 series airplanes rudders suggest that disbonding damage grows under vacuum air-ground cycling and that a previous study on a Model A310 airplane had shown no reduction in stiffness due to age. American Airlines suggests that it is unlikely that additional disbonding or degradation will occur on the affected rudders in storage, therefore requests that the compliance time represent 8 months in-service time. American Airlines states that this will allow for more efficient planning and will relieve the burden of obtaining special flight permits to move re-activated airplanes to facilities where the inspections are to be performed.

We agree to revise the proposed compliance time for the reason stated by the commenter. We have added a compliance time of within 840 flight hours after the effective date of this AD to paragraphs (g)(1), (g)(2), (g)(4), (g)(6), (h)(1), (h)(2), (h)(4), and (h)(6) of this AD. We have determined that 840 flight hours represents approximately 8 months given average utilization.

**Request To Include Costs of Special Equipment**

American Airlines requests that the cost of the elasticity laminate checker and the vacuum loss inspection equipment be included in the proposed cost estimate. American Airlines considers the equipment for both inspections to be special tooling and the inspection methods to be of limited application.

We agree that the cost of this special equipment should be included in the cost estimate specified in this AD. The Cost Estimate section of the final rule has been changed accordingly.

**Request To Remove Reporting Requirement for Negative Responses**

American Airlines requests that the reporting requirement for a negative response be removed from the NPRM. American Airlines states that Airbus All Operators Telexes A310–55A2048 and A300–55A6047, both Revision 02, both dated October 12, 2009, request reporting both positive and negative findings. American Airlines states that reporting negative findings has no effect on airplane safety and merely adds administrative burden to the operator, which could create compliance issues due to delays in the processing of paperwork.

We agree that negative responses need not be reported. We have removed the requirement to report if no defects are found from this AD (paragraphs (g)(11) and (h)(11) of the NPRM specified reporting if no defects are found).

**Change to Cost of Compliance**

We have revised the Costs of Compliance section of this AD. The work-hour estimate has been changed from 4 work-hours to 12 work-hours to match the work-hours specified in the service information, which increases the costs accordingly.

**Conclusion**

We reviewed the available data, including the comments received, and determined that air safety and the public interest require adopting the AD with the changes described previously.

We determined that these changes will not increase the economic burden on any operator or increase the scope of the AD.

**Differences Between This AD and the MCAI or Service Information**

We have reviewed the MCAI and related service information and, in general, agree with their substance. But we might have found it necessary to use different words from those in the MCAI to ensure the AD is clear for U.S. operators and is enforceable. In making these changes, we do not intend to differ substantively from the information provided in the MCAI and related service information.

We might also have required different actions in this AD from those in the MCAI in order to follow our FAA policies. Any such differences are highlighted in a NOTE within the AD.

**Costs of Compliance**

We estimate that this AD will affect 194 products of U.S. registry. We also estimate that it will take about 12 work-hours per product to comply with the basic requirements of this AD. The average labor rate is $85 per work-hour. Tooling costs for each operator will cost about $24,602. There are three affected US operators. Based on these figures, we estimate the cost of this AD to the U.S. operators to be $197,880, or $1,020 per product, plus the tooling costs of $24,602 for each operator.

**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 AD will not have federalism implications under Executive Order 13132. This AD 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.

For the reasons discussed above, I certify this AD:

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 AD and placed it in the AD docket.

**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 the NPRM, the regulatory evaluation, any comments received, and other information. The street address for the Docket Operations office (telephone (800) 647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

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

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

**Adoption of the Amendment**

■ Accordingly, under the authority delegated to me by the Administrator, the FAA amends 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:

**2010–16–13 Airbus:** Amendment 39–16390. Docket No. FAA–2010–0281; Directorate Identifier 2009–NM–184–AD.

**Effective Date**

(a) This airworthiness directive (AD) becomes effective September 17, 2010.

**Affected ADs**

(b) None.

**Applicability**

(c) This AD applies to Airbus Model A300 B4–601, B4–603, B4–620, B4–622, B4–605R, B4–622R, F4–605R, F4–622R, and C4–605R Variant F airplanes; and Model A310–203, –204, –221, –222, –304, –322, –324, and –325 airplanes; certificated in any category; equipped with carbon fiber reinforced plastic rudders having part numbers and serial numbers listed in Table 1 of this AD.

TABLE 1—RUDDER INFORMATION

| Rudder part No. | Affected rudder Serial No. | Core density 24kg/m$^3$ |
|---|---|---|
| A554–71500–016–91 | HF–1017 | Yes. |
| A554–71500–016–91 | HF–1020 | No. |
| A554–71500–016–91 | HF–1059 | No. |
| A554–71500–016–91 | HF–1061 | No. |
| A554–71500–016–91 | HF–1064 | No. |
| A554–71500–014–00 | HF–1087 | Yes. |
| A554–71500–014–00 | HF–1119 | Yes. |
| A554–71500–016–00 | HF–1189 | Yes. |
| A554–71500–016–00 | HF–1203 | Yes. |
| A554–71500–016–00 | HF–1266 | Yes. |
| A554–71500–026–00 | TS–1405 | No. |
| A554–71710–000–00 | TS–2001 | No. |
| A554–71710–000–00 | TS–2004 | No. |
| A554–71710–000–00 | TS–2007 | No. |
| A554–71710–000–00 | TS–2009 | No. |

TABLE 1—RUDDER INFORMATION—Continued

| Rudder part No. | Affected rudder Serial No. | Core density 24kg/m$^3$ |
|---|---|---|
| A554–71710–000–00 | TS–2011 | No. |
| A554–71710–000–00 | TS–2012 | No. |
| A554–71710–000–00 | TS–2013 | No. |
| A554–71710–000–00 | TS–2014 | No. |
| A554–71710–000–00 | TS–2016 | No. |
| A554–71710–000–00 | TS–2017 | No. |
| A554–71710–000–00 | TS–2018 | No. |
| A554–71710–000–00 | TS–2020 | No. |
| A554–71710–000–00 | TS–2021 | No. |
| A554–71710–000–00 | TS–2022 | No. |
| A554–71710–000–00 | TS–2024 | No. |
| A554–71710–000–00 | TS–2025 | No. |
| A554–71710–000–00 | TS–2026 | No. |
| A554–71710–000–00 | TS–2028 | No. |
| A554–71710–000–00 | TS–2029 | No. |
| A554–71710–002–00 | TS–2031 | No. |
| A554–71710–002–00 | TS–2032 | No. |
| A554–71710–002–00 | TS–2035 | No. |
| A554–71710–002–00 | TS–2040 | No. |
| A554–71710–002–00 | TS–2041 | No. |
| A554–71710–002–00 | TS–2044 | No. |
| A554–71710–002–00 | TS–2046 | No. |
| A554–71710–004–00 | TS–2050 | No. |
| A554–71710–004–00 | TS–2056 | No. |
| A554–71710–004–00 | TS–2058 | No. |
| A554–71710–004–00 | TS–2060 | No. |
| A554–71710–004–00 | TS–2062 | No. |
| A554–71710–004–00 | TS–2065 | No. |
| A554–71710–004–00 | TS–2066 | No. |
| A554–71710–004–00 | TS–2074 | No. |
| A554–71710–004–00 | TS–2075 | No. |
| A554–71710–004–00 | TS–2076 | No. |
| A554–71710–004–00 | TS–2079 | No. |

**Subject**

(d) Air Transport Association (ATA) of America Code 55: Stabilizers.

**Reason**

(e) The mandatory continuing airworthiness information (MCAI) states:

Surface defects were visually detected on the rudder of an [Airbus] A319 and an A321 in-service aeroplane. Investigation has determined that the defects reported on both rudders corresponded to areas that had been reworked in production. The investigation confirmed that the defects were the result of de-bonding between the skin and honeycomb core. Such reworks were also performed on some rudders fitted on A310 and A300–600 aeroplanes.

An extended de-bonding, if not detected and corrected, may degrade the structural integrity of the rudder. The loss of the rudder leads to degradation of the handling qualities and reduces the controllability of the aeroplane.

To address this unsafe condition [this EASA AD] requires inspections of specific areas and, depending on findings, the application of corrective actions for those rudders where production reworks have been identified. This * * * [EASA] AD * * * [also] requires for the vacuum loss hole restoration:

—A local ultrasonic inspection for reinforced area instead of the local thermographic inspection, which is maintained for non-reinforced areas, and

—Additional work performance for rudders on which this thermographic inspection has been performed in the reinforced area.

The inspections include vacuum loss inspections and elasticity laminate checker inspections for defects including de-bonding between the skin and honeycomb core of the rudder, and ultrasonic inspections for rudders on which temporary restoration with resin or permanent vacuum loss hole restoration has been performed. The corrective action is contacting the manufacturer for repair instructions and doing the repair. We are considering similar rulemaking action on Model A319 and A321 airplanes.

**Compliance**

(f) You are responsible for having the actions required by this AD performed within the compliance times specified, unless the actions have already been done.

**Actions and Compliance**

(g) For rudders with a honeycomb core density of 24 kg/m$^3$, as identified in Table 1 of this AD, do the actions required in paragraphs (g)(1) through (g)(10) of this AD, in accordance with Airbus All Operators Telex (AOT) A310–55A2048 or A300–55A6047, both Revision 02, both dated October 12, 2009, as applicable.

**Note 1:** Verification of the airplane serial numbers is not required.

(1) In the reinforced location: Within 8 months or 840 flight hours after the effective date of this AD, whichever occurs later, do a vacuum loss inspection to detect defects including de-bonding.

(2) In the trailing edge location: Within 24 months or 840 flight hours after the effective date of this AD, whichever occurs later, do an elasticity laminate checker inspection to detect defects including de-bonding.

(3) Repeat the inspection required by paragraph (g)(2) of this AD two times at intervals not to exceed 4,500 flight cycles, but not fewer than 4,000 flight cycles from the last inspection.

(4) In other locations (lower rib/upper edge/leading edge/other locations): Within 8 months or 840 flight hours after the effective date of this AD, whichever occurs later, do an elasticity laminate checker inspection to detect defects including de-bonding.

(5) Repeat the inspection required by paragraph (g)(4) of this AD at intervals not to exceed 8 months from the last inspection.

(6) Within 24 months or 840 flight hours after the effective date of this AD, whichever occurs later, do a vacuum loss inspection on the other locations (lower rib/upper edge/leading edge/other locations) to detect defects including de-bonding.

(7) Accomplishment of the inspection required by paragraph (g)(6) of this AD

terminates the initial and repetitive inspections required by paragraphs (g)(4) and (g)(5) of this AD.

(8) If any defect is found during any inspection required by paragraph (g)(1), (g)(2), (g)(4), or (g)(6) of this AD, before further flight, contact Airbus for repair instructions and do the repair.

(9) If no defects are found during any inspection required by paragraphs (g)(1) and (g)(6) of this AD, before further flight, restore the vacuum loss holes with temporary restoration with self-adhesive patches, temporary restoration with resin, or permanent restoration with resin and surface protection, and repeat the inspection required by paragraph (g)(3) of this AD at intervals not to exceed 4,500 flight cycles until permanent restoration is completed.

(10) If any defect is found during any inspection required by paragraphs (g)(1), (g)(2), (g)(4), and (g)(6) of this AD, at the applicable time specified in paragraph (g)(10)(i) or (g)(10)(ii) of this AD: Report the inspection results to Airbus SAS, SEER1/SEER2/SEER3, Customer Services, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France; fax +33 (0) 5 61 93 28 73; or e-mail to *region1.StructureRepairSupport@airbus.com, region2.StructureRepairSupport@airbus.com,* or *region3.StructureRepairSupport@airbus.com.*

(i) Inspections done before the effective date of this AD: Within 30 days after the effective date of this AD.

(ii) Inspections done on or after the effective date of this AD: Within 30 days after accomplishment of the inspection.

(h) For rudders not having a honeycomb core density of 24 kg/m$^3$, as identified in Table 1 of this AD, do the actions required in paragraphs (h)(1) through (h)(10) of this AD, in accordance with Airbus AOT A310–55A2048 or AOT A300–55A6047, both Revision 02, both dated October 12, 2009, as applicable.

**Note 2:** Verification of the airplane serial numbers is not required.

(1) In the reinforced location: Within 8 months after the rudder has accumulated 13,000 flight cycles since first installation, or within 8 months after the effective date of this AD, or within 840 flight hours after the effective date of this AD; whichever occurs latest, do a vacuum loss inspection to detect defects including de-bonding.

(2) In the trailing edge location: Within 24 months after the rudder has accumulated 13,000 flight cycles since first installation, or within 24 months after the effective date of this AD, or within 840 flight hours after the effective date of this AD, whichever occurs latest, do an elasticity laminate checker inspection to detect defects including de-bonding.

(3) Repeat the inspection required by paragraph (h)(2) of this AD two times at intervals not to exceed 4,500 flight cycles, but not fewer than 4,000 flight cycles from the last inspection.

(4) In other locations (lower rib/upper edge/leading edge/other locations): Within 8 months after the rudder has accumulated 13,000 flight cycles since first installation, or within 8 months after the effective date of this AD, or within 840 flight hours after the effective date of this AD, whichever occurs latest; do an elasticity laminate checker inspection to detect defects including de-bonding.

(5) Repeat the inspection required by paragraph (h)(4) of this AD at intervals not to exceed 8 months from the last inspection.

(6) Within 24 months after the rudder has accumulated 13,000 flight cycles since first installation, or within 24 months after the effective date of this AD, or within 840 flight hours after the effective date of this AD, whichever occurs latest, do a vacuum loss inspection on the other locations (lower rib/upper edge/leading edge/other location) to detect defects including de-bonding.

(7) Accomplishment of the inspection required by paragraph (h)(6) of this AD terminates the initial and repetitive inspections required by paragraphs (h)(4) and (h)(5) of this AD.

(8) If any defect is found during any inspection required by paragraph (h)(1), (h)(2), (h)(4), or (h)(6) of this AD, before further flight, contact Airbus for repair instructions and do the repair.

(9) If no defects are found during the inspections required by paragraphs (h)(1) and (h)(6) of this AD, before further flight, restore the vacuum loss holes with the temporary restoration with self adhesive patches, temporary restoration with resin, or permanent restoration with resin and surface protection, and repeat the inspection required by paragraph (h)(3) of this AD at intervals not to exceed 4,500 flight cycles until permanent restoration is completed.

(10) If any defect is found during any inspection required by paragraphs (h)(1), (h)(2), (h)(4), and (h)(6) of this AD, at the applicable time specified in paragraph (h)(10)(i) or (h)(10)(ii) of this AD: Report the inspection results to Airbus SAS, SEER1/SEER2/SEER3, Customer Services, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France; fax +33 (0) 5 61 93 28 73; or e-mail to *region1.StructureRepairSupport@airbus.com, region2.StructureRepairSupport@airbus.com,* or *region3.StructureRepairSupport@airbus.com.*

(i) Inspections done before the effective date of this AD: Within 30 days after the effective date of this AD.

(ii) Inspections done on or after the effective date of this AD: Within 30 days after accomplishment of the inspection.

(i) Actions done before the effective date of this AD, in accordance with the service information listed in Table 2 of this AD, are acceptable for compliance with the requirements of paragraphs (g) and (h) of this AD for the areas inspected, for any rudder listed in Table 1 of this AD.

(j) Additional areas requiring inspection for all airplanes are defined in Airbus AOT A310–55A2048 or AOT A300–55A6047, both Revision 02, both dated October 12, 2009, as applicable. For these additional areas, do the actions required in paragraphs (g) and (h) of this AD, as applicable, at the times specified in those paragraphs. For all areas, do the repetitive inspections required by paragraphs (g) and (h) of this AD as applicable at the times specified in those paragraphs.

TABLE 2—CREDIT SERVICE INFORMATION

| Airbus AOT— | Revision— | Dated— |
|---|---|---|
| A300–55A6047 | Original | May 11, 2009. |
| A300–55A6047 | 01 | July 8, 2009. |
| A310–55A2048 | Original | May 11, 2009. |
| A310–55A2048 | 01 | July 8, 2009. |

(k) For rudders on which temporary restoration with resin or permanent vacuum loss hole restoration has been done in accordance with the applicable service bulletin specified in Table 2 of this AD, as required in paragraph (g)(9) or (h)(9) of this AD, before the effective date of this AD: Within 4,500 flight cycles from the restoration date, do an ultrasonic inspection for defects, including debonding of the reinforced area, in accordance with Airbus AOT A310–55A2048 or AOT A300–55A6047, both Revision 02, both dated October 12, 2009, as applicable. If any defect is found, before further flight, contact Airbus for repair instructions and do the repair.

(l) After the effective date of this AD, no person may install any rudder listed in Table 1 of this AD on any airplane, unless the rudder has been inspected and all applicable corrective actions have been done in accordance with paragraph (g) or (h) of this AD.

**FAA AD Differences**

**Note 3:** This AD differs from the MCAI and/or service information as follows: No differences.

**Other FAA AD Provisions**

(m) The following provisions also apply to this AD:

(1) Alternative Methods of Compliance (AMOCs): The Manager, International Branch, ANM–116, FAA, has the authority to approve AMOCs for this AD, if requested

using the procedures found in 14 CFR 39.19. Send information to ATTN: Dan Rodina, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 227–2125; fax (425) 227–1149. Before using any approved AMOC on any airplane to which the AMOC applies, notify your principal maintenance inspector (PMI) or principal avionics inspector (PAI), as appropriate, or lacking a principal inspector, your local Flight Standards District Office. The AMOC approval letter must specifically reference this AD.

(2) Airworthy Product: For any requirement in this AD to obtain corrective actions from a manufacturer or other source, use these actions if they are FAA-approved. Corrective actions are considered FAA-approved if they are approved by the State of Design Authority (or their delegated agent). You are required to assure the product is airworthy before it is returned to service.

(3) Reporting Requirements: For any reporting requirement in this AD, under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), the Office of Management and Budget (OMB) has approved the information collection requirements and has assigned OMB Control Number 2120–0056.

**Related Information**

(n) Refer to MCAI European Aviation Safety Agency (EASA) Airworthiness Directive 2010–0002, dated January 5, 2010; Airbus AOT A310–55A2048, Revision 02, dated October 12, 2009; and Airbus AOT A300–55A6047, Revision 02, dated October 12, 2009; for related information.

**Material Incorporated by Reference**

(o) You must use Airbus All Operators Telex A300–55A6047, Revision 02, dated October 12, 2009; or Airbus All Operators Telex A310–55A2048, Revision 02, dated October 12, 2009; as applicable; to do the actions required by this AD, unless the AD specifies otherwise. (The document number, revision level, and date appear only on page 1 of the AOTs; no other page of these documents contains this information)

(1) The Director of the Federal Register approved the incorporation by reference of this service information under 5 U.S.C. 552(a) and 1 CFR part 51.

(2) For service information identified in this AD, contact Airbus SAS—EAW (Airworthiness Office), 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France; telephone +33 5 61 93 36 96; fax +33 5 61 93 44 51; e-mail: *account.airworth-eas@airbus.com;* Internet: *http://www.airbus.com.*

(3) You may review copies of the service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington. For information on the availability of this material at the FAA, call 425–227–1221.

(4) You may also review copies of the service information that is incorporated by reference at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

Issued in Renton, Washington, on July 28, 2010.

**Ali Bahrami,**

*Manager, Transport Airplane Directorate, Aircraft Certification Service.*

[FR Doc. 2010–19327 Filed 8–12–10; 8:45 am]

**BILLING CODE 4910–13–P**

## DEPARTMENT OF TRANSPORTATION

## Federal Aviation Administration

## 14 CFR Part 39

**[Docket No. FAA–2010–0704; Directorate Identifier 2010–NM–037–AD; Amendment 39–16389; AD 2010–16–12]**

**RIN 2120–AA64**

## Airworthiness Directives; The Boeing Company Model 777–200LR and –300ER Series Airplanes Equipped with GE90–100 Series Engines

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

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

**SUMMARY:** We are adopting a new airworthiness directive (AD) for certain Model 777–200LR and –300ER series airplanes equipped with GE90–100 series engines. This AD requires replacing the insulation blanket fasteners of the lower aft cowl of the thrust reverser. This AD also requires inspecting the oil scavenge tube on the turbine rear frame of the engine for damage, and replacement if necessary. This AD results from a determination of insufficient clearance and subsequent interference between the oil scavenge tube on the turbine rear frame of the engine and the bolt on the aft cowl insulation blanket of the thrust reverser. We are issuing this AD to prevent damage and possible puncture of the oil scavenge tube and consequent oil loss, which could result in an in-flight shutdown of the engine.

**DATES:** This AD is effective August 30, 2010.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in the AD as of August 30, 2010.

We must receive comments on this AD by September 27, 2010.

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

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590.
- *Hand Delivery:* U.S. Department of Transportation, Docket Operations, M–30, 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 service information identified in this AD, contact Boeing Commercial Airplanes, Attention: Data & Services Management, P.O. Box 3707, MC 2H–65, Seattle, Washington 98124–2207; telephone 206–544–5000, extension 1, fax 206–766–5680; e-mail *me.boecom@boeing.com;* Internet *https://www.myboeingfleet.com.*

**Examining the AD Docket**

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

**FOR FURTHER INFORMATION CONTACT:** Margaret Langsted, Aerospace Engineer, Propulsion Branch, ANM–140S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 917–6500; fax (425) 917–6590.

**SUPPLEMENTARY INFORMATION:**

**Discussion**

Boeing has determined that insufficient clearance and subsequent interference exists between the oil scavenge tube on the turbine rear frame of the engine and the bolt on the aft cowl insulation blanket. This location could encounter interference under flight loads. Damage to the oil scavenge tube was confirmed after flight on undelivered airplanes. Several in-service airplanes had sustained damage (dents, gouges, or chafing) because of the interference condition. This condition, if not corrected, could result in possible puncture of the oil scavenge tube and consequent oil loss, resulting in an in-flight shutdown of the engine.

**Relevant Service Information**

We reviewed Boeing Alert Service Bulletin 777–78A0070, dated November 20, 2008. This service bulletin describes

procedures for replacing the insulation blanket fasteners of the lower aft cowl of the thrust reverser.

Boeing Alert Service Bulletin 777–78A0070, dated November 20, 2008, specifies prior or concurrent accomplishment of an inspection of the oil scavenge tube on the turbine rear frame of the engine for damage, and replacement if damage is found, in accordance with General Electric GE90–100 Service Bulletin 79–0017, dated March 3, 2008.

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

No airplanes affected by this AD are on the U.S. Register. We are issuing this AD because the unsafe condition described previously is likely to exist or develop on other products of the same type design that could be registered in the United States in the future. This AD requires replacing the insulation blanket fasteners of the lower aft cowl of the thrust reverser. This AD also requires inspecting the oil scavenge tube on the turbine rear frame of the engine for damage, and replacement if necessary.

Since no airplanes are affected by this AD, notice and opportunity for public comment before issuing this AD are unnecessary.

**Comments Invited**

This AD is a final rule that involves requirements affecting flight safety, and we did not provide you with notice and an opportunity to provide your comments before it becomes effective. However, we invite you to send any written data, views, or arguments about this AD. Send your comments to an address listed under the **ADDRESSES** section. Include "Docket No. FAA–2010–0704; Directorate Identifier 2010–NM–037–AD" at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this AD. We will consider all comments received by the closing date and may amend this AD because of 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 we receive about this AD.

**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**

This AD will not have federalism implications under Executive Order 13132. This AD 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.

For the reasons discussed above, I certify that this AD:

(1) Is not a "significant regulatory action" under Executive Order 12866,

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

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

You can find our regulatory evaluation and the estimated costs of compliance in the AD docket.

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

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

**Adoption of the Amendment**

■ Accordingly, under the authority delegated to me by the Administrator, the FAA amends 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:

**2010–16–12 The Boeing Company:** Amendment 39–16389. Docket No. FAA–2010–0704; Directorate Identifier 2010–NM–037–AD.

**Effective Date**

(a) This airworthiness directive (AD) is effective August 30, 2010.

**Affected ADs**

(b) None.

**Applicability**

(c) This AD applies to The Boeing Company Model 777–200LR and –300ER series airplanes, certificated in any category; as identified in Boeing Alert Service Bulletin 777–78A0070, dated November 20, 2008.

**Subject**

(d) Air Transport Association (ATA) of America Code 78: Engine exhaust.

**Unsafe Condition**

(e) This AD results from a determination of insufficient clearance and subsequent interference between the oil scavenge tube on the turbine rear frame of the engine and the bolt on the aft cowl insulation blanket of the thrust reverser. The Federal Aviation Administration is issuing this AD to prevent damage and possible puncture of the oil scavenge tube and consequent oil loss, which could result in an in-flight shutdown of the engine.

**Compliance**

(f) You are responsible for having the actions required by this AD performed within the compliance times specified, unless the actions have already been done.

**Fastener Replacement**

(g) Within 180 days or 300 flight cycles after the effective date of this AD, whichever is later: Replace the insulation blanket fasteners of the lower aft cowl of the thrust reverser, in accordance with the Accomplishment Instructions of Boeing Alert Service Bulletin 777–78A0070, dated November 20, 2008.

**Inspect and Replace**

(h) Before or concurrently with accomplishing the requirements in paragraph (g) of this AD: Do a detailed inspection of the oil scavenge tube on the turbine rear frame of the engine for damage, in accordance with the Accomplishment Instructions of General Electric GE90–100 Service Bulletin 79–0017, dated March 3, 2008. If any damage is found, before further flight, replace the tube, in accordance with the Accomplishment Instructions of General Electric GE90–100 Service Bulletin 79–0017, dated March 3, 2008.

**Note 1:** For the purposes of this AD, a detailed inspection is: "An intensive examination of a specific item, installation, or assembly to detect damage, failure, or irregularity. Available lighting is normally supplemented with a direct source of good lighting at an intensity deemed appropriate. Inspection aids such as mirror, magnifying lenses, etc., may be necessary. Surface cleaning and elaborate procedures may be required."

**Alternative Methods of Compliance (AMOCs)**

(i)(1) The Manager, Seattle Aircraft Certification Office, FAA, has the authority to

approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. Send information to ATTN: Margaret Langsted, Aerospace Engineer, Propulsion Branch, ANM–140S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 917–6500; fax (425) 917–6590. Information may be e-mailed to: *9-ANM-Seattle-ACO-AMOC-Requests@faa.gov.*

(2) To request a different method of compliance or a different compliance time for this AD, follow the procedures in 14 CFR 39.19. Before using any approved AMOC on any airplane to which the AMOC applies, notify your principal maintenance inspector (PMI) or principal avionics inspector (PAI), as appropriate, or lacking a principal inspector, your local Flight Standards District Office. The AMOC approval letter must specifically reference this AD.

**Material Incorporated by Reference**

(j) You must use Boeing Alert Service Bulletin 777–78A0070, dated November 20, 2008; and General Electric GE90–100 Service Bulletin 79–0017, dated March 3, 2008; as applicable; to do the actions required by this AD, unless the AD specifies otherwise.

(1) The Director of the Federal Register approved the incorporation by reference of this service information under 5 U.S.C. 552(a) and 1 CFR part 51.

(2) For service information identified in this AD, contact Boeing Commercial Airplanes, Attention: Data & Services Management, P.O. Box 3707, MC 2H–65, Seattle, Washington 98124–2207; telephone 206–544–5000, extension 1, fax 206–766–5680; e-mail *me.boecom@boeing.com;* Internet *https://www.myboeingfleet.com.*

(3) You may review copies of the service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington. For information on the availability of this material at the FAA, call 425–227–1221.

(4) You may also review copies of the service information that is incorporated by reference at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

Issued in Renton, Washington, on July 27, 2010.

**Ali Bahrami,**

*Manager, Transport Airplane Directorate, Aircraft Certification Service.*

[FR Doc. 2010–19293 Filed 8–12–10; 8:45 am]

**BILLING CODE 4910–13–P**

## DEPARTMENT OF TRANSPORTATION

## Federal Aviation Administration

## 14 CFR Part 39

**[Docket No. FAA–2010–0222; Directorate Identifier 2008–NM–012–AD; Amendment 39–16387; AD 2010–16–10]**

**RIN 2120–AA64**

## Airworthiness Directives; BAE Systems (Operations) Limited Model Avro 146–RJ and BAe 146 Airplanes

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

**ACTION:** Final rule.

**SUMMARY:** We are adopting a new airworthiness directive (AD) for the products listed above. This AD results from mandatory continuing airworthiness information (MCAI) originated 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:

A potential fleet wide problem has been identified regarding the interchanging of wing links on all BAe 146 & AVRO 146–RJ aircraft during scheduled maintenance. Some operators erroneously believed that these parts were interchangeable. The effects of changing winglinks has resulted in either a shorter or longer wing link being fitted, which introduces local stresses in the wing top and bottom surfaces local to rib 2, wing links and wing link fitting attachment and the fuselage local to Frames 26 and 29. This condition, if not corrected, could result in a reduction of structural integrity of the fuselage/wing attachment with possible catastrophic consequences.

* * * * *

The unsafe condition could result in loss of a wing or controllability of the airplane. We are issuing this AD to require actions to correct the unsafe condition on these products.

**DATES:** This AD becomes effective September 17, 2010.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of September 17, 2010.

**ADDRESSES:** You may examine the AD docket on the Internet at *http://www.regulations.gov* or in person at the U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC.

**FOR FURTHER INFORMATION CONTACT:** Todd Thompson, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 227–1175; fax (425) 227–1149.

**SUPPLEMENTARY INFORMATION:**

### Discussion

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to include an AD that would apply to the specified products. That NPRM was published in the **Federal Register** on March 15, 2010 (75 FR 12158). That NPRM proposed to correct an unsafe condition for the specified products. The MCAI states:

A potential fleet wide problem has been identified regarding the interchanging of wing links on all BAe 146 & AVRO 146–RJ aircraft during scheduled maintenance. Some operators erroneously believed that these parts were interchangeable. The effects of changing winglinks has resulted in either a shorter or longer wing link being fitted, which introduces local stresses in the wing top and bottom surfaces local to rib 2, wing links and wing link fitting attachment and the fuselage local to Frames 26 and 29. This condition, if not corrected, could result in a reduction of structural integrity of the fuselage/wing attachment with possible catastrophic consequences.

For the reasons described above, the present Airworthiness Directive (AD) requires the accomplishment of inspections and rectification actions, as necessary.

The unsafe condition could result in loss of a wing or controllability of the airplane. The inspections include inspecting wing links for incorrect part numbers (*i.e.,* parts that are not original), inspecting to determine wing geometry measurements, and inspecting the wing link, bores, bolts, and nuts for corrosion. Corrective actions include installing wing-to-fuselage fairings and repairing. You may obtain further information by examining the MCAI in the AD docket.

### Comments

We gave the public the opportunity to participate in developing this AD. We received no comments on the NPRM or on the determination of the cost to the public.

### Explanation of Change to Applicability

We have revised the applicability in paragraph (c) of this final rule to identify model designations as published in the most recent type certificate data sheet for the affected models.

### Conclusion

We reviewed the available data and determined that air safety and the public interest require adopting the AD with the change described previously. We determined that this change will not

increase the economic burden on any operator or increase the scope of the AD.

**Differences Between This AD and the MCAI or Service Information**

We have reviewed the MCAI and related service information and, in general, agree with their substance. But we might have found it necessary to use different words from those in the MCAI to ensure the AD is clear for U.S. operators and is enforceable. In making these changes, we do not intend to differ substantively from the information provided in the MCAI and related service information.

We might also have required different actions in this AD from those in the MCAI in order to follow our FAA policies. Any such differences are highlighted in a Note within the AD.

**Costs of Compliance**

We estimate that this AD will affect 1 product of U.S. registry. We also estimate that it will take about 180 work-hours per product to comply with the basic requirements of this AD. The average labor rate is $85 per work-hour. Required parts will cost about $0 per product. Where the service information lists required parts costs that are covered under warranty, we have assumed that there will be no charge for these parts. As we do not control warranty coverage for affected parties, some parties may incur costs higher than estimated here. Based on these figures, we estimate the cost of this AD to the U.S. operators to be $15,300.

**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 AD will not have federalism implications under Executive Order 13132. This AD 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.

For the reasons discussed above, I certify this AD:

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 AD and placed it in the AD docket.

**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 the NPRM, the regulatory evaluation, any comments received, and other information. The street address for the Docket Operations office (telephone (800) 647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

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

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

**Adoption of the Amendment**

■ Accordingly, under the authority delegated to me by the Administrator, the FAA amends 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:

**2010–16–10 BAE Systems (Operations) Limited:** Amendment 39–16387. Docket No. FAA–2010–0222; Directorate Identifier 2008–NM–012–AD.

**Effective Date**

(a) This airworthiness directive (AD) becomes effective September 17, 2010.

**Affected ADs**

(b) None.

**Applicability**

(c) This AD applies to BAE Systems (Operations) Limited Model BAe 146–100A, –200A, and –300A airplanes, and Avro 146–RJ70A, 146–RJ85A, and 146–RJ100A airplanes; all serial numbers; certificated in any category; as identified in paragraph 1.A.(1) of BAE Systems (Operations) Limited Inspection Service Bulletin ISB.53–175, Revision 1, dated April 2, 2007.

**Subject**

(d) Air Transport Association (ATA) of America Code 57: Wings.

**Reason**

(e) The mandatory continuing airworthiness information (MCAI) states:

A potential fleet wide problem has been identified regarding the interchanging of wing links on all BAe 146 & AVRO 146–RJ aircraft during scheduled maintenance. Some operators erroneously believed that these parts were interchangeable. The effects of changing wing links has resulted in either a shorter or longer wing link being fitted, which introduces local stresses in the wing top and bottom surfaces local to rib 2, wing links and wing link fitting attachment and the fuselage local to Frames 26 and 29. This condition, if not corrected, could result in a reduction of structural integrity of the fuselage/wing attachment with possible catastrophic consequences.

For the reasons described above, the present Airworthiness Directive (AD) requires the accomplishment of inspections and rectification actions, as necessary.

The unsafe condition could result in loss of a wing or controllability of the airplane. The inspections include inspecting wing links for incorrect part numbers (*i.e.,* parts that are not original), inspecting to determine wing geometry measurements, and inspecting the wing link, bores, bolts, and nuts for corrosion. Corrective actions include installing wing-to-fuselage fairings and repairing.

**Compliance**

(f) You are responsible for having the actions required by this AD performed within the compliance times specified, unless the actions have already been done.

**Actions**

(g) Do the following actions.

(1) For airplanes subject to maintenance review board report (MRBR) requirements: Within 30 days after the effective date of this AD, revise the supplemental structural inspection (SSI) portion of the airplane inspection schedule, in accordance with paragraph 1.D.(2) of BAE Systems (Operations) Limited Inspection Service Bulletin ISB.53–175, Revision 1, dated April 2, 2007. Do the initial inspection at the applicable time, and repeat at the applicable intervals, as specified in Appendix 3 of BAE Systems (Operations) Limited Inspection Service Bulletin ISB.53–175, Revision 1, dated April 2, 2007. Where Appendix 3 of BAE Systems (Operations) Limited Inspection Service Bulletin ISB.53–175, Revision 1, dated April 2, 2007, does not

specify a compliance time in either flight cycles or in flight hours, use flight cycles.

(2) For airplanes subject to MRBR requirements: Accomplishing the inspections and all applicable corrective actions specified in paragraph 1.D.(3) of BAE Systems (Operations) Limited Inspection Service Bulletin ISB.53–175, Revision 1, dated April 2, 2007, terminates the revisions to the SSI portion of the airplane inspection schedule incorporated in accordance with paragraph (g)(1) of this AD, provided that if any corrosion is found during any inspection specified in "Part C" or "Part D" of paragraph 2.C. of BAE Systems (Operations) Limited Inspection Service Bulletin ISB.53–175, Revision 1, dated April 2, 2007, repair is accomplished before further flight using a method approved by the Manager, International Branch, ANM 116, Transport Airplane Directorate, FAA, or EASA (or its delegated agent).

(3) For operational airplanes subject to MRBR-to-supplemental-structural-inspection-document (SSID) transition requirements or to SSID requirements: Within 5,000 flight cycles after the effective date of this AD, do the inspections and all applicable corrective actions, in accordance with paragraph 2.C. of the Accomplishment Instructions of BAE Systems (Operations) Limited Inspection Service Bulletin ISB.53–175, Revision 1, dated April 2, 2007, except if any corrosion is found during any inspection specified in "Part C" or "Part D" of paragraph 2.C. of BAE Systems (Operations) Limited Inspection Service Bulletin ISB.53–175, Revision 1, dated April 2, 2007, repair must be accomplished using a method approved by the Manager, International Branch, ANM 116, Transport Airplane Directorate, FAA, or EASA (or its delegated agent). Do all applicable corrective actions before further flight, except that replacements of all the wing links that are not within the specified tolerance must be done before the airplane reaches its MRBR airframe life limit.

**Note 1:** For the purposes of this AD, a detailed inspection is: "An intensive examination of a specific item, installation, or assembly to detect damage, failure, or irregularity. Available lighting is normally supplemented with a direct source of good lighting at an intensity deemed appropriate. Inspection aids such as mirror, magnifying lenses, etc., may be necessary. Surface cleaning and elaborate procedures may be required."

(4) For any inspection done in accordance with paragraph (g)(2) or (g)(3) of this AD: Send reports to BAE Systems, Customer Liaison, Customer Support (Building 37), BAE Systems (Operations) Limited, Prestwick International Airport, Ayrshire, KA9 2RW, Scotland; fax +44 (0) 1292 675432; e-mail *raengliason@baesystems.com;* at the applicable time specified in paragraph (g)(4)(i) or (g)(4)(ii) of this AD. The report must include the inspection results, a description of any discrepancies found, the airplane serial number, and the number of landings and flight hours on the airplane.

(i) If the inspection was done on or after the effective date of this AD: Submit the report within 30 days after the inspection.

(ii) If the inspection was done before the effective date of this AD: Submit the report within 30 days after the effective date of this AD.

(5) For airplanes that are non-operational as of the effective date of this AD and that are subject to MRBR-to-SSID transition requirements or to SSID requirements: Before returning any airplane to service, do the inspections and all applicable corrective actions, in accordance with paragraph 2.C. of the Accomplishment Instructions of BAE Systems (Operations) Limited Inspection Service Bulletin ISB.53–175, Revision 1, dated April 2, 2007, except if any corrosion is found during any inspection specified in "Part C" or "Part D" of paragraph 2.C. of BAE Systems (Operations) Limited Inspection Service Bulletin ISB.53–175, Revision 1, dated April 2, 2007, repair must be accomplished using a method approved by the Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA, or EASA (or its delegated agent).

(6) Actions accomplished before the effective date of this AD in accordance with BAE Systems (Operations) Limited Inspection Service Bulletin ISB.53–175, dated December 21, 2006, are considered acceptable for compliance with the corresponding action specified in this AD.

**FAA AD Differences**

**Note 2:** This AD differs from the MCAI and/or service information as follows: The MCAI does not specify a corrective action if corrosion is found during accomplishment of the actions specified in "Part C" and "Part D" of paragraph 2.C. of BAE Systems (Operations) Limited Inspection Service Bulletin ISB.53–175, Revision 1, dated April 2, 2007. This AD requires that if any corrosion is found, a repair must be done in accordance with a method approved by the FAA or EASA (or its delegated agent).

**Other FAA AD Provisions**

(h) The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, International Branch, ANM–116, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. Send information to ATTN: Todd Thompson, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 227–1175; fax (425) 227–1149. Before using any approved AMOC on any airplane to which the AMOC applies, notify your principal maintenance inspector (PMI) or principal avionics inspector (PAI), as appropriate, or lacking a principal inspector, your local Flight Standards District Office. The AMOC approval letter must specifically reference this AD.

(2) *Airworthy Product:* For any requirement in this AD to obtain corrective actions from a manufacturer or other source, use these actions if they are FAA-approved. Corrective actions are considered FAA-approved if they are approved by the State of Design Authority (or their delegated agent). You are required to assure the product is airworthy before it is returned to service.

(3) *Reporting Requirements:* For any reporting requirement in this AD, under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), the Office of Management and Budget (OMB) has approved the information collection requirements and has assigned OMB Control Number 2120–0056.

**Related Information**

(i) Refer to MCAI EASA Airworthiness Directive 2008–0003, dated January 8, 2008; and BAE Systems (Operations) Limited Inspection Service Bulletin ISB.53–175, Revision 1, dated April 2, 2007; for related information.

**Material Incorporated by Reference**

(j) You must use BAE Systems (Operations) Limited Inspection Service Bulletin ISB.53–175, Revision 1, dated April 2, 2007, as applicable, to do the actions required by this AD, unless the AD specifies otherwise.

(1) The Director of the Federal Register approved the incorporation by reference of this service information under 5 U.S.C. 552(a) and 1 CFR part 51.

(2) For service information identified in this AD, contact BAE Systems (Operations) Limited, Customer Information Department, Prestwick International Airport, Ayrshire, KA9 2RW, Scotland, United Kingdom; telephone +44 1292 675207; fax +44 1292 675704; e-mail *RApublications@baesystems.com;* Internet *http://www.baesystems.com/Businesses/RegionalAircraft/index.htm.*

(3) You may review copies of the service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington. For information on the availability of this material at the FAA, call 425–227–1221.

(4) You may also review copies of the service information that is incorporated by reference at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

Issued in Renton, Washington, on July 28, 2010.

**Ali Bahrami,**

*Manager, Transport Airplane Directorate, Aircraft Certification Service.*

[FR Doc. 2010–19340 Filed 8–12–10; 8:45 am]

**BILLING CODE 4910–13–P**

## CONSUMER PRODUCT SAFETY COMMISSION

## 16 CFR Part 1500

## Correction to Internal Citation of "Extremely Flammable Solid" and "Flammable Solid"

**AGENCY:** Consumer Product Safety Commission.

**ACTION:** Final rule.

**SUMMARY:** The Consumer Product Safety Commission ("CPSC," "Commission," or "we") is amending its regulations concerning exemptions for small packages, minor hazards, and special circumstances to correct internal citations to the definitions of "extremely flammable solid" and "flammable solid" in our regulations.

**DATES:** This rule is effective on August 13, 2010.

**FOR FURTHER INFORMATION CONTACT:** Mary A. House, Office of the General Counsel, Consumer Product Safety Commission, 4330 East West Highway, Bethesda, Maryland 20814, e-mail: *mhouse@cpsc.gov.*

**SUPPLEMENTARY INFORMATION:** The Commission's regulations at 16 CFR 1500.83 titled "Exemptions for small packages, minor hazards, and special circumstances" cite to the definitions of "extremely flammable solid" and "flammable solid" contained in 16 CFR 1500.3(c)(6) in several subsections. The definitions of "extremely flammable solid" and "flammable solid" were originally codified at 16 CFR 1500.3(c)(6)(iii) and (iv), respectively. In 1986, the Commission amended the definitions of "extremely flammable," "flammable," and "combustible" hazardous substances contained in 16 CFR 1500.3(c)(6), 51 FR 28529 (Aug. 8., 1986), to align with the definitions used by other federal agencies. This 1986 amendment moved the definitions of "extremely flammable solid" and "flammable solid" to 16 CFR 1500.3(c)(6)(v) and (vi), respectively. The cross-references to these definitions contained in 16 CFR 1500.83, however, were not updated at that time. This amendment corrects this oversight by updating the references to the definitions of "extremely flammable solid" and "flammable solid" in the following subsections: 1500.83(a)(2), 1500.83(a)(3), 1500.83(a)(4), and 1500.83(a)(18).

**List of Subjects in 16 CFR Part 1500**

Consumer protection, Hazardous materials, Hazardous substances, Imports, Infants and children, Labeling, Law enforcement, Toys.

**Conclusion**

■ For the reasons discussed the Commission amends 16 CFR part 1500 to read as follows:

## PART 1500—[AMENDED]

■ 1. The authority citation for part 1500 continues to read as follows:

**Authority:** 15 U.S.C. 1261–1277.

■ 2. In § 1500.83, revise paragraphs (a)(2), (a)(3), (a)(4), and (a)(18) introductory text to read as follows:

**§ 1500.83 Exemptions for small packages, minor hazards, and special circumstances.**

(a) * * *

(2) Common matches, including book matches, wooden matches, and so-called "safety" matches are exempt from the labeling requirements of section 2(p)(1) of the act (repeated in § 1500.3(b)(14)(i)) insofar as they apply to the product being considered hazardous because of being an "extremely flammable solid" or "flammable solid" as defined in § 1500.3(c)(6)(v) and (vi).

(3) Paper items such as newspapers, wrapping papers, toilet and cleansing tissues, and paper writing supplies are exempt from the labeling requirements of section 2(p)(1) of the act (repeated in § 1500.3(b)(14)(i)) insofar as they apply to the products being considered hazardous because of being an "extremely flammable solid" or "flammable solid" as defined in § 1500.3(c)(6)(v) and (vi).

(4) Thread, string, twine, rope, cord, and similar materials are exempt from the labeling requirements of section 2(p)(1) of the act (repeated in § 1500.3(b)(14)(i)) insofar as they apply to the products being considered hazardous because of being an "extremely flammable solid" or "flammable solid" as defined in Sec. 1500.3(c)(6)(v) and (vi).

* * * * *

(18) Packages containing articles intended as single-use spot removers, and which consist of a cotton pad or other absorbent material saturated with a mixture of drycleaning solvents, are exempt from the labeling requirements of section 2(p)(1) of the act (repeated in § 1500.3(b)(14)(i)) insofar as they apply to the "flammable solid" hazard as defined in § 1500.3(c)(6)(vi), provided that:

* * * * *

Dated: August 10, 2010.

**Todd A. Stevenson,**

*Secretary, United States Consumer Product Safety Commission.*

[FR Doc. 2010–20063 Filed 8–12–10; 8:45 am]

**BILLING CODE 6355–01–P**

## DEPARTMENT OF THE TREASURY

### Internal Revenue Service

### 26 CFR Parts 1 and 602

**[TD 9498]**

**RIN 1545–BJ00**

## Application of Section 108(i) to Partnerships and S Corporations

**AGENCY:** Internal Revenue Service (IRS), Treasury.

**ACTION:** Temporary regulations.

**SUMMARY:** This document contains temporary regulations relating to the application of section 108(i) of the Internal Revenue Code (Code) to partnerships and S corporations and provides rules regarding the deferral of discharge of indebtedness income and original issue discount deductions by a partnership or an S corporation with respect to reacquisitions of applicable debt instruments after December 31, 2008, and before January 1, 2011. The regulations affect partnerships and S corporations with respect to reacquisitions of applicable debt instruments and their partners and shareholders. The text of these temporary regulations also serves as the text of the proposed regulations set forth in the Notice of Proposed Rulemaking on this subject in the Proposed Rules section of this issue of the **Federal Register.**

**DATES:** *Effective Date:* These regulations are effective on August 13, 2010.

*Applicability Date:* For dates of applicability, *see* § 1.108(i)–0T(b).

**FOR FURTHER INFORMATION CONTACT:** Megan A. Stoner or Joseph R. Worst, Office of Associate Chief Counsel (Passthroughs and Special Industries), (202) 622–3070 (not a toll-free number).

**SUPPLEMENTARY INFORMATION:**

**Paperwork Reduction Act**

The collection of information contained in these temporary regulations has been reviewed and approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507) under control number 1545–2147. The collection of information in these temporary regulations is in § 1.108(i)–2T(b)(3)(iv). Under § 1.108(i)–2T(b)(3)(iv), a partner in a partnership that makes an election under section 108(i) is required to provide certain information to the partnership so that the partnership can correctly determine the partner's deferred section 752 amount with

respect to an applicable debt instrument.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid control number assigned by the Office of Management and Budget.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and return information are confidential, as required by 26 U.S.C. 6103.

**Background**

Section 1231 of the American Recovery and Reinvestment Tax Act of 2009, Public Law 111–5 (123 Stat. 338 (2009)), added section 108(i) to the Code. Section 108(i) generally provides for an elective deferral of discharge of indebtedness income (COD income) realized by a taxpayer from a reacquisition of an applicable debt instrument that occurs after December 31, 2008, and before January 1, 2011. COD income deferred under section 108(i) is included in gross income ratably over a five taxable-year period (inclusion period) beginning with the taxpayer's fourth or fifth taxable year following the taxable year of the reacquisition. In circumstances where a debt instrument is issued (or treated as issued) as part of the reacquisition, some or all of any original issue discount (OID) expense accruing from the debt instrument in a taxable year prior to the first taxable year of the inclusion period may also be required to be deferred (deferred OID deduction). The aggregate amount of deferred OID deductions is limited to the amount of COD income deferred with respect to the applicable debt instrument for which the section 108(i) election is made and the aggregate amount of deferred OID deductions is taken into account ratably over the inclusion period. In general, COD income deferred under section 108(i) and related deferred OID deductions with respect to an applicable debt instrument that have not been previously taken into account (deferred items) are accelerated and taken into account in the taxable year in which an acceleration event occurs. A section 108(i) election is irrevocable and, if a section 108(i) election is made, sections 108(a)(1)(A), (B), (C), and (D) do not apply to the COD income that is deferred under section 108(i). Section 108(i)(7) authorizes the Secretary to prescribe regulations as may be necessary or appropriate for purposes of applying section 108(i).

After section 108(i) was enacted, the IRS and the Treasury Department received a number of comments regarding the application of section 108(i) to partnerships and S corporations. In August 2009, the IRS and the Treasury Department issued Rev. Proc. 2009–37 (2009–36 IRB 309), which provides election procedures for taxpayers (including partnerships and S corporations) and other guidance under section 108(i). With respect to COD income realized by a partnership or S corporation, the election is made at the entity level. Partnerships and S corporations that make an election under section 108(i) (electing partnership or electing S corporation) must follow the election procedures and reporting requirements of Rev. Proc. 2009–37.

These temporary regulations address issues relating to partnerships and S corporations with respect to section 108(i), including issues raised by commenters.

**Explanation of Provisions**

*A. Applicable Debt Instrument*

Section 108(i)(3) defines an "applicable debt instrument" as any debt instrument issued by a C corporation or by any other person in connection with the conduct of a trade or business by that person. The determination of whether a debt instrument is an applicable debt instrument within the meaning of section 108(i)(3) is based on all the facts and circumstances.

Section 1.108(i)–2T(d)(1) provides five safe harbors under which a debt instrument issued by a partnership or an S corporation is deemed to be issued in connection with the partnership's or S corporation's trade or business for purposes of section 108(i). Thus, a debt instrument issued by a partnership or an S corporation qualifies as an applicable debt instrument for purposes of section 108(i) if the electing partnership or electing S corporation can establish that it meets the requirements of one of the safe harbors.

Some commenters asked whether a debt instrument issued by a non-C corporation taxpayer to acquire an interest in a partnership or S corporation that is conducting a trade or business qualifies as an applicable debt instrument, where the issuing taxpayer does not conduct a trade or business. While a debt instrument generally does not qualify as an applicable debt instrument unless the issuing taxpayer conducts a trade or business, one of the safe harbors under § 1.108(i)–2T(d)(1) provides that if an electing partnership or an electing S corporation can establish that at least 95 percent of the interest paid or accrued on a debt instrument issued by a partnership or S corporation was allocated to a trade or business expenditure under § 1.163–8T for the taxable year of issuance, then the debt instrument qualifies as an applicable debt instrument for purposes of section 108(i).

Commenters also asked how a debt instrument issued by a disregarded entity should be treated under section 108(i). Generally, under § 301.7701–2 of the Procedure and Administration Regulations, if an entity is disregarded, its activities are treated in the same manner as a sole proprietorship, branch, or division of the owner. Thus, for purposes of determining whether a debt instrument qualifies as an applicable debt instrument under section 108(i), a debt instrument issued by a disregarded entity is treated as a debt instrument issued by the person treated as owning the assets of the disregarded entity for federal income tax purposes.

*B. Allocation of COD Income*

Section 108(i)(6) requires that a partnership allocate the COD income that is deferred under section 108(i) to the partners that were partners immediately prior to the transaction giving rise to the COD income in the same manner the income would be allocated without regard to section 108(i). In addition, section 108(i)(5)(B)(iii) provides that the section 108(i) election is to be made by the partnership and not its partners separately. The IRS and the Treasury Department recognize that there are instances in which the inclusion of COD income would be beneficial to some partners, but not to others. As a result, the temporary regulations, while not changing the general rules under section 704, permit a partnership to determine the portion of each partner's allocable share of COD income resulting from a reacquisition of an applicable debt instrument that is deferred under section 108(i) (deferred amount) and the portion that is not deferred (included amount). The temporary regulations therefore require that the electing partnership first allocate all of the COD income with respect to an applicable debt instrument to its partners that are partners in the partnership immediately before the reacquisition in the manner in which the income would be included in the distributive shares of the partners under section 704 and the regulations under section 704, including § 1.704–1(b)(2)(iii), without regard to section 108(i). The partnership must then

determine the portion of each such partner's allocable share of the COD income from the applicable debt instrument that is the deferred amount, and the portion that is the included amount and therefore included in the partner's distributive share of partnership income for the taxable year of the partnership in which the reacquisition occurs.

With respect to S corporations, section 108(i) requires that the election to defer COD income be made at the corporate level. Section 108(i) does not, however, impose a specific allocation rule with respect to the COD income realized by an electing S corporation from the reacquisition of an applicable debt instrument as it does for electing partnerships. The IRS and the Treasury Department believe that a rule similar to the partnership allocation rule under section 108(i)(6) should apply to electing S corporations. Therefore, § 1.108(i)–2T(c)(1) requires that the deferred COD income of an electing S corporation be shared pro rata, on the basis of stock ownership, among those shareholders that hold stock in the electing S corporation immediately prior to the transaction giving rise to the COD income.

*C. Basis Adjustments*

Commenters asked whether a partner is required to adjust the basis in its partnership interest under section 705 in the year of the reacquisition to account for the partner's share of deferred COD income, or whether such adjustments occur when the deferred items are recognized. In general, a partner's basis in its partnership interest is increased under section 705(a) to account for the partner's share of partnership COD income in the taxable year that the COD income is realized by the partnership. If a partnership elects to defer its COD income under section 108(i), however, a partner's basis in its partnership interest is not increased under section 705(a) to account for the partner's deferred amount in the taxable year that the COD income is realized, but rather is adjusted in the taxable year that the partner recognizes the deferred amount. Because a partner does not adjust its basis for deferred COD income in the taxable year of a reacquisition, a partner could recognize gain under section 731(a) in that taxable year if the decrease in the partner's share of partnership liabilities exceeds the partner's basis in its partnership interest. Congress anticipated this result and created a special deferral rule in section 108(i)(6).

Section 108(i)(6) provides that any decrease in a partner's share of partnership liabilities as a result of the discharge shall not be taken into account for purposes of section 752 at the time of the discharge to the extent it would cause the partner to recognize gain under section 731. If a partner were to increase the basis in its partnership interest to account for the deferred COD income at the time of the reacquisition, the special deferral rule in section 108(i)(6) would not be needed. Therefore, consistent with the rule in section 108(i)(6), § 1.108(i)–2T(b)(2) provides that a partner's basis in its partnership interest is not adjusted under section 705(a) to account for the partner's share of the partnership's deferred items at the time of the reacquisition, but is adjusted when the deferred items are recognized, either during the recognition period or as a result of an acceleration event. When the partner's share of the partnership's deferred items is recognized due to an acceleration event, the partner must adjust the basis in its partnership interest under section 705 immediately prior to the acceleration event to account for the deferred items that are recognized.

Like the basis adjustment rules for partners, an S corporation shareholder's stock basis is not adjusted under section 1367 to account for the shareholder's share of the S corporation's deferred items at the time of the reacquisition, but is adjusted when the deferred items are recognized. Moreover, an S corporation's accumulated adjustments account (AAA) is not adjusted to account for the deferred items at the time of the reacquisition, but is adjusted in the taxable year in which the deferred items are recognized.

*D. Deferred Section 752 Amount Rules*

Section 2.09 of Rev. Proc. 2009–37 provides general guidelines for a partnership to use in determining a partner's deferred section 752 amount (that is, a decrease in a partner's share of a partnership liability under section 752(b) resulting from the reacquisition of an applicable debt instrument that is not treated as a current distribution of money to the partner under section 752(b) by reason of section 108(i)(6)). The temporary regulations include the same general rules that are set forth in Rev. Proc. 2009–37 and provide additional computational rules for determining a partner's deferred section 752 amount.

In computing a partner's deferred section 752 amount, under § 1.108(i)–2T(b)(3)(ii), the electing partnership must determine the amount of gain the partner would recognize in a taxable year of a reacquisition under section 731 as a result of the reacquisition absent the deferral provided in the second sentence of section 108(i)(6). In making this determination, the basis ordering rules in section 705(a) apply and the amount of any deemed distribution of money under section 752(b), resulting from the reacquisition of an applicable debt instrument, that is treated as an advance or drawing under § 1.731–1(a)(1)(ii) is determined as if no COD income resulting from the reacquisition is deferred under section 108(i). *See* Rev. Rul. 94–4, 1994–1 C.B. 195, and Rev. Rul. 92–97, 1992–2 C.B. 124, for rules regarding when a deemed distribution of money under section 752(b) resulting from a cancellation of debt is treated as an advance or drawing under § 1.731–1(a)(1)(ii).

If the electing partnership determines that a partner would recognize gain under section 731 absent the deferral provided in the second sentence of section 108(i)(6) and the partnership makes a section 108(i) election to defer COD income from only one applicable debt instrument during the taxable year, then any deferred section 752 amount of the partner relates to that applicable debt instrument. If the partnership makes a section 108(i) election to defer COD income from more than one applicable debt instrument during the taxable year, § 1.108(i)–2T(b)(3)(iii) provides a rule for determining the portion of the partner's deferred section 752 amount that relates to each such applicable debt instrument.

Section 4.12(4) of Rev. Proc. 2009–37 provides that the deferred section 752 amount for partners in a partnership making a section 108(i) election is calculated for the electing partnership's direct partners. In circumstances where a partnership (upper-tier partnership) that is a direct or indirect partner of an electing partnership has a deferred section 752 amount with respect to an applicable debt instrument of the electing partnership, the upper-tier partnership does not need to calculate the deferred section 752 amount of its direct partners in the same manner that the electing partnership does. Instead, the upper-tier partnership that has a deferred section 752 amount shall allocate such amount among its direct partners that have a deferred amount with respect to the applicable debt instrument in proportion to the partners' respective shares of the upper-tier partnership's deferred amount. Section 1.108(i)–2T(b)(4)(ii) provides that a partner's share of an upper-tier partnership's deferred section 752 amount may not exceed the partner's deferred amount with respect to the

applicable debt instrument to which the deferred section 752 amount relates.

The temporary regulations contain examples to illustrate how a partner's deferred section 752 amount should be computed. One example illustrates ordering rules in computing a partner's deferred section 752 amount if the partnership has both gross income and separately stated losses in the year of a reacquisition. Section 1.704–1(d)(2) provides rules for computing the adjusted basis of a partner's interest for purposes of determining the extent to which a partner's distributive share of partnership loss is allowed as a deduction. The example illustrates how the deferred section 752 computational rule interacts with the rules under section 705(a) and § 1.704–1(d)(2).

*E. Capital Accounts*

Commenters requested that guidance address how a partnership's capital account should be adjusted under § 1.704–1(b)(2)(iv) to account for a partner's share of the partnership's deferred items. The IRS and the Treasury Department believe that, for capital account maintenance purposes, a partnership should treat deferred items as if no election under section 108(i) has been made. Accordingly, § 1.108(i)–2T(b)(2)(ii) provides that a partner's capital account is adjusted under § 1.704–1(b)(2)(iv) for the partner's share of the partnership's deferred items as if no election under section 108(i) were made.

*F. Section 465(e) Recapture*

Commenters requested that guidance be provided under section 465 to prevent an election under section 108(i) from triggering recapture of losses under section 465(e). Under section 465(e)(1)(A), if at the close of any taxable year a taxpayer's amount at risk in an activity is below zero, the taxpayer generally is required to include the amount of the excess in gross income. The amount required to be included in gross income, however, is limited to losses allowed in previous years that have not already been recaptured. Section 465(e)(1)(B) treats the recaptured amount as a deduction attributable to the activity in the following taxable year.

Although the second sentence of section 108(i)(6) provides for deferral of a deemed distribution under section 752 to the extent that it triggers gain to a partner under section 731, the statute does not provide a similar rule that defers any amount at risk in an activity required to be recaptured under section 465(e). Thus, if the discharged debt for which a section 108(i) election is made has been included in a partner's amount at risk in an activity and a portion of that debt is discharged, there could be recapture under section 465(e) if the amount discharged exceeds the partner's amount at risk in the activity. The same issue may arise with respect to shareholders of an S corporation.

The IRS and the Treasury Department believe that the decrease in a partner's or shareholder's amount at risk in an activity that results from the discharge of a debt for which a section 108(i) election is made by the partnership or S corporation, as the case may be, should also be deferred to prevent the partner or shareholder from recognizing more recapture income under section 465(e) than the partner or shareholder would recognize if the section 108(i) election had not been made. Accordingly, § 1.108(i)–2T(d)(3) provides that a decrease in a partner's or shareholder's amount at risk in an activity that results from a discharge of a debt for which a section 108(i) election is made is not taken into account in determining the partner's or shareholder's amount at risk in that activity under section 465 in the taxable year of the reacquisition. The decrease is taken into account at the same time and to the extent remaining in the same amount as the partner or shareholder recognizes the deferred COD income.

*G. Deferral of Original Issue Discount*

Under section 108(i)(2), if a debt instrument is issued (or treated as issued under section 108(e)(4)) in a debt-for-debt exchange described in section 108(i)(2)(A) or a deemed debt-for-debt exchange described in § 1.108(i)–3T(a) and there is any OID on the debt instrument, the issuer of the new debt instrument must defer some or all of the deductions for such OID under section 108(i). The temporary regulations provide that the aggregate amount of deferred OID is allowable as a deduction to the issuer of the debt instrument ratably over the inclusion period, or earlier upon the occurrence of an acceleration event.

The OID deferral rule in section 108(i)(2) applies to an issuing entity. An issuing entity includes an electing partnership or an electing S corporation that issues a debt instrument in a debt-for-debt exchange or a deemed debt-for-debt exchange and a partnership or an S corporation that is related (within the meaning of section 108(i)(5)(A)) to an electing entity (an entity that is a taxpayer that makes an election under section 108(i)) and that issues a debt instrument in a debt-for-debt exchange or a deemed debt-for-debt exchange.

The issuing entity determines whether any OID that accrues on a debt instrument in a taxable year during the deferral period is required to be deferred. For example, an electing partnership that issues a debt instrument with OID in a debt-for-debt exchange described in section 108(i)(2)(A) in which the partnership elects to defer $100 of COD income must defer the first $100 of OID that accrues on such debt instrument during the deferral period, even if a partner's share of the partnership's deferred OID exceeds the partner's deferred amount with respect to the applicable debt instrument.

The temporary regulations provide rules relating to basis adjustments and adjustments to AAA for deferred OID deductions that apply to the issuing entity.

*H. Acceleration Events*

Section 108(i)(5)(D)(i) provides that deferred items must be taken into account upon the occurrence of certain enumerated events (acceleration events) with respect to the electing partnership or electing S corporation. These events include the liquidation or sale of substantially all of the assets of the electing partnership or electing S corporation (including in a Title 11 or similar case), the cessation of business, or similar circumstances. If any of these events occurs, all of the deferred items of the electing partnership or electing S corporation are accelerated and must be taken into account by the partners and/or shareholders, as the case may be, in the taxable year of the electing partnership or electing S corporation in which such event occurs.

Section 108(i)(5)(D)(ii) contains additional acceleration events that apply to the partners and/or shareholders of an electing partnership or an electing S corporation, as the case may be, and includes the sale, exchange, or redemption of an interest in the electing partnership or electing S corporation by the holder of such interest. If any of these events occurs, the deferred items allocated to the partner or S corporation shareholder that sells, exchanges, or redeems its interest in the electing partnership or S corporation, as the case may be, are accelerated and must be taken into account by such partner or shareholder in the taxable year in which the event occurs. When an acceleration event occurs under section 108(i)(5)(D)(ii) with respect to a particular partner or an S corporation shareholder, it does not affect the continued deferral of another partner's or S corporation shareholder's

share of the partnership's or S corporation's deferred items.

Section 108(i)(7) authorizes the Secretary to prescribe such regulations as may be necessary or appropriate for purposes of applying section 108(i), including rules extending the acceleration provisions to other circumstances where appropriate. Therefore, the temporary regulations provide additional rules (and exceptions) that apply to the acceleration of deferred items under section 108(i)(5)(D).

The temporary regulations provide that the deferred items allocated to the direct and indirect partners of the electing partnership, which includes a shareholder of an S corporation that is a direct/indirect partner of an electing partnership (S corporation partner), and to the shareholder of an electing S corporation are accelerated if the electing partnership or the electing S corporation (i) liquidates, (ii) sells, exchanges, transfers (including contributions and distributions), or gifts substantially all of its assets, (iii) ceases doing business, or (iv) files a petition in a Title 11 or similar case. In addition, the deferred items of the shareholders of an electing S corporation or an S corporation partner are accelerated in the taxable year in which the S corporation's or S corporation partner's election under section 1362(a) is terminated. Moreover, the acceleration rules and exceptions that apply to an electing corporation under § 1.108(i)–1T(b) also apply to a C corporation partner in the same manner as if the C corporation partner were an electing corporation.

The temporary regulations specify that substantially all of the partnership's or S corporation's assets means assets representing at least 90 percent of the fair market value of the partnership's or S corporation's net assets and at least 70 percent of the fair market value of the partnership's or S corporation's gross assets, as measured immediately prior to the sale, exchange, transfer, or gift in question. If an electing partnership holds only an interest in another partnership (lower-tier partnership) and the lower-tier partnership sells its assets, the sale by the lower-tier partnership would not constitute a sale, exchange, transfer, or gift of the electing partnership's assets for purposes of applying the acceleration rules. However, the IRS and the Treasury Department believe that if an electing partnership, for example, transfers property to a partnership (transferee partnership) in a transaction governed all or in part by section 721 and the transferee partnership subsequently sells substantially all of its assets, it is appropriate to treat the electing partnership as having sold, exchanged, transferred, or gifted its entire interest in that transferee partnership for purposes of applying the acceleration rules. If, in that situation, the electing partnership's only asset is its interest in the transferee partnership, the electing partnership will be treated as selling substantially all of its assets and therefore, its deferred items would be accelerated. The principles of the substantially all rules apply to lower-tier partnerships of the electing partnership that receive assets of the electing partnership from a transferee partnership or another lower-tier partnership of the electing partnership in a transaction governed all or in part by section 721.

In addition to the electing partnership-level or electing S corporation-level events that trigger acceleration under section 108(i), certain events that occur at the partner or shareholder level also trigger acceleration of that partner's or shareholder's share of the electing partnership's or electing S corporation's deferred items. For instance, the deferred items allocated to a direct or indirect partner of an electing partnership are accelerated if: (1) The partner dies or liquidates, (2) the partner sells, exchanges (including redemptions treated as exchanges under section 302), transfers (including contributions and distributions), or gifts (including transfers treated as gifts under section 1041) all or a portion of a separate interest, (3) the partner's separate interest is redeemed, or (4) the partner abandons its separate interest. For this purpose, a distribution by a partnership to a partner of property other than a separate interest, in a transaction that does not constitute a complete redemption of the partner's interest, does not constitute an acceleration event, even if, for example, the distribution causes gain to be recognized to the partner under section 731(a). Moreover, a shareholder's share of an electing S corporation's deferred items is accelerated if the shareholder: (1) Dies, (2) sells, exchanges (including redemptions treated as exchanges under section 302), transfers (including contributions and distributions), or gifts (including transfers treated as gifts under section 1041) all or a portion of its interest in the electing S corporation, or (3) abandons its interest in the electing S corporation. For purposes of the temporary regulations, a "separate interest" is defined as any direct interest in an electing partnership or in a partnership or S corporation that is a direct or indirect partner of an electing partnership.

If a partner or shareholder sells, exchanges, transfers, or gifts only a portion of its interest in a partnership or an S corporation, only a proportionate amount of the partner's or shareholder's share of the partnership's or S corporation's deferred items is accelerated. For example, if a partner of an electing partnership with a $100 deferred amount from the electing partnership sells half of its interest in the electing partnership, $50 of the partner's $100 share of the partnership's deferred amount is accelerated.

The temporary regulations address when a partner's separate interest is redeemed for purposes of section 108(i). Commenters suggested that a non-liquidating distribution of cash or other property by a partnership to a partner should not be treated as a redemption under section 108(i). The IRS and the Treasury Department agree with the commenters. Difficulties in defining a redemption of a partnership interest for purposes of section 108(i) arise if non-liquidating distributions are treated as redemptions under section 108(i). The IRS and the Treasury Department believe that, for purposes of section 108(i), redemptions should be limited to cases where a partner's interest in the partnership is completely liquidated. Therefore, the temporary regulations provide that a redemption of a partner's separate interest occurs when a partner receives a distribution of cash and/or property in complete liquidation of such partner's separate interest.

The IRS and the Treasury Department believe that certain events should not cause a partner's or shareholder's share of the partnership's or S corporation's deferred items to be accelerated. For instance, if an electing partnership contributes its assets to another partnership (transferee partnership) in a transaction governed by section 721 (generally a non-recognition event to the electing partnership and the transferee partnership), the deferred items of an electing partnership can continue to be allocated to its partners under principles similar to section 704(c). Therefore, transactions wholly governed by section 721 in which a partner's or shareholder's share of the partnership's or S corporation's deferred items can continue to be allocated to that partner or shareholder are generally not acceleration events for purposes of section 108(i). These section 721 non-acceleration events include contributions by an electing partnership or an electing S corporation, contributions of an entire separate interest by direct or indirect partners of

an electing partnership, and section 708(b)(2)(A) mergers or consolidations of an electing partnership or a partnership that is a direct or indirect partner of an electing partnership.

In any of the events listed above, the general acceleration rules apply to any part of the transaction to which section 721(a) does not apply. For example, if an electing partnership merges with another partnership and one of the partners of the electing partnership elects to apply the partner buy-out rule of § 1.708–1(c)(4), such partner's share of the electing partnership's deferred items is accelerated because such partner is treated as selling its interest in the electing partnership immediately before the merger. The other partners' shares of deferred items of the electing partnership are not accelerated as a result of the merger.

In addition to the section 721 non-acceleration events, like-kind exchanges of property by an electing partnership or an electing S corporation pursuant to section 1031(a) are generally not acceleration events. As in a transaction governed by section 721, a transaction governed by section 1031(a) is generally a non-recognition event. The electing partnership or electing S corporation that transfers property in the like-kind exchange can continue to allocate the partners' or shareholders' shares of the partnership's or S corporation's deferred items as if no exchange occurred. To the extent money or property which does not meet the requirements of section 1031(a) (boot) is received in the exchange, however, a portion of the transferred property will be treated as sold. Under § 1.108(i)–2T(b)(6)(iii)(B) and § 1.108(i)–2T(c)(3)(iii)(B), the portion of the transferred property that is treated as sold is based on the ratio of the boot to the total consideration received in the exchange. For example, if an electing partnership exchanges property with a value of $100 and a basis of $30 for $80 of like-kind property and $20 of non-like kind property, the electing partnership is treated as if it sold 20 percent of the property transferred in the exchange. In such a case, if the portion sold constitutes substantially all of the electing partnership's assets, the electing partnership's deferred items would be accelerated under § 1.108(i)–2T(b)(6)(i)(A)(*2*).

In addition to the section 721 and section 1031 non-acceleration events, a technical termination of an electing partnership or a partnership that is a direct or indirect partner of an electing partnership under section 708(b)(1)(B) is not an acceleration event for purposes of section 108(i). Section 708(b)(1)(B) provides that a partnership is considered as terminated if within a twelve-month period there is a sale or exchange of 50 percent or more of the total interest in partnership capital and profits. Under § 1.708–1(b)(4), the terminated partnership is deemed to contribute its assets and liabilities to a new partnership in exchange for an interest in the new partnership and, immediately thereafter, the terminated partnership is deemed to distribute interests in the new partnership to its partners in liquidation of their interests. As in a transaction governed by section 721, the deferred items of the terminated partnership's partners can continue to be allocated to those partners by the new partnership. The terminated partnership's business continues in the new partnership and the non-selling partners of the terminated partnership remain partners in the new partnership. The terminated partnership's section 108(i) election remains in effect for the new partnership. Therefore, a technical termination of a partnership under section 708(b)(1)(B) is not an acceleration event for purposes of section 108(i). The transfer that causes a technical termination, however, may be an acceleration event for the transferring partner.

In addition to the section 721, section 1031, and section 708(b)(1)(B) non-acceleration events, certain distributions of separate interests by a partnership (upper-tier partnership) that is a direct or indirect partner of an electing partnership are not acceleration events for purposes of section 108(i). If an upper-tier partnership distributes its entire separate interest (distributed separate interest) to one or more of its partners (distributee partners) that have a share of the electing partnership's deferred items from upper-tier partnership's distributed separate interest, the partnership, the interest in which was distributed, can continue to allocate the deferred items of any distributee partner with respect to the distributed separate interest. As a result, the distributee partner's share of the electing partnership's deferred items associated with the distributed separate interest are not accelerated, even if such distribution is in complete liquidation of that partner's interest in the upper-tier partnership. However, because the upper-tier partnership no longer holds the separate interest, the upper-tier partnership's share of the electing partnership's deferred items associated with that separate interest will be accelerated for the non-distributee partners. Further, if the distributee's partnership interest is redeemed by the upper-tier partnership, any other share of an electing partnership's deferred items associated with the redeemed separate interest in the upper-tier partnership will be accelerated and must be taken into account by the distributee partner.

Certain non-acceleration events that apply to an electing corporation also apply to C corporation partners. The exception in § 1.108(i)–1T(b)(2)(ii)(B) relating to transactions governed by section 381 applies to C corporation partners. Section 1.108(i)–2T(b)(6)(iii)(G) contains special rules for certain intercompany transfers made by C corporation partners.

The above acceleration events only apply to deferred items allocated to direct or indirect partners of an electing partnership or to the shareholders of an electing S corporation. A direct or indirect partner's share of a related partnership's deferred OID deduction or a shareholder's share of a related S corporation's deferred OID deduction is only accelerated to the extent the deferred COD income attributable to the related partnership's or related S corporation's deferred OID deduction is taken into account by the electing entity or its owners.

*I. Foreign Partners of Electing Partnership*

Section 1446 and the regulations thereunder provide, in general, that if a domestic or foreign partnership has effectively connected taxable income allocable under section 704 to a foreign partner, then the partnership must withhold tax under section 1446 (section 1446 tax) at the time and in the manner prescribed in §§ 1.1446–1 through 1.1446–6. Section 1.1446–5 provides rules under section 1446 for tiered-partnership structures. These regulations provide a cross reference to the regulations under section 1446 to signal to partnerships, including tiered partnerships, that they may have an obligation to pay a section 1446 tax when income deferred under section 108(i) is recognized (either ratably over the inclusion period or as a result of an acceleration event).

*J. Effective Date*

These regulations apply to reacquisitions of applicable debt instruments in taxable years ending after December 31, 2008.

*Availability of IRS Documents*

The IRS revenue procedure cited in this preamble is published in the Internal Revenue Bulletin and is available at: *http://www.IRS.gov*.

**Special Analyses**

It has been determined that this Treasury decision is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. For applicability of the Regulatory Flexibility Act (5 U.S.C. chapter 6), refer to the Special Analyses section of the preamble to the cross-reference notice of proposed rulemaking published in the Proposed Rules section in this issue of the **Federal Register**. Pursuant to section 7805(f) of the Code, these regulations have been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Section 108(i) applies to the reacquisition of an applicable debt instrument during the brief election period, January 1, 2009 through December 31, 2010. These temporary regulations provide necessary guidance regarding the application of this new section 108(i) in order for partnerships and S corporations to timely file their tax returns. For this reason, it has been determined pursuant to 5 U.S.C. 553(b)(3)(B), that prior notice and public procedure are impracticable and contrary to the public interest. For the same reason, it has been determined pursuant to 5 U.S.C. 553(d)(3) that good cause exists for not delaying the effective date of these temporary regulations.

**Drafting Information**

The principal authors of these regulations are Megan A. Stoner and Joseph R. Worst of the Office of the Associate Chief Counsel (Passthroughs and Special Industries). However, other personnel from the IRS and the Treasury Department participated in their development.

**List of Subjects**

*26 CFR Part 1*

Income taxes, Reporting and recordkeeping requirements.

*26 CFR Part 602*

Reporting and recordkeeping requirements.

**Amendments to the Regulations**

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

## PART 1—INCOME TAXES

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

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

Section 1.108(i)–2T also issued under 26 U.S.C. 108(i)(7). * * *

■ **Par. 2.** Section 1.108(i)–2T is added to read as follows:

**§ 1.108(i)–2T Application of section 108(i) to partnerships and S corporations (temporary).**

(a) *Overview.* Under section 108(i), a partnership or an S corporation may elect to defer COD income arising in connection with a reacquisition of an applicable debt instrument for the deferral period. COD income deferred under section 108(i) is included in gross income ratably over the inclusion period, or earlier upon the occurrence of any acceleration event described in paragraph (b)(6) or (c)(3) of this section. If a debt instrument is issued (or treated as issued under section 108(e)(4)) in a debt-for-debt exchange described in section 108(i)(2)(A) or a deemed debt-for-debt exchange described in § 1.108(i)–3T(a), some or all of the deductions for OID with respect to such debt instrument must be deferred during the deferral period. The aggregate amount of OID deductions deferred during the deferral period is generally allowed as a deduction ratably over the inclusion period, or earlier upon the occurrence of any acceleration event described in paragraph (b)(6) or (c)(3) of this section. Paragraph (b) of this section provides rules that apply to partnerships. Paragraph (c) of this section provides rules that apply to S corporations. Paragraph (d) of this section provides general rules that apply to partnerships and S corporations. Paragraph (e) of this section provides election procedures and reporting requirements. Paragraph (f) of this section contains the effective/applicability date. *See* § 1.108(i)–0T(a) for definitions that apply to this section.

(b) *Specific rules applicable to partnerships*—(1) *Allocation of COD income and partner's deferred amounts.* An electing partnership that defers any portion of COD income realized from a reacquisition of an applicable debt instrument under section 108(i) must allocate all of the COD income with respect to the applicable debt instrument to its direct partners that are partners in the electing partnership immediately before the reacquisition in the manner in which the income would be included in the distributive shares of the partners under section 704 and the regulations under section 704, including § 1.704–1(b)(2)(iii), without regard to section 108(i). The electing partnership may determine, in any manner, the portion, if any, of a partner's COD income amount with respect to an applicable debt instrument that is the deferred amount, and the portion, if any, that is the included amount. However, no partner's deferred amount with respect to an applicable debt instrument may exceed that partner's COD income amount with respect to such applicable debt instrument, and the aggregate amount of the partners' COD income amounts and deferred amounts with respect to each applicable debt instrument must equal the electing partnership's COD income amount and deferred amount, respectively, with respect to each such applicable debt instrument.

(2) *Basis adjustments and capital account maintenance*—(i) *Basis adjustments.* The adjusted basis of a partner's interest in a partnership is not increased under section 705(a)(1) by the partner's deferred amount in the taxable year of the reacquisition. The adjusted basis of a partner's interest in a partnership is not decreased under section 705(a)(2) by the partner's share of any deferred OID deduction in the taxable year in which the deferred OID accrues. The adjusted basis of a partner's interest in a partnership is adjusted under section 705(a) by the partner's share of the electing partnership's deferred items for the taxable year in which the partner takes into account such deferred items under this section.

(ii) *Capital account maintenance.* For purposes of maintaining a partner's capital account under § 1.704–1(b)(2)(iv) and notwithstanding § 1.704–1(b)(2)(iv)(*n*), the capital account of a partner of a partnership is adjusted under § 1.704–1(b)(2)(iv) for a partner's share of an electing partnership's deferred items as if no election under section 108(i) were made.

(3) *Deferred section 752 amount*—(i) *In general.* An electing partnership shall determine, for each of its direct partners with a deferred amount, the partner's deferred section 752 amount, if any, with respect to an applicable debt instrument. A partner's deferred section 752 amount with respect to an applicable debt instrument equals the decrease in the partner's share of a partnership liability under section 752(b) resulting from the reacquisition of the applicable debt instrument that is not treated as a current distribution of money under section 752(b) by reason of section 108(i)(6) (deferred section 752 amount). A partner's deferred section 752 amount is treated as a distribution of money by the partnership to the partner under section 752(b), at the same time and to the extent remaining in the same amount, as the partner recognizes the deferred amount with

respect to the applicable debt instrument.

(ii) *Electing partnership's computation of a partner's deferred section 752 amount.* To compute a partner's deferred section 752 amount, the electing partnership must first determine the amount of gain that its direct partner would recognize in the taxable year of a reacquisition under section 731 as a result of the reacquisition of one or more applicable debt instruments during the taxable year absent the deferral provided in the second sentence of section 108(i)(6) (the section 108(i)(6) deferral). If a direct partner of an electing partnership would not recognize any gain under section 731 as a result of the reacquisition of one or more applicable debt instruments during the taxable year absent the section 108(i)(6) deferral, the partner will not have a deferred section 752 amount with respect to any applicable debt instrument that is reacquired during the taxable year. If a direct partner of an electing partnership would recognize gain under section 731 as a result of the reacquisition of one or more applicable debt instruments during the taxable year absent the section 108(i)(6) deferral, the partner's deferred section 752 amount for all applicable debt instruments that are reacquired during the taxable year is equal to the lesser of the partner's aggregate deferred amounts from the electing partnership for all applicable debt instruments reacquired during the taxable year, or the gain that the partner would recognize in the taxable year of the reacquisitions under section 731 as a result of the reacquisitions absent the section 108(i)(6) deferral. In determining the amount of gain that the direct partner would recognize in the taxable year of a reacquisition under section 731 as a result of the reacquisition of one or more applicable debt instruments during the taxable year absent the section 108(i)(6) deferral, the rule under § 1.731–1(a)(1)(ii) applies to any deemed distribution of money under section 752(b) resulting from a decrease in the partner's share of a reacquired applicable debt instrument that is treated as an advance or drawing of money. The amount of any deemed distribution of money under section 752(b) resulting from a decrease in the partner's share of a reacquired applicable debt instrument that is treated as an advance or drawing of money under § 1.731–1(a)(1)(ii) is determined as if no COD income resulting from the reacquisition of the applicable debt instrument is deferred under section 108(i).

(iii) *Multiple section 108(i) elections.* If a direct partner of an electing partnership has a deferred section 752 amount under paragraph (b)(3)(ii) of this section for the taxable year of a reacquisition and the partner has a deferred amount with respect to more than one applicable debt instrument from the electing partnership for which a section 108(i) election is made in that taxable year, the partner's deferred section 752 amount with respect to each such applicable debt instrument equals the partner's deferred section 752 amount as determined under paragraph (b)(3)(ii) of this section, multiplied by a ratio, the numerator of which is the partner's deferred amount with respect to such applicable debt instrument, and the denominator of which is the partner's aggregate deferred amounts from the electing partnership for all applicable debt instruments reacquired during the taxable year.

(iv) *Electing partnership's request for information.* At the request of an electing partnership, each direct partner of the electing partnership that has a deferred amount with respect to such partnership must provide to the electing partnership a written statement containing information requested by the partnership that is necessary to determine the partner's deferred section 752 amount (such as the partner's adjusted basis in the partner's interest in the electing partnership). The written statement must be signed under penalties of perjury and provided to the requesting partnership within 30 days of the date of the request by the electing partnership.

(v) *Examples.* The following examples illustrate the rules under paragraph (b)(3) of this section:

*Example 1.* (i) A and B each hold a 50 percent interest in Partnership, a calendar-year partnership. As of January 1, 2009, A and B each have an adjusted basis of $50 in their partnership interests. Partnership has two applicable debt instruments outstanding, debt one of $300 and debt two of $200. On March 1, 2009, debt one is cancelled and Partnership realizes $300 of COD income. On December 1, 2009, debt two is cancelled and Partnership realizes $200 of COD income. The Partnership has no other income or loss items for 2009. A and B are each allocated $150 of COD income from debt one and $100 of COD income from debt two. Partnership makes an election under section 108(i) to defer $225 of the $300 of COD income realized from the reacquisition of debt one, $150 of which is A's deferred amount, and $75 of which is B's deferred amount. Partnership also makes an election under section 108(i) to defer $125 of the $200 of COD income realized from the reacquisition of debt two, $100 of which is A's deferred amount, and $25 of which is B's deferred amount. A has no included amount for either debt. B has an included amount of $75 with respect to debt one and an included amount of $75 with respect to debt two for 2009.

(ii) Under paragraph (b)(3)(ii) of this section, the amount of gain that A would recognize under section 731 as a result of the reacquisitions absent the section 108(i)(6) deferral is $200. Thus, A's deferred section 752 amount with respect to debt one and debt two equals $200 (the lesser of A's aggregate deferred amounts with respect to debt one and debt two of $250, or gain that A would recognize under section 731 in 2009, as a result of the reacquisitions absent the section 108(i)(6) deferral, of $200). Under paragraph (b)(3)(iii) of this section, $120 of A's $200 deferred section 752 amount relates to debt one ($200 × $150/$250) and $80 relates to debt two ($200 × $100/$250).

(iii) Under paragraph (b)(3)(ii) of this section, the amount of gain that B would recognize under section 731 as a result of the reacquisitions absent the section 108(i)(6) deferral is $50. Thus, B's deferred section 752 amount with respect to debt one and debt two equals $50 (the lesser of B's aggregate deferred amounts with respect to debt one and debt two of $100, or gain that B would recognize under section 731 in 2009, as a result of the reacquisitions absent the section 108(i)(6) deferral, of $50). Under paragraph (b)(3)(iii) of this section, $37.50 of B's $50 deferred section 752 amount relates to debt one ($50 × $75/$100) and $12.50 relates to debt two ($50 × $25/$100).

*Example 2.* (i) The facts are the same as in *Example 1,* except that Partnership has gross income for the year (including the $500 of COD income) of $700 and other separately stated losses of $500. A's and B's distributive share of each item is 50 percent.

(ii) In determining the amount of gain that A would recognize under section 731 as a result of the reacquisitions absent the section 108(i)(6) deferral, Partnership first increases A's $50 adjusted basis in his interest in Partnership by A's distributive share of Partnership income (other than the deferred amounts relating to debt one and debt two) of $100, and then decreases A's adjusted basis in Partnership by deemed distributions under section 752(b) of $250 and, thereafter, by A's distributive share of Partnership losses of $250, but only to the extent that A's basis is not reduced below zero. Under paragraph (b)(3)(ii) of this section, the amount of gain that A would recognize under section 731 as a result of the reacquisitions absent section 108(i)(6) deferral is $100. Thus, A's deferred section 752 amount with respect to debt one and debt two equals $100 (the lesser of A's aggregate deferred amounts with respect to debt one and debt two of $250, or gain that A would recognize under section 731 as a result of the reacquisitions absent the deferral section 108(i)(6) deferral of $100). Under paragraph (b)(3)(iii) of this section, A's deferred section 752 amount with respect to debt one is $60 ($100 × $150/$250), and A's deferred section 752 amount with respect to debt two is $40 ($100 × $100/$250). A's $250 of Partnership losses are suspended under section 704(d).

(iii) In determining the amount of gain that B would recognize under section 731 as a result of the reacquisitions absent the section

108(i)(6) deferral, Partnership first increases B's $50 adjusted basis in his interest in Partnership by B's distributive share of Partnership income (other than the deferred amounts relating to debt one and debt two) of $250 ($100 other income plus $150 included amount with respect to debt one and debt two), and then decreases B's adjusted basis in Partnership by deemed distributions under section 752(b) of $250 and, thereafter, by B's distributive share of Partnership losses of $250, but only to the extent that B's basis is not reduced below zero. Under paragraph (b)(3)(ii) of this section, B would not recognize any gain under section 731 as a result of the reacquisitions absent the section 108(i)(6) deferral. Thus, B has no deferred section 752 amount with respect to either debt one or debt two. B may deduct his distributive share of Partnership losses to the extent of $50, with the remaining $200 suspended under section 704(d).

(4) *Tiered partnerships*—(i) *In general.* If a partnership (upper-tier partnership) is a direct or indirect partner of an electing partnership and directly or indirectly receives an allocation of a COD income amount from the electing partnership, all or a portion of which is deferred under section 108(i), the upper-tier partnership must allocate its COD income amount to its partners that are partners in the upper-tier partnership immediately before the reacquisition in the manner in which the income would be included in the distributive shares of the partners under section 704 and the regulations under section 704, including § 1.704–1(b)(2)(iii), without regard to section 108(i). The upper-tier partnership may determine, in any manner, the portion, if any, of a partner's COD income amount with respect to an applicable debt instrument that is the deferred amount, and the portion, if any, that is the included amount. However, no partner's deferred amount with respect to an applicable debt instrument may exceed that partner's COD income amount with respect to such applicable debt instrument, and the aggregate amount of the partners' COD income amounts and deferred amounts with respect to each applicable debt instrument must equal the upper-tier partnership's COD income amount and deferred amount, respectively, with respect to each such applicable debt instrument.

(ii) *Deferred section 752 amount.* The computation of a partner's deferred section 752 amount, as described in paragraph (b)(3)(ii) of this section, is calculated only for direct partners of the electing partnership. An upper-tier partnership's deferred section 752 amount with respect to an applicable debt instrument of the electing partnership is allocated only to those partners of the upper-tier partnership that have a deferred amount with respect to that applicable debt instrument, and in proportion to such partners' share of the upper-tier partnership's deferred amount with respect to that applicable debt instrument. A partner's share of the upper-tier partnership's deferred section 752 amount with respect to an applicable debt instrument must not exceed that partner's share of the upper-tier partnership's deferred amount with respect to the applicable debt instrument to which the deferred section 752 amount relates. The deferred section 752 amount of a partner of an upper-tier partnership is treated as a distribution of money by the upper-tier partnership to the partner under section 752(b), at the same time and to the extent remaining in the same amount, as the partner recognizes the deferred amount with respect to the applicable debt instrument.

(iii) *Examples.* The following examples illustrate the rules under paragraph (b)(4) of this section:

*Example 1.* (i) PRS, a calendar-year partnership, has two equal partners, A, an individual, and XYZ, a partnership. As of January 1, 2009, A and XYZ each have an adjusted basis of $50 in their partnership interests. PRS has a $500 applicable debt instrument outstanding. On June 1, 2009, the creditor agrees to cancel the $500 indebtedness. PRS realizes $500 of COD income as a result of the reacquisition. PRS has no other income or loss items for 2009. PRS makes an election under section 108(i) to defer $200 of the $500 of COD income. PRS allocates the $500 of COD income equally between its partners ($250 each). PRS determines that, for each partner, $100 of the COD income amount is the deferred amount, and $150 is the included amount. For 2009, each of A's and XYZ's share of the decrease in PRS's reacquired applicable debt instrument is $250.

(ii) XYZ has two equal partners, individuals X and Y. X and Y share equally in XYZ's liabilities. XYZ allocates the $250 COD income amount from PRS equally between X and Y ($125 each). XYZ determines that X has a deferred amount of $100 and an included amount of $25. All $125 of Y's COD income amount is Y's included amount. For 2009, each of X's and Y's share of XYZ's $250 decrease in liability with respect to the reacquired applicable debt instrument of PRS is $125.

(iii) Under paragraph (b)(3)(ii) of this section, PRS determines that XYZ has a deferred section 752 amount of $50. Therefore, for 2009, of XYZ's $250 share of the decrease in PRS's reacquired applicable debt instrument, $200 is treated as a deemed distribution under section 752(b) and $50 is the deferred section 752 amount.

(iv) Under paragraph (b)(4)(ii) of this section, none of XYZ's $50 deferred section 752 amount is allocated to Y because Y does not have a deferred amount with respect to the reacquired applicable debt interest. XYZ's entire $50 of deferred section 752 amount is allocated to X. Therefore, of X's $125 share of the XYZ's decrease in liability with respect to the reacquired applicable debt instrument of PRS, $75 is treated as a deemed distribution under section 752(b) and $50 is X's deferred section 752 amount. Y's $125 share of XYZ's decrease in liability with respect to the reacquired applicable debt instrument of PRS is treated as a deemed distribution under section 752(b) and none is a deferred section 752 amount.

*Example 2.* (i) The facts are the same as in *Example 1,* except for the following: XYZ has three partners, X, Y, and Z. The profits and losses of XYZ are shared 25 percent by X, 25 percent by Y, and 50 percent by Z. XYZ allocates its $250 COD income amount from PRS $62.50 to each of X and Y, and $125 to Z. XYZ determines that X has a deferred amount of $50 and an included amount of $12.50, Y has a deferred amount of $0 and an included amount of $62.50, and Z has a deferred amount of $50 and an included amount of $75 with respect to the applicable debt instrument. X's, Y's, and Z's share of XYZ's decrease in liability with respect to the reacquired applicable debt instrument of PRS is $62.50, $62.50 and $125, respectively.

(ii) Under paragraph (b)(4)(ii) of this section, none of XYZ's $50 deferred section 752 amount is allocated to Y because Y does not have a deferred amount with respect to the reacquired applicable debt instrument. XYZ's $50 deferred section 752 amount is allocated to X and Z in proportion to X's and Z's share of XYZ's deferred amount, or $25 each ($50 × ($50/$100)). Therefore, of X's $62.50 share of XYZ's decrease in liability with respect to the reacquired applicable debt instrument, $37.50 is treated as a deemed distribution under section 752(b) and $25 is X's deferred section 752 amount. All of Y's $62.50 share of XYZ's decrease in liability with respect to the reacquired applicable debt instrument is treated as a deemed distribution under section 752(b). Of Z's $125 share of XYZ's decrease in liability with respect to the reacquired applicable debt instrument, $100 is treated as a deemed distribution under section 752(b) and $25 is Z's deferred section 752 amount.

(5) *S corporation partner*—(i) *In general.* If an S corporation partner has a deferred amount with respect to an applicable debt instrument of an electing partnership, such deferred amount is shared pro rata only among those shareholders that are shareholders of the S corporation partner immediately before the reacquisition of the applicable debt instrument.

(ii) *Basis adjustments.* The adjusted basis of a shareholder's stock in an S corporation partner is not increased under section 1367(a)(1) by the shareholder's share of the S corporation partner's deferred amount in the taxable year of the reacquisition. The adjusted basis of a shareholder's stock in an S corporation partner is not decreased under section 1367(a)(2) by the shareholder's share of the S corporation

partner's deferred OID deduction in the taxable year in which the deferred OID accrues. The adjusted basis of a shareholder's stock in an S corporation partner is adjusted under section 1367(a) by the shareholder's share of the S corporation partner's share of the electing partnership's deferred items for the taxable year in which the shareholder takes into account its share of such deferred items under this section.

(iii) *Accumulated adjustments account.* The accumulated adjustments account (AAA), as defined in section 1368(e)(1), of an S corporation partner that has a deferred amount with respect to an applicable debt instrument of an electing partnership is not increased by its deferred amount in the taxable year of the reacquisition. The AAA of an S corporation partner is not decreased by its share of any deferred OID deduction in the taxable year in which the deferred OID accrues. The AAA of an S corporation partner is adjusted under section 1368(e) by a shareholder's share of the S corporation partner's share of the electing partnership's deferred items for the S period (as defined in section 1368(e)(2)) in which the shareholder of the S corporation partner takes into account its share of the deferred items under this section.

(6) *Acceleration of deferred items*—(i) *Electing partnership-level events*—(A) *General rules.* Except as provided in paragraph (b)(6)(iii) of this section, a direct or indirect partner's share of an electing partnership's deferred items is accelerated and must be taken into account by such partner—

(*1*) In the taxable year in which the electing partnership liquidates;

(*2*) In the taxable year in which the electing partnership sells, exchanges, transfers (including contributions and distributions), or gifts substantially all of its assets;

(*3*) In the taxable year in which the electing partnership ceases doing business; or

(*4*) In the taxable year that includes the day before the day on which the electing partnership files a petition in a Title 11 or similar case.

(B) *Substantially all requirement.* For purposes of this paragraph (b)(6), substantially all of a partnership's assets means assets representing at least 90 percent of the fair market value of the net assets, and at least 70 percent of the fair market value of the gross assets, held by the partnership immediately prior to the sale, exchange, transfer, or gift. For purposes of applying the rule in paragraph (b)(6)(i)(A)(*2*) of this section, a sale, exchange, transfer, or gift by any direct or indirect lower-tier partnership of the electing partnership (lower-tier partnership) of all or part of its assets is not treated as a sale, exchange, transfer, or gift of the assets of any partnership that holds, directly or indirectly, an interest in such lower-tier partnership. However, for purposes of applying the rule in paragraph (b)(6)(i)(A)(*2*) of this section, a sale, exchange, transfer, or gift of substantially all of the assets of a transferee partnership (as described in paragraph (b)(6)(iii)(A)(*1*) of this section), or of a lower-tier partnership that received assets of the electing partnership from a transferee partnership or another lower-tier partnership in a transaction governed all or in part by section 721, is treated as a sale, exchange, transfer, or gift by the holder of an interest in such transferee partnership or lower-tier partnership of its entire interest in that transferee partnership or lower-tier partnership.

(ii) *Direct or indirect partner-level events*—(A) *General rules.* Except as provided in paragraph (b)(6)(iii) of this section, a direct or indirect partner's share of an electing partnership's deferred items with respect to a separate interest is accelerated and must be taken into account by such partner in the taxable year in which—

(*1*) The partner dies or liquidates;

(*2*) The partner sells, exchanges (including redemptions treated as exchanges under section 302), transfers (including contributions and distributions), or gifts (including transfers treated as gifts under section 1041) all or a portion of its separate interest;

(*3*) The partner's separate interest is redeemed within the meaning of paragraph (b)(6)(ii)(B)(*2*) of this section; or

(*4*) The partner abandons its separate interest.

(B) *Meaning of terms; special rules*—(*1*) *Partial transfers.* For purposes of paragraph (b)(6)(ii)(A)(*2*) of this section, if a partner sells, exchanges (including redemptions treated as exchanges under section 302), transfers (including contributions and distributions), or gifts (including transfers treated as gifts under section 1041) a portion of its separate interest, such partner's share of the electing partnership's deferred items with respect to the separate interest proportionate to the separate interest sold, exchanged, transferred, or gifted is accelerated and must be taken into account by such partner.

(*2*) *Redemptions.* For purposes of paragraph (b)(6)(ii)(A)(*3*) of this section, a partner's separate interest is redeemed if the partner receives a distribution of cash and/or property in complete liquidation of such separate interest.

(*3*) *S corporation partners.* In addition to the rules in paragraphs (b)(6)(i) and (ii) of this section, an S corporation partner's share of the electing partnership's deferred items is accelerated and the shareholders of the S corporation partner must take into account their respective shares of the S corporation partner's share of the electing partnership's deferred items in the taxable year in which the S corporation partner's election under section 1362(a) terminates.

(*4*) *C corporation partners.* In addition to the rules in paragraphs (b)(6)(i), (ii), and (iii) of this section, the acceleration rules in § 1.108(i)–1T(b) and the earnings and profits rules in § 1.108(i)–1T(d) apply to partners that are electing corporations.

(iii) *Events not constituting acceleration.* Notwithstanding the rules in paragraphs (b)(6)(i) and (ii) of this section, a direct or indirect partner's share of an electing partnership's deferred items with respect to a separate interest is not accelerated by any of the events described in this paragraph (b)(6)(iii).

(A) *Section 721 contributions*—(*1*) *Electing partnership contributions.* A direct or indirect partner's share of an electing partnership's deferred items is not accelerated if the electing partnership contributes all or a portion of its assets in a transaction governed all or in part by section 721(a) to another partnership (transferee partnership) in exchange for an interest in the transferee partnership provided that the electing partnership does not terminate under section 708(b)(1)(A) or transfer its assets and liabilities in a transaction described in section 708(b)(2)(A) or section 708(b)(2)(B). *See* paragraph (b)(6)(iii)(D) of this section for transactions governed by section 708(b)(2)(A). Notwithstanding the rules in this paragraph (b)(6)(iii)(A)(*1*), the rules in paragraphs (b)(6)(i)(A) and (b)(6)(ii)(A) of this section apply to any part of the transaction to which section 721(a) does not apply.

(*2*) *Partner contributions.* A direct or indirect partner's share of an electing partnership's deferred items with respect to a separate interest is not accelerated if the holder of such interest (contributing partner) contributes its entire separate interest (contributed separate interest) in a transaction governed all or in part by section 721(a) to another partnership (transferee partnership) in exchange for an interest in the transferee partnership provided that the partnership in which the separate interest is held does not

terminate under section 708(b)(1)(A) or transfer its assets and liabilities in a transaction described in section 708(b)(2)(A) or section 708(b)(2)(B). *See* paragraph (b)(6)(iii)(D) of this section for transactions governed by section 708(b)(2)(A). The transferee partnership becomes subject to section 108(i), including all reporting requirements under this section, with respect to the contributing partner's share of the electing partnership's deferred items associated with the contributed separate interest. The transferee partnership must allocate and report the share of the electing partnership's deferred items that is associated with the contributed separate interest to the contributing partner to the same extent that such share of the electing partnership's deferred items would have been allocated and reported to the contributing partner in the absence of such contribution. Notwithstanding the rules in this paragraph (b)(6)(iii)(A)(*2*), the rules in paragraph (b)(6)(ii)(A) of this section apply to any part of the transaction to which section 721(a) does not apply.

(B) *Section 1031 exchanges.* A direct or indirect partner's share of the electing partnership's deferred items is not accelerated if the electing partnership transfers property held for productive use in a trade or business or for investment in exchange for property of like kind which is to be held either for productive use in a trade or business or for investment in a transaction to which section 1031(a)(1) applies. Notwithstanding the rules in this paragraph (b)(6)(iii)(B), to the extent the electing partnership receives money or other property which does not meet the requirements of section 1031(a) (boot) in the exchange, a proportionate amount of the property transferred by the electing partnership equal to the proportion of the boot to the total consideration received in the exchange shall be treated as sold for purposes of paragraph (b)(6)(i)(A)(*2*) of this section.

(C) *Section 708(b)(1)(B) terminations.* A direct or indirect partner's share of the deferred items of an electing partnership with respect to a separate interest is not accelerated if the electing partnership or a partnership that is a direct or indirect partner of the electing partnership terminates under section 708(b)(1)(B). Notwithstanding the rules in this paragraph (b)(6)(iii)(C), the rules in paragraph (b)(6)(ii)(A) of this section apply to the event that causes the termination under section 708(b)(1)(B) to the extent not otherwise excepted under paragraph (b)(6)(iii) of this section.

(D) *Section 708(b)(2)(A) mergers or consolidations.* A direct or indirect partner's share of the deferred items of an electing partnership with respect to a separate interest is not accelerated if the partnership in which the separate interest is held (the merger transaction partnership) merges into or consolidates with another partnership in a transaction to which section 708(b)(2)(A) applies. The resulting partnership or new partnership, as determined under § 1.708–1(c)(1), becomes subject to section 108(i), including all reporting requirements under this section, to the same extent that the merger transaction partnership was so subject prior to the transaction, and must allocate and report any merger transaction partnership's deferred items to the same extent and to the same partners that the merger transaction partnership allocated and reported such items prior to such transaction. Notwithstanding the rules in this paragraph (b)(6)(iii)(D), the rules in paragraphs (b)(6)(i)(A)(*2*) and (b)(6)(ii)(A)(*2*) of this section apply to that portion of the transaction that is treated as a sale, and the rules of (b)(6)(ii)(A)(*3*) apply if, as part of the transaction, the partner's separate interest is redeemed and the partner does not receive an interest in the resulting partnership with respect to such separate interest.

(E) *Certain distributions of separate interests.* If a partnership (upper-tier partnership) that is a direct or indirect partner of an electing partnership distributes its entire separate interest (distributed separate interest) to one or more of its partners (distributee partners) that have a share of the electing partnership's deferred items from upper-tier partnership with respect to the distributed separate interest, the distributee partners' shares of the electing partnership's deferred items with respect to such distributed separate interest are not accelerated. The partnership, the interest in which was distributed, must allocate and report the share of the electing partnership's deferred items associated with the distributed separate interest only to such distributee partners that had a share of the electing partnership's deferred items from the upper-tier partnership with respect to the distributed separate interest prior to the distribution.

(F) *Section 381 transactions.* A C corporation partner's share of an electing partnership's deferred items is not accelerated if, as part of a transaction described in paragraph (b)(6)(ii)(A) of this section, the assets of the C corporation partner are acquired by another C corporation (acquiring C corporation) in a transaction that is treated, under § 1.108(i)–1T(b)(2)(ii)(B), as a transaction to which section 381(a) applies. An S corporation partner's share of an electing partnership's deferred items is not accelerated if, as part of a transaction described in paragraph (b)(6)(ii)(A) of this section, the assets of the S corporation partner are acquired by another S corporation (acquiring S corporation) in a transaction to which section 381(a) applies. In such cases, the acquiring C corporation or acquiring S corporation, as the case may be, succeeds to the C corporation partner's or the S corporation partner's remaining share of the electing partnership's deferred items and becomes subject to section 108(i), including all reporting requirements under this section, as if the acquiring C corporation or acquiring S corporation were the C corporation partner or the S corporation partner, respectively. The acquiring S corporation must allocate and report the S corporation partner's deferred items to the same extent and only to those shareholders of the S corporation partner who had a share of the S corporation partner's deferred items from the electing partnership prior to the transaction.

(G) *Intercompany transfers.* A C corporation partner's share of an electing partnership's deferred items is not accelerated if, as part of a transaction described in paragraph (b)(6)(ii)(A) of this section, the C corporation partner transfers its entire separate interest in an intercompany transaction, as described in § 1.1502–13(b)(1)(i), and the electing partnership does not terminate under section 708(b)(1)(A) as a result of the intercompany transaction.

(H) *Retirement of a debt instrument. See* § 1.108(i)–3T(c)(1) for rules regarding the retirement of a debt instrument that is subject to section 108(i).

(I) *Other non-acceleration events.* A direct or indirect partner's share of an electing partnership's deferred items is not accelerated with respect to any transaction if the Commissioner makes a determination by published guidance that such transaction is not an acceleration event under the rules of this paragraph (b)(6).

(iv) *Related partnerships.* A direct or indirect partner's share of a related partnership's deferred OID deduction (as determined in paragraph (d)(2) of this section) that has not previously been taken into account is accelerated and taken into account by the direct or indirect partner in the taxable year in which, and to the extent that, deferred

COD income attributable to the related partnership's deferred OID deduction is taken into account by the electing entity or its owners.

(v) *Examples.* The following examples illustrate the rules under this paragraph (b)(6):

*Example 1. Meaning of "separate interest."* (i) Electing partnership (EP) has three partners, MT1, MT2, and UT, each of which is a partnership. The partners of MT1 are X and UT. The partners of MT2 are Y, UT, and B. The partners of UT are A, B, and C. In addition to their interests in the partnerships noted, MT1, MT2, and UT own other assets.

(ii) Within the meaning of paragraph (a)(29) of § 1.108(i)–0T, A and C each hold one separate interest (their interests in UT), B holds two separate interests (its interests in UT and MT2), UT holds three separate interests (its interests in MT1, MT2, and EP), MT1 and MT2 each hold one separate interest (their interests in EP), and X and Y each hold one separate interest (their interests in MT1 and MT2, respectively) with respect to EP.

*Example 2. Distributions of separate interests in an electing partnership.* (i) The facts are the same as in *Example 1,* except that A, as a direct partner of UT, has a share of EP's deferred items with respect to UT's interests in MT1 and EP. A does not have a share of EP's deferred items with respect to UT's interest in MT2. B, as a direct partner of UT, has a share of EP's deferred items with respect to UT's interest in MT1 and MT2, but not with respect to UT's interest in EP. B also has a share of EP's deferred items with respect to its separate interest in MT2. C does not have any share of EP's deferred items with respect to UT's interest in MT1, MT2, or EP.

(ii) UT distributes 40 percent of its separate interest in MT1 to A in redemption of A's interest in UT. Under paragraphs (b)(6)(ii)(A)(*2*) and (b)(6)(ii)(B)(*1*) of this section, a portion of UT's interest in MT1 has been transferred and a corresponding portion (40 percent) of UT's share of EP's deferred items from MT1 is accelerated. Thus, 40 percent of A's and B's share of EP's deferred items from UT with respect to UT's interest in MT1 is accelerated. Further, because A's interest in UT is redeemed within the meaning of paragraph (b)(6)(ii)(B)(*2*) of this section, all of A's shares of EP's deferred items from UT are accelerated under paragraph (b)(6)(ii)(A)(*3*) of this section. UT continues to allocate and report to B its remaining share of EP's deferred items from its separate interest in MT1 that was not distributed to A.

(iii) UT distributes its entire separate interest in MT1 to B (other than in redemption of B's interest in UT). Under paragraph (b)(6)(ii)(A)(*2*) of this section, UT's share of EP's deferred items from MT1 would be accelerated. However, because UT distributes its entire separate interest in MT1 to B, B's share of EP's deferred items from UT with respect to UT's separate interest in MT1 is not accelerated under paragraph (b)(6)(iii)(E) of this section. MT1 allocates and reports to B B's share of EP's deferred items from UT's separate interest in MT1 that was distributed to B.

(iv) UT distributes its entire separate interest in MT1 to A and B (other than in redemption of their interests in UT). Under paragraph (b)(6)(iii)(E) of this section, none of A's or B's shares of EP's deferred items from UT with respect to UT's separate interest in MT1 is accelerated, and MT1 allocates and reports to A and B their respective share of EP's deferred items from UT's separate interest in MT1 that was distributed to A and B.

*Example 3. Partial sale of interest by an indirect partner.* (i) Individual A holds a 50 percent partnership interest in UTP, a partnership that holds a 50 percent interest in EP, a partnership that makes an election to defer COD income under section 108(i). A's share of UTP's deferred amount with respect to EP's election under section 108(i) is $100. During a taxable year within the deferral period, A sells 25 percent of his partnership interest in UTP to an unrelated third party.

(ii) Under paragraphs (b)(6)(ii)(A)(*2*) and (b)(6)(ii)(B)(*1*) of this section, 25 percent of A's $100 deferred amount is accelerated as a result of A's partial sale of his interest in UTP. Thus, A must recognize $25 of his deferred amount in the taxable year of the sale. A's remaining deferred amount is $75.

*Example 4. Section 708(b)(1)(B) termination of electing partnership.* (i) A and B are equal partners in partnership AB. On January 1, 2009, AB reacquires an applicable debt instrument and makes an election under section 108(i) to defer $400 of COD income. A and B each have a deferred amount with respect to the applicable debt instrument of $200. On January 1, 2010, A sells its entire 50 percent interest in AB to C in a transfer that terminates the partnership under section 708(b)(1)(B).

(ii) Under paragraph (b)(6)(iii)(C) of this section, the technical termination of AB under section 708(b)(1)(B) does not cause A's or B's shares of AB's deferred items to be accelerated. However, A's $200 deferred amount is accelerated under paragraph (b)(6)(ii)(A)(*2*) of this section as a result of the sale.

*Example 5. Section 708(b)(2)(A) mergers.* (i) A, B, and C are equal partners in partnership X, which has made an election under section 108(i) to defer $150 of COD income. The fair market value of each interest in partnership X is $100. A, B, and C each has a deferred amount of $50 with respect to partnership X's election under section 108(i). E, F, and G are partners in partnership Y. Partnership X and partnership Y merge in a taxable year during the deferral period of partnership X's election under section 108(i). Under section 708(b)(2)(A), the resulting partnership is considered a continuation of partnership Y and partnership X is considered terminated. Under state law, partnerships X and Y undertake the assets-over form of § 1.708–1(c)(3)(i) to accomplish the merger. C does not want to become a partner in partnership Y, and partnership X does not have the resources to redeem C's interest before the merger. C, partnership X, and partnership Y enter into a merger agreement that satisfies the requirements of § 1.708–1(c)(4) and specifies that partnership Y will purchase C's interest in partnership X for $100 before the merger, and as part of the agreement, C consents to treat the transaction in a manner that is consistent with the agreement. As part of the merger, partnership X receives from partnership Y $100 (which will be distributed to C immediately before the merger), $100 (which will be distributed equally to A and B ($50 each)), and interests in partnership Y with a value of $100 (which will be distributed equally to A and B) in exchange for partnership X's assets and liabilities.

(ii) Under the general rule of paragraph (b)(6)(iii)(D) of this section, and except as provided below, the deferred items of partnership X are not accelerated as a result of the merger with partnership Y. Partnership Y, the resulting partnership that is considered the continuation of partnership X, becomes subject to section 108(i), including all reporting requirements under section 108(i), to the same extent that partnership X was subject to such rules. Under paragraph (b)(6)(iii)(D) of this section, partnership Y must allocate and report partnership X's deferred items to A and B in the same manner as partnership X had prior to the merger transaction.

(iii) Under § 1.708–1(c)(4), C is treated as selling its interest in partnership X immediately before the merger. As a result, C's $50 deferred amount is accelerated under paragraph (b)(6)(ii)(A)(*2*) of this section.

(iv) Under section 707(a)(2)(B), partnership X is deemed to have sold a portion of its assets to partnership Y. Because partnership X is not treated as selling substantially all of its assets under paragraph (b)(6)(i)(B) of this section, A's and B's deferred amounts are not accelerated under paragraph (b)(6)(i)(A)(*2*) of this section.

(v) Because A's and B's interests in partnership X are redeemed within the meaning of paragraph (b)(6)(ii)(B)(*2*) of this section, all of their shares of partnership X's deferred items would be accelerated under paragraph (b)(6)(ii)(A)(*3*). However, because they receive an interest in partnership Y in the merger, none of A's and B's share of partnership X's deferred items is accelerated.

(7) *Withholding under section 1446. See* section 1446 regarding withholding by a partnership on a foreign partner's share of income effectively connected with a U.S. trade or business.

(c) *Specific rules applicable to S corporations*—(1) *Deferred COD income.* An electing S corporation's COD income deferred under section 108(i) (an S corporation's deferred COD income) is shared pro rata among those shareholders that are shareholders of the electing S corporation immediately before the reacquisition of the applicable debt instrument. Any COD income deferred under section 108(i) is taken into account under section 1366(a) by those shareholders in the inclusion period, or earlier upon the occurrence of an acceleration event described in paragraph (c)(3) of this section.

(2) *Basis adjustments and accumulated adjustments account*—(i) *Basis adjustments.* The adjusted basis of a shareholder's stock in an electing S corporation is not increased under section 1367(a)(1) by the shareholder's share of the S corporation's deferred COD income in the taxable year of the reacquisition. The adjusted basis of a shareholder's stock in an electing S corporation or a related S corporation is not decreased under section 1367(a)(2) by the shareholder's share of the S corporation's deferred OID deduction in the taxable year in which the deferred OID accrues. The adjusted basis of a shareholder's stock in an electing S corporation or a related S corporation is adjusted under section 1367(a) by the shareholder's share of the S corporation's deferred items for the taxable year in which the shareholder takes into account its share of the deferred items under this section.

(ii) *Accumulated adjustments account.* The AAA of an electing S corporation is not increased by the S corporation's deferred COD income in the taxable year of a reacquisition. The AAA of an electing S corporation or a related S corporation is not decreased by the S corporation's deferred OID deduction in the taxable year in which the deferred OID accrues. The AAA of an electing S corporation or a related S corporation is adjusted under section 1368(e) by a shareholder's share of the S corporation's deferred items for the S period (as defined in section 1368(e)(2)) in which a shareholder of the S corporation takes into account its share of the deferred items under this section.

(3) *Acceleration of deferred items*—(i) *Electing S corporation-level events*—(A) *General rules.* Except as provided in paragraph (c)(3)(iii) of this section, a shareholder's share of an electing S corporation's deferred items is accelerated and must be taken into account by such shareholder—

(*1*) In the taxable year in which the electing S corporation liquidates;

(*2*) In the taxable year in which the electing S corporation sells, exchanges, transfers (including contributions and distributions), or gifts substantially all of its assets;

(*3*) In the taxable year in which the electing S corporation ceases doing business;

(*4*) In the taxable year in which the electing S corporation's election under section 1362(a) terminates; or

(*5*) In the taxable year that includes the day before the day on which the electing S corporation files a petition in a Title 11 or similar case.

(B) *Substantially all requirement.* For purposes of this paragraph (c)(3), substantially all of an electing S corporation's or partnership's assets means assets representing at least 90 percent of the fair market value of the net assets, and at least 70 percent of the fair market value of the gross assets, held by the S corporation or partnership immediately prior to the sale, exchange, transfer, or gift. For purposes of applying the rule in paragraph (c)(3)(i)(A)(*2*) of this section, a sale, exchange, transfer, or gift by any direct or indirect lower-tier partnership of the electing S corporation (lower-tier partnership) of all or part of its assets is not treated as a sale, exchange, transfer, or gift of the assets of any person that holds, directly or indirectly, an interest in such lower-tier partnership. However, for purposes of applying the rule in paragraph (c)(3)(i)(A)(*2*) of this section, a sale, exchange, transfer, or gift of substantially all of the assets of a transferee partnership (as described in paragraph (c)(3)(iii)(A) of this section), or of a lower-tier partnership that received assets of the electing S corporation from a transferee partnership of the electing S corporation or another lower-tier partnership in a transaction governed all or in part by section 721, is treated as a sale, exchange, transfer, or gift by the holder of an interest in such transferee partnership or lower-tier partnership of its entire interest in that transferee partnership or lower-tier partnership.

(ii) *Shareholder events*—(A) *General rules.* Except as provided in paragraph (c)(3)(iii) of this section, a shareholder's share of an electing S corporation's deferred items is accelerated and must be taken into account by such shareholder in the taxable year in which—

(*1*) The shareholder dies;

(*2*) The shareholder sells, exchanges (including redemptions treated as exchanges under section 302), transfers (including contributions and distributions), or gifts (including transfers treated as gifts under section 1041) all or a portion of its interest in the electing S corporation; or

(*3*) The shareholder abandons its interest in the electing S corporation.

(B) *Partial transfers.* For purposes of paragraph (c)(3)(ii)(A)(*2*) of this section, if a shareholder of an electing S corporation sells, exchanges (including redemptions treated as exchanges under section 302), transfers, or gifts (including transfers treated as gifts under section 1041) a portion of its interest in the electing S corporation, such shareholder's share of the electing S corporation's deferred items proportionate to the interest that was sold, exchanged, transferred, or gifted is accelerated and must be taken into account by such shareholder.

(iii) *Events not constituting acceleration.* Notwithstanding the rules in paragraphs (c)(3)(i) and (ii) of this section, a shareholder's share of an electing S corporation's deferred items is not accelerated by any of the events described in this paragraph (c)(3)(iii).

(A) *Electing S corporation's contributions.* A shareholder's share of an electing S corporation's deferred items is not accelerated if the electing S corporation contributes all or a portion of its assets in a transaction governed all or in part by section 721(a) to a partnership (transferee partnership) in exchange for an interest in the transferee partnership. Notwithstanding the rules in this paragraph (c)(3)(iii)(A), the rules in paragraph (c)(3)(i)(A) of this section apply to any part of the transaction to which section 721(a) does not apply.

(B) *Section 1031 exchanges.* A shareholder's share of an electing S corporation's deferred items is not accelerated if the electing S corporation transfers property held for productive use in a trade or business or for investment in exchange for property of like kind which is to be held either for productive use in a trade or business or for investment in a transaction to which section 1031(a)(1) applies. Notwithstanding the rules in this paragraph (c)(3)(iii)(B), to the extent the electing S corporation receives money or other property which does not meet the requirements of section 1031(a) (boot) in the exchange, a proportionate amount of the property transferred by the electing S corporation equal to the proportion of the boot to the total consideration received in the exchange shall be treated as sold for purposes of paragraph (c)(3)(i)(A)(*2*) of this section.

(C) *Section 381 transactions.* A shareholder's share of an electing S corporation's deferred items is not accelerated if, as part of a transaction described in paragraph (c)(3)(i)(A) of this section, the electing S corporation's assets are acquired by another S corporation (acquiring S corporation) in a transaction to which section 381(a) applies. In such a case, the acquiring S corporation succeeds to the electing S corporation's remaining deferred items and becomes subject to section 108(i), including all reporting requirements under this section, as if the acquiring S corporation were the electing S corporation. The acquiring S corporation must allocate and report the electing S corporation's deferred items to the same extent and only to those shareholders who had a share of the electing S corporation's deferred items prior to the transaction.

(D) *Retirement of a debt instrument. See* § 1.108(i)–3T(c)(1) for rules regarding the retirement of a debt instrument that is subject to section 108(i).

(E) *Other non-acceleration events.* A shareholder's share of an electing S corporation's deferred items is not accelerated with respect to any transaction if the Commissioner makes a determination by published guidance that such transaction is not an acceleration event under the rules of this paragraph (c)(3).

(iv) *Related S corporations.* A shareholder's share of a related S corporation's deferred OID deduction (as determined in paragraph (d)(2) of this section) that has not previously been taken into account is accelerated and taken into account by the shareholder in the taxable year in which, and to the extent that, deferred COD income attributable to the related S corporation's deferred OID deduction is taken into account by the electing entity or its owners.

(d) *General rules applicable to partnerships and S corporations*—(1) *Applicable debt instrument (trade or business requirement).* The determination of whether a debt instrument issued by a partnership or an S corporation is treated as a debt instrument issued in connection with the conduct of a trade or business by the partnership or S corporation for purposes of this section is based on all the facts and circumstances. However, a debt instrument issued by a partnership or an S corporation shall be treated as an applicable debt instrument for purposes of this section if the electing partnership or electing S corporation can establish that—

(i) The gross fair market value of the trade or business assets of the partnership or S corporation that issued the debt instrument represented at least 80 percent of the gross fair market value of that partnership's or S corporation's total assets on the date of issuance;

(ii) The trade or business expenditures of the partnership or S corporation that issued the debt instrument represented at least 80 percent of the partnership's or S corporation's total expenditures for the taxable year of issuance;

(iii) At least 95 percent of interest paid or accrued on the debt instrument issued by the partnership or S corporation was allocated to one or more trade or business expenditures under § 1.163–8T for the taxable year of issuance;

(iv) At least 95 percent of the proceeds from the debt instrument issued by the partnership or S corporation were used by the partnership or S corporation to acquire one or more trades or businesses within six months from the date of issuance; or

(v) The partnership or S corporation issued the debt instrument to a seller of a trade or business to acquire the trade or business.

(2) *Deferral of OID at entity level*—(i) *In general.* For each taxable year during the deferral period, an issuing entity determines the amount of its deferred OID deduction with respect to a debt instrument, if any. An issuing entity's deferred OID deduction for a taxable year is the lesser of:

(A) The OID that accrues in a current taxable year during the deferral period with respect to the debt instrument (less any of such OID that is allowed as a deduction in the current taxable year as a result of an acceleration event), or

(B) The excess, if any, of the electing entity's deferred COD income (less the aggregate amount of such deferred COD income that has been included in income in the current taxable year and any previous taxable year during the deferral period) over the aggregate amount of OID that accrued in previous taxable years during the deferral period with respect to the debt instrument (less the aggregate amount of such OID that has been allowed as a deduction in the current taxable year and any previous taxable year during the deferral period).

(ii) *Excess deferred OID deduction.* If, as a result of an acceleration event during a taxable year in the deferral period, an issuing entity's aggregate deferred OID deduction for previous taxable years with respect to a debt instrument (less the aggregate amount of such deferred OID deduction that has been allowed as a deduction in a previous taxable year during the deferral period) exceeds the amount of the electing entity's deferred COD income (less the aggregate amount of such deferred COD income that has been included in income in the current taxable year and any previous taxable year during the deferral period), the excess deferred OID deduction shall be allowed as a deduction in the taxable year in which the acceleration event occurs.

(iii) *Examples.* The following examples illustrate the rules under paragraph (d)(2) of this section:

*Example 1. Partner joins partnership during deferral period.* (i) A and B each hold a 50 percent interest in AB partnership, a calendar-year partnership. On January 1, 2009, AB partnership issues a new debt instrument with OID and uses all of the proceeds to reacquire an outstanding applicable debt instrument of AB partnership, realizing $100 of COD income, and makes an election under section 108(i) to defer $50 of the COD income. During the deferral period, a total of $150 of OID accrues on the new debt instrument issued as part of the reacquisition. A and B each have a deferred amount of $25 with respect to the applicable debt instrument reacquired by AB partnership. For 2009, $28 of OID accrues on the new debt instrument and A and B are each allocated $14 of accrued OID with respect to the new debt instrument. On January 1, 2010, C contributes cash to AB partnership in exchange for a ⅓ partnership interest. For 2010, $29 of OID accrues on the new debt instrument, and A, B, and C are each allocated $9.67 of accrued OID.

(ii) Under paragraph (d)(2) of this section, AB partnership's deferred OID deduction for 2009 is the lesser of: $28 of OID that accrues on the new debt instrument in 2009, or the excess of AB partnership's deferred COD income of $50 over the aggregate amount of OID that accrued on the debt instrument in previous taxable years during the deferral period of $0, or $50. Thus, all $28 of the OID that accrues on the debt instrument in 2009 is deferred under section 108(i).

(iii) Under paragraph (d)(2) of this section, AB partnership's deferred OID deduction for 2010 is the lesser of: $29 of OID that accrues on the new debt instrument in 2010, or the excess of AB partnership's deferred COD income of $50 over the aggregate amount of OID that accrued on the debt instrument in previous taxable years during the deferral period of $28, or $22. Thus, $22 of the $29 of OID that accrues in 2010 is deferred under section 108(i). A, B, and C will each defer $7.33 of the $9.67 of accrued OID that was allocated to each of them.

*Example 2. Acceleration of deferred items during deferral period.* (i) On January 1, 2009, ABC partnership, a calendar-year partnership with three partners, issues a new debt instrument with OID and uses all of the proceeds to reacquire an outstanding applicable debt instrument of ABC partnership. ABC partnership realizes $150 of COD income and makes an election under section 108(i) to defer the $150 of COD income. A's deferred amount with respect to the applicable debt instrument is $75, while B and C each have a deferred amount of $37.50. In 2009, $28 of OID accrues on the new debt instrument and is allocated $7.00 to A and $10.50 to each of B and C. In 2010, $29 of OID accrues on the new debt instrument and is allocated $7.25 to A and $10.87 to each of B and C. In 2011, $30 of OID accrues on the new debt instrument and is allocated $7.50 to A and $11.25 to each of B and C. In 2012, $31 of OID accrues on the new debt instrument and is allocated $7.75 to A and $11.62 to each of B and C. On December 31, 2012, A's entire share of ABC partnership's deferred items is accelerated under paragraph (b)(6) of this section. For 2012, A includes $75 of COD income in income and is allowed a deduction of $21.75 for A's share of ABC partnership's deferred OID deduction for taxable years 2009 through 2011, and a deduction of $7.75 for A's share of ABC partnership's OID that accrues on the debt instrument in 2012.

(ii) Under paragraph (d)(2) of this section, ABC partnership's deferred OID deduction

for 2012 is the lesser of: $23.35 ($31 of OID that accrues on the new debt instrument in 2012 less $7.75 of this OID that is allowed as a deduction to A in 2012) or $9.75 (the excess of $75 (ABC partnership's deferred COD income of $150 less A's share of ABC partnership's deferred COD income that is included in A's income for 2012 of $75) over $65.25 (the aggregate amount of OID that accrued in previous taxable years of $87 less the aggregate amount of such OID that has been allowed as a deduction by A in 2012 of $21.75)). Thus, of the $31 of OID that accrues in 2012, $9.75 is deferred under section 108(i).

(3) *Effect of an election under section 108(i) on recapture amounts under section 465(e)*—(i) *In general.* To the extent that a decrease in a partner's or shareholder's amount at risk (as defined in section 465) in an activity as a result of a reacquisition of an applicable debt instrument would cause a partner with a deferred amount or a shareholder with a share of the S corporation's deferred COD income to have income under section 465(e) in the taxable year of the reacquisition, such decrease (not to exceed the partner's deferred amount or the shareholder's share of the S corporation's deferred COD income with respect to that applicable debt instrument) (deferred section 465 amount) shall not be taken into account for purposes of determining the partner's or shareholder's amount at risk in an activity under section 465 as of the close of the taxable year of the reacquisition. A partner's or shareholder's deferred section 465 amount is treated as a decrease in the partner's or shareholder's amount at risk in an activity at the same time, and to the extent remaining in same amount, as the partner recognizes its deferred amount or the S corporation shareholder recognizes its share of the S corporation's deferred COD income.

(ii) *Example.* The following example illustrates the rules in paragraph (d)(3) of this section:

*Example.* (i) PRS is a calendar-year partnership with two equal partners, individuals A and B. PRS is engaged in an activity described in section 465(c) (Activity). PRS has a $500 recourse applicable debt instrument outstanding. Each partner's amount at risk on January 1, 2009 is $50. On June 1, 2009, the creditor agrees to cancel the $500 indebtedness. PRS realizes $500 of COD income as a result of the reacquisition. The partners' share of the liabilities of PRS decreases by $500 under section 752(b), and each partner's amount at risk is decreased by $250. Other than the $500 of COD income, PRS's income and expenses for 2009 are equal. PRS makes an election under section 108(i) to defer $200 of the $500 COD income realized in connection with the reacquisition. PRS allocates the $500 of COD income equally between its partners, A and B. A and B each have a COD income amount of $250 with respect to the applicable debt instrument. PRS determines that, for both partners A and B, $100 of the $250 COD income amount is the deferred amount, and $150 is the included amount. Beginning in each taxable year 2014 through 2018, A and B each include $20 of the deferred amount in gross income.

(ii) Under paragraph (d)(3)(i) of this section, $50 of the $250 decrease in A's and B's amount at risk in Activity is the deferred section 465 amount for each of A and B and is not taken into account for purposes of determining A's and B's amount at risk in Activity at the close of 2009. In taxable year 2014, A's and B's amount at risk in Activity is decreased by $20 (deferred section 465 amount that equals the deferred amount included in A's and B's gross income in 2014). In taxable year 2015, A's and B's amount at risk in Activity is decreased by $20 for the deferred section 465 amount that equals the deferred amount included in A's and B's gross income in 2015. In taxable year 2016, A's and B's amount at risk in Activity is decreased by $10 (the remaining amount of the deferred section 465 amount).

(e) *Election procedures and reporting requirements*—(1) *Partnerships*—(i) *In general.* A partnership makes an election under section 108(i) by following procedures outlined in guidance and applicable forms and instructions issued by the Commissioner. An electing partnership (or its successor) must provide to its partners certain information as required by guidance and applicable forms and instructions issued by the Commissioner.

(ii) *Tiered pass-through entities.* A partnership that is a direct or indirect partner of an electing partnership (or its successor) or a related partnership or an S corporation partner must provide to its partners or shareholders, as the case may be, certain information as required by guidance and applicable forms and instructions issued by the Commissioner.

(iii) *Related partnerships.* A related partnership must provide to its partners certain information as required by guidance and applicable forms and instructions issued by the Commissioner.

(2) *S corporations*—(i) *In general.* An S corporation makes an election under section 108(i) by following procedures outlined in guidance and applicable forms and instructions issued by the Commissioner. An electing S corporation (or its successor) must provide to its shareholders certain information as required by guidance and applicable forms and instructions issued by the Commissioner.

(ii) *Related S corporations.* A related S corporation must provide to its shareholders certain information as required by guidance and applicable forms and instructions issued by the Commissioner.

(f) *Effective/applicability date.* For the applicability dates of this section, *see* § 1.108(i)–0T(b).

(g) *Expiration date.* This section expires on August 9, 2013.

## PART 602—OMB CONTROL NUMBERS UNDER THE PAPERWORK REDUCTION ACT

■ **Par. 3.** The authority citation for part 602 continues to read as follows:

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

■ **Par. 4.** In § 602.101, paragraph (b) is amended by adding the following entry in numerical order to the table to read as follows:

**§ 602.101 OMB Control numbers.**

* * * * *

(b) * * *

| CFR part or section where identified and described | Current OMB control No. |
|---|---|
| * * * * * | |
| 1.108(i)–2T ..... | 1545–2147 |
| * * * * * | |

**Steven T. Miller,**

*Deputy Commissioner for Services and Enforcement.*

Approved: August 6, 2010.

**Michael F. Mundaca,**

*Assistant Secretary of the Treasury (Tax Policy).*

[FR Doc. 2010–20058 Filed 8–11–10; 11:15 am]

**BILLING CODE 4830–01–P**

## DEPARTMENT OF THE TREASURY

### Internal Revenue Service

### 26 CFR Parts 1 and 602

**[TD 9497]**

**RIN 1545–BI97**

## Guidance Regarding Deferred Discharge of Indebtedness Income of Corporations and Deferred Original Issue Discount Deductions

**AGENCY:** Internal Revenue Service (IRS), Treasury.

**ACTION:** Temporary regulations.

**SUMMARY:** This document contains temporary regulations under section 108(i) of the Internal Revenue Code (Code). These regulations primarily affect C corporations regarding the acceleration of deferred discharge of indebtedness (COD) income (deferred COD income) and deferred original

issue discount (OID) deductions (deferred OID deductions) under section 108(i)(5)(D), and the calculation of earnings and profits as a result of an election under section 108(i). In addition, these regulations provide rules applicable to all taxpayers regarding deferred OID deductions under section 108(i) as a result of a reacquisition of an applicable debt instrument by an issuer or related party. The text of these temporary regulations also serves as the text of proposed regulations (REG–142800–09) set forth in the notice of proposed rulemaking on this subject in the Proposed Rules section in this issue of the **Federal Register**.

**DATES:** *Effective Dates:* These regulations are effective on August 11, 2010.

*Applicability Dates:* For dates of applicability, *see* § 1.108(i)–0T(b).

**FOR FURTHER INFORMATION CONTACT:** Concerning the acceleration rules for deferred COD income and deferred OID deductions, and the rules for earnings and profits, Robert M. Rhyne (202) 622–7790; concerning the rules for deferred OID deductions, Rubin B. Ranat (202) 622–7530 (not toll-free numbers).

**SUPPLEMENTARY INFORMATION:**

**Paperwork Reduction Act**

These temporary regulations are being issued without prior notice and public procedure pursuant to the Administrative Procedure Act (5 U.S.C. 553). For this reason, the collection of information contained in these regulations has been reviewed and, pending receipt and evaluation of public comments, approved by the Office of Management and Budget under control number 1545–2147. Responses to this collection of information are required in order for a member of a consolidated group to make the election described in § 1.108(i)–1T(b)(3).

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid control number.

For further information concerning this collection of information, and where to submit comments on the collection of information and the accuracy of the estimated burden, and suggestions for reducing this burden, please refer to the preamble to the cross-referencing notice of proposed rulemaking on this subject in the Proposed Rules section in this issue of the **Federal Register**.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. *See* 26 U.S.C. 6001. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

**Background**

Under section 61(a)(12), a taxpayer includes in gross income any discharge of indebtedness (COD income) if the taxpayer's obligation to repay its indebtedness is discharged in whole or in part. Section 108 provides special rules for the treatment of COD income in certain cases.

Section 108(i) was added to the Code by section 1231 of the American Recovery and Reinvestment Tax Act of 2009 (Pub. L. 111–5, 123 Stat. 338), enacted on February 17, 2009. Section 108(i)(1) provides an election for deferral of the inclusion of COD income (deferred COD income) arising in connection with the reacquisition after December 31, 2008, and before January 1, 2011, of an applicable debt instrument. If a taxpayer makes the election, the deferred COD income generally is includible in gross income ratably over a 5-taxable-year period, beginning with the taxpayer's fourth or fifth taxable year following the taxable year of the reacquisition (inclusion period). If, as part of a reacquisition to which section 108(i)(1) applies, a debt instrument is issued (or is treated as issued) for the applicable debt instrument and there is any OID with respect to the newly issued debt instrument, then the deduction for all or a portion of the OID may be deferred (deferred OID deductions) under section 108(i)(2). (*See* the discussion of section 108(i)(2) later in this preamble.)

An applicable debt instrument means any debt instrument (within the meaning of section 1275(a)(1)) issued by a C corporation, or any other person in connection with the conduct of a trade or business by such a person. Section 108(i)(3). Section 108(i)(4)(A) defines a *reacquisition* as any acquisition of the debt instrument by the debtor which issued (or is otherwise the obligor under) the debt instrument, or by a person related to the debtor within the meaning of section 108(e)(4). An *acquisition* includes acquisitions for cash or other property, for another debt instrument, for corporate stock or a partnership interest, or as a contribution of the debt instrument to capital. The term also includes the complete forgiveness of the indebtedness by the holder of the debt instrument. Section 108(i)(4)(B).

Section 108(i)(5)(D) requires a taxpayer to accelerate the inclusion of any remaining items of deferred COD income or deferred (and otherwise allowable) OID deduction (deferred items) under certain circumstances, including the death of the taxpayer, the liquidation or sale of substantially all the assets of the taxpayer (including in a title 11 or similar case), the cessation of business by the taxpayer, or similar circumstances. Section 108(i)(7) authorizes the Secretary to issue guidance necessary or appropriate for purposes of applying section 108(i), including extending the application of the rules of section 108(i)(5)(D) to other appropriate circumstances.

On August 17, 2009, the IRS and Treasury Department issued Rev. Proc. 2009–37, 2009–36 IRB 309, providing procedures for taxpayers to make a section 108(i) election, and requiring the annual reporting of additional information. *See* § 601.601(d)(2)(ii)(*b*). The revenue procedure also announced the intention to issue additional guidance, and that the additional guidance may be retroactive.

**Explanation of Provisions**

*I. Mandatory Acceleration Events for Deferred COD Income*

The IRS and Treasury Department believe that the deferral rules of section 108(i) generally are intended to facilitate debt workouts and to alleviate taxpayer liquidity concerns by deferring the tax liability associated with COD income. These taxpayer-favorable deferral rules are tempered, however, by section 108(i)(5)(D), which operates to accelerate the inclusion of a taxpayer's remaining deferred COD income in the case of the death of the taxpayer, the liquidation or sale of substantially all the assets of the taxpayer (including in a title 11 or similar case), the cessation of business by the taxpayer or similar circumstances (acceleration events).

A common trait of these enumerated acceleration events is that they involve situations where collection of the tax liability associated with a taxpayer's deferred COD income may be hindered, either because the taxpayer has ceased to exist or because the taxpayer has disposed of the business to which the COD income relates. Section 108(i) poses unique concerns regarding collectability of the incipient tax liability associated with deferred COD income. In other contexts in which gain or income is deferred, the deferral is generally associated with a particular asset or its replacement. For example, gain on the sale of an asset under the installment method of accounting is deferred until payments are received under the installment obligation, or until the taxpayer disposes of the installment obligation. Collectability of

the tax liability associated with the deferred gain is preserved in that context because the taxpayer has either the installment obligation or the proceeds therefrom. Section 108(i) deferral, in contrast, is not linked to a particular asset or a particular replacement asset. In the absence of acceleration events, the government's ability to ensure appropriate inclusion of the deferred COD income and the collectability of the associated tax liability would be jeopardized.

The enumerated acceleration events apply, however, to a broad range of taxpayers, including individuals and passthrough entities as well as corporations. Applied literally, the statutory rules would require acceleration in circumstances, such as certain corporate nonrecognition transactions, that do not pose particular concerns regarding collectability. For example, the statute treats a sale of substantially all the assets of the taxpayer as an acceleration event. If construed broadly, any asset disposition involving the transfer of substantially all of the assets of a corporation that made a section 108(i) election (for example, a reorganization exchange described in section 368(a)(1)(C)) would constitute an acceleration event. However, commentators noted that it did not seem consistent with the purposes of section 108(i) to require the acceleration of an electing corporation's deferred items in the case of a transaction to which section 381(a) applies. As discussed further in this preamble, the IRS and Treasury Department generally agree.

The rules provided in these temporary regulations with respect to a C corporation with deferred COD income by reason of a section 108(i) election (electing corporation) are intended to focus more precisely on the underlying purpose of section 108(i)(5)(D) to ensure that the government's ability to collect the tax liability associated with the deferred COD income is not impaired. Thus, with respect to electing corporations, the rules provided in these regulations generally reflect a narrower interpretation of the statutory acceleration events.

In addition, however, the nature of the corporate entity introduces concerns not present for other types of taxpayers. In particular, a corporation can dissipate its assets (for example, by distributions to its shareholders) without harming the economic interests of its shareholders. As a result, there may be a greater incentive for the owners of a corporation to make the corporation judgment-proof with respect to its tax liability. This is illustrated by the intermediary transactions described in Notice 2008–111, 2008–2 CB 1299. The IRS and Treasury Department believe that the acceleration rules should be tailored to foreclose such opportunities.

Accordingly, while these temporary regulations do not require acceleration in every instance enumerated in the statute, they provide instead for acceleration in a limited number of circumstances in which corporations have impaired their ability to pay their incipient tax liability. This approach is broadly consistent with the approach advanced by commentators who suggested, for example, that a transfer of a corporation's business assets for stock in a section 351 exchange should not be an acceleration event, despite the literal language of section 108(i)(5)(D).

Specifically, these temporary regulations generally provide that an electing corporation will accelerate deferred COD income under section 108(i)(5)(D) if the electing corporation (i) changes its tax status, (ii) ceases its corporate existence in a transaction to which section 381(a) does not apply, or (iii) engages in a transaction that impairs its ability to pay the tax liability associated with its deferred COD income (the net value acceleration rule). Under these temporary regulations, the foregoing three rules are the only events that accelerate an electing corporation's deferred COD income. In addition to these temporary regulations, however, the rules under § 1.108(i)–2T apply to C corporations that are direct or indirect partners of a partnership.

The acceleration rules provided in these temporary regulations generally are different from the rules for passthrough entities. For example, a sale of substantially all of the assets of a passthrough entity is an acceleration event for an S corporation while that transaction, standing alone, is not an acceleration event for an electing corporation. The IRS and Treasury Department believe that it is appropriate to provide different acceleration rules for passthrough entities and electing corporations because the statute requires the debt instrument of a passthrough entity to be issued in connection with a trade or business. Accordingly, consistent with the trade or business requirement, it is appropriate to accelerate the deferred COD income of a passthrough entity if the entity sells substantially all of its assets.

*A. Net Value Acceleration Rule*

Under the net value acceleration rule, an electing corporation generally is required to accelerate all of its remaining deferred COD income if it engages in an impairment transaction, and immediately after the transaction, the value of its assets fails to satisfy a minimum threshold (as further described herein). In general, impairment transactions are volitional transactions that reduce an electing corporation's asset base.

As provided in these regulations, impairment transactions are any transactions, however effected, that impair an electing corporation's ability to pay the amount of Federal income tax liability on its deferred COD income and include, for example, distributions (including section 381(a) transactions), redemptions, below market sales, and donations, and the incurrence of additional indebtedness without a corresponding increase in asset value. However, value-for-value sales or exchanges (including, for example, an exchange to which section 351 or section 721 applies) are not impairment transactions. The IRS and Treasury Department believe that the receipt of replacement assets in these cases adequately protects the government's interests and ensures continued collectability of any incipient tax liability. Under this rule, an electing corporation's investments and expenditures in pursuance of its good faith business judgment are not impairment transactions, merely because, for example, acquired assets are riskier or less liquid than the electing corporation's previous assets. In addition, mere declines in the market value of an electing corporation's assets are not impairment transactions. Although the decline may impair an electing corporation's ability to pay its tax liability, a different rule would require continuous valuations and is contrary to the transactional approach taken in the statute and these regulations, and the realization requirement generally.

Under the net value acceleration rule, an electing corporation generally is required to accelerate its remaining deferred COD income if immediately after an impairment transaction, the gross value of the corporation's assets (gross asset value) is less than one hundred and ten percent of the sum of its total liabilities and the tax on the net amount of its deferred items (the net value floor). Solely for purposes of computing the net value floor, the tax on the net amount of the electing corporation's deferred items is determined by applying the highest rate of tax specified in section 11(b) for the taxable year (even though the corporation's actual tax rate for the taxable year may differ).

The net value acceleration rule has a mitigating provision that allows an

electing corporation to avoid accelerated inclusion of its deferred COD income if value is restored to the corporation by the due date of the electing corporation's tax return (including extensions). In general, the amount required to be restored is the lesser of: (i) The amount of value that was removed (net of amounts previously restored under this rule) from the electing corporation in one or more impairment transactions; or (ii) the amount by which the electing corporation's net value floor exceeds its gross asset value. For example, assume an electing corporation incurs $50 of indebtedness, distributes the $50 of proceeds to its shareholder, and immediately after the distribution, the electing corporation's gross asset value is $25 below the net value floor. The electing corporation may avoid application of the net value acceleration rule if, as a result of a transaction, assets with a value of $25 are restored to the corporation before the due date of its tax return (including extensions) for the taxable year that includes the distribution. For purposes of this provision, the value that must be restored is determined at the time of the impairment transaction, and is determined upon a net value basis (for example, additional borrowings by an electing corporation do not restore value).

The IRS and Treasury Department believe that the net value acceleration rule is an appropriate interpretation of section 108(i) because, consistent with the purpose of facilitating workouts, the rule allows electing corporations the flexibility to realign business operations through strategic acquisitions and dispositions within the objective standard of the net value floor. Although the net value acceleration rule contains a valuation component, a valuation will be required only if an electing corporation engages in an impairment transaction. Moreover, the IRS and Treasury Department believe that the net value acceleration rule is a more objective rule than requiring corporations to determine the amount of business assets that would have to be retained simply to preserve the deferral benefit of section 108(i).

1. Consolidated Groups

In the case of consolidated groups, the determination of whether an electing corporation that is a member of a consolidated group (electing member) has engaged in an impairment transaction is made on a group-wide basis. Thus, an electing member is treated as engaging in an impairment transaction if any member's transaction impairs the group's ability to pay the tax liability associated with the group's deferred COD income. *See* § 1.1502–6. Accordingly, intercompany transactions are not impairment transactions. Similarly, the net value acceleration rule is applied by reference to the gross asset value of all members (excluding stock of members whether or not the stock is described in section 1504(a)(4)), the liabilities of all members, and the tax on all members' deferred items. For example, assume P is the common parent of the P–S consolidated group, S has a section 108(i) election in effect, and S makes a $100 distribution to P, which, on a separate entity basis, would reduce S's gross asset value below the net value floor. S's intercompany distribution to P is not an impairment transaction. However, if P makes a $100 distribution to its shareholder, P's distribution, subject to an exception described in section I.A.2 of this preamble, is an impairment transaction, and the net value acceleration rule is applied by reference to the assets, liabilities, and deferred items of the P–S group.

Special rules are provided when an electing member that previously engaged in an impairment transaction on a separate entity basis leaves a consolidated group. If the electing member ceases to be a member of a consolidated group, the cessation is treated as an impairment transaction and the net value acceleration rule is applied on a separate entity basis (by reference to the assets, liabilities, and deferred items of the electing member only) immediately after it ceases to be a member. If the electing member's gross asset value is less than the net value floor, then the electing member's remaining deferred COD income must be taken into account immediately before the electing member ceases to be a member (unless value is restored). In the case of an electing member that becomes a member of another consolidated group, the cessation is treated as an impairment transaction and the net value acceleration rule is applied by reference to the assets, liabilities, and deferred items of the members of the acquiring group immediately after the transaction. If the gross asset value of the acquiring group is less than its net value floor, the electing member's remaining deferred COD income is taken into account immediately before the electing member ceases to be a member of the former group. If accelerated inclusion is not required, the common parent of the acquiring group succeeds to the reporting requirements of section 108(i) with respect to the electing member.

2. Exception for Distributions and Charitable Contributions Consistent With Historical Practice—In General

The IRS and Treasury Department believe it is appropriate to allow an electing corporation to continue to make distributions to the extent the distributions are consistent with its historical practice. Accordingly, these distributions are not treated as impairment transactions (and are not taken into account as a reduction in gross asset value when applying the net value acceleration rule to any impairment transaction). For this purpose, distributions are consistent with an electing corporation's historical practice to the extent the distributions are described in section 301(c) and the amount of these distributions, in the aggregate, for the applicable taxable year (applicable distribution amount) does not exceed the annual average amount of section 301(c) distributions over the preceding three taxable years (average distribution amount). Any excess of the applicable distribution amount over the average distribution amount is treated as an impairment transaction and is taken into account when applying the net value acceleration rule. For purposes of this rule, appropriate adjustments must be made to take into account any issuances or redemptions of stock, or similar transactions, occurring during a relevant taxable year. In addition, if the electing corporation has a short taxable year for the year of the distribution or for any of the years relied upon in computing the average distribution amount, the applicable distribution amount and the average distribution amount are determined on an annualized basis. If an electing corporation has been in existence for less than three years, the average distribution amount is computed by substituting the period during which the electing corporation has been in existence for the three preceding taxable years. The regulations also provide similar rules that exclude from impairment transaction status an electing corporation's charitable contributions (within the meaning of section 170(c)) that are consistent with its historical practice.

3. Special Rules for Regulated Investment Companies (RICs) and Real Estate Investment Trusts (REITs)

In the case of a RIC or REIT, any distributions with respect to stock that are treated as a dividend under section 852 or 857 are not treated as impairment transactions (and are not taken into

account as a reduction in gross asset value when applying the net value acceleration rule to any impairment transaction). In addition, any redemption of a redeemable security, as defined in 15 U.S.C. section 80a–2(a)(32), by a RIC in the ordinary course of business is not treated as an impairment transaction (and is not taken into account as a reduction in gross asset value when applying the net value acceleration rule to any impairment transaction).

*B. Other Mandatory Acceleration Events*

1. Changes in Tax Status

To preserve the government's ability to collect the incipient tax liability associated with a C corporation's deferred COD income, these regulations provide that an electing corporation must take into account its remaining deferred COD income immediately before a change in its tax status. An example of such a change includes a C corporation that becomes a tax-exempt entity, or a C corporation that begins operating as a cooperative. Other changes in tax status are more fully described herein.

If a C corporation elects to be treated as an S corporation, the S corporation is subject to tax on its net recognized built-in gains during the recognition period. Section 1374(a). Although an item of income, such as deferred COD income, can constitute recognized built-in gain, recognition of the gain for any taxable year may be limited under § 1.1374–2. Accordingly, if an electing corporation elects to be treated as an S corporation, the S corporation would not pay tax on its deferred COD income to the extent that the S corporation's COD income and other recognized built-in gains exceed the limitation.

The IRS and Treasury Department have determined that permanent exclusion of a corporate tax liability associated with a section 108(i) election is inconsistent with congressional intent to provide for deferral of corporate tax liability with respect to COD income. Accordingly, these temporary regulations provide that if an electing corporation elects to become an S corporation, the C corporation must take into account its deferred COD income immediately before the S corporation election is effective.

Similarly, these temporary regulations provide that an electing corporation that elects to be treated as a RIC or REIT must take into account its remaining deferred COD income immediately before the election is effective.

2. Cessation of Existence

Section 108(i)(5)(D) provides that in the case of the cessation of business by a taxpayer, deferred items must be taken into account in the taxable year of the cessation. Consistent with this provision, in general, these temporary regulations provide that an electing corporation must accelerate its remaining deferred COD income in the taxable year that the corporation ceases to exist.

As noted in section I of the preamble, commentators suggested that continued deferral of an electing corporation's COD income is appropriate if the corporation ceases to exist in a reorganization or liquidation to which section 381(a) applies. The IRS and Treasury Department agree that, in these transactions, the policies that support nonrecognition for corporations also support continued deferral of COD income. In addition, an exception for these transactions affords corporations maximum flexibility in structuring transactions as asset reorganizations or stock reorganizations to meet business exigencies.

Therefore, these temporary regulations generally provide that if the assets of the electing corporation are acquired in a transaction to which section 381(a) applies (the section 381 exception), the electing corporation's deferred COD income is not accelerated. In such a case, the acquiring corporation succeeds to the electing corporation's remaining deferred COD income, and becomes subject to section 108(i), including all of its reporting requirements. However, these temporary regulations limit the applicability of the section 381 exception in certain circumstances, some of which are described herein. Moreover, a section 381(a) transaction may still constitute an impairment transaction. (*See* Example 3 of § 1.108(i)–1T(c)).

a. Outbound Section 381(a) Transactions

If the assets of a domestic electing corporation are acquired by a foreign corporation in a transaction to which section 381(a) applies, the electing corporation's deferred COD income may not be subject to U.S. tax when it is includible in the foreign acquirer's gross income. Accordingly, to ensure that the COD income is appropriately taxed, these temporary regulations provide that the electing corporation takes into account its remaining deferred COD income immediately before the transaction.

b. Inbound Section 381(a) Transactions

As more fully described in section III, in general, deferred COD income increases the earnings and profits of an electing corporation, including a foreign electing corporation, in the year the debt is discharged. Accordingly, if the assets of a foreign electing corporation are acquired by a domestic corporation in a transaction to which section 381(a) applies, the increase in earnings and profits is taken into account in computing the foreign corporation's all earnings and profits amount and therefore, may be subject to U.S. taxation as a deemed dividend pursuant to § 1.367(b)–3(b)(3). To prevent the deferred COD income from being subject to U.S. tax a second time when the deferred COD income is includible in the domestic acquirer's gross income, these temporary regulations provide that a foreign electing corporation takes into account its remaining deferred COD income immediately before the transaction if, as a result of the transaction, one or more exchanging shareholders include in income as a deemed dividend the all earnings and profits amount with respect to stock in the foreign electing corporation pursuant to § 1.367(b)–3(b)(3).

c. Acquisition of Assets of an Electing Corporation by a RIC or REIT or by an S Corporation

To ensure that the corporate tax liability associated with deferred COD income is appropriately preserved, these temporary regulations provide that if the assets of an electing corporation are acquired by a RIC or REIT in a transaction that is subject to § 1.337(d)–7 and section 381(a) (a conversion transaction), the electing corporation takes into account its remaining deferred COD income immediately before the conversion transaction. Similarly, if the assets of an electing C corporation are acquired by an S corporation in a transaction to which sections 1374(d)(8) and section 381(a) apply, the electing C corporation takes into account its remaining deferred COD income immediately before the transaction.

*C. Title 11 (or Similar Case)*

Under section 108(i)(5)(D), if an electing corporation ceases to do business, liquidates or sells substantially all of its assets in a proceeding under title 11 (or a similar case), the corporation's deferred items are taken into account the day before the petition is filed. The IRS and Treasury Department believe that the acceleration rules (outlined in section I) are

sufficient to protect the collectability of tax relating to deferred COD income. Accordingly, no special acceleration rules for an electing corporation in a title 11 or similar case are provided.

**II. Elective Acceleration for Electing Members of a Consolidated Group**

These temporary regulations provide an elective provision under which an electing member of a consolidated group (other than the common parent) may at any time accelerate in full (and not in part) the inclusion of its remaining deferred COD income with respect to all applicable debt instruments. Elective acceleration within a consolidated group is consistent with other consolidated return provisions that mitigate the double taxation of income or gain.

**III. Earnings and Profits**

In Rev. Proc. 2009–37, the IRS and Treasury Department announced its intention to issue regulations regarding the computation of a corporation's earnings and profits in connection with an election under section 108(i). *See* § 601.601(d)(2)(ii)(*b*). Consistent with the revenue procedure, these temporary regulations provide that deferred COD income generally increases earnings and profits in the taxable year that it is realized, and deferred OID deductions generally decrease earnings and profits in the taxable year or years in which the deductions would be allowed without regard to the deferral rules of section 108(i).

Although § 1.312–6(a) generally states that adjustments to earnings and profits are dependent upon the method of accounting properly employed in computing taxable income (or net income, as the case may be), the IRS and Treasury Department believe this principle should not apply in the case of an electing corporation.

Section 312(n)(5) provides that in the case of any installment sale, earnings and profits shall be computed as if the corporation did not use the installment sale method. Some commentators have suggested that because the deferral of COD income under section 108(i) is analogous to the deferral of gain from an installment sale, a rule consistent with section 312(n)(5) should apply for purposes of determining the timing of adjustments to earnings and profits with respect to deferred items under section 108(i). The IRS and Treasury Department agree that the policies underlying section 312(n) inform the treatment of deferred COD income under section 108(i).

The legislative history to section 312(n)(5) focuses on the fact that a taxpayer may realize cash or its equivalent under the installment method in the year of the sale, but is not required to take income into account until later years. *S. Rep. No. 98–169, at 198–99 (1984*). As in the case of an installment sale, an electing corporation realizes economic income in the year of discharge. Even though the electing corporation is not required to recognize income until later years, its dividend paying capacity is enhanced immediately, not during the inclusion period, or at the time the deferred COD income may be accelerated into income.

These temporary regulations also provide certain exceptions to current year adjustments to earnings and profits. In the case of RICs and REITs, deferred COD income increases earnings and profits in the taxable year or years in which the deferred COD income is includible in gross income and not in the year that the deferred COD income is realized, and deferred OID deductions decrease earnings and profits in the taxable year or years that the deferred OID deductions are deductible. This rule is intended to ensure that a RIC or REIT has sufficient earnings and profits to claim a dividends paid deduction in the taxable year that the deferred COD income is included in taxable income. In addition, for purposes of calculating alternative minimum taxable income, deferred items increase or decrease, as the case may be, adjusted current earnings under section 56(g)(4) in the taxable year or years that the item is includible or deductible.

**IV. Deferred OID Deductions**

Section 108(i)(2) generally provides that if, as part of a reacquisition to which section 108(i)(1) applies, a debt instrument is issued (or is treated as issued under section 108(e)(4)) for the applicable debt instrument being reacquired and there is any OID with respect to the debt instrument, no deduction otherwise allowable is allowed for the portion of the OID that accrues before the inclusion period and that does not exceed the COD income with respect to the applicable debt instrument being reacquired. The aggregate amount of deferred OID deductions is allowed ratably over the inclusion period. If the amount of OID accruing before the inclusion period exceeds the deferred COD income with respect to the applicable debt instrument being reacquired, the deductions are disallowed in the order in which the OID is accrued.

Under section 108(i)(2)(B), if a debt instrument is issued by an issuer and the proceeds of the debt instrument are used directly or indirectly by the issuer to reacquire an applicable debt instrument of the issuer, then the debt instrument is treated as issued for the applicable debt instrument being reacquired. If only a portion of the proceeds of the debt instrument are used directly or indirectly to reacquire the applicable debt instrument, then the rules in section 108(i)(2)(A) apply to the portion of any OID on the debt instrument that is equal to the portion of the proceeds used to reacquire the applicable debt instrument.

*A. Application of § 1.1502–13(g)(5)*

The intercompany obligation rules of § 1.1502–13(g) operate to minimize the effect on consolidated taxable income of items of income, gain, deduction, or loss arising from intercompany debt. These rules generally match the amount, timing, and character of the creditor and debtor member's items, and ensure that future items similarly correspond. Thus, for example, assume that S holds a B note with an adjusted issue price and basis of $100 and a fair market value of $70, and that S sells the B note to a nonmember for $70. Under § 1.1502–13(g)(3), B is deemed, immediately before the sale to X, to satisfy the note for its fair market value of $70, resulting in $30 of COD income for B and $30 of loss for S (which is treated as ordinary loss under the attribute redetermination rule of § 1.1502–13(c)(4)(i)). Because the debtor's COD income matches the creditor's ordinary loss, in cases where the intercompany obligation becomes a non-intercompany obligation (and in intragroup transactions), there is no benefit to the group to elect deferral of COD income under section 108(i).

However, for those transactions in which a non-intercompany obligation becomes an intercompany obligation (as described in § 1.1502–13(g)(5)), the timing and attributes of the debtor and creditor member's items from the deemed satisfaction are determined on a separate entity basis. In such cases, the elective deferral rules of section 108(i) may be beneficial. Accordingly, these temporary regulations limit the application of section 108(i) by providing that in the case of an intercompany obligation (as defined in § 1.1502–13(g)(2)(ii)), the term *applicable debt instrument* includes only a debt instrument for which COD income is realized upon the debt instrument's deemed satisfaction under § 1.1502–13(g)(5).

*B. Deemed Debt-for-Debt Exchanges*

Pursuant to the regulatory authority in section 108(i)(7), the temporary regulations provide that, for purposes of section 108(i)(2) (relating to deferred

OID deductions that arise in certain debt-for-debt exchanges involving the reacquisition of an applicable debt instrument), if the proceeds of any debt instrument are used directly or indirectly by the issuer or a person related to the issuer (within the meaning of section 108(i)(5)(A)) to reacquire an applicable debt instrument, the debt instrument shall be treated as issued for the applicable debt instrument being reacquired. Therefore, section 108(i)(2) may apply, for example, to a debt instrument issued by a corporation for cash in which some or all of the proceeds are used directly or indirectly by the corporation's related subsidiary in the reacquisition of the subsidiary's applicable debt instrument. The rule in the temporary regulations is intended to prevent related parties from avoiding the rules for deferred OID deductions.

*C. Directly or Indirectly*

In response to comments received by the IRS and Treasury Department, the temporary regulations provide principles similar to those of § 1.279–3(b) for purposes of determining when the proceeds of a debt instrument will be treated as having been used "directly or indirectly" to reacquire an applicable debt instrument. Generally, whether the proceeds from an issuance of a debt instrument are used directly or indirectly by the issuer of the debt instrument or a person related to the issuer to reacquire an applicable debt instrument will depend upon all of the facts and circumstances surrounding the issuance and the reacquisition. The proceeds of an issuance of a debt instrument will be treated as being used indirectly to reacquire an applicable debt instrument if: (i) At the time of the issuance of the debt instrument, the issuer of the debt instrument anticipated that an applicable debt instrument of the issuer or a person related to the issuer would be reacquired by the issuer, and the debt instrument would not have been issued if the issuer had not so anticipated such reacquisition; (ii) at the time of the issuance of the debt instrument, the issuer of the debt instrument or a person related to the issuer anticipated that an applicable debt instrument would be reacquired by a related person and the related person receives cash or property that it would not have received unless the reacquisition had been so anticipated; or (iii) at the time of the reacquisition, the issuer or a person related to the issuer foresaw or reasonably should have foreseen that it would be required to issue a debt instrument, which it would not have otherwise been required to issue if the reacquisition had not occurred, in order to meet its future economic needs.

*D. Proportional Rule for Accruals of OID*

If a portion of the proceeds of a debt instrument with OID are used directly or indirectly to reacquire an applicable debt instrument, then the temporary regulations provide that the amount of the issuer's deferred OID deductions generally is equal to the product of the amount of OID that accrues in the taxable year under section 1272 or section 1275 (and the regulations under those sections), whichever section is applicable, and a fraction, the numerator of which is the portion of the total proceeds of the debt instrument used directly or indirectly to reacquire the applicable debt instrument and the denominator of which is the total proceeds of the debt instrument. However, if the total amount of OID that accrues before the inclusion period is greater than the total amount of deferred COD income under section 108(i), then the OID deductions are disallowed in the order in which the OID is accrued, subject to the total amount of deferred COD income.

*E. Acceleration Events for Deferred OID Deductions*

The temporary regulations provide rules for the acceleration of deferred OID deductions by an issuer that is a C corporation (C corporation issuer). The IRS and Treasury Department believe that it is appropriate to accelerate deferred OID deductions with respect to a debt instrument when the corresponding deferred COD income is taken into account. Accordingly, these temporary regulations provide that all or a portion of a C corporation issuer's deferred OID deductions with respect to a debt instrument are taken into account to the extent that an electing entity or its owners include all or a portion of the deferred COD income to which the C corporation issuer's deferred OID deductions relate.

These temporary regulations also include special rules to accelerate a C corporation issuer's remaining deferred OID deductions even though the deferred COD income to which it relates continues to be deferred. Under these rules, a C corporation issuer takes into account all of its remaining deferred OID deductions if the issuer (i) changes its tax status, or (ii) ceases to exist in a transaction to which section 381(a) does not apply, taking into account the application of § 1.1502–34. *See* § 1.1502–80(g).

With respect to all taxpayers with deferred OID deductions, the temporary regulations also provide that any remaining deferred OID deductions are not accelerated solely by reason of the retirement of any debt instrument subject to section 108(i)(2).

**V. Effective/Applicability Dates**

In general, the rules regarding deferred COD income and the calculation of earnings and profits apply to reacquisitions of applicable debt instruments in taxable years ending after December 31, 2008. In addition, the rules regarding deferred OID deductions generally apply to debt instruments issued after December 31, 2008 in connection with the reacquisition of an applicable debt instrument.

However, the rules with respect to the acceleration of deferred COD income and deferred OID deductions apply prospectively to acceleration events occurring on or after August 11, 2010. Electing corporations and C corporation issuers are given the option to apply these rules to all acceleration events occurring prior to August 11, 2010 by taking a return position consistent with these provisions. In the case of a consolidated group, this option is available only if the acceleration rules are applied to all acceleration events with respect to all members of the group. In addition, certain transitional rules are provided in order to allow electing corporations the ability to use provisions in the acceleration rules that are time sensitive.

To the extent an electing corporation or C corporation issuer does not apply these acceleration rules to acceleration events occurring prior to August 11, 2010, then all deferred items are subject to the rules of section 108(i)(5)(D)(i).

**Comments**

The text of these temporary regulations also serves as the text of the proposed regulations set forth in the notice of proposed rulemaking on this subject in the Proposed Rules section in this issue of the **Federal Register**. Please *see* the "Comments and Requests for a Public Hearing" section of the notice of proposed rulemaking for the procedures to follow in submitting comments on the proposed regulations on this subject.

**Special Analyses**

It has been determined that this Treasury decision is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. For applicability of the Regulatory Flexibility Act (5 U.S.C. chapter 6), refer to the Special Analyses section of the preamble to the cross-referenced notice of proposed rulemaking published in

the Proposed Rules section in this issue of the **Federal Register.** Pursuant to section 7805(f) of the Code, these regulations will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Section 108(i) applies to the reacquisition of an applicable debt instrument during the brief election period, January 1, 2009 through December 31, 2010. These temporary regulations provide necessary guidance regarding the application of this new section 108(i) in order for corporations to timely file their tax returns. For this reason, it has been determined pursuant to 5 U.S.C. 553(b)(3)(B), that prior notice and public procedure are impracticable and contrary to the public interest. For the same reason, it has been determined pursuant to 5 U.S.C. 553(d)(3) that good cause exists for not delaying the effective date of these temporary regulations.

**Drafting Information**

The principal authors of these regulations are Robert M. Rhyne and Rubin B. Ranat of the Office of Associate Chief Counsel (Corporate). Other personnel from the IRS and Treasury Department participated in their development.

**List of Subjects**

*26 CFR Part 1*

Income taxes, Reporting and recordkeeping requirements.

*26 CFR Part 602*

Reporting and recordkeeping requirements.

**Amendments to the Regulations**

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

## PART 1—INCOME TAXES

■ **Paragraph 1.** The authority citation for part 1 is amended by adding the entry for § 1.108(i)–0T, § 1.108(i)–1T, and § 1.108(i)–3T, to read, in part, as follows:

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

Section 1.108(i)–0T also issued under 26 U.S.C. 108(i)(7) and 1502. * * *

Section 1.108(i)–1T also issued under 26 U.S.C. 108(i)(7) and 1502. * * *

Section 1.108(i)–3T also issued under 26 U.S.C. 108(i)(7) and 1502. * * *

■ **Par. 2.** Section 1.108(i)–0T is added to read as follows:

**§ 1.108(i)–0T Definitions (temporary).**

(a) *Definitions.* For purposes of regulations under section 108(i)—

(1) *Acquisition.* An *acquisition,* with respect to any applicable debt instrument, includes an acquisition of the debt instrument for cash or other property, the exchange of the debt instrument for another debt instrument (including an exchange resulting from a modification of the debt instrument), the exchange of the debt instrument for corporate stock or a partnership interest, the contribution of the debt instrument to capital, the complete forgiveness of the indebtedness by the holder of the debt instrument, and a direct or an indirect acquisition within the meaning of § 1.108–2;

(2) *Applicable debt instrument.* An *applicable debt instrument* is a debt instrument that was issued by a C corporation or any other person in connection with the conduct of a trade or business by such person. In the case of an intercompany obligation (as defined in § 1.1502–13(g)(2)(ii)), *applicable debt instrument* includes only an instrument for which COD income is realized upon the instrument's deemed satisfaction under § 1.1502–13(g)(5);

(3) *C corporation issuer. C corporation issuer* means a C corporation that issues a debt instrument with any deferred OID deduction;

(4) *C corporation partner.* A *C corporation partner* is a C corporation that is a direct or indirect partner of an electing partnership or a related partnership;

(5) *COD income. COD income* means income from the discharge of indebtedness, as determined under sections 61(a)(12) and 108(a) and the regulations under those sections;

(6) *COD income amount.* A *COD income amount* is a partner's distributive share of COD income with respect to an applicable debt instrument of an electing partnership;

(7) *Debt instrument. Debt instrument* means a bond, debenture, note, certificate, or any other instrument or contractual arrangement constituting indebtedness (within the meaning of section 1275(a)(1));

(8) *Deferral period.* For a reacquisition that occurs in 2009, *deferral period* means the taxable year of the reacquisition and the four taxable years following such taxable year. For a reacquisition that occurs in 2010, *deferral period* means the taxable year of the reacquisition and the three taxable years following such taxable year;

(9) *Deferred amount.* A *deferred amount* is the portion of a partner's COD income amount with respect to an applicable debt instrument that is deferred under section 108(i);

(10) *Deferred COD income. Deferred COD income* means COD income that is deferred under section 108(i);

(11) *Deferred item.* A *deferred item* is any item of deferred COD income or deferred OID deduction that has not been previously taken into account under section 108(i);

(12) *Deferred OID deduction.* A *deferred OID deduction* means an otherwise allowable deduction for OID that is deferred under section 108(i)(2) with respect to a debt instrument issued (or treated as issued under section 108(e)(4)) in a debt-for-debt exchange described in section 108(i)(2)(A) or a deemed debt-for-debt exchange described in § 1.108(i)–3T(a);

(13) *Deferred section 465 amount.* A *deferred section 465 amount* is described in paragraph (d)(3) of § 1.108(i)–2T;

(14) *Deferred section 752 amount.* A *deferred section 752 amount* is described in paragraph (b)(3) of § 1.108(i)–2T;

(15) *Direct partner.* A *direct partner* is a person that owns a direct interest in a partnership;

(16) *Electing corporation.* An *electing corporation* is a C corporation with deferred COD income by reason of a section 108(i) election;

(17) *Electing entity.* An *electing entity* is an entity that is a taxpayer that makes an election under section 108(i);

(18) *Electing member.* An *electing member* is an electing corporation that is a member of an affiliated group that files a consolidated return;

(19) *Electing partnership.* An *electing partnership* is a partnership that makes an election under section 108(i);

(20) *Electing S corporation.* An *electing S corporation* is an S corporation that makes an election under section 108(i);

(21) *Included amount.* An *included amount* is the portion of a partner's COD income amount with respect to an applicable debt instrument that is not deferred under section 108(i) and is included in the partner's distributive share of partnership income for the taxable year of the partnership in which the reacquisition occurs;

(22) *Inclusion period.* The *inclusion period* is the five taxable years following the last taxable year of the deferral period;

(23) *Indirect partner.* An *indirect partner* is a person that owns an interest in a partnership through an S corporation and/or one or more partnerships;

(24) *Issuing entity.* An *issuing entity* is any entity that is—

(i) A related partnership;

(ii) A related S corporation;

(iii) An electing partnership that issues a debt instrument (or is treated as issuing a debt instrument under section 108(e)(4)) in a debt-for-debt exchange described in section 108(i)(2)(A) or a deemed debt-for-debt exchange described in § 1.108(i)–3T(a); or

(iv) An electing S corporation that issues a debt instrument (or is treated as issuing a debt instrument under section 108(e)(4)) in a debt-for-debt exchange described in section 108(i)(2)(A) or a deemed debt-for-debt exchange described in § 1.108(i)–3T(a);

(25) *OID. OID* means original issue discount, as determined under sections 1271 through 1275 (and the regulations under those sections). If the amount of OID with respect to a debt instrument is less than a de minimis amount as determined under § 1.1273–1(d), the OID is treated as zero for purposes of section 108(i)(2);

(26) *Reacquisition.* A *reacquisition,* with respect to any applicable debt instrument, is any event occurring after December 31, 2008 and before January 1, 2011, that causes COD income with respect to such applicable debt instrument, including any acquisition of the debt instrument by the debtor that issued (or is otherwise the obligor under) the debt instrument or a person related to such debtor (within the meaning of section 108(i)(5)(A));

(27) *Related partnership.* A *related partnership* is a partnership that is related to the electing entity (within the meaning of section 108(i)(5)(A)) and that issues a debt instrument in a debt-for-debt exchange described in section 108(i)(2)(A) or a deemed debt-for-debt exchange described in § 1.108(i)–3T(a);

(28) *Related S corporation.* A *related S corporation* is an S corporation that is related to the electing entity (within the meaning of section 108(i)(5)(A)) and that issues a debt instrument in a debt-for-debt exchange described in section 108(i)(2)(A) or a deemed debt-for-debt exchange described in § 1.108(i)–3T(a);

(29) *Separate interest.* A *separate interest* is a direct interest in an electing partnership or in a partnership or S corporation that is a direct or indirect partner of an electing partnership;

(30) *S corporation partner.* An *S corporation partner* is an S corporation that is a direct or indirect partner of an electing partnership or a related partnership.

(b) *Effective/Applicability dates*—(1) *In general.* This section, § 1.108(i)–2T, and, except as provided in paragraph (b)(2) of this section, § 1.108(i)–1T apply to reacquisitions of applicable debt instruments in taxable years ending after December 31, 2008. In addition, § 1.108(i)–3T applies to debt instruments issued after December 31, 2008, in connection with reacquisitions of applicable debt instruments in taxable years ending after December 31, 2008.

(2) *Acceleration events*—(i) *In general.* Section 1.108(i)–1T(b) (acceleration rules) generally applies to acceleration events occurring on or after August 11, 2010 However, an electing corporation or C corporation issuer may apply the acceleration rules to all acceleration events occurring prior to August 11, 2010 by taking a return position consistent with these provisions beginning with the first acceleration event occurring prior to August 11, 2010. Also, in the case of a consolidated group, if the common parent of the consolidated group applies the acceleration rules on behalf of one member of the consolidated group, then the common parent must apply the acceleration rules to all acceleration events with respect to all members of the group. If the electing corporation, common parent (under the preceding sentence), or C corporation issuer, as the case may be, does not apply the acceleration rules to all acceleration events occurring prior to August 11, 2010, then it is, with respect to all deferred items, subject to the rules of section 108(i)(5)(D)(i).

(3) *Transitional rules*—(i) *Net value acceleration rule and corrective action to restore net value rule.* If an electing corporation applies the acceleration rules of § 1.108(i)–1T(b) to all acceleration events occurring prior to August 11, 2010 and the due date of its tax return (including extensions) for the taxable year of the mandatory acceleration event occurs prior to August 11, 2010, then for purposes of the net value acceleration rule described in § 1.108(i)–1T(b)(2)(iii), an electing corporation may restore value by the fifteenth day of the ninth month following August 11, 2010.

(ii) *Elective acceleration.* If an electing member cannot timely file an election under § 1.108(i)–1T(b)(3) to accelerate its remaining deferred COD income by the due date of the electing member's tax return (including extensions) which occurs prior to August 11, 2010, then an amended return must be filed with the required information statement by the fifteenth day of the ninth month following August 11, 2010.

■ **Par. 3.** Section 1.108(i)–1T is added to read as follows:

**§ 1.108(i)–1T Deferred discharge of indebtedness income and deferred original issue discount deductions of C corporations (temporary).**

(a) *Overview.* Section 108(i)(1) provides an election for the deferral of COD income arising in connection with the reacquisition of an applicable debt instrument. An electing corporation generally includes deferred COD income ratably over the inclusion period. Paragraph (b) of this section provides rules for the mandatory acceleration of an electing corporation's remaining deferred COD income, the mandatory acceleration of a C corporation issuer's deferred OID deductions, and for the elective acceleration of an electing member's (other than the common parent's) remaining deferred COD income. Paragraph (c) of this section provides examples illustrating the application of the mandatory and elective acceleration rules. Paragraph (d) of this section provides rules for the computation of an electing corporation's earnings and profits. Paragraph (e) of this section refers to the effective/applicability dates.

(b) *Acceleration events*—(1) *Deferred COD income.* Except as otherwise provided in paragraphs (b)(2) and (3) of this section, and § 1.108(i)–2T(b)(6) (in the case of a corporate partner), an electing corporation's deferred COD income is taken into account ratably over the inclusion period.

(2) *Mandatory acceleration events.* An electing corporation takes into account all of its remaining deferred COD income, including its share of an electing partnership's deferred COD income, immediately before the occurrence of any one of the events described in this paragraph (b)(2) (mandatory acceleration events).

(i) *Changes in tax status.* The electing corporation changes its tax status. For purposes of the preceding sentence, an electing corporation is treated as changing its tax status if it becomes one of the following entities:

(A) A tax-exempt entity as defined in § 1.337(d)–4(c)(2).

(B) An S corporation as defined in section 1361(a)(1).

(C) A qualified subchapter S subsidiary as defined in section 1361(b)(3)(B).

(D) An entity operating on a cooperative basis within the meaning of section 1381.

(E) A regulated investment company (RIC) as defined in section 851 or a real estate investment trust (REIT) as defined in section 856.

(F) A qualified REIT subsidiary as defined in section 856(i), but only if the qualified REIT subsidiary was not a

REIT immediately before it became a qualified REIT subsidiary.

(ii) *Cessation of corporate existence*—(A) *In general.* The electing corporation ceases to exist for Federal income tax purposes.

(B) *Exception for section 381(a) transactions*—(*1*) *In general.* The electing corporation is not treated as ceasing to exist and is not required to take into account its remaining deferred COD income solely because its assets are acquired in a transaction to which section 381(a) applies. In such a case, the acquiring corporation succeeds to the electing corporation's remaining deferred COD income and becomes subject to section 108(i) and the regulations thereunder, including all reporting requirements, as if the acquiring corporation were the electing corporation. A transaction is not treated as one to which section 381(a) applies for purposes of this paragraph (b)(2)(ii)(B) in any one of the following circumstances:

(*i*) The acquisition of the assets of an electing corporation by an S corporation, if the acquisition is described in section 1374(d)(8).

(*ii*) The acquisition of the assets of an electing corporation by a RIC or REIT, if the acquisition is described in § 1.337(d)–7(a)(2)(ii).

(*iii*) The acquisition of the assets of a domestic electing corporation by a foreign corporation.

(*iv*) The acquisition of the assets of a foreign electing corporation by a domestic corporation, if as a result of the transaction, one or more exchanging shareholders include in income as a deemed dividend all the earnings and profits amount with respect to stock in the foreign electing corporation pursuant to § 1.367(b)–3(b)(3).

(*v*) The acquisition of the assets of an electing corporation by a tax-exempt entity as defined in § 1.337(d)–4(c)(2).

(*vi*) The acquisition of the assets of an electing corporation by an entity operating on a cooperative basis within the meaning of section 1381.

(*2*) *Special rules for consolidated groups*—(*i*) *Liquidations.* For purposes of paragraph (b)(2)(ii)(B) of this section, the acquisition of assets by distributee members of a consolidated group upon the liquidation of an electing corporation is not treated as a transaction to which section 381(a) applies, unless immediately prior to the liquidation, one of the distributee members owns stock in the electing corporation meeting the requirements of section 1504(a)(2) (without regard to § 1.1502–34). *See* § 1.1502–80(g).

(*ii*) *Taxable years.* In the case of an intercompany transaction to which section 381(a) applies, the transaction does not cause the transferor or distributor to have a short taxable year for purposes of determining the taxable year of the deferral and inclusion period.

(iii) *Net value acceleration rule*—(A) *In general.* The electing corporation engages in an impairment transaction and, immediately after the transaction, the gross value of the electing corporation's assets (gross asset value) is less than one hundred and ten percent of the sum of its total liabilities and the tax on the net amount of its deferred items (the net value floor) (the net value acceleration rule). Impairment transactions are any transactions, however effected, that impair an electing corporation's ability to pay the amount of Federal income tax liability on its deferred COD income and include, for example, distributions (including section 381(a) transactions), redemptions, below-market sales, charitable contributions, and the incurrence of additional indebtedness without a corresponding increase in asset value. Value-for-value sales or exchanges (for example, an exchange to which section 351 or section 721 applies), or mere declines in the market value of the electing corporation's assets are not impairment transactions. In addition, an electing corporation's investments and expenditures in pursuance of its good faith business judgment are not impairment transactions. For purposes of determining an electing corporation's gross asset value, the amount of any distribution that is not treated as an impairment transaction under paragraph (b)(2)(iii)(D) of this section (distribution consistent with historical practice) or under paragraph (b)(2)(iii)(E) of this section (special rules for RICs and REITs) is treated as an asset of the electing corporation. Solely for purposes of computing the amount of the net value floor, the tax on the deferred items is determined by applying the highest rate of tax specified in section 11(b) for the taxable year.

(B) *Transactions integrated.* Any transaction that occurs before the reacquisition of an applicable debt instrument, but that occurs pursuant to the same plan as the reacquisition, is taken into account in determining whether the gross asset value of the electing corporation is less than the net value floor.

(C) *Corrective action to restore net value.* An electing corporation is not required to take into account its deferred COD income under the net value acceleration rule of paragraph (b)(2)(iii)(A) of this section if, before the due date of the electing corporation's return (including extensions), value is restored in a transaction in an amount equal to the lesser of—

(*1*) The amount of value that was removed from the electing corporation in one or more impairment transactions (net of amounts previously restored under this paragraph (b)(2)(iii)(C)); or

(*2*) The amount by which the electing corporation's net value floor exceeds its gross asset value. For purposes of this paragraph (b)(2)(iii)(C), for example, assume an electing corporation incurs $50 of debt, distributes the $50 of proceeds to its shareholder, and immediately after the distribution, the electing corporation's gross asset value is below the net value floor by $25. The electing corporation may avoid the inclusion of its remaining deferred COD income if value of at least $25 is restored to it before the due date of the electing corporation's tax return (including extensions) for the taxable year that includes the distribution. The value that must be restored is determined at the time of the impairment transaction on a net value basis (for example, additional borrowings by an electing corporation do not restore value).

(D) *Exceptions for distributions and charitable contributions that are consistent with historical practice.* An electing corporation's distributions are not treated as impairment transactions (and are not taken into account as a reduction of the electing corporation's gross asset value when applying the net value acceleration rule to any impairment transaction), to the extent that the distributions are described in section 301(c) and the amount of these distributions, in the aggregate, for the applicable taxable year (applicable distribution amount) does not exceed the annual average amount of section 301(c) distributions over the preceding three taxable years (average distribution amount). If an electing corporation's applicable distribution amount exceeds its average distribution amount (excess amount), then the amount of the impairment transaction equals the excess amount. Appropriate adjustments must be made to take into account any issuances or redemptions of stock, or similar transactions, occurring during the year of distribution or any of the three preceding years. If the electing corporation has a short taxable year for the year of the distribution or for any of the three preceding years, the amounts are determined on an annualized basis. If an electing corporation has been in existence for less than three years, the period during which the electing corporation has been in existence is

substituted for the three preceding taxable years. For purposes of determining an electing corporation's average distribution amount, the electing corporation does not take into account the distribution history of a distributor or transferor in a transaction to which section 381(a) applies (other than a transaction described in section 368(a)(1)(F)). Rules similar to those prescribed in this paragraph (b)(2)(iii)(D) also apply to an electing corporation's charitable contributions (within the meaning of section 170(c)) that are consistent with its historical practice.

(E) *Special rules for RICs and REITs*—(*1*) *Distributions.* Notwithstanding paragraph (b)(2)(iii)(D) of this section, in the case of a RIC or REIT, any distribution with respect to stock that is treated as a dividend under section 852 or 857 is not treated as an impairment transaction (and is not taken into account as a reduction in gross asset value when applying the net value acceleration rule to any impairment transaction).

(*2*) *Redemptions by RICs.* Any redemption of a redeemable security, as defined in 15 U.S.C. section 80a–2(a)(32), by a RIC in the ordinary course of business is not treated as an impairment transaction (and is not taken into account as a reduction in gross asset value when applying the net value acceleration rule to any impairment transaction).

(F) *Special rules for consolidated groups*—(*1*) *Impairment transactions and net value acceleration rule.* In the case of an electing member, the determination of whether the member has engaged in an impairment transaction is made on a group-wide basis. An electing member is treated as engaging in an impairment transaction if any member's transaction impairs the group's ability to pay the tax liability associated with all electing members' deferred COD income. Accordingly, intercompany transactions are not impairment transactions. Similarly, the net value acceleration rule is applied by reference to the gross asset value of all members (excluding stock of members whether or not described in section 1504(a)(4)), the liabilities of all members, and the tax on all members' deferred items. For example, assume P is the common parent of the P–S consolidated group, S has a section 108(i) election in effect, and S makes a $100 distribution to P which, on a separate entity basis, would reduce S's gross asset value below the net value floor. S's intercompany distribution to P is not an impairment transaction. However, if P makes a $100 distribution to its shareholder, P's distribution is an impairment transaction (unless the distribution is consistent with its historical practice under paragraph (b)(2)(iii)(D) of this section), and the net value acceleration rule is applied by reference to the assets, liabilities, and deferred items of the P–S group.

(*2*) *Departing member.* If an electing member that previously engaged in one or more impairment transactions on a separate entity basis ceases to be a member of a consolidated group (departing member), the cessation is treated as an impairment transaction and the net value acceleration rule under paragraph (b)(2)(iii)(A) of this section is applied to the departing member on a separate entity basis immediately after ceasing to be a member (and taking into account the impairment transaction(s) that occurred on a separate entity basis). If the departing member's gross asset value is below the net value floor, the departing member's remaining deferred COD income is taken into account immediately before the departing member ceases to be a member (unless value is restored under paragraph (b)(2)(iii)(C) of this section). If the departing member's deferred COD income is not accelerated, the departing member is subject to the reporting requirements of section 108(i) on a separate entity basis. If the departing member becomes a member of another consolidated group, the cessation is treated as an impairment transaction and the net value acceleration rule under paragraph (b)(2)(iii)(A) of this section is applied by reference to the assets, liabilities, and the tax on deferred items of the members of the acquiring group immediately after the transaction. If the acquiring group's gross asset value is below the net value floor, the departing member's remaining deferred COD income is taken into account immediately before the departing member ceases to be a member (unless value is restored under paragraph (b)(2)(iii)(C) of this section). If the departing member's remaining deferred COD income is not accelerated, the common parent of the acquiring group succeeds to the reporting requirements of section 108(i) with respect to the departing member.

(3) *Elective acceleration for certain consolidated group members*—(i) *In general.* An electing member (other than the common parent) of a consolidated group may elect at any time to accelerate in full (and not in part) the inclusion of its remaining deferred COD income with respect to all applicable debt instruments by filing a statement described in paragraph (b)(3)(ii) of this section. Once made, an election to accelerate deferred COD income under this paragraph (b)(3) is irrevocable.

(ii) *Time and manner for making election*—(A) *In general.* The election to accelerate the inclusion of an electing member's remaining deferred COD income with respect to all applicable debt instruments is made on a statement attached to a timely filed tax return (including extensions) for the year in which the deferred COD income is taken into account. The election is made by the common parent on behalf of the electing member. *See* § 1.1502–77(a).

(B) *Additional information.* The statement must include—

(*1*) *Label.* A label entitled "SECTION 1.108(i)–1T ELECTION AND INFORMATION STATEMENT BY [INSERT NAME AND EMPLOYER IDENTIFICATION NUMBER OF THE ELECTING MEMBER]"; and

(*2*) *Required information.* An identification of each applicable debt instrument to which an election under this paragraph (b)(3) applies and the corresponding amount of—

(*i*) Deferred COD income that is accelerated under this paragraph (b)(3); and

(*ii*) Deferred OID deductions that are accelerated under paragraph (b)(4) of this section.

(4) *Deferred OID deductions*—(i) *In general.* Except as otherwise provided in paragraph (b)(4)(ii) of this section and § 1.108(i)–2T(b)(6) (in the case of a C corporation partner), a C corporation issuer's deferred OID deductions are taken into account ratably over the inclusion period.

(ii) *OID acceleration events.* A C corporation issuer takes into account all of its remaining deferred OID deductions with respect to a debt instrument immediately before the occurrence of any one of the events described in this paragraph (b)(4)(ii).

(A) *Inclusion of deferred COD income.* An electing entity or its owners take into account all of the remaining deferred COD income to which the C corporation issuer's deferred OID deductions relate. If, under § 1.108(i)–2T(b) or (c), an electing entity or its owners take into account only a portion of the deferred COD income to which the deferred OID deductions relate, then the C corporation issuer takes into account a proportionate amount of the remaining deferred OID deductions.

(B) *Changes in tax status.* The C corporation issuer changes its tax status within the meaning of paragraph (b)(2)(i) of this section.

(C) *Cessation of corporate existence*—(*1*) *In general.* The C corporation issuer

ceases to exist for Federal income tax purposes.

(*2*) *Exception for section 381(a) transactions*—(*i*) *In general.* A C corporation issuer is not treated as ceasing to exist and does not take into account its remaining deferred OID deductions in a transaction to which section 381(a) applies, taking into account the application of § 1.1502–34, as appropriate. *See* § 1.1502–80(g). This exception does not apply to a transaction which is not treated as one to which section 381(a) applies under paragraph (b)(2)(iii)(B)(*1*) of this section.

(*ii*) *Taxable years.* In the case of an intercompany transaction to which section 381(a) applies, the transaction does not cause the transferor or distributor to have a short taxable year for purposes of determining the taxable year of the deferral and inclusion period.

(c) *Examples.* The application of this section is illustrated by the following examples. Unless otherwise stated, P, S, S1, and X are domestic C corporations, and each files a separate return on a calendar year basis:

*Example 1. Net value acceleration rule.* (i) *Facts.* On January 1, 2009, S reacquires its own note and realizes $400 of COD income. Pursuant to an election under section 108(i), S defers recognition of the entire $400 of COD income. Therefore, absent a mandatory acceleration event, S will take into account $80 of its deferred COD income in each year of the inclusion period. On December 31, 2010, S makes a $25 distribution to its sole shareholder, P, and this is the only distribution made by S in the past four years. Immediately following the distribution, S's gross asset value is $100, S has no liabilities, and the Federal income tax on S's $400 of deferred COD income is $140. Accordingly, S's net value floor is $154 (110% × $140).

(ii) *Analysis.* Under paragraph (b)(2)(iii)(A) of this section, S's distribution is an impairment transaction. Immediately following the distribution, S's gross asset value of $100 is less than the net value floor of $154. Accordingly, under the net value acceleration rule of paragraph (b)(2)(iii)(A) of this section, S takes into account its $400 of deferred COD income immediately before the distribution.

(iii) *Corrective action to restore value.* The facts are the same as in paragraph (i) of this *Example 1,* except that P contributes assets with a value of $25 to S before the due date of S's 2010 return (including extensions). Because P restores $25 of value to S (the lesser of the amount of value removed in the distribution ($25) or the amount by which S's net value floor exceeds its gross asset value ($54)), under paragraph (b)(2)(iii)(C) of this section, S does not take into account its $400 of deferred COD income.

*Example 2. Distributions consistent with historical practice.* (i) *Facts.* P, a publicly traded corporation, makes a valid section 108(i) election with respect to COD income realized in 2009. On December 31, 2009, P distributes $25 million on its 5 million shares of common stock outstanding. As of January 1, 2006, P has 10 million shares of common stock outstanding, and on March 31, 2006, P distributes $10 million on those 10 million shares. On September 15, 2006, P effects a 2:1 reverse stock split, and on December 31, 2006, P distributes $10 million on its 5 million shares of common stock outstanding. In each of 2007 and 2008, P distributes $5 million on its 5 million shares of common stock outstanding. All of the distributions are described in section 301(c).

(ii) *Amount of impairment transaction.* Under paragraph (b)(2)(iii)(D) of this section, P's 2009 distributions are not treated as impairment transactions (and are not taken into account as a reduction of P's gross asset value when applying the net value acceleration rule to any impairment transaction), to the extent that the aggregate amount distributed in 2009 (the applicable distribution amount) does not exceed the annual average amount of distributions (the average distribution amount) over the preceding three taxable years. Accordingly, P's applicable distribution amount for 2009 is $25 million, and its average distribution amount is $10 million ($20 million (2006) plus $5 million (2007) plus $5 million (2008) divided by 3). The reverse stock split in 2006 is not a transaction requiring an adjustment to the determination of the average distribution amount. Because P's applicable distribution amount of $25 million exceeds its average distribution amount of $10 million, under paragraph (b)(2)(iii)(D) of this section, the amount of P's 2009 distribution that is treated as an impairment transaction is $15 million. The balance of the 2009 distribution, $10 million, is not treated as an impairment transaction (and is not taken into account as a reduction in P's gross asset value when applying the net value acceleration rule to any impairment transaction).

(iii) *Distribution history.* The facts are the same as in paragraph (i) of this *Example 2,* except that in 2010, P merges into X in a transaction to which section 381(a) applies, with X succeeding to P's deferred COD income, and X makes a distribution to its shareholders. For purposes of determining whether X's distribution is consistent with its historical practice, the average distribution amount is determined solely with respect to X's distribution history.

*Example 3. Cessation of corporate existence.* (i) *Transaction to which section 381(a) applies.* P owns all of the stock of S. In 2009, S reacquires its own note and elects to defer recognition of its $400 of COD income under section 108(i). On December 31, 2010, S liquidates into P in a transaction that qualifies under section 332. Under paragraph (b)(2) of this section, S must take into account all of its remaining deferred COD income upon the occurrence of any one of the mandatory acceleration events. Although S ceases its corporate existence as a result of the liquidation, S is not required to take into account its remaining deferred COD income under the exception in paragraph (b)(2)(ii)(B) of this section because its assets are acquired in a transaction to which section 381(a) applies. However, under paragraph (b)(2)(iii)(A) of this section, S's distribution to P is an impairment transaction and the net value acceleration rule is applied with respect to the assets, liabilities, and deferred items of P (S's successor) immediately following the distribution. If S's deferred COD income is not taken into account under the net value acceleration rule of (b)(2)(iii) of this section, P succeeds to S's remaining deferred COD income and to S's reporting requirements as if P were the electing corporation.

(ii) *Debt-laden distributee.* The facts are the same as in paragraph (i) of this *Example 3,* except that in the liquidation, S distributes $100 of assets to P, a holding company whose only asset is its stock in S. Assume that immediately following the distribution, P's gross asset value is $100, P has $60 of liabilities, and the Federal income tax on the $400 of deferred COD income is $140. Under paragraph (b)(2) of this section, S must take into account all of its remaining deferred COD income upon the occurrence of any one of the mandatory acceleration events. Although S ceases its corporate existence as a result of the liquidation, S is not required to take into account its remaining deferred COD income under the exception in paragraph (b)(2)(ii)(B) of this section because its assets are acquired in a transaction to which section 381(a) applies. However, under paragraph (b)(2)(iii)(A) of this section, S's distribution to X is an impairment transaction and the net value acceleration rule is applied with respect to the assets, liabilities, and deferred items of P (S's successor). Immediately following the distribution, P's gross asset value of $100 is less than the net value floor of $220 [110% × ($60 + $140)]. Accordingly, under the net value acceleration rule of paragraph (b)(2)(iii)(A) of this section, S is required to take into account its $400 of deferred COD income immediately before the distribution, unless value is restored to P pursuant to (b)(2)(iii)(C) of this section.

(iii) *Foreign acquirer.* The facts are the same as in paragraph (i) of this *Example 3,* except that P is a foreign corporation. Although S's assets are acquired in a transaction to which section 381(a) applies, under paragraph (b)(2)(ii)(B)(*1*)(*iii*) of this section, the exception to accelerated inclusion does not apply and S takes into account its remaining deferred COD income immediately before the liquidation. *See* also section 367(e)(2) and the regulations thereunder.

(iv) *Section 338 transaction.* P, the common parent of a consolidated group (P group), owns all the stock of S1, one of the members of the P group. In 2009, S1 reacquires its own indebtedness and realizes $30 of COD income. Pursuant to an election under section 108(i), S1 defers recognition of the entire $30 of COD income. In 2010, P sells all the stock of S1 to X, an unrelated corporation, for $300, and P and X make a timely section 338(h)(10) election with respect to the sale. Under paragraph (b)(2)(ii)(A) of this section, an electing corporation takes into account its remaining deferred COD income when it ceases its existence for Federal income tax purposes

unless the exception in paragraph (b)(2)(ii)(B) of this section applies. Pursuant to section 338(h)(10) and the regulations, S1 is treated as transferring all of its assets to an unrelated person in exchange for consideration that includes the discharge of its liabilities. This deemed value-for-value exchange is not an impairment transaction. Following the deemed sale, while S1 is still a member of the P group, S1 is treated as distributing all of its assets to P and as ceasing its existence. Under these facts, the distribution of all of S1's assets constitutes a deemed liquidation, and is a transaction to which sections 332 and 381(a) apply. Although S1 ceases its corporate existence as a result of the liquidation, S1 is not required to take into account its remaining deferred COD income under the exception in paragraph (b)(2)(ii)(B) of this section because its assets are acquired in a transaction to which section 381(a) applies. P succeeds to S1's remaining deferred COD income and to S1's reporting requirements as if P were the electing corporation. Under paragraph (b)(2)(iii)(F)(*1*) of this section, the intercompany distribution from S1 to P is not an impairment transaction.

(d) *Earnings and profits*—(1) *In general.* Deferred COD income increases earnings and profits in the taxable year that it is realized and not in the taxable year or years that the deferred COD income is includible in gross income. Deferred OID deductions decrease earnings and profits in the taxable year or years in which the deduction would be allowed without regard to section 108(i).

(2) *Exceptions*—(i) *RICs and REITs.* Notwithstanding paragraph (d)(1) of this section, deferred COD income increases earnings and profits of a RIC or REIT in the taxable year or years in which the deferred COD income is includible in gross income and not in the year that the deferred COD income is realized. Deferred OID deductions decrease earnings and profits of a RIC or REIT in the taxable year or years that the deferred OID deductions are deductible.

(ii) *Alternative minimum tax.* For purposes of calculating alternative minimum taxable income, any items of deferred COD income or deferred OID deduction increase or decrease, respectively, adjusted current earnings under section 56(g)(4) in the taxable year or years that the item is includible or deductible.

(e) *Effective/applicability dates.* For *effective/applicability dates, see* § 1.108(i)–0T(b).

(f) *Expiration date.* This section expires August 9, 2013.

■ **Par. 4.** Section 1.108(i)–3T is added to read as follows:

**§ 1.108(i)–3T Rules for the deduction of OID (temporary).**

(a) *Deemed debt-for-debt exchanges*—(1) *In general.* For purposes of section 108(i)(2) (relating to deferred OID deductions that arise in certain debt-for-debt exchanges involving the reacquisition of an applicable debt instrument), if the proceeds of any debt instrument are used directly or indirectly by the issuer or a person related to the issuer (within the meaning of section 108(i)(5)(A)) to reacquire an applicable debt instrument, the debt instrument shall be treated as issued for the applicable debt instrument being reacquired. Therefore, section 108(i)(2) may apply, for example, to a debt instrument issued by a corporation for cash in which some or all of the proceeds are used directly or indirectly by the corporation's related subsidiary in the reacquisition of the subsidiary's applicable debt instrument.

(2) *Directly or indirectly.* Whether the proceeds of an issuance of a debt instrument are used directly or indirectly to reacquire an applicable debt instrument depends upon all of the facts and circumstances surrounding the issuance and the reacquisition. The proceeds of an issuance of a debt instrument will be treated as being used indirectly to reacquire an applicable debt instrument if—

(i) At the time of the issuance of the debt instrument, the issuer of the debt instrument anticipated that an applicable debt instrument of the issuer or a person related to the issuer would be reacquired by the issuer, and the debt instrument would not have been issued if the issuer had not so anticipated such reacquisition;

(ii) At the time of the issuance of the debt instrument, the issuer of the debt instrument or a person related to the issuer anticipated that an applicable debt instrument would be reacquired by a related person and the related person receives cash or property that it would not have received unless the reacquisition had been so anticipated; or

(iii) At the time of the reacquisition, the issuer or a person related to the issuer foresaw or reasonably should have foreseen that the issuer or a person related to the issuer would be required to issue a debt instrument, which it would not have otherwise been required to issue if the reacquisition had not occurred, in order to meet its future economic needs.

(b) *Proportional rule for accruals of OID.* For purposes of section 108(i)(2), if only a portion of the proceeds from the issuance of a debt instrument are used directly or indirectly to reacquire an applicable debt instrument, the rules of section 108(i)(2)(A) will apply to the portion of OID on the debt instrument that is equal to the portion of the proceeds from such instrument used to reacquire the outstanding applicable debt instrument. Except as provided in the last sentence of section 108(i)(2)(A), the amount of deferred OID deduction that is subject to section 108(i)(2)(A) for a taxable year is equal to the product of the amount of OID that accrues in the taxable year under section 1272 or section 1275 (and the regulations under those sections), whichever section is applicable, and a fraction, the numerator of which is the portion of the total proceeds from the issuance of the debt instrument used directly or indirectly to reacquire the applicable debt instrument and the denominator of which is the total proceeds from the issuance of the debt instrument.

(c) *No acceleration*—(1) *Retirement.* Retirement of a debt instrument subject to section 108(i)(2) does not accelerate deferred OID deductions.

(2) *Cross-reference. See* § 1.108(i)–1T and § 1.108(i)–2T for rules relating to the acceleration of deferred OID deductions.

(d) *Examples.* The application of this section is illustrated by the following examples. Unless otherwise stated, all taxpayers in the following examples are calendar-year taxpayers, and P and S each file separate returns:

*Example 1.* (i) *Facts.* P, a domestic corporation, owns all of the stock of S, a domestic corporation. S has a debt instrument outstanding that has an adjusted issue price of $100,000. On January 1, 2010, P issues for $160,000 a four-year debt instrument that has an issue price of $160,000 and a stated redemption price at maturity of $200,000, resulting in $40,000 of OID. In P's discussion with potential lenders/holders, and as described in offering materials provided to potential lenders/holders, P disclosed that it planned to use all or a portion of the proceeds from the issuance of the debt instrument to reacquire outstanding debt of P and its affiliates. Following the issuance, P makes a $70,000 capital contribution to S. S then reacquires its debt instrument from X, a person not related to S within the meaning of section 108(i)(5)(A), for $70,000. At the time of the reacquisition, the adjusted issue price of S's debt instrument is $100,000. Under § 1.61–12(c), S realizes $30,000 of COD income. S makes a section 108(i) election for the $30,000 of COD income.

(ii) *Analysis.* Under the facts, at the time of P's issuance of its $160,000 debt instrument, P anticipated that the loan proceeds would be used to reacquire the debt of S, and P's debt instrument would not have been issued for an amount greater than $90,000 if P had not anticipated that S would use the proceeds to reacquire its debt. Pursuant to paragraph (a) of this section, the proceeds from P's issuance of its debt instrument are treated as being used indirectly to reacquire S's applicable debt instrument. Therefore, section 108(i)(2)(B) applies to P's debt instrument and P's OID

deductions on its debt instrument are subject to deferral under section 108(i)(2)(A). However, because only a portion of the proceeds from P's debt instrument are used by S to reacquire its applicable debt instrument, only a portion of P's total OID deductions will be deferred under section 108(i)(2)(A). *See* section 108(i)(2)(B). Accordingly, a maximum of $17,500 ($40,000 × $70,000/$160,000) of P's $40,000 total OID deductions is subject to deferral under section 108(i)(2)(A). Under paragraph (b) of this section, the amount of P's deferred OID deduction each taxable year under section 108(i)(2)(A) is equal to the product of the amount of OID that accrues in the taxable year under section 1272 for the debt instrument and a fraction ($70,000/$160,000). As a result, P's deferred OID deductions are the following amounts: $4,015.99 for 2010 ($ 9,179.40 × $70,000/$160,000); $4,246.39 for 2011 ($9,706.04 × $70,000/$160,000); $4,490.01 for 2012 ($10,262.88 × $70,000/$160,000); and $4,747.61 for 2013 ($10,851.68 × $70,000/$160,000).

*Example 2.* (i) *Facts.* The facts are the same as in *Example 1,* except that S makes a section 108(i) election for only $10,000 of the $30,000 of COD income.

(ii) *Analysis.* The maximum amount of P's deferred OID deductions under section 108(i)(2)(A) is $10,000 rather than $17,500 because S made a section 108(i) election for only $10,000 of the $30,000 of COD income. Under section 108(i)(2)(A), because the amount of OID that accrues prior to 2014 attributable to the portion of the debt instrument issued to indirectly reacquire S's applicable debt instrument under paragraph (b) of this section ($17,500) exceeds the amount of deferred COD income under section 108(i) ($10,000), P's deferred OID deductions are the following amounts: $4,015.99 for 2010; $4,246.39 for 2011; $1,737.62 for 2012; and $0 for 2013.

*Example 3.* (i) *Facts.* The facts are the same as in *Example 1,* except that P pays $200,000 in cash to the lenders/holders on December 31, 2012, to retire the debt instrument. P did not directly or indirectly obtain the funds to retire the debt instrument from the issuance of another debt instrument with OID.

(ii) *Analysis.* Under paragraph (c)(1) of this section, the retirement of P's debt instrument is not an acceleration event for the deferred OID deductions of $4,015.99 for 2010, $4,246.39 for 2011, and $4,490.01 for 2012. Except as provided in § 1.108(i)–1T(b)(4), these amounts will be taken into account during the inclusion period. P, however, paid a repurchase premium of $10,851.68 in 2012 ($200,000 minus the adjusted issue price of $189,148.32) to retire the debt instrument. If otherwise allowable, P may deduct this amount in 2012 under § 1.163–7(c).

(e) *Effective/applicability dates.* For *effective/applicability dates, see* § 1.108(i)–0T(b).

(f) *Expiration date.* This section expires August 9, 2013.

## PART 602—OMB CONTROL NUMBERS UNDER THE PAPERWORK REDUCTION ACT

■ **Par. 5.** The authority citation for part 602 continues to read as follows:

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

■ **Par. 6.** In § 602.101, paragraph (b) is amended by adding the following entry in numerical order to the table to read as follows:

**§ 602.101 OMB Control numbers.**

* * * * *

(b) * * *

| CFR part or section where identified and described | Current OMB control No. |
|---|---|
| * * * * * | |
| 1.108(i)–1T ..... | 1545–2147 |
| * * * * * | |

* * * * *

**Steven T. Miller,**

*Deputy Commissioner for Services and Enforcement.*

Approved: August 6, 2010.

**Michael Mundaca,**

*Assistant Secretary of the Treasury (Tax Policy).*

[FR Doc. 2010–20060 Filed 8–11–10; 11:15 am]

**BILLING CODE 4830–01–P**

## PENSION BENEFIT GUARANTY CORPORATION

### 29 CFR Part 4022

### Benefits Payable in Terminated Single-Employer Plans; Interest Assumptions for Valuing and Paying Benefits

**AGENCY:** Pension Benefit Guaranty Corporation.

**ACTION:** Final rule.

**SUMMARY:** Pension Benefit Guaranty Corporation's regulation on Benefits Payable in Terminated Single-Employer Plans prescribes interest assumptions for valuing and paying certain benefits under terminating single-employer plans. This final rule amends the benefit payments regulation to adopt interest assumptions for plans with valuation dates in September 2010. Interest assumptions are also published on PBGC's Web site (*http://www.pbgc.gov*).

**DATES:** Effective September 1, 2010.

**FOR FURTHER INFORMATION CONTACT:** Catherine B. Klion, Manager, Regulatory and Policy Division, Legislative and Regulatory Department, Pension Benefit Guaranty Corporation, 1200 K Street, NW., Washington, DC 20005, 202–326–4024. (TTY/TDD users may call the Federal relay service toll-free at 1–800–877–8339 and ask to be connected to 202–326–4024.)

**SUPPLEMENTARY INFORMATION:** PBGC's regulations prescribe actuarial assumptions—including interest assumptions—for valuing and paying plan benefits of terminating single-employer plans covered by title IV of the Employee Retirement Income Security Act of 1974. The interest assumptions are intended to reflect current conditions in the financial and annuity markets.

These interest assumptions are found in two PBGC regulations: The regulation on Benefits Payable in Terminated Single-Employer Plans (29 CFR part 4022) and the regulation on Allocation of Assets in Single-Employer Plans (29 CFR part 4044). Assumptions under the asset allocation regulation are updated quarterly; assumptions under the benefit payments regulation are updated monthly. This final rule updates only the assumptions under the benefit payments regulation.

Two sets of interest assumptions are prescribed under the benefit payments regulation: (1) A set for PBGC to use to determine whether a benefit is payable as a lump sum and to determine lump-sum amounts to be paid by PBGC (found in Appendix B to Part 4022), and (2) a set for private-sector pension practitioners to refer to if they wish to use lump-sum interest rates determined using PBGC's historical methodology (found in Appendix C to Part 4022).

This amendment (1) adds to Appendix B to Part 4022 the interest assumptions for PBGC to use for its own lump-sum payments in plans with valuation dates during September 2010, and (2) adds to Appendix C to Part 4022 the interest assumptions for private-sector pension practitioners to refer to if they wish to use lump-sum interest rates determined using PBGC's historical methodology for valuation dates during September 2010.

The interest assumptions that PBGC will use for its own lump-sum payments (set forth in Appendix B to Part 4022) will be 2.25 percent for the period during which a benefit is in pay status and 4.00 percent during any years preceding the benefit's placement in pay status. In comparison with the interest assumptions in effect for August 2010, these interest assumptions are unchanged. For private-sector payments, the interest assumptions (set forth in Appendix C to part 4022) will be the same as those used by PBGC for determining and paying lump sums (set forth in Appendix B to Part 4022).

PBGC has determined that notice and public comment on this amendment are impracticable and contrary to the public interest. This finding is based on the need to determine and issue new interest assumptions promptly so that the assumptions can reflect current market conditions as accurately as possible.

Because of the need to provide immediate guidance for the valuation and payment of benefits in plans with valuation dates during September 2010, PBGC finds that good cause exists for making the assumptions set forth in this amendment effective less than 30 days after publication.

PBGC has determined that this action is not a "significant regulatory action" under the criteria set forth in Executive Order 12866.

Because no general notice of proposed rulemaking is required for this amendment, the Regulatory Flexibility Act of 1980 does not apply. *See* 5 U.S.C. 601(2).

**List of Subjects in 29 CFR Part 4022**

Employee benefit plans, Pension insurance, Pensions, Reporting and recordkeeping requirements.

■ In consideration of the foregoing, 29 CFR Part 4022 is amended as follows:

## PART 4022—BENEFITS PAYABLE IN TERMINATED SINGLE–EMPLOYER PLANS

■ 1. The authority citation for Part 4022 continues to read as follows:

**Authority:** 29 U.S.C. 1302, 1322, 1322b, 1341(c)(3)(D), and 1344.

■ 2. In appendix B to Part 4022, Rate Set 203, is added to the table, as set forth below:

**Appendix B to Part 4022—Lump Sum Interest Rates For PBGC Payments**

* * * * *

| Rate set | For plans with a valuation date | | Immediate annuity rate (percent) | Deferred annuities (percent) | | | | |
|---|---|---|---|---|---|---|---|---|
| | On or after | Before | | $i_1$ | $i_2$ | $i_3$ | $n_1$ | $n_2$ |
| * | * | | * | * | * | * | * | |
| 203 | 9–1–10 | 10–1–10 | 2.25 | 4.00 | 4.00 | 4.00 | 7 | 8 |

■ 3. In appendix C to Part 4022, Rate Set 203, is added to the table, as set forth below:

**Appendix C to Part 4022—Lump Sum Interest Rates for Private-Sector Payments**

* * * * *

| Rate set | For plans with a valuation date | | Immediate annuity rate (percent) | Deferred annuities (percent) | | | | |
|---|---|---|---|---|---|---|---|---|
| | On or after | Before | | $i_1$ | $i_2$ | $i_3$ | $n_1$ | $n_2$ |
| * | * | | * | * | * | * | * | |
| 203 | 9–1–10 | 10–1–10 | 2.25 | 4.00 | 4.00 | 4.00 | 7 | 8 |

Issued in Washington, DC, on this 6th day of August 2010.

**Vincent K. Snowbarger,**

*Deputy Director for Operations, Pension Benefit Guaranty Corporation.*

[FR Doc. 2010–20000 Filed 8–12–10; 8:45 am]

**BILLING CODE 7709–01–P**

## DEPARTMENT OF HOMELAND SECURITY

### Coast Guard

### 33 CFR Parts 1, 114, 115, 116, 117, and 118

**[Docket No. USCG–2010–0351]**

**RIN 1625–ZA25**

## Navigation and Navigable Waters; Technical, Organizational, and Conforming Amendments, Bridges

**AGENCY:** Coast Guard, DHS.

**ACTION:** Final rule.

**SUMMARY:** This rule makes non-substantive changes throughout our regulations. The purpose of this rule is to make conforming amendments and technical corrections to Coast Guard bridge and navigable waters regulations. This rule will have no substantive effect on the regulated public.

**DATES:** This final rule is effective August 13, 2010.

**ADDRESSES:** Comments and material received from the public, as well as documents mentioned in this preamble as being available in the docket, are part of docket USCG–2010–0351 and are 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. You may also find this docket on the Internet by going to *http://www.regulations.gov,* inserting USCG–2010–0351 in the "Keyword" box, and then clicking "Search."

**FOR FURTHER INFORMATION CONTACT:** If you have questions on this rule, call or e-mail Diane LaCumsky, Coast Guard; telephone 202–372–1025, e-mail *Diane.M.LaCumsky@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 History

We did not publish a notice of proposed rulemaking (NPRM) for this rule. Under 5 U.S.C. 553(b)(3)(A), the Coast Guard finds this rule is exempt from notice and comment rulemaking requirements because these changes involve rules of agency organization, procedure, or practice. In addition, the Coast Guard finds notice and comment

procedure are unnecessary under 5 U.S.C. 553 (b)(3)(B) as this rule consists only of corrections and editorial, organizational, and conforming amendments and these changes will have no substantive effect on the public.

Under 5 U.S.C. 553(d)(3), the Coast Guard finds that, for the same reasons, good cause exists for making this rule effective upon publication in the **Federal Register**.

**Basis and Purpose**

This rule makes technical and editorial corrections to title 33 parts 1, 114, 115, 116, 117, and 118 in the Code of Federal Regulations. This rule does not create any substantive requirements on the public.

**Discussion of Rule**

This rule amends 33 CFR part 1 to reflect changes in agency organization by removing § 1.01–60 (a)(1)(iii). The Coast Guard is no longer under the Department of Transportation (DOT), therefore DOT Order 5610.1C (Procedures for Considering Environmental Impacts) referenced in this section no longer applies. However, paragraph (a)(1)(ii) will remain until it is confirmed that there are no longer any DOT 4(f) determinations requiring Coast Guard attention.

This rule amends 33 CFR parts 115 and 116 to clarify the regulations by replacing the word "hearing" with the word "meeting" in § 115.60(c), and the word "evidence" with "information" in § 116.01(d). This change has no substantive effect on how the Coast Guard currently announces or gathers public opinion or other information regarding bridge matters, nor will it change the substance of the public's involvement in the process. The terms "hearing" and "evidence" have definitive legal definitions which are not applicable in these instances. Changing the terms to "meeting" and "information" better represents established Coast Guard procedures regarding the public's role in commenting on proposed bridge actions set forth in these regulations and reduces confusion among members of the public. Additionally, "meeting" and "information" are the terms used throughout 33 CFR parts 115 and 116, and this change conforms the regulations with the remainder of the Parts.

This rule amends 33 CFR part 117 to correct: the name change of the Leon C. Simon Blvd. (Seabrook) bridge to the Senator Ted Hickey bridge in § 117.458(c), and a typographical error in § 117.557 changing mile marker 0.9 to 1.0.

This rule updates various addresses for Coast Guard offices throughout title 33 parts 114, 116, and 118 in order to conform to new mailing addresses and mailing address formats that came into use June 15, 2009. This rule updates internal Coast Guard office designators, as well as certain personnel titles throughout title 33 parts 114, 116 and 118. Changes in personnel titles included in this rule are only technical revisions reflecting changes in agency procedure and organization, and do not indicate new authorities.

**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. Because this rule involves non-substantive changes and internal agency practices and procedures, it will not impose any additional costs on the public.

**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.

We estimate this rule will not impose any additional costs and should have little or no impact on small entities because the provisions of this rule are technical and non-substantive, and will have no substantive effect on the public and will impose no additional costs. Therefore, the Coast Guard certifies under 5 U.S.C. 605(b) that this final rule will not have a significant economic impact on a substantial number of small entities.

**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 that 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 section 2.B.2, figure 2–1, paragraph (34)(a) of the Instruction. This rule involves regulations which are editorial and/or procedural, such as those updating addresses or establishing application procedures. An environmental analysis checklist and a categorical exclusion determination are available in the docket where indicated under **ADDRESSES**.

**List of Subjects**

*33 CFR Part 1*

Administrative practice and procedure, Authority delegations (Government agencies), Freedom of information, Penalties.

*33 CFR Parts 114, 115, 116, 117 and 118*

Bridges.

■ For the reasons discussed in the preamble, the Coast Guard amends 33 parts 1, 114, 115, 116, 117 and 118.

## PART 1—GENERAL PROVISIONS

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

**Authority:** 14 U.S.C. 633; 33 U.S.C. 401, 491, 525, 1321, 2716, and 2716a; 42 U.S.C. 9615; 49 U.S.C. 322; Department of Homeland Security Delegation No. 0170.1; section 1.01–70 also issued under the authority of E.O. 12580, 3 CFR, 1987 Comp., p. 193; and sections 1.01–80 and 1.01–85 also issued under the authority of E.O. 12777, 3 CFR, 1991 Comp., p. 351.

**§ 1.01–60 [Amended]**

■ 2. In § 1.01–60, remove paragraph (a)(1)(iii).

## PART 114—GENERAL

■ 3. The authority citation for part 114 continues to read as follows:

**Authority:** 33 U.S.C. 401, 406, 491, 494, 495, 499, 502, 511, 513, 514, 516, 517, 519, 521, 522, 523, 525, 528, 530, 533, and 535(c), (e), and (h); 14 U.S.C. 633; 49 U.S.C. 1655(g); Pub. L. 107–296, 116 Stat. 2135; 33 CFR 1.05–1 and 1.01–60, Department of Homeland Security Delegation Number 0170.1.

■ 4. Revise § 114.05(l) to read as follows:

**§ 114.05 Definitions.**

* * * * *

(l) *Deputy Commandant for Operations.* The term "Deputy Commandant for Operations" means the officer of the Coast Guard designated by the Commandant as the staff officer in charge of "Operations" (DCO), U.S. Coast Guard Headquarters.

* * * * *

**§ 114.50 [Amended]**

■ 5. In § 114.50, remove the phrase "Administrator, Bridge Administration Programs (CG–5411), 2100 2nd St., SW., Stop 7581, Washington, DC 20593–7581" and add, in its place, the phrase "Administrator, Office of Bridge Programs, (CG–551), 2100 2nd St., SW., Stop 7683, Washington, DC 20593–7683".

## PART 115—BRIDGE LOCATIONS AND CLEARANCE; ADMINISTRATIVE PROCEDURES

■ 6. The authority citation for part 115 continues to read as follows:

**Authority:** c. 425, sec. 9, 30 Stat. 1151 (33 U.S.C. 401); c. 1130, sec. 1, 34 Stat. 84 (33 U.S.C. 491); sec. 5, 28 Stat. 362, as amended (33 U.S.C. 499); sec. 11, 54 Stat. 501, as amended (33 U.S.C. 521); c. 753, Title V, sec. 502, 60 Stat. 847, as amended (33 U.S.C. 525); 86 Stat. 732 (33 U.S.C. 535); 14 U.S.C. 633; sec. g(6), 80 Stat. 941 (49 U.S.C. 1655(g)); 49 CFR 1.46(c).

**§ 115.60 [Amended]**

■ 7. In § 115.60(c), remove the word "hearings" and add in its place, the word "meeting".

## PART 116—ALTERATION OF UNREASONABLY OBSTRUCTIVE BRIDGES

■ 8. The authority citation for part 116 continues to read as follows:

**Authority:** 33 U.S.C. 401, 521; 49 U.S.C. 1655(g); 49 CFR 1.4, 1.46(c).

**§ 116.01 [Amended]**

■ 9. In § 116.01(d), remove the phrase "offer evidence" and add in its place, the phrase "provide information".

**§ 116.10 [Amended]**

■ 10. In § 116.10 paragraph (c), remove the words "Administrator, Bridge Administration Programs" and add, in their place, the words "Administrator, Office of Bridge Programs".

**§ 116.15 [Amended]**

■ 11. In § 116.15 paragraphs (c) and (d), remove the words "Administrator, Bridge Administration Program" and add, in their place, the words "Administrator, Office of Bridge Programs".

**§ 116.20 [Amended]**

■ 12. In § 116.20 paragraphs (a) and (b), remove the words "Administrator, Bridge Administration Program" and add, in their place, the words "Administrator, Office of Bridge Programs".

**§ 116.25 [Amended]**

■ 13. In § 116.25(a), remove the words "Administrator, Bridge Administration Program" and add, in their place, the words "Administrator, Office of Bridge Programs".

**§ 116.30 [Amended]**

■ 14. In the heading and paragraphs (a), (d), (e) and (g) of § 116.30, remove the words "Administrator, Bridge Administration Program" and add, in their place, the words "Administrator, Office of Bridge Programs".

**§ 116.35 [Amended]**

■ 15. In § 116.35(c), remove the words "Administrator, Bridge Administration

Program" and add, in their place, the words "Administrator, Office of Bridge Programs".

**§ 116.40 [Amended]**

■ 16. In § 116.40 paragraphs (a), (b), and (c) remove the words "Administrator, Bridge Administration Program" and add, in their place, the words "Administrator, Office of Bridge Programs".

**§ 116.45 [Amended]**

■ 17. In § 116.45(a), remove the words "Administrator, Bridge Administration Program" and add, in their place, the words "Administrator, Office of Bridge Programs".

**§ 116.55 [Amended]**

■ 18. Amend § 116.55 as follows:

■ a. In paragraph (a), remove the phrase "Administrator, Bridge Administration Program" and add in its place "Administrator, Office of Bridge Programs"; and

■ b. In paragraph (b), remove the phrase "Administrator's, Bridge Administration Program" and add in its place "Administrator, Office of Bridge Programs"; and

■ c. In paragraph (b), remove the phrase "Assistant Commandant for Operations, U.S. Coast Guard, (CG–3), 2100 2nd Street, SW., Washington, DC 20593–7238" and add, in its place, the phrase "Deputy Commandant of Operations, U.S. Coast Guard,(CG–DCO), 2100 2nd St., SW., Stop 7355, Washington, DC 20593–7355"; and

■ d. In paragraph (b), remove the phrase "Assistant Commandant for Operations" from the last sentence and add in its place, the phrase "Deputy Commandant of Operations".

## PART 117—DRAWBRIDGE OPERATION REGULATION

■ 19. The authority citation for part 118 continues to read as follows:

**Authority:** 33 U.S.C. 499; 33 CFR 1.05–1; and Department of Homeland Security Delegation No. 0170.1.

**§ 117.458 [Amended]**

■ 20. In § 117.458(c) change the name of the bridge from the "Leon C. Simon Blvd. (Seabrook) bridge" to the "Senator Ted Hickey Bridge".

**§ 117.557 [Amended]**

■ 21. In § 117.557, remove the number "0.9" and add, in its place, the number "1.0".

## PART 118—BRIDGE LIGHTING AND OTHER SIGNALS

■ 22. The authority citation for part 118 continues to read as follows:

**Authority:** 33 U.S.C. 494; 14 U.S.C. 85, 633; Department of Homeland Security Delegation No. 0170.1.

**§ 118.3 [Amended]**

■ 23. In § 118.3(b), remove the phrase "Administrator, Bridge Administration Program, room 3500, (CG–5411), 2100 2nd St., SW., Stop 7581, Washington, DC 20593–7581" and add, in its place, the phrase "Administrator, Office of Bridge Programs, (CG–551), 2100 2nd St. SW., Stop 7683, Washington, DC 20593–7683".

Dated: August 6, 2010.

**Steve Venckus,**

*Chief, Office of Regulations and Administrative Law, United States Coast Guard.*

[FR Doc. 2010–19890 Filed 8–12–10; 8:45 am]

**BILLING CODE P**

## DEPARTMENT OF HOMELAND SECURITY

### Coast Guard

### 33 CFR Part 138

**[USCG–2008–0007]**

**RIN 1625–AB25**

## Consumer Price Index Adjustments of Oil Pollution Act of 1990 Limits of Liability—Vessels and Deepwater Ports

**AGENCY:** Coast Guard, DHS.

**ACTION:** Rule; information collection approval.

**SUMMARY:** On July 1, 2009, the Coast Guard amended the Oil Pollution Act of 1990 limits of liability for vessels and deepwater ports to reflect significant increases in the Consumer Price Index. The amendment triggered information collection requirements affecting vessel operators required to establish evidence of financial responsibility. This notice announces that the collection of information has been approved by the Office of Management and Budget (OMB) and may now be enforced. The OMB Control Number is 1625–0046.

**DATES:** The collection of information requirement under 33 CFR 138.85 will be enforced from August 13, 2010.

**FOR FURTHER INFORMATION CONTACT:** If you have questions on this document contact Mr. Benjamin White, National Pollution Funds Center, Coast Guard, telephone 202–493–6863, e-mail *Benjamin.H.White@uscg.mil*. If you have questions on viewing the docket (USCG–2005–21780), call Ms. Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

**SUPPLEMENTARY INFORMATION:** On July 1, 2009, the Coast Guard published an interim rule entitled "Consumer Price Index Adjustments of Oil Pollution Act of 1990 Limits of Liability—Vessels and Deepwater Ports" (74 FR 31357) (CPI interim rule). This interim rule amended the Oil Pollution Act of 1990 limits of liability for vessels and deepwater ports under 33 CFR part 138 subpart B to reflect significant increases in the Consumer Price Index as required by 33 U.S.C. 2704(d)(4). These limit of liability amendments triggered information collection requirements under 33 CFR 138.85. This provision requires operators of vessels to establish evidence of financial responsibility under OPA 90, 33 U.S.C. 2716, acceptable to the Director, National Pollution Funds Center, in an amount equal to or greater than the total applicable amounts determined under 33 CFR 138.80(f). The total applicable amounts are, in turn, determined by reference to the limits of liability in 33 CFR part 138, subpart B. On January 6, 2010, the Coast Guard published a final rule adopting the interim rule without change (75 FR 750).

With the exception of this collection of information, the CPI interim rule limit of liability amendments became effective on July 31, 2009. As required by the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520), the preambles to the interim rule and the final rule stated that the Coast Guard would not enforce the collection of information requirements occurring under 33 CFR 138.85 until the collection of information request was approved by OMB, and also stated that the Coast Guard would publish a notice in the **Federal Register** announcing that OMB approved and assigned a control number for the requirement.

The Coast Guard submitted the information collection request to OMB for approval in accordance with the Paperwork Reduction Act of 1995. On June 18, 2010, OMB approved the collection of information and assigned the collection OMB Control Number 1625–0046 entitled "Financial Responsibility for Water Pollution (Vessels)." The approval for this collection of information expires on July 31, 2012. A copy of the OMB notice of action is available in our online docket at *http://www.regulations.gov*.

Dated: August 3, 2010.

**Craig A. Bennett,**

*Director, National Pollution Funds Center, U.S. Coast Guard.*

[FR Doc. 2010–19753 Filed 8–12–10; 8:45 am]

**BILLING CODE 9110–04–P**

## DEPARTMENT OF HOMELAND SECURITY

### Coast Guard

### 33 CFR Part 165

**[Docket No. USCG–2010–0685]**

**RIN 1625–AA00**

## Safety Zones; Fireworks Within the Captain of the Port Sector Boston Zone

**AGENCY:** Coast Guard, DHS.

**ACTION:** Temporary final rule.

**SUMMARY:** The Coast Guard is establishing temporary safety zones within the Captain of the Port Sector Boston Zone for various fireworks events. These safety zones are necessary to provide for the safety of life on navigable waters during these fireworks events. Entering into, transiting through, mooring or anchoring within these zones is prohibited unless authorized by the Captain of the Port Sector Boston.

**DATES:** This rule is effective in the CFR on August 13, 2010 through 11:59 p.m. on September 4, 2010. This rule is effective with actual notice for purposes of enforcement beginning at 9:30 p.m. on July 24, 2010.

**ADDRESSES:** Documents indicated in this preamble as being available in the docket are part of docket USCG–2010–0685 and are available online by going to *http://www.regulations.gov,* inserting USCG–2010–0685 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 David Labadie, Waterways Management Division, Coast Guard Sector Boston; telephone (617) 223–5768, e-mail *David.J.Labadie@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 the Coast Guard did not receive notification of the specific location or planned dates for the events in sufficient time to issue a NPRM without delaying this rulemaking. Delaying the effective date by first publishing a NPRM and holding a comment period would be contrary to the rule's objectives of ensuring safety of life on the navigable waters during these scheduled events as immediate action is needed to protect persons and vessels from the hazards associated with participation in these marine events.

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**. In addition to the reasons stated above, this rule is intended to ensure the safety of the event participants, spectators and other waterway users thus any delay in the rule's effective date would be impractical.

### Basis and Purpose

This temporary rule is necessary to ensure the safety of vessels and spectators from hazards associated with fireworks events. The Captain of the Port Boston has determined that fireworks events in close proximity to watercraft and waterfront structures pose a significant risk to public safety and property. Such hazards include obstructions to the waterway that may cause marine casualties and the explosive danger of fireworks and debris falling into the water that may cause death or serious bodily harm. Establishing a safety zone around the location of these fireworks events will help ensure the safety of persons and property and help minimize the associated risks.

The Coast Guard has ordered safety zones for these past events and has not received public comments or concerns regarding the impact to waterway traffic from these annual events.

### Discussion of Rule

These temporary safety zones are necessary to ensure the safety of participants, spectators, and vessels during the annual fireworks events in the Captain of the Port Boston area of responsibility that may pose a hazard to the public. The safety zones will be enforced immediately before, during, and after events.

The Captain of the Port will inform the public about the details of each fireworks event covered by these safety zones using a variety of means, including, but is not limited to, Broadcast Notices to Mariners and Local Notices to Mariners.

All persons and vessels shall comply with the instructions of the Captain of the Port Boston or designated on-scene patrol personnel. Entering into, transiting through, mooring or anchoring within the safety zones is prohibited unless authorized by the Captain of the Port Boston or his designated on-scene representative. The Captain of the Port or his designated on scene representative may be contacted via VHF Channel 16 or by telephone at (617) 223–5750.

### 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.

The Coast Guard determined that this rule is not a significant regulatory action for the following reasons: The safety zones will be of limited duration, they cover only a small portion of the navigable waterways, and the events are designed to avoid, to the extent possible, deep draft, fishing, and recreational boating traffic routes. In addition, vessels requiring entry into the area of the safety zones may be authorized to do so by the Captain of the Port.

### 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 will affect the following entities, some of which might be small entities: The owners and operators of vessels intending on entering into, transiting through, mooring or anchoring within the safety zones during the enforcement periods stated for each event in the List of Subjects.

These safety zones will not have a significant economic impact on a substantial number of small entities because of the minimal amount of time in which the safety zones will be enforced. These safety zones will be enforced for approximately four (4) hours on a given day during the effective period.

**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 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 safety zones. Based on our preliminary determination, there are no factors in this case that would limit the use of a categorical exclusion under section 2.B.2 of the Instruction. Therefore, we believe that this rule should be categorically excluded, under figure 2–1, paragraph (34)(g), of the Instruction, from further environmental documentation. 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 record keeping 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(g), 6.04–1, 6.04–6, and 160.5; Pub. L. 107–295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1.

■ 2. Add § 165.T01–0685 to read as follows:

### § 165.T01–0685 Safety Zones; Fireworks Within the Captain of the Port Sector Boston Zone.

(a) *General.* Temporary safety zones are established for fireworks events described in paragraphs (a)(1) through (a)(5):

(1) Surfside Fireworks, Salisbury Beach, MA

(i) All waters of the Atlantic Ocean near Salisbury Beach, MA from surface to bottom, within a 200-yard radius of the fireworks barge located at 42°50′36″ N, 070°48′24″ W.

(ii) *Enforcement Date.* This rule is effective from 9:30 p.m. on July 24, 2010 to 11:59 p.m. on September 4, 2010. This rule will be enforced every Saturday evening from 9:30 p.m. through 10:30 p.m. during the effective period.

(2) Yankee Homecoming Fireworks, Newburyport, MA

(i) All waters of the Merrimack River, from surface to bottom, within a 400-yard radius of the fireworks launch site located at position 42°48′58″ N, 070°52′41″ W.

(ii) *Enforcement Date.* This rule will be enforced from 9 p.m. to 10 p.m. on July 31, 2010.

(3) Beverly Homecoming Fireworks, Beverly, MA

(i) All waters of Beverly Harbor from surface to bottom, within a 200-yard radius of the fireworks barge located at position 42°32′37″ N, 070°52′09″ W.

(ii) *Enforcement Date.* This rule will be enforced from 9:00 p.m. to 11:00 p.m. on August 8, 2010.

(4) Town of Revere Fireworks, Revere, MA

(i) All waters of Broad Sound, from surface to bottom, within a 300-yard radius of the fireworks launch site located at Revere Beach at position 42°24′30″ N, 070°59′26″ W.

(ii) *Enforcement Date.* This rule will be enforced from 9:00 p.m. to 11 p.m. on August 14, 2010.

(5) Gloucester Schooner Festival Fireworks, Gloucester, MA

(i) All waters of Gloucester Harbor, from surface to bottom, within a 500-yard radius of the launch site on the beach at location of 42° 36′18″ N, 070°40′32″ W.

(ii) *Enforcement Date.* This rule will be enforced from 7:00 p.m. to 11 p.m. on September 4, 2010.

(b) *Regulations.*

(1) In accordance with the general regulations in Section 165.23 of this part, entering into, and transiting through, mooring or anchoring within these regulated areas is prohibited unless authorized by the Captain of the Port Boston, or his designated on-scene representative.

(2) These safety zones are closed to all vessel traffic, except as may be permitted by the Captain of the Port Boston or his designated on-scene representative. The Captain of the Port or his designated on-scene representative may be contacted via VHF Channel 16 or by telephone at (617) 223–5750.

(3) The "on-scene representative" of the Captain of the Port Boston is any Coast Guard commissioned, warrant, or petty officer who has been designated by the Captain of the Port Boston to act on his behalf. The on-scene representative of the Captain of the Port Boston will be aboard either a Coast Guard or Coast Guard Auxiliary vessel.

(4) Vessel operators given permission to enter or operate in the safety zones must comply with all directions given to them by the Captain of the Port or his on-scene representative.

Dated: August 2, 2010.

**John N. Healey,**

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

[FR Doc. 2010–19977 Filed 8–12–10; 8:45 am]

**BILLING CODE 9110–04–P**

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 35

**[FRL–9189–1]**

**RIN 2050–AG58**

## Cooperative Agreements and Superfund State Contracts for Superfund Response Actions

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

**ACTION:** Final rule.

**SUMMARY:** This rule amends the regulation by allowing interim progress reports to be due in 60 days, instead of the current 30-day requirement, following the close of the quarterly and semi-annual reporting periods. In addition, this amendment allows the recipient of a Superfund State Contract (SSC) to request that EPA apply any overpayment of cost share to another site. The revisions affect States, Indian Tribes, intertribal consortia, and political subdivisions. The revisions will improve the administration and effectiveness of Superfund Cooperative Agreements and Superfund State Contracts.

**DATES:** This rule is effective October 12, 2010.

**ADDRESSES:** EPA has established a docket for this action under Docket ID No. EPA–HQ–SFUND–2010–0085. All documents in the docket are listed on the *http://www.regulations.gov* Web site. Although listed in the index, some information is not publicly available, e.g., confidential business information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through *http://www.regulations.gov* or in hard copy at the CERCLA Docket, EPA/DC, EPA West, Room 3334, 1301 Constitution Ave., NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the CERCLA docket is (202) 566–0276.

**FOR FURTHER INFORMATION CONTACT:** Angelo Carasea, Assessment and Remediation Division, Office of Superfund Remediation and Technology Innovation, (5204P), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number: (703) 603–8828; fax number: (703) 603–9112; e-mail address: *carasea.angelo@epa.gov.*

**SUPPLEMENTARY INFORMATION:**



### I. Statutory Authority

This rule is issued under section 104(a)–(j) of the Comprehensive Environmental Response,

Compensation, and Liability Act of 1980 (42 U.S.C. 9601 *et seq.*) as amended (hereinafter CERCLA).

**II. Applicability**

The final regulation requirements shall apply to all new Cooperative Agreements and Superfund State Contracts, funded under CERCLA, which EPA signs on or after the effective date of this regulation. EPA may agree to amend existing Cooperative Agreements or Superfund State Contracts to make the final regulation requirements applicable to work performed on and after the date EPA signs the amendment.

**III. Background**

CERCLA launched the nation's first centralized and substantial commitment to clean up hazardous substance sites. CERCLA, or Superfund, provided federal authority and resources to respond directly to releases (or threatened releases) of hazardous substances, pollutants, or contaminants that could endanger human health or the environment. The law also authorized enforcement action and cost recovery from those responsible for a release of a hazardous substance.

CERCLA authorizes two types of Superfund response agreements for State, Tribal (including intertribal consortium) and political subdivision participation in CERCLA implementation: Cooperative Agreements and Superfund State Contracts. These agreements ensure State and Tribal involvement, consistent with section 121 of CERCLA, 42 U.S.C. 9621 (hereinafter section 121), and section 126 of CERCLA, 42 U.S.C. 9626 (hereinafter section 126), and are used to obtain State assurances required under section 104 of CERCLA, 42 U.S.C. 9604, (hereinafter section 104) before EPA begins a remedial action.

EPA uses Cooperative Agreements to transfer funds to a State, political subdivision, or Indian Tribe that assumes responsibility as the lead or support agency for Superfund responses. Core Program Cooperative Agreements are used to fund non-site-specific activities that support a State or Indian Tribe's involvement in CERCLA responses.

A Superfund State Contract is used to document a State's CERCLA section 104 assurances when either EPA or a political subdivision has the lead role in the implementation of a remedial action.

The role of States, Indian Tribes, and political subdivisions (also described as recipients) in Superfund has evolved substantially since 1990 when the original 40 CFR part 35 subpart O regulation was promulgated. The recipients' cleanup programs have matured and become more sophisticated. In addition, EPA has actively sought to fulfill CERCLA's mandate in sections 121 and 126 to provide States and Indian Tribes a "substantial and meaningful involvement" in Superfund by providing Core Program funding for the development of State and Tribal infrastructure.

On May 2, 2007, EPA promulgated a final regulation, which amended 40 CFR part 35 subpart O, to reduce the burden on recipients to receive and administer Cooperative Agreements and Superfund State Contracts. This rule amends 40 CFR part 35 subpart O to further reduce the recipients' burden by allowing interim progress reports to be due in 60 days, instead of 30 days, following the close of the quarterly and semi-annual reporting periods. Also, this rule amends 40 CFR part 35 subpart O so that under a Superfund State Contract, a recipient may request the overpayment of cost share from one site be applied to meet the cost share requirement of another site.

**IV. Description of Key Changes**

EPA made limited revisions to certain sections of the regulation. The following is a brief description of the key changes.

*A. Progress Reports*

This rule revises 40 CFR part 35 subpart O by amending the current reporting requirements that require the interim progress report to be due within 30 days after the reporting period. In the revised regulation, interim progress reports are now due within 60 days after the reporting period. This change codifies a recommendation under EPA initiative, "Burden Reduction Initiative" (*See http://www.epa.gov/burdenreduction/index.htm* for information about EPA's Burden Reduction Initiative.)

*B. Financial Reports*

This revision corrects a citation error to CFR 31.41(b)(3) for quarterly and semiannual financial reports requirement. The correct citation is CFR 31.41(b)(4), which requires quarterly and semiannual financial reports due 30 days after the reporting period.

*C. Overpayment*

In the revised regulation, a State may also direct EPA to use the excess cash cost share funds (overmatch) at one site to meet the cost share obligations at another State site. This change was made to provide greater flexibility to a State on how it wants to address the overmatch of cost share under a Superfund State Contract.

**V. Section-by-Section Analysis**

*Section 35.6650 Progress Reports*

Paragraph (a) is revised to read, "*Reporting frequency.* The recipient must submit progress reports as specified in the Cooperative Agreement. Progress reports will be required no more frequently than quarterly, and will be required at least annually. Notwithstanding 40 CFR 31.41(b)(1), the reports shall be due within 60 days after the reporting period. The final progress report shall be due 90 days after expiration or termination of the Cooperative Agreement." The reporting period for quarterly and semiannual progress reports was changed from 30 to 60 days.

*Section 35.6670 Financial Reports*

Paragraph (b)(2)(i) is revised to read, "If a Financial Status Report is required annually, the report is due 90 days after the end of the Federal fiscal year or as specified in the Cooperative Agreement. If quarterly or semiannual Financial Status Reports are required, reports are due in accordance with 40 CFR 31.41(b)(4)." The reference citation to 40 CFR 31.41(b)(3) was changed to 40 CFR 31.41(b)(4), and the redundant statement, "due 30 days after the reporting period," was deleted. 40 CFR 31.41(b)(4) requires quarterly and semiannual reports to be due 30 days after the reporting period.

*Section 35.6805 Contents of an SSC*

Paragraph (k) is revised to read, "*Reconciliation provision,* which states that the SSC remains in effect until the financial settlement of project costs and final reconciliation of response costs (including all change orders, claims, overmatch of cost share, reimbursements, etc.) ensures that both EPA and the State have satisfied the cost share requirement contained in section 104 of CERCLA, as amended. The recipient may direct EPA to return the overmatch or to use the excess cost share payment at one site to meet the cost share obligation at another site in accordance with § 35.6285(d). Reimbursements for any overpayment will be made to the payer identified in the SSC." The revised regulation permits the recipient also to request the overmatch be applied to the cost share requirements of another site. Under the current regulation, EPA must return the overpayment to the recipient. On May 2, 2007, EPA promulgated a final regulation, amending § 35.6285(d),

"Excess cash cost share contribution/overmatch," which permitted a state to request the overmatch be applied to the cost share requirements of another site when using a remedial cooperative agreement. This change makes the overmatch requirements the same for an SSC as for a remedial cooperative agreement.

## VI. Statutory and Executive Order Reviews

### *A. Executive Order 12866: Regulatory Planning and Reviews*

Under Executive Order (EO) 12866 (58 FR 51735, October 4, 1993), this action is a "significant regulatory action." Accordingly, EPA submitted this action to the Office of Management and Budget (OMB) for review under EO 12866 and any changes made in response to OMB recommendations have been documented in the docket for this action.

### *B. Paperwork Reduction Act*

This action does not impose any new information collection burden, because it makes only minimal changes in the current 40 CFR part 35 subpart O requirements. However, the Office of Management and Budget (OMB) has previously approved the information collection requirements contained in the existing regulations in 40 CFR part 35 under the provisions of the *Paperwork Reduction Act,* 44 U.S.C. 3501 *et seq.* and has assigned OMB control number 2050–0179. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9.

### *C. Regulatory Flexibility Act*

Today's final rule is not subject to the Regulatory Flexibility Act (RFA), which generally requires an agency to prepare a regulatory flexibility analysis for any rule that will have a significant economic impact on a substantial number of small entities. The RFA applies only to rules subject to notice and comment rulemaking requirements under the Administrative Procedure Act (APA) or any other statute. This rule is not subject to notice and comment requirements under the APA or any other statute because this rule pertains to grants which the APA expressly exempts from notice and comment rulemaking requirements under 5 U.S.C. 553(a)(2). Moreover, CERCLA also does not require EPA to issue a notice of proposed rulemaking prior to issuing this rule.

### *D. Unfunded Mandates Reform Act*

This action contains no Federal mandates under the provisions of Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1531–1538 for State, local, or tribal governments or the private sector. UMRA excludes from the definition of "Federal intergovernmental mandate" duties that arise from participation in a voluntary Federal program. Therefore, this action is not subject to the requirements of sections 202 or 205 of UMRA.

This action is also not subject to the requirements of section 203 of UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments. Participation by small governments in this program is voluntary and is funded by EPA.

### *E. Executive Order 13132: Federalism*

This final rule does not have federalism implications. This action 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 level of government, as specified in Executive Order 13132. This final rule makes minor changes to the regulation, under which the 40 CFR part 35 subpart O program has been operating since May 2007. Apart from the minor changes, this rule adds new provisions that increase State flexibility, so it does not have federalism implications as that phrase is defined for purposes of Executive Order 13132. Further, because this is a rule that primarily conditions the use of Federal assistance, it does not impose substantial direct compliance costs on States. Thus Executive Order 13132 does not apply to this final rule.

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

This action does not have tribal implications, as specified in Executive Order 13175 (65 FR 67249, November 9, 2000). It does not have substantial direct effects on Tribal governments, on the relationship between the Federal government and Indian Tribes, or the distribution of power between and responsibilities between the Federal government and Indian tribes. Thus, Executive Order 13175 does not apply to this action.

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

EPA interprets Executive Order 13045 (62 FR 19885, April 23, 1997) as applying only to those regulatory actions that concern health or safety risks, such that the analysis required under section 5–501 of the Executive Order has the potential to influence the regulation. This action is not subject to Executive Order 13045 because it does not establish an environmental standard intended to mitigate health or safety risks.

### *H. Executive Order 13211 (Energy Effects)*

This action is not a "significant energy action" as defined in Executive Order 13211 (66 FR 28355 (May 22, 2001)), because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. Further, we have concluded that this rule is not likely to have any adverse energy effects.

### *I. National Technology Transfer and Advancement Act*

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 ("NTTAA"), Public Law 104–113, 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. NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

This action does not involved technical standards. Therefore, EPA did not consider the use of any voluntary consensus standards.

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

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

EPA has determined that this final rule will not have disproportionately high and adverse human health and environmental effects on minority or low-income populations because it does

not affect the level of protection provided to human health or the environment. This rule amends 40 CFR part 35 subpart O by allowing interim progress reports to be due in 60 days, instead of the current 30-day requirement. In addition, this amendment allows the recipient of a Superfund State Contract to request that EPA apply any overpayment of cost share to another site. The regulation 40 CFR part 35 subpart O codified: (1) Recipient requirements for administering Cooperative Agreements awarded pursuant to section 104(d)(1) of CERCLA; and (2) requirements for administering Superfund State Contracts for non-State-lead remedial responses undertaken pursuant to section 104 of CERCLA.

*K. Congressional Review Act*

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. While this action is not a "major rule" as defined by 5 U.S.C. 804(2), the final rule becomes effective 60 days after publication in the **Federal Register** on October 12, 2010.

**List of Subjects in 40 CFR Part 35**

Administrative practices and procedures, Environmental protection, Grant programs—environmental protection, Reporting and recordkeeping.

Dated: August 9, 2010.

**Lisa P. Jackson,**

*Administrator.*

■ For the reasons set out in the preamble, 40 CFR part 35 is amended as follows:

## PART 35—STATE AND LOCAL ASSISTANCE

■ 1. The authority citation for 40 CFR part 35, subpart O continues to read as follows:

**Authority:** 42 U.S.C. 9601 *et seq.*

### Subpart O—Cooperative Agreements and Superfund State Contracts for Superfund Response Actions

■ 2. Amend § 35.6650 by revising paragraph (a) to read as follows:

**§ 35.6650 Progress reports.**

(a) *Reporting frequency.* The recipient must submit progress reports as specified in the Cooperative Agreement. Progress reports will be required no more frequently than quarterly, and will be required at least annually. Notwithstanding 40 CFR 31.41(b)(1), the reports shall be due within 60 days after the reporting period. The final progress report shall be due 90 days after expiration or termination of the Cooperative Agreement.

* * * * *

■ 3. Amend § 35.6670 by revising paragraph (b)(2)(i) to read as follows:

**§ 35.6670 Financial reports.**

* * * * *

(b) * * *

(2) * * *

(i) If a Financial Status Report is required annually, the report is due 90 days after the end of the Federal fiscal year or as specified in the Cooperative Agreement. If quarterly or semiannual Financial Status Reports are required, reports are due in accordance with 40 CFR 31.41(b)(4);

* * * * *

■ 4. Amend § 35.6805 by revising paragraph (k) to read as follows:

**§ 35.6805 Contents of an SSC.**

* * * * *

(k) *Reconciliation provision,* which states that the SSC remains in effect until the financial settlement of project costs and final reconciliation of response costs (including all change orders, claims, overmatch of cost share, reimbursements, etc.) ensures that both EPA and the State have satisfied the cost share requirement contained in section 104 of CERCLA, as amended. The recipient may direct EPA to return the overmatch or to use the excess cost share payment at one site to meet the cost share obligation at another site in accordance with § 35.6285(d). Reimbursements for any overmatch will be made to the recipient identified in the SSC.

* * * * *

[FR Doc. 2010–20086 Filed 8–12–10; 8:45 am]

BILLING CODE 6560–50–P

## DEPARTMENT OF HOMELAND SECURITY

## Federal Emergency Management Agency

## 44 CFR Part 64

**[Docket ID FEMA–2010–0003; Internal Agency Docket No. FEMA–8141]**

## 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** | | | | |
| Alabama: | | | | |
| Kinston, Town of, Coffee County ..... | 010237 | October 8, 1975, Emerg; December 30, 1977, Reg; August 19, 2010, Susp. | August 19, 2010 .. | August 19, 2010. |
| New Brockton, Town of, Coffee County. | 010238 | January 12, 1976, Emerg; July 22, 1977, Reg; August 19, 2010, Susp. | .....do ..... | Do. |
| Georgia: | | | | |
| Abbeville, City of, Dodge and Wilcox Counties. | 130195 | N/A, Emerg; May 26, 1998, Reg; August 19, 2010, Susp. | .....do ..... | Do. |
| Alamo, City of, Wheeler County ..... | 130507 | September 22, 1994, Emerg; August 19, 2010, Reg; August 19, 2010, Susp. | .....do ..... | Do. |
| Centralhatchee, Town of, Heard County. | 130257 | October 6, 1986, Emerg; May 1, 1988, Reg; August 19, 2010, Susp. | .....do ..... | Do. |
| Dodge County, Unincorporated Areas | 130523 | N/A, Emerg; July 9, 1998, Reg; August 19, 2010, Susp. | .....do ..... | Do. |
| Franklin, City of, Heard County ..... | 130106 | July 7, 1975, Emerg; July 17, 1986, Reg; August 19, 2010, Susp. | .....do ..... | Do. |
| Glenwood, City of, Wheeler County ... | 130419 | January 6, 2004, Emerg; August 1, 2004, Reg; August 19, 2010, Susp. | .....do ..... | Do. |
| Hazlehurst, City of, Jeff Davis County | 130114 | January 14, 1974, Emerg; August 1, 1979, Reg; August 19, 2010, Susp. | .....do ..... | Do. |
| Heard County, Unincorporated Areas | 130105 | April 11, 1985, Emerg; August 1, 1986, Reg; August 19, 2010, Susp. | .....do ..... | Do. |
| Jeff Davis County, Unincorporated Areas. | 130113 | N/A, Emerg; February 14, 2005, Reg; August 19, 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 |
|---|---|---|---|---|
| Lumber City, City of, Telfair County ... | 130167 | September 5, 1975, Emerg; September 29, 1986, Reg; August 19, 2010, Susp. | .....do ..... | Do. |
| Lyons, City of, Toombs County ..... | 130223 | June 2, 1976, Emerg; May 15, 1986, Reg; August 19, 2010, Susp. | .....do ..... | Do. |
| Montgomery County, Unincorporated Areas. | 130139 | October 3, 1994, Emerg; August 19, 2010, Reg; August 19, 2010, Susp. | .....do ..... | Do. |
| Mount Vernon, City of, Montgomery County. | 130140 | July 25, 1975, Emerg; August 19, 1986, Reg; August 19, 2010, Susp. | .....do ..... | Do. |
| Toombs County, Unincorporated Areas. | 130173 | N/A, Emerg; October 31, 1991, Reg; August 19, 2010, Susp. | .....do ..... | Do. |
| Treutlen County, Unincorporated Areas. | 130175 | January 22, 1999, Emerg; August 19, 2010, Reg; August 19, 2010, Susp. | .....do ..... | Do. |
| Uvalda, City of, Montgomery County .. | 130361 | February 28, 1980, Emerg; July 9, 1982, Reg; August 19, 2010, Susp. | .....do ..... | Do. |
| Wheeler County, Unincorporated Areas. | 130190 | October 11, 1994, Emerg; August 19, 2010, Reg; August 19, 2010, Susp. | .....do ..... | Do. |
| Wilcox County, Unincorporated Areas | 130524 | N/A, Emerg; April 16, 1998, Reg; August 19, 2010, Susp. | .....do ..... | Do. |
| Kentucky: Jamestown, City of, Russell County. | 210206 | September 5, 1975, Emerg; June 25, 1976, Reg; August 19, 2010, Susp. | .....do ..... | Do. |
| Mississippi: | | | | |
| Bruce, City of ..... | 280026 | February 5, 1975, Emerg; June 18, 1987, Reg; August 19, 2010, Susp. | .....do ..... | Do. |
| Calhoun County ..... | | | | |
| Calhoun City, City of, Calhoun County | 280027 | March 19, 1975, Emerg; June 18, 1987, Reg; August 19, 2010, Susp. | .....do ..... | Do. |
| Calhoun County, Unincorporated Areas. | 280288 | March 28, 1975, Emerg; January 3, 1990, Reg; August 19, 2010, Susp. | .....do ..... | Do. |
| Derma, Town of, Calhoun County ..... | 280217 | September 21, 1979, Emerg; September 1, 1987, Reg; August 19, 2010, Susp. | .....do ..... | Do. |
| Pittsboro, Town of, Calhoun County ... | 280218 | March 19, 1975, Emerg; August 5, 1985, Reg; August 19, 2010, Susp. | .....do ..... | Do. |
| Pontotoc, City of, Pontotoc County .... | 280348 | August 14, 2000, Emerg; August 19, 2010, Reg; August 19, 2010, Susp. | .....do ..... | Do. |
| Pontotoc County, Unincorporated Areas. | 280234 | July 22, 1977, Emerg; February 1, 1987, Reg; August 19, 2010, Susp. | .....do ..... | Do. |
| Sherman, Town of, Lee, Pontotoc and Union Counties. | 280296 | December 21, 1978, Emerg; September 4, 1985, Reg; August 19, 2010, Susp. | .....do ..... | Do. |
| Vardaman, Town of, Calhoun County | 280327 | N/A, Emerg; November 11, 1994, Reg; August 19, 2010, Susp. | .....do ..... | Do. |
| **Region V** | | | | |
| Ohio: | | | | |
| Clarington, Village of, Monroe County | 390405 | July 7, 1975, Emerg; November 16, 1983, Reg; August 19, 2010, Susp. | .....do ..... | Do. |
| Monroe County, Unincorporated Areas. | 390404 | February 11, 1977, Emerg; February 15, 1984, Reg; August 19, 2010, Susp. | .....do ..... | Do. |
| Wisconsin: | | | | |
| Durand, City of ..... | 550320 | April 13, 1973, Emerg; June 1, 1977, Reg; August 19, 2010, Susp. | .....do ..... | Do. |
| Pepin County ..... | | | | |
| Pepin, Village of, Pepin County ..... | 555569 | April 23, 1971, Emerg; May 26, 1977, Reg; August 19, 2010, Susp. | .....do ..... | Do. |
| Pepin County, Unincorporated Areas | 555570 | April 9, 1971, Emerg; December 16, 1972, Reg; August 19, 2010, Susp. | .....do ..... | Do. |
| Stockholm, Village of, Pepin County .. | 555581 | April 23, 1971, Emerg; December 8, 1972, Reg; August 19, 2010, Susp. | .....do ..... | Do. |
| **Region VI** | | | | |
| New Mexico: | | | | |
| Los Lunas, Village of, Valencia County. | 350144 | May 1, 1979, Emerg; October 13, 1987, Reg; August 19, 2010, Susp. | .....do ..... | Do. |
| Valencia County, Unincorporated Areas. | 350086 | April 13, 1979, Emerg; July 2, 1991, Reg; August 19, 2010, Susp. | .....do ..... | Do. |
| Oklahoma: | | | | |
| Davenport, Town of, Lincoln County .. | 400365 | June 30, 1976, Emerg; October 31, 1978, Reg; August 19, 2010, Susp. | .....do ..... | Do. |
| Hennessey, Town of, Kingfisher County. | 400389 | N/A, Emerg; August 26, 2005, Reg; August 19, 2010, Susp. | .....do ..... | Do. |
| Kickapoo, Tribe of Oklahoma, Lincoln, Oklahoma and Pottawatomie Counties. | 400563 | February 26, 2002, Emerg; August 19, 2010, Reg; August 19, 2010, Susp. | .....do ..... | Do. |
| Kingfisher, City of, Kingfisher County | 400082 | December 23, 1971, Emerg; September 30, 1976, Reg; August 19, 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 |
|---|---|---|---|---|
| Kingfisher County, Unincorporated Areas. | 400471 | January 9, 1987, Emerg; September 18, 1991, Reg; August 19, 2010, Susp. | .....do ..... | Do. |
| Lincoln County, Unincorporated Areas | 400457 | September 28, 1990, Emerg; February 3, 1993, Reg; August 19, 2010, Susp. | .....do ..... | Do. |
| Piedmont, City of, Canadian and Kingfisher Counties. | 400027 | February 4, 1985, Emerg; February 4, 1985, Reg; August 19, 2010, Susp. | .....do ..... | Do. |
| Prague, City of, Lincoln County ..... | 400435 | April 21, 1977, Emerg; September 4, 1985, Reg; August 19, 2010, Susp. | .....do ..... | Do. |
| **Region VIII** | | | | |
| Colorado: | | | | |
| Bayfield, Town of, La Plata County .... | 080098 | June 27, 1975, Emerg; September 29, 1978, Reg; August 19, 2010, Susp. | .....do ..... | Do. |
| Cedaredge, Town of, Delta County .... | 080304 | May 27, 1993, Emerg; May 21, 2009, Reg; August 19, 2010, Susp. | .....do ..... | Do. |
| Delta, City of, Delta County ..... | 080043 | August 2, 1974, Emerg; June 1, 1984, Reg; August 19, 2010, Susp. | .....do ..... | Do. |
| Delta County, Unincorporated Areas .. | 080041 | April 9, 1979, Emerg; March 15, 1984, Reg; August 19, 2010, Susp. | .....do ..... | Do. |
| Durango, City of, La Plata County ..... | 080099 | April 30, 1974, Emerg; January 17, 1979, Reg; August 19, 2010, Susp. | .....do ..... | Do. |
| La Plata County, Unincorporated Areas. | 080097 | December 12, 1974, Emerg; December 15, 1981, Reg; August 19, 2010, Susp. | .....do ..... | Do. |
| Orchard City, City of, Delta County .... | 080258 | May 16, 1983, Emerg; May 16, 1983, Reg; August 19, 2010, Susp. | .....do ..... | Do. |
| Paonia, Town of, Delta County ..... | 080045 | June 10, 1975, Emerg; March 16, 1983, Reg; August 19, 2010, Susp. | .....do ..... | Do. |
| North Dakota: | | | | |
| McLean County, Unincorporated Areas. | 380057 | July 12, 1982, Emerg; June 4, 1987, Reg; August 19, 2010, Susp. | .....do ..... | Do. |
| Three Affiliated Tribes, Fort Berthold Reservation, McLean County. | 380721 | August 23, 2000, Emerg; August 19, 2010, Reg; August 19, 2010, Susp. | .....do ..... | Do. |

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

Dated: August 4, 2010.

**Edward L. Connor,**

*Acting Federal Insurance and Mitigation Administrator, Department of Homeland Security Federal Emergency Management Agency.*

[FR Doc. 2010–20006 Filed 8–12–10; 8:45 am]

**BILLING CODE 9110–12–P**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

### 50 CFR Part 648

**[Docket No. 100513223–0289–02]**

**RIN 0648–AY88**

## Fisheries of the Northeastern United States; Atlantic Deep-Sea Red Crab Fisheries; 2010 Atlantic Deep-Sea Red Crab Specifications In-season Adjustment

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

**ACTION:** Final rule.

**SUMMARY:** This rule adjusts the target total allowable catch (TAC) and corresponding fleet days-at-sea (DAS) allocation for the Atlantic deep-sea red crab fishery that were implemented in May 2010. This adjustment is consistent with the most recent recommendation by the New England Fishery Management Council's (Council) Scientific and Statistical Committee (SSC) and the implementing regulations for the Atlantic Deep-Sea Red Crab Fishery Management Plan (FMP) allowing NMFS to make an in-season adjustment to the specifications, after consulting with the Council. In May 2010, NMFS finalized the fishing year (FY) 2010 specifications for the red crab fishery, including a target TAC and a fleet-wide DAS allocation.

**DATES:** This rule is effective on September 13, 2010.

**ADDRESSES:** Copies of the specifications document, including the Supplemental Environmental Assessment and Supplemental Regulatory Flexibility Analysis and other supporting documents for the in-season adjustment, are available from Patricia A. Kurkul, Regional Administrator, NMFS, Northeast Regional Office, 55 Great Republic Drive, Gloucester, MA 01930.

**FOR FURTHER INFORMATION CONTACT:** Moira Kelly, Fishery Policy Analyst, (978) 281–9218.

**SUPPLEMENTARY INFORMATION:**

### Background

For FY 2010, the Council was required by the FMP to establish specifications for the red crab fishery consistent with the best available scientific information. In September 2009, the Council's SSC recommended a maximum sustainable yield (MSY) for red crab within the range 3.75–4.19 million lb (1,700–1,900 mt), which was consistent with the most recent stock assessment (conducted by the Northeast Fisheries Science Center's 2008 Data Poor Stocks Working Group), and recommended that the interim acceptable biological catch (ABC) be set commensurate with recent catch. At the time, the SSC determined recent catch to be the amount of red crab landed in FY 2007, which was 2.83 million lb (1,284 mt). However, the landings in FY 2007 were the lowest since the implementation of the FMP in 2002, and so, during the Council's review of the

SSC's recommendation at its September and November 2009 meetings, the Council requested the SSC reconsider its recommendations.

The SSC met on March 16–17, 2010, and determined that the interim ABC for red crab should be revised. The SSC has determined that the model results from the December 2008 Data Poor Stocks Working Group are an underestimate of MSY, but could not determine by how much, and did not recommend an estimate of MSY. The SSC now recommends that the ABC for red crab be set equal to long-term average landings (3.91 million lb; 1,775 mt, based on data for 1974–2008). The SSC considers this level of landings to be sustainable and comfortably below the actual, but undetermined, MSY level.

Because NMFS does not have the regulatory authority to establish a target TAC greater than that recommended by the Council, the initial final rule (75 FR 27219, May 14, 2010) set the specifications equal to the Council's November 2009 recommendation for a target TAC of 3.56 million lb (1,615 mt) and a corresponding allocation of 582 fleet DAS. However, the regulations for red crab allow for an in-season adjustment of the specifications, as set forth in § 648.260(a)(3), after consultation with the Council and an opportunity for additional public comment. The Council met on April 28, 2010, and recommended adjusting the red crab specifications in accordance with the SSC's revised recommended catch level of 3.91 million lb (1,775 mt). A proposed rule was published on June 22, 2010 (75 FR 35435), requesting public comment on the revised recommended catch level.

**Comments and Responses**

No comments on the proposed rule were received during the comment period.

**Final Specifications**

This final rule adopts the SSC's revised recommended catch level as the adjusted target TAC for the FY 2010 red crab fishery. This would result in a target TAC of 3.91 million lb (1,775 mt). Using the most recent calculation of average landings-per-DAS charged (5,882 lb/DAS (2,668 kg/DAS) charged from FY 2005–2009), the corresponding fleet DAS allocation is 665 DAS.

**Classification**

Pursuant to section 304(b)(1)(A) of the Magnuson-Stevens Act, the NMFS Assistant Administrator has determined that this rule is consistent with the Atlantic Deep-Sea Red Crab FMP, other provisions of the Magnuson-Stevens Act, and other applicable law.

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

Included in this final rule is the FRFA prepared pursuant to 5 U.S.C. 604(a). The FRFA incorporates the IRFA, a summary of the significant issues raised by the public comments in response to the IRFA, and NMFS's responses to those comments, and a summary of the analyses completed to support the action. A copy of the EA/Regulatory Impact Review/IRFA is available from the Regional Administrator (see ADDRESSES).

The preamble to the proposed rule included a detailed summary of the analyses contained in the IRFA, and that discussion is not repeated here.

**Final Regulatory Flexibility Analysis**

*Statement of Objective and Need*

A description of the reasons why this action is being taken, and the objectives of and legal basis for these specifications are explained in the preambles to the proposed rule and this final rule and are not repeated here.

*Summary of Significant Issues Raised in Public Comments*

No public comments were received on the IFRA or the economic impacts of the rule more generally during the comment period on the proposed rule.

*Description and Estimated of Number of Small Entities to Which the Rule will Apply*

There are no large entities that participate in this fishery, as defined in section 601 of the RFA; therefore, there are no disproportionate effects on small versus large entities. Information on costs in the fishery are not readily available, and individual vessel profitability cannot be determined directly; therefore, changes in gross revenues were used as a proxy for profitability. In the absence of quantitative data, qualitative analyses were conducted.

The participants in the commercial sector are the owners of vessels issued limited access red crab vessel permits. There are five limited access red crab vessel permits, although only three vessels participated in the fishery in FY 2009.

*Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements*

No additional reporting, recordkeeping, or other compliance requirements are included in this final rule.

*Description of the Steps Taken to Minimize Economic Impact on Small Entities*

Specification of the target TAC and corresponding fleet DAS allocation is constrained by the conservation objectives of the FMP, under the authority of the Magnuson-Stevens Act. The target TAC contained in this final rule is equal to the long-term average landings of the fleet, and roughly 25 percent higher than the FY 2009 commercial red crab landings. Whereas a limited market has been responsible for the recent shortfall in landings compared to the target TAC, red crab vessel owners have invested heavily in a new processing plant in New Bedford, MA, and have developed new marketing outlets with hopes to increase demand for their product. Further, this rule implements a target TAC and DAS allocation that is consistent with both the FMP and the best available science.

The impacts on revenues associated with the target TAC were analyzed and are expected to be minimal. Because the 2010 target TAC being implemented in this final rule is greater than the FY 2009 target TAC, and the target TAC originally recommended by the Council, no negative economic impacts are expected as a result of this final rule.

*Small Entity Compliance Guide*

Section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996 states that, for each rule or group of related rules for which an agency is required to prepare a FRFA, the agency shall publish one or more guides to assist small entities in complying with the rule, and shall designate such publications as "small entity compliance guides." The agency shall explain the actions a small entity is required to take to comply with a rule or group of rules. As part of this rulemaking process, a small entity compliance guide will be sent to all holders of Federal permits issued for the Atlantic red crab fishery. In addition, copies of this final rule and guide (i.e., permit holder letter) are available from NMFS (see ADDRESSES) and at the following website: *http://www.nero.noaa.gov*.

**List of Subjects in 50 CFR Part 648**

Fisheries, Fishing, Reporting and recordkeeping requirements.

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

Dated: August 10, 2010.

**Eric C. Schwaab,**

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

■ For the reasons stated in the preamble, 50 CFR part 648 is amended as follows:

## PART 648--FISHERIES OF THE NORTHEASTERN UNITED STATES

■ 1. The authority citation for part 648 continues to read as follows:

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

■ 2. In § 648.260, paragraph (a)(1) is revised to read as follows:

**§ 648.260 Specifications.**

(a) * * *

(1) *Target total allowable catch.* The target TAC for each fishing year will be 3.910 million lb (1,775 mt), unless modified pursuant to this paragraph.

* * * * *

■ 3. In § 648.262, paragraph (b)(2) is revised to read as follows:

**§ 648.262 Effort-control program for red crab limited access vessels.**

* * * * *

(b) * * *

(2) *For fishing year 2010 and thereafter.* Each limited access permit holder shall be allocated 133 DAS unless one or more vessels declares out of the fishery consistent with § 648.4(a)(13)(i)(B)(*2*) or the TAC is adjusted consistent with § 648.260.

* * * * *

[FR Doc. 2010–20077 Filed 8–12–10; 8:45 am]

**BILLING CODE 3510–22–S**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

### 50 CFR Part 679

**[Docket No. 0910131363–0087–02]**

**RIN 0648–XY14**

## Fisheries of the Exclusive Economic Zone Off Alaska; Atka Mackerel Lottery in Areas 542 and 543

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

**ACTION:** Notification of fishery assignments.

**SUMMARY:** NMFS is notifying the owners and operators of registered vessels of their assignments for the 2010 B season Atka mackerel fishery in harvest limit area (HLA) 542 and/or 543 of the Aleutian Islands subarea of the Bering Sea and Aleutian Islands management area (BSAI). This action is necessary to allow the harvest of the 2010 B season HLA limits established for area 542 and area 543 pursuant to the final 2010 and 2011 harvest specifications for groundfish in the BSAI.

**DATES:** Effective 1200 hrs, Alaska local time (A.l.t.), August 10, 2010, until 1200 hrs, A.l.t., November 1, 2010.

**FOR FURTHER INFORMATION CONTACT:** Obren Davis, 907–586–7228.

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

In accordance with § 679.20(a)(8)(iii)(A), owners and operators of vessels using trawl gear for directed fishing for Atka mackerel in the HLA are required to register with NMFS. Eight vessels have registered with NMFS to fish in the B season HLA fisheries in areas 542 and/or 543. In accordance with § 679.20(a)(8)(iii)(B), the Administrator, Alaska Region, NMFS, has randomly assigned each vessel to the HLA directed fishery for Atka mackerel for which they have registered and is now notifying each vessel of its assignment.

For the Amendment 80 cooperative, the vessels authorized to participate in the first HLA directed fishery in area 542 and the second HLA directed fishery in area 543 in accordance with § 679.20(a)(8)(iii) are as follows: Federal Fishery Permit number (FFP) 2733 Seafreeze Alaska and FFP 3835 Seafisher. The vessel authorized to participate in the first HLA directed fishery in area 543 and the second HLA directed fishery in area 542 in accordance with § 679.20(a)(8)(iii) is as follows: FFP 2134 Ocean Peace.

For the Amendment 80 limited access sector, vessels authorized to participate in the first HLA directed fishery in area 542 and in the second HLA directed fishery in area 543 in accordance with § 679.20(a)(8)(iii) are as follows: FFP 3819 Alaska Spirit and FFP 4093 Alaska Victory. Vessels authorized to participate in the first HLA directed fishery in area 543 and in the second HLA directed fishery in area 542 in accordance with § 679.20(a)(8)(iii) are as follows: FFP 2443 Alaska Juris and FFP 3423 Alaska Warrior.

For the BSAI trawl limited access sector, the vessel authorized to participate in the first HLA directed fishery in area 542 in accordance with § 679.20(a)(8)(iii) is as follows: FFP 11770 Alaska Knight.

### Classification

The Assistant Administrator for Fisheries, NOAA (AA), finds good cause to waive the requirement to provide prior notice and opportunity for public comment pursuant to the authority set forth at 5 U.S.C. 553(b)(B) as such requirement is unnecessary. This notice merely advises the owners of these vessels of the results of a random assignment required by regulation. The notice needs to occur immediately to notify the owner of each vessel of its assignment to allow these vessel owners to plan for participation in the B season HLA fisheries in area 542 and area 543.

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

This action is required by § 679.20 and is exempt from review under Executive Order 12866.

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

Dated: August 9, 2010.

**Carrie Selberg,**

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

[FR Doc. 2010–20056 Filed 8–10–10; 4:15 pm]

**BILLING CODE 3510–22–S**

# Proposed Rules

Federal Register
Vol. 75, No. 156
Friday, August 13, 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 THE TREASURY

### Office of the Comptroller of the Currency

### 12 CFR Parts 1, 16, and 28

**[Docket ID: OCC–2010–0017]**

**RIN 1557–AD36**

### Alternatives to the Use of External Credit Ratings in the Regulations of the OCC

**AGENCY:** Office of the Comptroller of the Currency (OCC), Treasury.

**ACTION:** Advance notice of proposed rulemaking.

**SUMMARY:** Section 939A of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the Act) directs all Federal agencies to review, no later than one year after enactment, any regulation that requires the use of an assessment of credit-worthiness of a security or money market instrument and any references to or requirements in regulations regarding credit ratings. The agencies are also required to remove references or requirements of reliance on credit ratings and to substitute an alternative standard of credit-worthiness.

Through this ANPR, the OCC seeks comment on the implementation of section 939A with respect to its regulations (other than risk-based capital regulations, which are the subject of a separate ANPR issued jointly with the other Federal banking agencies), including alternative measures of credit-worthiness that may be used in lieu of credit ratings.

**DATES:** Comments on this ANPR must be received by October 12, 2010.

**ADDRESSES:** Comments should be directed to:

*OCC:* Because paper mail in the Washington, DC area and at the OCC is subject to delay, commenters are encouraged to submit comments by the Federal eRulemaking Portal or e-mail, if possible. Please use the title "Alternatives to the Use of External Credit Ratings in the Regulations of the OCC" to facilitate the organization and distribution of the comments. You may submit comments by any of the following methods:

- *Federal eRulemaking Portal—"regulations.gov":* Go to *http://www.regulations.gov.* Select "Document Type" of "Proposed Rules," and in "Enter Keyword or ID Box," enter Docket ID "OCC–2010–0017," and click "Search." On "View By Relevance" tab at bottom of screen, in the "Agency" column, locate the advance notice of proposed rulemaking for OCC, in the "Action" column, click on "Submit a Comment" or "Open Docket Folder" to submit or view public comments and to view supporting and related materials for this rulemaking action.
- Click on the "Help" tab on the Regulations.gov home page to get information on using Regulations.gov, including instructions for submitting or viewing public comments, viewing other supporting and related materials, and viewing the docket after the close of the comment period.
- *E-mail: regs.comments@occ.treas.gov.*
- *Mail:* Office of the Comptroller of the Currency, 250 E Street, SW., Mail Stop 2–3, Washington, DC 20219.
- *Fax:* (202) 874–5274.
- *Hand Delivery/Courier:* 250 E Street, SW., Mail Stop 2–3, Washington, DC 20219.

*Instructions:* You must include "OCC" as the agency name and "Docket ID OCC–2010–0017" in your comment. In general, OCC will enter all comments received into the docket and publish them on the Regulations.gov Web site without change, including any business or personal information that you provide such as name and address information, e-mail addresses, or phone numbers. Comments received, including attachments and other supporting materials, are part of the public record and subject to public disclosure. Do not enclose any information in your comment or supporting materials that you consider confidential or inappropriate for public disclosure.

You may review comments and other related materials that pertain to this advance notice of proposed rulemaking by any of the following methods:

- *Viewing Comments Electronically:* Go to *http://www.regulations.gov.* Select "Document Type" of "Public Submissions," in "Enter Keyword or ID Box," enter Docket ID "OCC–2010–0017," and click "Search." Comments will be listed under "View By Relevance" tab at bottom of screen. If comments from more than one agency are listed, the "Agency" column will indicate which comments were received by the OCC.
- *Viewing Comments Personally:* You may personally inspect and photocopy comments at the OCC, 250 E Street, SW., Washington, DC. For security reasons, the OCC requires that visitors make an appointment to inspect comments. You may do so by calling (202) 874–4700. Upon arrival, visitors will be required to present valid government-issued photo identification and to submit to security screening in order to inspect and photocopy comments.
- *Docket:* You may also view or request available background documents and project summaries using the methods described above.

**FOR FURTHER INFORMATION CONTACT:** *OCC:* Michael Drennan, Senior Advisor, Credit and Market Risk Division, (202) 874–5670; or Carl Kaminski, Senior Attorney, Legislative and Regulatory Activities Division, (202) 874–5090; or Beth Kirby, Special Counsel, Securities and Corporate Practices Division, (202) 874–5210, Office of the Comptroller of the Currency, 250 E Street, SW., Washington, DC 20219.

**SUPPLEMENTARY INFORMATION:**

## I. Background

Section 939A of the Act requires each Federal agency to review (1) any regulation issued by such agency that requires the use of an assessment of the credit-worthiness of a security or money market instrument; and (2) any references to or requirements in such regulations regarding credit ratings.[1] Each Federal agency must then modify any such regulations identified by the review * * * to remove any reference to or requirement of reliance on credit ratings and to substitute in such regulations such standard of credit-worthiness as each respective agency shall determine as appropriate for such regulations. In developing substitute standards of credit-worthiness, an agency shall seek to establish, to the extent feasible, uniform standards of

[1] Public Law 111–203, 124 Stat. 1376, section 939A (July 21, 2010).

credit-worthiness for use by the agency, taking into account the entities it regulates that would be subject to such standards.[2]

This ANPR describes the areas where the OCC's regulations, other than those that establish regulatory capital requirements, currently rely on credit ratings; sets forth the considerations underlying such reliance; and requests comment on potential alternatives to the use of credit ratings. The OCC and the other Federal banking agencies are issuing a separate joint advance notice of proposed rulemaking focused on the agencies' risk-based capital frameworks.

## II. OCC Regulations Referencing Credit Ratings

The non-capital regulations of the OCC include various references to and requirements for use of a credit rating issued by a nationally recognized statistical rating organization (NRSRO).[3] For example, the OCC's regulations regarding permissible investment securities, securities offerings, and international activities each reference or rely upon NRSRO credit ratings.[4] A description of these regulations is set forth below.

### *A. Investment Securities Regulations*

The OCC's investment securities regulations at 12 CFR part 1 use credit ratings as a factor for determining the credit quality, liquidity/marketability, and appropriate concentration levels of investment securities purchased and held by national banks. For example, under these rules, an investment security must not be "predominantly speculative in nature."[5] The OCC rules provide that an obligation is not "predominantly speculative in nature" if it is rated investment grade or, if unrated, is the *credit equivalent* of investment grade. "Investment grade," in turn, is defined as a security rated in one of the four highest rating categories by two or more NRSROs (or one NRSRO if the security has been rated by only one NRSRO).[6]

Credit ratings are also used to determine marketability in the case of a security that is offered and sold pursuant to Securities and Exchange Commission Rule 144A. Under Part 1, a 144A security is deemed to be marketable if it is rated investment grade or the credit equivalent of investment grade.

In addition, credit ratings are used to determine concentration limits on certain investment securities. For example, Part 1 limits holdings of Type IV small business related securities of any one issuer that are rated in the third or fourth highest investment grade rating categories to 25 percent of the bank's capital and surplus.[7] However, there is no concentration limit for small business-related securities that are rated in the highest or second highest investment grade categories.[8]

#### Current Safety and Soundness Standards

In addition to current regulatory provisions that generally limit banks to purchasing securities that are rated investment grade or, if not rated, are the credit equivalent of investment grade, OCC regulations also require that banks make the investments consistent with safe and sound banking practices.[9] Specifically, banks must consider the interest rate, credit, liquidity, price and other risks presented by investments, and the investments must be appropriate for the particular bank.[10] Whether a security is an appropriate investment for a particular bank will depend upon a variety of factors, including the bank's capital level, the security's impact on the aggregate risk of the portfolio, and management's ability to measure and manage bank-wide risks. In addition, a bank must determine that there is adequate evidence that the obligor possesses resources sufficient to provide for all required payments on its obligations.[11] Each bank also must maintain records available for examination purposes adequate to demonstrate that it meets the above requirements.[12]

The OCC has issued guidance on safe and sound investment securities practices. The OCC expects banks to understand the price sensitivity of securities before purchase (pre-purchase analysis) *and* on an ongoing basis.[13] Appropriate ongoing due diligence includes the ability to assess and manage the market, credit, liquidity, legal, operational and other risks of investment securities. As a matter of sound practice, banks are expected to perform quantitative tests to ensure that they thoroughly understand the accompanying cash flow and interest rate risks of their investment securities.

Sound investment practices dictate additional due diligence for purchases of certain structured or complex investment securities. The more complex a security's structure, the more due diligence that bank management should conduct. For securities with long maturities or complex options management should understand the structure and price sensitivity of its securities purchased. For complex asset-backed securities, such as collateralized debt obligations, bank management should ensure that they understand the security's structure and how the security will perform in different default environments.[14]

#### Alternative Standards

Three options for replacing the references to external credit ratings in the OCC's investment securities regulations include the following.

##### 1. Credit Quality Based Standard

One alternative would be to replace the references to credit ratings with a standard that is focused primarily on credit quality. The OCC could adopt standards similar to those applied to unrated securities. Specifically, banks could be required to document, through their own credit assessment and analysis, that the security meets specified internal credit rating standards.

Part 1 permits the purchase of investment securities that are not predominately speculative in nature. Under the current rules, a security is not predominately speculative in nature if it is rated investment grade or, if unrated, is the credit-equivalent of investment grade. To show that a non-rated security is the credit equivalent of investment grade, a bank must document, through its own credit assessment and analysis, that the security is a strong "pass" asset under its internal credit rating standards. (Because most internal bank rating systems "pass" some credit exposures that are not, or would not be, rated investment grade, a security will generally have to be rated higher than the bottom tier of internal credit rating "pass" standards in order to be the credit equivalent of investment grade.) Moreover, as a prudent credit practice, the OCC currently expects banks to

[2] *Id.*

[3] An NRSRO is an entity registered with the U.S. Securities and Exchange Commission (SEC) under section 15E of the Securities Exchange Act of 1934. *See,* 15 U.S.C. 78o–7, as implemented by 17 CFR 240.17g–1.

[4] *See generally,* 12 CFR part 1 (investment securities), 12 CFR part 16 (securities offerings), and 12 CFR part 28 (international banking activities).

[5] *See,* 12 CFR 1.5(e).

[6] 12 CFR 1.2(d).

[7] A Type IV investment security includes certain small business related securities, commercial mortgage related securities, or residential mortgage related securities. *See,* 12 CFR 1.2(m).

[8] *See,* 12 CFR 1.3(e), 1.2(m).

[9] 12 CFR 1.5.

[10] 12 CFR 1.5(a).

[11] 12 CFR 1.5(b).

[12] 12 CFR 1.5(c).

[13] OCC Bulletin 98–20, "Supervisory Policy Statement on Investment Securities and End-User Derivatives Activities."

[14] OCC Bulletin 2002–19, "Unsafe and Unsound Investment Portfolio Practices."

review the quality of material holdings of non-rated securities on an ongoing basis after purchase. Banks that fail to perform and document the necessary credit analysis are not in compliance with 12 CFR part 1 and the sound investment practices outlined in OCC Bulletin 98–20, "Supervisory Policy Statement on Investment Securities and End-User Derivatives Activities."

If the OCC adopts a general credit-quality based test that does not rely on external credit ratings, the OCC could require banks to determine that their investment securities meet certain credit quality standards. Banks could be required to document an internal credit assessment and analysis demonstrating that the issuer of a security is an entity that has an adequate capacity to meet its financial commitments, is subject only to moderate credit risk, and for whom expectations of default risk are currently low. As is currently the case for non-rated securities,[15] the OCC would require banks to document their credit assessment and analysis using systems and criteria similar to the bank's internal loan credit grading system. These reviews would be subject to examiner review and classification, similar to the process used for loan classifications.

If this alternative were adopted, national banks would continue to be expected to understand and manage the associated price, liquidity and other-related risks associated with their investment securities activities.

2. Investment Quality Based Standard

As an alternative to a standard that focuses solely on credit-worthiness, the OCC could adopt a broader "investment quality" standard that, in addition to credit-worthiness elements (such as the timely repayment of principal and interest and the probability of default), such a standard also would establish criteria for marketability, liquidity and price risk associated with market volatility.

As previously noted, the OCC's current investment securities regulations and guidance emphasize that national banks must consider, as appropriate, credit, liquidity, and market risk, as well as any other risks presented by proposed securities activities. An investment quality based standard could reflect some combination of these considerations and place quantitative limits on banks' investment securities activities based on the levels and types of risks in its portfolio. As with the credit quality standard, the OCC could require banks to document their credit assessment and analysis using systems and criteria similar to the bank's internal loan credit grading system. Such reviews would be subject to examiner review and classification, similar to the process used for loan classifications.

Under such a standard, a security with a low probability of default may nevertheless be deemed "predominantly speculative in nature," and therefore impermissible, if, under the new standard, it is deemed to be subject to significant liquidity or market risk. This would be consistent with current OCC guidance, which warns that complex and illiquid instruments often can involve greater risk than actively traded, more liquid securities. Oftentimes, this higher potential risk arising from illiquidity is not captured by standardized financial modeling techniques. Such risk is particularly acute for instruments that are highly leveraged or that are designed to benefit from specific, narrowly defined market shifts. If market prices or rates do not move as expected, the demand for such instruments can evaporate, decreasing the market value of the instrument below the modeled value.

3. Reliance on Internal Risk Ratings

A third alternative could establish a credit worthiness standard that is based on a bank's internal risk rating systems. The OCC could require a bank to document its credit assessment and analysis using systems and criteria similar to its internal loan credit rating system. Such reviews also would be subject to examiner review and classification, similar to the process used for loan classifications.

The bank regulatory agencies use a common risk rating scale to identify problem credits. The regulatory definitions are used for all credit relationships—commercial, retail, and those that arise outside lending areas, such as from capital markets. The regulatory ratings "special mention," "substandard," "doubtful," and "loss" identify different degrees of credit weakness. Therefore, for example, the rule could define all investments deemed "special mention" or worse as predominately speculative. Credits that are not covered by these definitions would be "pass" credits, for which no formal regulatory definition exists (because regulatory ratings currently do not distinguish among pass credits). Many banks have internal rating systems that distinguish between levels of credit-worthiness in the regulatory "pass" grade. In these systems, "pass" grades that denote lower levels of credit-worthiness usually do not equate to investment grade as defined in the current rule.

This option would be similar to the OCC's current treatment of unrated securities. Part 1 permits the purchase of investment securities that are not predominately speculative in nature. Under the current rules, a security is not predominately speculative in nature if it is rated investment grade, or if unrated, is the credit-equivalent of investment grade. National banks must document, through its own credit assessment and analysis, that the security is a strong "pass" asset under its internal credit rating standards to demonstrate that a non-rated security is the credit equivalent of investment grade. Because most internal bank rating systems "pass" some credit exposures that are not, or would not be, rated investment grade, a security will generally have to be rated higher than the bottom tier of internal credit rating "pass" standards in order to be the credit equivalent of investment grade.

*B. Securities Offerings*

Securities issued by national banks are not covered by the registration provisions and SEC regulations governing other issuers' securities under the Securities Act of 1933. However, the OCC has adopted part 16 to require disclosures related to national bank-issued securities. Part 16 includes references to "investment grade" ratings. For example, section 16.6, which provides an optional abbreviated registration system for debt securities that meet certain criteria, requires that a security receive an investment grade rating in order to qualify for the abbreviated registration system.[16] The OCC designed the requirements of the abbreviated registration system to ensure that potential purchasers of nonconvertible debt have access to necessary information on the issuing bank and commonly controlled depository institutions, as well as the appropriate knowledge and experience to evaluate that information.

Part 16 also cross-references to SEC regulations governing the offering of securities under the Securities Act of 1933 that may include references to or reliance on NRSRO credit ratings. The SEC is preparing to undertake a similar review of its regulations in accordance with the Dodd-Frank Act.[17] The OCC will consider any proposed and final changes to SEC regulations that are

[15] *See,* 12 CFR 1.5(c).

[16] In addition, section 16.2(g) defines the term "investment grade" as a security that is rated in one of the top four ratings categories by each NRSRO that has rated the security.

[17] *See, http://www.sec.gov/spotlight/regreformcomments.shtml.*

cross-referenced in part 16 in deciding whether to amend the references to the SEC's regulations in part 16, and whether the application of the SEC's regulations continues to be appropriate under part 16 in order to provide comparable investor protections covering bank-issued securities.

*C. International Banking Activities*

Pursuant to section 4(g) of the International Banking Act (IBA),[18] foreign banks with Federal branches or agencies must establish and maintain a capital equivalency deposit (CED) with a member bank located in the state where the Federal branch or agency is located. The IBA authorizes the OCC to prescribe regulations describing the types and amounts of assets that qualify for inclusion in the CED, "as necessary or desirable for the maintenance of a sound financial condition, the protection of depositors, creditors, and the public interest."[19] At 12 CFR 28.15, OCC regulations set forth the types of assets eligible for inclusion in a CED. Among these assets are certificates of deposit, payable in the United States, and banker's acceptances, provided that, in either case, the issuer or the instrument is rated investment grade by an internationally recognized rating organization, and neither the issuer nor the instrument is rated lower than investment grade by any such rating organization that has rated the issuer or the instrument.[20]

**III. Request for Comment**

The OCC is seeking public input as it begins reviewing its regulations pursuant to section 939A of the Dodd-Frank Act. In particular, the OCC is seeking comment on alternative measures of credit-worthiness that may be used instead of credit ratings in the regulations described in this ANPR. Commenters are encouraged to address the specific questions set forth below; the OCC also invites comment on any and all aspects of this ANPR.

*General Questions*

1. In some cases the regulations described in this ANPR use credit ratings for purposes other than measuring credit-worthiness (for example, the definition of "marketability" at 12 CFR 1.2(f)(3)). Should the Dodd-Frank Act's requirement for the removal of references to credit ratings be construed to prohibit the use of credit ratings as a proxy for measuring other characteristics of a security, for example, liquidity or marketability?

2a. If continued reliance on credit ratings is permissible for purposes other than credit-worthiness, should the OCC permit national banks to continue to use credit ratings in their risk assessment process for the purpose of measuring the liquidity and marketability of investment securities, even though alternative measures to determine credit-worthiness would be prescribed?

2b. What alternative measures could the OCC and banks use to measure the marketability, and liquidity of a security?

3. What are the appropriate objectives for any alternative standards of credit-worthiness that may be used in regulations in place of credit ratings?

4. In evaluating potential standards of credit-worthiness, the following criteria appear to be most relevant; that is, any alternative to credit ratings should:

a. Foster prudent risk management;

b. Be transparent, replicable, and well defined;

c. Allow different banking organizations to assign the same assessment of credit quality to the same or similar credit exposures;

d. Allow for supervisory review;

f. Differentiate among investments in the same asset class with different credit risk; and

g. Provide for the timely and accurate measurement of negative and positive changes in investment quality, to the extent practicable.

Are these criteria appropriate? Are there other relevant criteria? Are there standards of credit-worthiness that can satisfy these criteria?

5. The OCC recognizes that any measure of credit-worthiness likely will involve tradeoffs between more refined differentiation of credit-worthiness and greater implementation burden. What factors are most important in determining the appropriate balance between precise measurement of credit risk and implementation burden in considering alternative measures of credit-worthiness?

6. Would the development of alternatives to the use of credit ratings, in most circumstances, involve cost considerations greater than those under the current regulations? Are there specific cost considerations that the OCC should take into account? What additional burden, especially at community and regional banks, might arise from the implementation of alternative methods of measuring credit-worthiness?

7. The credit rating alternatives discussed in this ANPR differ, in certain respects, from those being proposed by the OCC and other federal banking agencies for regulatory capital purposes. The OCC believes such distinctions are consistent with current differences in the application and evaluation of credit quality for evaluating loans and investment securities and those used for risk-based capital standards. Are such distinctions warranted? What are the benefits and costs of using different standards for different regulations?

*Alternatives for Replacing References to Credit Ratings in Part 1*

8. What are the advantages and disadvantages of the alternative standards described in the **SUPPLEMENTARY INFORMATION**?

9. Should the credit-worthiness standard include only high quality and highly liquid securities? Should the standard include specific standards on probability of default? Should the standard vary by asset class? Are there other alternative credit-worthiness standards that should be considered?

10. If the OCC relied upon internal rating systems, should the credit-worthiness standard include any pass grade or should it only be mapped to higher grades of pass?

11. Alternatively, should the banking regulators revise the current regulatory risk rating system to include more granularity in the pass grade and develop a credit-worthiness standard based upon the regulatory risk rating system?

12. Should the OCC adopt standards for marketability and liquidity separate from the credit-worthiness standard? If so, how should this differ from the credit-worthiness standard?

13. Should an alternative approach establish different levels of quality that, for example, govern the amount of securities that may be held?

14. Should an alternative approach take into account the ability of a security issuer to repay under stressed economic or market environments? If so, how should stress scenarios be applied?

15. Should an assessment of credit-worthiness link directly to a bank's loan rating system (for example, consistent with the higher quality credit ratings)?

16. Should a bank be permitted to consider credit assessments and other analytical data gathered from third parties that are independent of the seller or counterparty? What, if any, criteria or standards should the OCC impose on the use of such assessments and data?

17. Should a bank be permitted to rely on an investment quality or credit quality determination made by another financial institution or another third party that is independent of the seller or counterparty? What, if any, criteria or

[18] 12 U.S.C. 3102(g).

[19] 12 U.S.C. 3102(g)(4).

[20] *See,* 12 CFR 28.15(a).

standards should the OCC impose on the use of such opinions?

18. Which alternative would be most appropriate for community banks and why?

19. Are there other alternatives that ought to be considered?

20. What level of due diligence should be required when considering the purchase of an investment security? How should the OCC set minimum standards for monitoring the performance of an investment security over time so that banks effectively ensure that their investment securities remain "investment quality" as long as they are held?

*Alternatives Credit-Worthiness Standards for Credit Ratings in Regulations Pertaining to Securities Issuances and International Banking Activities (Parts 16 and 28)*

As discussed above, the OCC's regulations include a number of other references to credit ratings, including in regulations pertaining to securities issuances [21] and international banking activities.[22]

21. Are there considerations, in addition to those discussed above, that the agency should address in developing alternative credit-worthiness standards for regulations pertaining to securities issuances or international banking activities?

22. What standard or standards should the OCC adopt to replace the investment grade requirement in section 16.6? Please comment on how the alternative standard will ensure that potential purchasers of nonconvertible debt have access to necessary information about the issuing bank and have the appropriate knowledge and experience to evaluate that information?

23. What standard or standards should the OCC adopt to specify the types of assets eligible for inclusion in the CED under Part 28 (section 4(g) of the IBA)? To what extent are alternative standards consistent with maintenance of sound financial condition, and the protection of depositors, creditors, and the public interest?

Dated: August 9, 2010.

By the Office of Comptroller of the Currency.

**John C. Dugan,**

*Comptroller of the Currency.*

[FR Doc. 2010–20048 Filed 8–12–10; 8:45 am]

**BILLING CODE 4810–01–P**

[21] Certain limitations in Part 16 refer to a security that is "investment grade," which means that it is rated in one of the top four rating categories by each NSRSO that has rated the security. *See, e.g,* 12 CFR 16.2(g), and 12 CFR 16.6(a)(4).

[22] A foreign bank's capital equivalency deposits may consist of certificates of deposit, payable in the United States, and banker's acceptances, provided that, in either case, the issuer or the instrument is rated investment grade by an internationally recognized rating organization, and neither the issuer nor the instrument is rated lower than investment grade by any such rating organization that has rated the issuer or the instrument. 12 CFR 28.15.

## DEPARTMENT OF THE TREASURY

### Internal Revenue Service

### 26 CFR Part 1

**[REG–144762–09]**

**RIN 1545–BI99**

## Application of Section 108(i) to Partnerships and S Corporations

**AGENCY:** Internal Revenue Service (IRS), Treasury.

**ACTION:** Notice of proposed rulemaking by cross-reference to temporary regulations.

**SUMMARY:** In the Rules and Regulations section of this issue of the **Federal Register**, the IRS is issuing temporary regulations relating to the application of section 108(i) of the Internal Revenue Code (Code) to partnerships and S corporations. The temporary regulations provide rules regarding the deferral of discharge of indebtedness income and original issue discount deductions by a partnership or an S corporation with respect to reacquisitions of applicable debt instruments after December 31, 2008, and before January 1, 2011. The regulations affect partnerships and S corporations with respect to reacquisitions of applicable debt instruments and their partners and shareholders. The text of the temporary regulations published in this issue of the **Federal Register** also serves as the text of these proposed regulations.

**DATES:** Written or electronic comments and requests for a public hearing must be received by November 12, 2010.

**ADDRESSES:** Send submissions to: CC:PA:LPD:PR (REG–144762–09), Room 5203, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand-delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (REG–144762–09), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW., Washington, DC, or sent electronically, via the Federal eRulemaking Portal at *http://www.regulations.gov* (IRS REG–144762–09).

**FOR FURTHER INFORMATION CONTACT:** Concerning the proposed regulations, Megan A. Stoner and Joseph R. Worst, Office of Associate Chief Counsel (Passthroughs and Special Industries) (202) 622–3070; concerning submissions of comments or a request for a public hearing, Richard Hurst, (202) 622–7180 (not toll-free numbers) and his e-mail address is *Richard.A.Hurst@irscounsel.treas.gov.*

**SUPPLEMENTARY INFORMATION:**

### Paperwork Reduction Act

The collection of information contained in these proposed regulations has been reviewed and approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507) under control number 1545–2147. The collection of information in these regulations are in § 1.108(i)–2(b)(3)(iv). Under § 1.108(i)–2(b)(3)(iv), a partner in a partnership that makes an election under section 108(i) is required to provide certain information to the partnership so that the partnership can correctly determine the partner's deferred section 752 amount with respect to an applicable debt instrument.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number assigned by the Office of Management and Budget.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

### Background and Explanation of Provisions

Temporary regulations in the Rules and Regulations section of this issue of the **Federal Register** amend the Income Tax Regulations (26 CFR part 1) relating to section 108(i). The temporary regulations set forth rules for applying section 108(i) to partnerships and S corporations. The text of the temporary regulations also serves as the text of these proposed regulations. The preamble to the temporary regulations explains the temporary regulations and these proposed regulations.

### Special Analyses

It has been determined that this notice of proposed rulemaking is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It is hereby certified that the collection of information contained in these

regulations will not have a significant economic impact on a substantial number of small entities. This certification is based on the fact that the collection of information imposed on partners of partnerships is minimal in that it requires partners to share information with partnerships that partners already maintain. Moreover, it should take a partner no more than one hour to satisfy the information-sharing requirement in these regulations. Therefore, a regulatory flexibility analysis under the Regulatory Flexibility Act (5 U.S.C. chapter 6) is not required. Pursuant to section 7805(f) of the Code, this regulation has been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

**Comments and Public Hearing**

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

**Drafting Information**

The principal authors of these regulations are Megan A. Stoner and Joseph R. Worst, Office of the Associate Chief Counsel (Passthroughs and Special Industries). However, other personnel from the IRS and the Treasury Department participated in their development.

**List of Subjects in 26 CFR Part 1**

Income taxes, Reporting and recordkeeping requirements.

**Proposed Amendment to the Regulations**

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

## PART 1—INCOME TAXES

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

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

Section 1.108(i)–2 also issued under 26 U.S.C. 108(i)(7). * * *

**Par. 2.** Section 1.108(i)–2 is added to read as follows:

**§ 1.108(i)–2 Application of section 108(i) to partnerships and S corporations.**

[The text of proposed § 1.108(i)–2 is the same as the text of § 1.108(i)–2T(a) through (f) published elsewhere in this issue of the **Federal Register**].

**Steven T. Miller,**

*Deputy Commissioner for Services and Enforcement.*

[FR Doc. 2010–20061 Filed 8–11–10; 11:15 am]

**BILLING CODE 4830–01–P**

## DEPARTMENT OF THE TREASURY

### Internal Revenue Service

### 26 CFR Part 1

**[REG–142800–09]**

**RIN 1545–BI96**

## Guidance Regarding Deferred Discharge of Indebtedness Income of Corporations and Deferred Original Issue Discount Deductions

**AGENCY:** Internal Revenue Service (IRS), Treasury.

**ACTION:** Notice of proposed rulemaking by cross-reference to temporary regulations.

**SUMMARY:** In the Rules and Regulations section of this issue of the **Federal Register**, the IRS and the Treasury Department are issuing temporary regulations (TD 9497) under section 108(i) of the Internal Revenue Code (Code). These regulations primarily affect C corporations regarding the acceleration of deferred discharge of indebtedness (COD) income (deferred COD income) and deferred original issue discount (OID) deductions (deferred OID deductions) under section 108(i)(5)(D), and the calculation of earnings and profits as a result of an election under section 108(i). In addition, these regulations provide rules applicable to all taxpayers regarding deferred OID deductions under section 108(i) as a result of a reacquisition of an applicable debt instrument by an issuer or related party. The text of the temporary regulations also serves as the text of these proposed regulations.

**DATES:** Written or electronic comments and request for a public hearing must be received by November 12, 2010.

**ADDRESSES:** Send submissions to: CC:PA:LPD:PR (REG–142800–09), Room 5203, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand-delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (REG–142800–09), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW., Washington, DC, or sent electronically, via the Federal eRulemaking Portal at *http://www.regulations.gov* (IRS REG–142800–09).

**FOR FURTHER INFORMATION CONTACT:** Concerning the proposed regulations, Robert M. Rhyne (202) 622–7790 and Rubin B. Ranat (202) 622–7530; concerning submissions of comments and/or requests for a public hearing, Richard Hurst (202) 622–7180 (not toll-free numbers), or *Richard.a.hurst@irscounsel.treas.gov.*

**SUPPLEMENTARY INFORMATION:**

**Paperwork Reduction Act**

The collection of information contained in this notice of proposed rulemaking has been submitted to the Office of Management and Budget in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507) under control number 1545–2147. Comments on the collection of information should be sent to the Office of Management and Budget, Attn: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503, with copies to the Internal Revenue Service, Attn: IRS Reports Clearance Officer, SE:W:CAR:MP:T:T:SP, Washington, DC 20224. Comments on the collection of information should be received by November 12, 2010. Comments are specifically requested concerning:

Whether the proposed collection of information is necessary for the proper performance of the functions of the Internal Revenue Service, including whether the information will have practical utility;

The accuracy of the estimated burden associated with the proposed collection of information (*see* below);

How the quality, utility, and clarity of the information to be collected may be enhanced;

How the burden of complying with the proposed collections of information may be minimized, including through the application of automated collection techniques or other forms of information technology; and

Estimates of capital or start-up costs of operation, maintenance, and purchase of service to provide information.

The collection of information in this proposed regulation is in § 1.108(i)–1(b)(3). This information is required by the IRS to allow members of a

consolidated group to make an election to accelerate the inclusion of deferred COD income under section 108(i). The likely recordkeepers are corporations filing consolidated income tax returns (electing members). The IRS and Treasury Department believe that an electing member's election under § 1.108(i)–1(b)(3) reduces the member's overall reporting burden under section 108(i).

*Estimated total annual reporting burden:* 0 hours.

*Estimated average annual burden per respondent:* 0 hours.

*Estimated number of respondents:* 5,000.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number assigned by the Office of Management and Budget.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

**Background and Explanation of Provisions**

The temporary regulations published in the Rules and Regulations section of this issue of the **Federal Register** amend the Income Tax Regulations (26 CFR parts 1 and 602) relating to section 108(i). The temporary regulations set forth rules for applying section 108(i) to C corporations. The text of those temporary regulations also serves as the text of these proposed regulations. The preamble to the temporary regulations explains the temporary regulations and these proposed regulations.

**Special Analyses**

It has been determined that this notice of proposed rulemaking is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It is hereby certified that these regulations will not have a significant economic impact on a substantial number of small entities. This certification is based upon the fact that these regulations merely provide more specific guidance for the timing of the inclusion of deferred COD income that is otherwise includible under the Code. Therefore, a Regulatory Flexibility analysis under the Regulatory Flexibility Act (5 U.S.C. chapter 6) is not required. Pursuant to section 7805(f) of the Code, this notice of proposed rulemaking will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

**Comments and Requests for a Public Hearing**

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

**Drafting Information**

The principal authors of these proposed regulations are Robert M. Rhyne and Rubin B. Ranat of the Office of Associate Chief Counsel (Corporate). However, other personnel from the IRS and Treasury Department participated in their development.

**List of Subjects in 26 CFR Part 1**

Income taxes, Reporting and recordkeeping requirements.

**Proposed Amendment to the Regulations**

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

## PART 1—INCOME TAXES

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

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

Section 1.108(i)–0T also issued under 26 U.S.C. 108(i)(7). * * *

Section 1.108(i)–1T also issued under 26 U.S.C. 108(i)(7) and 1502. * * *

Section 1.108(i)–3T also issued under 26 U.S.C. 108(i)(7) and 1502. * * *

**Par. 2.** Section 1.108(i)–0 is added to read as follows:

**§ 1.108(i)–0 Definitions.**

[The text of proposed § 1.108(i)–0 is the same as the text of § 1.108(i)–0T published elsewhere in this issue of the **Federal Register**].

**Par. 3.** Section 1.108(i)–1 is added to read as follows:

**§ 1.108(i)–1 Deferred discharge of indebtedness income and deferred original issue discount deductions of C corporations.**

[The text of proposed § 1.108(i)–1 is the same as the text of § 1.108(i)–1T published elsewhere in this issue of the **Federal Register**].

**Par. 4.** Section 1.108(i)–3 is added to read as follows:

**§ 1.108(i)–3 Rules for the deduction of OID.**

[The text of proposed § 1.108(i)–3 is the same as the text of § 1.108(i)–3T published elsewhere in this issue of the **Federal Register**].

**Steven T. Miller,**

*Deputy Commissioner for Services and Enforcement.*

[FR Doc. 2010–20059 Filed 8–11–10; 11:15 am]

**BILLING CODE 4830–01–P**

## DEPARTMENT OF LABOR

### Mine Safety and Health Administration

### 30 CFR Parts 56 and 57

**RIN 1219–AB70**

### Metal and Nonmetal Dams

**AGENCY:** Mine Safety and Health Administration, Labor.

**ACTION:** Advance Notice of Proposed Rulemaking (ANPRM).

**SUMMARY:** Dam failures at metal and nonmetal mines have exposed miners to life-threatening hazards. The Mine Safety and Health Administration (MSHA) is reviewing its existing metal and nonmetal standards for dams. The Agency is concerned that some dams pose hazards because they are not designed, constructed, operated, and maintained to accepted dam safety practices. MSHA is considering approaches to better protect miners from the hazards of dam failures and is soliciting information to help determine how best to proceed.

**DATES:** Comments must be received by midnight Eastern Daylight Saving Time on October 12, 2010.

**ADDRESSES:** Comments must be identified with "RIN 1219–AB70" and may be sent to MSHA by any of the following methods:

(1) *Federal E-Rulemaking Portal: http://www.regulations.gov.* Follow the on-line instructions for submitting comments.

(2) *Electronic mail: zzMSHA-Comments@dol.gov.* Include "RIN 1219–AB70" in the subject line of the message.

(3) *Facsimile:* 202–693–9441. Include "RIN 1219–AB70" in the subject line of the message.

(4) *Regular Mail:* MSHA, Office of Standards, Regulations, and Variances, 1100 Wilson Boulevard, Room 2350, Arlington, Virginia 22209–3939.

(5) *Hand Delivery or Courier:* MSHA, Office of Standards, Regulations, and Variances, 1100 Wilson Boulevard, Room 2350, Arlington, Virginia. Sign in at the receptionist's desk on the 21st floor.

MSHA will post all comments on the Internet without change, including any personal information provided. Comments can be accessed electronically at *http://www.msha.gov* under the "Rules and Regs" link. Comments may also be reviewed in person at the Office of Standards, Regulations, and Variances, 1100 Wilson Boulevard, Room 2350, Arlington, Virginia. Sign in at the receptionist's desk on the 21st floor.

MSHA maintains a list that enables subscribers to receive e-mail notification when the Agency publishes rulemaking documents in the **Federal Register**. To subscribe, go to *http://www.msha.gov/subscriptions/subscribe.aspx*.

**FOR FURTHER INFORMATION CONTACT:** Patricia W. Silvey, Director, Office of Standards, Regulations, and Variances, MSHA, at *silvey.patricia@dol.gov* (E-mail), 202–693–9440 (Voice), or 202–693–9441 (Fax).

**SUPPLEMENTARY INFORMATION:**

## I. Background

MSHA's database contains information on nearly 2000 dams at metal and nonmetal mines. Mine operators have constructed these structures for various purposes, such as disposing of tailings or mine waste, processing minerals, treating or supplying water, and controlling run-off and sediment. Although many of these dams are designed, constructed, operated, and maintained according to accepted dam safety practices, others are not and dam failures and near failures continue to occur.

Since 1990 to the present, MSHA investigated dam failures at metal and nonmetal mines in virtually every region of the country and at small and large operations. Failures or near failures have occurred at copper, phosphate, sand and gravel, trona, gypsum, and limestone mines, among others.

Failures have damaged property and equipment, but no deaths or serious injuries have occurred. Examples of dam failures include:

- A 1990 failure of a 100-foot high dam at a limestone mine in Puerto Rico released over 10 million gallons of water and tailings. The failure flooded eight lanes of a major highway, depositing tailings up to eight feet thick. The dam failed about 2 a.m. when no miners were present. The mine operator did not use an engineer to design the dam; several design and construction deficiencies, such as poor compaction, steep slopes, and absence of internal drains, contributed to the failure.
- A 70-foot high tailings dam failed at an andesite quarry in Wisconsin in 1992, tearing apart a railroad track and leveling a power line at the mine. The dam failed at 3 a.m. when no miners were present. The dam was not designed by an engineer. After a slope failure in 1987, the mine operator installed instruments in the dam to monitor internal water pressures. Pressures beyond a certain level would lead to structural instability. In the 18 months before the 1992 failure, however, the operator checked the instruments only twice. A combination of steep slopes and high internal water pressure contributed to the failure.
- In 1997, a dam at an Arizona copper mine released tailings for over a half mile downstream and to depths of 30 feet. Four miners, one in a haul truck, one in a bulldozer, and two in a pickup truck, were carried down-slope with the slide. One miner injured his back running from the pickup but the others were not injured. The dam was designed by an engineer; however, the mine operator's rate of placement of waste rock on top of the tailings created pressures that contributed to the failure.
- In August 2002, a 450-foot section of dam failed at a sand and gravel mine in Georgia, sending a wave of water and tailings through the shop area. The 30-foot high dam failed shortly after 8 p.m. The wave of water and tailings moved a scraper, backhoe and front-end loader, which were parked in the area. Three miners, near the shop, saw the dam failing and escaped in a pickup truck. The dam, built without being designed by an engineer, had a weak foundation, among other deficiencies.
- In 2004, a dam failure at a sand and gravel mine in California released over 200 million gallons of water and tailings, inundating a hydraulic excavator in an adjacent pit. The failure occurred shortly after 6 p.m., at the start of the maintenance shift. About 15 minutes before the failure, the excavator operator had gone home and a bulldozer operator had parked his machine on the top of the dam. A miner who lubricated the equipment was driving into the pit when he noticed the rising water, halted his truck, and backed up the access road. The dam was not properly designed. The investigation revealed that the design of the dam failed to include an evaluation of the foundation and embankment material strengths, and stability analyses to verify that the slopes of the dam would have adequate factors of safety.

MSHA investigators have found that design, construction, operation, or maintenance deficiencies have contributed to failures of dams at metal and nonmetal mines and exposed miners to hazards.

Since the early 1970's, Congress has enacted laws to create a national program to reduce the risks of dam failures. The Federal Emergency Management Agency (FEMA) is charged with administering the national dam safety program and has issued a series of Federal Guidelines for Dam Safety (Guidelines) (*http://www.fema.gov/library/viewRecord.do?id=1578*).

The Guidelines address, among other things, practices and procedures for the design, construction, operation, and maintenance of all types of dams. In the Guidelines, FEMA recommends that dams:

- Be designed by a competent engineer;
- Be constructed under the general supervision of a competent engineer knowledgeable about dam construction;
- Be inspected and monitored at frequent intervals by a person trained to recognize unusual conditions; be inspected by a competent engineer with knowledge of dam safety at a frequency consistent with the dam's hazard potential; and
- Have an emergency action plan, if dams are classified as having high or significant hazard potential in the event of failure.

Every two years, MSHA reports on the status of its dam safety program to FEMA, which then sends Congress an evaluation of each Federal agency's program and how it complies with the Guidelines. FEMA has recommended, in biennial reports to Congress and in meetings of the Interagency Committee on Dam Safety, that MSHA promulgate standards to encompass all aspects of design, construction, and inspection for dams at metal and nonmetal mines.

The existing requirements for dams at metal and nonmetal mines, 30 CFR 56.20010 and 57.20010, are derived from the Metal and Nonmetallic Mine Safety Act of 1966. The standards state: "If failure of a water or silt retaining dam will create a hazard, it shall be of substantial construction and inspected at regular intervals." The standards promulgated for coal mines under the Federal Coal Mine Health and Safety Act of 1969 were similar, but specified that the mine operator inspect the dams

at least once per week and record inspection findings.

The requirements for coal mines were revised in 1975 after the Buffalo Creek dam failure. For dams which can present a hazard or are of a certain size, the existing standards require a coal mine operator to:

- Have a registered professional engineer certify the dam's design;
- Develop plans for the design, construction, maintenance, and abandonment of the dam and have the plans approved by MSHA;
- Have a qualified person inspect the dam weekly;
- Have instrumentation monitored weekly;
- Correct any hazardous conditions and make required notifications; and
- Submit an annual report with a registered, professional engineer's certification that construction, operation, and maintenance of the dam have been in accordance with approved plans.

**II. Key Issues on Which Comment Is Requested**

MSHA is asking interested parties to comment on measures to assure that mine operators design, construct, operate and maintain dams to protect miners against the hazards of a dam failure.

MSHA seeks comments on the questions below. If a commenter refers to a particular dam as an example, please identify the mine, or provide the number of miners and the mine's commodity. Also, include the dam's storage capacity, height, and hazard potential and characterize its complexity. Provide enough detail with the comments that the Agency can understand the issues raised and give them the fullest consideration. Comments should include alternatives, rationales, benefits to miners, technological and economic feasibility, impact on small mines, and supporting data. Please include any information that supports your conclusions and recommendations: Experiences, data, analyses, studies and articles, and standard professional practices.

*General Questions*

1. MSHA is seeking information concerning current dam safety practices at metal and nonmetal mines. What measures do mine operators currently take to design, construct, operate, and maintain safe and effective dams? What measures do mine operators currently take to safely abandon their dams? For mine operators with dams, please provide your experiences.

2. MSHA is required to inspect every mine in its entirety, which includes dams of all sizes and hazard potential. A common approach for dam safety is to have tiered requirements based on a dam's size and hazard potential. How should MSHA determine safety requirements based on a dam's size and hazard potential? Please include specific recommendations and explain your reasoning.

3. What non-Federal authority regulates the safety of dams at metal and nonmetal mines in your state, territory, or local jurisdiction? Please discuss the specific requirements, including the principles that they address. If possible, please provide information about relevant non-federal dam safety requirements through a hyperlink or other means.

4. What records should be kept of activities related to the safety of dams? Please be specific and include your rationale. What records should be provided to miners if hazardous conditions are found?

*Design and Construction of Dams*

MSHA's existing standards do not include specific requirements for design of dams. MSHA found that inadequate design contributed to some of the metal and nonmetal dam failures. In responding to the following questions, please discuss how any requirements should vary according to the size or hazard potential of a dam, and why.

5. How should mine operators assure that dams are safely and effectively designed? Please suggest requirements that MSHA should consider for safe design of dams. Please be specific and include your rationale.

6. Please suggest requirements for review of dam designs by mine operators and MSHA and include your rationale for specific recommendations and alternatives.

7. With new standards, operators may need to evaluate and upgrade existing dams. Please elaborate on how the safety of existing dams should be addressed.

8. MSHA's existing standards for dams at metal and nonmetal mines do not address whether a dam is constructed as designed. What measures are necessary to ensure that mine operators construct dams as designed?

9. How should MSHA verify that dams have been constructed as designed? Please explain your rationale.

*Operation and Maintenance of Dams*

MSHA's existing standards do not contain specific requirements addressing the operation and maintenance of dams.

10. What should a mine operator do to operate and maintain a safe dam? How should MSHA verify that dams are safely operated and maintained? Please be specific.

MSHA's existing standards require dams to be inspected at regular intervals if failure would create a hazard. Inspections can identify hazardous conditions, allowing a mine operator to take corrective action to prevent a failure. The Agency will be referring to two types of inspections in this document, "routine" and "detailed." Mine operators should perform frequent, routine dam inspections, which may include monitoring instrumentation, to identify unusual conditions and signs of instability. Personnel with more specialized knowledge of dam safety should conduct detailed inspections to identify less obvious problems and evaluate the safety of the dam. Detailed inspections, occurring less often, would include an examination of the dam and a review of the routine inspections and monitoring data. The Guidelines recommend that inspection personnel be qualified for their level of responsibility and trained in inspection procedures.

11. What measures should mine operators take to assure that dams are adequately inspected for unusual conditions and signs of instability?

12. How often are routine inspections of dams conducted? How often should they be conducted? What determines the frequency? Who conducts the routine inspections? Please be specific and include your rationale.

13. Instruments, such as weirs, provide information on the performance of a dam. How frequently should mine operators monitor dam instrumentation? Please provide your rationale.

14. What information should be documented during routine dam inspections? Please provide your rationale.

15. Does a competent engineer inspect your mine's dam? If so, at what frequency? Please explain the rationale for these inspections and what is evaluated.

16. How often should detailed inspections be conducted? Please include your rationale.

17. What information and findings should be documented during detailed dam inspections? Please be specific and include your rationale.

18. How should MSHA verify that mine operators conduct routine and detailed inspections? Please explain how your suggestion would work.

*Qualifications of Personnel*

A mine operator is responsible for the design, construction, operation, and maintenance of dams. For an effective dam safety program, an operator must use personnel who are knowledgeable about dam safety.

19. What qualifications do mine operators currently require of persons who design, inspect, operate, and manage dams? In what capacities are engineers used? Please be specific in your response.

20. The Guidelines recommend that dams be designed by competent engineers. What specific qualifications or credentials should persons who design dams possess? Please include your rationale.

21. The Guidelines recommend that a dam be constructed under the general supervision of a competent engineer knowledgeable about dam construction. What specific qualifications or credentials should a person have who verifies that a dam is being constructed as designed? Please provide your rationale.

22. What training should personnel receive who perform frequent, routine inspections and who monitor instrumentation at dams? In your response, please suggest course content and the frequency of the training, including the rationale for your recommendations.

23. What qualifications or credentials should be required of persons who perform detailed inspections to evaluate the safety of a dam? Please be specific and include your rationale.

*Abandonment of Dams*

24. Some regulatory authorities require that dam owners obtain approval of a plan to cap, breach, or otherwise safely abandon dams. What actions should mine operators take to safely abandon dams? Please include specific suggestions and rationale.

25. How can MSHA verify that a mine operator has safely abandoned a dam?

*Economic Impact*

MSHA seeks information to assist the Agency in deriving the costs and benefits of any regulatory changes for dams at metal and nonmetal mines. In answering the following questions, please indicate the dam's storage capacity, height, and hazard potential and characterize the complexity of each dam referenced. Also, please include the state where each dam is located, and the number of employees at the mine.

26. What are the costs of designing a new dam? Please provide details such as hours, rates of pay, job titles, and any contractual services necessary. How often is the design of an existing dam changed? What are the costs of a redesign?

27. What are the costs of constructing a dam? Please provide details based on: Size of dam; labor costs, including hours, rates of pay, job titles; costs of equipment and materials; and any contractual services necessary.

28. Please describe the oversight you provide during dam construction to assure it complies with the design plan. How much does it cost per year per dam for oversight and quality control? What special knowledge, qualifications, or credentials do you require of those who provide oversight?

29. How often do you add height to an existing dam or modify it in some other way? Who supervises the design and construction of these modifications, for example, a professional engineer, competent engineer, contractor, etc? Please be specific and provide rationale for your answer. How much does it cost? Please provide details such as labor costs, including hours, rates of pay, job titles, and costs of equipment and materials and any contractual services necessary.

30. How much does it cost per year per dam for routine inspections? If you incur separate costs for monitoring instrumentation, how much is that cost? How often do you have a detailed inspection conducted? How much does it cost per year for these inspections?

31. Does the state or local jurisdiction in which you operate require you to use a professional engineer? If so, when is a professional engineer specifically required? (If you have dams in more than one state please identify which states require a professional engineer and which do not).

32. What are the costs associated with training personnel who conduct frequent, routine inspections and monitor instrumentation at dams?

33. What costs are involved in capping, breaching, or otherwise properly abandoning a dam? Please provide details of your experience and what was involved when you properly abandoned a dam. Describe any impact of a properly abandoned dam.

34. What are the costs to a mine operator if a dam fails? Please characterize other impacts such as loss of life, environmental damage, etc.

35. Do you have insurance against a dam failure? If so, please specify cost and coverage. Does the insurance carrier require the use of a professional engineer for specific dam activities? If a professional engineer is not required, does the insurance carrier give a discount if one is used? Does your insurance company have any other requirements related to dam safety?

36. What quantifiable and non-quantifiable costs and benefits for the downstream community are involved when a dam is properly designed and constructed? In addition, MSHA welcomes comments on other relevant indirect costs and benefits.

Dated: August 9, 2010.

**Joseph A. Main,**

*Assistant Secretary of Labor for Mine Safety and Health.*

[FR Doc. 2010–19960 Filed 8–12–10; 8:45 am]

**BILLING CODE 4510–43–P**

## DEPARTMENT OF EDUCATION

### 34 CFR Part 222

**[Docket ID ED–2010–OESE–0013]**

**RIN 1810–AB11**

### Impact Aid Programs

**AGENCY:** Office of Elementary and Secondary Education, Department of Education.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Secretary proposes to amend the regulations governing the Impact Aid Discretionary Construction Program, which is authorized under section 8007(b) of the Elementary and Secondary Education Act of 1965, as amended (ESEA). Through this program, the Department provides competitive grants for emergency repairs and modernization of school facilities to certain eligible local educational agencies (LEAs) that receive Impact Aid formula funds. The proposed regulations amend a provision regarding the submission of applications for these Federal funds, which the Department believes will improve the administration and distribution of funds under this program. The proposed regulations would apply to the grant competitions after the competition for fiscal year (FY) 2009 funds.

**DATES:** We must receive your comments on or before September 13, 2010.

**ADDRESSES:** Submit your comments through the Federal eRulemaking Portal or via postal mail, commercial delivery, or hand delivery. We will not accept comments by fax or by e-mail. Please submit your comments only one time, in order to ensure that we do not receive duplicate copies. In addition, please include the Docket ID at the top of your comments.

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov* to submit your comments electronically.

Information on using Regulations.gov, including instructions for accessing agency documents, submitting comments, and viewing the docket, is available on the site under "How To Use This Site."

• *Postal Mail, Commercial Delivery, or Hand Delivery.* If you mail or deliver your comments about these proposed regulations, address them to Catherine Schagh, Director, Impact Aid Program, U.S. Department of Education, 400 Maryland Avenue, SW., Room 3E105, LBJ, Washington, DC 20202.

**Privacy Note:** The Department's policy for comments received from members of the public (including those comments submitted by mail, commercial delivery, or hand delivery) is to make these submissions available for public viewing in their entirety on the Federal eRulemaking Portal at *http://www.regulations.gov.* Therefore, commenters should be careful to include in their comments only information that they wish to make publicly available on the Internet.

**FOR FURTHER INFORMATION CONTACT:** Kristen Walls-Rivas, Impact Aid Program, U.S. Department of Education, 400 Maryland Avenue, SW., Washington, DC 20202. Telephone: (202) 260–1357 or by e-mail: *Kristen.Walls-Rivas@ed.gov.*

If you use a telecommunications device for the deaf (TDD), call the Federal Relay Service (FRS), toll free, at 1–800–877–8339.

Individuals with disabilities can obtain this document in an accessible format (*e.g.,* braille, large print, audiotape, or computer diskette) on request to the contact person listed in this section.

**SUPPLEMENTARY INFORMATION:**

## Invitation To Comment

We invite you to submit comments regarding these proposed regulations.

We invite you to assist us in complying with the specific requirements of Executive Order 12866 and its overall requirement of reducing regulatory burden that might result from these proposed regulations. Please let us know of any further opportunities we should take to reduce potential costs or increase potential benefits while preserving the effective and efficient administration of the program.

During and after the comment period, you may inspect all public comments about these proposed regulations by accessing Regulations.gov. You may also inspect the comments, in person, in Room 3C101, 400 Maryland Avenue, SW., Washington, DC, between the hours of 8:30 a.m. and 4:00 p.m., Eastern time, Monday through Friday of each week except Federal holidays.

## Assistance to Individuals With Disabilities in Reviewing the Rulemaking Record

On request, we will supply an appropriate aid, such as a reader or print magnifier, to an individual with a disability who needs assistance to review the comments or other documents in the public rulemaking record for these proposed regulations. If you want to schedule an appointment for this type of aid, please contact the person listed under **FOR FURTHER INFORMATION CONTACT**.

## Background

The Impact Aid Discretionary Construction Program is authorized under section 8007(b) of the ESEA.

The purpose of this program is to assist certain eligible Impact Aid LEAs in meeting the emergency or modernization needs of their school facilities. The current regulations governing the Impact Aid Discretionary Construction Program are in 34 CFR 222.170 through 222.196 and were most recently amended on March 15, 2004, to govern the FY 2003 and subsequent grant competitions (69 FR 12234). Through this notice, we are proposing to amend § 222.183 governing the submission of multiple grant applications. The proposed amendment is based on our experience in implementing this program since the most recent regulations were published in 2004.

## Significant Proposed Regulations

*Section 222.183 How does an LEA apply for a grant?*

*Statute:* Section 8007(b)(6) of the ESEA provides that an LEA that desires to receive a grant shall submit an application to the Secretary at such time, in such manner, and accompanied by such information as the Secretary may require.

*Current Regulations:* Current § 222.183 specifies several application requirements, and provides that a local educational agency (LEA) may submit multiple applications for multiple educational facilities in a fiscal year.

*Proposed Regulations:* The proposed regulations would limit an LEA to submitting one application for one facility per competition.

*Reasons:* In 2004, when the most recent Impact Aid Discretionary Construction Program regulations were issued, the Department did not know how many LEAs would qualify for funding nor what the magnitude of their need would be under this program. Accordingly, we originally provided in the regulations that an applicant could submit multiple applications per competition so that the applicant would be able to separate into different applications different types of projects with different levels of urgency.

Our intent was to make the competition flexible and to ensure that we received enough high-quality applications to enable the Department to use the full appropriated amount.

The competitions under this program are based primarily on statutorily mandated objective and subjective scoring. Objective scores measure: the percentage of students in the LEA who are eligible under section 8003 of the Impact Aid Program; the percentage of those students enrolled in the building for which funding is sought; the area of tax-exempt Federal property in the LEA; and the LEA's assessed value of real property and its tax rate. If an LEA receives high scores on these objective criteria, its proposed projects may rank higher on the funding list than the condition of its building(s) (i.e., the subjective measure) would warrant, and LEAs with more urgent facility needs would not be funded. This has resulted in the unintended consequence of a few LEAs receiving high percentages of the available funding. For example, from the FY 2006 competition, one LEA received 13 out of 25 grants and 73 percent of the funds.

In addition, since this program was first funded and operated under the March 15, 2004, final regulations, the appropriation levels have decreased significantly, from $27 million (in FY 2003) to approximately $17 million (in FY 2009). With this reduction and given the scoring structure, if a single applicant receives multiple awards, an even smaller portion of the remaining funds is available for distribution to other LEAs, which generally has meant that the funds could not reach a larger pool of the eligible applicants.

These proposed regulations would give more applicants an opportunity to receive grants to remediate urgent emergency and modernization needs in their school facilities. We seek comments on alternative approaches that would permit the Department to distribute grant funding to a larger number of LEAs.

*Executive Order 12866:* Under Executive Order 12866, the Secretary must determine whether the regulatory action is "significant" and therefore subject to the requirements of the Executive order and subject to review by the Office of Management and Budget (OMB). Section 3(f) of Executive Order 12866 defines a "significant regulatory action" as an action likely to result in a rule that may (1) Have an annual effect

on the economy of $100 million or more, or adversely affect a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities in a material way (also referred to as an "economically significant" rule); (2) create serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive order. Pursuant to the terms of the Executive order, it has been determined that this regulatory action is not a significant regulatory action subject to OMB review under section 3(f) of Executive Order 12866.

We have also determined that this regulatory action does not unduly interfere with State, local, and tribal governments in the exercise of their governmental functions.

*Clarity of the Regulations*

Executive Order 12866 and the Presidential memorandum on "Plain Language in Government Writing" require each agency to write regulations that are easy to understand.

The Secretary invites comments on how to make these proposed regulations easier to understand, including answers to questions such as the following:

- Are the requirements in the proposed regulations clearly stated?
- Do the proposed regulations contain technical terms or other wording that interferes with their clarity?
- Does the format of the proposed regulations (grouping and order of sections, use of headings, paragraphing, etc.) aid or reduce their clarity?
- Would the proposed regulations be easier to understand if we divided them into more (but shorter) sections?
- Could the description of the proposed regulations in the **SUPPLEMENTARY INFORMATION** section of this preamble be more helpful in making the proposed regulations easier to understand? If so, how?
- What else could we do to make the proposed regulations easier to understand?

To send any comments that concern how the Department could make these proposed regulations easier to understand, see the instructions in the **ADDRESSES** section of this preamble.

*Regulatory Flexibility Act Certification*

The Secretary certifies that these proposed regulations would not have a significant economic impact on a substantial number of small entities. The small entities that would be affected by these regulations are small LEAs receiving Federal funds under this program. In the FY 2008 grant competition, fewer than 50 applications that were eligible to be evaluated by field readers were from small entities. In addition, we do not believe that the regulations would have a significant economic impact on the limited number of small LEAs affected, because the regulations would not impose excessive regulatory burdens or require unnecessary Federal supervision.

The proposed regulations would benefit both small and large entities in that they would provide more equitable opportunities for funding of school construction needs.

The proposed regulations would impose minimal paperwork burden requirements for all applicants and minimal requirements with which the grant recipients must comply. However, the Secretary specifically invites comments on the effects of the proposed regulations on small entities, and on whether there may be further opportunities to reduce any potential adverse impact or increase potential benefits resulting from these proposed regulations without impeding the effective and efficient administration of the Impact Aid Discretionary Construction Program. Commenters are requested to describe the nature of any effect and provide empirical data and other factual support for their views to the extent possible.

*Paperwork Reduction Act of 1995*

The proposed amendment to § 222.183 would modify the information collection requirements in that section; the Department does not believe the proposed changes add any new burden or decrease any burden to local educational agencies. The burden associated with § 222.183 was approved by OMB under OMB Control Number 1810–0687, which expires 9/30/2011. The proposed amendment would limit the number of applications to one per LEA. The Department expects that LEAs that have in the past scored lower on the objective scoring criteria will be encouraged to apply and the total number of applications will remain the same.

*Intergovernmental Review*

This program is subject to Executive Order 12372 and the regulations in 34 CFR part 79. One of the objectives of the Executive order is to foster an intergovernmental partnership and a strengthened federalism. The Executive order relies on processes developed by State and local governments for coordination and review of proposed Federal financial assistance.

This document provides early notification of our specific plans and actions for this program.

*Assessment of Educational Impact*

In accordance with section 411 of the General Education Provisions Act, 20 U.S.C. 1221e–4, the Secretary particularly requests comments on whether these proposed regulations would require transmission of information that any other agency or authority of the United States gathers or makes available.

*Electronic Access to This Document:* You can view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Adobe Portable Document Format (PDF) on the Internet at the following site: *http://www.ed.gov/news/fedregister.* To use PDF you must have Adobe Acrobat Reader, which is available free at this site.

**Note:** The official version of this document is the document published in the **Federal Register.** Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available on GPO Access at: *http://www.gpoaccess.gov/nara/index.html.*

(Catalog of Federal Domestic Assistance Number 84.041 Impact Aid Discretionary Construction Program)

**List of Subjects in 34 CFR Part 222**

Education, Education of children with disabilities, Educational facilities, Elementary and secondary education, Federally affected areas, Grant programs-education, Indians—education, Public housing, Reporting and recordkeeping requirements, School construction, Schools.

**Thelma Meléndez de Santa Ana,**

*Assistant Secretary for Elementary and Secondary Education.*

For the reasons discussed in the preamble, the Secretary proposes to amend part 222 of title 34 of the Code of Federal Regulations.

## PART 222—IMPACT AID PROGRAMS

1. The authority citation for part 222 continues to read as follows:

**Authority:** 20 U.S.C. 7701–7714, unless otherwise noted.

2. Section 222.183 is amended by revising paragraph (a) to read as follows:

**§ 222.183 How does an LEA apply for a grant?**

(a) To apply for funds under this program, an LEA may submit only one application for one educational facility for each competition.

* * * * *

[FR Doc. 2010–20065 Filed 8–12–10; 8:45 am]

**BILLING CODE 4000–01–P**

## ENVIRONMENTAL PROTECTION AGENCY

## 40 CFR Part 93

**[EPA–HQ–OAR–2009–0128; FRL–9188–5]**

**RIN 2060–AP57**

## Transportation Conformity Rule Restructuring Amendments

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

**ACTION:** Proposed rule.

**SUMMARY:** In this action, EPA is proposing to restructure several sections of the transportation conformity rule so that they would apply to any new or revised National Ambient Air Quality Standards (NAAQS) that are established in the future for transportation-related criteria pollutants. This proposal should reduce the need to amend the rule in the future for the sole purpose of referencing specific new or revised NAAQS. EPA is also proposing in this action that a near-term year would have to be analyzed when using the budget test when an area's attainment date has passed, or when an area's attainment date has not yet been established. The budget test demonstrates that the total on-road emissions projected for a metropolitan transportation plan or TIP are within the emissions limits ("budgets") established by the state air quality implementation plan ("SIP").

This action also includes several administrative proposals and clarifications to improve implementation of the rule.

The Clean Air Act (CAA) requires federally supported transportation plans, transportation improvement programs, and projects to be consistent with ("conform to") the purpose of the state air quality implementation plan. The U.S. Department of Transportation (DOT) is EPA's Federal partner in implementing the transportation conformity regulation. EPA has consulted with DOT, and they concur with this proposed rule.

**DATES:** Written comments on this proposal must be received on or before September 13, 2010.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA–HQ–OAR–2009–0128, by one of the following methods:

- *http://www.regulations.gov:* Follow the online instructions for submitting comments.
- *E-mail: a-and-r-docket@epa.gov.*
- *Fax:* (202) 566–9744.
- *Mail:* Air Docket, Environmental Protection Agency, Mailcode: 2822T, 1200 Pennsylvania Ave., NW., Washington, DC 20460, Attention Docket ID No. EPA–HQ–OAR–2009–0128. Please include a total of two copies.
- *Hand Delivery:* Air Docket, Environmental Protection Agency: EPA West Building, EPA Docket Center (Room 3334), 1301 Constitution Ave., NW., Washington, DC, Attention Docket ID No. EPA–HQ–OAR–2009–0128. Please include two copies. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

*Instructions:* Direct your comments to Docket ID No. EPA–HQ–OAR–2009–0128. 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 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 *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, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket visit the EPA Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm.* For additional instructions on submitting comments, go to Section I. of the **SUPPLEMENTARY INFORMATION** section of this document.

*Docket:* All documents in the docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some information is not publicly available, *e.g.,* CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy at the Air and Radiation Docket, EPA/DC, EPA West, Room 3334, 1301 Constitution Ave., NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744 and the telephone number for the Air and Radiation Docket is (202) 566–1742.

**FOR FURTHER INFORMATION CONTACT:** Patty Klavon, State Measures and Conformity Group, Transportation and Regional Programs Division, Environmental Protection Agency, 2000 Traverwood Drive, Ann Arbor, MI 48105, e-mail address: *klavon.patty@epa.gov,* telephone number: (734) 214–4476, fax number: (734) 214–4052; or Laura Berry, State Measures and Conformity Group, Transportation and Regional Programs Division, Environmental Protection Agency, 2000 Traverwood Drive, Ann Arbor, MI 48105, e-mail address: *berry.laura@epa.gov,* telephone number: (734) 214–4858, fax number: (734) 214–4052.

**SUPPLEMENTARY INFORMATION:** The contents of this preamble are listed in the following outline:

## I. General Information

*A. Does this action apply to me?*

Entities potentially regulated by the transportation conformity rule are those that adopt, approve, or fund transportation plans, programs, or projects under title 23 U.S.C. or title 49 U.S.C. chapter 53. Regulated categories and entities affected by today's action include:

| Category | Examples of regulated entities |
|---|---|
| Local government | Local transportation and air quality agencies, including metropolitan planning organizations (MPOs). |
| State government | State transportation and air quality agencies. |
| Federal government | Department of Transportation (Federal Highway Administration (FHWA) and Federal Transit Administration (FTA)). |

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this proposal. This table lists the types of entities of which EPA is aware that potentially could be regulated by the transportation conformity rule. Other types of entities not listed in the table could also be regulated. To determine whether your organization is regulated by this action, you should carefully examine the applicability requirements in 40 CFR 93.102. If you have questions regarding the applicability of this action to a particular entity, consult the persons listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

*B. What should I consider as I prepare my comments for EPA?*

1. Submitting CBI

Do not submit this information to EPA through *http://www.regulations.gov* or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD ROM that you mail to EPA, mark the outside of the disk or CD ROM as CBI and then identify electronically within the disk or CD ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. Tips for Preparing Your Comments

When submitting comments, remember to:

- Identify the rulemaking by docket number and other identifying information (subject heading, **Federal Register** date and page number).
- Follow directions—The Agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.
- Explain why you agree or disagree, suggest alternatives and substitute language for your requested changes.
- Describe any assumptions and provide any technical information and/or data that you used.
- If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.
- Provide specific examples to illustrate your concerns, and suggest alternatives.
- Explain your views as clearly as possible, avoiding the use of profanity or personal threats.
- Make sure to submit your comments by the comment period deadline identified.

3. Docket Copying Costs

You may be required to pay a reasonable fee for copying docket materials.

*C. How do I get copies of this proposed rule and other documents?*

1. Docket

EPA has established an official public docket for this action under Docket ID No. EPA–HQ–OAR–2009–0128. You can get a paper copy of this **Federal Register** document, as well as the documents specifically referenced in this action, any public comments received, and other information related to this action at the official public docket. *See* the **ADDRESSES** section for its location.

2. Electronic Access

You may access this **Federal Register** document electronically through EPA's Transportation Conformity Web site at *http://www.epa.gov/otaq/stateresources/transconf/index.htm.* You may also access this document electronically under the **Federal Register** listings at *http://www.epa.gov/fedrgstr/.*

An electronic version of the official public docket is available through *http://www.regulations.gov.* You may use *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, select "search," then key in the appropriate docket identification number.

Certain types of information will not be placed in the electronic public docket. Information claimed as CBI and other information for which disclosure is restricted by statute is not available for public viewing in the electronic public docket. EPA's policy is that copyrighted material will not be placed in the electronic public docket but will be available only in printed, paper form in the official public docket.

To the extent feasible, publicly available docket materials will be made available in the electronic public docket. When a document is selected from the index list in EPA Dockets, the system will identify whether the document is available for viewing in the electronic public docket. Although not all docket materials may be available electronically, you may still access any of the publicly available docket materials through the docket facility identified in the **ADDRESSES** section. EPA intends to provide electronic access in the future to all of the publicly available docket materials through the electronic public docket.

Public comments submitted on computer disks that are mailed or delivered to the docket will be transferred to the electronic public docket. Public comments that are mailed or delivered to the docket will be scanned and placed in the electronic public docket. Where practical, physical objects will be photographed, and the photograph will be placed in the electronic public docket along with a brief description written by the docket staff.

For additional information about the electronic public docket, visit the EPA Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm.*

## II. Background on the Transportation Conformity Rule

*A. What is transportation conformity?*

Transportation conformity is required under Clean Air Act (CAA) section 176(c) (42 U.S.C. 7506(c)) to ensure that transportation plans, transportation improvement programs (TIPs) and federally supported highway and transit projects are consistent with ("conform to") the purpose of the state air quality implementation plan (SIP). Conformity to the purpose of the SIP means that transportation activities will not cause new air quality violations, worsen existing violations, or delay timely attainment or achievement of interim emission reductions or milestones of the relevant NAAQS. Transportation conformity (hereafter, "conformity") applies to areas that are designated nonattainment, and those areas redesignated to attainment after 1990 ("maintenance areas") for transportation-related criteria pollutants: Carbon monoxide (CO), ozone, nitrogen dioxide ($NO_2$) and particulate matter ($PM_{2.5}$ and $PM_{10}$).[1]

EPA's conformity rule (40 CFR parts 51 and 93) establishes the criteria and procedures for determining whether transportation activities conform to the SIP. EPA first promulgated the conformity rule on November 24, 1993 (58 FR 62188), and subsequently published several other amendments. DOT is EPA's Federal partner in implementing the conformity regulation. EPA has consulted with DOT, and they concur with this proposed rule.

*B. Why are we issuing this proposed rule?*

EPA has already undertaken two conformity rulemakings primarily for the purpose of addressing a new or revised NAAQS. *See* the March 24, 2010 final rule and the July 1, 2004 final rule (75 FR 14260, and 69 FR 40004, respectively). Due to other CAA requirements, EPA will continue to establish new or revised NAAQS in the future. Therefore, EPA is proposing to restructure two sections of the conformity rule, 40 CFR 93.109 and 93.119, and is proposing minor changes for definitions in 40 CFR 93.101, so that the rule's requirements would clearly apply to areas designated for future new or revised NAAQS. These proposed changes are intended to minimize the need to make administrative updates to the conformity rule merely to reference a specific new or revised NAAQS. EPA believes that these proposed revisions would provide more certainty to implementers without compromising air quality benefits from the current program. These proposed changes are found in Sections III. and V. of today's proposal.

EPA is also proposing to clarify the additional conformity test option currently available to nonattainment areas that meet the criteria of EPA's clean data[2] regulations or policies for certain NAAQS, and to extend that flexibility to any nonattainment areas covered by such a regulation or policy. *See* Section IV. of today's proposal for further details. EPA is also clarifying that conformity requirements apply in areas designated nonattainment or maintenance for a transportation-related secondary NAAQS. *See* Section VI. for further information.

In addition, EPA is proposing that a near-term year would have to be analyzed when using the budget test when an area's attainment date has passed, or when an area's attainment date has not yet been established. The budget test demonstrates that the total on-road emissions projected for a metropolitan transportation plan or TIP are within the emissions limits ("budgets") established by the state air quality implementation plan ("SIP"). Section VII. of this preamble describes this issue and EPA's proposed change for budget test analysis years. Finally, Section VIII. covers how today's proposal affects conformity SIPs.[3]

Two recent actions are useful background for today's proposed rule. In the March 24, 2010 Transportation Conformity Rule $PM_{2.5}$ and $PM_{10}$ Amendments ("PM Amendments") rulemaking, EPA provided conformity procedures for state and local agencies in areas that are designated nonattainment for the 2006 24-hour $PM_{2.5}$ NAAQS ("2006 $PM_{2.5}$ NAAQS")(75 FR 14260). The other rulemaking that provides useful background is the final rule EPA published on July 1, 2004 (69 FR 40004). In this rulemaking, EPA provided conformity procedures for state and local agencies under the 8-hour ozone and $PM_{2.5}$ NAAQS (or "1997 ozone" and "1997 $PM_{2.5}$" NAAQS, respectively).[4] *See* EPA's Web site at *http://www.epa.gov/otaq/stateresources/transconf/index.htm* for further information about any of EPA's transportation conformity rulemakings.[5]

## III. Restructure of 40 CFR 93.109

*A. Overview*

Conformity determinations for transportation plans, TIPs, and projects not from a conforming transportation plan and TIP must include a regional emissions analysis that fulfills CAA requirements. The conformity rule provides for several different regional conformity tests that satisfy statutory requirements in different situations. Once a SIP with a motor vehicle emissions budget ("budget") is submitted for a NAAQS and EPA finds the budget adequate for conformity purposes or approves it as part of the SIP, conformity must be demonstrated using the budget test for that pollutant or precursor, as described in 40 CFR 93.118.

EPA has amended the conformity rule on two prior occasions to address a new or revised NAAQS. In the July 1, 2004 final rule (69 FR 40004), EPA amended 40 CFR 93.109 by adding new paragraphs to describe the regional conformity tests for the 1997 ozone areas that do not have 1-hour ozone budgets, 1997 ozone areas that have 1-hour ozone budgets, and 1997 $PM_{2.5}$ areas. Also, in the March 24, 2010 PM Amendments final rule (75 FR 14260), EPA amended 40 CFR 93.109 again by adding two new paragraphs to describe the regional conformity tests for 2006 $PM_{2.5}$ areas without 1997 $PM_{2.5}$ budgets, and 2006 $PM_{2.5}$ areas that have 1997 $PM_{2.5}$ budgets.

EPA believes it would be useful to restructure 40 CFR 93.109 to eliminate repetition and reduce the need to update the rule each time a NAAQS is promulgated. The same hierarchy of conformity tests as described below in B. of this section generally applies to all areas where conformity is required, and for the reasons described below, EPA believes it would apply to all future areas, regardless of pollutant or NAAQS. Given that CAA section 109(d)(1) requires EPA to revisit the NAAQS for criteria pollutants at least every five

[1] 40 CFR 93.102(b)(1) defines $PM_{2.5}$ and $PM_{10}$ as particles with an aerodynamic diameter less than or equal to a nominal 2.5 and 10 micrometers, respectively.

[2] Clean data refers to air quality monitoring data determined by EPA to indicate attainment of the NAAQS. Note that we are proposing a minor change to the existing definition of clean data found in 40 CFR 93.101, *see* Section IV. of today's notice.

[3] The transportation conformity SIP includes a state's specific criteria and procedures for certain aspects of the transportation conformity process. For more information about transportation conformity SIPs, see EPA's "Guidance for Developing Transportation Conformity State Implementation Plans (SIPs)", (EPA–420–B–09–001, January 2009).

[4] The July 1, 2004 final rule described regional conformity tests for areas designated nonattainment or maintenance for the 8-hour ozone NAAQS codified at 40 CFR 50.10 and for areas designated nonattainment or maintenance for the $PM_{2.5}$ NAAQS codified at 40 CFR 50.7.

[5] At this Web site, click on "Regulations" to find all of EPA's proposed and final rules as well the current transportation conformity regulations.

years, and that EPA is in the process of considering revisions to other NAAQS per this requirement, EPA anticipates other NAAQS revisions will be made in the future that will be subject to conformity requirements.

In the existing conformity regulation, 40 CFR 93.109 includes nine paragraphs, (c) through (k), one for each of the various types of nonattainment and maintenance areas. Each of these paragraphs contains the requirements that apply for that specific pollutant, NAAQS, and/or area boundary scenario, but each paragraph's requirements are consistent with the hierarchy of regional conformity tests described below in B. of this section. Therefore, there is redundancy in 40 CFR 93.109 as it currently exists.

*B. Proposal*

Today, EPA is proposing to restructure this section to provide the requirements for regional conformity tests in one paragraph, and project-level conformity tests in another. Under today's proposal, existing paragraphs (c) through (k) would be replaced with two paragraphs:

- Regional conformity tests, which would be covered by newly proposed paragraph § 93.109(c); and,
- Project-level conformity tests, which would be covered by newly proposed paragraph § 93.109(d).

EPA is not proposing substantive changes to this section of the conformity rule; therefore, we are taking comments only on the proposed restructuring of 40 CFR 93.109, not on the underlying requirements of the regulation.

*New paragraph (c).* Under today's proposal, § 93.109(c) would include requirements for using the budget test and/or interim emissions tests in the same manner as in the existing regulation. That is, the following general hierarchy of regional conformity tests that is found in the existing regulations would be retained by the new structure:

- First, a nonattainment or maintenance area for a specific NAAQS must use the budget test, if the area has budgets from an adequate or approved SIP for that specific NAAQS (proposed § 93.109(c)(1)). For example, once a 2010 ozone nonattainment or maintenance area has adequate or approved SIP budgets for the 2010 ozone NAAQS, it would use those budgets for the budget test as the regional test of conformity;
- Second, if an area does not have such budgets but has budgets from an adequate or approved SIP that addresses a different NAAQS for the same criteria pollutant, these budgets must be used in the budget test. Where such budgets do not cover the entire area, the interim emissions test(s) may also have to be used (proposed § 93.109(c)(2)). For example, before a 2010 ozone area has adequate or approved budgets for the 2010 ozone NAAQS, it would use the budget test, using budgets from an adequate or approved SIP for an earlier ozone NAAQS, if it has them.[6] If these budgets do not cover the entire 2010 ozone area, the interim emissions test(s) may also have to be used;
- Third, if an area has no adequate or approved budgets for that criteria pollutant at all, it must use the interim emissions test(s), as described in 40 CFR 93.119 (proposed § 93.109(c)(3)). For example, if a 2010 ozone area has no adequate or approved budgets for any ozone NAAQS, it would use the interim emissions test(s), as described in 40 CFR 93.119.

All of the requirements and flexibilities in the existing rule that apply for regional conformity tests for specific pollutants would be retained in proposed § 93.109(c)(4) and (c)(6). In addition, EPA is proposing to expand the clean data[7] conformity option in 40 CFR 93.109(c)(5), (d)(5) and (e)(4) to all clean data areas for which EPA has a clean data regulation or policy (proposed § 93.109(c)(5)). *See* Section IV. below for further information.

*New paragraph (d).* With regard to project-level requirements, today's proposed paragraph § 93.109(d) places the existing rule's requirements for hot-spot analyses of projects in CO, $PM_{10}$, and $PM_{2.5}$ nonattainment and maintenance areas together in one paragraph (proposed § 93.109(d)(1), (2), and (3)). These requirements would be unchanged from the existing regulation.[8]

*Related proposed amendments to 40 CFR 93.101.* EPA also proposes to remove the definitions for "1-hour ozone NAAQS,", "8-hour ozone NAAQS", "24-hour $PM_{10}$ NAAQS", "1997 $PM_{2.5}$ NAAQS", "2006 $PM_{2.5}$ NAAQS", and "Annual $PM_{10}$ NAAQS" found in 40 CFR 93.101 of the conformity rule. Under today's proposed reconstruction of 40 CFR 93.109, these definitions would no longer be necessary because the proposed regulatory text for 40 CFR 93.109 would apply for any and all NAAQS of a pollutant for which conformity applies.

*C. Rationale for Restructuring of § 93.109*

EPA believes that section 93.109 of the conformity rule can be restructured because a recent court decision has already established the legal parameters for regional conformity tests. In *Environmental Defense* v. *EPA,* 467 F.3d 1329 (DC Cir. 2006), the Court of Appeals for the District of Columbia Circuit held that where a motor vehicle emissions budget developed for the revoked 1-hour ozone NAAQS existed in an approved SIP, that budget must be used to demonstrate conformity to the 8-hour ozone NAAQS until the SIP is revised to include budgets for the new (or revised) NAAQS. EPA incorporated the court's decision for ozone conformity tests in its January 24, 2008 final rule (73 FR 4434). While the *Environmental Defense* case concerned ozone, EPA believes the court's holding is relevant for other pollutants for which conformity must be demonstrated. Consequently, EPA believes that the hierarchy of regional conformity tests described above, which is already found in the existing rule for 8-hour ozone and 2006 $PM_{2.5}$ areas, would apply for any NAAQS of a pollutant for which conformity applies.

Today's proposed restructuring would reduce the likelihood that EPA would have to amend the conformity rule when new or revised NAAQS are promulgated, which would have several benefits. First, implementers would know the requirements for regional conformity tests for any potential area designated nonattainment for a new or revised NAAQS, even before such area's designation. Thus, implementers may have more time to determine conformity of a transportation plan and TIP and would not need to wait for any additional conformity rulemaking from EPA. Second, reducing the need to amend the conformity regulation each time a NAAQS change is made would save government resources and taxpayer dollars and also reduce stakeholder effort needed to keep track of regulatory changes.

EPA's proposed changes to 40 CFR 93.109, along with today's proposed elimination of definitions in 40 CFR 93.101 and proposed changes for the baseline year in 40 CFR 93.119 (*see* Section V.), should make the rule sufficiently flexible to cover most future NAAQS changes, such as promulgation

[6] It is possible that the adequate or approved budget for an earlier ozone NAAQS could be an adequate or approved 1-hour ozone budget.

[7] Clean data refers to air quality monitoring data determined by EPA to indicate attainment of the NAAQS. Note that we are proposing a minor change to the existing definition of clean data found in 40 CFR 93.101, see Section IV. of today's notice.

[8] Project-level conformity determinations are typically developed during the National Environmental Policy Act (NEPA) process, although conformity requirements are separate from NEPA-related requirements. Today's proposal to restructure 40 CFR 93.109 does not affect how NEPA-related requirements are implemented in the field.

of a new or revised NAAQS or revocation of a NAAQS.

EPA is not proposing to revise regional conformity test requirements in 40 CFR 93.109 [9] or hot-spot analyses requirements for existing areas and is therefore not seeking comment on these requirements in existing areas. Further, today's proposal is consistent with the regional conformity test requirements for 2006 $PM_{2.5}$ areas and $PM_{10}$ areas described in the March 24, 2010 PM Amendments final rule. The rationale for the required regional tests has been described in previous rulemakings as well. The rationale for the requirements for project-level conformity tests in CO, $PM_{2.5}$, and $PM_{10}$ areas has also been described in previous rulemakings,[10] and EPA is not proposing to revise and is therefore not seeking comment on those requirements.

*Request for comments.* While EPA believes today's changes proposed for 40 CFR 93.109 are clear and concise, we also recognize that there could be other ways to organize this section to achieve the same result of accommodating the promulgation of future NAAQS. For example, another possible structure for this section could be to create separate paragraphs containing the conformity tests required for each of the pollutants for which conformity applies: Ozone, CO, $PM_{10}$, $PM_{2.5}$, and $NO_2$. Under this alternative structure, the requirements for each pollutant would be wholly contained in one specific paragraph but the same requirements for regional conformity tests would be repeated five times in the regulatory text.

EPA is specifically seeking comment on the overall organization of this section, whether it be (1) By regional conformity test and project-level test requirements as in today's proposed regulatory text, (2) by each of the five pollutants for which conformity applies, or (3) by another method that achieves the goals described in today's proposal to restructure the conformity provisions in this section, without affecting the substantive requirements of the regulation. EPA requests that commenters provide the reasons for their preferences if possible, as these reasons are especially valuable to EPA in making a final decision. Where commenters recommend an alternative structure, please provide example text.

## IV. Additional Option for Areas That Qualify for EPA's Clean Data Regulations or Policies

### *A. Overview*

Currently, sections 93.109(c)(5), (d)(5), and (e)(4) of the conformity rule provide an additional regional conformity test option for moderate and above 1-hour and 8-hour ozone nonattainment areas that meet the criteria of EPA's existing clean data regulation and policy.[11] Today's conformity proposal would clarify this flexibility and extend this flexibility to any nonattainment areas that are covered by EPA's clean data regulations or clean data policies.[12]

### *B. Proposal*

Today, EPA is proposing to clarify that any nonattainment area that EPA determines has air quality monitoring data that meet the requirements of 40 CFR parts 50 and 58 and that show attainment of the NAAQS—a "clean data" area [13]—can choose to complete a regional conformity analysis using the most recent year of clean data as the motor vehicle emissions budget(s) rather than using the interim emissions test(s) per 40 CFR 93.119 if the following are true:

- The state or local air quality agency requests that budgets be established in conjunction with EPA's determination of attainment (Clean Data) rulemaking for the respective NAAQS, and EPA approves the request; and,
- These areas have not submitted a maintenance plan for the respective NAAQS and EPA has determined that these areas are not subject to the CAA reasonable further progress and attainment demonstration requirements for the respective NAAQS.

Otherwise, clean data areas for a relevant NAAQS must complete a regional conformity analysis using either the budget test if they have adequate or approved budgets (per 40 CFR 93.109 and 93.118), or the interim emissions test(s) per 40 CFR 93.119 if they do not have adequate or approved budgets.

The proposed regulatory text for this flexibility is found in § 93.109(c)(5), and would clarify that the state or local air quality agency would have to make the request that the emissions in the most recent year for which the area is attaining (*i.e.,* the most recent year that the area has "clean data") be used as budgets, and that EPA would have to approve that request. These steps are in the current regulation; today's proposed regulatory text would simply make them more explicit and would extend them to any nonattainment area covered by EPA's clean data regulations or policies.

EPA is also proposing to update the definition of "clean data" in 40 CFR 93.101 to describe this term more accurately. The updated definition would reference the appropriate requirements at 40 CFR part 50, as well as part 58. The reference to 40 CFR part 58 is included in the existing definition.

We are seeking comments on the proposal to extend this flexibility to use clean data budgets for any NAAQS for which EPA has a clean data regulation or policy. We are not seeking comments on the existing clean data regulation and policy and how they currently apply to ozone nonattainment areas under the conformity rule.

### *C. Rationale*

Today's proposed clarification for clean data areas is consistent with the current conformity rule. Options for conformity tests for clean data areas remain the same, although today's proposal would extend the additional flexibility to use clean data budgets to any nonattainment areas where EPA develops a clean data regulation or policy for the relevant NAAQS. The regulatory text for this proposal is found

[9] EPA is proposing to include a near-term analysis year requirement for the SIP budget test in 40 CFR 93.118. See Section VII. of today's proposal for further details.

[10] For further details on project-level conformity test requirements, please refer to the March 10, 2006 final rule (71 FR 12469–12506). See also EPA's January 24, 2008 final rule (73 FR 4432–4434), EPA's July 1, 2004 final rule (69 FR 40036–40037; 40056–40058), the August 15, 1997 final rule (62 FR 43798), and the November 24, 1993 final rule (58 FR 62199–62201; 62207; 62212–62213).

[11] For further details on EPA's clean data policy for ozone areas, please refer to July 1, 2004 final rule (69 FR 40019–40020). See also EPA's November 29, 2005 Phase 2 Ozone Implementation rulemaking for the 1997 ozone NAAQS (70 FR 71644–71646) and 40 CFR 51.918. EPA had also previously issued a policy memorandum on May 10, 1995 that addressed certain SIP requirements of moderate and above 1-hour ozone areas. This memorandum is entitled, "Reasonable Further Progress, Attainment Demonstrations, and Related Requirements of Ozone Nonattainment Areas Meeting the Ozone National Ambient Air Quality Standard," and is available on EPA's Web site at: *http://www.epa.gov/ttn/caaa/t1/memoranda/clean15.pdf.*

[12] In addition to EPA's clean data regulation and policy for ozone areas, EPA also promulgated a clean data regulation for the $PM_{2.5}$ NAAQS. See EPA's April 25, 2007 Phase 1 $PM_{2.5}$ Implementation rulemaking for the 1997 $PM_{2.5}$ NAAQS (72 FR 20586) and 40 CFR 51.1004(c). EPA had previously issued a policy memorandum on December 14, 2004 on this subject. This memorandum is entitled, "Clean Data Policy for the Fine Particle National Ambient Air Quality Standards," and is available on EPA's Web site at: *http://www.epa.gov/pmdesignations/1997standards/documents/Clean_Data_Policy.pdf.*

EPA has also applied its clean data policy in making determinations of attainment in $PM_{10}$ nonattainment areas. For example, see the October 30, 2006 final rule (71 FR 63642) for the finding of attainment for the San Joaquin Valley, California $PM_{10}$ nonattainment area. See also the February 8, 2006 final rule (71 FR 6352) for the finding of attainment of the Ajo, Arizona $PM_{10}$ nonattainment area, and the March 14, 2006 final rule (71 FR 13021) for the finding of attainment for the Yuma, Arizona $PM_{10}$ nonattainment area.

[13] *See* 40 CFR 93.101.

in proposed § 93.109(c)(5), which would apply to areas designated for any NAAQS.

EPA believes that nonattainment areas that EPA has determined to be attaining a NAAQS (clean data areas) for which EPA has developed a clean data regulation or policy should be extended the same flexibility that the current conformity rule provides to moderate and above 1-hour and 8-hour ozone areas [14] that qualify for EPA's ozone clean data regulation and policy. *See* EPA's previous discussion and rationale for the clean data conformity option in the preamble to the 1996 conformity proposal and 1997 final rule (July 9, 1996, 61 FR 36116, and August 15, 1997, 62 FR 43785, respectively).

For further details on EPA's clean data regulations and policies, please refer to the July 1, 2004 final rule (69 FR 40019–40020). *See* also EPA's November 29, 2005 Phase 2 Ozone Implementation rulemaking for the 1997 ozone NAAQS (70 FR 71644–71646), 40 CFR 51.918, and EPA's April 25, 2007 Clean Air Fine Particle Implementation Rule for the 1997 $PM_{2.5}$ NAAQS (72 FR 20603–20605). *See* also the October 30, 2006 final rule (71 FR 63642), the February 8, 2006 final rule (71 FR 6352) and the March 14, 2006 final rule (71 FR 13021) determinations of attainment for various $PM_{10}$ nonattainment areas using EPA's Clean Data policy.

## V. Baseline Year for Certain Nonattainment Areas

### *A. Overview*

Before an adequate or approved SIP budget is available, conformity for the transportation plan, TIP, or project not from a conforming transportation plan and TIP is demonstrated with one or both of the interim emissions tests, as described in 40 CFR 93.119. The interim emissions tests include different forms of the "build/no-build" test and "baseline year" test. In general, the baseline year test compares emissions from the planned transportation system to emissions that occurred in the relevant baseline year. The build/no-build test compares emissions from the planned (or "build") transportation system with the existing (or "no-build") transportation system in the analysis year. Because EPA has amended this section of the conformity rule two times in the past to add a baseline year for new or revised NAAQS (*See* Section II.B. of today's proposal for details), EPA is proposing today to revise 40 CFR 93.119 to apply more generally to any NAAQS, rather than updating this section of the conformity rule to address a specific NAAQS.

### *B. Proposal*

EPA is proposing to revise 40 CFR 93.119 to define the baseline year by reference to another requirement. Rather than naming a specific year, EPA is proposing to define the baseline year for conformity purposes as the most recent year for which EPA's Air Emissions Reporting Requirements (AERR) (40 CFR 51.30(b)) requires submission of on-road mobile source emissions inventories, as of the effective date of EPA's nonattainment designations for any NAAQS promulgated after 1997. AERR requires on-road mobile source emission inventories to be submitted for every third year, for example, 2002, 2005, 2008, 2011, etc.[15]

This proposed definition establishes the baseline year for conformity purposes for any areas designated nonattainment for a NAAQS that EPA promulgated after 1997. This has already been done for areas designated nonattainment for the 2006 $PM_{2.5}$ NAAQS, which was promulgated on October 17, 2006 (71 FR 61144). *See* the March 24, 2010 PM Amendments final rule (75 FR 14265–14266) for further details. Today's proposed definition is consistent with Option 2 which was finalized for the 2006 $PM_{2.5}$ NAAQS in the PM Amendments final rule, except that in the PM Amendments final rule, this definition applies only to areas designated for a $PM_{2.5}$ NAAQS other than the 1997 $PM_{2.5}$ NAAQS. Today's proposal would apply more generally, for any new or revised NAAQS of any pollutant promulgated after 1997, not just the $PM_{2.5}$ NAAQS. Therefore, for any future NAAQS changes, the conformity rule would not have to be amended merely to establish a new baseline year for conformity purposes; this proposed definition would automatically establish a relevant baseline year. For all future NAAQS, EPA would identify the baseline year that results from today's proposed definition for implementers in guidance and maintain a list of baseline years on EPA's Web site.[16] Once the baseline year is established according to this provision, it would not change (*i.e.,* the baseline year would not be a rolling baseline year for a given NAAQS). Today's proposal would not change the baseline years already established prior to today's proposed rule.

The current requirements for interagency consultation (40 CFR 93.105(c)(1)(i)) would apply to the process to determine the latest assumptions and models for generating baseline year motor vehicle emissions to complete any baseline year test. The baseline year emissions level that is used in conformity would be required to be based on the latest planning assumptions available, the latest emissions model, and appropriate methods for estimating travel and speeds as required by 40 CFR 93.110, 93.111, 93.122 of the current conformity rule.

The baseline year test can be completed with a submitted or draft baseline year motor vehicle emissions SIP inventory, if the SIP reflects the latest information and models. An MPO or state DOT, in consultation with state and local air agencies, could also develop baseline year emissions as part of the conformity analysis. EPA believes that a submitted or draft SIP baseline inventory may be the most appropriate source for completing the baseline year tests for an area's first conformity determination under a new or revised NAAQS. This is due to the fact that SIP inventories are likely to be under development at the same time as these conformity determinations, and such inventories must be based on the latest available data at the time they are developed (CAA section 172(c)(3)).

### *C. Rationale*

EPA believes that today's proposed definition for the baseline year is appropriate for meeting CAA conformity requirements for nonattainment areas and is environmentally protective. Coordinating the conformity baseline year with the year used for SIP planning and an emissions inventory year was EPA's rationale for using 2002 as the baseline year for conformity tests in nonattainment areas for the 1997 ozone NAAQS. As described in the July 1, 2004 final rule (69 FR 40015), EPA selected 2002 as the conformity baseline year because 2002 was identified as the anticipated emissions inventory base year for the SIP planning process under the 1997 ozone NAAQS.[17] EPA continues to believe that coordinating the baseline year for interim emissions tests with other data collection and inventory requirements would allow state and local governments to use their

[14] The 1-hour ozone NAAQS was revoked effective June 15, 2005. Transportation conformity no longer applies for this NAAQS.

[15] These are known as Three-Year Cycle Inventories. *See* 40 CFR 51.30(b) in the EPA's December 17, 2008 final rule (73 FR 76539) for more details.

[16] *See http://www.epa.gov/otaq/stateresources/transconf/baseline.htm.*

[17] Also, the AERR requires submission of point, nonpoint, and mobile source emissions inventories every three years, and 2002 was one of those required years for such updates.

resources more efficiently. EPA also believes it would be important to coordinate the conformity rule's baseline year with a year that is consistent with emission inventory requirements, which will most likely be consistent with the year ultimately used as a baseline for SIP planning for a particular NAAQS as well.

Because the CAA requires EPA to review the NAAQS for possible revision once every five years, the existing conformity rule as structured requires EPA to update the conformity rule to establish a baseline year every time a new or revised NAAQS is promulgated. Therefore, EPA is proposing to generalize the language for the baseline year for areas designated under any NAAQS established after 1997. Adopting this proposal would standardize the process for selecting an appropriate baseline year to use in meeting conformity requirements before SIP budgets have been established for any NAAQS promulgated in the future.

Today's proposed baseline year definition provides implementers with knowledge of the baseline year for any NAAQS promulgated after 1997 upon the effective date of nonattainment designations for that NAAQS, without having to wait for EPA to amend the conformity rule. As a result, MPOs and other implementers would understand conformity requirements for future NAAQS revisions more quickly, which may, in turn, enable them to fully utilize the 12-month conformity grace period to complete conformity determinations for new nonattainment areas.

EPA believes that generalizing the baseline year in the conformity rule would result in an appropriate baseline year for any given NAAQS. This proposed amendment to the conformity rule is based on criteria that have been used for establishing specific baseline years for other NAAQS (58 FR 62191, 69 FR 40014). Therefore, EPA believes that generalizing the baseline year would continue to result in an environmentally protective and appropriate baseline year for conformity under any future NAAQS revisions and is consistent with how conformity has been implemented for new or revised NAAQS in the past.

## VI. Transportation Conformity Requirements for Secondary NAAQS

Based on the CAA conformity provisions, the existing conformity rule, and today's proposal, conformity requirements must be met for all transportation-related criteria pollutants and NAAQS. All of the transportation-related criteria pollutants except CO have a primary NAAQS and a secondary NAAQS. The primary NAAQS protects public health. The secondary NAAQS prevents unacceptable effects on the public welfare, *e.g.,* unacceptable damage to crops and vegetation, buildings and property, and ecosystems (CAA section 109(b)(2)).

CAA section 176(c)(1)(A) states that conformity to a SIP means "conformity to an implementation plan's purpose of eliminating or reducing the severity and number of violations of the national ambient air quality standards and achieving expeditious attainment of such standards * * *" In other words, because the CAA refers to the NAAQS without qualifying them, conformity applies to both the primary and secondary NAAQS for transportation-related criteria pollutants.

EPA has historically set the secondary NAAQS at the same level as the relevant primary NAAQS for transportation-related criteria pollutants (*i.e.,* PM, ozone, nitrogen dioxide). Hence, the conformity rule has not needed to address requirements specifically for areas designated nonattainment only for a secondary NAAQS or designated for both a primary and a different secondary NAAQS for the same pollutant.

However, for example, in its January 19, 2010 (75 FR 2938) proposal to revise the ozone NAAQS, EPA proposed a secondary ozone NAAQS that, if finalized as proposed, would be distinct from the primary ozone NAAQS that was proposed. It is also possible that in the future EPA will propose to establish distinct secondary NAAQS for other transportation-related criteria pollutants.

Because a secondary NAAQS may not have a specified attainment year which is required to be analyzed,[18] EPA is proposing in Section VII. of today's proposal to address analysis year requirements for areas without an established attainment date. EPA would issue guidance as needed to assist areas in implementing conformity requirements for new NAAQS, including any secondary NAAQS for the 2010 ozone NAAQS, if applicable.

[18] This may occur in areas designated nonattainment for a secondary NAAQS which is different from the primary NAAQS. The CAA does not specify an attainment date for such areas. CAA section 172(a)(2)(B) specifies that "[t]he attainment date for an area designated nonattainment with respect to a secondary [NAAQS] shall be the date by which attainment can be achieved as expeditiously as practicable after the date such an area was designated under section 107(d)." For transportation conformity purposes, an attainment date would be established when an attainment demonstration is submitted and SIP budgets are found adequate through the adequacy process or approved through the SIP approval process.

## VII. Analysis of a Near-Term Year in the Budget Test

### *A. Existing Requirements for Analysis Years*

As described earlier, conformity determinations for transportation plans and TIPs include a regional emissions analysis for the budget test and/or interim emissions test, whichever applies in a given area. When these tests are performed, state and local agencies are not required to examine the emissions impacts of every year within the timeframe of the transportation plan. Rather, the conformity rule requires that only certain years be analyzed (40 CFR 93.118(d)) to understand the emissions impacts of planned transportation activities over the timeframe of the entire transportation plan and conformity determination. Emissions in these analysis years must be consistent with budgets, as required by 40 CFR 93.118(b).

Analysis years are those years for which a regional emissions analysis that meets the requirements of 40 CFR 93.110, 93.111, and 93.122 must be run. The analysis year requirements in the existing conformity rule differ slightly between the budget test and the interim emissions tests. The existing rule at 40 CFR 93.118(d)(2) requires the following years to be analyzed when the budget test is used:

- The attainment year, if it is within the timeframe of the transportation plan and conformity determination;
- The last year of the timeframe of the conformity determination (as described in 40 CFR 93.106(d)); and
- Intermediate years as necessary, so that analysis years are no more than ten years apart.

Under this existing set of analysis years, once the attainment year has passed, or when the attainment year is not yet established, there is no requirement to analyze a near-term year. In contrast, the existing rule at 40 CFR 93.119(g)(1) addressing the interim emissions tests requires that a near-term year always be analyzed. Specifically, when performing the interim emissions tests, a year not more than five years beyond the year in which the conformity determination is being made must be analyzed, in addition to the last year of the transportation plan/conformity determination and intermediate years.

### *B. Proposal*

EPA proposes that when the attainment year has passed, or when an area's attainment date has not been

established,[19] a near-term year would have to be analyzed when using the budget test. For these cases, EPA proposes to amend 40 CFR 93.118(d)(2) to require areas to analyze a year no more than five years beyond the year in which the conformity determination is being made. This proposal would not affect budget test analysis year requirements where the attainment year for a given NAAQS is within the timeframe of the transportation plan and conformity determination.

An example may help illustrate today's proposal. Current 1997 ozone areas that are classified as moderate are required to demonstrate attainment in the year 2009. Suppose one of these areas is demonstrating conformity in the year 2010 for a transportation plan that covers the years 2010 through 2030. Under the current conformity rule, the budget test for such an area would be required to be performed, at a minimum, for the years 2020 and 2030. An analysis of the attainment year would not be required under the current conformity rule since the attainment year would no longer be in the timeframe of the transportation plan. Today's proposal would add an analysis year to this example by requiring that an analysis year be chosen that is no more than five years beyond 2010 (the year the conformity determination is being done) but within the timeframe of the transportation plan, (in this case, any year from 2010 to 2015).

As a second example, suppose a maintenance area makes a conformity determination in the year 2010, and the last year of its maintenance plan is 2017. The area's transportation plan covers the years 2010 through 2030. Under the current conformity rule, three regional emissions analyses will be required to meet the budget test requirements: An analysis must be done for 2030, the last year of the transportation plan/conformity determination; 2017, likely chosen because 40 CFR 93.118(b)(2) requires consistency with the budgets in the last year of the maintenance plan; and a year between 2017 and 2030 would also have to be selected for analysis, so that analysis years are not more than ten years apart.

Under today's proposal, this maintenance area would have to demonstrate consistency with the SIP budget for four years but could choose to perform a regional emissions analysis for only three of those years: 2030, because it is the last year of the transportation plan or conformity determination; any year from 2010 to 2015, to fulfill the proposed requirement to analyze a year no more than five years beyond the year the conformity determination is being made; and a year between 2020 and 2024, required so that analysis years are not more than ten years apart. In contrast to the first illustration above, the area is not required and could choose not to perform a regional emissions analysis for the year 2017 because the conformity rule permits the area to interpolate emissions for that year (40 CFR 93.118(d)(2)).[20]

EPA is proposing a related change to 40 CFR 93.118(b). Currently, this provision requires that consistency with budgets be demonstrated for any year for which the SIP establishes a budget, the attainment year if it is in the timeframe of the transportation plan and conformity determination, the last year of the transportation plan/conformity determination, and intermediate years as needed so that years for which consistency is demonstrated are no more than ten years apart.

Today's proposal would simplify this language by requiring consistency for any years where a budget is established and for any years that are analyzed to meet the requirements in 40 CFR 93.118(d). This change would ensure that consistency is demonstrated for the analysis year chosen to fulfill a year within the first five years, in the case where the attainment year has passed or is not established.

This proposal would not affect requirements to demonstrate consistency with the budgets where the attainment year for a given NAAQS is within the timeframe of the transportation plan and conformity determination.

*C. Rationale*

EPA believes this proposal is consistent with the conformity requirements in the CAA that transportation activities not create new air quality violations, worsen existing violations, or delay timely attainment or achievement of interim reductions or milestones of the relevant NAAQS. The CAA does not require specific analysis years for the conformity tests; it simply establishes the foundations of these tests and that they apply over the entire timeframe of the transportation plan and conformity determination. EPA has established and subsequently amended the analysis years for these conformity tests in past rulemakings.[21]

EPA believes it is appropriate to require that a near-term year be analyzed when using the budget test after an attainment year has passed or when an area's attainment date has not been established because EPA believes doing so would better demonstrate that the CAA's requirements at 176(c) are met, and thus would better protect air quality.

Today's proposal results from EPA's experience in implementing several different NAAQS over the years, including the 1997 ozone and $PM_{2.5}$ NAAQS. While conformity applies one year after the effective date of nonattainment designations by statute, areas generally have three years to submit SIPs by statute. Once those SIP budgets are adequate or approved, areas have two years to determine conformity to those budgets (CAA 176(c)(2)(E) and 40 CFR 93.104(e)). In cases where the attainment date is within five or six years of the date of designations, this schedule can result in areas analyzing the attainment year and using the budgets specifically established for that year only once. In subsequent conformity determinations after the attainment year, there is no requirement to analyze a near term year.

As NAAQS are established or revised, EPA believes this case will be repeated because many CAA attainment dates are within a few years of the date that areas are designated nonattainment. The CAA establishes attainment dates for various criteria pollutants, the attainment dates vary by pollutant and, in most cases, attainment dates also vary based on the severity of an area's air quality problem. For example, under Subpart 1 of the CAA, which covers nonattainment areas in general, areas must attain no later than five years from the effective date of their designation as nonattainment; [22] for various other pollutants, attainment dates are often within five or six years

[19] Cases in which an area's attainment date may not be established include areas designated for a secondary NAAQS only or areas designated nonattainment for a secondary NAAQS that is different than the primary NAAQS of the same pollutant.

[20] Demonstrating consistency with the motor vehicle emissions budget for the last year of the maintenance plan could be satisfied using interpolation rather than analysis (40 CFR 93.118(d)(2)). In the example given in which the MPO has the choice to analyze or interpolate a year for the conformity determination, we assume that the MPO would choose to interpolate to minimize the number of years that have to be analyzed.

[21] For further details on EPA's rulemakings that address analysis years requirements for transportation conformity tests, *see* the November 24, 1993 final rule (58 FR 62195). See also the July 9, 1996 proposed rule (61 FR 36118, 36130), the August 15, 1997 final rule (62 FR 43780), the July 1, 2004 final rule (69 FR 40004), and the January 24, 2008 final rule (73 FR 4429–4430).

[22] Subpart 1 of the Clean Air Act provides for an extension of up to an additional five years based on the severity of an area's air quality problem, and the availability and feasibility of controls.

of the date of nonattainment designations.

In contrast to areas with higher classifications where the attainment date is farther into the future, in areas with near-term attainment dates, the conformity rule's requirement to analyze the attainment year is in effect only briefly. Once the attainment year passes, under the existing regulation, the only years that areas have to analyze are the last year of the transportation plan (or timeframe of the conformity determination), and intermediate years such that analysis years are not more than ten years apart. Therefore, the first year analyzed could be as distant as ten years into the future.

Today's proposed change would rectify that situation by ensuring that a near-term year would be analyzed in all cases. EPA believes this result better protects air quality by ensuring that air quality impacts of the transportation plan and TIP are examined during the whole period of time covered by the transportation plan or conformity determination, not just the later years. EPA believes that ensuring analysis of a near-term year meets the intent of the CAA, which requires that a transportation plan, TIP, and project not from a conforming transportation plan and TIP not cause a new violation, worsen an existing violation or delay timely attainment or achievement of any interim milestone. Under today's proposal, areas would be ensuring that state and local air quality goals are met over the entire timeframe of the transportation plan or conformity determination, even when the attainment date has passed.

Today's proposal also ensures that areas designated for a secondary NAAQS analyze a near term year when using the budget test. As described in Section VI., EPA has proposed a secondary ozone NAAQS that, if finalized as proposed, would be distinct from the primary ozone NAAQS that was proposed. It is also possible that in the future EPA will propose to establish distinct secondary NAAQS for other transportation-related pollutants.

The CAA does not establish specific attainment dates for secondary NAAQS. Instead, CAA section 172(a)(2)(B) requires that areas designated nonattainment for a secondary NAAQS attain this NAAQS as expeditiously as practicable. This means that an area's attainment date may be established in its attainment demonstration. For conformity purposes, the attainment date would be established and therefore, analyzed in the budget test, once EPA finds the budgets adequate or approves the SIP. However, an area designated for a secondary NAAQS could be using the budget test even before those budgets are found adequate or approved if it has adequate or approved budgets for another NAAQS of the same pollutant. In this case, today's proposal would require that the area analyze a near-term year no more than five years in the future. Absent this requirement, the first analysis year for the secondary NAAQS in such an area could be as much as ten years in the future.

Although this proposed requirement may add some analytical burden to some areas, EPA does not believe that it would be significant. This proposal would continue to ensure that the budget test, when required, would continue to analyze emissions near the attainment year when it has passed or a near-term year in cases where the attainment date has not been established.

## VIII. How does this proposal affect conformity SIPs?

Today's proposal would not affect existing conformity SIPs that were prepared in accordance with CAA requirements, as amended by SAFETEA–LU [23] because today's proposal does not affect the three provisions that are required to be in a conformity SIP (40 CFR 93.105, 93.122(a)(4)(ii), and 93.125(c)). A conformity SIP contains the state's criteria and procedures for interagency consultation (40 CFR 93.105) and two additional provisions related to written commitments for certain control and mitigation measures (40 CFR 93.122(a)(4)(ii) and 93.125(c)).

In general, § 51.390 of the conformity rule specifies that after EPA approves any conformity SIP revisions, the conformity rule no longer governs conformity determinations (for the sections of the conformity rule that are covered by the approved conformity SIP).

In addition, 40 CFR 51.390(c) requires states to submit a new or revised conformity SIP to EPA within 12 months of the **Federal Register** publication date of any final conformity amendments if a state's conformity SIP includes the provisions of such final amendments. However, EPA encourages states to revise their conformity SIP to include only the three required sections so that future changes to the conformity rule do not require further revisions to conformity SIPs. EPA will continue to work with states to approve such revisions as expeditiously as possible through flexible administrative techniques, such as parallel processing and direct final rulemaking.

Finally, any state that has not previously been required to submit a conformity SIP to EPA must submit a conformity SIP within 12 months of an area's nonattainment designation (40 CFR 51.390(c)).

For additional information on conformity SIPs, please refer to the January 2009 guidance entitled, "Guidance for Developing Transportation Conformity State Implementation Plans" available on EPA's Web site at *http://www.epa.gov/otaq/stateresources/transconf/policy/420b09001.pdf.*

## IX. Statutory and Executive Order Reviews

### *A. Executive Order 12866: Regulatory Planning and Review*

Under Executive Order 12866, (58 FR 51735; October 4, 1993), this action is a "significant regulatory action" because it raises novel legal and policy issues. Accordingly, EPA submitted this action to the Office of Management and Budget (OMB) for review under EO 12866 and any changes made in response to OMB recommendations have been documented in the docket for this action.

### *B. Paperwork Reduction Act*

This action does not impose any new information collection burden. The information collection requirements of EPA's existing transportation conformity regulations and the proposed revisions in today's action are already covered by EPA information collection request (ICR) entitled, "Transportation Conformity Determinations for Federally Funded and Approved Transportation Plans, Programs and Projects." The Office of Management and Budget (OMB) has previously approved the information collection requirements contained in the existing regulations at 40 CFR part 93 under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* and has assigned OMB control number 2060–0561. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9.

### *C. Regulatory Flexibility Act*

The Regulatory Flexibility Act (RFA) generally requires an Agency to prepare a regulatory flexibility analysis of rules subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the Agency certifies

[23] SAFETEA–LU stands for the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA–LU), enacted August 10, 2005.

that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small not-for-profit organizations and small government jurisdictions.

For purposes of assessing the impacts of today's proposed rule on small entities, small entity is defined 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; and (3) a small organization that is any not-for-profit enterprise that is independently owned and operated and is not dominant in its field.

After considering the economic impacts of today's proposed rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. This regulation directly affects Federal agencies and metropolitan planning organizations that, by definition, are designated under federal transportation laws only for metropolitan areas with a population of at least 50,000. These organizations do not constitute small entities within the meaning of the Regulatory Flexibility Act. Therefore, this proposed rule will not impose any requirements on small entities. We continue to be interested in the potential impacts of the proposed rule on small entities and welcome comments on issues related to such impacts.

*D. Unfunded Mandates Reform Act*

This rule does not contain a Federal mandate that may result in expenditures of $100 million or more for state, local, and tribal governments, in the aggregate, or the private sector in any one year. This proposal merely implements already established law that imposes conformity requirements and does not itself impose requirements that may result in expenditures of $100 million or more in any year. Thus, today's proposal is not subject to the requirements of sections 202 and 205 of the UMRA.

This rule is also not subject to the requirements of section 203 of UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments. This rule will not significantly or uniquely impact small governments because it directly affects federal agencies and metropolitan planning organizations that, by definition, are designated under federal transportation laws only for metropolitan areas with a population of at least 50,000.

*E. Executive Order 13132: Federalism*

This proposed rule does not have federalism implications. It will not have substantial direct effects on states, on the relationship between the national government and states, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. The Clean Air Act requires conformity to apply in certain nonattainment and maintenance areas as a matter of law, and this proposed action merely proposes to establish and revise procedures for transportation planning entities in subject areas to follow in meeting their existing statutory obligations. Thus, Executive Order 13132 does not apply to this rule.

In the spirit of Executive Order 13132, and consistent with EPA policy to promote communication between EPA and state and local governments, EPA specifically solicits comment on this proposed rule from state and local officials.

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

This action does not have tribal implications, as specified in Executive Order 13175 (65 FR 67249, November 9, 2000). The Clean Air Act requires transportation conformity to apply in any area that is designated nonattainment or maintenance by EPA. Because today's proposed amendments to the conformity rule do not significantly or uniquely affect the communities of Indian tribal governments, Executive Order 13175 does not apply to this action.

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

Executive Order 13045: "Protection of Children from Environmental Health Risks and Safety Risks" (62 FR 19885, April 23, 1997,) applies to any rule that: (1) Is determined to be "economically significant" as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

This proposed rule is not subject to Executive Order 13045 because the Agency does not have reason to believe the environmental health or safety risks addressed by this action present a disproportionate risk to children.

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

This action is not a "significant energy action" as defined in Executive Order 13211 (66 FR 18355 (May 22, 2001)), because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. It does not create a serious inconsistency or otherwise interfere with an action taken or planned by another agency regarding energy. Further, this rule is not likely to have any adverse energy effects because it does not raise novel legal or policy issues adversely affecting the supply, distribution or use of energy arising out of legal mandates, the President's priorities, or the principles set forth in Executive Orders 12866 and 13211.

*I. National Technology Transfer and Advancement Act*

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 ("NTTAA"), Public Law No. 104–113, section 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.,* material 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 proposal does not involve technical standards. Therefore, EPA is not considering the use of any voluntary consensus standards.

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

Executive Order (EO) 12898 (59 FR 7629 (Feb. 16, 1994)) establishes federal executive policy on environmental justice. Its main provision directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or

environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States.

EPA has determined that this 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.

**List of Subjects in 40 CFR Part 93**

Administrative practice and procedure, Air pollution control, Carbon monoxide, Clean Air Act, Environmental protection, Highways and roads, Intergovernmental relations, Mass transportation, Nitrogen dioxide, Ozone, Particulate matter, Transportation, Volatile organic compounds.

Dated: August 6, 2010.

**Lisa P. Jackson,**

*Administrator.*

For the reasons discussed in the preamble, the Environmental Protection Agency proposes to amend 40 CFR part 93 as follows:

## PART 93—[AMENDED]

1. The authority citation for part 93 continues to read as follows:

**Authority:** 42 U.S.C. 7401–7671q.

2. Section 93.101 is amended by removing paragraphs (1) through (6) of the definition for "National ambient air quality standards (NAAQS)" and by revising the definition for "Clean data" to read as follows:

### § 93.101 Definitions.

* * * * *

*Clean data* means air quality monitoring data determined by EPA to meet the applicable requirements of 40 CFR parts 50 and 58 and to indicate attainment of a national ambient air quality standard.

* * * * *

### § 93.105 [Amended]

3. Section 93.105(c)(1)(vi) is amended by removing the citation "§ 93.109(n)(2)(iii)" and adding in its place the citation "§ 93.109(g)(2)(iii)".

4. Section 93.109 is amended as follows:

a. By revising paragraphs (b) introductory text, (c), and (d);

b. By removing paragraphs (e) through (k), and redesignating paragraphs (l), (m), and (n) as paragraphs (e), (f), and (g);

c. In newly redesignated paragraph (g)(2),

i. In paragraph (g)(2) introductory text, by removing the citation "paragraphs (c) through (m)" and adding in its place "paragraph (c)";

ii. In paragraph (g)(2)(iii), by removing the citation "paragraph (n)(2)(ii)" and adding in its place "paragraph (g)(2)(ii)";

iii. In paragraph (g)(2)(iii), by removing the citation "paragraph (n)(2)(ii)(C)" and adding in its place "paragraph (g)(2)(ii)(C)".

### § 93.109 Criteria and procedures for determining conformity of transportation plans, programs, and projects: General.

* * * * *

(b) Table 1 in this paragraph indicates the criteria and procedures in §§ 93.110 through 93.119 which apply for transportation plans, TIPs, and FHWA/FTA projects. Paragraph (c) of this section explains when the budget and interim emissions tests are required for each pollutant and NAAQS. Paragraph (d) of this section explains when a hot-spot test is required. Paragraph (e) of this section addresses conformity requirements for areas with approved or adequate limited maintenance plans. Paragraph (f) of this section addresses nonattainment and maintenance areas which EPA has determined have insignificant motor vehicle emissions. Paragraph (g) of this section addresses isolated rural nonattainment and maintenance areas. Table 1 follows:

* * * * *

(c) *Regional conformity test requirements for all nonattainment and maintenance areas.* This provision applies one year after the effective date of EPA's nonattainment designation for a NAAQS in accordance with § 93.102(d) and until the effective date of revocation of such NAAQS for an area. In addition to the criteria listed in Table 1 in paragraph (b) of this section that are required to be satisfied at all times, in such nonattainment and maintenance areas conformity determinations must include a demonstration that the budget and/or interim emissions tests are satisfied as described in the following:

(1) In all nonattainment and maintenance areas for a NAAQS, the budget test must be satisfied as required by § 93.118 for conformity determinations for such NAAQS made on or after:

(i) The effective date of EPA's finding that a motor vehicle emissions budget in a submitted control strategy implementation plan revision or maintenance plan for such NAAQS is adequate for transportation conformity purposes;

(ii) The publication date of EPA's approval of such a budget in the **Federal Register**; or

(iii) The effective date of EPA's approval of such a budget in the **Federal Register**, if such approval is completed through direct final rulemaking.

(2) Prior to paragraph (c)(1) of this section applying for a NAAQS, in a nonattainment area that has approved or adequate motor vehicle emissions budgets in an applicable implementation plan or implementation plan submission for another NAAQS of the same pollutant, the following tests must be satisfied:

(i) If the nonattainment area covers the same geographic area as another NAAQS of the same pollutant, the budget test as required by § 93.118 using the approved or adequate motor vehicle emissions budgets for that other NAAQS;

(ii) If the nonattainment area covers a smaller geographic area within an area for another NAAQS of the same pollutant, the budget test as required by § 93.118 for either:

(A) The nonattainment area, using corresponding portion(s) of the approved or adequate motor vehicle emissions budgets for that other NAAQS, where such portion(s) can reasonably be identified through the interagency consultation process required by § 93.105; or

(B) The area designated nonattainment for that other NAAQS, using the approved or adequate motor vehicle emissions budgets for that other NAAQS. If additional emissions reductions are necessary to meet the budget test for the nonattainment area for a NAAQS in such cases, these emissions reductions must come from within such nonattainment area;

(iii) If the nonattainment area covers a larger geographic area and encompasses an entire area for another NAAQS of the same pollutant, then either (A) or (B) must be met:

(A)(*1*) The budget test as required by § 93.118 for the portion of the nonattainment area covered by the approved or adequate motor vehicle emissions budgets for that other NAAQS; and

(*2*) the interim emissions tests as required by § 93.119 for one of the following areas: The portion of the nonattainment area not covered by the approved or adequate budgets for that other NAAQS; the entire nonattainment area; or the entire portion of the nonattainment area within an individual state, in the case where separate adequate or approved motor

vehicle emissions budgets for that other NAAQS are established for each state of a multi-state nonattainment or maintenance area.

(B) The budget test as required by § 93.118 for the entire nonattainment area using the approved or adequate motor vehicle emissions budgets for that other NAAQS.

(iv) If the nonattainment area partially covers an area for another NAAQS of the same pollutant:

(A) The budget test as required by § 93.118 for the portion of the nonattainment area covered by the corresponding portion of the approved or adequate motor vehicle emissions budgets for that other NAAQS, where they can be reasonably identified through the interagency consultation process required by § 93.105; and

(B) The interim emissions tests as required by § 93.119, when applicable, for either: The portion of the nonattainment area not covered by the approved or adequate budgets for that other NAAQS; the entire nonattainment area; or the entire portion of the nonattainment area within an individual state, in the case where separate adequate or approved motor vehicle emissions budgets for that other NAAQS are established for each state of a multi-state nonattainment or maintenance area.

(3) In a nonattainment area, the interim emissions tests required by § 93.119 must be satisfied for a NAAQS if neither paragraph (c)(1) nor paragraph (c)(2) of this section applies for such NAAQS.

(4) An ozone nonattainment area must satisfy the interim emissions test for $NO_X$, as required by § 93.119, if the implementation plan or plan submission that is applicable for the purposes of conformity determinations is a 15% plan or other control strategy SIP that does not include a motor vehicle emissions budget for $NO_X$. The implementation plan for an ozone NAAQS will be considered to establish a motor vehicle emissions budget for $NO_X$ if the implementation plan or plan submission contains an explicit $NO_X$ motor vehicle emissions budget that is intended to act as a ceiling on future $NO_X$ emissions, and the $NO_X$ motor vehicle emissions budget is a net reduction from $NO_X$ emissions levels in the SIP's baseline year.

(5) Notwithstanding paragraphs (c)(1), (c)(2), and (c)(3) of this section, nonattainment areas with clean data for a NAAQS that have not submitted a maintenance plan and that EPA has determined are not subject to the Clean Air Act reasonable further progress and attainment demonstration requirements for that NAAQS must satisfy one of the following requirements:

(i) The budget test and/or interim emissions tests as required by §§ 93.118 and 93.119 as described in paragraphs (c)(2) and (c)(3) of this section;

(ii) The budget test as required by § 93.118, using the adequate or approved motor vehicle emissions budgets in the submitted or applicable control strategy implementation plan for the NAAQS for which the area is designated nonattainment (subject to the timing requirements of paragraph (c)(1) of this section); or

(iii) The budget test as required by § 93.118, using the motor vehicle emissions in the most recent year of attainment as motor vehicle emissions budgets, if the state or local air quality agency requests that the motor vehicle emissions in the most recent year of attainment be used as budgets, and EPA approves the request in conjunction with the rulemaking that determines that the area has attained the NAAQS for which the area is designated nonattainment.

(6) For the $PM_{10}$ NAAQS only, the interim emissions tests must be satisfied as required by § 93.119 for conformity determinations made if the submitted implementation plan revision for a $PM_{10}$ nonattainment area is a demonstration of impracticability under CAA section 189(a)(1)(B)(ii) and does not demonstrate attainment.

(d) *Hot-spot conformity test requirements for CO, $PM_{2.5}$, and $PM_{10}$ nonattainment and maintenance areas.* This provision applies in accordance with § 93.102(d) for a NAAQS and until the effective date of any revocation of such NAAQS for an area. In addition to the criteria listed in Table 1 in paragraph (b) of this section that are required to be satisfied at all times, project-level conformity determinations in CO, $PM_{10}$, and $PM_{2.5}$ nonattainment and maintenance areas must include a demonstration that the hot-spot tests for the applicable NAAQS are satisfied as described in the following:

(1) FHWA/FTA projects in CO nonattainment or maintenance areas must satisfy the hot-spot test required by § 93.116(a) at all times. Until a CO attainment demonstration or maintenance plan is approved by EPA, FHWA/FTA projects must also satisfy the hot-spot test required by § 93.116(b).

(2) FHWA/FTA projects in $PM_{10}$ nonattainment or maintenance areas must satisfy the appropriate hot-spot test as required to by § 93.116(a).

(3) FHWA/FTA projects in $PM_{2.5}$ nonattainment or maintenance areas must satisfy the appropriate hot-spot test required by § 93.116(a).

* * * * *

**§ 93.116 [Amended]**

5. Section 93.116(b) is amended by removing the citation "§ 93.109(f)(1)" and adding in its place the citation "§ 93.109(d)(1)".

6. Section 93.118 is amended:

a. In paragraph (a), by removing the citation "§ 93.109(c) through (n)" and adding in its place the citation "§ 93.109(c) through (g)";

b. By revising paragraph (b) introductory text;

c. In paragraph (d)(2), by adding a new sentence after the first sentence to read as follows:

**§ 93.118 Criteria and procedures: Motor vehicle emissions budget.**

* * * * *

(b) Consistency with the motor vehicle emissions budget(s) must be demonstrated for each year for which the applicable (and/or submitted) implementation plan specifically establishes a motor vehicle emissions budget(s), and for each year for which a regional emissions analysis is performed to fulfill the requirements in paragraph (d) of this section, as follows:

* * * * *

(d) * * *

(2) * * * If the attainment year is no longer in the timeframe of the transportation plan and conformity determination, or if the attainment date has not yet been established, the first analysis year must be no more than five years beyond the year in which the conformity determination is being made. * * *

* * * * *

7. Section 93.119 is amended as follows:

a. In paragraph (a), by removing the citation "§ 93.109(c) through (n)" and adding in its place the citation "§ 93.109(c) through (g)";

b. In paragraph (b) introductory text, by removing "1-hour ozone and 8-hour";

c. By revising paragraphs (b)(1)(ii) and (b)(2)(ii);

d. By revising paragraphs (c)(1)(ii) and (c)(2)(ii);

e. In paragraph (d),

i. By revising the heading of paragraph (d) to read "$PM_{2.5}$, $PM_{10}$, and $NO_2$ areas.";

ii. In paragraph (d) introductory text, by removing "$PM_{10}$ and $NO_2$" and adding in its place "$PM_{2.5}$, $PM_{10}$, and $NO_2$";

iii. By revising paragraph (d)(2); and

g. By revising paragraph (e).

**§ 93.119 Criteria and procedures: Interim emissions in areas without motor vehicle emissions budgets.**

(b) * * *

(1) * * *

(ii) The emissions predicted in the "Action" scenario are lower than emissions in the baseline year for that NAAQS as described in paragraph (e) of this section by any nonzero amount.

(2) * * *

(ii) The emissions predicted in the "Action" scenario are not greater than emissions in the baseline year for that NAAQS as described in paragraph (e) of this section.

(c) * * *

(1) * * *

(ii) The emissions predicted in the "Action" scenario are lower than emissions in the baseline year for that NAAQS as described in paragraph (e) of this section by any nonzero amount.

(2) * * *

(ii) The emissions predicted in the "Action" scenario are not greater than emissions in the baseline year for that NAAQS as described in paragraph (e) of this section.

(d) * * *

(2) The emissions predicted in the "Action" scenario are not greater than emissions in the baseline year for that NAAQS as described in paragraph (e) of this section.

(e) *Baseline year for various NAAQS.* The baseline year is defined as follows:

(1) 1990, in areas designated nonattainment for the 1990 CO NAAQS or the 1990 $NO_2$ NAAQS.

(2) 1990, in areas designated nonattainment for the 1990 $PM_{10}$ NAAQS, unless the conformity implementation plan revision required by § 51.390 of this chapter defines the baseline emissions for a $PM_{10}$ area to be those occurring in a different calendar year for which a baseline emissions inventory was developed for the purpose of developing a control strategy implementation plan.

(3) 2002, in areas designated nonattainment for the 1997 ozone NAAQS or 1997 $PM_{2.5}$ NAAQS.

(4) The most recent year for which EPA's Air Emission Reporting Rule (40 CFR part 51, subpart A) requires submission of on-road mobile source emissions inventories as of the effective date of designations, in areas designated nonattainment for a NAAQS that is promulgated after 1997.

* * * * *

**§ 93.121 [Amended]**

8. Section 93.121 is amended:

a. In paragraph (b) introductory text, by removing the citation "§ 93.109(n)" and adding in its place the citation "§ 93.109(g)".

b. In paragraph (c) introductory text, by removing the citation "§ 93.109(l) or (m)" and adding in its place the citation "§ 93.109(e) or (f)".

[FR Doc. 2010–19928 Filed 8–12–10; 8:45 am]

BILLING CODE 6560–50–P

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

### 50 CFR Part 622

**[Docket No. 0907271170–0314–02]**

**RIN 0648–AY10**

## Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Snapper-Grouper Fishery off the Southern Atlantic States; Amendment 17A

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

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

**SUMMARY:** NMFS issues this proposed rule to implement Amendment 17A to the Fishery Management Plan for the Snapper-Grouper Fishery of the South Atlantic Region (FMP), as prepared and submitted by the South Atlantic Fishery Management Council (Council). This proposed rule would establish an annual catch limit (ACL) for red snapper of zero, which means all harvest and possession of red snapper in or from the South Atlantic EEZ would be prohibited, and for a vessel with a Federal commercial or charter vessel/headboat permit for South Atlantic snapper-grouper, harvest and possession of red snapper would be prohibited in or from state or Federal waters. To constrain red snapper harvest to the ACL, this rule would implement an area closure for South Atlantic snapper-grouper that extends from southern Georgia to northern Florida where all harvest and possession of snapper-grouper would be prohibited (except when fishing with black sea bass pots or spearfishing gear for species other than red snapper), and require the use of non-stainless steel circle hooks north of 28° N. lat. Additionally, Amendment 17A would establish a rebuilding plan for red snapper, require a monitoring program as the accountability measure (AM) for red snapper, and specify a proxy for the fishing mortality rate that will produce the maximum sustainable yield (MSY) and specify optimum yield (OY). The intended effects of this rule are to end overfishing of South Atlantic red snapper and rebuild the stock.

**DATES:** Comments must be received no later than 5 p.m., eastern time, on September 27, 2010.

**ADDRESSES:** You may submit comments, identified by "0648–AY10", by any one 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, Attn: Kate Michie

Mail: Kate Michie, 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 is over. 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–2010–0035" in the keyword search, then check the box labeled "Select to find documents accepting comments or submissions", 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). Attachments to electronic comments will be accepted in Microsoft Word, Excel, WordPerfect, or Adobe PDF file formats only.

Copies of Amendment 17A may be obtained from the South Atlantic Fishery Management Council, 4055 Faber Place, Suite 201, North Charleston, SC 29405; phone: 843–571–4366 or 866–SAFMC–10 (toll free); fax: 843–769–4520; e-mail: safmc@safmc.net. Amendment 17A includes an Environmental Assessment, an Initial Regulatory Flexibility Analysis (IRFA), a Regulatory Impact Review, and a Social Impact Assessment/Fishery Impact Statement.

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

**SUPPLEMENTARY INFORMATION:** The South Atlantic snapper-grouper fishery is managed under the FMP. The FMP was prepared by the Council and implemented by NMFS under the authority of the Magnuson-Stevens Fishery Conservation and Management

Act (Magnuson-Stevens Act) by regulations at 50 CFR part 622.

**Background**

On July 8, 2008, the Council was notified that South Atlantic red snapper is undergoing overfishing and is overfished. This determination was based upon a review of the 2008 assessment of this species by the Southeast Data, Assessment, and Review panel and the Council's Scientific and Statistical Committee. To immediately address overfishing of red snapper and at the Council's request, an interim rule prohibiting all harvest and possession of red snapper in Federal waters, and in state waters for vessels holding Federal snapper-grouper permits, was published in the **Federal Register** (74 FR 63673, December 4, 2009). The extension of this interim rule (74 FR 27658, May 8, 2010) will expire December 5, 2010. Amendment 17A and this proposed rule would establish long-term management measures to end overfishing of red snapper, including the prohibition on the harvest and possession of red snapper, as well as other management measures that will help rebuild the stock.

*Management Measures Contained in this Proposed Rule*

This proposed rule would prohibit the harvest and possession of red snapper in or from Federal waters, in the South Atlantic, and in or from adjacent state waters for vessels holding Federal snapper-grouper permits. However, because the red snapper stock is part of a multi-species fishery, i.e., red snapper co-occur with vermilion snapper, tomtate, scup, red porgy, white grunt, black sea bass, red grouper, scamp, and other snapper-grouper species, there is significant bycatch of red snapper for fishermen targeting other snapper-grouper. This is a significant issue because release mortality rates for red snapper are estimated to be 40 percent for the recreational sector and 90 percent for the commercial sector (due to deeper waters fished by the commercial sector). Because bycatch mortality rates of red snapper are very high, and they are often caught while targeting co-occurring snapper-grouper species, a harvest prohibition of red snapper alone will not end overfishing. Therefore, this proposed rule also includes an area closure where harvest of all snapper-grouper species would be prohibited (except when fishing with black sea bass pots with valid identification tags or spearfishing gear for species other than red snapper). The proposed closed area encompasses locations from which the highest amount of landings of red snapper are reported, primarily off the coast of southern Georgia and the north and central east coast of Florida between the depths of 98 ft (30 m) and 240 ft (73 m).

Within the proposed snapper-grouper closed area, fishing for species other than red snapper using black sea bass pots that have a valid identification tag issued by the Regional Administrator (RA) attached and spearfishing gear would be permitted. Black sea bass pots would be permitted in the closed area because commercial logbook data show that red snapper are rarely taken as bycatch in these pots. Also, allowing the use of black sea pots within the closed area could help mitigate adverse socioeconomic effects caused by an area closure without impeding efforts to end overfishing of red snapper.

The use of spearfishing gear would be permitted in the closed area when fishing for species other than red snapper because spearfishing gear is highly selective and would be the least likely of all fishing gears to result in red snapper bycatch. Allowing the use of spearfishing gear may also help to offset, to a small degree, some of the adverse socioeconomic impacts expected from a large area closure. In addition to the exemptions for black sea bass pots and spearfishing gear, this proposed rule also includes a provision to allow transit of vessels with snapper-grouper species on board other than red snapper through the proposed closed area with gear appropriately stowed.

In addition to the area closure, this proposed rule would require the use of non-stainless steel circle hooks when fishing for snapper-grouper species with hook-and-line gear and natural baits north of 28° N. lat. Some studies show that circle hooks may be beneficial in reducing bycatch mortality of fish species as compared to J hooks.

*Red Snapper Monitoring Program*

In addition to the measures contained in this proposed rule, Amendment 17A would require a red snapper monitoring program that would utilize, but not be limited to, fishery independent data collection methods. The monitoring program would be designed to monitor rebuilding progress of the stock, and data would be employed in red snapper assessments. Stock assessments would be used to determine if the stock is rebuilding, or if additional regulatory modifications are needed to end overfishing.

Sampling could include deployment of chevron traps, cameras, and hook-and-line gear at randomly selected stations within the proposed closed area as well outside the closed area. The preferred independent monitoring program would continue the long-term data series from the Marine Resources Monitoring Assessment and Prediction (MARMAP) survey and would likely add a complementary sampling program to expand needed coverage. The improved sampling plan may increase the (1) spatial footprint to include areas from central Florida to Cape Hatteras, North Carolina, (2) sample size, and (3) number of gear types from current survey levels, thereby considerably improving program effectiveness. Aspects of the current sampling program (survey design, chevron traps, short bottom longline and rod and reel sampling) would remain the core of the improved program, enabling comparisons of data collected in the improved program with those collected during previous years by MARMAP. Additional gear could be added and utilized by both the Southeast Fisheries Science Center (SEFSC) and MARMAP, with gear effectiveness research performed by the SEFSC. SEFSC could coordinate with MARMAP to plan annual survey efforts (e.g., spatiotemporal focus of sampling) as guided by the Council and NMFS data needs. The improved monitoring program would inform fishery management decisions and would likely contribute to improved management of the stock.

*Rebuilding Plan*

The Magnuson-Stevens Act requires that a rebuilding plan be specified for any federally-managed species determined to be overfished. Rebuilding plans consist of a rebuilding schedule and a rebuilding strategy. Amendment 17A would define a rebuilding schedule of 35 years for red snapper. The rebuilding time period would end in 2044, and would reduce, to the maximum extent practicable, adverse socioeconomic impacts while still achieving the rebuilding goal.

Amendment 17A includes a rebuilding strategy equal to 98 percent of $F_{MSY}$ ($98\%F_{30\%SPR}$) based a constant $F_{REBUILD}$ of 0.145, and the ACL would be zero. Under this rebuilding strategy, an initial 76 percent reduction in total mortality would be required, and the OY value would be 2,425,000 lb (1,083,632 kg) whole weight with a 53 percent probability of rebuilding by 2044. The AM for red snapper would include monitoring the catch per unit effort using both fishery-independent and fishery-dependent data gathering methods to track changes in biomass.

*Maximum Sustainable Yield Proxy*

Amendment 17A would specify a proxy for the fishing mortality rate that will produce the maximum sustainable yield ($F_{MSY}$). Initially, the Council determined $F_{MSY}$ proxy of F40%SPR should be used for red snapper because it is more conservative than the current $F_{MSY}$ proxy of $F_{30\%SPR}$, and would require a more significant harvest reduction to end overfishing. However, at their June 2010 meeting, the Council changed their preferred alternative from F40%SPR to $F_{30\%SPR}$. The Council recommended that the status quo FMSY proxy ($F_{30\%SPR}$) be maintained until the SEFSC is able to conduct a comprehensive review of how $F_{MSY}$ proxies should be applied across all southeastern fisheries. The Council also suggested that the decision to apply a specific $F_{MSY}$ proxy should be made comprehensively, considering all southeastern fisheries, rather than on a species-by-species basis. Therefore, the Council determined it would be advantageous to first determine what methodology would be most appropriate for assigning $F_{MSY}$ proxies to species/stocks in the southeast before proceeding with a change to the current $F_{MSY}$ proxy for red snapper.

Additionally, the Council previously specified the Minimum Stock Size Threshold (MSST) as the biomass using the formula $MSST = (1–M)*SSB_{MSY}$. This formula is recommended in the 1998 Technical Guidance Document developed by NMFS (NOAA Technical Memorandum NMFS-F/SPO–31) and represents 1 minus the natural mortality multiplied by the spawning stock biomass at MSY. The updated MSST value from the most recent red snapper stock assessment is 12,247,000 lb (5,555,146 kg), whole weight.

*Availability of Amendment 17A*

Additional background and rationale for the measures discussed above are contained in Amendment 17A. The availability of Amendment 17A was announced in the **Federal Register** on July 29, 2010, (75 FR 44753). Written comments on Amendment 17A must be received by September 27, 2010. All comments received on Amendment 17A or on this proposed rule during their respective comment periods will be addressed in the preamble to the final rule.

**Classification**

Pursuant to section 304(b)(1)(A) of the Magnuson-Stevens Act, the NMFS Assistant Administrator has determined that this proposed rule is consistent with Amendment 17A, other provisions of the Magnuson-Stevens Act, and other applicable law, subject to further consideration after public comment.

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

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

The proposed rule, which consists of several actions, would introduce changes to the management of South Atlantic snapper-grouper fisheries. This rule would prohibit all commercial and recreational harvest and possession of red snapper year-round in the South Atlantic EEZ. Prohibition of red snapper applies in the South Atlantic on board a vessel for which a valid Federal charter vessel/headboat or commercial permit for South Atlantic snapper-grouper has been issued, without regard to where such species were harvested, i.e., in state or Federal waters. Furthermore, this rule would prohibit commercial and recreational harvest and possession of all snapper-grouper species year-round in an area that includes commercial logbook grids 2880, 2980, and 3080 between 98 ft (16 fathoms; 30 m) and 240 ft (40 fathoms; 73 m), except when fish (other than red snapper) are harvested with black sea bass pots that have a valid identification tag issued by the RA attached or fish (other than red snapper) are harvested with spearfishing gear. The prohibition on possession does not apply to a person aboard a vessel that is in transit with other snapper-grouper species on board and with fishing gear appropriately stowed. Finally, this proposed rule would require the use of non-stainless steel circle hooks when fishing for snapper-grouper with snapper-grouper hook-and-line gear and natural baits north of 28° N. lat.

The Magnuson Stevens Act provides the statutory basis for the proposed rule.

No duplicative, overlapping, or conflicting Federal rules have been identified. The proposed rule would not alter existing reporting, record keeping, or other compliance requirements, except when the vessel is in transit across the proposed closed area, during which, fishing gear must be appropriately stowed, or when the vessel is selected for the fishery independent monitoring program to track the progress of red snapper.

This proposed rule is expected to directly affect commercial harvesting and for-hire fishing operations. The Small Business Administration (SBA) has established size criteria for all major industry sectors in the U.S. including fish harvesters and for-hire operations. A business involved in fish harvesting is classified as a small business if it is independently owned and operated, is not dominant in its field of operation (including its affiliates), and has combined annual receipts not in excess of $4.0 million (NAICS code 114111, finfish fishing) for all its affiliated operations worldwide. For for-hire vessels, the other qualifiers apply and the annual receipts threshold is $7.0 million (NAICS code 713990, recreational industries).

From 2003–2007, an average of 944 vessels per year was permitted to operate in the commercial snapper-grouper fishery. Of these vessels, 749 held transferable permits and 195 held non-transferable permits. On average, 890 vessels landed 6.43 million lb (2.92 million kg) of snapper-grouper and 1.95 million lb (0.88 million kg) of other species on snapper-grouper trips. Total dockside revenues from snapper-grouper species stood at $13.81 million (2007 dollars) and from other species, at $2.30 million (2007 dollars). Considering revenues from both snapper-grouper and other species, the revenues per vessel were $18,101. An average of 27 vessels per year harvested more than 50,000 lb (22,680 kg) of snapper-grouper species per year, generating at least, at an average price of $2.15 (2007 dollars) per pound, dockside revenues of $107,500. Vessels that operate in the snapper-grouper fishery may also operate in other fisheries, the revenues of which cannot be determined with available data and are not reflected in these totals.

Although a vessel that possesses a commercial snapper-grouper permit can harvest the various snapper-grouper species, not all permitted vessels landed all of the snapper-grouper species most affected by this amendment, i.e. red snapper, gag, vermilion snapper, black sea bass, black grouper, and red grouper. The following average number of vessels landed the subject species in 2003–2007: 292 vessels landed gag, 253 vessels landed vermilion snapper, 220 vessels landed red snapper, 237 vessels landed black sea bass, 323 vessels landed black grouper, and 402 vessels landed red grouper. Combining revenues from snapper-grouper and

other species on the same trip, the average revenue (2007 dollars) per vessel for vessels landing the subject species were $20,551 for gag, $28,454 for vermilion snapper, $22,168 for red snapper, $19,034 for black sea bass, $7,186 for black grouper, and $17,164 for red grouper.

Based on revenue information, all commercial vessels directly affected by the proposed rule are considered small entities.

The for-hire fleet is comprised of charterboats, which charge a fee on a vessel basis, and headboats, which charge a fee on an individual angler (head) basis. For the period 2003–2007, an average of 1,635 vessels was permitted to operate in the snapper-grouper for-hire fishery, of which 82 are estimated to have operated as headboats. Within the total number of vessels, 227 also possessed a commercial snapper-grouper permit and are included in the summary information provided on the commercial sector. The charterboat annual average gross revenue is estimated to range from approximately $62,000-$84,000 for Florida vessels, $73,000-$89,000 for North Carolina vessels, $68,000-$83,000 for Georgia vessels, and $32,000-$39,000 for South Carolina vessels. For headboats, the corresponding estimates are $170,000-$362,000 for Florida vessels, and $149,000-$317,000 for vessels in the other states.

Based on these average revenue figures, all for-hire operations directly affected by the proposed rule are considered small entities.

Some fleet activity may exist in both the commercial and for-hire snapper-grouper sectors but its extent is unknown, and all vessels are treated as independent entities in this analysis.

All entities that are expected to be directly affected by the proposed rule are considered small entities, so no disproportionate effects on small entities relative to large entities are expected.

The proposed rule is expected to reduce short-run harvests and fishing opportunities of commercial and for-hire vessels that, in turn, would reduce their short-run revenues and profits. In the following discussion, net operating revenue is considered equivalent to profit.

Prohibiting all commercial and recreational harvest and possession of red snapper year-round in the South Atlantic EEZ and prohibiting all commercial and recreational harvest and possession of species (except when caught with spearfishing gear or black sea bass pots that have a valid identification tag issued by the RA attached) in the snapper-grouper fishery year-round in the area that includes commercial logbook grids 2880, 2980, and 3080 between 98 ft (16 fathoms; 30 m) and 240 ft (40 fathoms; 73 m) is expected to reduce net operating revenues of commercial vessels operating in the South Atlantic by an average of approximately $430,000 (4.8 percent). This measure is also expected to reduce the net operating revenues of for-hire vessels operating in the South Atlantic by approximately $5.04 million. Most of the effects would be borne by commercial and for-hire vessels operating in northeast Florida and Georgia. Moreover, most of the effects would fall on commercial vessels using vertical lines and on headboats. However, it is highly probable that the effects on headboats are overestimated due to overestimation of affected target trips by headboats.

Exempting from the closed area prohibition harvests of snapper-grouper species, except red snapper, caught with spearfishing gear or black sea bass pots that have valid identification tags would mitigate the effects of the area closures on commercial vessels. These effects are already incorporated in the estimated effects of the fishing prohibition on red snapper and fishing prohibition on snapper-grouper in the closed areas. There are no known recreational spearfishing activities in the closed areas.

Requiring the use of non-stainless steel circle hooks when fishing for snapper-grouper species with snapper-grouper hook-and-line gear north of 28° N. lat. is expected to increase the fishing costs of some commercial and for-hire vessels. Depending on the physical structure of a fish's mouth and the way that they take bait, the circle hook requirement may reduce the harvest of some desired species. The potential cost increase and harvest reduction cannot be estimated, although they are deemed to be relatively small considering that circle hooks are already used on some vessels.

The estimated short-run reductions in the net operating revenues of the directly affected small entities, particularly for-hire vessels, may be considered substantial. Small entities operating off of northeast Florida and Georgia are expected to bear most of the short-run adverse economic effects.

Fifteen alternatives, four of which comprise the proposed action, and three sub-alternatives, one of which is the proposed action, were considered for the red snapper management measures. The first alternative to the proposed action, the no action alternative, would not conform to the Magnuson-Stevens Act requirements to end the overfished and overfishing conditions of red snapper. The second alternative to the proposed action would prohibit all commercial and recreational harvest and possession of red snapper year-round in the South Atlantic EEZ. This alternative has been determined to be insufficient to rebuild the red snapper stock within the specified timeframe due to discard mortalities from fishing for co-occurring snapper-grouper species. The third alternative to the proposed action would close four logbook grids and would close all water depths in the four subject areas. This alternative would result in larger short-run adverse economic effects than the proposed action. The fourth alternative to the proposed action would close four logbook grids and would close more water depths in the shallower parts of the four subject areas. This alternative would result in larger short-run adverse economic effects than the proposed measure. The fifth alternative to the proposed action is similar to the proposed action, except that it would close four, instead of three, logbook grids. This alternative would result in slightly larger short-run adverse economic effects than the proposed action. The sixth alternative to the proposed action would close four logbook grids and would close more water depths in the deeper parts of the four subject areas. This alternative would result in larger short-run adverse economic effects than the proposed action. The seventh alternative to the proposed action differs from the proposed action by closing four additional areas and all water depths in the subject seven areas. This alternative would result in substantially larger short-run adverse economic effects than the proposed action. The eighth alternative to the proposed action differs from the proposed action by closing four additional areas and more water depths in the shallower parts of the subject seven areas. This alternative would result in substantially larger short-run adverse economic effects than the proposed action. The ninth alternative to the proposed action differs from the proposed action by closing four additional areas. This alternative would result in substantially larger short-run adverse economic effects than the proposed action. The tenth alternative to the proposed action differs from the proposed action by closing four additional areas and more water depths in the deeper parts of the subject seven areas. This alternative would result in substantially larger short-run adverse

economic effects than the proposed action. The eleventh alternative to the proposed action would, in combination with any of the alternatives that would prohibit harvest and possession of red snapper and close four or seven areas to snapper-grouper fishing, allow harvest and possession of snapper-grouper species (except red snapper) with bottom longline gear in the closed areas deeper than 50 fathoms (91 m). Relative to the proposed action, this alternative would have small adverse effects on commercial vessels and no effects on for-hire vessels. Three sub-alternatives, including the proposed action, were considered for vessels transiting through the closed areas. The first sub-alternative would be less restrictive than the proposed action by not requiring that fishing gear be appropriately stowed when vessels transit through the closed areas. This alternative would slightly mitigate the adverse economic effects of the closed areas, but it could compromise the effectiveness of enforcing regulations in the closed areas. The second sub-alternative to the proposed action would be less restrictive than the proposed action for vessels with wreckfish on board. This alternative would particularly avoid the potential unintended adverse effects on vessels fishing for wreckfish, but it could also compromise the effectiveness of enforcing regulations in the closed areas.

Three alternatives, including the proposed action, were considered for requiring the use of circle hooks. The first alternative to the proposed action, the no action alternative, would allow but would not require the use of circle hooks, and so would not entail any additional fishing cost. On the other hand, it would not take advantage of the potential afforded by circle hooks in reducing discard and bycatch mortality of red snapper, particularly in the center of the red snapper fishing area. The second alternative to the proposed action would require the use of circle hooks throughout the South Atlantic EEZ and not just north of 28° N. lat. as in the proposed action. This alternative could entail higher fishing costs than the proposed action. It could also lower vessel revenues when some species cannot be effectively caught with circle hooks, particularly in the southern areas where red snapper harvest is relatively low.

In addition to the foregoing actions, Amendment 17A also considered various alternatives for establishing an MSY proxy, a rebuilding schedule, a rebuilding strategy, and a monitoring program for red snapper.

The proposed action on the MSY proxy for red snapper is the no action alternative, which would use $F_{30\%SPR}$ as the $F_{MSY}$ proxy. The proposed action on the rebuilding strategy for red snapper would define a rebuilding strategy that sets $F_{OY}$ equal to 98 percent FMSY ($98\%F_{30\%SPR}$), specify an ACL based on landings, establish an ACL of zero for 2010 which would remain in effect beyond 2010 until modified. OY at equilibrium would be 2,425,000 lb (1,099,961 kg) whole weight. The proposed action on the monitoring programs is to establish a fishery independent monitoring program to track the progress of red snapper. Sampling would include deployment of chevron traps, cameras, and snapper-grouperhook-and-line at randomly selected stations.

Two alternatives, including the proposed action which is the no action alternative, were considered for the MSY/MSY proxy for red snapper. The only alternative to the proposed action uses $F_{40\%SPR}$ as the proxy for $F_{MSY}$. This alternative is more conservative than the proposed action, and thus provides more assurance that overfishing would be ended and the stock rebuilt within the specified time frame. However, the Council recommended that the status quo proxy of $F_{MSY}$ be maintained until the SEFSC is able to conduct a comprehensive review of how $F_{MSY}$ proxies should be applied across all southeastern fisheries. The Council is considering a more comprehensive approach for assigning MSY proxies for red snapper and other species in southeastern fisheries.

Four alternatives, including the proposed action, were considered for the red snapper rebuilding schedule. The first alternative to the proposed action, the no action alternative, would not define a rebuilding schedule for red snapper. Considering that a previous rebuilding schedule expired in 2006 and the stock is overfished, this alternative would not meet the Magnuson-Stevens Act requirements. The second alternative to the proposed action would define a rebuilding schedule equal to 15 years, which is the shortest possible period to rebuild in the absence of fishing mortality. Even if retention of red snapper is prohibited, red snapper would still be caught since they have temporal and spatial coincidence with other species fishermen target. Hence, adopting this alternative would mean more stringent regulations than those of the proposed action, thereby affecting a wider range of fisheries and more economically important snapper-grouper species. This would result in much larger economic effects in the short run which may or may not be recouped in the long run unless those other affected snapper-grouper species become substantially abundant and fisheries become more economically important. The third alternative to the proposed action would define a rebuilding schedule equal to 25 years, which is the mid-point between the shortest possible (15 years) and maximum (35 years) timeframe to rebuild the stock. This alternative would require more stringent regulations in the short run and thus more short-run adverse economic effects than the proposed action. Uncertainties associated with assessments and effectiveness of proposed management measures to reduce red snapper mortality, particularly due to incidental catches, present some issues on rebuilding the stock in a timeframe shorter than the proposed action.

Nine alternatives, including the proposed action, were considered for the rebuilding strategy, OY, ACL, and AM. With the exception of the no action alternative, each alternative includes two sub-alternatives for the ACL, and each ACL in turn includes three alternatives for the AM. It may be noted that the three AM alternatives, which all include monitoring programs, are identical for all alternatives and sub-alternatives, so they do not merit additional discussions here. The first alternative to the proposed action, the no action alternative, would not specify an ACL and so would not meet the Magnuson-Stevens Act requirements. In addition, it would set $F_{OY}$ at a level equivalent to 85 percent $F_{40\%SPR}$ such that OY at equilibrium equals 2,196,000 lb (996,089 kg) whole weight. This would then imply more restrictive measures than the proposed action, resulting in larger adverse economic effects in the short run. With a lower OY level, it also would tend to generate lower long-run economic benefits than the proposed action, although it could result in a more sustainable fishery because it is more biologically conservative. The second alternative to the proposed action would define a red snapper rebuilding strategy that sets FOY at a level equivalent to 85 percent F40%SPR such that OY at equilibrium equals 2,199,000 lb (997,450 kg) whole weight. This alternative would imply more restrictive measures in the short run, resulting in larger short-run adverse economic effects and potentially lower long-run benefits than the proposed action. Being more biologically conservative, however, than the proposed action, this alternative may provide a higher probability of a more

sustainable fishery. The first sub-alternative would base the ACL on landings, with the ACL equal to zero in 2010. This is identical to the proposed action. The second sub-alternative would base the ACL on total removal, with the ACL equal to 89,000 lb (40,370 kg) whole weight in 2010. This would still require prohibition of red snapper harvest by both the commercial and recreational sectors. In addition, this would require monitoring of dead discards so that total removal would not exceed the ACL. The difficulty of monitoring dead discards, together with the likelihood that self-reported discards would be understated, raises concerns regarding the eventual effectiveness of the rebuilding strategy. The third alternative to the proposed action would define a red snapper rebuilding strategy that sets FOY at a level equivalent to 75 percent F40%SPR such that OY at equilibrium equals 2,104,000 lb (954,358 kg) whole weight. This alternative would imply more restrictive measures in the short-run, resulting in larger short-run adverse economic effects and potentially lower long-run benefits than the proposed action. Because it is more biologically conservative than the proposed action, it may provide a higher probability of a more sustainable fishery. The first sub-alternative is identical to the proposed action. The second sub-alternative would base the ACL on total removal, with the ACL equal to 79,000 lb (35,834 kg) whole weight in 2010. This sub-alternative raises similar issues of concern associated with the monitoring of dead discards. The fourth alternative to the proposed action would define a red snapper rebuilding strategy that sets $F_{OY}$ at a level equivalent to 65 percent $F_{40\%SPR}$ such that OY at equilibrium equals 1,984,000 lb (899,927 kg) whole weight. This alternative would imply more restrictive measures in the short run, resulting in larger short-run adverse economic effects. With a lower OY, it may result in lower long-run benefits than the proposed action, although it may provide a higher probability of a more sustainable fishery because it is more biologically conservative. The first sub-alternative is identical to the proposed action. The second sub-alternative would base the ACL on total removal, with the ACL equal to 68,000 lb (30,844 kg) whole weight in 2010. This sub-alternative raises similar issues of concern associated with the monitoring of dead discards. The fifth alternative to the proposed action would define a red snapper rebuilding strategy that sets FOY at a level equivalent to 97 percent $F_{40\%SPR}$ such that OY at equilibrium equals 2,287,000 lb (1,037,366 kg) whole weight. This alternative would imply more restrictive measures in the short run, resulting in larger short-run adverse economic effects. Because of a lower OY, it may result in lower long-run benefits than the proposed action, although it may result in a higher probability of a more sustainable fishery due to its being more biologically conservative than the proposed action. The first sub-alternative is identical to the proposed action. The second sub-alternative would base the ACL on total removal, with the ACL equal to 68,000 lb (30,844 kg) whole weight in 2010. This sub-alternative raises similar issues of concern associated with the monitoring of dead discards. The sixth alternative to the proposed action would define a red snapper rebuilding strategy that sets FOY at a level equivalent to 85 percent F30%SPR such that OY at equilibrium equals 2,392,000 lb (1,084,993 kg) whole weight. This alternative would imply more restrictive measures than the proposed action in the short run, resulting in larger short-run adverse economic effects and potentially lower long-run benefits because of a lower OY. The first sub-alternative is identical to the proposed action. The second sub-alternative would base the ACL on total removal, with the ACL equal to 125,000 lb (56,699 kg) whole weight in 2010. This sub-alternative raises similar issues of concern associated with the monitoring of dead discards, although the higher ACL than that of previous sub-alternatives would tend to mitigate but not erase such concerns. The seventh alternative to the proposed action would define a red snapper rebuilding strategy that sets $F_{OY}$ at a level equivalent to 75 percent $F_{30\%SPR}$ such that OY at equilibrium equals 2,338,000 lb (1,060,499 kg) whole weight. This alternative would imply more restrictive measures in the short run, resulting in lower short-run adverse economic effects and potentially higher long-run benefits because of a lower OY. The first sub-alternative is identical to the proposed action. The second sub-alternative would base the ACL on total removal, with the ACL equal to 111,000 lb (50,349 kg) whole weight in 2010. This sub-alternative raises similar issues of concern associated with the monitoring of dead discards, although the higher ACL than that of some previous sub-alternatives would tend to mitigate but not erase such concerns. The eighth alternative to the proposed action would define a red snapper rebuilding strategy that sets $F_{OY}$ at a level equivalent to 65 percent $F_{30\%SPR}$ such that OY at equilibrium equals 2,257,000 lb (1,023,758 kg) whole weight. This alternative would imply more restrictive measures than the proposed action in the short run, resulting in lower short-run adverse economic effects and potentially lower long-run benefits because of a lower OY. The first sub-alternative is identical to the proposed action. The second sub-alternative would base the ACL on total removal, with the ACL equal to 97,000 lb (43,998 kg) whole weight in 2010. This sub-alternative raises similar issues of concern associated with the monitoring of dead discards, particularly that the ACL is lower than that of some previous sub-alternatives.

Three alternatives, including the proposed action, were considered for the red snapper monitoring program. The first alternative, the no action alternative, would not entail any additional cost by utilizing existing data collection programs. However, existing data collection programs may not be adequate to collect vital information on red snapper during the time harvest of the species is prohibited. The second alternative to the proposed action would establish a red snapper fishery dependent monitoring program involving for-hire vessels. This alternative offers some potential, as does the proposed action, in collecting the needed information on red snapper, especially during the period when harvest of the species is prohibited. Although the near ideal approach is to combine this alternative with the proposed action, funding for both may not be available on a continuing basis.

**List of Subjects in 50 CFR Part 622**

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

Dated: August 10, 2010.

**Eric C. Schwaab,**

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

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

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

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

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

2. In § 622.32, paragraph (b)(3)(vi) is added to read as follows:

**§ 622.32 Prohibited and limited-harvest species.**

* * * * *

(b) * * *

(3) * * *

(vi) Red snapper may not be harvested or possessed in or from the South Atlantic EEZ. Such fish caught in the South Atlantic EEZ must be released immediately with a minimum of harm. In addition, for a person on board a vessel for which a valid Federal commercial or charter vessel/headboat permit for South Atlantic snapper-grouper has been issued, the provisions of this closure apply in the South Atlantic, regardless of where such fish are harvested, i.e., in state or Federal waters.

* * * * *

3. In § 622.35, paragraph (l) is revised to read as follows:

**§ 622.35 Atlantic EEZ seasonal and/or area closures.**

* * * * *

(l) *Area closure for South Atlantic snapper-grouper.* (1) No person may harvest or possess a South Atlantic snapper-grouper in or from the South Atlantic EEZ in the closed area defined in paragraph (1)(2) of this section, except a person harvesting South Atlantic snapper-grouper (see § 622.32(b)(3) for the current prohibitions on the harvest and possession of red snapper and other snapper-grouper species) with spearfishing gear or with a sea bass pot that has a valid identification tag issued by the RA attached, as specified in § 622.6(b)(1)(i)(B). This prohibition on possession does not apply to a person aboard a vessel that is transiting through the closed area with fishing gear appropriately stowed as specified in paragraph (l)(3) of this section.

(2) The area closure for South Atlantic snapper-grouper is bounded by rhumb lines connecting, in order, the following points:

| Point | North lat. | West long. |
|---|---|---|
| A | 28°00′00″ | 80°00′00″ |
| B | 28°00′00″ | 80°10′57″ |
| C | 29°31′40″ | 80°30′34″ |
| D | 30°02′03″ | 80°50′45″ |
| E | 31°00′00″ | 80°35′19″ |
| F | 31°00′00″ | 80°00′00″ |
| G | 30°52′54″ | 80°00′00″ |
| H | 30°27′19″ | 80°11′41″ |
| I | 29°54′31″ | 80°15′51″ |
| J | 29°24′24″ | 80°13′32″ |
| K | 28°27′20″ | 80°00′00″ |
| A | 28°00′00″ | 80°00′00″ |

(3) For the purpose of paragraph (l)(1) of this section, continuous transiting or transit through means that a fishing vessel crosses the area closure on a constant heading, along a continuous straight line course, while underway, making way, not anchored, and by means of a source of power at all times (not including drifting by means of the prevailing water current or weather conditions). Fishing gear appropriately stowed means -

(i) A longline may be left on the drum if all gangions and hooks are disconnected and stowed below deck. Hooks cannot be baited. All buoys must be disconnected from the gear; however, buoys may remain on deck.

(ii) A trawl or try net may remain on deck, but trawl doors must be disconnected from such net and must be secured.

(iii) A gillnet, stab net, or trammel net must be left on the drum. Any additional such nets not attached to the drum must be stowed below deck.

(iv) Terminal gear (i.e., hook, leader, sinker, flasher, or bait) used with an automatic reel, bandit gear, buoy gear, trolling gear, handline, or rod and reel must be disconnected and stowed separately from such fishing gear. A rod and reel must be removed from the rod holder and stowed securely on or below deck.

(v) A crustacean trap or golden crab trap cannot be baited. All buoys must be disconnected from the gear; however, buoys may remain on deck.

(vi) Other stowage methods may be authorized by the Regional Administrator in the future. These would be published in the **Federal Register** and become effective at that time.

* * * * *

4. In § 622.37, paragraph (e)(1)(v) is revised to read as follows:

**§ 622.37 Size limits.**

* * * * *

(e) * * *

(1) * * *

(v) Red snapper -20 inches (50.8 cm), TL, however, see § 622.32(b)(3)(vii) for the current prohibition on the harvest and possession of red snapper.

* * * * *

5. In § 622.39, paragraph (d)(1)(iv) and (d)(1)(viii) are revised and paragraph (d)(1)(ix) is added to read as follows:

**§ 622.39 Bag and possession limits.**

* * * * *

(d) * * *

(1) * * *

(iv) Snappers, combined -10. However, excluded from this 10–fish bag limit are cubera snapper, measuring 30 inches (76.2 cm), TL, or larger, in the South Atlantic off Florida, and red snapper and vermilion snapper. (See § 622.32(b)(3)(vii) for the prohibition on harvest and possession of red snapper and § 622.32(c)(2) for limitations on cubera snapper measuring 30 inches (76.2 cm), TL, or larger, in or from the South Atlantic EEZ off Florida.)

* * * * *

(viii) South Atlantic snapper-grouper, combined -20. However, excluded from this 20–fish bag limit are tomtate, blue runner, and those specified in paragraphs (d)(1)(i) through (vii), and (ix) of this section.

(ix) No red snapper may be retained.

* * * * *

6. In § 622.41, paragraph (n) introductory text is revised and paragraph (n)(2) is added to read as follows:

**§ 622.41 Species specific limitations.**

* * * * *

(n) * * * For a person on board a vessel to harvest or possess South Atlantic snapper-grouper in or from the South Atlantic EEZ, the vessel must possess on board and such person must use the gear as specified in paragraphs (n)(1) and (n)(2) of this section.

* * * * *

(2) *Non-stainless steel circle hooks.* Non-stainless steel circle hooks are required when fishing with hook-and-line gear and natural baits north of 28° N. lat.

7. In § 622.45, paragraph (d)(10) is added to read as follows:

**§ 622.45 Restrictions on sale and purchase.**

* * * * *

(d) * * *

(10) No person may sell or purchase a red snapper harvested from or possessed in the South Atlantic, i.e., state or Federal waters, by a vessel for which a Federal commercial permit for South Atlantic snapper-grouper has been issued.

* * * * *

[FR Doc. 2010–20070 Filed 8–12–10; 8:45 am]

BILLING CODE 3510–22–S

# Notices

Federal Register
Vol. 75, No. 156
Friday, August 13, 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

### Submission for OMB Review; Comment Request

August 9, 2010.

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments regarding (a) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology should be addressed to: Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), *OIRA_Submission@OMB.EOP.GOV* or fax (202) 395–5806 and to Departmental Clearance Office, USDA, OCIO, Mail Stop 7602, Washington, DC 20250–7602. Comments regarding these information collections are best assured of having their full effect if received within 30 days of this notification. Copies of the submission(s) may be obtained by calling (202) 720–8958.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

**Animal and Plant Health Inspection Service**

*Title:* Importation of Live Poultry, Poultry Meat, and Other Poultry Products from Specified Regions.

*OMB Control Number:* 0579–0228.

*Summary of Collection:* The Animal Health Protection Act (AHPA) of 2002 is the primary Federal law governing the protection of animal health. Veterinary Services of the USDA's Animal and Plant Health Inspection Service (APHIS) is responsible for administering regulations intended to prevent the introduction of animal diseases into the United States. The regulations in 9 CFR part 94 allow the importation of poultry meat and products and live poultry from Argentina and the Mexican States of Campeche, Quintana Roo, and Yucatan under certain conditions. APHIS will collect information through the use of a certification statement that must be completed by Mexican veterinary authorities prior to export and three APHIS forms VS 17–129, VS 17–29, and VS 17–30.

*Need and Use of the Information:* The information collected from the certificate and forms will provide APHIS with critical information concerning the origin and history of the items destined for importation in the United States. Without the information APHIS would be unable to establish an effective defense against the incursion of END from poultry and poultry products imported from Argentina and certain States within Mexico.

*Description of Respondents:* Federal Government; Business or other for-profit.

*Number of Respondents:* 25.

*Frequency of Responses:* Reporting: On occasion.

*Total Burden Hours:* 240.

**Animal and Plant Health Inspection Service**

*Title:* Highly Pathogenic Avian Influenza (HPAI) Subtype H5N1.

*OMB Control Number:* 0579–0245.

*Summary of Collection:* The Animal Health Protection Act (AHPA) of 2002 is the primary Federal law governing the protection of animal health. The law gives the Secretary of Agriculture broad authority to detect, control, or eradicate pests or diseases of livestock or poultry. The agency charged with carrying out this disease prevention mission is the Animal and Plant Health Inspection Service (APHIS), through its Veterinary Services Program. Highly pathogenic avian influenza (HPAI) is an extremely infectious and often fatal disease affecting all types of birds and poultry. To protect the United States against an incursion of HPAI, APHIS requires the use of several information collection activities, including an Application to Import Controlled Materials or Transport Organisms (VS Form 16–3); an Import permit (VS Form 16–6); and Application for Import or In-Transit permit (VS Form 17–129); a notarized declaration or affirmation; and a Pet Bird Owner Agreement (VS Form 17–8).

*Need and Use of the Information:* APHIS will collect information to ensure that U.S. origin pet birds, performing or theatrical birds and poultry undergo appropriate examinations before entering the United States. Without the information, it would be impossible for APHIS to establish an effective line of defense against an introduction of highly pathogenic avian influenza.

*Description of Respondents:* Individuals or households; Business or other for-profit; Not-for-profit institutions.

*Number of Respondents:* 270.

*Frequency of Responses:* Reporting: On occasion.

*Total Burden Hours:* 166.

**Animal Plant and Health Inspection Service**

*Title:* Health Certificate/Export Certificate-Animal Products.

*OMB Control Number:* 0579–0256.

*Summary of Collection:* The Animal Health Protection Act (AHPA) of 2002 is the primary Federal law governing the protection of animal health. The law gives the Secretary of Agriculture board authority to detect, control, or eradicate pests or diseases of livestock or poultry. The export of agricultural commodities, including animals and animal products, is a major business in the United States and contributes to a favorable balance of trade. To facilitate the export of U.S. animals and products, the U.S. Department of Agriculture, Animal and Plant Health Inspection Service (APHIS), Veterinary Services maintains information regarding the import health requirements of other countries for animals and animal products exported

from the United States. Many countries that import animal products from the United States require a certification from APHIS that the United States is free of certain diseases. These countries may also require that our certification statement contain additional declarations regarding the U.S. animal products being exported. Form VS–16–4 and VS–16–4A, Export Certificate for Animal Products and Export Certificate for Animal Products Continuation Sheet, a Hearing Request to appeal VS' decision to refuse to grant a certificate, and a Notification of Tampered Certificate can be used to meet these requirements. Regulations pertaining to export certification of animals and animal products are contained in 9 CFR part 91.

*Need and Use of the Information:* Form VS 16–4 and VS 16–4A serves as the official certification that the United States is free of rinderpest, foot-and-mouth disease, classical swine fever, swine vesicular disease, African swine fever, bovine fever, bovine spongiform encephalopathy, and contagious bovine pleuropneuomia. APHIS will collect the exporter's name, address, the name and address of the consignee, the quantity, and unit of measure, type of product being exported, the exporter's identification, and type of conveyance (ship, train, and truck) that will transport the products. Without the information, many countries would not accept animal products from the United States, creating a serious trade imbalance and adversely affecting U.S. exporters.

*Description of Respondents:* Business or other-for-profit.

*Number of Respondents:* 34,652.

*Frequency of Responses:* Reporting: On occasion.

*Total Burden Hours:* 66,266.

**Animal and Plant Health Inspection Service**

*Title:* Importation of Table Eggs from Regions Where END Exists.

*OMB Control Number:* 0579–0328.

*Summary Of Collection:* The Animal Health Protection Act (AHPA) of 2002 is the primary Federal law governing the protection of animal health. The law gives the Secretary of Agriculture broad authority to detect, control, or eradicate pests or diseases of livestock or poultry. Veterinary Services, a program with the Animal and Plant Health Inspection Service (APHIS) is responsible for administering regulations intended to prevent the introduction of animal disease in the United States. Regulations in title 9, Code of Federal Regulations, section 94.6 deal specifically with the importation of table eggs from certain regions that may pose a risk of introducing Exotic Newcastle Disease (END) into the United States.

*Need and Use of the Information:* While this collection applies to any region where END is considered to exist, Mexico is currently the only END-affected region importing table eggs. APHIS requires the following with regard to imported table eggs: (1) A certificate for table eggs from END-affected regions; and (2) a government seal issued by the veterinarian accredited by the national government of Mexico who signed the certificate. If the information were collected less frequently or not collected at all, APHIS would be unable to establish an effective defense against the incursion of END from table eggs imported from END-affected regions. This could have serious health consequences for U.S. poultry and economic consequences for the U.S. poultry industry.

*Description of Respondents:* Federal Government.

*Number of Respondents:* 1.

*Frequency of Responses:* Reporting: On occasion.

*Total Burden Hours:* 3.

**Ruth Brown,**

*Departmental Information Collection Clearance Officer.*

[FR Doc. 2010–19970 Filed 8–12–10; 8:45 am]

**BILLING CODE 3410–34–P**

## DEPARTMENT OF AGRICULTURE

### Food Safety and Inspection Service

**[Docket No. FSIS–2010–0018]**

### Notice of Request for Revision of a Currently Approved Information Collection (Procedures for the Notification of New Technology)

**AGENCY:** Food Safety and Inspection Service, USDA.

**ACTION:** Notice and request for comments.

**SUMMARY:** In accordance with the Paperwork Reduction Act of 1995 and Office of Management and Budget (OMB) regulations, this notice announces the Food Safety and Inspection Service's (FSIS) intention to request a revision of a currently approved information collection regarding the procedures for notifying the Agency about new technology because the OMB approval will expire on November 30, 2010, and because FSIS has revised its total annual burden estimate in light of the latest available data.

**DATES:** Comments on this notice must be received on or before October 12, 2010.

**ADDRESSES:** FSIS invites interested persons to submit comments on this notice. Comments may be submitted by either of the following methods:

- *Federal eRulemaking Portal:* This Web site provides the ability to type short comments directly into the comment field on this Web page or attach a file for lengthier comments. Go to *http://www.regulations.gov.* Follow the on-line instructions at that site for submitting comments.
- *Mail, including floppy disks or CD–ROMs, and hand- or courier-delivered items:* Send to Docket Clerk, U.S. Department of Agriculture, Food Safety and Inspection Service, Room 2–2175, George Washington Carver Center, 5601 Sunnyside Avenue, Beltsville, MD 20705.

*Instructions:* All items submitted by mail or electronic mail must include the Agency name and docket number FSIS–2010–0018. Comments received in response to this docket will be made available for public inspection and posted without change, including any personal information, to *http://www.regulations.gov.*

*Docket:* For access to background documents or comments received, go to the FSIS Docket Room at the address listed above between 8:30 a.m. and 4:30 p.m., Monday through Friday.

**FOR FURTHER INFORMATION CONTACT:** Contact John O'Connell, Paperwork Reduction Act Coordinator, Food Safety and Inspection Service, USDA, 1400 Independence Avenue, SW., Room 6065, South Building, Washington, DC 20250, (202) 720–0345.

**SUPPLEMENTARY INFORMATION:**

*Title:* Procedures for the Notification of New Technology.

*OMB Number:* 0583–0127.

*Expiration Date of Approval:* 11/30/2010.

*Type of Request:* Revision of a currently approved information collection.

*Abstract:* FSIS has been delegated the authority to exercise the functions of the Secretary as specified in the Federal Meat Inspection Act (FMIA) (21 U.S.C. 601, *et seq.*), the Poultry Products Inspection Act (PPIA) (21 U.S.C. 451, *et seq.*), and the Egg Products Inspection Act (EPIA) (21 U.S.C. 1031, *et seq.*). These statutes provide that FSIS is to protect the public by verifying that meat, poultry, and egg products are safe, wholesome, not adulterated, and properly labeled and packaged.

FSIS is planning to request a revision of an approved information collection addressing paperwork and recordkeeping requirements regarding new technology because the OMB

approval will expire on November 30, 2010, and because FSIS has revised its total annual burden estimate from 8,400 hours to 8,600 hours.

FSIS has established procedures for notifying the Agency of any new technology intended for use in official establishments and plants (68 FR 6873). To follow the procedures, establishments, plants, and firms that manufacture and sell technology to official establishments and plants notify the Agency by submitting documents describing the operation and purpose of the new technology. The documents should explain why the new technology will not (1) adversely affect the safety of the product, (2) jeopardize the safety of Federal inspection personnel, (3) interfere with inspection procedures, or (4) require a waiver of any Agency regulation. If use of the new technology will require a waiver of any Agency regulation, the notice should identify the regulation and explain why a waiver would be appropriate. If the new technology could affect FSIS regulations, product safety, inspection procedures, or the safety of inspection program personnel, the establishment or plant would need to submit a written protocol for an in-plant trial as part of a pre-use review. FSIS expects the submitter of a written protocol to provide data to the Agency throughout the duration of the in-plant trial.

FSIS has made the following estimates based upon an information collection assessment:

*Estimate of Burden:* FSIS estimates that it will take respondents an average of 8 hours to complete a notification of intent to use new technology if no in-plant trial is necessary. If an in-plant trial is necessary, FSIS estimates that it will take an average of 80 hours to develop a protocol and an average of 80 more hours to collect data and keep records during the in-plant trial.

*Respondents:* Official establishments and plants; firms that manufacture or sell technology to official establishments and plants.

*Estimated Number of Respondents:* 75 respondents will submit notifications of intent to use new technology; 50 respondents will develop a protocol for and conduct an in-plant trial.

*Estimated Numbers of Annual Responses per Respondent:* 1.

*Estimated Total Annual Burden on Respondents:* 8,600 hours.

Copies of this information collection assessment can be obtained from John O'Connell, Paperwork Reduction Act Coordinator, Food Safety and Inspection Service, USDA, 1400 Independence, SW., Room 6065, South Building, Washington, DC 20250, (202) 720–0345.

*Comments are invited on:* (a) Whether the proposed collection of information is necessary for the proper performance of FSIS's functions, including whether the information will have practical utility; (b) the accuracy of FSIS's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques, or other forms of information technology. Comments may be sent both to FSIS, at the addresses provided above, and to the Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20253.

Responses to this notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

**USDA Nondiscrimination Statement**

The U.S. Department of Agriculture (USDA) prohibits discrimination in all its programs and activities on the basis of race, color, national origin, gender, religion, age, disability, political beliefs, sexual orientation, and marital or family status. (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 written complaint of discrimination, write USDA, Office of the Assistant Secretary for Civil Rights, 1400 Independence Avenue, SW., Washington, DC 20250–9410 or call 202–720–5964 (voice and TTY). USDA is an equal opportunity provider and employer.

**Additional Public Notification**

Public awareness of all segments of rulemaking and policy development is important. Consequently, in an effort to ensure that the public and in particular minorities, women, and persons with disabilities, are aware of this notice, FSIS will announce it on-line through the FSIS Web page located at *http://www.fsis.usda.gov/regulations/2010_Notices_Index/index.asp.*

FSIS also will make copies of this **Federal Register** publication available through the *FSIS Constituent Update,* which is used to provide information regarding FSIS policies, procedures, regulations, **Federal Register** notices, FSIS public meetings, and other types of information that could affect or would be of interest to our constituents and stakeholders. The *Update* is communicated via Listserv, a free e-mail subscription service consisting of industry, trade, and farm groups, consumer interest groups, allied health professionals, scientific professionals, and other individuals who have requested to be included. The *Update* also is available on the FSIS Web page. Through Listserv and the Web page, FSIS is able to provide information to a much broader, more diverse audience.

In addition, FSIS offers an e-mail subscription service which provides automatic and customized access to selected food safety news and information. This service is available at *http://www.fsis.usda.gov/news_and_events/email_subscription/.* Options range from recalls to export information to regulations, directives and notices. Customers can add or delete subscriptions themselves, and have the option to password protect their accounts.

Done at Washington, DC, on: August 6, 2010.

**Alfred V. Almanza,**

*Administrator.*

[FR Doc. 2010–19976 Filed 8–12–10; 8:45 am]

**BILLING CODE 3410–DM–P**

## DEPARTMENT OF AGRICULTURE

### Forest Service

### Chequamegon-Nicolet National Forest; Wisconsin, Phelps Vegetation and Transportation Management Project

**AGENCY:** Forest Service, USDA.

**ACTION:** Notice of intent to prepare an environmental impact statement.

**SUMMARY:** The Eagle River-Florence Ranger District intends to prepare an environmental impact statement (EIS) to disclose the environmental consequences of proposed land management activities. The Phelps Vegetation and Transportation Management Project area is approximately 53,055 acres in size; about 24,500 acres of this is National Forest System land, 19,100 acres are other ownerships, and 9,020 acres are water. The project area is located in Vilas County, directly south of the Wisconsin-Michigan border, east of State Highway 45, and north of County Highway A, Wisconsin. The legal description is T41N, R11E; T41N, R12E; T42N, R11E; and T42N, R12E. See the

**SUPPLEMENTARY INFORMATION** section for the purpose and need for the action.

**DATES:** Comments concerning the scope of the analysis must be received by September 13, 2010. The draft environmental impact statement is expected January 2011 and the final environmental impact statement is expected May 2011.

**ADDRESSES:** Send written comments to District Ranger Joel Skjerven, Eagle River-Florence Ranger District, Chequamegon-Nicolet National Forest, 1247 East Wall Street, Eagle River, WI 54521. Comments may also be sent via e-mail to the district ranger through the project leader at *cbrunner@fs.fed.us,* or via facsimile to 715–479–6407.

It is important that reviewers provide their comments at such times and in such a way that they are useful to the Agency's preparation of the EIS. Therefore, comments should be provided prior to the close of the comment period and should clearly articulate the reviewer's concerns and contentions.

Comments received in response to this solicitation, including names and addresses of those who comment, will be part of the public record for this proposed action. Comments submitted anonymously will be accepted and considered, however.

**FOR FURTHER INFORMATION CONTACT:** Christine Brunner, NEPA Coordinator, Eagle River-River-Florence Ranger District, Chequamegon-Nicolet National Forest, 1247 East Wall Street, Eagle River, WI 54521. Individuals who use telecommunication devices for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8 a.m. and 8 p.m., Eastern Time, Monday through Friday.

**SUPPLEMENTARY INFORMATION:**

**Purpose and Need for Action**

Two major areas of focus were identified for this project—vegetation and transportation. Based on the Forest Plan desired future conditions for the area, the following eight needs were identified by the Interdisciplinary Team: (1) Move northern hardwood stands in MA 2A toward an uneven-aged condition consistent with the Forest Plan; (2) promote healthy forests; (3) improve the aspen age class distribution; (4) improve upland forest type composition; (5) maintain adequate openings to provide habitat for wildlife species dependent on early successional forest; (6) reduce hazardous fuels and reintroduce fire as a disturbance regime in the Wildland Urban Interface west of Lac Vieux Desert; (7) contribute toward satisfying the demand for wood products; (8) provide a safe, efficient, and effective transportation system.

**Proposed Action**

In order to address the vegetation needs identified above, approximately 8430 acres of various forest types would be harvested using selection, overstory removal, shelterwood, clearcut, and thin methods. As a result of clearcutting portions of four contiguous stands in order to convert them to less fire-prone species, a 44-acre temporary opening would be created. Other proposed actions include 240 acres of mechanical site preparation for regeneration, 54 acres of burning for regeneration, 35 acres of planting, and 237 acres of wildlife opening improvement.

The proposed action includes the following to address need 8 above: Decommission approximately 31 miles of unauthorized road, close 6 miles of system road closed, reconstruct 12 miles of road, and construct 0.8 miles of new road.

**Possible Alternatives**

One alternative to the Proposed Action that was developed in response to a public comment would result in the following changes: Approximately 6,455 fewer acres of harvest, 58 fewer acres of opening improvement, and 8.3 fewer miles of road reconstruction.

**Responsible Official**

The responsible official is District Ranger Joel Skjerven.

**Nature of Decision To Be Made**

The decision will be limited to answering the following questions based on the environmental analysis: (1) Will the proposed action proceed as proposed, as modified, or not at all; (2) what mitigation measures and monitoring requirements are needed, if any; (3) will the decision require a Forest Plan amendment?

**Preliminary Issues**

The following issues will be analyzed in the EIS: Effects of the proposed action and alternatives on soil, water, Regional Forester Sensitive Species, and non-native invasive species.

**Scoping Process**

This notice of intent initiates the scoping process, which guides the development of the environmental impact statement. The District began the scoping process for this project as an environmental assessment during March 2010. Approximately 345 persons and organizations were sent information packages, and a notice was placed in the newspaper of record. The project is also listed in the Chequamegon-Nicolet Schedule of Proposed Actions, and is viewable on the Forest Web page at *http://fs.usda.gov/goto/cnnf/nepa* and click on "View a Listing of all Under Analysis," then select Phelps Vegetation and Transportation Management Project."

It is important that reviewers provide their comments at such times and in such manner that they are useful to the agency's preparation of the environmental impact statement. Therefore, comments should be provided prior to the close of the comment period and should clearly articulate the reviewer's concerns and contentions.

Dated: August 2, 2010.

**Paul I.V. Strong,**

*Forest Supervisor.*

[FR Doc. 2010–19904 Filed 8–12–10; 8:45 am]

**BILLING CODE 3410–11–P**

## DEPARTMENT OF AGRICULTURE

### Forest Service

### Amador County Resource Advisory Committee

**AGENCY:** Forest Service, USDA.

**ACTION:** Notice of meeting.

**SUMMARY:** The Amador County Resource Advisory Committee will meet in Sutter Creek, California. The committee is meeting as authorized under the Secure Rural Schools and Community Self-Determination Act (Pub. L. 110–343) and in compliance with the Federal Advisory Committee Act. The RAC will review project proposals submitted by the Forest Service and the public, listen to project proponents explain their projects, deliberate and vote on projects to recommend for approval and implementation, and conduct RAC management business.

**DATES:** The meetings will be held on August 30, 2010 and September 13, 2010 beginning at 6 p.m.

**ADDRESSES:** The meeting will be held at 10877 Conductor Blvd., Sutter Creek, CA. Written comments should be sent to Frank Mosbacher; Forest Supervisor's Office; 100 Forni Road; Placerville, CA 95667. Comments may also be sent via e-mail to *fmosbacher@fs.fed.us,* or via facsimile to 530–621–5297.

All comments, including names and addresses when provided, are placed in the record and are available for public inspection and copying. The public may inspect comments received at 100 Forni Road; Placerville, CA 95667. Visitors are encouraged to call ahead to 530–622–5061 to facilitate entry into the building.

**FOR FURTHER INFORMATION CONTACT:** Frank Mosbacher, Public Affairs Officer, Eldorado National Forest Supervisors Office, (530) 621–5268.

Individuals who use telecommunication devices for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8 a.m. and 8 p.m., Eastern Standard Time, Monday through Friday.

**SUPPLEMENTARY INFORMATION:** The meeting is open to the public. The following business will be conducted: At that meeting the RAC will review project proposals submitted by the Forest Service and the public, listen to project proponents explain their projects, deliberate and vote on projects to recommend for approval and implementation and conduct RAC management buiness.

More information will be posted on the Eldorado National Forest Web site @ *http://www.fs.fed.us/r5/eldorado.* A public comment opportunity will be made available following the business activity. Future meetings will have a formal public input period for those following the yet to be developed public input process.

Dated: August 9, 2010.

**Ramiro Villalvazo,**

*Forest Supervisor.*

[FR Doc. 2010–20085 Filed 8–12–10; 8:45 am]

**BILLING CODE 3410–11–P**

## DEPARTMENT OF AGRICULTURE

### Commodity Credit Corporation

### Meeting of the Advisory Committee on Emerging Markets

*Announcement Type:* New.

*Catalog of Federal Domestic Assistance (CFDA) Number:* 10.603.

**SUMMARY:** Pursuant to the provisions of section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), notice is hereby given that a meeting of the Advisory Committee on Emerging Markets will be held on September 14, 2010, in Washington, DC. The role of the committee is to provide information and advice, based upon knowledge and expertise of the members, useful to the U.S. Department of Agriculture (USDA) in implementing the Emerging Markets Program. The committee also advises USDA on the involvement of the U.S. private sector in cooperative work with emerging markets in food and rural business systems, and reviews proposals submitted to the Program.

**DATES:** There will be a "Welcome" conference call on July 22, 2010, at 2 p.m. EDT, and the meeting will convene on September 14, 2010, from 9:30 a.m. to 5:30 p.m. EDT.

**ADDRESSES:** The meeting will be held in the 4th Floor, Room 411 Portals Building, 1250 Maryland Ave., SW., Washington, DC 20024. Please submit comments by no later than September 10, 2010, by e-mail to *podadmin@fas.usda.gov* or by FAX to 202–720–9361.

**FOR FURTHER INFORMATION CONTACT:** Colette Ross, *Colette.Ross@fas.usda.gov,* (202) 720–2379.

**SUPPLEMENTARY INFORMATION:** The purpose of this meeting is to review and discuss qualified proposals submitted by the private sector for participation in the fiscal year 2011 Emerging Markets Program. The meeting is open to the public, and members of the public may provide comments, but they should not make any oral comments at the meeting unless invited to do so by the co-chairpersons. The proposals will be posted on the Federal Advisory Committee's Database at: *http://fido.gov/facadatabase/public.asp.*

Information on the advisory committee and the Emerging Markets Program is also available on the Web at: *http://www.fas.usda.gov/mos/em-markets/em-markets.asp.*

Signed at Washington, DC, on July 27, 2010.

**John D. Brewer,**

*Administrator, Foreign Agricultural Service, and Vice President, Commodity Credit Corporation.*

[FR Doc. 2010–20101 Filed 8–12–10; 8:45 am]

**BILLING CODE 3410–10–P**

## DEPARTMENT OF AGRICULTURE

### Foreign Agricultural Service

### Trade Adjustment Assistance for Farmers

**AGENCY:** Foreign Agricultural Service, USDA.

**ACTION:** Notice.

The Administrator of the Foreign Agricultural Service (FAS) today accepted and began a review of a petition for trade adjustment assistance filed under the Fiscal Year 2011 program by the University of Rhode Island on behalf of American lobster (Homarus americanus) fishermen who catch and market their lobster in Rhode Island. The Administrator will determine within 40 days whether or not increasing imports of American lobster contributed importantly to a greater than 15-percent decrease in the production value of lobster compared to the average of the three preceding marketing years. If a determination is affirmative, fishermen who land and market American lobster in Rhode Island will be eligible to apply to the Farm Service Agency for free technical assistance and cash benefits.

**FOR FURTHER INFORMATION CONTACT:** Trade Adjustment Assistance for Farmers Program Staff, FAS, USDA by phone: (202) 720–0638 or (202) 690–0633; or by e-mail at: *tradeadjustment@fas.usda.gov;* or visit the TAA for Farmers' Web site: *http://www.fas.usda.gov/itp/taa.*

Dated: August 3, 2010.

**Suzanne Hale,**

*Acting Administrator, Foreign Agricultural Service.*

[FR Doc. 2010–20093 Filed 8–12–10; 8:45 am]

**BILLING CODE 3410–10–P**

## DEPARTMENT OF AGRICULTURE

### Foreign Agricultural Service

### Trade Adjustment Assistance for Farmers

**AGENCY:** Foreign Agricultural Service, USDA.

**ACTION:** Notice.

The Administrator of the Foreign Agricultural Service (FAS) today accepted and began a review of a petition for trade adjustment assistance filed under the Fiscal Year 2011 program by the Wild Blueberry Commission of Maine on behalf of blueberry producers in Maine. The Administrator will determine within 40 days whether increasing imports of blueberries contributed importantly to a greater than 15-percent decrease in the average annual price of blueberries compared to the average of the three preceding marketing years. If a determination is affirmative, producers who produce and market blueberries in Maine will be eligible to apply to the Farm Service Agency for free technical assistance and cash benefits.

**FOR FURTHER INFORMATION CONTACT:** Trade Adjustment Assistance for Farmers Program Staff, FAS, USDA by phone: (202) 720–0638 or (202) 690–0633; or by e-mail at: *tradeadjustment@fas.usda.gov;* or visit the TAA for Farmers' Web site: *http://www.fas.usda.gov/itp/taa.*

Dated: August 3, 2010.

**Suzanne Hale,**

*Acting Administrator, Foreign Agricultural Service.*

[FR Doc. 2010–20097 Filed 8–12–10; 8:45 am]

**BILLING CODE 3410–10–P**

## DEPARTMENT OF COMMERCE

### International Trade Administration

**A–570–912**

### Certain New Pneumatic Off-The-Road Tires from the People's Republic of China: Notice of Amended Final Determination of Sales at Less Than Fair Value and Amended Antidumping Duty Order in Accordance With Final Court Decision

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

**EFFECTIVE DATE:** August 13, 2010.

**SUMMARY:** On May 14, 2010, the United States Court of International Trade ("CIT") sustained the final remand redetermination made by the Department of Commerce ("the Department") pursuant to the CIT's remand of the final determination in the antidumping investigation on certain new pneumatic off–the-road tires ("OTR tires") from the People's Republic of China ("PRC"). *See Bridgestone Americas Inc. v. United States*, Consol. Ct. No. 08–00256, Slip Op. 10–55 (Ct. Int'l Trade May 14, 2010) ("Bridgestone"). This case arose out of the Department's final determination in the antidumping duty investigation on OTR tires from the PRC. *See 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) ("*Final Determination*"); *Certain New Pneumatic Off–the-Road Tires from the People's Republic of China: Notice of Amended Final Affirmative Determination of Sales at Less than Fair Value and Antidumping Duty Order*, 73 FR 51624 (September 4, 2008) ("*OTR Tires Order*"). As there is now a final and conclusive court decision in this action, we are amending our final determination and our antidumping duty order.

**FOR FURTHER INFORMATION CONTACT:** Lilit Astvatsatrian or Charles Riggle, AD/CVD Operations, Office 8, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington DC 20230; telephone (202) 482–6412 or (202) 482–0650, respectively.

**SUPPLEMENTARY INFORMATION:** In July 2008, the Department published in the **Federal Register** the *Final Determination* in the antidumping duty investigation on OTR tires from the PRC in which it calculated a zero dumping rate for respondent Xugong Tyres Co., Ltd. ("Xugong"). *See Final Determination*, 73 FR at 40489; *OTR Tires Order*, 73 FR at 51625–26.

In August 2008, Bridgestone Americas, Inc. and Bridgestone Americas Tire Operations, LLC (collectively, "Bridgestone") and Titan Tire Corporation ("Titan"), respectively, domestic producers of the like product, initiated actions at the CIT challenging the final determination with respect to Xugong's zero dumping margin. Among their claims, Bridgestone and Titan alleged that the Department erred in its final determination by treating as indirect materials certain inputs used by Xugong in the production of subject merchandise.

In April 2009, the Department requested a voluntary remand to further explain its determination regarding the classification of the fifteen raw materials reported by Xugong as indirect materials. On August 4, 2009, the CIT remanded this matter to the Department to reconsider whether each of the fifteen inputs was a direct or indirect material, to reopen the record as appropriate, and to recalculate the margin accordingly. *See Bridgestone Americas Inc. v. United States*, Consol. Ct. No. 08–00256, Slip Op. 09–79 (Ct. Int'l Trade Aug. 4, 2009).

After receiving comments on the draft remand results, the Department on January 7, 2010, issued its final remand redetermination in which it treated Xugong's fifteen raw material inputs as direct materials and, thus, recalculated Xugong's margin by adding Xugong's fifteen raw materials as direct material inputs in the calculation of the normal value. As a result of this recalculation, Xugong's dumping rate changed from 0.00 percent to 10.01 percent. *See Final Determination Pursuant to Court Remand, Bridgestone Americas Inc. v. United States*, Consol. Ct. No. 08–00256, dated January 8, 2010.

On May 14, 2010, the CIT sustained the final redetermination made by the Department pursuant to the CIT's remand of the final determination in the antidumping investigation of the OTR tires from the PRC. *See Bridgestone*, Slip Op. 10–55 at 14. Consistent with the decision of U.S. Court of Appeals for the Federal Circuit in *Timken Co. v. United States*, 893 F.2d 337 (Fed. Cir. 1990), the Department published in the **Federal Register** a notice of a court decision that is not "in harmony" with the Department's final determination. *See Certain New Pneumatic Off–the-Road Tires from the People's Republic of China: Notice of Decision of the Court of International Trade Not in Harmony*, 75 FR 31422 (June 3, 2010) ("*Timken* Notice "). Pursuant to section 516A(e) of the Tariff Act of 1930, as amended ("the Act"), and consistent with the *Timken* Notice, the Department instructed U.S. Customs and Border Protection ("CBP") to begin suspension of liquidation, effective May 24, 2010, with respect to subject merchandise produced and exported by Xugong, pending a final and conclusive court decision in this action. While merchandise produced and exported by Xugong was originally excluded from the antidumping order, the Department's remand determination found that merchandise exported and produced by Xugong was, in fact, sold at less than fair value. As the period to appeal the CIT decision in Bridgestone has expired, and a final and conclusive court decision with respect to this proceeding is in place, we are amending our amended final determination and antidumping duty order, accordingly.

### Inclusion in the Application of the Antidumping Duty Order

As discussed above and pursuant to the affirmed remand determination, Xugong is no longer excluded from the antidumping duty order issued in this case. Therefore, as noted above, subject merchandise exported and produced by Xugong is subject to the antidumping duty order on OTR tires from the PRC.

### Amendment to Final Determination and Antidumping Order

Because there is now a final and conclusive court decision with respect to this proceeding, the revised dumping margin in the amended final determination is as follows:

OTR TIRES FROM THE PRC

| Exporter | Producer | Original Final Margin (Percent) | Amended Final Margin (Percent) |
|---|---|---|---|
| Xuzhou Xugong Tyres Co., Ltd. ..... | Xuzhou Xugong Tyres Co., Ltd. ..... | 0.00 | 10.01 |

Also, as noted above, Xugong is no longer excluded from the antidumping duty order issued in this case. Therefore, the Department will instruct the CBP to collect a cash deposit of 10.01 percent for entries of subject merchandise produced and exported by Xugong, effective May 24, 2010, in accordance with the *Timken* Notice.

This notice is issued and published in accordance with sections 735(d), 736(a), and 777(i)(1) of the Act.

Dated: August 6, 2010.

**Ronald K. Lorentzen,**

*Deputy Assistant Secretary for Import Administration.*

[FR Doc. 2010–20078 Filed 8–12–10; 8:45 am]

**BILLING CODE 3510–DS–S**

## DEPARTMENT OF COMMERCE

### International Trade Administration

**[A–570–893]**

### Administrative Review of Certain Frozen Warmwater Shrimp From the People's Republic of China: Final Results and Partial Rescission of Antidumping Duty Administrative Review

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

**SUMMARY:** On March 12, 2010, the Department of Commerce ("Department") published in the **Federal Register** the *Preliminary Results* of the fourth administrative review of the antidumping duty order on certain frozen warmwater shrimp from the People's Republic of China ("PRC").[1] We gave interested parties an opportunity to comment on the *Preliminary Results.* Based upon our analysis of the comments and information received, we made changes to the margin calculations for the final results. We find that certain exporters have not sold subject merchandise at less than normal value ("NV") during the period of review ("POR"), February 1, 2008, through January 31, 2009.

**DATES:** *Effective Date:* August 13, 2010.

**FOR FURTHER INFORMATION CONTACT:** Bob Palmer and Irene Gorelik, 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) 482–9068 and (202) 482–6905, respectively.

**SUPPLEMENTARY INFORMATION:**

#### Background

On March 26, 2009, the Department initiated an administrative review of 477 producers/exporters of subject merchandise from the PRC.[2] In the *Preliminary Results,* the Department preliminarily rescinded the review with respect to several companies which submitted no shipment certifications and for which we have not found any information to contradict these claims. These companies are Yangjiang City Yelin Hoitat Quick Frozen Seafood Co., Ltd., Fuqing Yihua Aquatic Food Co., Ltd., Fuqing Minhua Trade Co., Ltd., the Allied Pacific Group (comprised of Allied Pacific Food (Dalian) Co., Ltd.; Allied Pacific Aquatic Products (Zhanjiang) Co., Ltd.; Zhanjiang Allied Pacific Aquaculture Co., Ltd.; Allied Pacific (H.K.) Co., Ltd.; and King Royal Investments Ltd.); Gallant Ocean (Lianjiang), Ltd.; Gallant Ocean (Nanhai), Ltd.; Shantou Yelin Frozen Seafood Co., Ltd. (doing business as Shantou Yelin Quick-Freeze Marine Products Co., Ltd.).

As noted above, on March 12, 2010, the Department published the *Preliminary Results* of this administrative review.[3] On April 1, 2010, the Petitioner,[4] Domestic Processors,[5] Zhanjiang Regal Integrated Marine Resources Co., Ltd. ("Regal"), and Hilltop International ("Hilltop") submitted additional surrogate value information. On April 6, 2010, Petitioner, Domestic Processors, and Hilltop submitted rebuttal surrogate value information.

On March 30, 2010, we extended the deadline for parties to submit the case briefs and rebuttal briefs to April 12, 2010 and April 17, 2010, respectively.[6] On April 12, 2010, the Petitioner, Domestic Processors, Hilltop, and Regal filed case briefs. On April 19, 2010, the Petitioner, Domestic Processors, and Hilltop filed rebuttal briefs. On May 20, 2010, the Department extended the deadline for the completion of the final results of this review until August 9, 2010.[7] On June 15, June 23, and July 14, 2010, the Department placed wage rate data on the record for comment following the recent decision in *Dorbest Limited et. al.* v. *United States,* 2009–1257, –1266, issued by the United States Court of Appeals for the Federal Circuit ("CAFC") on May 14, 2010, regarding the Department's wage rate methodology.[8] Interested parties submitted comments regarding the new wage rate data on June 22, and July 21, 2010. *See* "Wage Rate Methodology" section below for a detailed explanation of the Department's revised wage rate for these final results.

#### Analysis of Comments Received

All issues raised in the case and rebuttal briefs by parties to this review are addressed in the "Fourth Administrative Review of Frozen Warmwater Shrimp from the People's Republic of China: Issues and Decision Memorandum for the Final Results," which is dated concurrently with this notice ("*I&D Memo*"). A list of the issues which parties raised and to which we respond in the *I&D Memo* is attached to this notice as an Appendix. The *I&D Memo* 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 Web site at *http://www.trade.gov/ia.* The paper copy and electronic version of the memorandum are identical in content.

#### Changes Since the Preliminary Results

Based on a review of the record as well as comments received from parties regarding our *Preliminary Results,* we have made revisions to Hilltop and Regal's margin calculations for the final results. First, we have revised classifications for certain expenses in the surrogate financial ratios used in the *Preliminary Results.* The Department's practice is to exclude certain expenses in the surrogate financial ratio calculations for constructed export price ("CEP") sales where those expenses have been accounted for elsewhere in the margin program.[9] Hilltop reported only CEP sales, so the Department will

[1] *See Fourth Administrative Review of Certain Frozen Warmwater Shrimp from the People's Republic of China: Preliminary Results, Preliminary Partial Rescission of Antidumping Duty Administrative Review and Intent Not to Revoke, In Part,* 75 FR 11855 (March 12, 2010) ("*Preliminary Results*").

[2] *See Notice of Initiation of Administrative Reviews and Requests for Revocation in Part of the Antidumping Duty Orders on Frozen Warmwater Shrimp from the Socialist Republic of Vietnam and the People's Republic of China,* 74 FR 13178 (March 26, 2009) for a listing of these companies.

[3] *See Preliminary Results.*

[4] Petitioner is the Ad Hoc Shrimp Trade Action Committee (hereinafter referred to as "Petitioner").

[5] These domestic parties are the American Shrimp Processors Association and Louisiana Shrimp Association (hereinafter referred to as "Domestic Processors").

[6] *See* Letter from the Department to Interested Parties, dated March 30, 2010.

[7] *See Certain Frozen Warmwater Shrimp from the People's Republic of China: Extension of Final Results of Antidumping Administrative Review,* 75 FR 28235 (May 20, 2010).

[8] *See* Memoranda to the File re; Wage Rate Data, dated June 15, June 23, and July 14, 2010.

[9] *See 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 18C.

exclude expenses that have been accounted for elsewhere. Specifically, we have determined that, absent any information to the contrary, the FDA expense identified in Schedule 15 of the surrogate financial statement as a U.S. sales expense has been accounted for elsewhere in the margin calculation program for Hilltop. Therefore, the Department excluded the FDA expense from Hilltop's surrogate financial ratio calculation because it was properly deducted from the gross unit price in the margin calculation program. *See I&D Memo* at Comment 10. However, unlike Hilltop, all of Regal's sales were export price ("EP") sales, where, in non-market economy cases, the "Department does not make circumstance-of-sale adjustments as the offsetting adjustments to the normal value are not normally possible." [10] Consequently, for the reasons stated above, we will not exclude FDA related charges in the calculation of the surrogate financial ratios for Regal. See *Id.*

Further, in the *Preliminary Results,* the Department classified the FDA Expense as overhead, while the surrogate company categorized this expense as a selling, general, and administrative ("SG&A") expense. Because there is no information in surrogate company's financial statement to indicate that the FDA expense is not related to the general operations of the company, in accordance with the Department's practice,[11] the FDA expense should be reflected in the SG&A expense ratio for this company. Consequently, for the final results, we will reclassify the FDA expense from an overhead item and treat it as an SG&A expense, as reported by the surrogate company. For further details, *see I&D Memo* at Comment 10.

Additionally, we have revised the wage rate methodology and the surrogate values for shrimp larvae, diesel fuel, shrimp waste, and by-products. For further details *see I&D Memo* at Comments 8, 3, 6, and 7; *see also* "Memorandum to the File through Catherine Bertrand, Program Manager, Office IX from Bob Palmer, Case Analyst, Office IX; Fourth Administrative Review of Certain Frozen Warmwater Shrimp from the People's Republic of China: Surrogate Factor Valuations for the Final Results," ("*Final SV Memo*") dated concurrently with this notice. Because of the changes noted above, the antidumping duty margin calculations for both of the mandatory respondents have changed since the *Preliminary Results.* For further details on these company-specific changes, see the company-specific analysis memoranda.

**Wage Rate Methodology**

Pursuant to a recent decision by the CAFC, we have calculated a revised hourly wage rate to use in valuing Hilltop's and Regal's reported labor. The revised wage rate is calculated by averaging earnings and/or wages in countries that are economically comparable to the PRC and that are significant producers of comparable merchandise. *See I&D Memo* at Comment 8; *see also Final SV Memo* for the details of the calculation and supporting data.

**Scope of the Order**

The scope of this order includes certain frozen warmwater shrimp and prawns, whether wild-caught (ocean harvested) or farm-raised (produced by aquaculture), head-on or head-off, shell-on or peeled, tail-on or tail-off,[12] deveined or not deveined, cooked or raw, or otherwise processed in frozen form.

The frozen warmwater shrimp and prawn products included in the scope of this *Order,* regardless of definitions in the Harmonized Tariff Schedule of the United States ("HTS"), are products which are processed from warmwater shrimp and prawns through freezing and which are sold in any count size.

The products described above may be processed from any species of warmwater shrimp and prawns. Warmwater shrimp and prawns are generally classified in, but are not limited to, the *Penaeidae* family. Some examples of the farmed and wild-caught warmwater species include, but are not limited to, white-leg shrimp (*Penaeus vannemei*), banana prawn (*Penaeus merguiensis*), fleshy prawn (*Penaeus chinensis*), giant river prawn (*Macrobrachium rosenbergii*), giant tiger prawn (*Penaeus monodon*), redspotted shrimp (*Penaeus brasiliensis*), southern brown shrimp (*Penaeus subtilis*), southern pink shrimp (*Penaeus notialis*), southern rough shrimp (*Trachypenaeus curvirostris*), southern white shrimp (*Penaeus schmitti*), blue shrimp (*Penaeus stylirostris*), western white shrimp (*Penaeus occidentalis*), and Indian white prawn (*Penaeus indicus*).

Frozen shrimp and prawns that are packed with marinade, spices or sauce are included in the scope of this order. In addition, food preparations, which are not "prepared meals," that contain more than 20 percent by weight of shrimp or prawn are also included in the scope of this order.

Excluded from the scope are: (1) Breaded shrimp and prawns (HTS subheading 1605.20.1020); (2) shrimp and prawns generally classified in the *Pandalidae* family and commonly referred to as coldwater shrimp, in any state of processing; (3) fresh shrimp and prawns whether shell-on or peeled (HTS subheadings 0306.23.0020 and 0306.23.0040); (4) shrimp and prawns in prepared meals (HTS subheading 1605.20.0510); (5) dried shrimp and prawns; (6) Lee Kum Kee's shrimp sauce; (7) canned warmwater shrimp and prawns (HTS subheading 1605.20.1040); (8) certain dusted shrimp; and (9) certain battered shrimp. Dusted shrimp is a shrimp-based product: (1) That is produced from fresh (or thawed-from-frozen) and peeled shrimp; (2) to which a "dusting" layer of rice or wheat flour of at least 95 percent purity has been applied; (3) with the entire surface of the shrimp flesh thoroughly and evenly coated with the flour; (4) with the non-shrimp content of the end product constituting between four and 10 percent of the product's total weight after being dusted, but prior to being frozen; and (5) that is subjected to individually quick frozen ("IQF") freezing immediately after application of the dusting layer. Battered shrimp is a shrimp-based product that, when dusted in accordance with the definition of dusting above, is coated with a wet viscous layer containing egg and/or milk, and par-fried.

The products covered by this *Order* are currently classified under the following HTS subheadings: 0306.13.0003, 0306.13.0006, 0306.13.0009, 0306.13.0012, 0306.13.0015, 0306.13.0018, 0306.13.0021, 0306.13.0024, 0306.13.0027, 0306.13.0040, 1605.20.1010 and 1605.20.1030. These HTS subheadings are provided for convenience and for customs purposes only and are not dispositive, but rather the written description of the scope of this order is dispositive.

[10] *See, e.g., Heavy Forged Hand Tools, Finished or Unfinished, With or Without Handles, From the People's Republic of China: Final Results of Antidumping Duty Administrative Reviews, Final Partial Rescission of Antidumping Duty Administrative Reviews, and Determination Not To Revoke in Part,* 69 FR 55581 (September 15, 2004) and accompanying Issues and Decision Memorandum at Comment 15.

[11] *See, e.g., Rhodia, Inc.* v. *United States,* 240 F. Supp. 2d 1247, 1250–1251 (CIT 2002); *see also 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 15.

[12] "Tails" in this context means the tail fan, which includes the telson and the uropods.

**Final Partial Rescission**

In the *Preliminary Results,* the Department preliminarily rescinded this review with respect to the following companies: Allied Pacific Group; [13] Gallant Ocean (Lianjiang), Ltd.; Gallant Ocean (Nanhai), Ltd.; Shantou Yelin Frozen Seafood Co., Ltd.; Shantou Yelin Quick-Freeze Marine Products Co., Ltd.; Yangjiang City Yelin Hoitat Quick Frozen Seafood Co., Ltd., Fuqing Yihua Aquatic Food Co., Ltd., and Fuqing Minhua Trading Co., Ltd. The Department determined that they had no shipments of subject merchandise to the United States during the POR.

Subsequent to the *Preliminary Results,* no information was submitted on the record indicating that the above companies made sales to the United States of subject merchandise during the POR and no parties provided written arguments regarding this issue. Thus, in accordance with 19 CFR 351.213(d)(3), and consistent with our practice, we are rescinding this review with respect to the above-named companies.

**Request for Revocation, in Part**

In the *Preliminary Results,* we preliminarily determined that Regal has not met the regulatory criteria for revocation set forth in 19 CFR 351.222(b). *See Preliminary Results* at 11857. In Regal's request for revocation, Regal argued that it has maintained three consecutive years of sales at not less than normal value. However, in the third administrative review of this order, the Department determined that Regal sold the subject merchandise at less than normal value and assigned Regal a weight-averaged dumping margin.[14] We have not received any further information following the issuance of the *Preliminary Results* that would warrant revocation of the order with regard to Regal. Therefore, we will not revoke the order with respect to Regal because it has not met the regulatory criteria for revocation set forth in 19 CFR 351.222(b).

**Duty Absorption**

In the *Preliminary Results,* we conducted a duty absorption inquiry with regard to Hilltop, pursuant to section 751(a)(4) of the Tariff Act of 1930, as amended ("Act"), and preliminarily found that Hilltop has not absorbed antidumping duties on U.S. sales made through its affiliated importer. *See Preliminary Results* at 11857. We have not received any further information which would provide a basis for the reconsideration of our determination. Therefore, the Department continues to find that Hilltop has not absorbed antidumping duties on U.S. sales made through its affiliated importer, pursuant to section 751(a)(4) of the Act.

**Separate Rates**

In our *Preliminary Results,* we preliminarily determined that Hilltop, Regal, and Shantou Yuexing Enterprises Co. ("Shantou Yuexing") met the criteria for the application of a separate rate. We have not received any information since the issuance of the *Preliminary Results* that provides a basis for the reconsideration of these determinations. Therefore, the Department continues to find that Hilltop, Regal, and Shantou Yuexing meet the criteria for a separate rate.

**Rate for Non-Selected Companies**

In the *Preliminary Results,* we stated that the Department employed a limited examination methodology, as it did not have the resources to examine all companies for which a review request was made, and selected two exporters, Hilltop and Regal, as mandatory respondents in this review. *See Preliminary Results* at 11855. Additionally, Shantou Yuexing submitted timely information as requested by the Department and remained subject to review as a cooperative separate rate respondent. In the *Preliminary Results,* the Department assigned a preliminary rate to Shantou Yuexing. *See Preliminary Results* at 11861.

In the *Preliminary Results,* we noted that the statute and the Department's regulations do not directly address the establishment of a rate to be applied to companies not selected for individual examination where the Department limited its examination in an administrative review pursuant to section 777A(c)(2) of the Act. *See Preliminary Results* at 11859. We further explained that the Department's practice in this regard, in cases involving limited selection based on exporters accounting for the largest volumes of trade, has been to weight-average the rates for the selected companies excluding zero and *de minimis* rates and rates based entirely on facts available. *See Preliminary Results* at 11859. However, due to changes in certain surrogate values for Hilltop and Regal from the *Preliminary Results,* the Department has, for the final results, calculated all zero or *de minimis* dumping margins for the mandatory respondents.

Because the Act does not address the rate to be applied to companies not selected for individual examination, we have looked to section 735(c)(5) of the Act for guidance. Section 735(c)(5)(A) of the Act instructs that we are not to calculate an all-others rate using any zero or *de minimis* margins or any margins based entirely on facts available. Section 735(c)(5)(B) of the Act also provides that, where all margins are zero rates, *de minimis* rates, or rates based entirely on facts available, we may use "any reasonable method" for assigning the rate to non-selected respondents.

In exercising this discretion to determine a non-examined rate, the Department considers relevant the fact that section 735(c)(5) of the Act: (a) Is explicitly applicable to the determination of an all others rate in an investigation; and (b) articulates a preference that the Department avoid zero, *de minimis* rates or rates based entirely on facts available when it determines the all others rate. With respect to the second point, the Department consistently seeks to avoid the use of total facts available, zero and *de minimis* margins in determining non-selected rates in administrative reviews, in order to implement this statutory preference. With respect to the first point, the statute's statement that averaging of zero/*de minimis* margins and margins based entirely on facts available may be a reasonable method, and the Statement of Administrative Action's ("SAA") indication that such averaging may be the expected method, should be read in the context of an investigation. *See* SAA accompanying the Uruguay Round Agreements Act, H.R. Doc. No. 103–316 at 872 (1994), reprinted in 1994 U.S.C.C.A.N. 4040, 4200. First, if there are only zero or *de minimis* margins determined in the investigation (and there is no other entity to which a facts available margin has been applied), the investigation would terminate and no order would be issued. Thus, the provision necessarily only applies to circumstances in which there are either both zero/*de minimis* and total facts available margins, or only total facts available margins. Second, when such rates are the only rates determined in an investigation, there is little information on which to rely to determine an appropriate all-others rate. In this context, therefore, the SAA's stated expected method is reasonable: the zero/*de minimis* and facts available

[13] Allied Pacific Group is comprised of: Allied Pacific Food (Dalian) Co., Ltd.; Allied Pacific Aquatic Products (Zhanjiang) Co., Ltd.; Zhanjiang Allied Pacific Aquaculture Co., Ltd.; Allied Pacific (H.K.) Co., Ltd.; and King Royal Investments Ltd.

[14] *See Third Administrative Review of Frozen Warmwater Shrimp From the People's Republic of China: Final Results and Partial Rescission of Antidumping Duty Administrative Review,* 74 FR 46565 (September 10, 2009) ("*China Shrimp AR3 Final*").

margins may be the only or best data the Department has available to apply to non-selected companies.

We note that the Department has sought other reasonable means to assign separate-rate margins to non-reviewed companies because we calculated zero rates, *de minimis* rates, or rates based entirely on facts available for the mandatory respondents. *See Certain Frozen Warmwater Shrimp From the Socialist Republic of Vietnam: Final Results and Final Partial Rescission of Antidumping Duty Administrative Review,* 73 FR 52273 (September 9, 2008) ("*Vietnam Shrimp AR2 Final*") and accompanying Issues and Decision Memorandum at Comment 6; *see also Certain Frozen Warmwater Shrimp From the Socialist Republic of Vietnam: Final Results and Final Partial Rescission of Antidumping Duty Administrative Review,* 74 FR 47191 (September 15, 2009) ("*Vietnam Shrimp AR3 Final*") at 47194. Because the Department is faced with similar circumstances in these final results as in *Vietnam Shrimp AR2 Final* and *Vietnam Shrimp AR3 Final,* we must look to other reasonable means to assign separate rate margins to non-reviewed companies eligible for a separate rate in this review.

The history of the PRC shrimp order shows that positive margins, including calculated margins for individually investigated companies, have existed in all segments subsequent to the underlying investigation. Thus, we find that a reasonable method is to assign to non-reviewed companies in this review the most recent rate calculated for the non-selected companies in question, unless we calculated in a more recent segment a rate for any company that was not zero, *de minimis,* or based entirely on facts available. Pursuant to this method, we are assigning a rate of 9.08 percent, the most recent positive rate (from the *China Shrimp AR3 Final*) calculated for cooperative separate rate respondents, to Shantou Yuexing, which had no calculated margin that is concurrent with or more recent than this rate. In assigning a margin to the non-examined companies, the Department did not impute the actions of any companies subject to an AFA rate, or the zero/*de minimis* rates, to the behavior of the non-individually examined companies, but because these were the only rates determined in the proceeding, consistent with the statute, the Department avoids the use of these rates and selected another reasonable method to assign rates to these companies.

**Final Results of Review**

The weighted-average dumping margins for the POR are as follows:

CERTAIN FROZEN WARMWATER SHRIMP FROM THE PRC

| Manufacturer/Exporter | Weighted-Average margin (percent) |
|---|---|
| Hilltop International | 0.00 |
| Zhanjiang Regal Integrated Marine Resources Co., Ltd. | 0.00 |
| Shantou Yuexing Enterprises Co. | 9.08 |
| PRC-Wide Entity [15] | 112.81 |

**Assessment**

Upon issuance of the final results, the Department will determine, and U.S. Customs and Border Protection ("CBP") shall assess, antidumping duties on all appropriate entries. The Department intends to issue assessment instructions to CBP 15 days after the date of publication of the final results of review. Pursuant to 19 CFR 351.212(b)(1), we will calculate importer-specific (or customer) *ad valorem* duty assessment rates based on the ratio of the total amount of the dumping margins calculated for the examined sales to the total entered value of those same sales. In accordance with 19 CFR 351.106(c)(2), we will instruct CBP to liquidate, without regard to antidumping duties, all entries of subject merchandise during the POR for which the importer-specific assessment rate is zero or *de minimis.*

**Cash Deposit Requirements**

The following cash deposit requirements will be effective upon publication of these final results of this 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 the rate established in these final results of review (except, if the rate is zero or *de minimis, i.e.,* less than 0.5 percent, a zero cash deposit rate 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 of 112.81 percent; 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 publication of the final results of the next administrative review.

**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

[15] The PRC-wide entity includes the 463 companies currently under review that have not established their entitlement to a separate rate, including Shantou Longfeng Aquatic Product Foodstuff Co., Ltd.

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.

Dated: August 9, 2010.

**Ronald K. Lorentzen,**

*Deputy Assistant Secretary for Import Administration.*

### Appendix I—Issues & Decision Memorandum

Comment 1: Respondent Selection Methodology
Comment 2: North Korean Import Data
Comment 3: Shrimp Larvae
Comment 4: Shrimp Feed
Comment 5: Electricity
Comment 6: Diesel Fuel
Comment 7: Byproducts
Comment 8: Wage Rate Methodology
Comment 9: Use of Uniroyal's and Waterbase's Financial Statements
Comment 10: Classification of Expenses from Falcon's Financial Statements

[FR Doc. 2010–20073 Filed 8–12–10; 8:45 am]

**BILLING CODE 3510–DS–P**

## DEPARTMENT OF COMMERCE

### International Trade Administration

**A–469–814, A–570–898**

### Chlorinated Isocyanurates from Spain and the People's Republic of China: Final Results of the Expedited Sunset Reviews of the Antidumping Duty Orders

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

**SUMMARY:** On May 3, 2010, the Department of Commerce ("the Department") initiated sunset reviews of the antidumping duty orders on chlorinated isocyanurates ("chlorinated isos") from Spain and the People's Republic of China ("PRC") pursuant to section 751(c) of the Tariff Act of 1930, as amended ("the Act"). Based on the notices of intent to participate and adequate responses filed by the domestic interested parties, and the lack of response from any respondent interested party, the Department conducted expedited (120-day) sunset reviews of the antidumping duty orders on chlorinated isos from Spain and the PRC, pursuant to section 751(c)(3)(B) of the Act and 19 CFR 351.218(e)(1)(ii)(C)(2). As a result of these sunset reviews, the Department finds that revocation of the antidumping duty orders would be likely to lead to continuation or recurrence of dumping, at the levels indicated in the "Final Results of Sunset Review" section of this notice, *infra*.

**EFFECTIVE DATE:** August 13, 2010.

**FOR FURTHER INFORMATION CONTACT:** Brandon Petelin or Charles Riggle, 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) 482–8173 or (202) 482–0650, respectively.

**SUPPLEMENTARY INFORMATION:** On June 24, 2005, the Department published the antidumping duty orders on chlorinated isos from Spain and the PRC.[1] On May 3, 2010, the Department published the notice of initiation of the first sunset reviews of the antidumping duty orders on chlorinated isos from Spain and the PRC, pursuant to section 751(c) of the Act.[2] On May 18, 2010, pursuant to 19 CFR 351.218(d)(1), the Department received timely and complete notices of intent to participate in the sunset reviews from Clearon Corporation and Occidental Chemical Corporation, domestic producers of chlorinated isos (collectively "Petitioners"). On June 2, 2010, pursuant to 19 CFR 351.218(d)(3), Petitioners filed timely and adequate substantive responses within 30 days after the date of publication of the *Sunset Initiation*. The Department did not receive substantive responses from any respondent interested party with respect to the orders on chlorinated isos from Spain or the PRC. As a result, pursuant to section 751(c)(3)(B) of the Act and 19 CFR 351.218(e)(1)(ii)(C)(2), the Department conducted expedited (120-day) sunset reviews of the antidumping duty orders on chlorinated isos from Spain and the PRC.

### SCOPE OF THE ORDERS:

The products covered by the orders are chlorinated isos, which are derivatives of cyanuric acid, described as chlorinated s–triazine triones. There are three primary chemical compositions of chlorinated isos: (1) trichloroisocyanuric acid ($Cl_3(NCO)_3$), (2) sodium dichloroisocyanurate (dihydrate) ($NaCl_2(NCO)_3(2H_2O)$, and (3) sodium dichloroisocyanurate (anhydrous) ($NaCl_2(NCO)_3$). Chlorinated isos are available in powder, granular, and tableted forms. The orders cover all chlorinated isos. Chlorinated isos are currently classifiable under subheadings 2933.69.6015, 2933.69.6021, 2933.69.6050, 3808.40.50, 3808.50.40 and 3808.94.50.00 of the Harmonized Tariff Schedule of the United States ("HTSUS").[3] The tariff classification 2933.69.6015 covers sodium dichloroisocyanurates (anhydrous and dihydrate forms) and trichloroisocyanuric acid. The tariff classifications 2933.69.6021 and 2933.69.6050 represent basket categories that include chlorinated isos and other compounds including an unfused triazine ring. Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope of this order is dispositive.

### ANALYSIS OF COMMENTS RECEIVED:

A complete discussion of all issues raised in these sunset reviews is provided in the accompanying Issues and Decision Memorandum, which is hereby adopted by this notice. *See* "Issues and Decision Memorandum for the Expedited Sunset Reviews of the Antidumping Duty Orders on Chlorinated Isocyanurates from Spain and the People's Republic of China," from Edward C. Yang, Acting Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, to Ronald K. Lorentzen, Deputy Assistant Secretary for Import Administration, dated concurrently with this notice ("I&D Memo"). The issues discussed in the I&D Memo include the likelihood of continuation or recurrence of dumping and the magnitude of the margins likely to prevail if the orders were revoked. Parties can obtain a public copy of the I&D Memo from the Central Records Unit, room 1117, of the main Commerce building. In addition, a complete public version of the I&D Memo can be accessed directly on the Web at http://ia.ita.doc.gov/frn. The paper copy and electronic version of the I&D Memo are identical in content.

### FINAL RESULTS OF REVIEW:

The Department determines that revocation of the antidumping duty orders on chlorinated isos from Spain and the PRC would be likely to lead to continuation or recurrence of dumping

[1] *See Notice of Antidumping Duty Order: Chlorinated Isocyanurates from the People's Republic of China*, 70 FR 36561 (June 24, 2005) ("PRC Order"); *see also Chlorinated Isocyanurates from Spain: Notice of Antidumping Duty Order*, 70 FR 36562 (June 24, 2005) ("Spain Order").

[2] *See Initiation of Five-Year ("Sunset") Review*, 75 FR 23240 (May 3, 2010) ("Sunset Initiation").

[3] The Spain Order currently covers HTSUS subheadings 2933.69.6015, 2933.69.6021, and 2933.69.6050, while the PRC Order currently covers HTSUS subheadings 2933.69.6015, 2933.69.6021, 2933.69.6050, 3808.40.50, 3808.50.40 and 3808.94.50.00.

at the following weighted–average margins:

| Manufacturers/Exporters/Producers | Weighted–Average Margin (percent) |
|---|---|
| *Spain.* | |
| Argonesas Delsa S.A. | 24.83 |
| All–Others Rate | 24.83 |
| *PRC.* | |
| Hebei Jiheng Chemical Co., Ltd. | 75.78 |
| Nanning Chemical Industry Co., Ltd. | 285.63 |
| Changzhou Clean Chemical Co., Ltd. | 137.69 |
| Liaocheng Huaao Chemical Industry Co., Ltd. | 137.69 |
| Sinochem Hebei Import & Export Corporation | 137.69 |
| Sompcje, Shanghai Import & Export Corp. | 137.69 |
| PRC–Wide Rate | 285.63 |

**NOTIFICATION REGARDING ADMINISTRATIVE PROTECTIVE ORDER:**

This notice also serves as the only reminder to parties subject to administrative protective order ("APO") of their responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305. Timely notification of the return or destruction of APO materials or conversion to judicial protective orders 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 the results and notice in accordance with sections 751(c), 752(c), and 777(i)(1) of the Act.

Dated: August 9, 2010.

**Ronald K. Lorentzen,**

*Deputy Assistant Secretary for Import Administration.*

[FR Doc. 2010–20074 Filed 8–12–10; 8:45 am]

**BILLING CODE 3510–DS–S**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

**RIN 0648–XY09**

### Marine Mammals; File No. 14682

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

**ACTION:** Notice; issuance of permit.

**SUMMARY:** Notice is hereby given that NMFS has issued a permit to Whitlow Au, Ph.D., University of Hawaii, Hawaii Institute of Marine Biology, Marine Mammal Research Program, PO Box 1106, Kailua, HI 96734, to conduct research on marine mammals.

**ADDRESSES:** The permits and related documents are available for review upon written request or by appointment in the following offices: See **SUPPLEMENTARY INFORMATION**.

**FOR FURTHER INFORMATION CONTACT:** Kristy Beard or Carrie Hubard at (301)713–2289.

**SUPPLEMENTARY INFORMATION:** On November 12, 2009, notice was published in the **Federal Register** (74 FR 58243) that a request for a permit to conduct scientific research on marine mammals had been submitted by the above-named applicant. The requested permit has been issued under the authority of the Marine Mammal Protection Act of 1972, as amended (16 U.S.C. 1361 *et seq.*), the regulations governing the taking and importing of marine mammals (50 CFR part 216), the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*), and the regulations governing the taking, importing, and exporting of endangered and threatened species (50 CFR parts 222–226).

A five-year permit was issued to Dr. Au to investigate the population dynamics and behavior of cetaceans around Hawaii and the Pacific, to determine aspects of the behavior and use of the acoustic environment by large whales, and to determine the effects of noise on behavior of cetaceans around Hawaii. The permit authorizes researchers to conduct behavioral observations, photo-identification, genetic sampling, suction-cup tagging, acoustic recording, and acoustic playbacks from vessels on: Blainville's beaked whale (*Mesoplodon densirostris*), Cuvier's beaked whale (*Ziphius cavirostris*), killer whale (*Orcinus orca*), humpback whale (*Megaptera novaeangliae*), dwarf sperm whale (*Kogia sima*), pygmy sperm whale (*K. breviceps*), short-finned pilot whale (*Globicephala macrorhynchus*), false killer whale (*Pseudorca crassidens*), pygmy killer whale (*Feresa attenuata*), melon-headed whale (*Peponocephala electra*), long-beaked common dolphin (*Delphinus capensis*), short-beaked common dolphin (*D. delphis*), striped dolphin (*Stenella coeruleoalba*), spinner dolphin (*S. longirostris*), pantropical spotted dolphin (*S. attenuata*), bottlenose dolphin (*Turisiops truncatus*), Risso's dolphin (*Grampus griseus*), Pacific white-sided dolphin (*Lagenorhynchus obliquidens*), and rough-toothed dolphin (*Steno bredanensis*).

In compliance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*), an environmental assessment (EA) was prepared analyzing the effects of the permitted activities on the human environment. Based on the analyses in the EA, NMFS determined that issuance of the permit will not significantly impact the quality of the human environment and that preparation of an environmental impact statement was not required. That determination is documented in a Finding of No Significant Impact (FONSI), signed on July 14, 2010.

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

Documents may be reviewed in the following locations:

Permits, Conservation and Education Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13705, Silver Spring, MD 20910; phone (301)713–2289; fax (301)713–0376;

Southwest Region, NMFS, 501 West Ocean Blvd., Suite 4200, Long Beach, CA 90802–4213; phone (562)980–4001; fax (562)980–4018; and

Pacific Islands Region, NMFS, 1601 Kapiolani Blvd., Rm 1110, Honolulu, HI

96814–4700; phone (808)944–2200; fax (808)973–2941.

Dated: August 9, 2010.

**P. Michael Payne,**

*Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service.*

[FR Doc. 2010–20084 Filed 8–12–10; 8:45 am]

**BILLING CODE 3510–22–S**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

**RIN 0648–XY17**

### New England Fishery Management Council; Public Meeting

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

**ACTION:** Notice; public meeting.

**SUMMARY:** The New England Fishery Management Council's (Council) VMS/Enforcement Committee will meet to consider actions affecting New England fisheries in the exclusive economic zone (EEZ).

**DATES:** The meeting will be held on Friday, September 10, 2010, at 9:30 a.m.

**ADDRESSES:** *Meeting address*: The meeting will be held at theHoliday Inn, One Newbury Street, Route 1, Peabody, MA 01960; Telephone: (978)535–4600; Fax: (978)535–8238.

*Council address*: New England Fishery Management Council, 50 Water Street, Mill 2, Newburyport, MA 01950.

**FOR FURTHER INFORMATION CONTACT:** Paul J. Howard, Executive Director, New England Fishery Management Council; telephone: (978)465–0492.

**SUPPLEMENTARY INFORMATION:** The items of discussion in the committee's agenda are as follows:

The Committee will develop recommendations for standard gear marking regulations. Other business may be discussed.

Although non-emergency issues not contained in this agenda may come before this group for discussion, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically identified in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the Council's intent to take final action to address the emergency.

**Special Accommodations**

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Paul J. Howard (see **ADDRESSES**) at least 5 days prior to the meeting date.

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

Dated: August 10, 2010.

**Tracey L. Thompson,**

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

[FR Doc. 2010–19995 Filed 8–12–10; 8:45 am]

**BILLING CODE 3510–22–S**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

**RIN 0648–XY16**

### New England Fishery Management Council; Public Meeting

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

**ACTION:** Notice; public meeting.

**SUMMARY:** The New England Fishery Management Council's (Council) Groundfish Committee will meet to consider actions affecting New England fisheries in the exclusive economic zone (EEZ).

**DATES:** The meeting will be held on Thursday, September 9, 2010 at 9 a.m.

**ADDRESSES:**

*Meeting address*: The meeting will be held at theHoliday Inn, 31 Hampshire Street, Mansfield, MA 02048; Telephone: (508)339–2200; Fax:(508)339–1040.

*Council address*: New England Fishery Management Council, 50 Water Street, Mill 2, Newburyport, MA 01950.

**FOR FURTHER INFORMATION CONTACT:** Paul J. Howard, Executive Director, New England Fishery Management Council; telephone: (978)465–0492.

**SUPPLEMENTARY INFORMATION:** The items of discussion in the committee's agenda are as follows:

(1) The Committee will continue development of Framework 45 to the Northeast Multispecies Fishery Management Plan and other actions. Possible management measures to be discussed include:

- Georges Bank yellowtail flounder rebuilding strategies
- ABCs for stocks including Gulf of Maine winter flounder and pollock
- Whaleback area spawning closure
- Permit bank implementation
- Accountability measures
- Handgear A and B exemption from dockside monitoring requirements
- Other issues

(2) The Committee may also review a preliminary draft of the white paper on accumulation limits and fleet diversity.

(3) Other business may also be discussed, including any recommendations from the Joint Groundfish/Scallop Committee.

The Committee's recommendations will be delivered to the full Council at its meeting in Newport, RI on September 28–30, 2010.

Although non-emergency issues not contained in this agenda may come before this group for discussion, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically identified in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the Council's intent to take final action to address the emergency.

**Special Accommodations**

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Paul J. Howard (see **ADDRESSES**) at least 5 days prior to the meeting date.

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

Dated: August 10, 2010.

**Tracey L. Thompson,**

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

[FR Doc. 2010–19993 Filed 8–12–10; 8:45 am]

**BILLING CODE 3510–22–S**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

**RIN 0648–XY15**

### New England Fishery Management Council; Public Meeting

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

**ACTION:** Notice; public meeting.

**SUMMARY:** The New England Fishery Management Council's (Council) Herring Oversight Committee will meet to consider actions affecting New England fisheries in the exclusive economic zone (EEZ).

**DATES:** The meeting will be held on Wednesday, September 1, 2010 at 9:30

a.m. and Thursday September 2, 2010 at 9 a.m.

**ADDRESSES:** *Meeting address*: The meeting will be held at the Sheraton Harborside Hotel, 250 Market Street, Portsmouth, NH 03801: Telephone: (603) 431–2300; Fax: (603) 433–5649.

*Council address*: New England Fishery Management Council, 50 Water Street, Mill 2, Newburyport, MA 01950.

**FOR FURTHER INFORMATION CONTACT:** Paul J. Howard, Executive Director, New England Fishery Management Council; telephone: (978) 465–0492.

**SUPPLEMENTARY INFORMATION:** The items of discussion in the committee's agenda are as follows:

*1. Wednesday, September 1, 2010 beginning at 9:30 a.m.*

The Committee will review/discuss report from Herring Advisory Panel. They will also continue development of catch monitoring alternatives for inclusion in Amendment 5 to the Atlantic Herring Fishery Management Plan (FMP); alternatives may include management measures to: improve quota monitoring and reporting; standardize/certify volumetric measurements of catch; address vessel-to-vessel transfers of Atlantic herring; address requirements for catch monitoring and control plans (CMCPs); address maximized retention; maximize sampling and address net slippage; address at-sea monitoring; address portside sampling; require electronic monitoring; and address other elements of catch monitoring in the Atlantic herring fishery. Other business may also be discussed.

*2. Thursday, September 2, 2010 beginning at 9 a.m.*

The Committee will continue agenda from September 1, 2010 meeting to develop catch monitoring alternatives for inclusion in Amendment 5; discuss outstanding issues and other elements of Amendment 5. They will also develop management measures and alternatives to address river herring bycatch for consideration in Amendment 5. They will review/discuss management measures under consideration to address interactions with the mackerel fishery. The Committee will develop recommendations for Council consideration regarding management alternatives for inclusion in Amendment 5 Draft EIS (catch monitoring program, measures to address river herring bycatch, access to groundfish closed areas, interactions with the mackerel fishery, protection of spawning fish). Other business may be discussed.

Although non-emergency issues not contained in this agenda may come before this group for discussion, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically identified in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the Council's intent to take final action to address the emergency.

### Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Paul J. Howard (see **ADDRESSES**) at least 5 days prior to the meeting date.

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

Dated: August 10, 2010.

**Tracey L. Thompson,**

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

[FR Doc. 2010–19992 Filed 8–12–10; 8:45 am]

**BILLING CODE 3510–22–S**

## DEPARTMENT OF COMMERCE

### International Trade Administration

**[A–583–831]**

## Stainless Steel Sheet and Strip in Coils From Taiwan: Preliminary Results and Rescission in Part of Antidumping Duty Administrative Review

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

**SUMMARY:** The Department of Commerce (the Department) is conducting an administrative review of the antidumping duty order on stainless steel sheet and strip in coils (SSSSC) from Taiwan with respect to 20 companies.[1] The Department selected Chia Far Industrial Factory Co., Ltd. (Chia Far), as the mandatory respondent in this review. The respondents which were not selected for individual examination are listed in the "Preliminary Results of Review" section of this notice. The period of review (POR) is July 1, 2008, through June 30, 2009.

We preliminarily determine that sales were not made below normal value (NV). We are also rescinding this review with respect to Emerdex Group, Emerdex Stainless Flat-Rolled Products, Inc., and Emerdex Stainless Steel, Inc. (collectively, the "Emerdex Companies").

If the preliminary results are adopted in our final results of this administrative review, we will instruct U.S. Customs and Border Protection (CBP) to assess antidumping duties on all appropriate entries. Interested parties are invited to comment on the preliminary results.

**DATES:** *Effective Date:* August 13, 2010.

**FOR FURTHER INFORMATION CONTACT:** Henry Almond, 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) 482–0049.

**SUPPLEMENTARY INFORMATION:**

### Background

On July 27, 1999, the Department published in the **Federal Register** the antidumping duty order on SSSSC from Taiwan. *See Notice of Antidumping Duty Order; Stainless Steel Sheet and Strip in Coils From United Kingdom, Taiwan, and South Korea,* 64 FR 40555 (July 27, 1999) (*SSSSC Order*). On July 1, 2009, the Department published in the **Federal Register** a notice of opportunity to request administrative review of this order. *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review,* 74 FR 31406 (July 1, 2009).

On July 28, 2009, Chia Far submitted a timely request for the Department to conduct an administrative review of its shipments of SSSSC made during the POR, in accordance with section 751(a) of the Tariff Act of 1930, as amended (the Act), and 19 CFR 351.213(b)(2). On July 31, 2009, the petitioners[2] submitted a timely request for the Department to conduct an administrative review of the sales of SSSSC made during the POR by the following 23 companies: Chain Chon Industrial Co., Ltd.; Chia Far; Chien Shing Stainess Co.; China Steel Corporation; Dah Shi Metal Industrial Co., Ltd.; Emerdex Group; Emerdex Stainless Flat-Rolled Products, Inc.; Emerdex Stainless Steel, Inc.; Goang Jau Shing Enterprise Co., Ltd.; KNS Enterprise Co., Ltd.; Lih Chan Steel Co., Ltd.; Maytun International Corp.; PFP Taiwan Co., Ltd.; Shih Yuan Stainess Steel Enterprise Co., Ltd.; Ta Chen Stainless Pipe Co., Ltd. (Ta Chen); Tang

[1] This figure does not include those companies for which the Department is rescinding the administrative review.

[2] The petitioners are Allegheny Ludlum Corporation, AK Steel Corporation, North American Stainless, United Auto Workers Local 3303, United Steelworkers of America, AFL–CIO/CLC, and Zanesville Armco Independent Organization.

Eng Iron Works; Tibest International Inc.; Tung Mung Development Co., Ltd. (Tung Mung)/Ta Chen; [3] Waterson Corp.; Yieh Loong Enterprise Co., Ltd. (aka Chung Hung Steel Co., Ltd.); Yieh Mau Corp.;Yieh Trading Corp.; and Yieh United Steel Corporation, also pursuant to section 751(a) of the Act, and in accordance with 19 CFR 351.213(b)(1).

In August 2009, the Department published a notice of initiation of administrative review covering each of these 23 companies. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part,* 74 FR 42873, 42875 (Aug. 25, 2009) (*Initiation Notice*). In our initiation notice we indicated that, in the event we limited the number of respondents for individual examination, we would select mandatory respondents for review based upon CBP entry data. *See Initiation Notice,* 74 FR at 42874. In this month we released relevant CBP data to interested parties. Also in this month we received a statement from China Steel Corporation indicating that it had no shipments of subject merchandise to the United States during the POR.

In September 2009, we received comments on the issue of respondent selection from the petitioners and Chia Far.

In October 2009, after considering the resources available to the Department, we determined that it was not practicable to examine all exporters/producers of subject merchandise for which a review was requested. *See* Memorandum to James Maeder, Director, Office 2, AD/CVD Operations, from Henry Almond, Analyst, Office 2, AD/CVD Operations, entitled: "2008–2009 Antidumping Duty Administrative Review of SSSSC from Taiwan: Selection of Respondents for Individual Review," dated October 6, 2009 (Respondent Selection Memo). As a result, we selected the largest exporter of subject merchandise during the POR, Chia Far, for individual examination in this segment of the proceeding. Accordingly, we issued the antidumping duty questionnaire to Chia Far on October 6, 2009.

In December 2009, we received Chia Far's responses to sections A through D of the questionnaire.

In February 2010, the Department exercised its discretion to toll deadlines for the duration of the closure of the Federal Government from February 5, through February 12, 2010. For further discussion, 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.

In March 2010, we issued supplemental questionnaires covering sections A (*i.e.,* the section related to general information), B and C (*i.e.,* the sections covering comparison market and U.S. sales, respectively), and D (*i.e.,* the section covering cost of production (COP)) of the questionnaire. Chia Far responded to these supplemental questionnaires in March and April 2010.

In April 2010, we published a notice extending the time limit for completion of the preliminary results. *See Stainless Steel Sheet and Strip in Coils from Taiwan: Notice of Extension of Time Limits for Preliminary Results of Antidumping Duty Administrative Review,* 75 FR 17378 (Apr. 6, 2010).

In May 2010, the Department verified the sales data submitted by Chia Far. We have incorporated our sales verification findings in these preliminary results. Also in this month we issued an additional questionnaire regarding section D of the questionnaire.

In July 2010, the Department verified the cost data submitted by Chia Far.

**Period of Review**

The POR is July 1, 2008, through June 30, 2009.

**Scope of the Order**

The products covered by the order are certain stainless steel sheet and strip in coils. Stainless steel is an alloy steel containing, by weight, 1.2 percent or less of carbon and 10.5 percent or more of chromium, with or without other elements. The subject sheet and strip is a flat-rolled product in coils that is greater than 9.5 mm in width and less than 4.75 mm in thickness, and that is annealed or otherwise heat treated and pickled or otherwise descaled. The subject sheet and strip may also be further processed (*e.g.,* cold-rolled, polished, aluminized, coated, etc.) provided that it maintains the specific dimensions of sheet and strip following such processing.

The merchandise subject to the order is classified in the Harmonized Tariff Schedule of the United States (HTSUS) at subheadings: 7219.13.00.31, 7219.13.00.51, 7219.13.00.71, 7219.13.00.81, 7219.14.00.30, 7219.14.00.65, 7219.14.00.90, 7219.32.00.05, 7219.32.00.20, 7219.32.00.25, 7219.32.00.35, 7219.32.00.36, 7219.32.00.38, 7219.32.00.42, 7219.32.00.44, 7219.33.00.05, 7219.33.00.20, 7219.33.00.25, 7219.33.00.35, 7219.33.00.36, 7219.33.00.38, 7219.33.00.42, 7219.33.00.44, 7219.34.00.05, 7219.34.00.20, 7219.34.00.25, 7219.34.00.30, 7219.34.00.35, 7219.35.00.05, 7219.35.00.15, 7219.35.00.30, 7219.35.00.35, 7219.90.00.10, 7219.90.00.20, 7219.90.00.25, 7219.90.00.60, 7219.90.00.80, 7220.12.10.00, 7220.12.50.00, 7220.20.10.10, 7220.20.10.15, 7220.20.10.60, 7220.20.10.80, 7220.20.60.05, 7220.20.60.10, 7220.20.60.15, 7220.20.60.60, 7220.20.60.80, 7220.20.70.05, 7220.20.70.10, 7220.20.70.15, 7220.20.70.60, 7220.20.70.80, 7220.20.80.00, 7220.20.90.30, 7220.20.90.60, 7220.90.00.10, 7220.90.00.15, 7220.90.00.60, and 7220.90.00.80. Although the HTSUS subheadings are provided for convenience and customs purposes, the Department's written description of the merchandise under the order is dispositive.

Excluded from the scope of the order are the following: (1) Sheet and strip that is not annealed or otherwise heat treated and pickled or otherwise descaled, (2) sheet and strip that is cut to length, (3) plate (*i.e.,* flat-rolled stainless steel products of a thickness of 4.75 mm or more), (4) flat wire (*i.e.,* cold-rolled sections, with a prepared edge, rectangular in shape, of a width of not more than 9.5 mm), and (5) razor blade steel. Razor blade steel is a flat-rolled product of stainless steel, not further worked than cold-rolled (cold-reduced), in coils, of a width of not more than 23 mm and a thickness of 0.266 mm or less, containing, by weight, 12.5 to 14.5 percent chromium, and certified at the time of entry to be used in the manufacture of razor blades. *See* Chapter 72 of the HTSUS, "Additional U.S. Note" 1(d).

Also excluded from the scope of the order are certain specialty stainless steel products described below. Flapper valve steel is defined as stainless steel strip in coils containing, by weight, between 0.37 and 0.43 percent carbon, between 1.15 and 1.35 percent molybdenum, and between 0.20 and 0.80 percent manganese. This steel also contains, by weight, phosphorus of 0.025 percent or less, silicon of between 0.20 and 0.50 percent, and sulfur of 0.020 percent or less. The product is manufactured by means of vacuum arc remelting, with inclusion controls for sulphide of no more than 0.04 percent and for oxide of no more than 0.05 percent. Flapper valve steel has a tensile strength of between 210 and 300 ksi, yield strength

[3] Regarding Tung Mung/Ta Chen we initiated this review with respect to merchandise produced by Tung Mung and exported by Ta Chen. *See Initiation Notice,* 74 FR 42873 n.4.

of between 170 and 270 ksi, plus or minus 8 ksi, and a hardness (Hv) of between 460 and 590. Flapper valve steel is most commonly used to produce specialty flapper valves in compressors.

Also excluded is a product referred to as suspension foil, a specialty steel product used in the manufacture of suspension assemblies for computer disk drives. Suspension foil is described as 302/304 grade or 202 grade stainless steel of a thickness between 14 and 127 microns, with a thickness tolerance of plus-or-minus 2.01 microns, and surface glossiness of 200 to 700 percent Gs. Suspension foil must be supplied in coil widths of not more than 407 mm, and with a mass of 225 kg or less. Roll marks may only be visible on one side, with no scratches of measurable depth. The material must exhibit residual stresses of 2 mm maximum deflection, and flatness of 1.6 mm over 685 mm length.

Certain stainless steel foil for automotive catalytic converters is also excluded from the scope of the order. This stainless steel strip in coils is a specialty foil with a thickness of between 20 and 110 microns used to produce a metallic substrate with a honeycomb structure for use in automotive catalytic converters. The steel contains, by weight, carbon of no more than 0.030 percent, silicon of no more than 1.0 percent, manganese of no more than 1.0 percent, chromium of between 19 and 22 percent, aluminum of no less than 5.0 percent, phosphorus of no more than 0.045 percent, sulfur of no more than 0.03 percent, lanthanum of less than 0.002 or greater than 0.05 percent, and total rare earth elements of more than 0.06 percent, with the balance iron.

Permanent magnet iron-chromium-cobalt alloy stainless strip is also excluded from the scope of the order. This ductile stainless steel strip contains, by weight, 26 to 30 percent chromium, and 7 to 10 percent cobalt, with the remainder of iron, in widths 228.6 mm or less, and a thickness between 0.127 and 1.270 mm. It exhibits magnetic remanence between 9,000 and 12,000 gauss, and a coercivity of between 50 and 300 oersteds. This product is most commonly used in electronic sensors and is currently available under proprietary trade names such as Arnokrome III.[4]

Certain electrical resistance alloy steel is also excluded from the scope of the order. This product is defined as a non-magnetic stainless steel manufactured to American Society of Testing and Materials specification B344 and containing, by weight, 36 percent nickel, 18 percent chromium, and 46 percent iron, and is most notable for its resistance to high temperature corrosion. It has a melting point of 1390 degrees Celsius and displays a creep rupture limit of 4 kilograms per square millimeter at 1000 degrees Celsius. This steel is most commonly used in the production of heating ribbons for circuit breakers and industrial furnaces, and in rheostats for railway locomotives. The product is currently available under proprietary trade names such as Gilphy 36.[5]

Certain martensitic precipitation-hardenable stainless steel is also excluded from the scope of the order. This high-strength, ductile stainless steel product is designated under the Unified Numbering System as S45500-grade steel, and contains, by weight, 11 to 13 percent chromium, and 7 to 10 percent nickel. Carbon, manganese, silicon and molybdenum each comprise, by weight, 0.05 percent or less, with phosphorus and sulfur each comprising, by weight, 0.03 percent or less. This steel has copper, niobium, and titanium added to achieve aging, and will exhibit yield strengths as high as 1700 Mpa and ultimate tensile strengths as high as 1750 Mpa after aging, with elongation percentages of 3 percent or less in 50 mm. It is generally provided in thicknesses between 0.635 and 0.787 mm, and in widths of 25.4 mm. This product is most commonly used in the manufacture of television tubes and is currently available under proprietary trade names such as Durphynox 17.[6]

Finally, three specialty stainless steels typically used in certain industrial blades and surgical and medical instruments are also excluded from the scope of the order. These include stainless steel strip in coils used in the production of textile cutting tools (*e.g.,* carpet knives).[7] This steel is similar to AISI grade 420 but containing, by weight, 0.5 to 0.7 percent of molybdenum. The steel also contains, by weight, carbon of between 1.0 and 1.1 percent, sulfur of 0.020 percent or less, and includes between 0.20 and 0.30 percent copper and between 0.20 and 0.50 percent cobalt. This steel is sold under proprietary names such as GIN4 Mo. The second excluded stainless steel strip in coils is similar to AISI 420–J2 and contains, by weight, carbon of between 0.62 and 0.70 percent, silicon of between 0.20 and 0.50 percent, manganese of between 0.45 and 0.80 percent, phosphorus of no more than 0.025 percent and sulfur of no more than 0.020 percent. This steel has a carbide density on average of 100 carbide particles per 100 square microns. An example of this product is GIN5 steel. The third specialty steel has a chemical composition similar to AISI 420 F, with carbon of between 0.37 and 0.43 percent, molybdenum of between 1.15 and 1.35 percent, but lower manganese of between 0.20 and 0.80 percent, phosphorus of no more than 0.025 percent, silicon of between 0.20 and 0.50 percent, and sulfur of no more than 0.020 percent. This product is supplied with a hardness of more than Hv 500 guaranteed after customer processing, and is supplied as, for example, GIN6.[8]

**Partial Rescission of Review**

The Department finds that it is appropriate to rescind the instant review with respect to the Emerdex Companies named by the petitioners in their review request because the Department found in the 2003–2004 administrative review of this order that the Emerdex companies are U.S. entities. *See Stainless Steel Sheet and Strip in Coils from Taiwan: Preliminary Results and Rescission in Part of Antidumping Duty Administrative Review,* 71 FR 45521, 45524–45525 (Aug. 9, 2006) unchanged in *Stainless Steel Sheet and Strip in Coils From Taiwan; Final Results and Partial Rescission of Antidumping Duty Administrative Review,* 71 FR 75504 (Dec. 15, 2006). We note that the petitioners in the instant review have not provided any additional information demonstrating that the Emerdex companies for which they have requested a review are located in Taiwan. Consequently, we are rescinding this review with regard to the Emerdex companies. This treatment is consistent with the Department's treatment of these companies in the most recent administrative review of the antidumping order on SSSSC from Taiwan involving the Emerdex Companies. *See Stainless Steel Sheet and Strip in Coils from Taiwan: Preliminary Results and Rescission in Part of Antidumping Duty Administrative Review,* 72 FR 43236, 43239 (Aug. 3, 2007) unchanged in *Stainless Steel Sheet and Strip in Coils From Taiwan: Final Results and Rescission in Part of Antidumping Duty Administrative Review,* 73 FR 6932, (Feb. 6, 2008).

[4] Arnokrome III is a trademark of the Arnold Engineering Company.

[5] Gilphy 36 is a trademark of Imphy, S.A.

[6] Durphynox 17 is a trademark of Imphy, S.A.

[7] This list of uses is illustrated and provided for descriptive purposes only.

[8] GIN4 Mo, GIN5 and GIN6 are the proprietary grades of Hitachi Metals America, Ltd.

**Preliminary No Shipment Determination**

As noted in the "Background" section above, China Steel Corporation certified to the Department that it had no shipments/entries of subject merchandise into the United States during the POR. The Department subsequently confirmed with CBP the no-shipment claim made by China Steel Corporation. Because the evidence on the record indicates that China Steel Corporation did not export subject merchandise to the United States during the POR, we preliminarily determine that China Steel Corporation had no reviewable transactions during the POR.

Since the implementation of the 1997 regulations, our practice concerning no-shipment respondents has been to rescind the administrative review if the respondent certifies that it had no shipments and we have confirmed through our examination of CBP data that there were no shipments of subject merchandise during the POR. *See Antidumping Duties; Countervailing Duties,* 62 FR 27296, 27393 (May 19, 1997). As a result, in such circumstances, we normally instruct CBP to liquidate any entries from the no-shipment company at the deposit rate in effect on the date of entry.

In our May 6, 2003, "automatic assessment" clarification, we explained that, where respondents in an administrative review demonstrate that they had no knowledge of sales through resellers to the United States, we would instruct CBP to liquidate such entries at the all-others rate applicable to the proceeding. *See Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties,* 68 FR 23954 (May 6, 2003) (*Assessment Policy Notice*).

Because "as entered" liquidation instructions do not alleviate the concerns which the May 2003 clarification was intended to address, we find it appropriate in this case to instruct CBP to liquidate any existing entries of merchandise produced by China Steel Corporation and exported by other parties at the all-others rate, should we continue to find that China Steel Corporation had no shipments of subject merchandise in the POR in our final results. *See, e.g., Magnesium Metal From the Russian Federation: Preliminary Results of Antidumping Duty Administrative Review,* 75 FR 26922 (May 13, 2010). In addition, the Department finds that it is more consistent with the May 2003 clarification not to rescind the review in part in these circumstances but, rather, to complete the review with respect to China Steel Corporation and issue appropriate instructions to CBP based on the final results of the review. *See* the "Assessment Rates" section of this notice below.

**Affiliation**

In the 2007–2008 administrative review, the most recently completed segment of this proceeding, we found Chia Far and Lucky Medsup Inc. (Lucky Medsup), one of Chia Far's U.S. reseller customers, to be affiliated under section 771(33) of the Act, which states that, for purposes of affiliation, "a person shall be considered to control another person if the person is legally or operationally in a position to exercise restraint or direction over that person." The Department's regulations further provide that "{t}he Secretary will not find that control exists on the basis of these factors unless the relationship has the potential to impact decisions concerning the production, pricing, or cost of the subject merchandise or foreign like product." *See* 19 CFR 351.102(b)(3). This affiliation determination was based on the fact that "Chia Far is in a position to exercise restraint or direction over Lucky Medsup and has the potential to have an impact on Lucky Medsup's decisions regarding sales and pricing." *See Stainless Steel Sheet and Strip in Coils From Taiwan: Preliminary Results and Rescission in Part of Antidumping Duty Administrative Review,* 74 FR 39055, 39058 (Aug. 5, 2009) (*2007–2008 Preliminary Results*), unchanged in *Stainless Steel Sheet and Strip in Coils From Taiwan: Final Results and Rescission in Part of Antidumping Duty Administrative Review,* 75 FR 5947, 5949 (Feb. 5, 2010) (*2007–2008 Final Results*).

Moreover, this affiliation determination in the 2007–2008 administrative review is consistent with the Department's finding in prior administrative reviews. *See, e.g., Stainless Steel Sheet and Strip in Coils From Taiwan: Preliminary Results and Preliminary Rescission in Part of Antidumping Duty Administrative Review,* 73 FR 45393, 45395–45396 (Aug. 5, 2008) unchanged in *Stainless Steel Sheet and Strip in Coils From Taiwan: Final Results and Rescission in Part of Antidumping Duty Administrative Review,* 73 FR 74704, 74706 (Dec. 9, 2008) (*2006–2007 Final Results*); *Stainless Steel Sheet and Strip From Taiwan; Final Results and Partial Rescission of Antidumping Duty Administrative Review,* 67 FR 6682 (Feb. 13, 2002), and accompanying Issues and Decision Memorandum at Comment 23 (upheld by the Court of International Trade (CIT) in *Chia Far Indus. Factory Co., Ltd.* v. *United States, et al.,* 343 F. Supp. 2d 1344, 1356–57 (CIT 2004)). *See also* the August 9, 2010, Memorandum to the File from Henry Almond, Analyst, entitled, "Placing Information Regarding the Principal-Agent Relationship between Lucky Medsup Inc. and Chia Far Industrial Factory Co., Ltd. on the Record of the 2008–2009 Antidumping Duty Administrative Review on Stainless Steel Sheet and Strip in Coils from Taiwan."

In the present review, Lucky Medsup continues to act as a "go-through" without maintaining inventory, and Chia Far supplied all of the subject merchandise sold by Lucky Medsup during the POR. Further, Chia Far has submitted no evidence on the record to demonstrate that Chia Far is less involved in the transactions between Lucky Medsup and its customers as found in prior reviews. Therefore, we continue to find for purposes of these preliminary results that Chia Far is affiliated with Lucky Medsup because Chia Far is in a position to exercise restraint or direction over Lucky Medsup and has the potential to have an impact on Lucky Medsup's decisions regarding sales and pricing.

**Identifying Home Market Sales**

Section 773(a)(1)(B) of the Act defines NV as the price at which the foreign like product is first sold (or, in the absence of a sale, offered for sale) for consumption in the exporting country (home market), in the usual commercial quantities and in the ordinary course of trade and, to the extent practicable, at the same level of trade (LOT) as the export price (EP) or constructed export price (CEP). In implementing this provision, the CIT has found that sales should be reported as home market sales if the producer "knew or should have known that the merchandise {it sold} was for home consumption based upon the particular facts and circumstances surrounding the sales." *See Tung Mung Dev. Co* v. *United States,* 25 CIT 752, 783 (2001) (quoting *INA Walzlager Schaeffler KG* v. *United States,* 957 F. Supp. 251 (CIT 1997)). Where a respondent has no knowledge as to the destination of subject merchandise, except that it is for export, the Department will classify such sales as export sales and exclude them from the home market sales database. *See 2007–2008 Preliminary Results,* 74 FR at 39058, unchanged in *2007–2008 Final Results,* and *Final Determinations of Sales at Less Than Fair Value: Certain Hot-Rolled Carbon Steel Flat Products, Certain Cold-Rolled Carbon Steel Flat*

*Products, Certain Corrosion-Resistant Carbon Steel Flat Products, and Certain Cut-to-Length Carbon Steel Plate From Korea,* 58 FR 37176, 37182–37183 (July 9, 1993).

In its December 4, 2009, questionnaire response, Chia Far stated that it shipped some of the SSSSC it sold to home market customers during the POR to a container yard or it placed the SSSSC in an ocean shipping container at the home market customer's request. The Department has preliminarily determined that, based on the fact that these sales were sent to a container yard or placed in a container by Chia Far at the request of the home market customer, Chia Far should have known that the SSSSC in question was not for consumption in the home market. Therefore, consistent with this determination, the Department has preliminarily excluded these sales from Chia Far's home market sales database. This treatment is consistent with our practice in prior administrative reviews of this order. *See, e.g., 2007–2008 Preliminary Results,* 74 FR at 39059, unchanged in *2007–2008 Final Results.*

**Comparisons to Normal Value**

In order to determine whether Chia Far sold SSSSC to the United States at prices less than NV, we compared the EP and CEP of individual U.S. sales to the monthly weighted-average NV of sales of the foreign like product made in the ordinary course of trade. *See* sections 777A(d)(2) and 773(a)(1)(B)(i) of the Act. Section 771(16) of the Act defines foreign like product as merchandise that is identical or similar to subject merchandise and produced by the same person and in the same country as the subject merchandise. Thus, we considered all products covered by the scope of the order that were produced by the same person and in the same country as the subject merchandise, and sold by Chia Far in the comparison market during the POR, to be foreign like products for the purpose of determining appropriate product comparisons to SSSSC sold in the United States.

During the POR, Chia Far sold subject merchandise and foreign like product that it made from hot- and cold-rolled stainless steel coils (products covered by the scope of the order) purchased from unaffiliated parties. Chia Far further processed the hot- and cold-rolled stainless steel coils by performing one or more of the following procedures: cold-rolling, bright annealing, surface finishing/shaping, and slitting. We did not consider Chia Far to be the producer of the merchandise under review if it performed only insignificant processing on the coils (*e.g.,* annealing, slitting, surface finishing). *See Stainless Steel Plate in Coils from Belgium: Final Results of Antidumping Duty Administrative Review,* 69 FR 74495 (Dec. 14, 2004), and accompanying Issues and Decision Memorandum at Comment 4 (listing painting, slitting, finishing, pickling, oiling, and annealing as minor processing for flat-rolled products). Furthermore, we did not consider Chia Far to be the producer of the cold-rolled products that it sold if it was not the first party to cold-roll the coils. The cold-rolling process changes the surface quality and mechanical properties of the product and produces useful combinations of hardness, strength, stiffness, and ductility. Stainless steel cold-rolled coils are distinguished from hot-rolled coils by their reduced thickness, tighter tolerances, better surface quality, and increased hardness which are achieved through cold-rolling. Chia Far's subsequent cold-rolling of the cold-rolled coils that it purchased may have modified these characteristics to suit the needs of particular customers; however, it did not impart these defining characteristics to the finished coils. Thus, we considered the original party that cold-rolled the product to be its producer.

**Product Comparisons**

As described in the "Normal Value" section below, we are using a quarterly costing approach. Therefore, we have not made price-to-price comparisons outside of a quarter to lessen the distortive effect of comparing non-contemporaneous sales prices during a period of significantly changing costs. Where there were no sales of identical merchandise made in the comparison market in the ordinary course of trade within the same quarter, we compared U.S. sales to sales of the most similar foreign like product made in the ordinary course of trade within the same quarter. In making product comparisons, we selected identical and most similar foreign like products based on the physical characteristics reported by Chia Far in the following order of importance: grade, hot- or cold-rolled, gauge, surface finish, metallic coating, non-metallic coating, width, temper, and edge.

**Export Price and Constructed Export Price**

The Department based the price of Chia Far's U.S. sales of subject merchandise on EP or CEP, as appropriate. Specifically, when Chia Far sold subject merchandise to unaffiliated purchasers in the United States prior to importation and CEP was not otherwise warranted based on the facts of the record, we based the price of the sale on EP, in accordance with section 772(a) of the Act. When Chia Far sold subject merchandise to unaffiliated purchasers in the United States through its U.S. affiliate, Lucky Medsup, we based the price of the sale on CEP, in accordance with section 772(b) of the Act.

We revised Chia Far's reported U.S. sales data to take in account our findings at verification. For further discussion, see the August 9, 2010, memorandum to the file from Henry Almond entitled, "Sales Calculation Adjustments for Chia Far for the Preliminary Results" (Sales Calculation Memo).

We based EP on packed prices to the first unaffiliated purchaser in the United States. We made deductions from the starting price for foreign inland freight expenses, foreign brokerage and handling expenses, international freight expenses, marine insurance expenses, container handling charges, foreign harbor construction expenses, and certificate-of-origin fees, in accordance with section 772(c)(2)(A) of the Act.

We based CEP on packed prices sold to the first unaffiliated purchaser in the United States. We made deductions for foreign inland freight expenses, foreign brokerage and handling expenses, container handling charges, foreign harbor construction expenses, international freight expenses, marine insurance expenses, U.S. duty expenses, U.S. brokerage and handling expenses, and other U.S. transportation expenses, in accordance with section 772(c)(2)(A) of the Act.

In accordance with section 772(d)(1) of the Act and 19 CFR 351.402(b), we deducted from CEP those selling expenses associated with economic activities occurring in the United States, including direct selling expenses (*i.e.,* imputed credit expenses and bank fees) and indirect selling expenses.

In addition, we deducted from the CEP starting price an amount for CEP profit (*i.e.,* profit allocated to expenses deducted under sections 772(d)(1) and (d)(2) of the Act), in accordance with sections 772(d)(3) and 772(f) of the Act. We computed profit by deducting from the total revenue realized on sales in both the U.S. and home markets all expenses associated with those sales. We then allocated profit to the expenses incurred with respect to U.S. economic activity, based on the ratio of total U.S. expenses to total expenses for both the U.S. and home markets.

**Normal Value**

*A. Home Market Viability*

In order to determine whether there was a sufficient volume of sales in the home market to serve as a viable basis for calculating NV, we compared the volume of home market sales of the foreign like product to the volume of U.S. sales of the subject merchandise, in accordance with section 773(a)(1)(C) of the Act. Because the aggregate volume of Chia Far's home market sales of the foreign like product is more than five percent of the aggregate volume of its U.S. sales of subject merchandise, we based NV on sales of the foreign like product in the respondent's home market.

*B. Level of Trade*

Section 773(a)(1)(B)(i) of the Act states that, to the extent practicable, the Department will calculate NV based on sales at the same level of trade (LOT) as the EP or CEP. Sales are made at different LOTs if they are made at different marketing stages (or their equivalent). *See* 19 CFR 351.412(c)(2). Substantial differences in selling activities are a necessary, but not sufficient, condition for determining that there is a difference in the stages of marketing. *Id. See also 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) (*Plate from South Africa*). In order to determine whether the comparison market sales were at different stages in the marketing process than the U.S. sales, we reviewed the distribution system in each market (*i.e.,* the chain of distribution), including selling functions, class of customer (customer category), and the level of selling expenses for each type of sale.

Pursuant to section 773(a)(1)(B)(i) of the Act, in identifying LOTs for EP and comparison market sales (*i.e.,* NV based on either home market or third country prices),[9] we consider the starting prices before any adjustments. For CEP sales, we consider only the selling activities reflected in the price after the deduction of expenses and profit under section 772(d) of the Act. *See Micron Tech., Inc.* v. *United States,* 243 F.3d 1301, 1313–14 (Fed. Cir. 2001).

When the Department is unable to match U.S. sales of the foreign like product in the comparison market at the same LOT as the EP or CEP, the Department may compare the U.S. sale to sales at a different LOT in the comparison market. In comparing EP or CEP sales at a different LOT in the comparison market, where available data make it practicable, we make an LOT adjustment under section 773(a)(7)(A) of the Act. Finally, for CEP sales only, if the NV LOT is at more advanced stage of distribution than the CEP LOT and there is no basis for determining whether the difference in LOTs between NV and CEP affects price comparability (*i.e.,* no LOT adjustment was practicable), the Department shall grant a CEP offset, as provided in section 773(a)(7)(B) of the Act. *See Plate from South Africa,* 62 FR at 61732–33.

In this administrative review, we obtained information from Chia Far regarding the marketing stages involved in making the reported home market and U.S. sales, including a description of the selling activities performed by Chia Far for each channel of distribution. Chia Far reported that it made EP sales in the U.S. market to distributors, as well as CEP sales to its affiliate, Lucky Medsup. Chia Far reported identical selling activities in selling to its unaffiliated U.S. customers as it did in selling to Lucky Medsup. We examined the selling activities performed for both channels and found that Chia Far performed the following types of selling activities equally in selling to its unaffiliated U.S. customers and to Lucky Medsup: (1) Price negotiation and communication with the customer (*i.e.,* either its unaffiliated customers for EP sales, or Lucky Medsup for its CEP sales); (2) arranging for freight and the provision of customs clearance/brokerage services (where necessary); and (3) provision of general technical advice (where necessary) and quality assurance-related activities. These selling activities can be generally grouped into four selling function categories for analysis: (1) Sales and marketing; (2) freight and delivery; and (3) inventory maintenance and warehousing; and (4) warranty and technical support. Accordingly, we find that Chia Far performed sales and marketing, freight and delivery services, and technical support services for U.S. sales. Because the level of Chia Far's selling activities did not vary by distribution channel, we preliminarily determine that there is one LOT in the U.S. market.

With respect to the home market, Chia Far reported that it made sales to distributors and end users. We examined the selling activities performed for home market sales and found that Chia Far performed the following types of selling activities equally for sales to distributors and end users: (1) Price negotiation and communication with the customer; (2) arranging for freight (where necessary); (3) provision of general technical advice (where necessary) and quality assurance-related activities, including providing warranty services and rebates; and (4) post-sale warehousing/processing on request. Accordingly, based on the selling functions analysis described above, we find that Chia Far performed sales and marketing, freight and delivery services, warranty and technical support services, and inventory maintenance and warehousing for home market sales. Consequently, we preliminarily determine that there is one LOT in the home market for Chia Far.

Finally, we compared the U.S. LOT to the home market LOT and found that the selling functions performed for U.S. and home market customers do not differ significantly. Specifically, although Chia Far performed occasional warehousing and post-sale processing functions, as well as offering warranty services in the home market that it did not perform on sales to the United States, we do not find these differences to be material selling function distinctions sufficient to warrant a separate LOT for purposes of these preliminary results. Thus, we determine that the NV LOT is the same as the U.S. LOT.

Regarding the CEP-offset provision, as described above, it is appropriate only if the NV LOT is at more advanced stage of distribution than the CEP LOT and there is no basis for determining whether the difference in LOTs between NV and CEP affects price comparability. Because we find that no difference exists between the NV and CEP LOTs, we do not find that a CEP offset is warranted.

*C. Cost of Production Analysis*

In the 2006–2007 administrative review, the most recently completed segment of this proceeding as of the date of initiation of this review, the Department determined that Chia Far sold the foreign like product at prices below the cost of producing the product and excluded such sales from the calculation of NV. *See 2006–2007 Final Results,* 73 FR at 74706. As a result, the Department initiated an investigation to determine whether Chia Far made home market sales during the POR at prices below their COPs. *See* section 773(b)(2)(A)(ii) of the Act.

1. Cost-Averaging Methodology

The Department's normal practice is to calculate an annual weighted-average

[9] Where NV is based on constructed value (CV), we determine the NV LOT based on the LOT of the sales from which we derive selling expenses, general and administrative (G&A) expenses, and profit for CV, where possible.

cost for the POR. *See, e.g., Certain Pasta From Italy: Final Results of Antidumping Duty Administrative Review,* 65 FR 77852 (Dec. 13, 2000), and accompanying Issues and Decision Memorandum at Comment 18, and *Notice of Final Results of Antidumping Duty Administrative Review: Carbon and Certain Alloy Steel Wire Rod from Canada,* 71 FR 3822 (Jan. 24, 2006), and accompanying Issues and Decision Memorandum at Comment 5 (explaining the Department's practice of computing a single weighted-average cost for the entire period).

We recognize that distortions may result if we use our normal annual-average cost method during a period of significant cost changes. In determining whether to deviate from our normal methodology of calculating an annual weighted-average cost, we evaluate the case-specific record evidence using two primary factors: (1) The change in the cost of manufacture (COM) recognized by the respondent during the POR must be significant; (2) sales during the shorter averaging periods could be reasonably linked with the COP or CV during the same shorter averaging periods. *See, e.g., Stainless Steel Sheet and Strip in Coils From Mexico; Final Results of Antidumping Duty Administrative Review,* 75 FR 6627 (Feb. 10, 2010) (*SSSSC from Mexico*), and accompanying Issues and Decision Memorandum at Comment 6 and *Stainless Steel Plate in Coils From Belgium: Final Results of Antidumping Duty Administrative Review,* 73 FR 75398 (Dec. 11, 2008), and accompanying Issues and Decision Memorandum at Comment 4 (*SSPC from Belgium*).

We requested that Chia Far provide pertinent information for the products with the five highest volumes sold in the home market and the United States over the twelve months of the POR. Chia Far provided this information in its June 2, 2010, response.

2. Significance of Cost Changes

In prior cases, we established 25 percent as the threshold (between the high- and low-quarter COM) for determining that the changes in COM are significant enough to warrant a departure from our standard annual-cost approach. *See SSPC from Belgium* at Comment 4. In the instant case, record evidence shows that Chia Far experienced significant changes (*i.e.,* changes that exceeded 25 percent) between the high and low quarterly COM during the POR and that the change in COM is primarily attributable to the price volatility of hot-rolled steel, the major input for SSSSC. For further discussion, see the memorandum from James Balog, Accountant, to Neal M. Halper, Director, Office of Accounting, entitled, "Cost of Production and Constructed Value Calculations for the Preliminary Results—Chia Far," dated August 9, 2010 (Cost Memo). As a result, we have preliminarily determined that the changes in COM for Chia Far are significant enough to warrant a departure from our annual costing approach.

3. Linkage Between Cost and Sales Information

The Department's definition of "linkage" does not require direct traceability between specific sales and their specific production costs but, rather, relies on whether there are elements that would indicate a reasonable correlation between the underlying costs and the final sales prices levied by the company. *See SSPC from Belgium* at Comment 4. These correlative elements may be measured and defined in a number of ways depending on the associated industry and the overall production and sales processes. To determine whether a reasonable correlation existed between the sales prices and their underlying costs during the POR, we compared weighted-average quarterly prices to the corresponding quarterly COM for the five highest volume products sold in each of the home and U.S. markets. After reviewing this information and determining that there is a consistent trend of sales and costs throughout the POR, we preliminarily determine that there is linkage between Chia Far's changing costs and sales prices during the POR. *See* the Cost Memo.

Because we have found significant cost changes in COM as well as reasonable linkage between costs and sales prices, we have preliminarily determined that a quarterly costing approach leads to more appropriate comparisons in our antidumping duty calculation for Chia Far.

4. Calculation of COP

In accordance with section 773(b)(3) of the Act, for each foreign like product sold by Chia Far during the POR, we calculated a weighted-average quarterly COP based on the sum of Chia Far's materials and fabrication costs, G&A expenses, and financial expenses to determine if Chia Far's home market sales were made at prices below the COP.

For the cost of SSSSC sold by Chia Far in its home market during the POR, but not produced by Chia Far during the POR, we used, as facts available, Chia Far's quarterly costs to produce merchandise with characteristics similar to the merchandise not produced by Chia Far.

The Department relied on the COP data submitted by Chia Far in its most recently submitted cost database for the COP calculation, except in the following instances:

a. Chia Far sold certain models of SSSSC in its home market during the POR, which it did not produce during the period. As the costs for these models, we used, as facts available, Chia Far's quarterly costs reported for the most similar models produced during the POR. For further discussion, see the Cost Memo and the Sales Calculation Memo.

b. We disallowed Chia Far's reported negative financial expenses. For further discussion, see the Cost Memo.

5. Test of Comparison-Market Sales Prices

In order to determine whether sales were made at prices below the COP on a product-specific basis, we compared Chia Far's weighted-average quarterly COP to the prices of its home market sales of foreign like product, as required under section 773(b) of the Act. In accordance with sections 773(b)(1)(A) and (B) of the Act, in determining whether to disregard home market sales made at prices less than the COP, we examined whether such sales were made: (1) In substantial quantities within an extended period of time; and (2) at prices which permitted the recovery of all costs within a reasonable period of time. We compared the COP to home market sales prices, less any applicable movement charges and direct and indirect selling expenses.

6. Results of the COP Test

Pursuant to section 773(b)(2)(C) of the Act, where less than 20 percent of Chia Far's sales of a given product were made at prices less than the COP, we did not disregard any below-cost sales of that product because the below-cost sales were not made in "substantial quantities." Where 20 percent or more of Chia Far's sales of a given product were made at prices less than the COP during the POR, we determined such sales to have been made in "substantial quantities" within an extended period of time (*i.e.,* one year) pursuant to sections 773(b)(2)(B) and (C) of the Act. Based on our comparison of indexed POR average costs to reported prices, we also determined, in accordance with section 773(b)(2)(D) of the Act, that these sales were not made at prices which would permit recovery of all costs within a reasonable period of time. As a result,

we disregarded the below-cost sales of that product.

*D. Calculation of Normal Value Based on Comparison Market Prices*

We have preliminarily excluded from our calculation of normal value all of Chia Far's sales to certain of its home market customers on the basis that these sales were not made in the ordinary course of trade, in accordance with sections 773(a)(1)(B) and 771(15) of the Act. Specifically, these customers exclusively purchased small, left over coils resulting from the process of slitting larger coils into specific lengths and widths for re-sale as scrap, at prices which were similar to Chia Far's reported per-unit scrap values. When faced with similar fact patterns, the Department has treated such sales as outside the ordinary course of trade. *See, e.g., Notice of Final Determination of Sales at Less Than Fair Value: Hot-Rolled Flat-Rolled Carbon-Quality Steel Products From Japan,* 64 FR 24329, 24341 (May 6, 1999) (where the Department classified overrun sales as outside the ordinary course of trade where they were made in small quantities overall, at lower prices than normal merchandise, and to a small number of customers). For further discussion, see the June 16, 2010, memorandum from Henry Almond to the File, entitled "Verification of the Sales Response of Chia Far" at pages 2 and 9–10 and the Sales Calculation Memo.

We based NV for Chia Far on prices to unaffiliated customers in the home market. We revised Chia Far's reported home market sales data to take into account our findings at verification. For further discussion, see the Sales Calculation Memo. We made deductions from the starting price, where appropriate, for billing adjustments, discounts, and rebates. We also made deductions from the starting price for foreign inland freight expenses under section 773(a)(6)(B)(ii) of the Act.

For comparisons to EP sales, we made adjustments under section 773(a)(6)(C)(iii) of the Act and 19 CFR 351.410 for differences in circumstances of sale for direct selling expenses (including imputed credit expenses, warranties, and other direct selling expenses).

For comparisons to CEP sales, in accordance with section 773(a)(6)(C)(iii) of the Act and 19 CFR 351.410, we deducted from NV direct selling expenses (*i.e.,* including imputed credit expenses, warranties, and other direct selling expenses), and indirect selling expenses (including inventory carrying costs and other indirect selling expenses).

For all price-to-price comparisons 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. Finally, 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.

**Currency Conversion**

We made currency conversions into U.S. dollars in accordance with section 773A 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.

**Preliminary Results of the Review**

We preliminarily determine that the following weighted-average dumping margin exists for Chia Far for the period July 1, 2008, through June 30, 2009:

| Manufacturer/exporter | Percent margin |
|---|---|
| Chia Far Industrial Factory Co., Ltd. | 0.00 |

Where the Department exercises its discretion to limit the number of respondents for individual examination pursuant to section 777A(c)(2) of the Act, it is the Department's normal practice to calculate a review-specific rate for the companies for which the Department received review requests, but did not individually examine, based upon the rates calculated for the individually examined companies, excluding any zero or *de minimis* margins or any margins based on total facts available. Where, as here, the only calculated margins are zero or *de mimimis,* it is the Department's practice to base the review-specific rate on calculated rates from prior segments of the proceeding. *See Certain Frozen Warmwater Shrimp From the Socialist Republic of Vietnam: Final Results and Final Partial Rescission of Antidumping Duty Administrative Review,* 73 FR 52273 (Sept. 9, 2008), and accompanying Issues and Decision Memorandum at Comment 6.

Accordingly, we have preliminarily based the review-specific rate on the 4.30 percent in the 2007–2008 administrative review, which is the most recently completed segment of this proceeding. *See 2007–2008 Final Results* 75 FR at 5949. This rate is applicable to the following companies:

| Manufacturer/exporter | Percent margin |
|---|---|
| Chain Chon Industrial Co., Ltd. | 4.30 |
| Chien Shing Stainess Co. | 4.30 |
| China Steel Corporation | (*) |
| Dah Shi Metal Industrial Co., Ltd. | 4.30 |
| Goang Jau Shing Enterprise Co., Ltd. | 4.30 |
| KNS Enterprise Co., Ltd. | 4.30 |
| Lih Chan Steel Co., Ltd. | 4.30 |
| Maytun International Corp. | 4.30 |
| PFP Taiwan Co., Ltd. | 4.30 |
| Shih Yuan Stainless Steel Enterprise Co., Ltd. | 4.30 |
| Ta Chen Stainless Pipe Co., Ltd. (Ta Chen) | 4.30 |
| Tang Eng Iron Works | 4.30 |
| Tibest International Inc. | 4.30 |
| Tung Mung Development Co., Ltd./Ta Chen Stainless Pipe Co., Ltd.** | 4.30 |
| Waterson Corp. | 4.30 |
| Yieh Loong Enterprise Co., Ltd. (aka Chung Hung Steel Co., Ltd.) | 4.30 |
| Yieh Mau Corp. | 4.30 |
| Yieh Trading Corp. | 4.30 |
| Yieh United Steel Corporation | 4.30 |

* No shipments or sales subject to this review.

** This rate applies to shipments of SSSSC produced by Tung Mung in Taiwan and exported from Taiwan to the United States by Ta Chen.

**Disclosure and Public Hearing**

The Department will disclose to parties the calculations performed in connection with these preliminary results within five days of the date of publication of this notice. *See* 19 CFR 351.224(b). Pursuant to 19 CFR 351.309(c)(ii), interested parties may submit cases briefs not later than 30 days after the date of publication of this notice. Rebuttal briefs, limited to issues raised in the case briefs, may be filed not later than 35 days after the date of publication of this notice. *See* 19 CFR 351.309(d)(1). Parties who submit case briefs or rebuttal briefs in this proceeding are requested to submit with each argument: (1) A statement of the issue; (2) a brief summary of the argument; and (3) a table of authorities. *See* 19 CFR 351.309(c)(2).

Pursuant to 19 CFR 351.310(c), 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, Room 1870, within 30 days of the date of 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 issues to be discussed. *Id.* Issues raised in the hearing will be limited to those raised in the respective case briefs. The Department will issue the final results

of this administrative review, including the results of its analysis of the issues raised in any written briefs, not later than 120 days after the date of publication of this notice, pursuant to section 751(a)(3)(A) of the Act.

**Assessment Rates**

Upon completion of the administrative review, the Department shall determine, and CBP shall assess, antidumping duties on all appropriate entries, in accordance with 19 CFR 351.212. The Department will issue appropriate appraisement instructions for the companies subject to this review directly to CBP 15 days after the date of publication of the final results of this review.

For Chia Far, we will calculate importer-specific *ad valorem* duty assessment rates based on the ratio of the total amount of antidumping duties calculated for the examined sales to the total entered value of those sales. Consistent with the Department's practice, for the companies which were not selected for individual review, we will use the cash deposit rate as the assessment rate for these companies. *See, e.g., Certain Frozen Warmwater Shrimp From India: Final Results and Partial Rescission of Antidumping Duty Administrative Review,* 74 FR 33409, (July 13, 2009), and accompanying Issues and Decision Memorandum at Comment 3.

We will instruct CBP to assess antidumping duties on all appropriate entries covered by this review if any importer-specific assessment rate calculated in the final results of this review is above *de minimis* (*i.e.,* less than 0.50 percent). Pursuant to 19 CFR 351.106(c)(2), we will instruct CBP to liquidate without regard to antidumping duties any entries for which the assessment rate is *de minimis. See* 19 CFR 351.106(c)(1). The final results of this review shall be the basis for the assessment of antidumping duties on entries of merchandise covered by the final results of this review and for future deposits of estimated duties, where applicable.

As noted above, the Department clarified its "automatic assessment" regulation on May 6, 2003. *See Assessment Policy Notice,* 68 FR 23954. This clarification will apply to entries of subject merchandise during the POR produced by companies included in these final results of review for which the reviewed companies did not know that the merchandise they sold to the intermediary (*e.g.,* a reseller, trading company, or exporter) was destined for the United States. In such instances, we will instruct CBP to liquidate unreviewed entries at the all others rate if there is no rate for the intermediary involved in the transaction. *See Assessment Policy Notice* for a full discussion of this clarification.

**Cash Deposit Requirements**

The following cash deposit requirements will be effective for all shipments of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the publication date of the final results of this administrative review, as provided by section 751(a)(2)(C) of the Act: (1) The cash deposit rate for each specific company listed above will be that established in the final results of this review, except if the rate is less than 0.50 percent and, therefore, *de minimis* within the meaning of 19 CFR 351.106(c)(1), in which case the cash deposit rate will be zero; (2) for previously reviewed or investigated companies not participating in this review, the cash deposit rate will continue to be the company-specific rate published for the most recent period; (3) if the exporter is not a firm covered in this review, or the less-than-fair value (LTFV) investigation, but the manufacturer is, the cash deposit rate will be the rate established for the most recent period for the manufacturer of the merchandise; and, (4) the cash deposit rate for all other manufacturers or exporters will continue to be 12.61 percent, the all others rate made effective by the LTFV investigation. *See SSSSC Order,* 64 FR at 40557. These deposit requirements, when imposed, shall remain in effect until further notice.

**Notification to Importers**

This notice also serves as a preliminary 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 review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

These preliminary results of administrative review and notice are issued and published in accordance with sections 751(a)(1) and 777(i)(1) of the Act and 19 CFR 351.221.

Dated: August 9, 2010.

**Ronald K. Lorentzen,**

*Deputy Assistant Secretary for Import Administration.*

[FR Doc. 2010–20075 Filed 8–12–10; 8:45 am]

**BILLING CODE 3510–DS–P**

## DEPARTMENT OF COMMERCE

### International Trade Administration

**[A–570–504]**

### Petroleum Wax Candles From the People's Republic of China: Preliminary Results of Request for Comments on the Scope of the Petroleum Wax Candles From the People's Republic of China Antidumping Duty Order

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

**SUMMARY:** On August 21, 2009, the Department solicited comments from the general public on the best method to consider whether novelty [1] candles should or should not be included within the scope of the *Order* [2] given the extremely large number of scope determinations requested by outside parties. *See Petroleum Wax Candles from the People's Republic of China: Request for Comments on the Scope of the Antidumping Duty Order and the Impact on Scope Determinations,* 74 FR 42230 (August 21, 2009). The general public was given two options (as well as the choice to submit additional options and ideas):

*Option A:* The Department would consider all candle shapes identified in the scope of the *Order* (*i.e.,* tapers, spirals, and straight-sided dinner candles; rounds, columns, pillars, votives; and various wax-filled containers) to be within the scope of the *Order,* regardless of etchings, prints moldings or other artistic or decorative enhancements, including any holiday-related art. All other candle shapes would be considered outside of the scope of the *Order.*

*Option B:* The Department would consider all candle shapes, including novelty candles, to be within the scope of the *Order,* including those not in the shapes listed in the scope of the *Order,* as that is not an exhaustive list of shapes, but simply an illustrative list of common candle shapes.

The Department received comments from interested parties by the appropriate deadline. In examining these comments and the administrative

[1] The term "novelty candle," as defined in *Scope Comments* and prior scope rulings, refers to candles that are in the shapes of identifiable objects, or are holiday-themed.

[2] *See Antidumping Duty Order: Petroleum Wax Candles from the People's Republic of China,* 51 FR 30686 (August 28, 1996) ("*Order*").

record since the less-than-fair value ("LFTV") antidumping duty investigation, we have preliminarily developed a new interpretation for interpreting candle scope ruling requests. Moreover, we have preliminarily applied this new interpretation to all 388 pending scope determinations under the *Order. See infra.*

**DATES:** Parties may submit comments no later than 30 calendar days after date of publication of this notice and rebuttal comments 10 calendar days later.

**FOR FURTHER INFORMATION CONTACT:** Tim Lord, AD/CVD Operations, Office 9, Import Administration, U.S. Department of Commerce, 14th Street & Constitution Ave., NW., Washington, DC 20230, telephone: (202) 482–7425.

**Comments From Interested Parties**

On September 16, 2009, the Department received comments from the following interested parties: The National Candle Association ("NCA"); the National Retail Federation ("NRF"); HSE USA, Inc. ("HSE"); Universal Candle Company ("UC"); Sourcing International ("SI"); the Retail Industry Leaders of America ("RILA"); and Trade Associates Group, Ltd. ("TAG").

*Support for Option A* [3]

NRF and SI urge the Department to adopt Option A in its un-altered form. NRF argues this option is most consistent with the original scope of the case that retailers have operated under for over 20 years. HSE argues that Option A is the best way to ensure that the scope interpretation be "shape-based." That is, HSE maintains, Option A will guarantee that only candles in the shapes specifically enumerated in the scope of the *Order*—tapers, spirals, straight-sided dinner candles; rounds, columns, pillars; votives; and various wax-filled containers ("the enumerated shapes")—be considered as within the scope. HSE also argues that the current scope language is exhaustive, not illustrative, and that Option A recognizes this fact.

*Support for Option B* [4]

UC specifically states that it is in favor of Option B, though it requests that its birthday and cake-top candles be considered outside of the scope because there is no domestic production of these candles.

*Additional Proposals*

NCA proposes a combination of Options A and B whereby all candle shapes, regardless of embellishment or holiday theme, would be included within the scope of the *Order.*

RILA argues that because much of the debate over what is or is not a holiday candle centers on what symbols or objects are specific to a holiday and how obvious those symbols or objects must be on the candle, the Department should develop objective criteria from prior rulings. Such criteria might include a list of symbols and objects that are specific to a holiday and numerical standards for what portion of the candle surface must be covered by such symbols. RILA also maintains the Department should engage more closely with U.S. Customs and Border Protection ("CBP") to ensure that there is an accurate and consistent understanding of the scope of the *Order* and any guidelines established by the Department.

TAG argues that neither option should be chosen, and that the Department's current practices should remain in effect. However, TAG maintains, the current practice that candles be recognizable from multiple angles is overly formalistic, and thus the identifiable object exception should be based on "realistic guidelines."

NRF asserts that the Department should adopt some practices used by CBP, including having a designated Department employee whom importers can call to discuss scope issues.

SI and NCA argue that the Department's regulations be amended to allow the Department to issue summary determinations so that the Department could issue a single ruling when there are multiple requests for what is essentially the same product. For instance, if an importer requests scope determinations on 25 pillar candles that differed only in their size, the Department would be able to issue one summary scope determination instead of 25.

*Other Issues Raised by Parties*

Although NRF requests that we choose Option A, it also argues that the choice of either option would cause the Department to have to address prior decisions where items that have been previously found to be within the scope of the *Order* would now be considered outside the *Order,* and vice-versa for items previously found to be outside the scope of the *Order.*

NCA asserts that the novelty candle exclusion established in the CBP Notice [5] was baseless. NCA also maintains that the Department's LTFV investigation and the Antidumping Petition [6] did not exclude any petroleum wax candles from the scope of the investigation requested.

HSE argues that the Department's should abandon the "JC Penney methodology," [7] because this interpretation no longer considers the shape of the candle to be dispositive in determining whether it is covered by the scope, and should return to its prior practice of looking at the shape of the candle in evaluating the scope. HSE continues that the JC Penney methodology disregarded the history of the case and has also proven to be extremely burdensome by increasing the number of candle scope ruling requests.

**Background of the Order**

In determining whether it is appropriate to formulate a new interpretation for interpreting the scope of this *Order,* the Department must examine documents from the LFTV investigation and subsequent segments of this proceeding to understand the validity of its current practices and to re-examine the products originally covered by the scope of the LTFV investigation. *See* 19 CFR 351.225(k)(1). In particular, the Department puts much weight on the original intent of the injured domestic industry, in this case, represented by NCA. Below is the Department's analysis of these documents, which are included in the Memorandum to the File through Alex Villanueva, Program Manager, from Tim Lord, Case Analyst, Certain Petroleum Wax Candles from the People's Republic of China: Placing Documents on the Record (August 9, 2010) ("Relevant Documents Memorandum").

*Petition*

The *Petition* illustrates that, contrary to its current assertions, NCA advocated for an exhaustive scope where those candles not specifically enumerated in the scope language, as well as figurine candles, "household," "utility," or "emergency" [8] candles, were to be

[3] With Option A, the Department would consider all candle shapes identified in the scope of the *Order,* (*i.e.,* tapers, spirals, and straight-sided dinner candles; rounds, columns, pillars, votives; and various wax-filled containers) to be within the scope of the *Order,* regardless of etchings, prints, moldings or other artistic or decorative enhancements including any holiday-related art. All other candle shapes would be considered outside the scope of the *Order.*

[4] With Option B, the Department would consider all candle shapes, including novelty candles, to be within the scope of the *Order* including those not in the shapes listed in the scope of the *Order,* as that is not an exhaustive list of shapes, but simply an illustrative list of common candle shapes.

[5] The CBP Notice is discussed *infra.*

[6] The Antidumping Petition is discussed *infra.*

[7] The JC Penney ruling and JC Penney methodology are discussed *infra.*

[8] Those candles known as "household," "utility," "emergency," or "household emergency candles"

excluded from the investigation. For instance, when discussing its choice of a surrogate country, NCA states, "Korea was deemed a poor choice as a surrogate because its primary domestic production of candles consists of types of candles which are not similar to candles exported by the PRC. Korea produces mostly small, plain, white utility candles and hand-crafted novelty candles." *See Antidumping Petition Submitted on Behalf of the National Candle Association in the Matter of: Petroleum Wax Candles from the People's Republic of China* (September 3, 1985) ("*Petition*") at 14; *see also* Relevant Documents Memorandum, at Tab A.

Additionally, NCA via a consulting firm, requested information from a market research firm in Malaysia on producers' prices for candles made and sold in Malaysia and stated that the candles they were concerned with were ordinary candles. NCA's consulting firm noted that they were uninterested in those candles not in the enumerated shapes. *See Petition,* at Exhibit 21; *see also* Relevant Documents Memorandum, at Tab A. Additionally, the *Petition's* like product definition itself indicates exclusivity:

> The imported PRC candles are made from petroleum wax and contain fiber or paper-cored wicks. They *are* {emphasis added} sold in the following shapes: tapers, spirals, and straight-sided dinner candles; rounds, columns, pillars; votives; and various wax filled containers. These candles may be scented or unscented. While manufactured in the PRC, these candles are marketed in the United States and are generally used by retail consumers in the home or yard for decorative or lighting purposes."

*See Petition,* at 6–7; *see also* Relevant Documents Memorandum, at Tab A.

*Initiation*

The *Initiation* used language virtually identical to NCA's like product description:

> The products covered by this investigation are certain scented or unscented petroleum wax candles made from petroleum wax and having fiber or paper-cored wicks. They are sold in the following shapes: tapers, spirals, and straight-sided dinner candles; rounds, columns, pillars; votives; and various wax-filled containers. The products are classified under the Tariff Schedules of the United States (TSUS) item 755.25, Candles and Tapers.

*See Petroleum Wax Candles From the People's Republic of China; Initiation of Antidumping Duty Investigation,* 50 FR 39743 (September 30, 1985) ("*Initiation*"); *see also* Relevant Documents Memorandum at Tab B.

*ITC Preliminary Results*

The description of the International Trade Commission's ("ITC") like product was nearly the same as NCA's like product definition and the *Initiation.* The ITC was silent with regard to novelty candles, although it devotes some discussion to Christmas candles.[9] However, as noted *infra,* the ITC stated that there was no clear definition of a "Christmas/seasonal candle" and used candle color (red, white, or green) as an indicator of whether a candle is a Christmas/seasonal candle or not. Thus, the *ITC Preliminary Results* are not dispositive with regard to novelty candles based on shape or seasonal nature.

*DOC Preliminary Results*

The Department's scope of the investigation remained unchanged from the *Initiation,* and novelty candles are not mentioned. *See Petroleum Wax Candles From the People's Republic of China; Preliminary Determination of Sales at Less Than Fair Value,* 51 FR 6016 (February 19, 1986) ("*DOC Preliminary Results*"); *see also* Relevant Documents Memorandum at Tab D.

*Memorandum Dated October 2, 1986*

Further insight into which candles NCA originally intended to be outside the scope of the investigation is found in a Departmental memorandum dated October 2, 1986. In this memorandum, the Department notes that on February 20, 1986 the Department issued instructions to the U.S. Customs Service ("Customs") [10] suspending liquidation on merchandise covered under Tariff Schedules of the United States ("TSUSA") item 755.25, a basket category which included numerous different types of candles. The memorandum details subsequent clarifications issued after the initial February 20, 1986 instructions to the U.S. Customs Service:

> Subsequent telephone complaints by some importers prompted another telex to customs on March 20, 1986, in which 'candles not described above, such as birthday, birthday numeral, and figurine-type candles,' are also outside the scope of this investigation.

*See* Memorandum to Bill Matthews through Bob Marenick from Elena Gonzalez, Subject: Scope of Investigation, Petroleum Wax Candles from the People's Republic of China (October 2, 1986) ("Memorandum Dated October 2, 1986"); *see also* Relevant Documents Memorandum at Tab E.

*Memorandum Dated April 30, 1986*

A memorandum dated April 30, 1986, describes two conversations between the Department and NCA's counsel that illustrates that NCA did not intend for the scope of the *Order* to cover all petroleum wax candles:

> On March 20, 1986, Mr. Randolph Stayin of Taft, Stettinus & Hollister, who represents the petitioner, advised by telephone that candles described as household candles, household emergency candles, or utility candles, which are white in color and 5″ long × ¾″ diameter, do not fit the product description included in this petition and are therefore outside the scope of this investigation.
>
> Earlier, Ann King, of the same law firm, had told me that birthday candles, birthday numeral candles and figurine-type candles are also outside the scope of this investigation.

*See* Memorandum to the File, from Michael Ready, Subject: Petroleum Wax Candles from the PRC—Scope of the Investigation (April 30, 1986) ("Memorandum Dated April 30, 1986"); *see also* Relevant Documents Memorandum at Tab F.

*Scope Clarification Communication*

Following the communications with NCA described above, the Department sent a telex to the U.S. Customs Service clarifying the scope of products subject to the LTFV investigation on March 20, 1986. *See* Communication to All U.S. Customs Field Officers from John Durant, Acting Director, Commercial Compliance Division: Petroleum Wax Candles from the People's Republic of China: Clarification of Scope of Investigation ("Scope Clarification Communication"):

> 1. The scope of Investigation as defined in the Federal Register (February 19, 1986, page 6016) and referenced in our February 20, 1986 telex is as follows: 'Scope of Investigation: The products covered by this investigation are certain scented or unscented petroleum wax candles made from petroleum wax and having paper or fiber-cored wicks. They are sold in the following

will be termed "utility candles" for purposes of this notice.

[9] The ITC deems the term "Christmas candle" as synonymous with "seasonal candle" and uses the terms interchangeably. For the purposes of this notice, the Department will use the term "Christmas/seasonal" to refer to this type of candle. No other holidays or special events are mentioned or equated with the term "seasonal." *See Candles from the People's Republic of China: Determination of the Commission in Investigation No. 731–TA–282 (Preliminary) Under the Tariff Act of 1930, Together with the Information Obtained in the Investigation,* USITC Publication 1768 (October, 1985) ("*ITC Preliminary Results*") at A–22; *see also* Relevant Documents Memorandum at Tab C.

[10] On July 28, 2006, the United States Customs Service since was renamed as the United States Bureau of Customs and Border Protection. *See* Homeland Security Act of 2002, Public Law 107–296, § 1502, 116 Stat. 2135, 2308–09 2002); Reorganization Plan Modification for the Department of Homeland Security, H.R. Doc. No. 108–32, at 4 (2003).

shapes: tapers, spirals, and straight-sided dinner candles, rounds, columns, pillars, votives, and various wax-filled containers. The products are classified under the Tariff Schedules of the United States (TSUS) Item 755 25, Candles and Tapers.' 2. Candles not described above, such as birthday, birthday numeral, and figurine type candles are outside the scope of this investigation.

*See* Scope Clarification Communication; *see also* Relevant Documents Memorandum at Tab G.

The Memorandum dated October 1986, indicates that conversations between the Department and importers were an impetus for the exclusions of the Scope Clarification Communication, and the timing of communications with NCA (detailed in the Memorandum Dated April, 1986) indicate that NCA endorsed these exclusions. However, while the Department adhered to NCA's opinion that candles not in the enumerated shapes and birthday candles were not covered by the scope of the investigation, it did not specifically state in the Scope Clarification Communication that utility candles were not covered.

*DOC Final Results*

The scope of the *Order* listed in the *DOC Final Results* is the same as that of the *Initiation. See Petroleum Wax Candles From the People's Republic of China: Final Determination of Sales at Less Than Fair Value,* 51 FR 25085 (July 10, 1986) ("*DOC Final Results*"); *see also* Relevant Documents Memorandum at Tab H. Record evidence that NCA did not intend for certain candles to be covered can also be seen in the *DOC Final Results.* Specifically, when addressing respondents' comment that the Department should not have excluded candle imports from Jamaica in determining foreign market value, we defend our position by stating, "At the preliminary determination we excluded imports from Jamaica from consideration because we received information from petitioner that the Jamaican candles were 'household candles' not subject to this investigation." *See* Relevant Documents Memorandum at Tab H.

*ITC Final Results*

The ITC lists "novelties" as among the types of candles it analyzed, although it gives no definition of the term. *See Determination of the Commission in Investigation No. 731–TA–282 (Final) Under the Tariff Act of 1930, Together With the Information Obtained in the Investigation,* USITC Publication 1888 (August, 1986) ("*ITC Final Results*") at A–6; *see also* Relevant Documents Memorandum at Tab I.

The ITC also included Christmas/seasonal candles as among the types of candles it analyzed, and in response to respondents' contention that seasonality is indicative of a lack of competition between domestic candles and Chinese imports, the Commission states:

> Data on seasonality should be used with caution, as no clear definition of 'Christmas candle' has been offered. Some reporting companies indicated that all red, white, and green candles were reported as Christmas candles, whereas other companies indicated that they sell Christmas colors year round and reported sales for October through December as Christmas candles. *See ITC Final Results* at A–7, fn 1.

Thus, the ITC conceded that there was no concrete definition of a Christmas/seasonal candle, and noted that the most widely-used metric in determining whether a candle was Christmas/seasonal was based upon its color and/or the time of year in which it was sold. However, the ITC's indication of what is considered a Christmas/seasonal candle does not signify it advocated that Christmas/seasonal candles in *any* shape should be within the scope of the investigation. Rather, it indicates that the ITC advocated that those candles in the enumerated shapes should not be considered outside the scope of the investigation simply because they are in "Christmas/seasonal colors."

*Order*

The Department published the *Order,* with scope language identical to the Department's *Initiation, Preliminary Results,* and *Final Results. See Order; see also* Relevant Documents Memorandum at Tab J.

*Novelty Exclusion Scope Rulings*

The first novelty exclusion, issued in October 30, 1986, regarded a taper imported by Global Marketing Services' that had a Santa Claus figurine attached to the taper. The Department solicited comments from NCA before it made its final scope ruling. NCA agreed that the candle was outside of the scope, stating:

> This particular candle is considered borderline in our opinion because the only novelty is the wax Santa Claus which can be removed or added to the taper. Without the attached wax Santa Claus, the subject taper would clearly be within the scope of the order. However, we consent to the exclusion of this specific taper only on the basis that the hand-painted wax Santa Claus is attached to each taper entered through Customs.

*See* Letter to the Department on Behalf of NCA, dated October 15, 1986 ("NCA's October 15, 1986 Letter"); *see also* Relevant Documents Memorandum at Tab K. In a letter explaining to Global Marketing Services why we excluded their candle, the Department stated:

> Your tapers have a hand-painted *figurine* {emphasis added} molded to the candle, which could not be removed without damage to the taper. This different physical characteristic precludes inclusion of these candles in the scope of the order.

*See* Letter from the Department to Global Marketing Services, dated October 30, 1986 ("Department's October 30, 1986 Letter"); *see also* Relevant Documents Memorandum at Tab L.

It is therefore apparent from examining NCA's October 15, 1986, Letter and the Department's October 30, 1986, Letter that Global Marketing Service's Santa Claus candle was found outside of the scope not because of its Christmas/seasonal characteristics, but because of its figurine component.

The second novelty exclusion, issued in July 13, 1987, regarded candles with raised Christmas motifs imported by Giftco Inc. The Department solicited comments from NCA before it made its final scope ruling. NCA agreed that the candles were outside of the scope, stating:

> {O}ur examination of the candles * * * revealed that they are novelty candles which are specially designed for Christmas. That is, they are holiday scenes and symbols. Both candles are square, four inches high, and have alternating raised motif scenes outlined by borders. The first candle is red and has the word 'JOY' written in yellow letters surrounded by green pine branches. The alternate scene has a red cardinal sitting on yellow cornets. The second candle is light blue and has the words 'Silent Night' surrounded by one large and several small stars painted yellow, blue, and white. The alternate scenes depict a yellow church with two green trees, green grass, and a snow-topped mountain in the background.
>
> These specific candles are Christmas novelty candles that are outside the scope of the order. They are similar to the hand-painted Santa Claus figure candles that we have already agreed should be excluded from the order. However, not all raised motif candles should be excluded from the order. We specifically included petroleum wax candles that have raised motifs in the investigation since several of the petitioners produce them. For example, Candle-lite makes votive candles with raised flower motifs while Colonial Candle of Cape Cod attaches a small 'CCCC' motif to all of its candles.

*See* Letter to the Department on Behalf of NCA, dated May 4, 1987 ("NCA's May 4, 1987 Letter"); *see also* Relevant Documents Memorandum at Tab M. This statement may be interpreted in different ways. While one could argue this is evidence that NCA supported Christmas/seasonal candles being outside of the scope of the *Order,* one

could also contend that NCA supported these candles as outside of the scope because they were in the shape of squares—not one of the enumerated shapes. Furthermore, even if one were to interpret this statement as NCA supporting the exclusion of Christmas/holiday candles, this point is moot because as stated above, the Department must reasonably determine the products originally covered by the scope of the LTFV investigation as well as the original intent of the injured domestic industry *before* the issuance of the *Order*. This scope ruling, however, came after the completion of the investigation and issuance of the *Order*.

*CBP Notice*

The Department issued instructions to the U.S. Customs Service in connection with the second novelty exclusion from the *Order* for Christmas/seasonal novelty candles ("CBP Notice"). While this notice included exclusions discussed during the course of the investigation (*i.e.,* numeral and "figurine-type" candles), the notice also introduced the idea of a novelty candle exclusion that clarified the candle types excluded from the *Order* beyond those discussed during the investigation:

> The Department of Commerce has determined that certain novelty candles, such as Christmas novelty candles, are not within the scope of the antidumping duty order on petroleum wax candles from the People's Republic of China (PRC). Christmas novelty candles are candles specially designed for use only in connection with the Christmas holiday season. This use is clearly indicated by scenes or symbols depicted in the candle design. Other novelty candles not within the scope of the order include candles having scenes or symbols of other occasions (*e.g.,* religious holidays or special events) depicted in their designs, figurine candles, and candles shaped in the form of identifiable objects (*e.g.,* animals or numerals).

*See* CBP Notice; *see also* Relevant Documents Memorandum at Tab N. While this exception for Christmas/seasonal and special occasion-themed candles appears to be in response to the first two novelty scope rulings for Christmas/seasonal candles, there is no evidence on record from the investigation to indicate that any religious, holiday, or special occasion-themed candles, otherwise within the shapes outlined in the scope,[11] were considered outside the scope of the investigation prior to the issuance of the *Order*.

*JC Penney*

In November 2001, the Department reconsidered its practice on the issue of candle shapes. *See Final Scope Ruling Antidumping Duty Order on Petroleum Wax Candles From the People's Republic of China* (A–570–504); JC Penney Purchasing Corporation, (November 9, 2001) ("*JC Penney*"). In this ruling, the Department reviewed the text of the scope of the *Order,* beginning with the text of the first sentence of the scope which covers "{c}ertain scented or unscented petroleum wax candles made from petroleum wax and having fiber or paper–cored wicks." *See Order.* The Department stated in *JC Penney:*

> {t}he text following this broad inclusive sentence provides a list of shapes, which list is not modified by any express words of exclusivity. The result of our prior practice of excluding candles of a shape other than those listed was arguably inconsistent with the fact that such candles were scented or unscented petroleum wax candles made from petroleum wax and having fiber or paper-cored wicks.'

*See JC Penney* at 4–5, fn 1; *see also* Relevant Documents Memorandum at Tab O. Furthermore, in *JC Penney,* the Department stated:

> We now determine that this practice was incorrect because it had the effect of narrowing the broad coverage of the first sentence of the *Order*'s scope. The list of shapes in the second sentence of the *Order*'s scope does not provide a textual basis for such a narrowing of the coverage of the first sentence of the *Order*'s scope.

*See JC Penney* at 5, fn 1; *see also* Relevant Documents Memorandum at Tab O.

Therefore, since 2001, the Department has followed the "JC Penney methodology" whereby it determines that if the candle is made from petroleum wax and has a fiber or paper–cored wick it falls within the scope of the *Order* regardless of shape unless the candle possesses the characteristics set out in the CBP Notice, in which case a candle falls within the Department's novelty candle exception and is not within the scope of the *Order.*

However, a close review of the investigation record shows that, although addressing a key enforcement concern, the *JC Penney* methodology did not fully take into account record evidence from the investigation. While *JC Penney* stated that the scope of the *Order* was inclusive, the language of the *Order* indicates that the scope is exclusive, whereby only those candles in the enumerated shapes are considered inside the scope. For instance, the scope of the *Order* covers "{*c*}ertain scented or unscented petroleum wax candles" that "*are* sold in the following shapes: tapers, spirals, and straight-sided dinner candles; rounds, columns, pillars, votives; and various wax-filled containers" (emphasis added). That is, the language of the scope is overt in its exclusivity. As discussed above, NCA's apparent concurrence with the scope clarifications issued to Customs further indicate that the scope was originally intended to include only those candle shapes described in the scope and to exclude birthday and utility candles).

**Preliminary Determination**

A thorough review of the record clearly illustrates that NCA did not intend for the scope of the candles *Order* to include all candles. At the time of the LTFV investigation and the concomitant setting of the scope, NCA advocated a scope where only the enumerated shapes would be covered. For instance, NCA's agreement in the Memorandum Dated April 30, 1986, that "figurine" candles were not within the scope of the *Order* indicates that candles in shapes other than those enumerated in the scope language were not included within the scope of the investigation. Furthermore, NCA also intended for the *Order* to exclude birthday candles and utility candles. While the Department adhered to the original intent of NCA in excluding birthday candles and candles not in the enumerated shapes through the Scope Clarification Communication and CBP Notice, we inadvertently did not specify that utility candles should also be excluded.

Thus, after examining the historical record of this case to determine the original intent of NCA, and taking into consideration the comments of interested parties, the Department is taking this opportunity to clarify how it will analyze candle scope requests so as to best reflect the products covered by the LTFV investigation. The Department agrees with NCA that there is no basis in the record of the LTFV investigation for excluding candles based upon holiday characteristics. In addition, the Department notes that, in contrast to *JC Penney,* record evidence suggests that the scope of the *Order* is exclusive and that candles not in the shapes described in the scope fall outside the scope of the *Order*.

Therefore, the Department's proposed new interpretation for interpreting candle scope determination requests would entail Option A, with the addition that two specific types of candles—utility candles and birthday candles—would be excluded. The proposed new interpretation would be

[11] As noted previously, the ITC's discussion of Christmas/seasonal candles (*i.e.* those in red, white, or green) made no indication that these candles (if in one of the non-enumerated shapes) should be included within the scope.

as follows: [12] The Department will consider all candle shapes identified in the scope of the *Order* [13] (*i.e.,* tapers,[14] spirals,[15] and straight-sided dinner candles; [16] rounds,[17] columns,[18] pillars,[19] votives; [20] and various wax-filled containers [21]) to be within the scope of the *Order,* regardless of etchings, prints, texture, moldings or other artistic or decorative enhancements including any holiday-related art. However, even if they are one of the shapes listed within the scope of the *Order,* two types of candles will be excluded: (1) those candles known variously as "household candles," "emergency candles," or "utility candles," (which are typically white in color, 5 inches long, .75 inch in diameter, and come in packs of two or more); and (2) birthday candles (which are typically small, thin, pillar-shaped candles that range in height from 2 inches to 3.5 inches, are .18 inch to .25 inch in width, and come in packs of 10 to 24), and birthday numeral candles (which are candles in the shape of numbers that typically range in height from 2 to 4 inches). All other candle shapes and types will be considered outside the scope of the *Order.*

**Analysis of Parties' Comments**

RILA suggests that the Department use objective criteria to make scope rulings more efficient, such as a list of symbols and objects that are specific to a holiday. We have not adopted this suggestion because our proposed interpretation would not take into account holiday ornamentation when determining whether a candle is outside of the scope of the *Order*.

TAG suggested that the identifiable object exclusion be based on "realistic guidelines." We have not adopted this suggestion either, as the Department's proposed interpretation would not take into account identifiability as a particular object, but rather candle shape and candle type in scope determinations.

In response to NRF's suggestion that the Department should use practices such as utilizing a designated Department employee whom importers can call to discuss scope issues, the Department notes that it already has analysts who perform this function. However, while analysts may discuss scope issues with interested parties, no scope determination can be made by telephone. An official scope ruling can only be made when an interested party formally submits its scope ruling request to the Department. *See* 19 CFR 351.225.

With regard to NCA's and SI's suggestion that the Department issue summary determinations, the Department notes that it already issues determinations that include multiples of what are essentially the same item. *See, e.g.,* Antidumping Duty Order on Petroleum Wax Candles From the People's Republic of China: Final Scope Ruling, Fashion Craft-Excello, Inc. (April 12, 2007).

In response to the assertion by NRF and SI that a change in the Department's current practice would mean that it would have to address prior scope rulings, the Department notes that in previous instances where it has changed its scope ruling interpretation in the candles case, the Department has only applied the change to current and future scope rulings. *See LDM Anticircumvention Determination* [22] and *JC Penney*.

**Application of Interpretation**

Given the above, the Department hereby preliminarily applies this new interpretation to the 388 pending scope determinations before us. *See* Memorandum to the File through Alex Villanueva, Program Manager, from Tim Lord, Case Analyst, Certain Petroleum Wax Candles from the People's Republic of China: Candle Scope Request Preliminary Determinations (August 9, 2010). The 388 requests consisted of 269 unique candles.[23] Of those 269 unique candles, 250 were preliminarily determined to be outside of the scope of the *Order,* while 19 unique candles were preliminarily determined to be within of the scope of the *Order*.

**Submission of Comments**

The Department invites interested parties to comment on these preliminary results and the proposed interpretation for analyzing scope requests under the *Order*. Persons wishing to comment should file one signed original and six copies of each set of comments by the date specified above. The Department will consider all comments received before the close of the comment period in reaching its final determination. Comments received after the end of the comment period may not be considered. All comments responding to this notice will be a matter of public record and will be available for inspection and copying at Import Administration's Central Records Unit, Room 1117. The Department requires that comments be submitted in written form. The Department recommends submission of comments in electronic form to accompany the required paper copies.

Comments filed in electronic form should be submitted either by e-mail to the Webmaster below, or on CD–ROM,

[12] The definitions used in the proposed new interpretation were taken from a variety of sources: (1) Historical documents on record from the candles case, such as the Petition and Departmental memoranda; (2) past candle scope rulings; and (3) sources outside of the Department, including the NCA's Web site.

[13] Note: The term "circumference" as used below denotes the length of the perimeter of a candle, whether measured at the base, top, etc. It can be used in reference to candles that have cylindrical or polygonal (*i.e.,* multi-sided, with all sides being relatively straight) bases and tops.

[14] A taper is a candle that has a circumference at its base of up to 5 inches, is typically six inches or longer and gradually decreases in width from base to top so that the width at the base is typically no more than 60 percent larger than the width at the top (the top of a taper candle is typically 1⁄6 of the candle's height from the tip of the candle, excluding the wick). The decrease in width may be continuously straight or slightly convex.

[15] A spiral is a candle that has dimensions similar to a taper's and has helical indentations around its length.

[16] A straight-sided dinner candle has dimensions similar to a taper's, although its width is constant through the length of the candle.

[17] A round may come in two varieties: (1) A "spherical round" is one in which all points on the candle's surface (except for those on the base and top) are approximately equidistant from the candle's center; *see* Final Scope Ruling: Antidumping Duty Order on Petroleum Wax Candles from the People's Republic of China (A–570–504): Wal-Mart Stores, Inc. (December 17, 2004) at 13. Thus, a spherical round does not contain multiple surface angles (or embellishments so prominent that it could not be considered approximately spherical); (2) a "flattened round," is typically disc-shaped and has at its widest point an approximately circular circumference which is greater than it its height. All horizontal radii of this circumference are approximately equidistant from the circumference's center. Thus, a flattened round does not contain multiple surface angles (or embellishments so prominent that it does not exhibit an approximately circular circumference). The top, bottom, and side of a flattened round may be slightly convex or non-convex.

[18] A column is a candle that is often free-standing, has a width of up to 8 inches and a height of up to 14 inches. It typically maintains a constant circumference throughout its length. The base and top may have a cylinder or polygon shape.

[19] A pillar is a candle that is often free-standing, has a width of up to 8 inches and a height of up to 12 inches. It typically maintains a constant circumference throughout its length. The base and top may have a cylinder or polygon shape.

[20] A votive candle is typically about 1.5 inches in diameter, 2 to 2.5 inches high, and typically designed to be placed in a container.

[21] The exposed surface of the wax at the top of the container is typically horizontally flat. The container may be in any shape and be made of any material.

[22] *See Later-Developed Merchandise Anticircumvention Inquiry of the Antidumping Duty Order on Petroleum Wax Candles from the People's Republic of China: Affirmative Final Determination of Circumvention of the Antidumping Duty Order,* 71 FR 59075 (October 6, 2006) ("*LDM Anticircumvention Determination*").

[23] "Unique candles" are those from a particular requestor that the Department deems identical. For example, if a requestor submitted three beach ball candles, and two of those were exactly the same size, shape, and color, while the third candle was not, the set of three candles would consist of two unique candles.

as comments submitted on diskette are likely to be damaged by postal radiation treatment. Comments received in electronic form will be made available to the public in Portable Document Format (PDF) on the Internet at the Import Administration Web site at the following address: *http://www.ia.ita.doc.gov*.

Any questions concerning file formatting, document conversion, access on the Internet, or other electronic filing issues should be addressed to Andrew Lee Beller, Import Administration Webmaster, at (202) 482–0866, e-mail address: *webmastersupport@ita.doc.gov*.

Dated: August 6, 2010.

**Ronald K. Lorentzen,**

*Deputy Assistant Secretary for Import Administration.*

[FR Doc. 2010–20076 Filed 8–12–10; 8:45 am]

**BILLING CODE 3510–DS–P**

## COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

### Procurement List; Additions and Deletion

**AGENCY:** Committee for Purchase From People Who Are Blind or Severely Disabled.

**ACTION:** Additions to and deletion from the Procurement List.

**SUMMARY:** This action adds services to the Procurement List that will be provided by nonprofit agencies employing persons who are blind or have other severe disabilities and deletes a service from the Procurement List previously furnished by such agency.

**DATES:** *Effective Date:* 9/13/2010.

**ADDRESSES:** Committee for Purchase From People Who Are Blind or Severely Disabled, Jefferson Plaza 2, Suite 10800, 1421 Jefferson Davis Highway, Arlington, Virginia, 22202–3259.

**FOR FURTHER INFORMATION CONTACT:** Barry S. Lineback, Telephone: (703) 603–7740, Fax: (703) 603–0655, or e-mail *CMTEFedReg@AbilityOne.gov.*

**SUPPLEMENTARY INFORMATION:**

### Additions

On 6/4/2010 (75 FR 31768–31769), 6/11/2010 (75 FR 33270–33271), and 6/18/2010 (75 FR 34701–34702), the Committee for Purchase From People Who Are Blind or Severely Disabled published notices of proposed additions to the Procurement List.

After consideration of the material presented to it concerning capability of qualified nonprofit agencies to provide the services and impact of the additions on the current or most recent contractors, the Committee has determined that the services listed below are suitable for procurement by the Federal Government under 41 U.S.C. 46–48c and 41 CFR 51–2.4.

*Regulatory Flexibility Act Certification*

I certify that the following action will not have a significant impact on a substantial number of small entities. The major factors considered for this certification were:

1. The action will not result in any additional reporting, recordkeeping or other compliance requirements for small entities other than the small organizations that will provide the services to the government.

2. The action will result in authorizing small entities to provide the services to the government.

3. There are no known regulatory alternatives which would accomplish the objectives of the Javits-Wagner-O'Day Act (41 U.S.C. 46–48c) in connection with the services proposed for addition to the Procurement List.

*End of Certification*

Accordingly, the following services are added to the Procurement List:

*Services*

*Service Type/Locations:*
Laundry Service, Atlanta VA Medical Center, 1670 Clairmont Road, Decatur, GA.
W.J.B. Dorn VA Medical Center, 6439 Garners Ferry Road, Columbia, SC.
Ralph H. Johnson VA Medical Center, 109 Bee Street, Charleston, SC.
Charlie Norwood VA Medical Center Downtown Division, 800 Balie Street, Augusta, GA.
Athens VA Community Based Outpatient Clinic (CBOC), 9249 Highway 29 South, Athens, GA.
Aiken Community Based Outpatient Clinic (CBOC), 951 Milbrook Avenue, Aiken, SC.
Charlie Norwood VA Medical Center Uptown Division, 1 Freedom Way, Augusta, GA.
Carl Vinson VA Medical Center, 1826 Veterans Boulevard, Dublin, GA.
*NPA:* GINFL Services, Inc., Jacksonville, FL.
*Contracting Activity:* Department of Veterans Affairs, VISN 7 Consolidated Contracting, Augusta, GA.

*Service Type/Location:* Custodial Service, Fort Leonard Wood, MO.
*NPA:* Challenge Unlimited, Inc., Alton, IL.
*Contracting Activity:* Dept of the Army, XR W6BA ACA FT Leonard Wood, MO.

*Service Type/Location:* Custodial Service, CMS Headquarters (Central, North & South Bldgs.), 7500 Security Boulevard, Woodlawn, MD.
*NPA:* Didlake, Inc., Manassas, VA.
*Contracting Activity:* GSA/PBS/R03 Chesapeake, Philadelphia, PA.

*Service Type/Location:* Custodial Service, U.S. Department of Energy, Forrestal Complex, 1000 Independence Avenue, SW., Washington, DC.
*NPA:* Didlake, Inc., Manassas, VA
*Contracting Activity:* Department of Energy, Headquarters Procurement Services, Washington, DC.

*Service Type/Location:* Custodial Service, Tobyhanna Army Depot, 11 Hap Arnold Blvd, Tobyhanna, PA.
*NPA:* Allied Health Care Services, Scranton, PA.
*Contracting Activity:* Dept of the Army, XR W0ML USA DEP Tobyhanna, Tobyhanna Army Depot, PA.

*Service Type/Location:* Custodial Service, Command, Control Computers and Communications, Intelligence, Surveillance and Reconnaissance (C4ISR), 4118 Susquehanna Avenue, Aberdeen Proving Ground, MD.
*NPA:* The Chimes, Inc., Baltimore, MD.
*Contracting Activity:* Dept of the Army, XR W6BA ACA, Aberdeen Proving Ground, Aberdeen Proving Ground, MD.

*Service Type/Location:* Base Supply Center (BSC) and Individual Equipment Element (IEE) Scott Air Force Base, IL.
*NPA:* Associated Industries for the Blind, Milwaukee, WI.
*Contracting Activity:* Dept of the Air Force, FA4407 375 CONS LGC, Scott AFG, IL.

### Deletion

On 6/4/2010 (75 FR 31768–31769), the Committee for Purchase From People Who Are Blind or Severely Disabled published notice of proposed deletion from the Procurement List.

After consideration of the relevant matter presented, the Committee has determined that the service listed below is no longer suitable for procurement by the Federal Government under 41 U.S.C. 46–48c and 41 CFR 51–2.4.

*Regulatory Flexibility Act Certification*

I certify that the following action will not have a significant impact on a substantial number of small entities. The major factors considered for this certification were:

1. The action will not result in additional reporting, recordkeeping or other compliance requirements for small entities.

2. The action may result in authorizing small entities to provide a service to the Government.

3. There are no known regulatory alternatives which would accomplish the objectives of the Javits-Wagner-O'Day Act (41 U.S.C. 46–48c) in connection with a service deleted from the Procurement List.

*End of Certification*

Accordingly, the following service is deleted from the Procurement List:

*Service*

*Service Type/Location:* Administrative Service, U.S. Department of Commerce: National Weather Service NOAA, National Reconditioning Center, Kansas City, MO.

*NPA:* Alphapointe Association for the Blind, Kansas City, MO.

*Contracting Activity:* Department Of Commerce, National Oceanic and Atmospheric Administration, Norfolk, VA.

**Barry S. Lineback,**

*Director, Business Operations.*

[FR Doc. 2010–20053 Filed 8–12–10; 8:45 am]

**BILLING CODE 6353–01–P**

## DEPARTMENT OF DEFENSE

### Office of the Secretary

**[Docket ID: DOD–2010–OS–0114]**

### Privacy Act of 1974; System of Records

**AGENCY:** Defense Information Systems Agency, DoD.

**ACTION:** Notice to amend a system of records.

**SUMMARY:** The Defense Information Systems Agency proposes to amend a system of records notice in its existing inventory of records systems subject to the Privacy Act of 1974, (5 U.S.C. 552a), as amended.

**DATES:** This proposed action will be effective without further notice on September 13, 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, Room 3C843 Pentagon, 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 of 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. Jeanette M. Weathers-Jenkins at (703) 681–2409.

**SUPPLEMENTARY INFORMATION:** The Defense Logistics Agency systems 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 the Defense Information Systems Agency, 5600 Columbia Pike, Room 505, Falls Church, VA 22041–2705.

The specific changes to the record system being amended are set forth below followed by the notice, as amended, published in its entirety. The proposed amendment is not within the purview of subsection (r) of the Privacy Act of 1974 (5 U.S.C. 552a), as amended, which requires the submission of new or altered systems reports.

Dated: August 10, 2010.

**Mitchell S. Bryman,**

*Alternate OSD Federal Register Liaison Officer, Department of Defense.*

**KEUR.03**

**SYSTEM NAME:**

Incident Report File (February 22, 1993; 58 FR 10562).

**CHANGES:**

* * * * *

**SYSTEM NAME:**

Delete entry and replace with "Incident Report Records."

**SYSTEM LOCATION:**

Delete entry and replace with "Command Support Division, EU1, Defense Information Systems Agency-Europe, APO AE 09131–4103."

* * * * *

**AUTHORITY FOR MAINTENANCE OF THE SYSTEM:**

Delete entry and replace with "10 U.S.C. 133(b) 5 U.S.C. 301, Departmental Regulations; and DoD Instruction 6055.7, Mishap Notification, Investigation, Reporting, and Recordkeeping."

* * * * *

**SAFEGUARDS:**

Delete entry and replace with "Records are maintained in a locked security file container and may be accessed only by the Commander, Deputy Commander, Chief, Command Support Division, or other persons specifically designated by the Commander."

* * * * *

**SYSTEM MANAGER(S) AND ADDRESS:**

Delete entry and replace with "Command Support Division, EU1, Defense Information Systems Agency-Europe, APO AE 09131–4103."

**NOTIFICATION PROCEDURE:**

Delete entry and replace with "Individuals seeking to determine whether information about themselves is contained in this system should address written inquiries to the Command Support Division, EU1, Defense Information Systems Agency-Europe, APO AE 09131–4103.

The full name of the requesting individual will be required to determine if the system contains a record about him or her. As proof of identity, the requester must present a current DISA identification badge or driver's license."

**RECORD ACCESS PROCEDURES:**

Delete entry and replace with "Individuals seeking access to information about themselves contained in this system should address written inquiries to the Command Support Division, EU1, Defense Information Systems Agency-Europe, APO AE 09131–4103.

The full name of the requesting individual will be required to determine if the system contains a record about him or her. As proof of identity, the requester must present a current DISA identification badge or driver's license."

* * * * *

**KEUR.03**

**SYSTEM NAME:**

Incident Report Records

**SYSTEM LOCATION:**

Command Support Division, EU1, Defense Information Systems Agency-Europe, APO AE 09131–4103.

**CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:**

Any personnel (military or civilian) assigned to DISA Europe involved in traffic, financial, criminal or other incident which is reported to the Commander DISA Europe for information or necessary action.

**CATEGORIES OF RECORDS IN THE SYSTEM:**

Copies of Reports of Investigation, Military Police Incident Reports, traffic tickets, letters of notification of dishonored checks, and correspondence or documents concerning other matters brought to the attention of the Commander DISA Europe relating to personnel assigned to this Command.

**AUTHORITY FOR MAINTENANCE OF THE SYSTEM:**

10 U.S.C. 133(b) 5 U.S.C. 301, Departmental Regulations; and DoD Instruction 6055.7, Mishap Notification, Investigation, Reporting, and Recordkeeping.

**PURPOSE(S):**

Maintained as a reference file for use by the Commander DISA Europe to document required actions taken in

response to reports and notification of incidents involving assigned 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:

The DoD 'Blanket Routine Uses' set forth at the beginning of the DISA'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:**

Records are stored in file folders.

**RETRIEVABILITY:**

Information is retrieved by name of the individual.

**SAFEGUARDS:**

Records are maintained in a locked security file container and may be accessed only by the Commander, Deputy Commander, Chief, Command Support Division, or other persons specifically designated by the Commander.

**RETENTION AND DISPOSAL:**

Records are maintained in an active file during the period of the individual's assignment to DISA Europe and destroyed on his or her departure.

**SYSTEM MANAGER(S) AND ADDRESS:**

Command Support Division, EU1, Defense Information Systems Agency-Europe, APO AE 09131–4103.

**NOTIFICATION PROCEDURE:**

Individuals seeking to determine whether information about themselves is contained in this system should address written inquiries to the Command Support Division, EU1, Defense Information Systems Agency-Europe, APO AE 09131–4103.

The full name of the requesting individual will be required to determine if the system contains a record about him or her. As proof of identity, the requester must present a current DISA identification badge or driver's license.

**RECORD ACCESS PROCEDURES:**

Individuals seeking access to information about themselves contained in this system should address written inquiries to the Command Support Division, EU1, Defense Information Systems Agency-Europe, APO AE 09131–4103.

The full name of the requesting individual will be required to determine if the system contains a record about him or her. As proof of identity, the requester must present a current DISA identification badge or driver's license.

**CONTESTING RECORD PROCEDURES:**

DISA's rules for accessing records, for contesting contents and appealing initial agency determinations are published in DISA Instruction 210–225–2; 32 CFR part 316; or may be obtained from the system manager.

**RECORD SOURCE CATEGORIES:**

Information is obtained from reports, documents, and correspondence received from Civilian and Military Police Service Investigative Agencies, Military Exchange and Commissary systems, or any other agency or individual that reports information of an incident nature to the Commander DISA Europe.

**EXEMPTIONS CLAIMED FOR THE SYSTEM:**

None.

[FR Doc. 2010–19989 Filed 8–12–10; 8:45 am]

**BILLING CODE 5001–06–P**

## DEPARTMENT OF DEFENSE

### Department of the Army

### Notice of Availability of the Final Environmental Impact Statement (FEIS) for Training Range and Garrison Support Facilities Construction and Operation at Fort Stewart, GA

**AGENCY:** Department of the Army, DoD.

**ACTION:** Notice of Availability (NOA).

**SUMMARY:** The Department of the Army announces the availability of an FEIS to analyze the environmental and socioeconomic impacts resulting from the proposed construction and operation of 12 range projects and two garrison support facilities at Fort Stewart, Georgia.

**DATES:** The waiting period for the FEIS will end 30 days after the publication of an NOA in the **Federal Register** by the U.S. Environmental Protection Agency.

**ADDRESSES:** For further information regarding the FEIS, please contact Mr. Charles Walden, Project Manager, Directorate of Public Works, Prevention and Compliance Branch, Environmental Division, 1550 Frank Cochran Drive, Building 1137–A, Fort Stewart, Georgia 31314–4928 or via e-mail at: *Charles.Walden4@us.army.mil*.

**FOR FURTHER INFORMATION CONTACT:** Ms. Dina McKain, Public Affairs Office, at (912) 435–9874 during normal business hours.

**SUPPLEMENTARY INFORMATION:** To meet the needs of Soldiers at Fort Stewart, additional ranges and garrison support facilities are required. This Final EIS examines the potential environmental and socioeconomic impacts of the construction and operation of 12 ranges (a Multipurpose Machine Gun Range, an Infantry Platoon Battle Course, a Known Distance Range, two Modified Record Fire Ranges, a Qualification Training Range, an Infantry Squad Battle Course, a Fire and Movement Range, a Digital Multipurpose Training Range, a 25 Meter Zero Range, a Combat Pistol Range, and a Convoy Live-Fire Course and associated engagement boxes) and two garrison support facilities (a Sky Warrior Unmanned Aerial System (UAS) facility and a 10th Engineering Battalion Complex) to be constructed over a 4-year time period. It also examines potential impacts to surrounding lands and/or local communities.

In addition to consideration of a No Action Alternative (Alternative A), under which the construction and operation of the ranges and facilities would not take place, the FEIS analyzed two action alternatives. Alternative B includes project sites which predominantly utilize footprints of existing ranges, limit construction and restrictions to existing maneuver terrain, are located in relatively close proximity to the cantonment area to reduce unit transit time, and have fewer overall environmental impacts. Alternative C includes sites that are not predominantly pre-existing range sites and generally are located at greater distances from the cantonment area. These locations generally have a higher level of environmental impacts. After consideration of all anticipated operational and environmental impacts, the Army has selected Alternative B as its preferred alternative.

Impacts were analyzed for a wide range of environmental resource areas including, but not limited to, air quality, noise, water resources, biological resources (to include protected species), cultural resources, socioeconomics, infrastructure (utilities and transportation), land use, and solid and hazardous materials/waste, as well as cumulative environmental effects. No significant impacts are anticipated on any environmental resources. Moderate adverse impacts have been identified for soils, water quality, protected species, timber resources, wildland fire, and noise. Adverse impacts to other resource areas were negligible or minor.

The Final EIS is available at local libraries surrounding Fort Stewart and

may also be accessed at *http://www.Fortstewart-mmp.eis.com.*

Dated: July 28, 2010.

**Addison D. Davis, IV,**

*Deputy Assistant Secretary of the Army (Environment, Safety and Occupational Health).*

[FR Doc. 2010–19987 Filed 8–12–10; 8:45 am]

**BILLING CODE 3710–08–P**

## DEPARTMENT OF EDUCATION

### Office of Postsecondary Education; Asian American and Native American Pacific Islander-Serving Institutions (AANAPISI), Native American-Serving Nontribal Institutions (NASNTI), Hispanic Serving Institutions-STEM and Articulation (HSI–STEM), and Predominantly Black Institutions (PBI) Programs

**AGENCY:** Office of Postsecondary Education, Department of Education.

**ACTION:** Notice reopening the application for eligibility for AANAPISI, NASNTI, HSI–STEM, and PBI fiscal year (FY) 2010 competitions.

**SUMMARY:** On December 7, 2009, we published in the **Federal Register** (74 FR 64059–64062) a notice inviting applications for eligibility for the programs authorized under Titles III and Title V of the Higher Education Act of 1965, as amended (FY 2010 Eligibility Notice). The FY 2010 Eligibility Notice established a January 6, 2010 deadline date for applicants to apply for designation as an eligible institution under the Title III and Title V programs.

**SUPPLEMENTARY INFORMATION:** In this notice, the Department announces the reopening of the period for submitting an application for a designation of eligibility. This reopening of the application period applies only to those institutions that intend to apply for new awards in competitions to be announced this fall under the AANAPISI, NASNTI, HSI–STEM, and PBI programs. This limited reopening is intended to ensure that all potential applicants to the AANAPISI, NASNTI, HSI–STEM, and PBI programs have the opportunity to submit applications for eligibility prior to the announcement of these competitions. (While HSI–STEM was not included in the FY 2010 Eligibility Notice, it has been added to this notice due to funds made available by the Student Aid and Fiscal Responsibility Act.) If you have already submitted an application for eligibility based on the FY 2010 Eligibility Notice and were designated as eligible, you do not need to resubmit your application. Deadline for Transmittal of Applications: September 13, 2010.

**Note:** Applications for designation of eligibility must be submitted electronically using the following Web site: *https://opeweb.ed.gov/title3and5.*

To enter the Web site, you must use your institution's unique eight-digit identifier, *i.e.,* your Office of Postsecondary Education Identification Number (OPE ID Number). Your business office or student financial aid office should have the OPE ID Number. If not, contact the Department using the e-mail addresses of the contact persons listed in this notice under **FOR FURTHER INFORMATION CONTACT**.

You will find detailed instructions for completing the application form electronically under the "Eligibility" link at the following Web site: *http://www.ed.gov/programs/iduestitle3a/index.html.*

**FOR FURTHER INFORMATION CONTACT:** Kelley Harris or Carnisia Proctor, Institutional Development and Undergraduate Education Service, U.S. Department of Education, 1990 K Street, NW., room 6033, Request for Eligibility Designation, Washington, DC 20006–8513. You may contact these individuals at the following e-mail addresses or phone numbers: *Kelley.Harris@ed.gov,* 202–219–7083. *Carnisia.Proctor@ed.gov,* 202–502–7606.

If you use a telecommunications device for the deaf (TDD), call the Federal Relay Service (FRS), toll-free, at 1–800–877–8339.

*Accessible Format:* Individuals with disabilities can obtain this notice in an accessible format (*e.g.,* braille, large print, audiotape, or computer diskette) by contacting the persons listed in this section.

*Electronic Access to This Document:* You can view this document, as well as other Department of Education documents published in the **Federal Register**, in text or Adobe Portable Document Format (PDF), on the Internet at the following site: *http://www.ed.gov/news/fedregister.*

To use PDF, you must have Adobe Acrobat Reader, which is available free at this site.

**Note:** The official version of this document is the document published in the **Federal Register**. Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available on GPO Access at: *http://www.gpoaccess.gov/nara/index.html.*

**Program Authority:** 20 U.S.C. 1057–1059d, 1101–1103g, 20 U.S.C. 1059e (PBI), 20 U.S.C. 1069f (NASNTI), 20 U.S.C. 1059g (AANAPISI) and 20 U.S.C. 1067q (HSI–STEM) including amendments to these sections made by Public Law 110–315 and Public Law 111–152.

CFDA Numbers: 84.031C, 84.382A, 84.382B, and 84.382C

Dated: August 10, 2010.

**Eduardo M. Ochoa,**

*Assistant Secretary for Postsecondary Education.*

[FR Doc. 2010–20064 Filed 8–12–10; 8:45 am]

**BILLING CODE 4000–01–P**

## DEPARTMENT OF EDUCATION

### Office of Postsecondary Education; Overview Information; Jacob K. Javits Fellowship Program; Notice Inviting Applications for New Awards for Fiscal Year (FY) 2011

Catalog of Federal Domestic Assistance (CFDA) Number: 84.170A.

*Dates Applications Available:* August 13, 2010.

*Deadline for Transmittal of Applications:* September 30, 2010.

*Deadline for Transmittal of the Free Application for Federal Student Aid (FAFSA):* January 31, 2011.

**Full Text of Announcement**

**I. Funding Opportunity Description**

*Purpose of Program:* The purpose of the Jacob K. Javits (JKJ) Fellowship Program is to award fellowships to eligible students of superior ability, selected on the basis of demonstrated achievement, financial need, and exceptional promise, to undertake graduate study in specific fields in the arts, humanities, and social sciences leading to a doctoral degree or to a master's degree in those fields in which the master's degree is the terminal highest degree awarded to the selected field of study at accredited institutions of higher education. The selected fields in the arts are: Creative writing, music performance, music theory, music composition, music literature, studio arts (including photography), television, film, cinematography, theater arts, playwriting, screenwriting, acting, and dance. The selected fields in the humanities are: Art history (including architectural history), archeology, area studies, classics, comparative literature, English language and literature, folklore, folk life, foreign languages and literature, history, linguistics, philosophy, religion (excluding study of religious vocation), speech, rhetoric, and debate. The selected fields in the social sciences are: Anthropology, communications and media, economics, ethnic and cultural studies, geography, political science, psychology (excluding clinical psychology), public policy and

public administration, and sociology (excluding the master's and doctoral degrees in social work).

**Program Authority:** 20 U.S.C. 1134–1134d.

*Applicable Regulations:* (a) The Education Department General Administrative Regulations (EDGAR) in 34 CFR parts 74, 75 (except as provided in 34 CFR 650.3(b)), 77, 82, 84, 85, 86, 97, 98 and 99. (b) The regulations for this program in 34 CFR part 650.

## II. Award Information

*Type of Award:* Discretionary grant.

*Estimated Available Funds:* $1,451,637 for new awards.

*Estimated Average Size of Awards:* $43,989.

*Estimated Number of Awards:* 33.

**Note:** The Department is not bound by any estimates in this notice.

*Project Period:* Up to 48 months.

## III. Eligibility Information

1. *Eligible Applicants:* Individuals who, at the time of application: Are eligible to receive a Federal grant, loan or work assistance pursuant to section 484 of the Higher Education Act of 1965, as amended (HEA); intend to pursue a doctoral or Master of Fine Arts degree in an eligible field of study selected by the Board at an accredited U.S. institution of higher education; and are a U.S. citizen or national, a permanent resident of the United States, in the United States for other than a temporary purpose and intending to become a permanent resident, or a citizen of any one of the Freely Associated States. Applicants must also either: Be entering into a doctoral program in academic year 2011–2012, or have not yet completed the first full year in the doctoral program, in an eligible field of study for which they are seeking support; or be entering a Master of Fine Arts program in academic year 2011–2012, or have not yet completed the first full year in the Master of Fine Arts program, in an eligible field of study for which they are seeking support.

2. *Cost Sharing or Matching:* This program does not require cost sharing or matching.

## IV. Application and Submission Information

1. *Address to Request Application Package:* You can obtain an application package via the Internet or from the Department. To obtain a copy via the Internet, use the following address for the JKJ Fellowship Program Web site: *http://www.ed.gov/programs/jacobjavits/index.html.* To obtain a copy from the Department, write, fax, or call the following: Carmen Gordon or Sara Starke, Jacob K. Javits Fellowship Program, U.S. Department of Education, Teacher and Student Development Programs Service, 1990 K St., NW., room 6013, Washington, DC 20006–8524. Telephone: (202) 502–7542 or by e-mail: *ope_javits_program@ed.gov.*

If you use a telecommunications device for the deaf (TDD), call the Federal Relay Service (FRS), toll free, at 1–800–877–8339.

Individuals with disabilities can obtain a copy of the application package in an accessible format (*e.g.,* braille, large print, audiotape, or computer diskette) by contacting the person listed under *For Further Information Contact* in section VII of this notice.

**Note:** The FAFSA can be obtained from the institution of higher education's financial aid office or accessed at: *http://www.fafsa.ed.gov.*

2. *Content and Form of Application Submission:* Requirements concerning the content of an application, together with the forms you must submit, are in the application package for this program.

3. *Submission Dates and Times:*

*Applications Available:* August 13, 2010.

*Deadline for Transmittal of Applications:* September 30, 2010.

*Deadline for Transmittal of the FAFSA:* January 31, 2011.

Applications for grants under this program must be submitted in paper format by mail or hand delivery. For information (including dates and times) about how to submit your application by mail or hand delivery, please refer to section IV. 7. *Other Submission Requirements* of this notice.

We do not consider an application that does not comply with the deadline requirements.

Individuals with disabilities who need an accommodation or auxiliary aid in connection with the application process should contact the person listed under *For Further Information Contact* in section VII in this notice. If the Department provides an accommodation or auxiliary aid to an individual with a disability in connection with the application process, the individual's application remains subject to all other requirements and limitations of this notice.

4. *Intergovernmental Review:* This program is not subject to Executive Order 12372 and the regulations in 34 CFR part 79.

5. *Funding Restrictions:* We reference regulations outlining funding restrictions in the *Applicable Regulations* section of this notice.

6. *Data Universal Numbering System Number, Taxpayer Identification Number, and Central Contractor Registry:* To do business with the Department of Education, (1) you must have a Data Universal Numbering System (DUNS) number and a Taxpayer Identification Number (TIN); (2) you must register both of those numbers with the Central Contractor Registry (CCR), the Government's primary registrant database; and (3) you must provide those same numbers on your application.

You can obtain a DUNS number from Dun and Bradstreet. A DUNS number can be created within one business day.

If you are a corporate entity, agency, institution, or organization, you can obtain a TIN from the Internal Revenue Service. If you are an individual, you can obtain a TIN from the Internal Revenue Service or the Social Security Administration. If you need a new TIN, please allow 2–5 weeks for your TIN to become active.

The CCR registration process may take five or more business days to complete. If you are currently registered with the CCR, you may not need to make any changes. However, please make certain that the TIN associated with your DUNS number is correct. Also note that you will need to update your CCR registration on an annual basis. This may take three or more business days to complete.

7. *Other Submission Requirements:* Applications for grants under this program must be submitted in paper format by mail or hand delivery.

a. *Submission of Applications by Mail.*

If you submit your application by mail (through the U.S. Postal Service or a commercial carrier), you must mail the original and two copies of your application, on or before the application deadline date, to the Department at the following address: U.S. Department of Education, Application Control Center, Attention: (CFDA Number 84.170A) LBJ Basement Level 1, 400 Maryland Avenue, SW., Washington, DC 20202–4260.

You must show proof of mailing consisting of one of the following:

(1) A legibly dated U.S. Postal Service postmark.

(2) A legible mail receipt with the date of mailing stamped by the U.S. Postal Service.

(3) A dated shipping label, invoice, or receipt from a commercial carrier.

(4) Any other proof of mailing acceptable to the Secretary of the U.S. Department of Education.

If you mail your application through the U.S. Postal Service, we do not accept either of the following as proof of mailing:

(1) A private metered postmark.

(2) A mail receipt that is not dated by the U.S. Postal Service.

If your application is postmarked after the application deadline date, we will not consider your application.

**Note 1:** The U.S. Postal Service does not uniformly provide a dated postmark. Before relying on this method, you should check with your local post office.

**Note 2:** Materials mailed through the U.S. Postal Service may be subject to damage due to irradiation processes. Therefore, Arts applicants are required to send their applications by commercial carrier.

b. *Submission of Applications by Hand Delivery.*

If you submit your application by hand delivery, you (or a courier service) must deliver the original and two copies of your application by hand, on or before the application deadline date, to the Department at the following address: U.S. Department of Education, Application Control Center, Attention: (CFDA Number 84.170A) 550 12th Street, SW., Room 7041, Potomac Center Plaza, Washington, DC 20202–4260.

The Application Control Center accepts hand deliveries daily between 8:00 a.m. and 4:30:00 p.m., Washington, DC time, except Saturdays, Sundays, and Federal holidays.

**Note for Mail or Hand Delivery of Paper Applications:** If you mail or hand deliver your application to the Department—

(1) You must indicate on the envelope and—if not provided by the Department—in Item 11 of the SF 424 the CFDA Number, including suffix letter, if any, of the competition under which you are submitting your application; and

(2) The Application Control Center will mail to you a notification of receipt of your grant application. If you do not receive this notification within 15 business days from the application deadline date, you should call the U.S. Department of Education Application Control Center at (202) 245–6288.

## V. Application Review Information

1. *Selection Criteria:* The selection criteria for this program are established by the JKJ Program Fellowship Board, pursuant to section 702(a)(2) of the HEA and 34 CFR 650.20(a). The selection criteria for applications in the humanities and social sciences are: (a) Statement of purpose (150 points); (b) Letters of recommendation (100 points); (c) Academic record (100 points); and (d) Scholarly awards/honors (50 points). The selection criteria for applications in the arts are: (a) Statement of purpose (100 points); (b) Letters of recommendation (100 points); (c) Academic record (50 points); (d) Scholarly awards/honors (50 points); and (e) Supporting arts materials (100 points).

2. *Review and Selection Process:* The review and selection process for the JKJ Fellowship Program consists of a two-part process. Eligible applications are read and rated by a panel of distinguished scholars and academics in the arts, humanities, and social sciences on the basis of demonstrated scholarly achievements and exceptional promise. The second part of the evaluation is a determination of financial need.

## VI. Award Administration Information

1. *Award Notices:* If your application is successful, we will notify you by telephone and we will send a Grant Award Notice (GAN) directly to the institution you will be attending.

If your application is not evaluated or not selected for funding, we notify you.

2. *Administrative and National Policy Requirements:* We identify administrative and national policy requirements in the application package and reference these and other requirements in the *Applicable Regulations* section in this notice.

We reference the regulations outlining the terms and conditions of an award in the *Applicable Regulations* section of this notice and include these and other specific conditions in the GAN. The GAN also incorporates your approved application as part of your binding commitments under the grant.

3. *Reporting:* On an annual basis, fellows must submit their FAFSA to the Javits Program Coordinator at their institutions, as directed by the Secretary, pursuant to 34 CFR 650.37. In addition, Javits fellows are required to submit an annual performance report. The Department will contact fellows regarding the completion of the annual performance report.

4. *Performance Measures:* The effectiveness of the JKJ Fellowship Program will be measured by graduate completion rates, time-to-degree completion rates, and the costs per PhD or master's degree of talented graduate students with demonstrated financial need who are pursuing the highest degree available in their designated fields of study. Institutions of higher education in which the fellows are enrolled are required to submit an annual report documenting the fellows' satisfactory academic progress and the determined financial need. Javits fellows are also required to submit an annual performance report to assist program staff in tracking time-to-degree completion rates, graduation rates, as well as the employment status of individual fellows. The Department will use the reports to assess the program's success in assisting fellows in completing their course of study and receiving their degree.

## VII. Agency Contacts

*For Further Information Contact:* Carmen Gordon or Sara Starke, Jacob K. Javits Fellowship Program, U.S. Department of Education, Teacher and Student Development Programs Service, 1990 K St., NW., room 6013, Washington, DC 20006–8524. Telephone: (202) 502–7542 or e-mail: *ope_javits_program@ed.gov.*

If you use a TDD, call the FRS, toll free, at 1–800–877–8339.

## VIII. Other Information

*Accessible Format:* Individuals with disabilities can obtain this document and a copy of the application package in an accessible format (*e.g.,* braille, large print, audiotape, or computer diskette) on request to the program contact person listed under *For Further Information Contact* in section VII of this notice.

*Electronic Access to This Document:* You can view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Adobe Portable Document Format (PDF), on the Internet at the following site: *http://www.ed.gov/news/fedregister.* To use PDF, you must have Adobe Acrobat Reader, which is available free at this site.

**Note:** The official version of this document is the document published in the **Federal Register**. Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available on GPO Access at: *http://www.gpoaccess.gov/nara/index.html.*

Dated: August 10, 2010.

**Eduardo M. Ochoa,**

*Assistant Secretary for Postsecondary Education.*

[FR Doc. 2010–20062 Filed 8–12–10; 8:45 am]

**BILLING CODE 4000–01–P**

## ENVIRONMENTAL PROTECTION AGENCY

**[ER–FRL–8992–2]**

## Environmental Impacts Statements; Notice Of Availability

*Responsible Agency:* Office of Federal Activities, General Information (202) 564–1399 or *http://www.epa.gov/compliance/nepa/.*

### Weekly Receipt of Environmental Impact Statements

Filed 08/02/2010 through 08/06/2010 pursuant to 40 CFR 1506.9.

*Notice:*

In accordance with Section 309(a) of the Clean Air Act, EPA is required to make its comments on EISs issued by other Federal agencies public. Historically, EPA has met this mandate by publishing weekly notices of availability of EPA comments, which includes a brief summary of EPA's comment letters, in the **Federal Register**. Since February 2008, EPA has been including its comment letters on EISs on its Web site at: *http://www.epa.gov/compliance/nepa/eisdata.html.* Including the entire EIS comment letters on the Web site satisfies the Section 309(a) requirement to make EPA's comments on EISs available to the public. Accordingly, on March 31, 2010, EPA discontinued the publication of the notice of availability of EPA comments in the **Federal Register**.

*EIS No. 20100304, Final EIS, USFS, 00,* Umatilla National Forest Invasive Plants Treatment, Propose to Treat Invasive Plants and Restore Treated Sites, Asotin, Columbia, Garfield, Walla Walla Counties, WA and Grant, Morrow, Umatilla, Union, Wallowa, Wheeler Counties, OR, Wait Period Ends: 09/13/2010, Contact: Robert Giannity, 541–278–3869.

*EIS No. 20100305, Draft EIS, NPS, AK,* Nebesna Off-Road Vehicle Management Plan, Implementation, Wrangell-St. Elias National Park and Preserve, AK, Comment Period Ends: 09/27/2010, Contact: Bruce Rogers, 907–822–7276.

*EIS No. 20100306, Final EIS, USA, GA,* Fort Stewart Training Range and Garrison Support Facilities Construction and Operation, Liberty, Long, Bryan, Evans and Tattnall Counties, GA, Wait Period Ends: 09/13/2010, Contact: Jennifer Shore, 703–602–4238.

*EIS No. 20100307, Revised Final EIS, FHWA, MN,* MN–371 North Improvement Project, Reconstruction from the Intersection of Crow Wing County Road 18 in Nisswa to the Intersection of Cass County Road 42 in Pine River, Funding, NPDES Permit, and US Army COE Section 404 Permit Issuance, Crow Wing and Cass Counties, MN, Wait Period Ends: 09/13/2010, Contact: Philip Forst, 651–291–6110.

*EIS No. 20100308, Draft EIS, USFS, MN,* South Fowl Lake Snowmobile Access Project, Proposing a Replacement Snowmobile Trail between McFarland Lake and South Fowl Lake, Gunflint Ranger District, Superior National Forest, Eastern Region, Cook County, MN, Comment Period Ends: 09/27/2010, Contact: Peter Taylor, 218–626–4368.

*EIS No. 20100309, Final EIS, BLM, CO,* Little Snake Resource Management Plan, Implementation, Moffat, Routt and Rio Blanco Counties, Craig CO, Wait Period Ends: 09/13/2010, Contact: Jeremy Casterson, 970–836–5071.

*EIS No. 20100310, Final EIS, BLM, CA,* Chevron Energy Solutions Lucerne Valley Solar Project, Proposing To Develop a 45-megawatt (MW) Solar Photovotaic (PV) Plant and Associated Facilities on 516 Acres of Federal Land Managed, California Desert Conservation Area Plan Amendment, San Bernardino County, CA, Wait Period Ends: 09/13/2010, Contact: Greg Thomsen, 951–697–5237.

*EIS No. 20100311, Draft EIS, NRC, FL,* Levy Nuclear Plant Units 1 and 2, Application for Combined Licenses (COLs) for Construction Permits and Operating Licenses, (NUREG–1941), Levy County, FL Comment Period Ends: 10/26/2010, Contact: Douglas Bruner, 301–415–2730.

*EIS No. 20100312, Draft EIS, NRC, TX,* Comanche Peak Nuclear Power Plant Units 3 and 4, Application for Combined Licenses (COLs) for Construction Permits and Operating Licenses, (NUREG–1943), Hood and Somervell Counties, TX, Comment Period Ends: 10/26/2010, Contact: Michael H. Willingham, 301–415–3924.

*EIS No. 20100313, Final EIS, CDBG, 00,* Goethals Bridge Replacement Project, Construction of Bridge across the Arthur Kill between Staten Island New York and Elizabeth, New Jersey, Funding and USCG Bridge Permit, NY and NJ, Wait Period Ends: 09/13/2010, Contact: Shelly Sugarman, 202–372–1521.

*EIS No. 20100314, Final EIS, DOD, VT,* 158th Fighter Wing Vermont Air National Guard Project, Proposed Realignment of National Guard Avenue and Main Gate Construction, Burlington International Airport in South Burlington, VT, Wait Period Ends: 09/13/2010, Contact: Robert Dogan, 301–836–8859.

*EIS No. 20100315, Final EIS, USFWS, 00,* Lewis and Clark National Wildlife Refuge and Julia Butler Hansen Refuge for the Columbian White-tailed Deer, Comprehensive Conservation Plan, Implementation, Wahkiakum County, WA and Clatsop and Columbia Counties, OR, Wait Period Ends: 09/13/2010, Contact: Charlie Stenvall, 360–484–3482.

*EIS No. 20100316, Final EIS, BIA, CA,* Ione Band of Miwok Indians Project, Proposed 228.04 Acre Fee-to-Trust Land Transfer and Casino Project, Amador County, CA, Wait Period Ends: 09/13/2010, Contact: John Rydzik, 916–978–6051.

Dated: August 10, 2010.

**Robert W. Hargrove,**

*Director, NEPA Compliance Division, Office of Federal Activities.*

[FR Doc. 2010–20050 Filed 8–12–10; 8:45 am]

**BILLING CODE 6560–50–P**

## ENVIRONMENTAL PROTECTION AGENCY

**[FRL–9189–3; Docket ID No. EPA–HQ–ORD–2010–0658]**

### Nanomaterial Case Study: Nanoscale Silver in Disinfectant Spray

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

**ACTION:** Notice of public comment period.

**SUMMARY:** EPA is announcing a 45-day public comment period for the draft document "Nanomaterial Case Study: Nanoscale Silver in Disinfectant Spray" (EPA/600/R–10/081). The document is being issued by the National Center for Environmental Assessment within EPA's Office of Research and Development. The draft is intended to serve as part of a process to help identify and prioritize scientific and technical information that could be used in conducting comprehensive environmental assessments of selected nanomaterials. It does not attempt to draw conclusions regarding potential environmental risks of nanoscale silver; rather, it aims to identify what is known and unknown about nanoscale silver to support future assessment efforts.

When finalizing the draft document, EPA intends to consider any public comments that EPA receives in accordance with this notice.

EPA is releasing this draft document solely for the purpose of pre-dissemination review under applicable information quality guidelines. This document has not been formally disseminated by EPA. It does not represent and should not be construed to represent any Agency policy or determination.

The draft document is available via the Internet on the NCEA home page under the Recent Additions and the Data and Publications menus at *http://www.epa.gov/ncea.*

**DATES:** The 45-day public comment period begins August 13, 2010, and ends September 27, 2010. Technical comments should be in writing and must be received by EPA by September 27, 2010.

**ADDRESSES:** The draft "Nanomaterial Case Study: Nanoscale Silver in Disinfectant Spray" is available primarily via the Internet on the National Center for Environmental Assessment's home page under the Recent Additions and the Data and Publications menus at *http://www.epa.gov/ncea.* A limited number of paper copies are available from Deborah Wales, NCEA–RTP, Research Triangle Park, NC 27711; phone: (919) 541–4731; facsimile: (919) 541–5078. If you are requesting a paper copy, please provide your name, your mailing address, and the document title, "Nanomaterial Case Study: Nanoscale Silver in Disinfectant Spray."

Comments may be submitted electronically via *http://www.regulations.gov,* by mail, by facsimile, or by hand delivery/courier. Please follow the detailed instructions provided in the **SUPPLEMENTARY INFORMATION** section of this notice.

**FOR FURTHER INFORMATION CONTACT:** For information on the public comment period, contact the Office of Environmental Information Docket; telephone: 202–566–1752; facsimile: 202–566–1753; or e-mail: *ORD.Docket@epa.gov.*

For technical information, contact Dr. J. Michael Davis, NCEA; telephone: (919) 541–4162; facsimile: (919) 685–3331; or e-mail: *Davis.Jmichael@epa.gov.*

**SUPPLEMENTARY INFORMATION:**

## I. Information About the Project/Document

Engineered nanoscale materials (nanomaterials) have been described as having at least one dimension between 1 and 100 nanometers (nm). They often have novel or unique properties that can arise from their small size. Like all technological developments, nanomaterials offer the potential for both benefits and risks. The assessment of such risks and benefits requires information, but given the nascent state of nanotechnology, much remains to be learned about the characteristics and effects of nanomaterials. The draft document "Nanomaterial Case Study: Nanoscale Silver in Disinfectant Spray" is intended to highlight what is known and unknown about nanoscale silver (nano-Ag) as part of a process to identify and prioritize information gaps relevant to assessing the broad environmental implications, including potential ecological as well as human health impacts, of nanomaterials.

The complex properties of various nanomaterials make it difficult to evaluate them in the abstract or with generalizations. Thus, this document focuses on a specific example of nano-Ag in disinfectant spray products. This "case study" does *not* represent a completed or even a preliminary assessment; rather, it uses an assessment framework known as comprehensive environmental assessment (CEA), which starts with the product life cycle but encompasses fate and transport processes in various environmental media, exposure-dose characterization, and ecological and health effects, as well as other direct and indirect ramifications of both primary and secondary substances or stressors associated with a nanomaterial. The CEA approach is both a framework and a process; the latter aspect employs a collective judgment process that will be the subject of a future announcement.

Previous EPA case studies focused on nanoscale titanium dioxide used in drinking water treatment and in topical sunscreen (U.S. EPA. Nanomaterial Case Studies: Nanoscale Titanium Dioxide in Water Treatment and in Topical Sunscreen (External Review Draft). U.S. Environmental Protection Agency, Washington, DC, EPA/600/R–09/057, 2009, available at: *http://cfpub.epa.gov/ncea/cfm/recordisplay.cfm?deid=210206).*

## II. How To Submit Technical Comments to the Docket at http://www.regulations.gov

Submit your comments, identified by Docket ID No. EPA–HQ–ORD 2010–0658, by one of the following methods:

- *http://www.regulations.gov:* Follow the on-line instructions for submitting comments.
- *E-mail: ORD.Docket@epa.gov.*
- *Fax:* 202–566–1753.
- *Mail:* Office of Environmental Information (OEI) Docket (Mail Code: 2822T), U.S. Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460. The phone number is 202–566–1752.
- *Hand Delivery:* The OEI Docket is located in the EPA Headquarters Docket Center, Room 3334 EPA West Building, 1301 Constitution Ave., NW., Washington, DC. The EPA Docket Center's 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. Such deliveries are only accepted during the docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

If you provide comments by mail or hand delivery, please submit three copies of the comments. For attachments, provide an index, number pages consecutively with the comments, and submit an unbound original and three copies.

*Instructions:* Direct your comments to Docket ID No. EPA–HQ–ORD–2010–0658. Please ensure that your comments are submitted within the specified comment period. Comments received after the closing date will be marked "late," and may only be considered if time permits. It is EPA's policy to include all comments it receives in the public docket without change and to make the comments available online at *http://www.regulations.gov,* including any personal information provided, unless a 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 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 *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, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket visit the EPA Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm.*

*Docket:* Documents in the docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some information is not publicly available, *e.g.,* CBI or other information whose disclosure is restricted by statute. Certain other materials, such as copyrighted material, are publicly available only in hard copy. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy at the OEI Docket in the EPA Headquarters Docket Center.

Dated: August 3, 2010.

**Rebecca Clark,**

*Acting Director, National Center for Environmental Assessment.*

[FR Doc. 2010–20083 Filed 8–12–10; 8:45 am]

**BILLING CODE 6560–50–P**

## ENVIRONMENTAL PROTECTION AGENCY

**[FRL–9189–5; EPA–HQ–OEI–2010–0263]**

## Establishment of a New System of Records for Personal Information Collected by the Environmental Protection Agency When Certifying Pesticide Applicators

**AGENCY:** Environmental Protection Agency.

**ACTION:** Notice.

**SUMMARY:** The Environmental Protection Agency's (EPA) Office of Pesticide Programs, Field & External Affairs Division, is giving notice that it proposes to create a new system of records pursuant to the provisions of the Privacy Act of 1974 (5 U.S.C. 552a). This system of records contains personal information collected when EPA certifies persons to apply restricted use pesticides (RUPs).

**DATES:** Persons wishing to comment on this new system of records notice must do so by September 22, 2010.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA–HQ–2010–0263, by one of the following methods:

- *http://www.regulations.gov:* Follow the online instructions for submitting comments.
- *E-mail: oei.docket@epa.gov.*
- *Fax:* 202–566–1752.
- *Mail: OEI Docket, Environmental Protection Agency, Mail code:* 2822T, 1200 Pennsylvania Ave., NW., Washington, DC 20460.
- *Hand Delivery:* OEI Docket, EPA/DC, EPA West Building, Room 3334, 1301 Constitution Ave., NW., Washington, DC. Such deliveries are only accepted during the docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

*Instructions:* Direct your comments to Docket ID No. EPA–HQ–OEI–2010–0263. 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 for which disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *http://www.regulations.gov.* The *http://www.regulations.gov* Web site is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *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, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket visit the EPA Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm.*

*Docket:* All documents in the docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some information is not publicly available (*e.g.,* CBI or other information for which disclosure is restricted by statute). Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy at the OEI Docket, EPA/DC, EPA West Building, Room 3334, 1301 Constitution Ave., NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the OEI Docket is (202) 566–1745.

**FOR FURTHER INFORMATION CONTACT:** Jenna Carter, Office of Pesticide Programs, Field & External Affairs Division, U.S. Environmental Protection Agency, Mail Code 7506P, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number 703–308–8370.

**SUPPLEMENTARY INFORMATION:**

### I. General Information

The U.S. Environmental Protection Agency plans to create a Privacy Act system of records to document the Agency's decisions on applications filed requesting certification to apply restricted use pesticides (RUP) under certification plans administered by EPA regional offices or the Office of Pesticide Programs. The types of information in the system include: (1) Contact information (*e.g.,* name, address, telephone number, e-mail address); (2) identification information (*e.g.,* birth date, proof of identification (*e.g.,* driver's license no.)), physical description (*e.g.,* height, weight, gender, race)) (3) certification information (*e.g.,* EPA certified applicator number, certification type (private or commercial), certification categories (*e.g.,* aerial, aquatic, fumigation), certification issuance and expiration dates, and (4) information regarding qualifications (*e.g.,* scores from EPA certification examinations; records of training and continuing education; state, tribal or other federal agency certification number(s), types, categories, issuance and expiration dates; records of compliance with federal, state and tribal pesticide laws). Some of this information is provided by the pesticide applicators applying for EPA certification, and some is generated during the certification process.

The above information will be contained in one or more databases (such as Lotus Notes) that reside on servers in EPA offices. The database(s) may be specific to one particular pesticide applicator certification plan, or may encompass several EPA pesticide applicator certification plans. Records maintained in the database will include applications, certifications, Agency decisions and correspondence related to applicators seeking and maintaining EPA certifications.

Records protected under the Privacy Act are subject to Agency-wide security requirements governing all database systems at EPA. Privacy is maintained by limiting access to database systems containing personal information. Access to any such database system is limited to system administrators, individuals responsible for evaluating the applications and issuing the EPA certification, and program personnel responsible for data entry. Physical access to the area where certifications are processed is limited to EPA employees with building key cards. Paper applications are stored in a locked cabinet when not in use. System administrators will routinely disclose certain personal information (*e.g.,*

names, addresses, EPA certification numbers, categories of certification) upon request. EPA's Office of Pesticide Programs, Field & External Affairs Division, will exercise general oversight of the system of records associated with EPA-administered pesticide applicator certification plans; databases for particular pesticide applicator certification plans may be maintained by EPA regional offices and other divisions of the Office of Pesticide Programs as authorized by the Field & External Affairs Division.

Dated: July 19, 2010.

**Linda A. Travers,**

*Principal Deputy Assistant Administrator and Deputy Chief Information Officer.*

**EPA–59**

**SYSTEM NAME:**

Records of Pesticide Applicators Certified Under EPA-Administered Certification Plans

**SYSTEM LOCATION:**

USEPA, Office of Pesticide Programs, Field & External Affairs Division, Mail Code 7506P, 1200 Pennsylvania Ave., NW., Washington, DC 20460, and other EPA offices authorized by the Field & External Affairs Division to maintain portions of the system.

**CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:**

Persons certified or seeking certification to apply restricted use pesticides (RUPs) under Certification Plans administered by EPA.

**CATEGORIES OF RECORDS IN THE SYSTEM:**

(a) Contact information (*e.g.,* name, address, telephone number, email address).

(b) Identification information (*e.g.,* birth date, proof of identification (*e.g.,* driver's license no.), physical description (*e.g.,* height, weight, gender, race)).

(c) Data generated by EPA in the processing of the EPA certification (e.g., EPA certified applicator number, certification type (private or commercial), certification categories (e.g., aerial, aquatic, fumigation), certification issuance and expiration dates).

(d) Information regarding qualifications (*e.g.,* scores from EPA certification examinations; records of training and continuing education; state, tribal or other federal agency certification number(s), types, categories, issuance and expiration dates; records of compliance with federal, state and tribal pesticide laws).

**AUTHORITY FOR MAINTENANCE OF THE SYSTEM (INCLUDES ANY REVISIONS OR AMENDMENTS):**

Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) Section 11(a)(1) provides for the certification of RUP applicators. 40 CFR 171.11 further describes certification procedures including the completion and submission of certification applications to EPA, issuance/revocation of certificates, monitoring of certifications, and applicator recordkeeping requirements.

**PURPOSE(S):**

The primary purpose of the system is to track RUP applicator certifications issued by EPA under pesticide applicator certification plans, including the initial applications/issuance and any renewals, denials, or revocations of certifications. Certified applicators are subject to RUP recordkeeping requirements under FIFRA, section 11 and 40 CFR part 171. The system may also be used to contribute to the development of inspection targeting schemes to verify compliance with recordkeeping requirements for RUPs.

**ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS, AND THE PURPOSES OF SUCH USES:**

RUPs may not be distributed, sold, or made available to persons other than certified applicators. The system will be used to record the identity and certification status of pesticide applicators certified by EPA. Certain personal information contained in the system (*e.g.,* date of birth, drivers' license numbers) will be protected from general disclosure under the Privacy Act: however, many of the records will be subject to general routine uses (*http://www.epa.gov/privacy/notice/general.htm*), particularly routine uses A, B, C, F, G, H, and K. Such routine uses will include disclosures to RUP retailers and dealers in order to verify the status of persons claiming to be certified by EPA, and to state or tribal officials intending to grant certifications based upon EPA's prior certification. Information from this system also may be disclosed for law enforcement purposes to federal, state, and tribal officials responsible for pesticide enforcement. Disclosure will assist in determining compliance and non-compliance with Federal, State, and tribal requirements of certified applicators.

**POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:**

• Storage: Records will be stored using the Agency's standard database system (e.g., Lotus Notes) and managed by system administrators and Pesticide Office personnel.

• Retrievability: Data will be retrieved by the applicator's name and certification action (e.g., new, recertification, duplicate).

• Safeguards:

—Standard Agency-wide protections for internal databases.

—The access control list is limited to Agency system administrators, individuals responsible for evaluating applications and issuing the EPA certifications and program personnel responsible for data entry. No other EPA personnel have access to the database(s). Program personnel are trained to protect sensitive and confidential information submitted under FIFRA. No external access to the system is provided.

• Retention and Disposal: Records stored in this system are subject to Schedule 090.

• System Manager(s) and Address: Jenna Carter, Office of Pesticide Programs, Field & External Affairs Division, U.S. Environmental Protection Agency, Mail Code 7506P, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number 703–308–8370.

**NOTIFICATION PROCEDURES:**

Requests to determine whether this system of records contains a record pertaining to you must be sent to the Agency's Freedom of Information Office. The address is: U.S. Environmental Protection Agency; 1200 Pennsylvania Ave., NW., Room 6416 West; Washington, DC 20460; (202) 566–1667; *E-mail:* (*hq.foia@epa.gov*); *Attn:* Privacy Act Officer.

**RECORD ACCESS PROCEDURES:**

Persons seeking access to their own personal information in this system of records will be required to provide adequate identification (*e.g.,* driver's license, military identification card, employee badge or identification card) and, if necessary, proof of authority. Additional identity verification procedures may be required as warranted. Requests must meet the requirements of EPA regulations at 40 CFR part 16.

**CONTESTING RECORDS PROCEDURES:**

Requests for correction or amendment must identify the record to be changed and the corrective action sought. Complete EPA Privacy Act procedures are set out at 40 CFR part 16.

**RECORD SOURCE CATEGORIES:**

There are three sources of data for records stored in the system:

(1) State, tribal or other Federal certification data upon which the EPA certification is based.

(2) Data provided by the requesting applicator at the time of its request for EPA certification.

(3) Data generated by EPA in the processing of the EPA certification.

**SYSTEM EXEMPTED FROM CERTAIN PROVISIONS OF THE PRIVACY ACT:**

None.

[FR Doc. 2010–20081 Filed 8–12–10; 8:45 am]

**BILLING CODE 6560–50–P**

## FEDERAL COMMUNICATIONS COMMISSION

**[CG Docket No. 03–123; FCC 10–115]**

### Telecommunications Relay Services and Speech-to-Speech Services for Individuals With Hearing and Speech Disabilities

**AGENCY:** Federal Communications Commission.

**ACTION:** Notice; approval of new rates.

**SUMMARY:** In this document, the Commission adopts per-minute compensation rates for the July 1, 2010 through June 30, 2011 Interstate Telecommunications Relay Services (TRS) Fund (Fund) year. This action is necessary because the rates for the previous Fund year expired on June 30, 2010. The intended effect of this action is to establish reimbursement rates for TRS providers and an appropriate funding requirement for the 2010–2011 Fund year.

**DATES:** The new rates became effective July 1, 2010.

**FOR FURTHER INFORMATION CONTACT:** Diane Mason, Consumer and Governmental Affairs Bureau, Disability Rights Office at (202) 418–7126 (voice), (202) 418–7828 (TTY), or e-mail at *Diane.Mason@fcc.gov.*

**SUPPLEMENTARY INFORMATION:** This is a summary of the Commission's *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities,* Order, document FCC 10–115, adopted June 18, 2010, and released June 28, 2010 in CG Docket number 03–123 (*Order*). On April 30, 2010, the Fund administrator, the National Exchange Carrier Association, Inc. (NECA), filed its annual Interstate Telecommunications Relay Services Fund Payment Formula and Fund Size Estimate for the period of July 1, 2010 through June 30, 2011. That same day, the Commission's Consumer and Governmental Affairs Bureau (Bureau) released a public notice requesting comment on NECA's filing. *See National Exchange Carrier Association Submits the Payment Formula and Fund Size Estimate for the Interstate Telecommunications Relay Services Fund for the July 2010 Through June 2011 Fund Year,* CG Docket No. 03–123, public notice, document DA 10–761, published at 75 FR 26701, May 12, 2010 (*2010 TRS Rate PN*). Over 22,000 comments, reply comments, and *ex partes* were filed in response to the *2010 TRS Rate PN.*

The full text of document FCC 10–115 and copies of any subsequently filed documents in this matter will be available for public inspection and copying during regular business hours at the FCC Reference Information Center, Portals II, 445 12th Street, SW., Room CY–A257, Washington, DC 20554. Document FCC 10–115 and copies of subsequently filed documents in this matter may also be purchased from the Commission's duplicating contractor, BCPI, Inc., Portals II, 445 12th Street, SW., Room CY–B402, Washington, DC 20554. Customers may contact BCPI, Inc. via its Web site *http://www.bcpiweb.com* or by calling 1–800–378–3160. To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an e-mail to *fcc504@fcc.gov* or call the Consumer and Governmental Affairs Bureau at (202) 418–0530 (voice) or (202) 418–0432 (TTY). Document FCC 10–115 can also be downloaded in Word or Portable Document Format (PDF) at: *http://www.fcc.gov/cgb/dro/trs.html#orders.*

### Synopsis

*The Compensation Rates for VRS for the 2010–2011 Fund Year*

1. The Commission adopts interim, one-year rates of $6.2390 for Tier I, $6.2335 for Tier II, and $5.0668 for Tier III for VRS by averaging NECA's proposed per-minute rates calculated as a measure of actual, historical provider costs, and the current rates, which were based on providers' projected costs. Projected costs for VRS for a given Fund year have consistently proven to be higher than actual costs for that Fund year, and there is currently no "true-up" mechanism for reconciling, after the Fund year, the rates at which providers are reimbursed from the Fund and their actual costs for the Fund year. By NECA's calculation, the rates based on actual, historical costs would be $5.7754 for Tier I, $6.0318 for Tier II, and $3.8963 for Tier III for the 2010–2011 Fund year, all of which include allowances of 1.6% for cash working capital, 3.2% for growth in expenses, and $0.0083 per minute for ongoing E911 and ten-digit numbering costs. However, in light of concerns expressed by providers and users, and to ensure sufficient, quality service for users while the Commission considers broad reform, the Commission declines to reduce the VRS rates to that level at this time.

2. *Interim VRS Rates for the 2010–2011 Fund Year.* The Commission finds that adopting a multi-year rate structure would be premature at this time. The Commission believes that establishing multi-year VRS rates at this time may hamper the Commission's efforts to implement in a timely manner reforms that the Commission may determine are needed as a result of the *2010 VRS NOI* proceeding. *See Structure and Practices of the Video Relay Service Program,* CG Docket No. 10–51, Notice of Inquiry, FCC 10–111, published at 75 FR 41863, July 19, 2010 (*2010 VRS NOI*).

3. *Rates Based on Actual vs. Projected Costs for VRS.* The Commission finds that NECA's use of providers' actual, historical costs in proposing VRS rates provides a valuable point of reference for setting VRS rates. Specifically, a comparative analysis by NECA of providers' projected and actual cost and demand over the past several years reveals that there is a substantial disparity between providers' reported projected costs and demand, and what turns out to be their actual costs and demand. In particular, based on the data received from providers, NECA indicates that VRS providers' weighted average actual per-minute costs as submitted to NECA were $4.4603 in 2006, $3.9604 in 2007, $4.1180 in 2008, and $4.1596 in 2009. By contrast, the compensation rates were in the following ranges for each of those years: $6.644 in 2006, $6.444 to $6.77 in 2007, $6.30 to $6.7632 in 2008, and $6.2373 to $6.7362 in 2009. In addition, in the past, the Commission has not provided a process for reconciling providers' actual costs to their compensation from the Fund, and the Commission declines to do so here.

4. With the benefit of four years' data showing that providers' projections consistently overstate their costs, the Commission concludes that it can no longer justify basing VRS compensation rates only on projected costs. Furthermore, NECA, which has been the Fund administrator since the inception of the Fund, used weighted averages in proposing tiered rates based on actual costs. To the extent that one provider commands a substantial share of the VRS market, the Commission finds that

NECA's use of weighted averages is appropriate, and properly balances, on one side, the greater relative costs incurred by smaller providers with, on the other, not penalizing providers operating at lower costs for their greater efficiency. The Commission therefore concludes that NECA's methodology, and use of actual cost information submitted by the providers and certified under penalty of perjury to be true and correct, were reasonable.

5. The Commission has an obligation to protect the integrity of the Fund and to deter and detect waste. It has therefore sought to find a reasonable balance between the past rates based on projections that consistently overstate true costs and overcompensate VRS providers, and the NECA-proposed rates based on actual costs that would represent a significant and sudden cut to providers' compensation. The Commission concludes that adjusting NECA's proposed rates based on actual costs for a one-year, interim period strikes the correct balance. The Commission also notes that the rates adopted in the *Order* fall within the range of rates proposed by providers for each of the tiers. As such, the Commision expects that the interim rates adopted will permit service providers to continue offering service in accordance with the Commission's rules to consumers, while the Commission considers the *2010 VRS NOI.* In the interim, the Commission is obliged to adopt a set of rates that compensates VRS providers for reasonable costs caused by their provision of VRS "in the most efficient manner" possible, and is otherwise consistent with the Communications Act of 1934, as amended (Act) and the Commission's rules.

6. Sorenson argues that "any decision to create a new methodology—based on historical costs or any other approach that deviates from the incentive-based (or projected-'cost') approach adopted in 2007—would amount to a rule change that could be adopted only pursuant to a new rulemaking proceeding." Even if Sorenson is correct that, by adopting these interim VRS rates, the Commission is somehow changing a "rule," the Commission has provided ample notice and opportunity for public comment regarding this action. For example, the Commission has twice expressly sought comment recently in this proceeding on the use of actual cost data as a basis for determining rates. Moreover, the Commission is taking the additional precaution of establishing VRS rates on an interim basis to address a significant disparity between actual costs and provider compensation while the Commission undertakes to examine VRS compensation more broadly in a formal rulemaking proceeding. The Commission notes that in the past, it has been afforded substantial deference when imposing regulations on an interim basis, particularly where it is acting in the public interest. The Commission therefore finds Sorenson's arguments in this regard to be without merit.

7. Further, provider criticisms of NECA's proposal relying on actual cost data to set VRS rates—based on the argument that costs allowed by NECA do not include all of the true costs of providing VRS—should, in theory, apply equally to reliance on projected cost data in VRS rate setting because the *categories* of compensable costs are the same whether actual or projected. Therefore, they are not persuasive as a challenge to reliance on actual cost data.

8. *Tiered Rate Structure.* The Commission concludes that for the 2010–2011 Fund year, the interim rate shall continue to be tiered based on the demand thresholds established in *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities,* Report and Order and Declaratory Ruling, CG Docket No. 03–123, document FCC 07–186, published at 73 FR 3254, Jan. 17, 2008. (*2007 TRS Rate Methodology Order):* Tier I shall include monthly minutes submitted in the range of 0—50,000, Tier II shall include monthly minutes from 50,001 to 500,000, and Tier III shall include monthly minutes submitted above 500,000. The rationale for adopting the tiers in the *2007 TRS Rate Methodology Order* remains applicable; that is, providers with a relatively small number of minutes generally have higher costs. Further, the Commission lacks sufficient record evidence to depart from the existing tier structure in favor of any particular alternative. The Commission therefore declines to change the tier structure at this time.

9. *Consistency of this Action with the ADA.* The Commission concludes that the adoption of the VRS rates herein is consistent with its obligations under Title IV of the Americans with Disabilities Act, codified as section 225 of the Communications Act. In complying with these statutory requirements, the Commission often must balance the interests of contributors to the Fund, who are ratepayers, with the interests of *users* of TRS. Because the rates adopted in the *Order* exceed the VRS providers' average actual costs as reported by them, the Commission concludes that they are consistent with the requirements in section 225 of the Act, and furthermore reflect a full awareness of the Commission's obligations under section 225 and a commitment to further the goals of functional equivalency through strengthening and sustaining VRS.

*The Compensation Rate for TRS and STS for the 2010–2011 Fund Year*

10. The Commission adopts NECA's proposed per-minute base rate of $2.0256 for traditional TRS and STS for the 2010–2011 Fund year. The base rate for TRS and STS is formulated by NECA following the MARS analysis adopted in the *2007 TRS Rate Methodology Order.*

11. Although the base rate for STS is the same as for TRS, in the *2007 TRS Rate Methodology Order,* the Commission recognized that many potential STS users were not being made aware of this important service. Therefore, for the 2007–2008 Fund year, the Commission added an additional amount of $1.131 per minute to the STS compensation rate calculated under the MARS plan to be used for outreach purposes. The Bureau decided to retain the outreach payment for the 2008–2009 and 2009–2010 Fund years. The Commission will continue the additional funding for STS as adopted in the *2007 TRS Rate Methodology Order* for the 2010–2011 Fund year in light of NECA's and commenters' belief that continued additional support for outreach is needed. However, the Commission will monitor the impact of this funding for the next cycle and consider alternative approaches to STS outreach in the future.

*The Compensation Rates for Captioned Telephone Service (CTS) and Internet-Protocol (IP) CTS for the 2010–2011 Fund Year*

12. The Commission adopts NECA's proposed per-minute compensation rate of $1.6951 for CTS and IP CTS for the 2010–2011 Fund year. These rates are also calculated using the MARS formula adopted in the *2007 TRS Rate Methodology Order.*

*The Compensation Rate for IP Relay for the 2010–2011 Fund Year*

13. The Commission adopts NECA's proposed per-minute compensation rate of $1.2985 for IP Relay for the 2010–2011 Fund year. This rate includes $0.0503 per minute for ongoing ten-digit numbering and E911 costs and $0.0204 per minute as a rate of return on capital investment as explained in NECA's filing. Beginning July 1, 2010, all numbering and E911 costs associated with IP Relay, as well as VRS, will be compensated on a per-minute basis. The

Commission adopted a price cap formula in the *2007 TRS Rate Methodology Order* for three years which expires June 30, 2010. The Commission finds it appropriate to continue to use the price-cap methodology used in setting the previous rates for IP Relay, and to adopt NECA's proposed rate for the 2010–2011 Fund year based on IP Relay providers' projected costs and demand.

14. Unlike VRS, for IP Relay, the Commission explicitly stated that at the end of the first three-year cycle, it would adopt IP Relay rates for another three-year cycle. Therefore, NECA's proposed rate for the 2010–2011 Fund year for IP Relay will serve as a base rate for a new three-year cycle for IP Relay that will expire June 30, 2013. As has been done in the previous cycle based on the *2007 TRS Rate Methodology Order,* this rate will be adjusted annually by an inflation factor and an efficiency factor, and will include any appropriate exogenous costs submitted by providers. The inflation factor is the Gross Domestic Product minus the Price Index (GDP − PI), and the efficiency factor is the inflation factor minus 0.5 percent to account for productivity gains.

*The Carrier Contribution Factor and Funding Requirement*

15. Because the Commission adopts NECA's proposed compensation rates for the various forms of TRS, with the adjustment of VRS rates to prevent a steep and disruptive decrease in per-minute compensation, and because the Commission agrees that NECA's projected minutes of use for each service are supported by the record and thus reasonable, the remaining issue to resolve is the treatment of NECA's March 30, 2010 *Supplemental Filing* recommending a decrease in 2009–2010 funding requirements from $891 million to $701.8 million, and a reduction in the carrier contribution factor from 0.01137 to 0.00886. NECA made this recommendation based on the finding that actual VRS minutes for a seven-month period of July 2009 through January 2010 consistently averaged 18% below projections. The Commission declines to reduce the 2009–2010 Fund size as recommended, and instead concludes that the most administratively reasonable approach is to apply NECA's recommended Fund adjustment to the funding requirement for 2010–2011. Based on this, the Commission adopts a total funding requirement of $433,990,484.98 and carrier contribution factor of 0.00585 which will result in a total Fund size of $705,048,502.19.

**Paperwork Reduction Act**

16. This document does not contain new or modified information collection requirements subject to the Paperwork Reduction Act of 1995, Public Law 104–13. In addition, therefore, it does not contain any new or modified information collection burden for small business concerns with fewer than 25 employees, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, *see* 44 U.S.C. 3506(c)(4).

**Congressional Review Act**

17. The Commission will send a copy of this *Order* in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act. *See* 5 U.S.C. 801(a)(1)(A).

**Ordering Clauses**

Pursuant to the authority contained in section 225 of the Communications Act of 1934, as amended, 47 U.S.C. 225, and § 64.604(c)(5)(iii) of the Commission's rules, 47 CFR 64.604(c)(5)(iii), document 10–115 *is adopted.*

NECA shall compensate providers of interstate traditional TRS for the July 1, 2010 through June 30, 2011 Fund year, at the rate of $2.0256 per completed interstate conversation minute.

NECA shall compensate providers of interstate Speech-to-Speech service for the July 1, 2010 through June 30, 2011 Fund year, at the rate of $3.1566 per completed interstate conversation minute.

NECA shall compensate providers of interstate captioned telephone service and intrastate and interstate IP captioned telephone service for the July 1, 2010 through June 30, 2011 Fund year, at the rate of $1.6951 per completed conversation minute.

NECA shall compensate providers of intrastate and interstate IP Relay service for the July 1, 2010 through June 30, 2011 Fund year, at the rate of $1.2985 per completed conversation minute.

NECA shall compensate providers of intrastate and interstate Video Relay Service at the rates of $6.2390 for the first 50,000 monthly minutes (Tier I), $6.2335 for monthly minutes between 50,001 and 500,000 (Tier II), and $5.0668 for minutes above 500,000 (Tier III) per completed conversation minute for the July 1, 2010 through June 30, 2011 Fund year.

The Interstate TRS carrier contribution factor shall be 0.00585, and the funding requirement shall be $433,990,484.98, and the, for the July 1, 2010 through June 30, 2011 Fund year.

Federal Communications Commission.

**Marlene H. Dortch,**

*Secretary.*

[FR Doc. 2010–20047 Filed 8–12–10; 8:45 am]

**BILLING CODE 6712–01–P**

## FEDERAL RESERVE SYSTEM

### Change in Bank Control Notices; Acquisition of Shares of Bank or Bank Holding Companies

The notificants listed below have applied under the Change in Bank Control Act (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire a bank or bank holding company. The factors that are considered in acting on the notices are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The notices are available for immediate inspection at the Federal Reserve Bank indicated. The notices also will be available for inspection at the office of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank indicated for that notice or to the offices of the Board of Governors. Comments must be received not later than August 27, 2010.

**A. Federal Reserve Bank of St. Louis** (Glenda Wilson, Community Affairs Officer) P.O. Box 442, St. Louis, Missouri 63166–2034:

*1. George J. Shackelford*, Coila, Mississippi; to acquire additional voting shares of Peoples Commerce Corporation, and thereby indirectly acquire additional voting shares of Peoples Bank and Trust Company, both of North Carrollton, Mississippi.

**B. Federal Reserve Bank of Dallas** (E. Ann Worthy, Vice President) 2200 North Pearl Street, Dallas, Texas 75201–2272:

*1. John D. Mican*, Bastrop, Texas; Robert E. Berryhill, Smithville, Texas; Tammy L. Goertz, Rosansky, Texas; and Dianna L. Kana, Bastrop, Texas, individually and collectively as co–trustees of the Bastrop Bancshares, Inc. Employee Stock Ownership Plan ("ESOP") and on behalf of ESOP; to acquire voting shares of Bastrop Bancshares, Inc., and thereby indirectly acquire voting shares of The First National Bank of Bastrop, both of Bastrop, Texas.

Board of Governors of the Federal Reserve System, August 9, 2010.

**Robert deV. Frierson,**

*Deputy Secretary of the Board.*

[FR Doc. 2010–19948 Filed 8–12–10; 8:45 am]

**BILLING CODE 6210–01–S**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Office of the Secretary

### Statement of Organization, Functions, and Delegations of Authority; Office of the National Coordinator for Health and Information Technology; Correction

**AGENCY:** Office of the Secretary, HHS.

**ACTION:** Notice, correction.

**SUMMARY:** This Notice was previously published in the **Federal Register** on December 1, 2009, but it contained an error with respect to one of the office names.

**FOR FURTHER INFORMATION CONTACT:** Marc Weisman, Office of the National Coordinator, Office of the Secretary, 200 Independence Ave., NW., Washington, DC 20201, 202–690–6285.

Part A, Office of the Secretary, Statement of Organization, Functions, and Delegations of Authority for the Department of Health and Human Services, Chapter AR, Office of the National Coordinator for Health Information Technology (ONC), as last amended at 74 FR 62785–62786, dated December 1, 2009, is corrected as follows:

I. Under Section AR.10 Organization, retitle "B. Office of Economic Modeling and Analysis (ARB)" as B. Office of Economic Analysis and Modeling (ARB)."

II. Under Section AR.20 Functions, Chapter B, retitle all references to the "Office of Economic Modeling and Analysis" as the "Office of Economic Analysis and Modeling."

III. Delegation of Authority. Pending further delegation, directives or orders by the Secretary or by the National Coordinator for Health Information Technology, all delegations and redelegations of authority made to officials and employees of affected organizational components will continue in them or their successors pending further redelegations, provided they are consistent with this reorganization.

(Authority: 44 U.S.C. 3101.)

Dated: July 26, 2010.

**Kathleen Sebelius,**

*Secretary.*

[FR Doc. 2010–19999 Filed 8–12–10; 8:45 am]

**BILLING CODE 4150–24–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Medicare & Medicaid Services

**[Document Identifier: CMS–265–94, CMS–1728–94, CMS–10240, CMS–P–0015A and CMS–10203]**

### Agency Information Collection Activities: Submission for OMB Review; Comment Request

**AGENCY:** Centers for Medicare & Medicaid Services, HHS.

In compliance with the requirement of section 3506I(2)(A) of the Paperwork Reduction Act of 1995, the Centers for Medicare & Medicaid Services (CMS), Department of Health and Human Services, is publishing the following summary of proposed collections for public comment. Interested persons are invited to send comments regarding this burden estimate or any other aspect of this collection of information, including any of the following subjects: (1) The necessity and utility of the proposed information collection for the proper performance of the Agency's function; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

1. *Type of Information Collection Request:* Extension of a currently approved collection; *Title of Information Collection:* Independent Renal Dialysis Facility Cost Report; *Use:* The Independent Renal Dialysis Facility Cost Report, is filed annually by providers participating in the Medicare program to identify the specific items of cost and statistics of facility operation that independent renal dialysis facilities are required to report. *Form Number:* CMS–265–94 (OMB#: 0938–0236); *Frequency:* Yearly; *Affected Public:* Business or other for-profits and Not-for-profit institutions; *Number of Respondents:* 5,508 *Total Annual Responses:* 5,508; *Total Annual Hours:* 275,400 (For policy questions regarding this collection contact Gail Duncan at 410–786–7278. For all other issues call 410–786–1326.)

2. *Type of Information Collection Request:* Extension of a currently approved collection; *Title of Information Collection:* Home Health Agency Cost Report; *Use:* These cost report forms are filed annually by freestanding providers participating in the Medicare program to effect year end cost settlement for providing services to Medicare beneficiaries. The data submitted on the cost reports supports management of Federal programs. Providers receiving Medicare reimbursement must provide adequate cost data based on financial and statistical records which can be verified by qualified auditors. The data from these cost reporting forms will be used for the purpose of evaluating current levels of Medicare reimbursement. *Form Number:* CMS–1728–94 (OMB#: 0938–0022); *Frequency:* Yearly; *Affected Public:* Business or other for-profits and Not-for-profit institutions; *Number of Respondents:* 7,479 *Total Annual Responses:* 7,479; *Total Annual Hours:* 1,690,254 (For policy questions regarding this collection contact Angela Havrilla at 410–786–4516. For all other issues call 410–786–1326.)

3. *Type of Information Collection Request:* Revision of a currently approved collection; *Title of Information Collection:* Data Collection for the Nursing Home Value-Based Purchasing (NHVBP) Demonstration; *Use:* The goal of the NHVBP Demonstration is to use financial incentives to improve the quality of care in nursing homes. The main purpose of the NHVBP data collection effort is to gather information that will enable CMS to determine which nursing homes will be eligible to receive incentive payments under the NHVBP Demonstration. Information will be collected from nursing homes participating in the demonstration on an ongoing basis. CMS will collect payroll-based staffing, agency staffing and resident census information to help assess the quality of care in participating nursing homes. CMS will determine which homes qualify for an incentive payment based on their relative performance in terms of quality. *Form Number:* CMS–10240 (OMB#: 0938–1039); *Frequency:* Quarterly; *Affected Public:* Business or other for-profits and Not-for-profit institutions; *Number of Respondents:* 178 *Total Annual Responses:* 712; *Total Annual Hours:* 5,530 (For policy questions regarding this collection contact Ron Lambert at 410–786–6624. For all other issues call 410–786–1326.)

4. *Type of Information Collection Request:* Revision of a currently approved collection; *Title of Information Collection:* Medicare Current Beneficiary Survey; *Use:* The Medicare Current Beneficiary Survey (MCBS) serves to measure what impact the changes of adding a new benefit have on the program and its beneficiaries. The MCBS is a comprehensive data collection effort that fills an information gap in the

Centers for Medicare and Medicaid Services, and is depended on to help manage the program. Being able to examine various characteristics and to chart evolving trends offers policy makers a reliable tool for making informed decisions. The MCBS is used to identify potential new policy direction or modifications to the Medicare program and once those program enhancements are implemented, monitor the impact of those changes. The central goals of the MCBS are to determine medical care expenditures and sources of payment for all services, including copayments, deductibles, and non-covered services; to ascertain all types of health insurance coverage and relate coverage to actual payments; and to trace processes over time, such as changes in health status, spending down to Medicaid eligibility, and the impacts of program changes. *Form Number:* CMS–P–0015A (OMB#: 0938–0568); *Frequency:* Yearly; *Affected Public:* Business or other for-profits and Not-for-profit institutions; *Number of Respondents:* 16,217 *Total Annual Responses:* 48,650; *Total Annual Hours:* 57,062 (For policy questions regarding this collection contact William Long at 410–786–7927. For all other issues call 410–786–1326.)

5. *Type of Information Collection Request:* Revision of a currently approved collection; *Title of Information Collection:* Medicare Health Outcomes Survey (HOS); *Use:* CMS has a responsibility to its Medicare beneficiaries to require that care provided by managed care organizations under contract with CMS is of high quality. One way of ensuring high quality care in Medicare Managed Care Organizations (MCOs), or more commonly referred to as Medicare Advantage Organizations (MAOs), is through the development of standardized, uniform performance measures to enable CMS to gather the data needed to evaluate the care provided to Medicare beneficiaries.

The goal of the Medicare HOS program is to gather valid, reliable, clinically meaningful health status data in Medicare managed care for use in quality improvement activities, plan accountability, public reporting, and improving health. All managed care plans with Medicare Advantage (MA) contracts must participate. CMS, in collaboration with the National Committee for Quality Assurance (NCQA), launched the Medicare HOS as part of the Effectiveness of Care component of the former Health Plan Employer Data and Information Set, now known as the Healthcare Effectiveness Data and Information Set (HEDIS®).

The HOS measure was developed under the guidance of a Technical Expert Panel comprised of individuals with specific expertise in the health care industry and outcomes measurement. The measure includes the most recent advances in summarizing physical and mental health outcomes results and appropriate risk adjustment techniques. In addition to health outcomes measures, the HOS is used to collect the Management of Urinary Incontinence in Older Adults, Physical Activity in Older Adults, Fall Risk Management, and Osteoporosis Testing in Older Women HEDIS® measures. The collection of Medicare HOS is necessary to hold Medicare managed care contractors accountable for the quality of care they are delivering. This reporting requirement allows CMS to obtain the information necessary for proper oversight of the Medicare Advantage program. *Form Number:* CMS–10203 (OMB#: 0938–0701); *Frequency:* Yearly; *Affected Public:* Individuals and households; *Number of Respondents:* 1,099,560 *Total Annual Responses:* 1,099,560; *Total Annual Hours:* 366,520 (For policy questions regarding this collection contact Chris Haffer at 410–786–8764. For all other issues call 410–786–1326.)

To obtain copies of the supporting statement and any related forms for the proposed paperwork collections referenced above, access CMS Web site address at *http://www.cms.hhs.gov/PaperworkReductionActof1995,* or e-mail your request, including your address, phone number, OMB number, and CMS document identifier, to *Paperwork@cms.hhs.gov,* or call the Reports Clearance Office on (410) 786–1326.

To be assured consideration, comments and recommendations for the proposed information collections must be received by the OMB desk officer at the address below, no later than 5 p.m. on *September 13, 2010.*

OMB, Office of Information and Regulatory Affairs, *Attention:* CMS Desk Officer, *Fax Number:* (202) 395–6974, *E-mail: OIRA_submission@omb.eop.gov.*

Dated: August 6, 2010.

**Michelle Shortt,**

*Director, Regulations Development Group, Office of Strategic Operations and Regulatory Affairs.*

[FR Doc. 2010–19756 Filed 8–12–10; 8:45 am]

**BILLING CODE 4120–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

**[Docket No. FDA–2010–N–0248]**

### Agency Information Collection Activities; Submission for Office of Management and Budget Review; Comment Request; Format and Content Requirements for Over-the-Counter Drug Product Labeling

**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 September 13, 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 0910–0340. Also include the FDA docket number found in brackets in the heading of this document.

**FOR FURTHER INFORMATION CONTACT:** Elizabeth Berbakos, Office of Information Management, Food and Drug Administration, 1350 Piccard Dr., PI50–400B, Rockville, MD 20850, 301–796–3792, *Elizabeth.Berbakos@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.

### Format and Content Requirements for Over-the-Counter Drug Product Labeling—OMB Control Number 0910–0340—Reinstatement

In the **Federal Register** of March 17, 1999 (64 FR 13254) (the 1999 labeling final rule), we amended our regulations governing requirements for human drug products to establish standardized format and content requirements for the labeling of all marketed over-the-counter (OTC) drug products in part 201 (21 CFR part 201). The regulations in part 201 require OTC drug product labeling to include uniform headings

and subheadings, presented in a standardized order, with minimum standards for type size and other graphical features. Specifically, the 1999 labeling final rule added new § 201.66. Section 201.66 sets content and format requirements for the Drug Facts portion of labels on OTC drug products.

The only burden to comply with the regulations in part 201 is a one-time burden for the following products:

- New OTC drug products introduced to the marketplace under new drug applications (NDAs), abbreviated new drug applications (ANDAs), or an OTC drug monograph, except for products in "convenience size" packages[1]
- OTC sunscreen products.

The burden is limited to these products because, as explained in this document, most currently marketed OTC drug products are already required to be in compliance with these labeling regulations, and thus will incur no further burden in order to satisfy this regulation. We recognize that some manufacturers may choose to modify labeling already required to be in Drug Facts format. We believe that such changes are usual and customary as part of routine redesign practice, and thus do not create additional burden within the meaning of the PRA. With the exceptions described, new products must comply with the regulations as they are introduced to the marketplace. Also, as explained in this document, OTC sunscreen products have not been required to comply with these regulations but are anticipated to become subject to these requirements when a sunscreen final rule becomes effective.

Specifically, on June 20, 2000 (65 FR 38191), we published a **Federal Register** document that required all OTC drug products marketed under the OTC monograph system except sunscreen products to comply with the regulations by May 16, 2005, or sooner (65 FR 38191 at 38193). Sunscreen products do not have to comply with the regulations until we lift the stay of the sunscreen final rule that was published in the **Federal Register** of May 21, 1999 (64 FR 27666) (the 1999 sunscreen final rule). In the **Federal Register** of December 31, 2001 (66 FR 67485), we stayed the 1999 sunscreen final rule indefinitely. In the **Federal Register** of September 3, 2004 (69 FR 53801), we delayed the § 201.66 implementation date for OTC sunscreen products indefinitely, pending future rulemaking to amend the substance of labeling for these products. In the **Federal Register** of August 27, 2007 (72 FR 49070), we proposed changes to labeling and related testing requirements for sunscreen products to address both ultraviolet A and ultraviolet B radiation, and anticipated that sunscreen products would become subject to § 201.66 at the time any resultant final rule becomes effective.

Based on a recent estimate provided by the Consumer Healthcare Products Association (CHPA),[2] we believe that approximately 900 new OTC drug product stock keeping units (SKUs) are introduced to the marketplace each year. Further, we estimate that these SKUs are marketed by 300 manufacturers. We estimate that the preparation of labeling for new OTC drug products will require 5 hours to prepare, complete, and review prior to submitting the new labeling to us. Based on this estimate, the annual reporting burden for this type of labeling is approximately 4,500 hours. (See table 1 of this document.)

We estimate that there are 4,752 OTC sunscreen drug product SKUs that have not yet complied with the 1999 labeling final rule. All of these SKUs will need to implement the new labeling format by the implementation date included in a sunscreen final rule when it is published in the **Federal Register**. We estimate that these 4,752 SKUs are marketed by 400 manufacturers and that approximately 2 hours will be spent on each submission. (See table 1 of this document.) The number of hours per submission (response) is based on our estimate in the 1999 labeling final rule (64 FR 13254 at 13276). If an average of 2 hours is spent preparing, completing, and reviewing each of the estimated 4,752 sunscreen SKUs, the total number of hours dedicated to the labeling of OTC sunscreen products would be 9,504 hours (4,752 SKUs times 2 hours/SKU). (See table 1 of this document.)

In determining the burden for § 201.66, it is also important to consider exemptions or deferrals of the regulation allowed products under § 201.66(e). Since publication of the 1999 labeling final rule, we have received only one request for exemption or deferral. One response over an 8-year period equates to an annual frequency of response equal to 0.125. In the 1999 labeling final rule, we estimated that a request for deferral or exemption would require 24 hours to complete (64 FR 13254 at 13276). We continue to believe that this type of response will require approximately 24 hours. Multiplying the annual frequency of response (0.125) by the number of hour per response (24) gives a total response time for requesting exemption or deferral equal to 3 hours.

In the **Federal Register** of June 3, 2010 (75 FR 31448), we published a 60-day notice requesting public comment on the proposed collection of information. We received no comments.

We estimate the burden of this collection of information as follows:

TABLE 1.—ESTIMATED ANNUAL REPORTING BURDEN[1]

| 21 CFR Section | No. of Respondents | Annual Frequency per Response | Total Annual Responses | Hours per Response | Total Hours |
|---|---|---|---|---|---|
| 201.66(c) and (d)[2] | 400 | 11.88 | 4,752 | 2 | 9,504 |
| 201.66(c) and (d)[3] | 300 | 3 | 900 | 5 | 4,500 |
| 201.66(e) | 1 | 0.125 | 0.125 | 24 | 3 |
| Total | | | | | 14,007 |

[1] We estimate that capital costs of 22 to 25 million dollars will result from preparing labeling content and format in accordance with § 201.66. There are no operating or maintenance costs associated with this collection of information.

[1] In a final rule published in the **Federal Register** of April 5, 2002 (67 FR 16304), the agency delayed the compliance dates for the 1999 labeling final rule for all OTC drug products that: (1) Contain no more than two doses of an OTC drug; and (2) because of their limited available labeling space, would require more than 60 percent of the total surface area available to bear labeling to meet the requirements set forth in § 201.66(d)(1) and (d)(9) and, therefore, qualify for the labeling modifications currently set forth in § 201.66(d)(10) (67 FR 16304 at 16306). The agency issued this delay in order to develop additional rulemaking for these "convenience size" products (December 12, 2006, 71 FR 74474). These products are not currently subject to the requirements of § 201.66. PRA approval for any requirements to which they may be subject in the future will be handled in a separate rulemaking.

[2] Letter submitted to FDA by CHPA on March 1, 2010 (available in Docket No. FDA–2010–N–0248).

[2] Burden for manufacturers of sunscreen drug products.
[3] Burden for manufacturers of new OTC drug products.

Dated: August 9, 2010.

**Leslie Kux,**

*Acting Assistant Commissioner for Policy.*

[FR Doc. 2010–19985 Filed 8–12–10; 8:45 am]

**BILLING CODE 4160–01–S**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

**[Docket No. FDA–2010–N–0305]**

### John Bonnes: Debarment Order

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Notice.

**SUMMARY:** The Food and Drug Administration (FDA) is issuing an order under the Federal Food, Drug, and Cosmetic Act (the act) debarring John Bonnes for a period of 5 years from importing articles of food or offering such articles for importation into the United States. FDA bases this order on a finding that Mr. Bonnes was convicted of a felony under Federal law for conduct relating to the importation into the United States of an article of food. Mr. Bonnes has notified FDA that he acquiesces to debarment, and therefore has waived his opportunity for a hearing concerning this action.

**DATES:** This order is effective April 19, 2010.

**ADDRESSES:** Submit applications for termination of debarment to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

**FOR FURTHER INFORMATION CONTACT:** Kenny Shade, Division of Compliance Policy (HFC–230), Office of Enforcement, Office of Regulatory Affairs, Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 240–632–6844.

**SUPPLEMENTARY INFORMATION:**

#### I. Background

Section 306(b)(1)(C) of the act (21 U.S.C. 335a(b)(1)(C)) permits FDA to debar an individual from importing an article of food or offering such article for import into the United States if FDA finds, as required by section 306(b)(3)(A) of the act (21 U.S.C. 335a(b)(3)(A)), that the individual has been convicted of a felony under Federal law for conduct relating to the importation into the United States of any food. Section 306(l)(1)(C) of the act (21 U.S.C. 335a(l)(1)(C)) provides that, for purposes of section 306, a person is considered to have been convicted of a criminal offense "when the person has entered into participation in a first offender, deferred adjudication, or other similar arrangement or program where judgment of conviction has been withheld."

On April 17, 2010, Mr. Bonnes entered into a deferred prosecution agreement with the United States Attorney's Office, Eastern District of New York. FDA's finding that debarment is appropriate is based on the following facts, as set forth in the deferred prosecution agreement. Between April 1, 2006, and August 1, 2006, Mr. Bonnes did knowingly and willfully make materially false, fictitious, and fraudulent statements and representations, in a matter within the jurisdiction of the executive branch of the Government of the United States, in violation of 18 U.S.C. 1001(a)(2). Specifically, Mr. Bonnes' company, Ameritech Laboratories, provided seventeen certificates of analysis to a client certifying that fresh produce the client wished to import into the United States from the Dominican Republic was free of any pesticides. Mr. Bonnes signed each of the certificates of analysis as the director of Ameritech Laboratories.

Each of these certificates of analysis was false. Although the certificates stated that Ameritech Laboratories performed pesticide tests on the produce, Ameritech Laboratories did not perform a chemical analysis to certify that the produce was free of any pesticides. Mr. Bonnes knew at the time he prepared the certificates that they were false, and he also knew that the client intended to submit certificates to FDA's District Office in Queens, New York, in support of importing the produce into the United States for sale as human food.

Mr. Bonnes' actions and his deferred prosecution agreement make him subject to permissive debarment as described under section 306(b)(3)(A) of the act. Pursuant to the deferred prosecution agreement, Mr. Bonnes expressly acquiesced to permissive debarment under section 306(b)(1)(C) of the act for the conduct described in this document. In accordance with section 306(c)(2)(B) of the act (21 U.S.C. 335a(c)(2)(B)), Mr. Bonnes notified FDA of his acquiescence to debarment in a letter dated April 19, 2010. A person subject to debarment is entitled to an opportunity for an agency hearing on disputed issues of material fact under section 306(i) of the act (21 U.S.C. 335a(i)), but by acquiescing to debarment Mr. Bonnes waived his opportunity for a hearing and to raise any contentions concerning his debarment. The maximum period of debarment under section 306(c)(2)(A)(iii) of the act (21 U.S.C. 335a(c)(2)(A)(iii)) is 5 years. FDA concludes that the nature and scope of Mr. Bonnes' conduct supports the maximum possible period of debarment.

#### II. Findings and Order

Therefore, the Director, Office of Enforcement, Office of Regulatory Affairs, under section 306(b)(1)(C) of the act, under authority delegated to the Director (Staff Manual Guide 1410.35), finds that Mr. John Bonnes has entered into a deferred prosecution agreement as the result of conduct relating to the importation of an article of food into the United States that makes him subject to permissive debarment.

As a result of the foregoing finding, Mr. Bonnes is debarred for a period of 5 years from importing articles of food or offering such articles for import into the United States, effective (see **DATES**). Under section 301(cc) of the act (21 U.S.C. 331(cc)), the importing or offering for import into the United States of an article of food by, with the assistance of, or at the direction of Mr. Bonnes is a prohibited act.

Any application by Mr. Bonnes for termination of debarment under section 306(d)(1) of the act should be identified with Docket No. FDA–2010–N–0305 and sent to the Division of Dockets Management (see **ADDRESSES**). All such submissions are to be filed in four copies. The public availability of information in these submissions is governed by 21 CFR 10.20(j).

Publicly available submissions may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

Dated: August 2, 2010.

**Howard R. Sklamberg,**

*Director, Office of Enforcement, Office of Regulatory Affairs.*

[FR Doc. 2010–19981 Filed 8–12–10; 8:45 am]

**BILLING CODE 4160–01–S**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### National Center for Research Resources; Notice of Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of a meeting of the National Advisory Research Resources Council.

The meeting will be open to the public as indicated below, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* National Advisory Research Resources Council.

*Date:* September 14, 2010.

*Open:* 8 a.m. to 12 p.m.

*Agenda:* Report from the Institute Director and other Institute business.

*Place:* National Institutes of Health, Building 31, 31 Center Drive, Conference Room 10, Bethesda, MD 20892.

*Closed:* 1 p.m. to adjournment.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, Building 31, 31 Center Drive, Conference Room 10, Bethesda, MD 20892.

*Contact Person:* Louise E. Ramm, PhD, Deputy Director, National Center for Research Resources, National Institutes of Health, Building 31, Room 3B11, Bethesda, MD 20892, 301–496–6023, *louiser@ncrr.nih.gov.*

Any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

In the interest of security, NIH has instituted stringent procedures for entrance onto the NIH campus. All visitor vehicles, including taxicabs, hotel, and airport shuttles will be inspected before being allowed on campus. Visitors will be asked to show one form of identification (for example, a government-issued photo ID, driver's license, or passport) and to state the purpose of their visit.

Information is also available on the Institute's/Center's home page: *http://www.ncrr.nih.gov/newspub/minutes.htm,* where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research; 93.371, Biomedical Technology; 93.389, Research Infrastructure, 93.306, 93.333; 93.702, ARRA Related Construction Awards., National Institutes of Health, HHS)

Dated: August 9, 2010.

**Jennifer Spaeth,**

*Director, Office of Federal Advisory Committee Policy.*

[FR Doc. 2010–20014 Filed 8–12–10; 8:45 am]

**BILLING CODE 4140–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### National Institute of Allergy and Infectious Diseases; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* National Institute of Allergy and Infectious Diseases Special Emphasis Panel; Tissue Transplantation.

*Date:* August 30, 2010.

*Time:* 1 p.m. to 5 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, 6700B Rockledge Drive, Bethesda, MD 20817 (Telephone Conference Call).

*Contact Person:* James T. Snyder, PhD, Scientific Review Officer, Scientific Review Program, Division of Extramural Activities/NIAID, National Institutes of Health, 6700B Rockledge Drive, MSC 7616, Room # 3257, Bethesda, MD 20892–7616, 301–435–1614, *james.snyder@nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.855, Allergy, Immunology, and Transplantation Research; 93.856, Microbiology and Infectious Diseases Research, National Institutes of Health, HHS).

Dated: August 9, 2010.

**Jennifer Spaeth,**

*Director, Office of Federal Advisory Committee Policy.*

[FR Doc. 2010–20017 Filed 8–12–10; 8:45 am]

**BILLING CODE 4140–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### Office of the Director, National Institutes of Health; Notice of Meeting

Pursuant to section 10(a) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of a meeting of the Advisory Committee on Research on Women's Health.

The meeting will be open to the public, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

*Name of Committee:* Advisory Committee on Research on Women's Health.

*Date:* September 28, 2010.

*Time:* 9 a.m. to 5 p.m.

*Agenda:* The purpose of the meeting will be for the Committee to provide advice to the Office of Research on Women's Health (ORWH) on appropriate research activities with respect to women's health and related studies to be undertaken by the national research institutes; to provide recommendations regarding ORWH activities; to meet the mandates of the office; and for discussion of scientific issues.

*Place:* National Institutes of Health, Building 31, 31 Center Drive, Conference Room 10, Bethesda, MD 20892.

*Contact Person:* Joyce Rudick, Director, Programs & Management, Office of Research on Women's Health, Office of the Director, National Institutes of Health, Building 1, Room 201, Bethesda, MD 20892, 301–402–1770.

Any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

In the interest of security, NIH has instituted stringent procedures for entrance onto the NIH campus. All visitor vehicles, including taxicabs, hotel, and airport shuttles will be inspected before being allowed on campus. Visitors will be asked to show one form of identification (for example, a government-issued photo ID, driver's license, or passport) and to state the purpose of their visit.

Information is also available on the Institute's/Center's home page: *http://www4.od.nih.gov/orwh/,* where an agenda

and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos. 93.14, Intramural Research Training Award; 93.22, Clinical Research Loan Repayment Program for Individuals from Disadvantaged Backgrounds; 93.232, Loan Repayment Program for Research Generally; 93.39, Academic Research Enhancement Award; 93.936, NIH Acquired Immunodeficiency Syndrome Research Loan Repayment Program; 93.187, Undergraduate Scholarship Program for Individuals from Disadvantaged Backgrounds, National Institutes of Health, HHS)

Dated: August 3, 2010.

**Jennifer Spaeth,**

*Director, Office of Federal Advisory Committee Policy.*

[FR Doc. 2010–20021 Filed 8–12–10; 8:45 am]

**BILLING CODE 4140–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### Center for Scientific Review; 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:* Risk, Prevention and Health Behavior Integrated Review Group; Psychosocial Risk and Disease Prevention Study Section.

*Date:* September 27–28, 2010.

*Time:* 8 a.m. to 5 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:* Martha Faraday, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3110, MSC 7808, Bethesda, MD 20892, 301–435–3575, *faradaym@csr.nih.gov.*

*Name of Committee:* Risk, Prevention and Health Behavior Integrated Review Group; Risk, Prevention and Intervention for Addictions Study Section.

*Date:* September 30–October 1, 2010.

*Time:* 8 a.m. to 5 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* Renaissance M Street Hotel, 1143 New Hampshire Avenue, NW., Washington, DC 20037.

*Contact Person:* Gabriel B. Fosu, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3108 MSC 7808, Bethesda, MD 20892, (301) 435–3562, *fosug@csr.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: August 9, 2010.

**Jennifer Spaeth,**

*Director, Office of Federal Advisory Committee Policy.*

[FR Doc. 2010–20044 Filed 8–12–10; 8:45 am]

**BILLING CODE 4140–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### National Institute on Aging; Notice of Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of a meeting of the National Advisory Council on Aging.

The meeting will be open to the public as indicated below, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

The meeting will be closed to the public in accordance with the provisions set forth in section 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* National Advisory Council on Aging.

*Date:* September 21–22, 2010.

*Closed:* September 21, 2010, 3 p.m. to 5 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, Building 31, 31 Center Drive, C Wing, Conference Room 10, Bethesda, MD 20892.

*Open:* September 22, 2010, 8 a.m. to 1:25 p.m.

*Agenda:* Call to order and reports from the Task Force on Minority Aging Research; the Working Group on Program; the Council of Councils; final report of the Review of the Division of Gerontology of Clinical Gerontology; council speaker, Dr. Tony Scarpa; remarks from retiring members; and Program Highlights.

*Place:* National Institutes of Health, Building 31, 31 Center Drive, C Wing, Conference Room 10, Bethesda, MD 20892.

*Contact Person:* Robin Barr, PhD, Director, National Institute on Aging, Office of Extramural Activities, Gateway Building, 7201 Wisconsin Avenue, Bethesda, MD 20814, (301) 496–9322, *barrr@nia.nih.gov.*

Any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

In the interest of security, NIH has instituted stringent procedures for entrance onto the NIH campus. All visitor vehicles, including taxicabs, hotel, and airport shuttles will be inspected before being allowed on campus. Visitors will be asked to show one form of identification (for example, a government-issued photo ID, driver's license, or passport) and to state the purpose of their visit.

Information is also available on the Institute's/Center's home page: *http://www.nih.gov/nia/naca/*, where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos. 93.866, Aging Research, National Institutes of Health, HHS)

Dated: August 9, 2010.

**Jennifer S. Spaeth,**

*Director, Office of Federal Advisory Committee Policy.*

[FR Doc. 2010–20054 Filed 8–12–10; 8:45 am]

**BILLING CODE 4140–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### National Institute of General Medical Sciences; Notice of Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of a meeting of the National Advisory General Medical Sciences Council.

The meeting will be open to the public as indicated below, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections

552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* National Advisory General Medical Sciences Council.

*Date:* September 20–21, 2010.

*Closed:* September 20, 2010, 8:30 a.m. to 5 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, Natcher Building, Conference Rooms E1 & E2, 45 Center Drive, Bethesda, MD 20892.

*Open:* September 21, 2010, 8:30 a.m. to Adjournment.

*Agenda:* For the discussion of program policies and issues, opening remarks, report of the Director, NIGMS, and other business of the Council.

*Place:* National Institutes of Health, Natcher Building, Conference Rooms E1 & E2, 45 Center Drive, Bethesda, MD 20892.

*Contact Person:* Ann A. Hagan, PhD, Associate Director for Extramural Activities, NIGMS, NIH, DHHS, 45 Center Drive, Room 2AN24H, MSC6200, Bethesda, MD 20892–6200, (301) 594–4499, *hagana@nigms.nih.gov.*

Any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

In the interest of security, NIH has instituted stringent procedures for entrance onto the NIH campus. All visitor vehicles, including taxis, hotel, and airport shuttles will be inspected before being allowed on campus. Visitors will be asked to show one form of identification (for example, a government-issued photo ID, driver's license, or passport) and to state the purpose of their visit. Information is also available on the Institute's/Center's home page: *http://www.nigms.nih.gov/about/advisory_council.html,* where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos. 93.375, Minority Biomedical Research Support; 93.821, Cell Biology and Biophysics Research; 93.859, Pharmacology, Physiology, and Biological Chemistry Research; 93.862, Genetics and Developmental Biology Research; 93.88, Minority Access to Research Careers; 93.96, Special Minority Initiatives, National Institutes of Health, HHS)

Dated: August 9, 2010.

**Jennifer Spaeth,**

*Director, Office of Federal Advisory Committee Policy.*

[FR Doc. 2010–20052 Filed 8–12–10; 8:45 am]

**BILLING CODE 4140–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### Eunice Kennedy Shriver National Institute of Child Health & Human Development; Notice of Closed Meeting

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 meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* National Institute of Child Health and Human Development Initial Review Group; Pediatrics Subcommittee.

*Date:* October 25–26, 2010.

*Time:* 8:30 a.m. to 5:30 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* The Legacy Hotel and Meeting Center, 1775 Rockville Pike, Rockville, MD 20852.

*Contact Person:* Rita Anand, PhD, Scientific Review Officer, Division of Scientific Review, Eunice Kennedy Shriver National Institute of Child Health and Human Development, NIH, 6100 Executive Blvd., Room 5B01, Bethesda, MD 20892, 301–496–1487, *anandr@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.864, Population Research; 93.865, Research for Mothers and Chidren; 93.929, Center for Medical Rehabilitation Research; 93.209, Contraception and Infertility Loan Repayment Program, National Institutes of Health, HHS)

Dated: August 6, 2010.

**Anna Snouffer,**

*Deputy Director, Office of Federal Advisory Committee Policy.*

[FR Doc. 2010–20051 Filed 8–12–10; 8:45 am]

**BILLING CODE 4140–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### National Institute of Environmental Health Sciences; Notice of Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of a meeting of the National Advisory Environmental Health Sciences Council.

The meeting will be open to the public as indicated below, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* National Advisory Environmental Health Sciences Council.

*Date:* September 1–2, 2010.

*Open:* September 1, 2010, 8:30 a.m. to 5 p.m.

*Agenda:* Discussion of program policies and issues.

*Place:* Nat. Inst. of Environmental Health Sciences, Building 101, Rodbell Auditorium, 111 T. W. Alexander Drive, Research Triangle Park, NC 27709.

*Closed:* September 2, 2010, 8:30 a.m. to 12 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* Nat. Inst. of Environmental Health Sciences, Building 101, Rodbell Auditorium, 111 T. W. Alexander Drive, Research Triangle Park, NC 27709.

*Contact Person:* Gwen W. Collman, PhD, Interim Director, Division of Extramural Research & Training, National Institutes of Health, Nat. Inst. of Environmental Health Sciences, 615 Davis Dr., KEY615/3112, Research Triangle Park, NC 27709, (919) 541–4980, *collman@niehs.nih.gov.*

Any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

Information is also available on the Institute's/Center's home page: *http://www.niehs.nih.gov/dert/c-agenda.htm,* where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos. 93.115, Biometry and Risk Estimation—Health Risks from Environmental Exposures; 93.142, NIEHS Hazardous Waste Worker Health and Safety Training; 93.143, NIEHS Superfund Hazardous Substances—Basic Research and Education; 93.894, Resources and Manpower Development in the Environmental Health Sciences; 93.113, Biological Response to Environmental Health Hazards; 93.114,

Applied Toxicological Research and Testing, National Institutes of Health, HHS)

Dated: August 3, 2010.

**Anna Snouffer,**

*Deputy Director, Office of Federal Advisory Committee Policy.*

[FR Doc. 2010–20046 Filed 8–12–10; 8:45 am]

**BILLING CODE 4140–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### National Institute on Deafness and Other Communication Disorders; Notice of Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of a meeting of the National Deafness and Other Communication Disorders Advisory Council.

The meeting will be open to the public as indicated below, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* National Deafness and Other Communication Disorders Advisory Council.

*Date:* September 17, 2010.

*Closed:* 8:30 a.m. to 10:30 a.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, Building 31, 31 Center Drive, Conference Room 10, Bethesda, MD 20892.

*Open:* 10:30 a.m. to 2:30 p.m.

*Agenda:* Staff reports on divisional, programmatic, and special activities.

*Place:* National Institutes of Health, Building 31, 31 Center Drive, Conference Room 10, Bethesda, MD 20892.

*Contact Person:* Craig A. Jordan, PhD, Director, Division of Extramural Activities, NIDCD, NIH, Executive Plaza South, Room 400C, 6120 Executive Blvd., Bethesda, MD 20892–7180, 301–496–8693, *jordanc@nidcd.nih.gov.*

Any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

In the interest of security, NIH has instituted stringent procedures for entrance onto the NIH campus. All visitor vehicles, including taxicabs, hotel, and airport shuttles will be inspected before being allowed on campus. Visitors will be asked to show one form of identification (for example, a government-issued photo ID, driver's license, or passport) and to state the purpose of their visit.

Information is also available on the Institute's/Center's home page: *http://www.nidcd.nih.gov/about/groups/ndcdac/,* where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos. 93.173, Biological Research Related to Deafness and Communicative Disorders, National Institutes of Health, HHS)

Dated: August 9, 2010.

**Jennifer Spaeth,**

*Director, Office of Federal Advisory Committee Policy.*

[FR Doc. 2010–20045 Filed 8–12–10; 8:45 am]

**BILLING CODE 4140–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### Center for Scientific Review; 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:* Center for Scientific Review Special Emphasis Panel, Member Conflict: Cell Biology.

*Date:* September 1–2, 2010.

*Time:* 8 a.m. to 5 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Virtual Meeting).

*Contact Person:* Elena Smirnova, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5187, MSC 7840, Bethesda, MD 20892, 301–435–1236, *smirnove@csr.nih.gov.*

*Name of Committee:* Center for Scientific Review Special Emphasis Panel, Member Conflict: Musculoskeletal Regeneration.

*Date:* September 14, 2010.

*Time:* 2 p.m. to 5 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Telephone Conference Call).

*Contact Person:* Rajiv Kumar, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4122, MSC 7802, Bethesda, MD 20892, 301–435–1212, *kumarra@csr.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: August 4, 2010.

**Anna Snouffer,**

*Deputy Director, Office of Federal Advisory Committee Policy.*

[FR Doc. 2010–20023 Filed 8–12–10; 8:45 am]

**BILLING CODE 4140–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### National Institute of Neurological Disorders and Stroke; 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 materials, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* National Institute of Neurological Disorders and Stroke Special Emphasis Panel; PD–DOC Review.

*Date:* August 30, 2010.

*Time:* 10 a.m. to 4 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* Hyatt Regency Bethesda, One Bethesda Metro Center, 7400 Wisconsin Avenue, Bethesda, MD 20814.

*Contact Person:* Shanta Rajaram, PhD, Scientific Review Administrator, Scientific

Review Branch, NINDS/NIH/DHHS, Neuroscience Center, 6001 Executive Blvd., Suite 3208, MSC 9529, Bethesda, MD 20892–9529, 301–435–6033, *rajarams@mail.nih.gov.* (Catalogue of Federal Domestic Assistance Program Nos. 93.853, Clinical Research Related to Neurological Disorders; 93.854, Biological Basis Research in the Neurosciences, National Institutes of Health, HHS)

Dated: August 9, 2010.

**Jennifer Spaeth,**

*Director, Office of Federal Advisory Committee Policy.*

[FR Doc. 2010–20019 Filed 8–12–10; 8:45 am]

**BILLING CODE 4140–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### National Institute of Allergy and Infectious Diseases; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* Microbiology, Infectious Diseases and AIDS Initial Review Group; Microbiology and Infectious Diseases Research Committee.

*Date:* October 14, 2010.

*Time:* 8 a.m. to 5 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* Courtyard by Marriott, 5520 Wisconsin Avenue, Chevy Chase, MD 20815.

*Contact Person:* Michelle M. Timmerman, PhD, Scientific Review Officer, Scientific Review Program, DEA/NIAID/NIH/DHHS, Room 2217, 6700B Rockledge Drive, MSC–7616, Bethesda, MD 20892–7616, 301–451–4573, *timmermanm@niaid.nih.gov.* (Catalogue of Federal Domestic Assistance Program Nos. 93.855, Allergy, Immunology, and Transplantation Research; 93.856, Microbiology and Infectious Diseases Research, National Institutes of Health, HHS)

Dated: August 9, 2010.

**Jennifer Spaeth,**

*Director, Office of Federal Advisory Committee Policy.*

[FR Doc. 2010–20015 Filed 8–12–10; 8:45 am]

**BILLING CODE 4140–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### Fogarty International Center; Notice of Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of a meeting of the Fogarty International Center Advisory Board.

The meeting will be open to the public as indicated below, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

The meeting will be closed to the public in accordance with the provisions set forth in section 552b(c)(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 materials, 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:* Fogarty International Center Advisory Board.

*Date:* September 14, 2010.

*Closed:* 8 a.m. to 9:30 a.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, Lawton Chiles International House, Bethesda, MD 20892.

*Open:* 9:30 a.m. to 3 p.m.

*Agenda:* A report of the FIC Director on updates of current and planned FIC activities. Topics to be discussed: Communications Strategy; and Global Research Priorities in Maternal, Newborn, and Child Health.

*Place:* National Institutes of Health, Lawton Chiles International House, Bethesda, MD 20892.

*Contact Person:* Robert Eiss, Public Health Advisor, Fogarty International Center, National Institutes of Health, 31 Center Drive, Room B2C02, Bethesda, MD 20892, (301) 496–1415, *EISSR@MAIL.NIH.GOV.*

Any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

In the interest of security, NIH has instituted stringent procedures for entrance onto the NIH campus. All visitor vehicles, including taxicabs, hotel, and airport shuttles will be inspected before being allowed on campus. Visitors will be asked to show one form of identification (for example, a government-issued photo ID, driver's license, or passport) and to state the purpose of their visit. Information is also available on the Institute's/Center's home page: *http://www.nih.gov/fic/about/advisory.html,* where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos. 93.14, Intramural Research Training Award; 93.22, Clinical Research Loan Repayment Program for Individuals from Disadvantaged Backgrounds; 93.232, Loan Repayment Program for Research Generally; 93.39, Academic Research Enhancement Award; 93.936, NIH Acquired Immunodeficiency Syndrome Research Loan Repayment Program; 93.187, Undergraduate Scholarship Program for Individuals from Disadvantaged Backgrounds, National Institutes of Health, HHS)

Dated: August 9, 2010.

**Jennifer S. Spaeth,**

*Director, Office of Federal Advisory Committee Policy.*

[FR Doc. 2010–20012 Filed 8–12–10; 8:45 am]

**BILLING CODE 4140–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

**[Docket No. 2010–N–0389]**

### Medical Device User Fee Act; Public Meeting; Request for Comments

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Notice of public meeting; request for comments.

**SUMMARY:** The Food and Drug Administration (FDA) is announcing a public meeting on the reauthorization of the medical device user fee program. The current legislative authority for the medical device user fee program expires in September 2012 and new legislation will be required for FDA to continue collecting user fees for the medical device program. The Federal Food, Drug, and Cosmetic Act (FD&C Act) requires that before FDA begins negotiations with the regulated industry on medical device user fee program reauthorization, we publish a notice in the **Federal Register** requesting public input on the reauthorization, hold a public meeting at which the public may present its views on the reauthorization, provide a period of 30 days after the public meeting to obtain written comments from the public suggesting changes, and publish the comments on FDA's Web site. FDA invites public comment on the medical device user fee program and suggestions regarding the commitments FDA should propose for the next reauthorized program.

*Date and Time*: The public meeting will be held on September 14, 2010, from 9 a.m. to 5 p.m.

*Location*: FDA is currently in the process of determining the meeting location, which will be in the Washington DC metropolitan area. When the location has been determined, FDA plans to publish a notice in the **Federal Register** that will provide the address of the meeting location.

*Contact Person*: James Swink, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, rm. 1609, Silver Spring, MD 20993, 301–796–6313, FAX: 301–847–8121, *James.Swink@fda.hhs.gov*.

*Registration and Requests for Oral Presentations*: If you wish to attend and/or present at the meeting, please register by August 31, 2010. Please register at *http://www.fda.gov/MedicalDevices/NewsEvents/WorkshopsConferences/ucm218250.htm*. Those without e-mail access may register by contacting James Swink (see *Contact Person*). Please provide complete contact information for each attendee, including name, title, firm name, address, e-mail address, telephone and fax number. Registrants wishing to make a presentation or provide public comments should note that when registering. Registration is free and will be on a first-come, first-served basis. Early registration is recommended because seating is limited. FDA may limit the number of participants from each organization, as well as the total number of participants, based on space limitations to ensure representation of all stakeholder interest groups. Registrants will receive confirmation once they have been accepted. Onsite registration on the day of the meeting will be based on space availability. We will try to accommodate all persons who wish to make a presentation or public comments. The time allotted for presentations may depend on the number of persons who wish to speak.

If you need special accommodations due to a disability, please contact James Swink at least 7 days in advance.

*Comments*: Regardless of attendance at the public meeting, interested persons may submit either electronic or written comments by October 14, 2010. Submit electronic comments to *http://www.regulations.gov*. Submit written comments to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. It is only necessary to send one set of comments. It is no longer necessary to send two copies of mailed comments. Identify comments with the docket number found in brackets in the heading of this document. Received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

**SUPPLEMENTARY INFORMATION:**

## I. Background

FDA is announcing its intention to hold a public meeting on the reauthorization of the medical device user fee program. The authority for such program expires in September 2012. Without new legislation, user fees can no longer be collected by FDA to fund the medical device review process. Section 738A(b)(2) of the FD&C Act (21 U.S.C. 379j-1(b)(2)) requires that, before FDA begins negotiations with the regulated industry on user fee reauthorization, we do the following: (1) Publish a notice in the **Federal Register** requesting public input on the reauthorization; (2) hold a public meeting at which the public may present its views on the reauthorization, including specific suggestions for changes to the goals referred to in section 738A(a)(1); (3) provide a period of 30 days after the public meeting to obtain written comments from the public suggesting changes to this part; and (4) publish the comments on the Food and Drug Administration's Web site. This notice, the public meeting, the 30 day comment period after the meeting, and the posting of the comments on the FDA Web site will satisfy these requirements. The purpose of the meeting is to hear stakeholder views on medical device user fee reauthorization as we consider the features to propose in the next medical device user fee program. FDA is interested in responses to the following two general questions and welcomes any other pertinent information stakeholders would like to share:

1. What is your assessment of the overall performance of the medical device user fee program thus far?

2. What aspects of the medical device user fee program should be retained, changed, or discontinued to further strengthen and improve the program?

The following information is provided to help potential meeting participants better understand the history and evolution of the medical device user fee program and its current status.

## II. What is the Medical Device User Fee Program? What Does It Do?

In the years preceding enactment of Medical Device User Fee and Modernization Act of 2002 (MDUFMA) (Public Law 107–250), FDA's medical device program suffered a long-term, significant loss of resources that undermined the program's capacity and performance. MDUFMA was enacted "in order to provide the Food and Drug Administration (FDA) with the resources necessary to better review medical devices, to enact needed regulatory reforms so that medical device manufacturers can bring their safe and effective devices to the American people at an earlier time, and to ensure that reprocessed medical devices are as safe and effective as original devices."[1] MDUFMA had a 5-year life and contained two particularly important features which relate to reauthorization:

- *User fees* for the review of medical device premarket applications, reports, supplements, and premarket notification submissions provided additional resources to make FDA reviews more timely, predictable, and transparent to applicants. MDUFMA fees and mandated appropriations for the medical device program helped FDA expand available expertise, modernized its information management systems, provided new review options, and provided more guidance to prospective applicants. The ultimate goal was to approve and clear safe and effective medical devices more rapidly, benefiting applicants, the health care community, and most importantly, patients.
- *Negotiated performance goals* for many types of premarket reviews provided FDA with benchmarks for measuring review improvements. These quantifiable goals became more demanding each year and include FDA decision goals and cycle goals (cycle goals refer to FDA actions prior to a final action on a submission). Under MDUFMA, FDA must also have met several other commitments that do not have specific timeframes or direct measures of performance, such as expanding the use of meetings with industry, maintenance of current performance in review areas where specific performance goals have not been identified, and publication of additional guidance documents.

Medical device user fees and increased appropriations were viewed by FDA, Congress, and industry stakeholders as essential to support high-quality, timely medical device reviews, and other activities critical to the device review program.

MDUFMA provided for fee discounts and waivers for small businesses. Small businesses make up a large proportion of the medical device industry, and these discounts and waivers helped reduce the financial impact of the user

[1] H.R. Rep. No. 107–728, at 21 (2002).

fees on this sector of the device industry, which plays an important role in fostering innovation.

The negotiated performance goals and commitments that do not have specific timeframes or direct measures of performance set under MDUFMA were comprehensive and demanding. By Fiscal Year (FY) 2007, approximately 85 performance goals and commitments were in effect. FDA provided periodic reports on its progress towards meeting these performance goals and commitments to its stakeholders and Congress. FDA also provided an annual financial report to Congress that helped to ensure transparency and accountability of its use of the additional resources provided by MDUFMA.

In 2007, Congress reauthorized medical device user fees through FY 2012 under the Medical Device User Fee Amendments of 2007 (MDUFA) (title II of the Food and Drug Administration Amendments Act of 2007 (FDAAA) (Public Law 110–85).

Under MDUFA, the user fee program remained intact, with a few significant modifications to the program. The user fee framework was changed to provide a more reliable and stable funding stream. Specifically, MDUFA included establishment registration as a new fee type that provided a more predictable amount of funds that could be collected by the Agency in any given year. MDUFA also saw changes to the performance goals. Compared to MDUFMA, there were fewer performance goals under MDUFA, yet the goals were more demanding. Specifically, individual cycle goals were removed and tighter overall goals were implemented. This was done to facilitate a more interactive review process. Specific timelines were established under MDUFA for Modular Premarket Approvals (PMAs) and Real-Time PMA supplements, which were not included under MDUFMA in 2002. The commitment letter outlining the goals in the last reauthorization can be found at *http://www.fda.gov/MDUFA*. FDA published a number of reports that provide the public with useful background on MDUFMA, FDAAA, and MDUFA. Key **Federal Register** documents, MDUFA-related guidance documents, legislation, performance reports, and financial reports and plans can be found at *http://www.fda.gov/MDUFA*. FDA will also post a webinar on the medical device user fee program to give the public more background information on the program. The webinar will be available through the link to the Public Meeting at *http://www.fda.gov/MedicalDevices/NewsEvents/WorkshopsConferences/ucm218250.htm* approximately 10 days before the public meeting. FDAAA specific information is available at *http://www.fda.gov/RegulatoryInformation/Legislation/FederalFoodDrugandCosmeticActFDCAct/SignificantAmendmentstotheFDCAct/FoodandDrugAdministrationAmendmentsActof2007/default.htm*.

### III. What Information Should You Know About the Meeting?

*A. When and Where Will the Meeting Occur? What Format Will FDA Use?*

Through this notice, we are announcing a public meeting to hear stakeholder views on the reauthorization of the medical device user fee program, including specific suggestions for any changes to the program that we should consider. We will conduct the meeting on September 14, 2010. In general, the meeting format will include presentations by FDA and a series of panels representing different stakeholder interest groups (such as patient advocates, consumer protection, industry, health professionals, and academic researchers). We will also provide an opportunity for individuals to make presentations at the meeting and for organizations and individuals to submit written comments to the docket after the meeting. FDA policy issues are beyond the scope of these reauthorization discussions. Accordingly, the presentations should focus on program improvements and funding issues, including specific suggestions for changes to performance goals, and not focus on policy issues.

*B. What Questions Would FDA Like the Public to Consider?*

Please consider the following questions for this meeting:

1. What is your assessment of the overall performance of the medical device user fee program thus far?

2. What aspects of the medical device user fee program should be retained, changed, or discontinued to further strengthen and improve the program?

*C. Will Meeting Transcripts be Available?*

Please be advised that as soon as a transcript is available, it will be accessible at *http://www.regulations.gov*. It may be viewed at the Division of Dockets Management (see *Comments*). A transcript will also be available in either hard copy or on CD–ROM, after submission of a Freedom of Information request. Written requests are to be sent to Division of Freedom of Information (HFI–35), Office of Management Programs, Food and Drug Administration, 5600 Fishers Lane, rm. 6–30, Rockville, MD 20857.

Dated: August 6, 2010.

**Leslie Kux,**

*Acting Assistant Commissioner for Policy.*

[FR Doc. 2010–19843 Filed 8–12–10; 8:45 am]

**BILLING CODE 4160–01–S**

## DEPARTMENT OF HOMELAND SECURITY

### Coast Guard

**[Docket No. USCG–2009–0097]**

### Notice of Availability of Final Environmental Impact Statement for the Goethals Bridge Replacement Project

**AGENCY:** Coast Guard, DHS.

**ACTION:** Notice of availability.

**SUMMARY:** The Coast Guard announces the availability of the Final Environmental Impact Statement for the proposed replacement by the Port Authority of New York and New Jersey of the 82-year old Goethals Bridge across the Arthur Kill between Staten Island, NY, and Elizabeth, NJ. The FEIS analyzes the potential for impact to the natural, human and cultural environment of the proposed Goethals Bridge Replacement Project.

**DATES:** The review period for the FEIS will close on September 13, 2010. Comments and related material must either be submitted to our online docket via *http://www.regulations.gov* on or before September 13, 2010 or reach the Docket Management Facility by that date.

**ADDRESSES:** You may submit comments identified by docket number USCG–2009–0097 using any one of the following methods:

(1) *Federal eRulemaking Portal: http://www.regulations.gov.*

(2) *Fax:* 202–493–2251.

(3) *Mail:* Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590–0001.

(4) *Hand Delivery:* Same as mail address above, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The telephone number is 202–366–9329.

To avoid duplication, please use only one of these four methods. See the "Public Participation and Request for Comments" portion of the

**SUPPLEMENTARY INFORMATION** section below for instructions on how to submit comments.

The First Coast Guard District Bridge Office located at One South Street, Battery Park Building, New York, NY 10004, will maintain a printed copy of the FEIS available for inspection or copying between 9 a.m. and 3:30 p.m., Monday through Friday, except Federal holidays.

**FOR FURTHER INFORMATION CONTACT:** If you have questions regarding this notice, call or e-mail Gary Kassof, Bridge Program Manager, First Coast Guard District, U.S. Coast Guard; telephone 212–668–7165, e-mail *gary.kassof@uscg.mil.* If you have questions regarding viewing or submitting material to the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

**SUPPLEMENTARY INFORMATION:**

**Public Participation**

*Submitting Comments:* If you submit a comment, please include the docket number for this notice (USCG–2009–0097) and provide a reason for each suggestion or recommendation. You may submit your comments and material online, or by fax, mail or hand delivery, but please use only one of these means. We recommend that you include your name and a mailing address, an e-mail address, or a telephone number in the body of your document so that we can contact you if we have questions regarding your submission. All comments received will be posted, without change, to *http://www.regulations.gov* and will include any personal information you have provided.

To submit your comment online, go to *http://www.regulations.gov,* click on the "submit a comment" box, which will then become highlighted in blue. In the "Document Type" drop down menu select "Notices" and insert "USCG–2009–0097" in the "Keyword" box. Click "Search" then click on the balloon shape in the "Actions" column. If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit them by mail and would like to know that they reached the Facility, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments and material received during the comment period.

*Viewing the Comments and the FEIS:* To view the comments and the FEIS, go to *http://www.regulations.gov,* click on the "read comments" box, which will then become highlighted in blue. In the "Keyword" box insert "USCG–2009–0097" and click "Search." Click the "Open Docket Folder" in the "Actions" column. If you do not have access to the Internet, you may view the docket online by visiting the Docket Management Facility in Room W12–140 on the ground floor of the Department of Transportation West Building, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. We have an agreement with the Department of Transportation to use the Docket Management Facility.

*Privacy Act:* Anyone can search the electronic form of comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review a Privacy Act, system of records notice regarding our public dockets in the January 17, 2008 issue of the **Federal Register** (73 FR 3316).

**Background and Purpose**

The Port Authority of New York and New Jersey (Port Authority), a transportation and development agency for the Port of New York and New Jersey, has proposed replacement of the functionally and physically obsolete Goethals Bridge that carries I–278 vehicular traffic between Staten Island, NY, and Elizabeth, NJ. On May 28, 2009 (74 FR 25572), the USCG made available the Draft EIS (DEIS). Two formal public meetings were held, on July 8 and 9, 2009, to provide an opportunity for submittal of oral comments to the USCG; written comments were accepted by the USCG through July 28, 2009.

Following the close of the public comment period in July 2009, the Port Authority, the project sponsor, chose the New Alignment South as its proposed alignment, and the USCG, the lead Federal agency for the NEPA process, has identified the New Alignment South as the Preferred Alternative for presentation and evaluation in the FEIS. The Preferred Alternative comprises a new cable-stayed replacement bridge on an alignment south of the existing Goethals Bridge, and removal of the existing bridge following construction of the new bridge. The replacement bridge would comprise the following elements: Six 12-foot-wide travel lanes, three on each of two roadway decks (one roadway for eastbound traffic and one roadway for westbound traffic); a 12-foot-wide outer shoulder and a 5-foot-wide inner shoulder on each roadway; a minimum 10-foot-wide sidewalk/bikeway along the northern edge of the westbound roadway; and a 65-foot-wide central area to be maintained between the east- and westbound decks to accommodate the towers and support cables as well as to allow for the provision of mass transit service, should future conditions warrant inclusion of such service during the service life of the replacement bridge. Navigational clearance beneath the new bridge is proposed to be a minimum of 135 feet above mean high water (MHW) at the channel margins; similar to the current minimum vertical clearance of the existing bridge. The main piers are proposed to be constructed 900 feet apart, an increase from the existing horizontal separation of 672 feet; thereby moving all bridge structure-related hazards further away from the 500-foot wide federally maintained navigation channel of the Arthur Kill. The elevation of the two bridge towers is proposed to be 272 feet above mean sea level (MSL), as compared to the 248 feet above MSL associated with the existing bridge's truss superstructure.

As a structure over navigable waters of the United States, any replacement bridge requires a U.S. Coast Guard (USCG) Bridge Permit pursuant to the General Bridge Act of 1946 (Title 33 U.S.C. 525–533). Additionally, the bridge permit would be the major federal action in this undertaking. The USCG, a component of the Department of Homeland Security (DHS), by virtue of its regulatory authority over bridges across navigable waters of the United States, is the lead Federal agency for review of potential effects on the human environment, including historic properties, of the Preferred Alternative, three alternative alignments for construction and operation of a replacement bridge, and the No Build alternative. The FEIS was prepared pursuant to the National Environmental Policy Act of 1969 (NEPA), as amended (42 U.S.C. 4321 *et seq.*).

This notice is issued under authority of the Administrative Procedure Act (5 U.S.C. 553(c)); the General Bridge Act of 1946 (Title 33 U.S.C. 525–533); and the National Environmental Policy Act (NEPA) of 1969 (Section 102(2)(c)), as implemented by the Council on Environmental Quality regulations (40 CFR parts 1500–1508), Department of Homeland Security Directive 023–01, and Coast Guard Commandant Instruction M16475.1D.

Given the Findings of Adverse Effect on three historic properties (including the existing Goethals Bridge) and the ongoing development of a Memorandum of Agreement (MOA) as per Section 106 of the National Historic Preservation Act

(NHPA), as amended (16 U.S.C. 470 *et seq.*), this notice also serves as an instrument for integration of the Section 106 Consultation into the NEPA process, as required under 40 CFR 1505.25(a); as well as 36 CFR 800.2(a)(4), 800.3(b) and 800.8. An MOA for the Preferred Alternative will be executed in consultation with the New York and New Jersey State Historic Preservation Offices, and will be completed prior to the anticipated record of decision (ROD) at the culmination of the NEPA process.

In accordance with the applicable regulations of the General Conformity Rule (pursuant to the Clean Air Act; 42 U.S.C. 7401 *et seq.* as amended) and given the findings that the estimated annual emission rates of two pollutants (*i.e.,* CO and $NO_X$) are predicted to exceed the General Conformity applicability thresholds during the GBR Project's construction period, this notice also serves as the instrument to fulfill the 30-day public review requirements for the General Conformity Determination by the USCG.

Absent new information coming to its attention prior to the conclusion of the 30-day period, the Coast Guard intends to complete its ROD and pursue the preferred alternative at that time. The ROD will identify the environmentally-preferred alternative for the proposed action and be announced in the **Federal Register**.

Dated: August 3, 2010.

**Hala Elgaaly,**

*Administrator, Bridge Program, United States Coast Guard.*

[FR Doc. 2010–19630 Filed 8–12–10; 8:45 am]

**BILLING CODE 9110–04–P**

## DEPARTMENT OF HOMELAND SECURITY

### Federal Emergency Management Agency

**[Internal Agency Docket No. FEMA–1931–DR; Docket ID FEMA–2010–0002]**

### Texas; Major Disaster and Related Determinations

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

**ACTION:** Notice.

**SUMMARY:** This is a notice of the Presidential declaration of a major disaster for the State of Texas (FEMA–1931–DR), dated August 3, 2010, and related determinations.

**DATES:** *Effective Date:* August 3, 2010.

**FOR FURTHER INFORMATION CONTACT:** Peggy Miller, Recovery Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–3886.

**SUPPLEMENTARY INFORMATION:** Notice is hereby given that, in a letter dated August 3, 2010, the President issued a major disaster declaration under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the "Stafford Act"), as follows:

I have determined that the damage in certain areas of the State of Texas resulting from Hurricane Alex beginning on June 30, 2010, and continuing, is of sufficient severity and magnitude to warrant a major disaster declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the "Stafford Act"). Therefore, I declare that such a major disaster exists in the State of Texas.

In order to provide Federal assistance, you are hereby authorized to allocate from funds available for these purposes such amounts as you find necessary for Federal disaster assistance and administrative expenses.

You are authorized to provide Individual Assistance and Public Assistance in the designated areas and Hazard Mitigation throughout the State. Consistent with the requirement that Federal assistance is supplemental, any Federal funds provided under the Stafford Act for Public Assistance, Hazard Mitigation, and Other Needs Assistance will be limited to 75 percent of the total eligible costs.

Further, you are authorized to make changes to this declaration for the approved assistance to the extent allowable under the Stafford Act.

The time period prescribed for the implementation of section 310(a), Priority to Certain Applications for Public Facility and Public Housing Assistance, 42 U.S.C. 5153, shall be for a period not to exceed six months after the date of this declaration.

The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, under Executive Order 12148, as amended, Bradley M. Harris, of FEMA is appointed to act as the Federal Coordinating Officer for this major disaster.

The following areas of the State of Texas have been designated as adversely affected by this major disaster:

Cameron, Hidalgo, Jim Hogg, Maverick, Starr, Val Verde, Webb, and Zapata Counties for Individual Assistance.

Cameron, Hidalgo, Jim Hogg, Jim Wells, Maverick, Starr, Webb, Willacy, and Zapata Counties for Public Assistance.

All counties within the State of Texas are eligible to apply for assistance under the Hazard Mitigation Grant Program.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households in Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

**W. Craig Fugate,**

*Administrator, Federal Emergency Management Agency.*

[FR Doc. 2010–20007 Filed 8–12–10; 8:45 am]

**BILLING CODE 9111–23–P**

## DEPARTMENT OF HOMELAND SECURITY

### Federal Emergency Management Agency

**[Docket ID FEMA–2010–0048]**

### Recovery Policy, RP9525.16, Research-Related Equipment and Furnishings

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

**ACTION:** Notice of availability; request for comments.

**SUMMARY:** The Federal Emergency Management Agency (FEMA) is accepting comments on Recovery Policy RP9525.16 *Research-related Equipment and Furnishings.* This is an existing policy that is scheduled for review to ensure that Recovery Directorate policies are consistent with current laws and regulations. This policy identifies the expenses associated with disaster-damaged research-related equipment and furnishings of eligible private nonprofit or public facilities that are eligible for reimbursement under the Public Assistance Program.

**DATES:** Comments must be received by September 13, 2010.

**ADDRESSES:** Comments must be identified by docket ID FEMA–2010–0048 and may be submitted by one of the following methods:

*Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments. Please note that this proposed policy is not a rulemaking and the Federal Rulemaking Portal is being utilized only as a mechanism for receiving comments.

*Mail:* Rules Docket Manager, Office of Chief Counsel, Federal Emergency Management Agency, Room 835, 500 C Street, SW., Washington, DC 20472–3100.

**FOR FURTHER INFORMATION CONTACT:** Deborah Atkinson, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, *Deborah.Atkinson@dhs.gov.*

**SUPPLEMENTARY INFORMATION:**

### I. Public Participation

*Instructions:* All submissions received must include the agency name and docket ID. Regardless of the method used for submitting comments or material, all submissions will be posted, without change, to the Federal eRulemaking Portal at *http://www.regulations.gov,* and will include any personal information you provide. Therefore, submitting this information makes it public. You may wish to read the Privacy Act notice, which can be viewed by clicking on the "Privacy Notice" link in the footer of *www.regulations.gov.*

You may submit your comments and material by the methods specified in the **ADDRESSES** section above. Please submit your comments and any supporting material by only one means to avoid the receipt and review of duplicate submissions.

*Docket:* The proposed policy is available in docket ID FEMA–2010–0048. For access to the docket to read background documents or comments received, go to the Federal eRulemaking Portal at *http://www.regulations.gov* and search for the docket ID. Submitted comments may also be inspected at FEMA, Office of Chief Counsel, Room 835, 500 C Street, SW., Washington, DC 20472.

### II. Background

Eligible Public Assistance applicants conducting active research programs, and that have incurred damages to their facility as a result of a declared major disaster, may be eligible for Public Assistance grant funding for replacement or repair of facilities and the equipment and/or furnishings contained within. The cost of performing research itself is not eligible for Public Assistance grant funding. Because research is not identified as an eligible PNP service under 44 CFR 206.221(e), an active research program must support an eligible function such as an educational or medical function in order for the facilities, equipment and/or furnishings to be eligible. The draft updated policy proposes to include insurance considerations for the applicant that may affect Public Assistance funding.

FEMA seeks comment on the proposed policy, which is available online at *http://www.regulations.gov* in docket ID FEMA–2010–0048. Based on the comments received, FEMA may make appropriate revisions to the proposed policy. Although FEMA will consider any comments received in the drafting of the final policy, FEMA will not provide a response to comments document. When or if FEMA issues a final policy, FEMA will publish a notice of availability in the **Federal Register** and make the final policy available at *http://www.regulations.gov.*

**Authority:** 42 U.S.C. 5121–5207; 44 CFR part 206.

**David J. Kaufman,**

*Director, Office of Policy and Program Analysis, Federal Emergency Management Agency.*

[FR Doc. 2010–20071 Filed 8–12–10; 8:45 am]

**BILLING CODE 9111–23–P**

## DEPARTMENT OF HOMELAND SECURITY

### Federal Emergency Management Agency

**[Docket ID FEMA–2010–0049]**

### Recovery Policy, RP9525.4, Emergency Medical Care and Medical Evacuations

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

**ACTION:** Notice of availability; request for comments.

**SUMMARY:** The Federal Emergency Management Agency (FEMA) is accepting comments on RP9525.4, *Emergency Medical Care and Medical Evacuations.* This is an existing policy that is scheduled for review to ensure that the Recovery Directorate policies are consistent with current laws and regulations. This policy identifies the extraordinary emergency medical care and medical evacuation expenses that are eligible for reimbursement under the Category B, Emergency Protective Measures provision of the Public Assistance Program following an emergency or major disaster declaration.

**DATES:** Comments must be received by September 13, 2010.

**ADDRESSES:** Comments must be identified by docket ID FEMA–2010–0049 and may be submitted by one of the following methods:

*Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments. Please note that this proposed policy is not a rulemaking and the Federal Rulemaking Portal is being utilized only as a mechanism for receiving comments.

*Mail:* Rules Docket Manager, Office of Chief Counsel, Federal Emergency Management Agency, Room 835, 500 C Street, SW., Washington, DC 20472–3100.

**FOR FURTHER INFORMATION CONTACT:** Deborah Atkinson, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, *Deborah.Atkinson@dhs.gov.*

**SUPPLEMENTARY INFORMATION:**

### I. Public Participation

*Instructions:* All submissions received must include the agency name and docket ID. Regardless of the method used for submitting comments or material, all submissions will be posted, without change, to the Federal eRulemaking Portal at *http://www.regulations.gov,* and will include any personal information you provide. Therefore, submitting this information makes it public. You may wish to read the Privacy Act notice, which can be viewed by clicking on the "Privacy Notice" link in the footer of *http://www.regulations.gov.*

You may submit your comments and material by the methods specified in the **ADDRESSES** section above. Please submit your comments and any supporting material by only one means to avoid the receipt and review of duplicate submissions.

*Docket:* The proposed policy is available in docket ID FEMA–2010–0049. For access to the docket to read background documents or comments received, go to the Federal eRulemaking Portal at *http://www.regulations.gov* and search for the docket ID. Submitted comments may also be inspected at FEMA, Office of Chief Counsel, Room 835, 500 C Street, SW., Washington, DC 20472.

### II. Background

Sections 403 and 502 of the Stafford Act authorize Federal agencies to provide assistance, including emergency medical care, essential to meeting immediate threats to life and property resulting from a major disaster or emergency, respectively. When the emergency medical delivery system within the designated disaster area is destroyed or severely compromised by a disaster event, assistance for emergency medical care and medical evacuations of disaster survivors from eligible public and private nonprofit hospitals and custodial care facilities is available to eligible Public Assistance applicants through Public Assistance grants, Direct Federal Assistance (DFA), or a combination of both. When the State and local governments lack the capability to perform or contract for eligible emergency medical care or

medical evacuation work, they may request Direct Federal Assistance from FEMA. Usually, FEMA will task the appropriate Federal agencies via mission assignments to perform the requested emergency work. FEMA may task the Department of Health and Human Services to provide emergency medical assistance when requested by the State.

The draft updated policy proposes that labor costs for personnel activated and deployed to support the performance of eligible emergency medical care and medical evacuations of patients be eligible for reimbursement.

FEMA seeks comment on the proposed policy, which is available online at *http://www.regulations.gov* in docket ID FEMA–2010–0049. Based on the comments received, FEMA may make appropriate revisions to the proposed policy. Although FEMA will consider any comments received in the drafting of the final policy, FEMA will not provide a response to comments document. When or if FEMA issues a final policy, FEMA will publish a notice of availability in the **Federal Register** and make the final policy available at *http://www.regulations.gov*.

**Authority:** 42 U.S.C. 5121–5207; 44 CFR part 206.

**David J. Kaufman,**

*Director, Office of Policy and Program Analysis, Federal Emergency Management Agency.*

[FR Doc. 2010–20069 Filed 8–12–10; 8:45 am]

**BILLING CODE 9111–23–P**

## DEPARTMENT OF HOMELAND SECURITY

### Federal Emergency Management Agency

**[Docket ID FEMA–2010–0050]**

### Recovery Policy, RP9525.7, Labor Costs—Emergency Work

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

**ACTION:** Notice of availability; request for comments.

**SUMMARY:** The Federal Emergency Management Agency (FEMA) is accepting comments on RP9525.7, *Labor Costs—Emergency Work.* This is an existing policy that is scheduled for review to ensure that Recovery Directorate policies are up to date, incorporate lessons learned and are consistent with current laws and regulations. The purpose of this policy is to provide guidance on eligible labor costs for an applicant's permanent, temporary, and contract employees who perform emergency work (Categories A and B).

**DATES:** Comments must be received by September 13, 2010.

**ADDRESSES:** Comments must be identified by docket ID FEMA–2010–0050 and may be submitted by one of the following methods:

*Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments. Please note that this proposed policy is not a rulemaking and the Federal Rulemaking Portal is being utilized only as a mechanism for receiving comments.

*Mail:* Rules Docket Manager, Office of Chief Counsel, Federal Emergency Management Agency, Room 835, 500 C Street, SW., Washington, DC 20472–3100.

**FOR FURTHER INFORMATION CONTACT:** Deborah Atkinson, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, *Deborah.Atkinson@dhs.gov.*

**SUPPLEMENTARY INFORMATION:**

#### I. Public Participation

*Instructions:* All submissions received must include the agency name and docket ID. Regardless of the method used for submitting comments or material, all submissions will be posted, without change, to the Federal eRulemaking Portal at *http://www.regulations.gov,* and will include any personal information you provide. Therefore, submitting this information makes it public. You may wish to read the Privacy Act notice, which can be viewed by clicking on the "Privacy Notice" link in the footer of *http://www.regulations.gov.*

You may submit your comments and material by the methods specified in the **ADDRESSES** section above. Please submit your comments and any supporting material by only one means to avoid the receipt and review of duplicate submissions.

*Docket:* The proposed policy is available in docket ID FEMA–2010–0050. For access to the docket to read background documents or comments received, go to the Federal eRulemaking Portal at *http://www.regulations.gov* and search for the docket ID. Submitted comments may also be inspected at FEMA, Office of Chief Counsel, Room 835, 500 C Street, SW., Washington, DC 20472.

#### II. Background

On October 14, 1993, FEMA published a regulation that made the force account labor straight-time salary for work under Sections 403 and 407 ineligible under the Public Assistance Program. The 1993 regulation did not include emergency work accomplished under Section 502 (Federal Emergency Assistance) of The Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* The ineligibility of straight-time salaries for emergency work under Section 502 is included as a provision of the FEMA–State Agreement.

Labor (straight-time, overtime, and fringe benefits to the extent the benefits were being paid before the disaster) performed under Section 406 (permanent work) of the Stafford Act remains eligible for reimbursement.

In the draft updated policy, FEMA proposes that labor costs for firefighters and other responders when activated and deployed to perform eligible emergency work be eligible for reimbursement. FEMA also proposes to provide assistance for overtime for firefighters for up to 24 hours per day for the first two weeks after a disaster.

FEMA seeks comment on the proposed policy, which is available online at *http://www.regulations.gov* in docket ID FEMA–2010–0050. Based on the comments received, FEMA may make appropriate revisions to the proposed policy. Although FEMA will consider any comments received in the drafting of the final policy, FEMA will not provide a response to comments document. When or if FEMA issues a final policy, FEMA will publish a notice of availability in the **Federal Register** and make the final policy available at *http://www.regulations.gov*.

**Authority:** 42 U.S.C. 5121–5207; 44 CFR part 206.

**David J. Kaufman,**

*Director, Office of Policy and Program Analysis, Federal Emergency Management Agency.*

[FR Doc. 2010–20072 Filed 8–12–10; 8:45 am]

**BILLING CODE 9111–23–P**

## DEPARTMENT OF HOMELAND SECURITY

### Coast Guard

**[Docket No. USCG–2010–0708]**

### Navigation Safety Advisory Council; Vacancies

**AGENCY:** Coast Guard, DHS.

**ACTION:** Request for applications.

**SUMMARY:** The Coast Guard seeks applications for membership on the Navigation Safety Advisory Council (NAVSAC). This Committee advises the Coast Guard on a wide range of issues

related to navigation safety such as the prevention of collisions, rammings, and groundings. This includes, but is not limited to: Inland and International Rules of the Road, navigation regulations and equipment, routing measures, marine information, and aids to navigation systems.

**DATES:** Completed application forms should reach us on or before September 13, 2010.

**ADDRESSES:** A copy of the application form, as well as this notice, is available in our online docket, USCG–2010–0708, at *http://www.regulations.gov.* Or, you may request an application form by writing Mr. Mike Sollosi, Designated Federal Officer (DFO) of NAVSAC, at Commandant (CG–553), U.S. Coast Guard, 2100 Second Street, SW., Stop 7683, Washington, DC 20593–7683; by calling 202–372–1531; or by faxing 202–372–1991. Send your completed application to the DFO at the street address above.

**FOR FURTHER INFORMATION CONTACT:** Mr. Dennis Fahr, Assistant to the DFO of NAVSAC; telephone 202–372–1531, fax 202–372–1991, or e-mail *Dennis.Fahr@uscg.mil.*

**SUPPLEMENTARY INFORMATION:** The Navigation Safety Advisory Council (NAVSAC) ("Committee") is a Federal advisory committee under 5 U.S.C. App. (Pub. L. 92–463). It was established under authority of Section 5 of the Inland Navigational Rules Act of 1980 (33 U.S.C. 2073) establishing the Rules of the Road Advisory Council (RORAC), and the Coast Guard Authorization Act of 1989 (Pub. L. 101–225, December 12, 1989) expanding the scope and changing the name of the Committee to the Navigation Safety Advisory Council. The Committee advises the Coast Guard on matters related to navigation safety such as the prevention of collisions, rammings, and groundings.

The Committee meets at least annually in Washington, DC, or another location selected by the Coast Guard. It may also meet for extraordinary purposes. Its subcommittees and working groups may meet to consider specific problems and issues as required.

We will consider applications for seven positions that expire or become vacant in November 2010. To be eligible, you should have experience in the Inland and International Rules of the Road, aids to navigation, navigational safety equipment, vessel traffic services, and vessel routing measures.

Registered lobbyists are not eligible to serve on Federal Advisory Committees. Registered lobbyists are lobbyists required to comply with provisions contained in the Lobbying Disclosure Act of 1995 (Pub. L. 104–65, as amended).

Each member serves for a term of three years. Individuals appointed as the Committee Chair or Vice-Chair may serve three consecutive three year terms. All members serve at their own expense and receive no salary but will receive reimbursement of travel and per diem expenses from the Federal Government for committee related expenses.

Members will be chosen from persons representing, insofar as practical, the following groups: Two persons from among recognized experts and leaders in organizations having an active interest in the Rules of the Road and vessel and port safety (Group One); three persons representing the interests of owners and operators of vessels, professional mariners, recreational boaters, and the recreational boating industry (Group Two); one person who is a lawyer licensed by a state and who either practices or teaches admiralty and maritime law (Group Three); and, one person who is a Federal or state official with responsibility for vessel and port safety (Group Four).

Group One Members. All Group One members serve as Special Government Employees (SGE). The Group One term "organizations having an active interest in the Rules of the Road and vessel and port safety" includes: Organizations that represent owners and operators of vessels operating on international waters and inland waters of the United States; Federal and state maritime academies; maritime education and training institutions teaching Rules of the Road, navigation, and electronic navigation; and organizations established to facilitate vessel movement and navigational safety.

Group Two Members. All Group Two members serve as members representing the interests of owners and operators of vessels, professional mariners, recreational boaters, and the recreational boating industry and are not Special Government Employees (SGE). Group Two members must be active or retired mariners experienced in applying the Inland and/or International Rules as masters or licensed deck officers of vessels operating on international waters or the inland waters of the United States, or be Federal or state licensed pilots.

Group Three Members. All Group Three members serve as Special Government Employees (SGE). All Group Three members must be lawyers licensed by a state who either practice admiralty and maritime law or who teach admiralty and maritime law.

Group Four Members. Group Four consists of Federal and state officials with responsibility for vessel and port safety. Federal officials who serve as Group Four members serve as Regular Government Employees. The Group Four term "state officials" includes government and agency officials from state, regional and local levels. Those officials who serve as Group Four members serve as members representing the interests of their state, regional, or local government and are not Special Government Employees (SGE).

As stated above, Group One and Group Three members will serve as Special Government Employees (SGE) as defined in section 202(a) of title 18, United States Code. Candidates for appointment as SGEs must complete a Confidential Financial Disclosure Report (OGE Form 450). A completed OGE Form 450 is not releasable to the public except under an order issued by a Federal court or as otherwise provided under the Privacy Act (5 U.S.C. 552a). Only the Designated Agency Ethics Official or the DAEO's designate may release a Confidential Financial Disclosure Report.

The Coast Guard values diversity and recognizes that different characteristics and attributes of persons will enhance the Coast Guard and improve the services we deliver to the public. In support of Coast Guard policy on gender and ethnic nondiscrimination, we encourage qualified men and women and members of all racial and ethnic groups to apply.

If you are interested in applying to become a member of the Committee, send a completed application to Mr. Mike Sollosi, Designated Federal Officer (DFO) of NAVSAC at Commandant (CG–553), U.S. Coast Guard, 2100 Second Street, SW., Stop 7683, Washington, DC 20593–7683; or by fax at 202–372–1991. Send the application in time for it to be received by the DFO on or before September 13, 2010.

A copy of the application form is available in the docket for this notice. To visit our online docket, go to *http://www.regulations.gov,* enter the docket number for this notice (USCG–2010–0708) in the Search box, and click "Go >>."

Dated: August 6, 2010.

**D.A. Goward,**

*Acting Director, Marine Transportation Systems Management.*

[FR Doc. 2010–19974 Filed 8–12–10; 8:45 am]

**BILLING CODE 9110–04–P**

## DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

**[Docket No. FR–5411–N–02]**

### Credit Watch Termination Initiative

**AGENCY:** Office of the Assistant Secretary for Housing—Federal Housing Commissioner, HUD.

**ACTION:** Notice.

**SUMMARY:** This notice advises of the cause and effect of termination of Origination Approval Agreements taken by HUD's Federal Housing Administration (FHA) against HUD-approved mortgagees through the FHA Credit Watch Termination Initiative. This notice includes a list of mortgagees which have had their Origination Approval Agreements terminated.

**FOR FURTHER INFORMATION CONTACT:** The Quality Assurance Division, Office of Housing, Department of Housing and Urban Development, 451 Seventh Street, SW., Room B133–P3214, Washington, DC 20410–8000; telephone (202) 708–2830 (this is not a toll free number). Persons with hearing or speech impairments may access that number through TTY by calling the Federal Information Relay Service at (800) 877–8339.

**SUPPLEMENTARY INFORMATION:** HUD has the authority to address deficiencies in the performance of lenders' loans as provided in HUD's mortgagee approval regulations at 24 CFR 202.3. On May 17, 1999 HUD published a notice (64 FR 26769), on its procedures for terminating Origination Approval Agreements with FHA lenders and placement of FHA lenders on Credit Watch status (an evaluation period). In the May 17, 1999 notice, HUD advised that it would publish in the **Federal Register** a list of mortgagees, which have had their Origination Approval Agreements terminated.

*Termination of Origination Approval Agreement:* Approval of a mortgagee by HUD/FHA to participate in FHA mortgage insurance programs includes an Origination Approval Agreement (Agreement) between HUD and the mortgagee. Under the Agreement, the mortgagee is authorized to originate single-family mortgage loans and submit them to FHA for insurance endorsement. The Agreement may be terminated on the basis of poor performance of FHA-insured mortgage loans originated by the mortgagee. The termination of a mortgagee's Agreement is separate and apart from any action taken by HUD's Mortgagee Review Board under HUD's regulations at 24 CFR part 25.

*Cause:* HUD's regulations permit HUD to terminate the Agreement with any mortgagee having a default and claim rate for loans endorsed within the preceding 24 months that exceeds 200 percent of the default and claim rate within the geographic area served by a HUD field office, and also exceeds the national default and claim rate. For the 42nd review period, HUD is terminating the Agreement of mortgagees whose default and claim rate exceeds both the national rate and 200 percent of the field office rate.

*Effect:* Termination of the Agreement precludes that branch(s) of the mortgagee from originating FHA-insured single-family mortgages within the area of the HUD field office(s) listed in this notice. Mortgagees authorized to purchase, hold, or service FHA insured mortgages may continue to do so.

Loans that closed or were approved before the termination became effective may be submitted for insurance endorsement. Approved loans are (1) those already underwritten and approved by a Direct Endorsement (DE) underwriter employed by an unconditionally approved DE lender and (2) cases covered by a firm commitment issued by HUD. Cases at earlier stages of processing cannot be submitted for insurance by the terminated branch; however, they may be transferred for completion of processing and underwriting to another mortgagee or branch authorized to originate FHA insured mortgages in that area. Mortgagees are obligated to continue to pay existing insurance premiums and meet all other obligations associated with insured mortgages.

A terminated mortgagee may apply for a new Origination Approval Agreement if the mortgagee continues to be an approved mortgagee meeting the requirements of 24 CFR 202.5, 202.6, 202.7, 202.8 or 202.10 and 202.12, if there has been no Origination Approval Agreement for at least six months, and if the Secretary determines that the underlying causes for termination have been remedied. To enable the Secretary to ascertain whether the underlying causes for termination have been remedied, a mortgagee applying for a new Origination Approval Agreement must obtain an independent review of the terminated office's operations as well as its mortgage production, specifically including the FHA-insured mortgages cited in its termination notice. This independent analysis shall identify the underlying cause for the mortgagee's high default and claim rate. The review must be conducted and issued by an independent Certified Public Accountant (CPA) qualified to perform audits under Government Auditing Standards as provided by the Government Accountability Office. The mortgagee must also submit a written corrective action plan to address each of the issues identified in the CPA's report, along with evidence that the plan has been implemented. The application for a new Agreement should be in the form of a letter, accompanied by the CPA's report and corrective action plan. The request should be sent to the Director, Office of Lender Activities and Program Compliance, 451 Seventh Street, SW., Room B133–P3214, Washington, DC 20410–8000 or by courier to 490 L'Enfant Plaza, East, SW., Suite 3214, Washington, DC 20024–8000.

*Action:* The following mortgagees have had their Origination Agreements terminated by HUD:

| Mortgagee name | Mortgagee branch address | HUD office jurisdictions | Termination effective date | Homeownership centers |
|---|---|---|---|---|
| 1st Continental Mortgage, Inc | 2691 E. Oakland Park Blvd, Suite 203, Fort Lauderdale, FL 3306. | Orlando | 4/28/2010 | Atlanta |
| 1st Continental Mortgage, Inc | 2691 E. Oakland Park Blvd, Suite 203, Fort Lauderdale, FL 3306. | Jacksonville | 4/28/2010 | Atlanta |
| 1st Continental Mortgage, Inc | 2691 E. Oakland Park Blvd, Suite 203, Fort Lauderdale, FL 3306. | Birmingham | 4/28/2010 | Atlanta |
| Allied Home Mortgage Capital Corp | 6110 Pinemont Drive, Suite 215, Houston, TX 77092. | Newark | 4/9/2010 | Denver |
| Allied Home Mortgage Capital Corp | 6110 Pinemont Drive, Suite 215, Houston, TX 77092. | Washington, DC | 4/9/2010 | Philadelphia |
| Americare Investment Group, Inc. d/b/a Premier Capital Lending. | 901 W. Bardin Road, Suite 200, Arlington, TX 76017. | Dallas | 2/18/2010 | Denver |

| Mortgagee name | Mortgagee branch address | HUD office jurisdictions | Termination effective date | Homeownership centers |
|---|---|---|---|---|
| Ameristar Mortgage & Financial Services, Inc. | 2468 Old Springville Road, Birmingham, AL 35215. | Birmingham ..... | 4/9/2010 | Denver |
| Community West Mortgage, LLC ..... | 3360 South Wadsworth Blvd., Lakewood, CO 80227. | Denver ..... | 2/18/2010 | Denver |
| Consumers Real Estate Finance Company. | 888 E. Las Olas Blvd., Suite 506, Ft. Lauderdale, FL 33301. | Cleveland ..... | 11/4/2009 | Santa Ana |
| D and R Mortgage Corp. d/b/a Metro Finance. | 29870 Middlebelt Road, Suite 100, Farmington Hills, MI 48334. | Flint ..... | 4/9/2010 | Philadelphia |
| D and R Mortgage Corp. d/b/a Metro Finance. | 29870 Middlebelt Road, Suite 100, Farmington Hills, MI 48334. | Grand Rapids ... | 4/9/2010 | Philadelphia |
| D and R Mortgage Corp. d/b/a Metro Finance. | 29870 Middlebelt Road, Suite 100, Farmington Hills, MI 48334. | Detroit ..... | 4/9/2010 | Philadelphia |
| D and R Mortgage Corp. d/b/a Metro Finance. | 29870 Middlebelt Road, Suite 100, Farmington Hills, MI 48334. | Greensboro ..... | 4/9/2010 | Atlanta |
| Dell Franklin Financial, LLC ..... | 8334 Veterans Highway, Suite 1, Millersville, MD 21108. | Baltimore ..... | 4/9/2010 | Philadelphia |
| Essential Mortgage, Inc ..... | 1701 48th Street, Suite 110, West Des Moines, IA 50266. | Des Moines ..... | 4/30/2010 | Denver |
| First Mortgage Corp ..... | 3230 Fallow Field Drive, Diamond Bar, CA 91765. | Fresno ..... | 2/18/2010 | Santa Ana |
| First Ohio Banc and Lending, Inc ..... | 6100 Rockside Woods Blvd, Suite 1, Independence, OH 44313. | Richmond ..... | 4/30/2010 | Philadelphia |
| Franklin First Financial, Ltd. d/b/a President First Mortgage Bankers. | 445 Broadhollow Road, Suite 215, Melville, NY 11747. | Newark ..... | 4/9/2010 | Philadelphia |
| Franklin First Financial, Ltd. d/b/a President First Mortgage Bankers. | 445 Broadhollow Road, Suite 215, Melville, NY 11747. | Camden ..... | 4/9/2010 | Philadelphia |
| Gateway Funding Diversified Mtg. SRVS LP. | 300 Welsh Road, Building 5, Horsham, PA 19044. | Camden ..... | 2/18/2010 | Philadelphia |
| Gold Star Home Mortgage, LLC ..... | 3007 North Belt Highway, Suite K, Saint Joseph, MO 64506. | Kansas City ..... | 2/18/2010 | Denver |
| Group Two Thousand Real Estate Services d/b/a Empire Financial. | 8010 Haven Avenue, Rancho Cucamonga, CA 91730. | Santa Ana ..... | 4/9/2010 | Santa Ana |
| Interlinc Mortgage, Inc ..... | 19221 Interstate 45, Suite 210, Conroe, TX 77385. | San Antonio ..... | 4/30/2010 | Denver |
| Jagle and Associates, LLC ..... | 900 N. Federal Highway, Suite 240, Boca Raton, FL 33432. | Miami ..... | 2/18/2010 | Atlanta |
| Loanmans Mortgage Store, LLC d/b/a Hamilton Lending. | 602 S. Marina Drive, Gilbert, AZ 85233 .. | Omaha ..... | 4/23/2010 | Denver |
| Morrison Capital Corporation, Inc ..... | 251 S.W. Noel Street, Lees Summit, MO 64063. | Kansas City ..... | 4/30/2010 | Denver |
| Neighborhood Funding, Inc ..... | 8910 N. Dale Mabry Highway, Suite 18, Tampa, FL 33614. | Atlanta ..... | 2/18/2010 | Atlanta |
| Newport Shores Mortgage, Inc ..... | 1526 York Road, Lutherville Timonium, MD 21093. | Greensboro ..... | 2/18/2010 | Atlanta |
| Paraiso, LLC ..... | 5505 Roswell Road, NE., Suite 250, Atlanta, GA 30342. | Atlanta ..... | 2/18/2010 | Atlanta |
| Pinnacle Mortgage Funding, LLC ..... | 250 E. 96th, Suite 125, Indianapolis, IN 46240. | Indianapolis ..... | 2/18/2010 | Denver |
| Premium Capital Funding, LLC d/b/a Topdot Mortgage. | 125 Jericho Turnpike, Suite 400, Jericho, NY 11753–1030. | Jacksonville ..... | 2/18/2010 | Atlanta |
| Premium Capital Funding, LLC d/b/a Topdot Mortgage. | 125 Jericho Turnpike, Suite 400, Jericho, NY 11753–1030. | Atlanta ..... | 2/18/2010 | Atlanta |
| Premium Capital Funding, LLC d/b/a Topdot Mortgage. | 125 Jericho Turnpike, Suite 400, Jericho, NY 11753–1030. | Baltimore ..... | 2/18/2010 | Philadelphia |
| Premium Capital Funding, LLC d/b/a Topdot Mortgage. | 125 Jericho Turnpike, Suite 400, Jericho, NY 11753–1030. | Richmond ..... | 2/18/2010 | Philadelphia |
| Republic State Mortgage ..... | 2715 Bissonnet Street, Suite 102, Houston, TX 77005. | Dallas ..... | 4/30/2010 | Denver |
| Tamayo Financial Services, Inc ..... | 16123 La Grange Road, Orland Park, IL | Chicago ..... | 4/30/2010 | Atlanta |
| The First Fidelity Mortgage Group d/b/a First Fidelity Mortgage. | 9607 Belair Road, Baltimore, MD 21236 | Columbia ..... | 2/18/2010 | Atlanta |
| The First Fidelity Mortgage Group d/b/a First Fidelity Mortgage. | 9607 Belair Road, Baltimore, MD 21236 | Greensboro ..... | 2/18/2010 | Atlanta |
| Weststar Mortgage Group ..... | 2155 Louisiana Boulevard, NE., Albuquerque, NM 87110. | Dallas ..... | 4/28/2010 | Denver |

Dated: July 30, 2010.

**David H. Stevens,**

*Assistant Secretary for Housing—Federal Housing Commissioner.*

[FR Doc. 2010–20068 Filed 8–12–10; 8:45 am]

**BILLING CODE 4210–67–P**

## DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

**[Docket No. FR–5375–N–31]**

### Federal Property Suitable as Facilities To Assist the Homeless

**AGENCY:** Office of the Assistant Secretary for Community Planning and Development, HUD.

**ACTION:** Notice.

**SUMMARY:** This Notice identifies unutilized, underutilized, excess, and surplus Federal property reviewed by HUD for suitability for possible use to assist the homeless.

**DATES:** *Effective Date:* August 13, 2010.

**FOR FURTHER INFORMATION CONTACT:** Kathy Ezzell, Department of Housing and Urban Development, 451 Seventh Street SW., Room 7262, Washington, DC 20410; telephone (202) 708–1234; TTY number for the hearing- and speech-impaired (202) 708–2565, (these telephone numbers are not toll-free), or call the toll-free Title V information line at 800–927–7588.

**SUPPLEMENTARY INFORMATION:** In accordance with the December 12, 1988 court order in *National Coalition for the Homeless* v. *Veterans Administration,* No. 88–2503–OG (D.D.C.), HUD publishes a Notice, on a weekly basis, identifying unutilized, underutilized, excess and surplus Federal buildings and real property that HUD has reviewed for suitability for use to assist the homeless. Today's Notice is for the purpose of announcing that no additional properties have been determined suitable or unsuitable this week.

Dated: August 5, 2010.

**Mark R. Johnston,**

*Deputy Assistant Secretary for Special Needs.*

[FR Doc. 2010–19744 Filed 8–12–10; 8:45 am]

**BILLING CODE 4210–67–P**

## DEPARTMENT OF THE INTERIOR

### Bureau of Land Management

**[LLCO–921000–L13200000–EL0000–LVELC10CC770; COC–74219]**

### Notice of Availability of the Environmental Assessment and Notice of Public Hearing for the Sage Creek Holdings, LLC, Federal Coal Lease Application, COC–74219

**AGENCY:** Bureau of Land Management, Interior.

**ACTION:** Notice of availability and notice of public hearing.

**SUMMARY:** In accordance with the Federal coal management regulations, the Sage Creek Holdings, LLC Federal Coal Lease-By-Application (LBA) Environmental Assessment (EA) is available for public review and comment. The Department of the Interior, Bureau of Land Management (BLM) Colorado State Office will hold a public hearing to receive comments on the EA, Finding of No Significant Impact (FONSI), Fair Market Value (FMV), and Maximum Economic Recovery (MER) of the coal resources for Sage Creek Holdings, LLC LBA COC–74219.

**DATES:** The public hearing will be held at 6 p.m., September 27, 2010. Written comments should be received no later than October 27, 2010.

**ADDRESSES:** The public hearing will be held at the BLM Little Snake Field Office (BLM/LSFO) 455 Emerson St., Craig, Colorado 81625. Written comments should be sent to Jennifer Maiolo at the same address. You may also send Jennifer Maiolo a fax at 970–826–5002 or e-mail *Jennifer_Maiolo@blm.gov.* Copies of the EA, FONSI, and MER report are available at the field office address above.

**FOR FURTHER INFORMATION CONTACT:** Kurt M. Barton at (303) 239–3714, *Kurt_Barton@blm.gov,* or Jennifer Maiolo at (970) 826–5077, *Jennifer_Maiolo@blm.gov.*

**SUPPLEMENTARY INFORMATION:** An LBA was filed by Sage Creek Holdings, LLC. The coal resource to be offered is limited to coal recoverable by underground mining methods. The Federal coal is in the lands outside established coal production regions and may supplement the reserves at the Sage Creek Mine. The Federal coal resources are located in Routt County, Colorado.

**Sixth Principal Meridian**

T. 5 N., R. 87 W.,
Sec. 21, NE1/4NE1/4;
Sec. 22, N1/2, NW1/4SW1/4.

These lands contain 400 acres, more or less.

The EA addresses the cultural, socioeconomic, environmental, and cumulative impacts that would likely result from leasing these coal lands. Two alternatives are addressed in the EA:

*Alternative 1:* (Proposed Action) The tracts would be leased as requested in the application; and

*Alternative 2:* (No Action) The application would be rejected or denied. The Federal coal reserves would be bypassed.

Proprietary data marked as confidential may be submitted to the BLM in response to this solicitation of public comments. Data so marked shall be treated in accordance with the laws and regulations governing the confidentiality of such information. A copy of the comments submitted by the public on the EA, FONSI, FMV, and MER, except those portions identified as proprietary by the author and meeting exemptions stated in the Freedom of Information Act, will be available for public inspection at the BLM Colorado State Office, 2850 Youngfield, Lakewood, Colorado, 80215, during regular business hours (9 a.m. to 4 p.m.) Monday through Friday.

Comments on the EA, FMV, and MER should address, but not necessarily be limited to, the following:

1. The quality and quantity of the coal resources;

2. The method of mining to be employed to obtain MER of the coal, including specifications of the seams to be mined, timing and rate of production, restriction to mining, and the inclusion of the tracts in an existing mining operation; and

3. The FMV appraisal including, but not limited to, the evaluation of the tract as an incremental unit of an existing mine, quality and quantity of the coal resource, selling price of the coal, mining and reclamation costs, net present value discount factors, depreciation and other tax accounting factors, value of the surface estate, the mining method or methods, and any comparable sales data on similar coal lands. The values given above may or may not change as a result of comments received from the public and changes in market conditions between now and when final economic evaluations are completed.

Written comments on the EA, MER, and FMV should be sent to Jennifer Maiolo at the above address prior to close of business October 27, 2010. Substantive comments, whether written

or oral, will receive equal consideration prior to any lease offering. 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.

The forgoing is published in the **Federal Register** pursuant to 43 CFR 3422 and 3425.

**Helen Hankins,**

*State Director.*

[FR Doc. 2010–19918 Filed 8–12–10; 8:45 am]

**BILLING CODE 4310–JB–P**

## DEPARTMENT OF THE INTERIOR

### Bureau of Indian Affairs

### Final Environmental Impact Statement for the Ione Band of Miwok Indians 228.04-Acre Fee-to-Trust Land Transfer and Casino Project, Amador County, California

**AGENCY:** Bureau of Indian Affairs, Interior.

**ACTION:** Notice of availability.

**SUMMARY:** This notice advises the public that the Bureau of Indian Affairs (BIA) as lead agency, with the National Indian Gaming Commission, the U.S. Environmental Protection Agency (USEPA), and the City of Plymouth as cooperating agencies, intends to file a Final Environmental Impact Statement (FEIS) with the USEPA for the approval of a 228.04-acre trust acquisition and casino project in the City of Plymouth and unincorporated Amador County, California, and that the FEIS is now available for public review. The purpose of the proposed action is to establish a land base and help provide for the economic development of the Tribe.

**DATES:** The Record of Decision on the proposed action will be issued on or after September 13, 2010. Comments on the FEIS will be accepted until September 13, 2010.

**ADDRESSES:** Mail or hand carry written comments to Dale Risling, Acting Regional Director, Bureau of Indian Affairs, Pacific Region, 2800 Cottage Way, Sacramento, CA 95825. *See* the **SUPPLEMENTARY INFORMATION** section of this notice for directions on submitting comments.

**FOR FURTHER INFORMATION CONTACT:** John Rydzik, (916) 978–6051.

**SUPPLEMENTARY INFORMATION:** The Tribe has requested that the BIA take into trust 228.04 acres of land, on which the Tribe proposes to construct a casino, hotel, parking areas and other facilities. The proposed project is located partially within the City of Plymouth and partially within unincorporated Amador County, just off State Route 49.

The proposed project includes the development of a 120,000 square-foot gaming facility, a 166,500 square-foot hotel and a 30,000 square-foot event/conference center on the 228.04-acre site. The gaming facility would include a casino floor, food and beverage areas (consisting of a buffet, specialty restaurant, bar, and coffee bar), meeting space, guest support services, offices, and security area. The five-story hotel facility would have 250 guest rooms and the event/conference center would have seating for 1,200 people. Access to the casino would be provided from State Route 49.

Project alternatives considered in the FEIS include: (A) Proposed project; (B) a reduced casino with hotel alternative; (C) a reduced casino alternative; (D) a retail development alternative; and (E) no action. Alternative A has been selected as the Preferred Alternative, as discussed in the FEIS. The alternatives are intended to assist the review of the issues presented, but the Preferred Alternative does not necessarily reflect what the final decision will be, because a complete evaluation of the criteria listed in 25 CFR part 151 may lead to a final decision that selects an alternative other than the Preferred Alternative, including no action, or that selects a variant of the Preferred or another of the alternatives analyzed in the FEIS.

Environmental issues addressed in the FEIS include land resources, water resources, air quality, biological resources, cultural and paleontological resources, socioeconomic conditions, environmental justice, transportation and circulation, land use, public services, noise, hazardous materials, visual resources, cumulative effects, indirect effects, and mitigation measures.

The BIA has afforded other government agencies and the public extensive opportunity to participate in the preparation of this EIS. The BIA published a Notice of Intent (NOI) to prepare the EIS for the proposed action in the **Federal Register** on November 7, 2003 (67 FR 63127). The BIA held a public scoping meeting on November 19, 2003 at the Amador County Fairgrounds in Plymouth. On January 20, 2004, the BIA published a supplemental NOI in the **Federal Register** to announce an additional public scoping hearing that was held on February 4, 2004, at the Amador County Fairgrounds in Plymouth (69 FR 2728). A Notice of Availability for the Draft EIS (DEIS) was published in the **Federal Register** on April 18, 2008 (73 FR 21150) and in the Amador Ledger Dispatch on April 22, and May 20, 2008. The DEIS was available for public comment from April 18 to July 2, 2008. The BIA held a public hearing on the DEIS on May 21, 2008, at the Amador County Fairgrounds in Plymouth.

**Directions for Submitting Comments**

Please include your name, return address, and the caption, "FEIS Comments, Ione Band of Miwok Indians, Land Transfer and Casino Project," on the first page of your written comments.

**Public Availability of the FEIS**

The FEIS will be available for review at the Amador County Library, 530 Sutter Street, Jackson, CA and the Plymouth City Hall, 9426 Main Street, Plymouth, CA. General information for the Amador County Library can be obtained by calling (209) 223–6400. For information on Plymouth City Hall, please call (209) 245–6941. The FEIS is also available on the following Web site: *http://www.ioneeis.com.*

To obtain a compact disk copy of the FEIS, please provide your name and address by voicemail to the person listed in the **FOR FURTHER INFORMATION CONTACT** section of this notice or in writing to John Rydzik at the address listed in the **ADDRESSES** section of this notice. Note, however, individual paper copies of the FEIS will be provided upon payment of applicable printing expenses by the requestor for the number of copies requested.

**Public Comment Availability**

Comments, including names and addresses of respondents, will be available for public review at the mailing address shown in the **ADDRESSES** section, during regular business hours, 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. 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.

**Authority**

This notice is published in accordance with section 1503.1 of the CEQ Regulations (40 CFR parts 1500 through 1508) implementing the procedural requirements of NEPA, as amended (42 U.S.C. 4371 *et seq.*), and the Department of the Interior Manual (516 DM 1–6), and is in the exercise of authority delegated to the Assistant Secretary—Indian Affairs by 209 DM 8.

Dated: July 20, 2010.

**Donald Laverdure,**

*Deputy Assistant Secretary—Indian Affairs.*

[FR Doc. 2010–19906 Filed 8–12–10; 8:45 am]

**BILLING CODE 4310–W7–P**

## DEPARTMENT OF THE INTERIOR

### Bureau of Land Management

**[CO–100–1610 DQ]**

### Notice of Availability for the Little Snake Proposed Resource Management Plan and Final Environmental Impact Statement, Colorado

**AGENCY:** Bureau of Land Management, Interior.

**ACTION:** Notice of availability.

**SUMMARY:** In accordance with the National Environmental Policy Act of 1969 and the Federal Land Policy and Management Act of 1976, the Bureau of Land Management (BLM) has prepared a Proposed Resource Management Plan (RMP)/Final Environmental Impact Statement (EIS) for the Little Snake Field Office.

**DATES:** The BLM planning regulations (43 CFR 1610.5–2) provide that any person who meets the conditions as described in the regulations may protest the BLM's Proposed RMP. A person who meets the conditions and files a protest must file the protest within 30 days of the date that the Environmental Protection Agency publishes its Notice in the **Federal Register**.

**ADDRESSES:** Copies of the Little Snake Proposed RMP/Final EIS have been sent to affected Federal, State, and local government agencies and to interested parties. Copies of the Proposed RMP/Final EIS are also available for public inspection at the following locations:

1. Bureau of Land Management, Colorado State Office, 2850 Youngfield Street, Lakewood, Colorado 80215.

2. Bureau of Land Management, Little Snake Field Office, 455 Emerson Street, Craig, Colorado 81625.

Interested persons may also review the Proposed RMP/Final EIS at the following Web site: *http://www.blm.gov/co/st/en/fo/lsfo/plans/rmp_revision.html.* Upon request, additional copies in limited numbers of both paper and digital formats are available.

All protests must be in writing and mailed to the following addresses:

| Regular mail: | Overnight mail: |
|---|---|
| BLM Director (210), Attention: Brenda Williams, P.O. Box 66538, Washington, DC 20035. | BLM Director (210), Attention: Brenda Williams, 1620 L Street, NW., Suite 1075, Washington, DC 20036. |

**FOR FURTHER INFORMATION CONTACT:** Jeremy Casterson, RMP Project Manager, 455 Emerson Street, Craig, Colorado 81625, 970–826–5071, *Jeremy_Casterson@blm.gov.*

**SUPPLEMENTARY INFORMATION:** The planning area is located in Northwest Colorado in Moffat, Routt, and Rio Blanco counties. The plan will provide a framework to guide subsequent management decisions on approximately 1.3 million acres of BLM-administered public lands and 1.1 million acres of BLM-administered subsurface mineral estate. The Little Snake Field Office area is currently being managed under its 1989 RMP, which has been amended for Oil and Gas Leasing (1991), Black-Footed Ferret Reintroduction (1996), Land Health Standards (1997), and the Emerald Mountain Land Exchange (2007).

The Draft RMP/EIS was made available for public review for a 90-day period beginning in February 2007. After the careful review and consideration of all public comments, changes to Alternative C (the Preferred Alternative as described in the Draft RMP/EIS) have been made to clarify management direction, incorporate as appropriate management direction from other alternatives analyzed, and update the effects analysis.

The Little Snake Field Office has worked extensively with interested and affected publics and cooperating agencies in the development of the Proposed RMP/Final EIS. Cooperating agencies include: Moffat County, the Colorado Department of Natural Resources, the U.S. Fish and Wildlife Service, the City of Steamboat Springs, and the Juniper Water Conservancy District.

During the public review of the Draft RMP/EIS, the Environmental Protection Agency, in consultation with the BLM, identified areas where additional air quality information would augment the existing analysis in the Draft RMP/EIS. As a result, on December 19, 2007, the BLM published its Notice of Intent to prepare additional air quality analysis in the **Federal Register**. On October 10, 2008, the BLM published the Notice of Availability (NOA) in the **Federal Register** for Additional Air Quality Impact Assessment to support the Little Snake Draft RMP/EIS. On November 19, 2008, the BLM published a Notice of Correction to the NOA for additional air quality information in the **Federal Register**. The additional air quality analysis information was released to the public for review and comment. A response to these comments and all other public comments is included in the Proposed RMP/Final EIS.

The Proposed RMP/Final EIS addresses many issues important to the area, including energy development, special designations, transportation and travel management, wildlife habitat and socio-economic values. Four alternatives were analyzed in the Proposed RMP/Final EIS.

Alternative A, the No Action Alternative, would maintain present uses by continuing present management direction and activities. Commodity production and unrestricted off-highway vehicle (OHV) travel would be allowed throughout a majority of the planning area.

Alternative B would allow the greatest extent of resource use within the planning area, while maintaining the basic protection needed to sustain resources. Under this alternative, constraints on commodity production for the protection of sensitive resources would be the least restrictive within the limits defined by law, regulation, and BLM policy. Fewer areas would be limited or closed to OHV use than under the No Action Alternative.

Alternative C, the Proposed RMP, would emphasize multiple resource use in the planning area by protecting sensitive resources, including high priority sagebrush habitat, through performance-based approaches. Commodity production would be balanced with providing protection for wildlife habitat, vegetation, and natural values. More areas would be limited or closed to OHV use than under the No Action Alternative.

Alternative D would allow the greatest extent of resource protection within the planning area, while still allowing resource use. Commodity production would be constrained to protect natural resource values or to accelerate improvement in their condition. Under this alternative there would be an increase in areas closed or limited to OHV use than in Alternative C, the Proposed RMP.

In the Proposed RMP (Alternative C), Irish Canyon is designated as an Area of Critical Environmental Concern (ACEC). The ACEC objective would be to protect sensitive plants, remnant plant communities, cultural and geologic values, and scenic quality. The area would be closed to oil and gas leasing, limited to designated routes for OHVs, withdrawn from locatable mineral entry, managed as Visual Resource Management Class II, and designated as a right-of-way exclusion area unless associated with valid existing rights.

ACEC proposals that were determined to meet the relevance and importance criteria, but not designated as ACECs in the Proposed RMP because they were deemed not warranted for special management attention include: Lookout Mountain, Limestone Ridge, Cross Mountain Canyon, White-tailed Prairie Dog habitat, and 11 additional areas proposed to protect sensitive plants and plant communities (Cold Desert Shrublands occurrences, Gibben's beardtongue occurrences, Bull Canyon, G Gap, Little Juniper Canyon, the Bassett Spring, No Name Spring, Pot Creek, Whiskey Springs, Willow Spring, and Deception Creek).

Instructions for filing a protest with the Director of the BLM regarding the Proposed RMP/Final EIS may be found in the Dear Reader letter of the Little Snake Proposed RMP/Final EIS and at 43 CFR 1610.5–2. E-mail and faxed protests will not be considered as valid protests unless the protesting party also provides the original letter by either regular or overnight mail postmarked by the close of the protest period. Under these conditions, the BLM will consider the e-mail or faxed protest as an advance copy and it will receive full consideration. If you wish to provide the BLM with such advance notification, please direct faxed protests to the attention of Brenda Hudgens-Williams, BLM protest coordinator, at (202) 912–7212, and e-mails to *Brenda_Hudgens-Williams@blm.gov.*

All protests, including the follow-up letter (if e-mailing or faxing) must be in writing and mailed to the appropriate address, as set forth in the **ADDRESSES** section above.

Before including your phone number, e-mail address, or other personal identifying information in your protest, you should be aware that your entire protest—including your personal identifying information—may be made publicly available at any time. While you can ask us in your protest to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

**Helen M. Hankins,**

*State Director.*

**Authority:** 40 CFR 1506.6, 43 CFR 1610.2 and 1610–1.

[FR Doc. 2010–19917 Filed 8–12–10; 8:45 am]

**BILLING CODE 4310–JB–P**

## DEPARTMENT OF THE INTERIOR

### Bureau of Land Management

**[CACA–49575 L51010000 FX0000 LVRWB09B3220 LLCAD08000]**

### Notice of Availability of the Final Environmental Impact Statement for the Chevron Energy Solutions Lucerne Valley Solar Project, California and the Proposed Amendment to the California Desert Conservation Area Plan

**AGENCY:** Bureau of Land Management, Interior.

**ACTION:** Notice of Availability.

**SUMMARY:** In accordance with the National Environmental Policy Act of 1969, as amended, and the Federal Land Policy and Management Act of 1976, as amended, the Bureau of Land Management (BLM) has prepared a Proposed California Desert Conservation Area Plan (CDCA Plan) Amendment/Final Environmental Impact Statement (EIS) for the Chevron Energy Solutions Lucerne Valley Solar Project and by this notice is announcing its availability.

**DATES:** The publication of the Environmental Protection Agency's (EPA) Notice of Availability of this Final EIS in the **Federal Register** initiates a 30-day public comment period. Submit comments to Greg Thomsen by mail 22835 Calle San Juan de Los Lagos, Moreno Valley, California 92553; or e-mail *lucernesolar@blm.gov.* In addition, BLM planning regulations state that any person who meets the conditions as described in the regulations may protest the BLM's Proposed CDCA Plan Amendment. A person who meets the conditions and files a protest must do so within 30 days of the date that the Environmental Protection Agency publishes its notice of availability in the **Federal Register.**

**ADDRESSES:** Interested persons may also review the Proposed CDCA Plan Amendment/Final EIS at the following Web site: *http://www.blm.gov/ca/st/en/prog/energy/fasttrack.html.* All protests must be in writing and mailed to one of the following addresses:

| Regular mail | Overnight mail |
|---|---|
| BLM Director (210), Attention: Brenda Williams, P.O. Box 66538, Washington, DC 20035. | BLM Director (210), Attention: Brenda Williams, 1620 L Street, NW., Suite 1075, Washington, DC 20036. |

**FOR FURTHER INFORMATION CONTACT:** Greg Thomsen; telephone (951) 697–5237; address 22835 Calle San Juan de Los Lagos, Moreno Valley, California 92553; e-mail *lucernesolar@blm.gov.*

**SUPPLEMENTARY INFORMATION:** Chevron Energy Solutions (CES) has requested a 516 acre right-of-way (ROW) authorization from the BLM for the CES Lucerne Valley Solar Project, consisting of construction and operation of a 45 megawatt (MW) solar photovoltaic project which would connect to an existing Southern California Edison 33 kilovolt (kV) distribution system. The proposed project would include a new switchyard, a control and maintenance building, and a parking area. Pursuant to BLM's CDCA Plan (1980, as amended), sites associated with power generation or transmission not identified in the CDCA Plan will be considered through the plan amendment process. The Final EIS considers five alternatives, including the project as proposed by the applicant, the no action alternative; a no project alternative with a plan amendment that classifies the lands as either "suitable" or "unsuitable" for solar energy development; a smaller 30 MW facility of 238 acres; and the preferred alternative: a modified design of the proposed project that addresses some of the environmental concerns. Copies of the proposed CDCA Plan Amendment/Final EIS are available for public inspection at 22835 Calle San Juan de Los Lagos, Moreno Valley, California. Comments on the Draft CDCA Plan Amendment/Draft EIS received from the

public and internal BLM review were considered and incorporated as appropriate into Final EIS. Public comments resulted in the addition of clarifying text, but did not significantly change any of the proposed decisions.

Instructions for filing a protest with the Director of the BLM regarding the Proposed CDCA Plan Amendment/Final EIS may be found in the "Dear Reader Letter" of the CES Lucerne Valley Solar Project Final EIS and Proposed CDCA Plan Amendment and at 43 CFR 1610.5–2. Protests must be received by the Director by the close of the protest period to be accepted as valid. Protests that are postmarked by the close of the protest period, but received by the Director after the close of the protest period, will only be accepted as valid if the protesting party also provides a faxed or e-mailed advance copy before the close of the protest period. To provide the BLM with such advance notification, please fax protests to the attention of Brenda Hudgens-Williams, BLM protest coordinator at 202–912–7129, or e-mail protests to: *Brenda_Hudgens-Williams@blm.gov.*

All protests, including the follow-up letter to e-mails or faxes, must be in writing and mailed to the appropriate address, as set forth in the **ADDRESSES** section above.

Before including your phone number, e-mail address, or other personal identifying information in your protest, you should be aware that your entire protest—including your personal identifying information—may be made publicly available at any time. While you can ask us in your protest to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

**Thomas Pogacnik,**

*Deputy State Director, Natural Resources.*

**Authority:** 40 CFR 1506.6 and 1506.10 and 43 CFR 1610.2 and 1610.5.

[FR Doc. 2010–19916 Filed 8–12–10; 8:45 am]

**BILLING CODE 4310–40–P**

## DEPARTMENT OF THE INTERIOR

## Fish and Wildlife Service

**[FWS–R1–R–2010–N111; 1265–0000–10137]**

## Lewis and Clark National Wildlife Refuge and the Julia Butler Hansen Refuge for the Columbian White-tailed Deer

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Notice of availability: final comprehensive conservation plan and environmental impact statement.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service), announce the availability of the final comprehensive conservation plan and environmental impact statement (final CCP/EIS) for the Lewis and Clark National Wildlife Refuge and the Julia Butler Hansen Refuge for the Columbian White-tailed Deer (refuge or collectively, refuges). These refuges are located in Wahkiakum County, Washington, and Clatsop and Columbia Counties, Oregon. In the final CCP/EIS, we describe how we propose to manage these refuges for the next 15 years.

**DATES:** We will sign a record of decision no sooner than 30 days after publication of this notice.

**ADDRESSES:** You may view or request copies of the final CCP/EIS by any of the following methods. You may request a printed copy or CD–ROM.

*Agency Web Sites:* Download a copy of the document at *http://www.fws.gov/lc/* or *http://www.fws.gov/jbh/.*

*E-mail: FW1Planning@fws.gov.* Include "Lewis and Clark and Julia Butler Hansen Final CCP/EIS" in the subject line of the message.

*Mail:* Willapa National Wildlife Refuge Complex, 3888 SR 101, Ilwaco, WA 98624.

*Fax:* (360) 484–3109.

*In person viewing:* Copies of the final CCP/EIS may be viewed at the Willapa National Wildlife Refuge Complex, 3888 SR 101, Ilwaco, WA 98624; and the Julia Butler Hansen Refuge for the Columbian White-tailed Deer, 46 Steamboat Slough Road, Cathlamet, WA 98612.

*Local Libraries*: The final documents are available for review at the libraries listed under **SUPPLEMENTARY INFORMATION.**

**FOR FURTHER INFORMATION CONTACT:** Charlie Stenvall, (360) 484–3482.

**SUPPLEMENTARY INFORMATION:**

### Introduction

With this notice, we announce the availability of the final CCP/EIS for the refuges. We started this process through a notice in the **Federal Register** (71 FR 55214; September 21, 2006). We released the draft CCP/EIS to the public, announcing and requesting comments in a notice of availability in the **Federal Register** (75 FR 6694; February 10, 2010).

The Lewis and Clark National Wildlife Refuge was established in 1972 to preserve vital fish and wildlife habitat of the Columbia River estuary. The refuge's riverine islands encompass a variety of habitat types, from tidal sand flats and marshes to forested swamps. This combination of habitats supports large numbers of waterfowl, gulls, terns, wading birds, shorebirds, and a variety of raptors and songbirds. The Lewis and Clark Refuge islands are only accessible by boat and include 18 named islands, a number of unnamed islands, and marshes stretching over 25 miles of the Columbia River.

The Julia Butler Hansen Refuge for the Columbian White-tailed Deer was established in 1971 to protect and manage the endangered Columbian white-tailed deer. The refuge contains over 6,000 acres of pastures, forested tidal swamps, brushy woodlots, marshes, and sloughs along the Columbia River.

The final CCP/EIS was completed in accordance with National Environmental Policy Act (40 CFR 1506.6(b)) and National Wildlife Refuge System Administration Act of 1966 (16 U.S.C. 668dd–668ee) requirements. We completed a thorough analysis of impacts on the human environment, which we included in the final EIS for the CCP. The CCP will guide us in managing and administering the refuges for the next 15 years.

We analyzed two alternatives for future management of the Lewis and Clark National Wildlife Refuge and three alternatives for future management of the Julia Butler Hansen Refuge for the Columbian White-tailed Deer. Alternative 2 is our preferred alternative for both refuges, and is the foundation for the CCP. We addressed public comments on the draft CCP/EIS in the final CCP/EIS.

### Background

*The CCP Process*

The National Wildlife Refuge System Administration Act of 1966 (16 U.S.C. 668dd–668ee) (Refuge Administration Act), as amended by the National Wildlife Refuge System Improvement Act of 1997, requires us to develop a CCP for each national wildlife refuge. The purpose for developing a CCP is to provide refuge managers with a 15-year plan for achieving refuge purposes and contributing toward the mission of the National Wildlife Refuge System, consistent with sound principles of fish and wildlife management, conservation, legal mandates, and our policies. In addition to outlining broad management direction for conserving wildlife and their habitats, CCPs identify wildlife-dependent recreational opportunities available to the public, including opportunities for hunting, fishing, wildlife observation and photography,

and environmental education and interpretation. We will review and update the CCP at least every 15 years in accordance with the Refuge Administration Act.

**CCP Alternatives We Are Considering**

*Lewis and Clark Refuge Alternative 1*

No changes to the current refuge management programs would occur under Alternative 1. Habitat management would consist of monitoring refuge islands and treating invasive plant infestations as funding allows. Refuge staff members would continue to protect and maintain wintering and foraging habitat for migratory waterfowl, and nesting and roosting habitat for bald eagles. Existing public uses, including hunting, fishing, and wildlife observation and photography, would continue at current levels.

*Lewis and Clark Refuge Alternative 2*

Under Alternative 2 (the preferred alternative), current wildlife and habitat management would be maintained. Key refuge enhancements would include establishing or expanding partnerships for managing invasive species, recruiting graduate students to conduct wildlife and habitat research, and exploring options for managing Oregon Department of State Lands property within the approved refuge boundary. The refuge would also expand opportunities for wildlife observation and photography, study potential wilderness lands, and work with partners to ensure that dredge-spoil islands provide benefits for wildlife.

*Julia Butler Hansen Refuge Alternative 1*

Under Alternative 1, no changes to the current refuge management programs would occur at Julia Butler Hansen Refuge. We would continue to maintain and protect habitats, establish early successional riparian forest habitat, maintain predator management January through April, and continue wildlife-dependent public use programs.

*Julia Butler Hansen Refuge Alternative 2*

Refuge management changes under Alternative 2 (the preferred alternative) would include opening Crims and Price Islands to waterfowl hunting, closing portions of refuge lands along the lower Elochoman River to waterfowl hunting for public safety purposes, studying potential wilderness lands, developing two trails, and improving interpretive media. To achieve the recovery goals for the Columbian white-tailed deer, predator management would take place on an as-needed basis year–round under this alternative. We would also expand the Columbian white-tailed deer population by establishing an experimental population upriver.

*Julia Butler Hansen Refuge Alternative 3*

Refuge management changes under Alternative 3 would include opening Crims and Price Islands to waterfowl hunting, closing portions of refuge lands along the lower Elochoman River to waterfowl hunting for public safety purposes, studying potential wilderness lands, developing a bicycling and hiking trail, installing interpretive panels, and developing curriculum for refuge study sites. To achieve the recovery goals for the Columbian white-tailed deer, predator management would take place January through August under this alternative.

**Comments**

We solicited comments on the Draft CCP/EIS from February 10, 2010, to April 12, 2010. Public comments were considered and addressed in the final CCP/EIS, resulting in only minor changes to the final document.

**Public Availability of Documents**

In addition to the methods in **ADDRESSES**, you can view documents at the following libraries:

- Blanch Bradley Library, 100 Main Street, Cathlamet, WA 98612.
- Astoria Public Library, 450 10th Street, Astoria, OR 97103.
- Clatskanie Library District, 11 Lillich Street, Clatskanie, OR 97016.
- Ilwaco Timberline Regional Library, 158 1st Ave. Ilwaco, WA 98624.
- Longview Public Library, 1600 Louisiana Street, Longview, WA 98632.
- Fort Vancouver Regional Library, 1007 E. Mill Plain Blvd., Vancouver WA 98663.

Dated: June 10, 2010.

**Carolyn A. Bohan,**

*Acting Regional Director, Region 1, Portland, Oregon.*

[FR Doc. 2010–19803 Filed 8–12–10; 8:45 am]

**BILLING CODE 4310–55–P**

## DEPARTMENT OF THE INTERIOR

### Bureau of Land Management

**[L51010000.FX0000 LVRWB10B4040 LLCAC05000]**

### Notice of Intent To Prepare an Environmental Impact Statement for the Walker Ridge Wind Project, Lake and Colusa Counties, CA

**AGENCY:** Bureau of Land Management, Interior.

**ACTION:** Notice of Intent.

**SUMMARY:** In compliance with the National Environmental Policy Act of 1969, as amended (NEPA), and the Federal Land Policy and Management Act of 1976, as amended, the Bureau of Land Management (BLM) Ukiah Field Office, Ukiah, California, intends to prepare an Environmental Impact Statement (EIS) and by this notice is announcing the beginning of the scoping process to solicit public comments and identify issues.

**DATES:** This notice initiates the public scoping process for the EIS. Comments on issues may be submitted in writing until September 13, 2010. The date(s) and location(s) of any scoping meetings will be announced at least 15 days in advance through local media, newspapers, and the BLM Web site at: *http://www.blm.gov/ca/st/en/fo/ukiah.html.* In order to be considered in the Draft EIS, all comments must be received prior to the close of the scoping period or 15 days after the last public meeting, whichever is later. We will provide additional opportunities for public participation upon publication of the Draft EIS.

**ADDRESSES:** You may submit comments related to the Walker Ridge Wind Project by any of the following methods:

- Web site: *http://www.blm.gov/ca/st/en/fo/ukiah.html.*
- E-mail: *ukiahwindeis@ca.blm.gov.*
- Fax: (707) 468–4027.
- Mail: BLM Ukiah Field Office, Attention: Rich Burns, 2550 North State Street, Ukiah, California 95482.

Documents pertinent to this proposal may be examined at the Ukiah Field Office.

**FOR FURTHER INFORMATION CONTACT:** For further information and/or to have your name added to our mailing list, contact Bethney Lefebvre, telephone (707) 468–4000; address Ukiah Field Office, 2550 North State Street, Ukiah, California 95482; e-mail: *ukiahwindeis@ca.blm.gov.*

**SUPPLEMENTARY INFORMATION:** The applicant, AltaGas Renewable Energy Pacific, Inc., has requested a right-of-way (ROW) to construct and operate a 67 megawatt (MW) wind energy project with an interconnection to the Pacific Gas and Electric 115-kilovolt (kV) distribution system. The proposed action would include up to 42 wind turbine generators, an underground electrical collection system, a substation, a 115-kV overhead transmission line, an interconnect station, an operations and maintenance building, access roads, and a temporary laydown area. The EIS will analyze the site-specific impacts to the environment from the project if the ROW is granted.

The project would be built on about 500 acres within the 8,157.35 acre ROW on Federal land under the jurisdiction of the BLM within the Ukiah Field Office area.

The purpose of the public scoping process is to determine relevant issues that will influence the scope of the environmental analysis, including alternatives, and guide the process for developing the EIS. At present, the BLM has identified the following preliminary issues: Social and economic impacts, including impacts to the public from traffic; ground and surface water quantity and quality impacts; plant and animal species impacts, including impacts to special status species; cultural resources impacts; visual resource impacts; and impacts to lands with wilderness characteristics.

The BLM will use and coordinate the NEPA commenting process to satisfy the public involvement process for Section 106 of the National Historic Preservation Act (16 U.S.C. 470f) as provided for in 36 CFR 800.2(d)(3). Native American Tribal consultations will be conducted, and Tribal concerns, including impacts on Indian trust assets, will be given due consideration. Federal, state, and local agencies, along with other stakeholders that may be interested or affected by the BLM's decision on this project, are invited to participate in the scoping process. If eligible, the agencies may request or be requested by the BLM to participate as a cooperating agency.

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.

**Authority:** 40 CFR 1501.7.

**Thomas Pogacnik,**

*Deputy State Director, Natural Resources.*

[FR Doc. 2010–19958 Filed 8–12–10; 8:45 am]

**BILLING CODE 4310–40–P**

## DEPARTMENT OF THE INTERIOR

### Bureau of Reclamation

### Northwest Area Water Supply Project, North Dakota

**AGENCY:** Bureau of Reclamation, Interior.

**ACTION:** Notice of intent to prepare a supplemental environmental impact statement.

**SUMMARY:** The Bureau of Reclamation (Reclamation) is commencing work under the National Environmental Policy Act of 1969 (NEPA) on a Supplemental Environmental Impact Statement (EIS) for the Northwest Area Water Supply Project (NAWS Project), a Federal reclamation project, located in North Dakota. A Final EIS and Record of Decision (ROD) for the NAWS Project were previously completed in December 2008 and January 2009, respectively. The Final EIS and ROD were challenged in U.S. District Court. A subsequent court order found the Final EIS to be insufficient in two areas. Therefore a supplement is being prepared to address those areas in more detail and any others that interested parties or the public may identify warranting additional analysis, as well as to re-examine and update, to the extent necessary, prior NEPA analysis that has been completed in connection with the NAWS Project to date. This notice is being published to inform the public about the preparation of the Supplemental EIS and to initiate a formal scoping period for obtaining public comment. The scoping period for the supplement will conclude 60 days following publication of this notice. Public meetings are scheduled as part of the scoping process.

Reclamation invites all interested parties to submit written comments or suggestions during the scoping period related to significant issues, environmental impacts, and reasonable alternatives to the proposed action. Reclamation will provide a separate project information document that describes the Supplemental EIS actions and how the public can become involved and participate. The project information document will provide details relative to the Supplemental EIS and is intended to assist the public in providing comments during the scoping period.

**DATES:** Public scoping meetings will be held during September 2010. See the Supplemental Information section for dates and locations of these meetings. Individuals who want to receive the additional project information document should contact Reclamation within 15 days following publication of this notice. Written or e-mailed comments on the scope of issues and alternatives should be received by October 12, 2010. Comments received after that date will be considered to the extent practical.

**ADDRESSES:** Written comments should be submitted to: Bureau of Reclamation, Dakotas Area Office, Attention: Alicia Waters, P.O. Box 1017, Bismarck, ND 58502.

**FOR FURTHER INFORMATION CONTACT:** Alicia Waters, Northwest Area Water Supply Project EIS, Bureau of Reclamation, Dakotas Area Office, P.O. Box 1017, Bismarck, ND 58502; Telephone: (701) 221–1206; or facsimile (701) 250–4326. You may submit e-mail to *NAWS_EIS@usbr.gov.*

**SUPPLEMENTARY INFORMATION:**

#### Dates of Public Scoping Meetings

- September 13, 2010, 6:30 p.m.–8:30 p.m., Bottineau, ND.
- September 14, 2010, 6:30 p.m.–8:30 p.m., Minot, ND.
- September 15, 2010, 6:30 p.m.–8:30 p.m., New Town, ND.
- September 16, 2010, 6:30 p.m.–8:30 p.m., Bismarck, ND.

#### Locations of Public Scoping Meetings

- MSU–Bottineau, Nelson Science Center Room 125, 105 Simrall Boulevard, Bottineau, ND.
- Sleep Inn—Inn and Suites, North Convention Center, 2400 10th Street, NW., Minot, ND.
- 4 Bears Casino, Mandan Room, 202 Frontage Room, New Town, ND.
- Best Western Doublewood Inn, Congress Room, 1400 Interchange Avenue, Bismarck, ND.

The meeting facilities are physically accessible to people with disabilities. People needing special assistance to attend and/or participate in the public meetings should contact Patience Hurley at 701–221–1204 as soon as possible. To allow sufficient time to process special requests, please call no later than one week before the public meeting of interest.

#### Background

The Garrison Diversion Unit's Municipal, Rural and Industrial Water Supply (MR&I) program was authorized by the U.S. Congress on May 12, 1986, through the Garrison Diversion Unit Reformulation Act of 1986. This act authorized the appropriation of $200 million of Federal funds for the planning and construction of water supply facilities throughout North Dakota. The NAWS Project is being constructed under this authorization.

The NAWS Project is designed as a bulk water distribution system that will service local communities and rural water systems in 10 counties in northwestern North Dakota including the community of Minot. The NAWS Project would convey water from Lake

Sakakawea, in the Missouri River Basin in North Dakota, through a buried pipeline to Minot, surrounding communities and rural water systems in the Hudson Bay Basin. The Project would include a treatment plant in the Missouri River Basin to disinfect the water prior to it being delivered through the pipeline into the Hudson Bay Basin. An Environmental Assessment (EA) and Finding of No Significant Impact (FONSI) were completed for the Project in 2001.

Construction on the project began in April 2002. In October 2002, the Province of Manitoba, Canada, filed a legal challenge in U.S. District Court in Washington, DC to compel the Department of the Interior to complete an EIS on the project. A court order dated February 3, 2005, remanded the case to Reclamation for completion of additional environmental analysis, but allowed construction to proceed on project features that would not preclude a future decision on water treatment to reduce the risk of transferring invasive species.

Project construction has continued as allowed by the court. Between 2002 and 2010, the entire 45 miles of main transmission pipeline for NAWS, from Lake Sakakawea to Minot, was completed along with several segments of the distribution system. The City of Minot is temporarily serving water to several communities and rural water systems with water from the city's ground water wells. This interim water supply is provided by the city through temporary water service contracts which expire in 2018 or sooner depending on the reliability of the water source.

Recently completed features of the NAWS Project include a high service pump station and 2 million gallon storage reservoir in Minot. Most of the other segments of the distribution system are being designed or constructed. The court also allowed the State of North Dakota to initiate design work on upgrades to the existing Minot water treatment plant which are necessary for the city to continue delivering the interim water supply to adjacent communities.

In March 2006, Reclamation initiated an EIS focused on different water treatment methods for the water from Lake Sakakawea. The analysis focused on environmental impacts that could occur due to pipeline leaks and failure of the water treatment systems. The Draft EIS was published on December 21, 2007 and the Final EIS on December 5, 2008 (documents available electronically at *http://www.usbr.gov/gp/dkao/*). Reclamation signed a Record of Decision (ROD) on January 15, 2009, selecting an alternative using chlorination and ultraviolet radiation to disinfect the water before it is delivered into the Hudson Bay Basin. Final treatment to drinking water standards would occur at the existing water treatment plant in Minot.

In February 2009, the Department of Justice notified the court that Reclamation had completed the Final EIS and ROD. Shortly thereafter, the Province of Manitoba filed a supplemental complaint contending the Final EIS was insufficient. Additionally, the State of Missouri filed a complaint against the Department of the Interior and the U.S. Army Corps of Engineers in the same District Court in Washington, DC. The State of Missouri alleged that Reclamation's Final EIS was insufficient and that the Corps of Engineers failed to complete a separate National Environmental Policy Act assessment for the NAWS Project. The court combined the Missouri suit with the Manitoba suit. On March 5, 2010, the court issued an order in favor of the Province of Manitoba and the State of Missouri. The case was remanded to Reclamation and the injunction imposed by the April 15, 2005, order remains in effect.

The Court found the EIS inadequately examined: (1) Cumulative impacts of water withdrawals on Lake Sakakawea and the Missouri River, and (2) consequences of transferring potentially invasive species into the Hudson Bay Basin.

**Purpose of the Proposed Action**

The purpose of the proposed action is to provide a reliable source of high quality treated water to northwestern North Dakota for MR&I uses.

**Need for the Proposed Action**

The NAWS Project is needed: (1) To provide high quality treated water because northwestern North Dakota has experienced water supply problems for many years, (2) to replace poor quality groundwater sources presently used for MR&I purposes, and (3) because the surface water supplies within the service area are insufficient from both a quality and quantity standpoint. This Supplemental EIS is needed to comply with the Court order of March 5, 2010, and fully satisfy NEPA. Reclamation will conduct additional analyses to address the Court's order regarding the consequences of transferring potentially invasive species into the Hudson Bay Basin and the cumulative impacts of water withdrawals on Lake Sakakawea and the Missouri River, in addition to re-examining and updating all prior NEPA analysis that has been completed in connection with the NAWS Project to date.

**The Proposed Action**

Reclamation proposes to complete construction of the NAWS Project, including construction of a biota water treatment plant, to treat the source water from Lake Sakakawea before it is transported into the Hudson Bay drainage. As part of this proposed action, Reclamation would implement construction methods and operational measures to further reduce the risk of invasive species transfer that may occur as a result of an interruption in the treatment process and breach in the buried pipeline to the Minot water treatment plant.

**Scope of the Proposed Action**

The geographic scope of the Supplemental EIS will include areas and resources within the Missouri River Basin and Hudson Bay Basin that may be affected by water diversion and delivery for NAWS project purposes. This includes, but is not necessarily limited to: (1) The sites of NAWS Project features and facilities; (2) lands and waters that receive NAWS Project MR&I water supplies, including downstream areas in the Hudson Bay Basin; and (3) the Missouri River from Lake Sakakawea to its confluence with the Mississippi River.

The Supplemental EIS will review, and update, if necessary, the prior Environmental Assessment and Environmental Impact Statement. This Supplemental EIS will further evaluate the consequences of transferring potentially invasive species to the Hudson Bay Basin and the cumulative effects of water withdrawals from the Missouri River. Additional issues or concerns identified in the scoping process will be considered by Reclamation and evaluated in the Supplemental EIS as appropriate. Identification of known methods and technologies that can be used to assess potential consequences to resources will be considered as well.

**Summary**

Reclamation is preparing a Supplemental EIS to address the relevant issues related to final construction and operation of the NAWS Project. We are seeking comment from the public on the development of reasonable alternatives to the proposed action, information relative to new water treatment processes that could be considered, methods for evaluating the risks and potential consequences which may be associated with the proposed action, and concerns relative to the

environmental effects that should be described in the supplement. We also seek identification of any issues in prior NEPA analyses for the NAWS Project to date that should be updated, and the identification of any other issues that should be addressed by the Supplemental EIS.

**Public Disclosure Statement**

Before including your name, address, telephone 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.

**John F. Soucy,**

*Assistant Regional Director, Great Plains Region, Bureau of Reclamation.*

[FR Doc. 2010–19922 Filed 8–12–10; 8:45 am]

**BILLING CODE 4310–MN–P**

## DEPARTMENT OF THE INTERIOR

### National Park Service

### Landmarks Committee of the National Park System Advisory Board Meeting

**AGENCY:** National Park Service, Interior.

**ACTION:** Notice of meeting.

**SUMMARY:** Notice is hereby given in accordance with the Federal Advisory Committee Act [5 U.S.C. Appendix (1988)], that a meeting of the Landmarks Committee of the National Park System Advisory Board will be held beginning at 12:30 p.m. on November 2, 2010, at the following location. The meeting will continue beginning at 9 a.m. on November 3, 2010 and November 4, 2010.

**DATES:** November 2, 2010 at 12:30 p.m. and November 3 and November 4, 2010 at 9 a.m.

*Location:* The 2nd Floor Board Room of the National Trust for Historic Preservation, 1785 Massachusetts Avenue, NW., Washington, DC 20036.

**FOR FURTHER INFORMATION CONTACT:** Patricia Henry, National Historic Landmarks Program, National Park Service; 1849 C Street, NW., (2280); Washington, DC 20240; Telephone (202) 354–2216; E-mail *Patty_Henry@nps.gov.*

**SUPPLEMENTARY INFORMATION:** The purpose of the meeting of the Landmarks Committee of the National Park System Advisory Board is to evaluate nominations of historic properties in order to advise the National Park System Advisory Board of the qualifications of each property being proposed for National Historic Landmark (NHL) designation, and to make recommendations regarding the possible designation of those properties as National Historic Landmarks to the National Park System Advisory Board at its subsequent meeting at a place and time to be determined. The Committee also makes recommendations to the National Park System Advisory Board regarding amendments to existing designations and proposals for withdrawal of designation. The members of the Landmarks Committee are:

Mr. Ronald James, Chair; Dr. James M. Allan; Dr. Cary Carson; Dr. Darlene Clark Hine; Mr. Luis Hoyos, AIA; Dr. Barbara J. Mills; Dr. William J. Murtagh; Dr. Franklin Odo; Dr. William D. Seale; Dr. Michael E. Stevens.

The meeting will be open to the public. Pursuant to 36 CFR part 65, any member of the public may file, for consideration by the National Park System Advisory Board, written comments concerning the National Historic Landmarks nominations, amendments to existing designations, or proposals for withdrawal of designation.

Comments should be submitted to J. Paul Loether, Chief, National Register of Historic Places and National Historic Landmarks Program, National Park Service; 1849 C Street, NW., (2280); Washington, DC 20240; E-mail *Paul_Loether@nps.gov.*

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.

The National Park System Advisory Board and its Landmarks Committee may consider the following nominations:

**Nominations**

*Delaware*

- LIGHTSHIP *OVERFALLS,* Lewes, DE

*District of Columbia*

- CONGRESSIONAL CEMETERY, Washington, DC

*Kansas*

- WESTERN BRANCH, NATIONAL HOME FOR DISABLED VOLUNTEER SOLDIERS, Leavenworth, KS

*Maine*

- OLSON HOUSE, Cushing, ME

*Minnesota*

- GRAND MOUND, Koochiching County, MN
- SPLIT ROCK LIGHT STATION, Lake County, MN

*New York*

- WOODLAWN CEMETERY, Bronx, NY

*North Dakota*

- LYNCH QUARRY, Dunn County, ND

*Ohio*

- PENNSYLVANIA RAILROAD DEPOT AND BAGGAGE ROOM, Dennison, OH
- WRIGHT FIELD, Dayton, OH

*Oklahoma*

- CHILOCCO INDIAN AGRICULTURAL SCHOOL, Kay County, OK
- PLATT NATIONAL PARK, Murray County, OK

*Oregon*

- AUBREY WATZEK HOUSE, Portland, OR

*Pennsylvania*

- ARCH STREET FRIENDS MEETING HOUSE, Philadelphia, PA
- KUERNER FARM, Delaware County, PA
- SCHAEFFER HOUSE, Schaefferstown, PA

*South Dakota*

- BATTLE MOUNTAIN SANITARIUM, NATIONAL HOME FOR DISABLED VOLUNTEER SOLDIERS, Hot Springs, SD

*Tennessee*

- MOUNTAIN BRANCH, NATIONAL HOME FOR DISABLED VOLUNTEER SOLDIERS, Johnson City, TN

*Utah*

- MOUNTAIN MEADOWS MASSACRE SITE, Washington County, UT

*Wisconsin*

- NORTHWESTERN BRANCH, NATIONAL HOME FOR DISABLED VOLUNTEER SOLDIERS, Milwaukee, WI

**Proposals for Withdrawal of Designation**

• *PRESIDENT* (RIVERBOAT), St. Elmo, IL

**Proposed Amendments to Existing Designations**

• USS *CONSTELLATION,* Baltimore, MD (updated documentation)
• JOHN B. GOUGH HOUSE, Boylston, MA (additional documentation)
• HARRY S TRUMAN HISTORIC DISTRICT, Independence, MO (additional documentation and boundary change)
• MEDICINE WHEEL/MEDICINE MOUNTAIN, Bighorn County, WY (updated documentation, boundary, and name change)

Dated: August 3, 2010.

**Alexandra Lord,**

*Acting Chief, National Historic Landmarks Program; National Park Service, Washington, DC.*

[FR Doc. 2010–19967 Filed 8–12–10; 8:45 am]

**BILLING CODE P**

## DEPARTMENT OF THE INTERIOR

### Bureau of Land Management

**[LLIDB00000 L17110000.PH0000 LXSS024D0000 4500014673]**

### Notice of Public Meeting: Resource Advisory Council to the Boise District, Bureau of Land Management, U.S. Department of the Interior

**AGENCY:** Bureau of Land Management, U.S. Department of the Interior.

**ACTION:** Notice of public meeting.

**SUMMARY:** In accordance with the Federal Land Policy and Management Act (FLPMA) and the Federal Advisory Committee Act of 1972 (FACA), the U.S. Department of the Interior, Bureau of Land Management (BLM) Boise District Resource Advisory Council (RAC), will hold a meeting as indicated below.

**DATES:** The meeting will be held September 8, 2010 at the ICRMP Building, located at 3100 S. Vista Avenue, Boise, Idaho, beginning at 9 a.m. and adjourning at 4:30 p.m. Members of the public are invited to attend. A comment period will be held following the Field Office Updates.

**FOR FURTHER INFORMATION CONTACT:** MJ Byrne, Public Affairs Officer and RAC Coordinator, BLM Boise District, 3948 Development Ave., Boise, ID 83705, Telephone (208) 384–3393.

**SUPPLEMENTARY INFORMATION:** The 15-member Council advises the Secretary of the Interior, through the BLM, on a variety of planning and management issues associated with public land management in southwestern Idaho. Items on the agenda will include reports by the RAC's Resource Management Plan, Off Highway Vehicle and Transportation Management, Sage-Grouse Habitat Management, and Land Exchange Subgroups. Updates on the status of Economic Recovery and Reinvestment Act of 2009 (ARRA) projects in the Boise District, and on actions related to the implementation of the Owyhee Public Lands Management Act (OMA) will be provided. Field Office managers will provide highlights for discussion on activities in their offices. Agenda items and location may change due to changing circumstances. All RAC meetings are open to the public. The public may present written or oral comments to members of the Council. At each full RAC meeting, time is provided in the agenda for hearing public comments. Depending on the number of persons wishing to comment and time available, the time for individual oral comments may be limited. Individuals who plan to attend and need special assistance, should contact the BLM Coordinator as provided above.

Dated: August 6, 2010.

**Arnold L. Pike,**

*Acting District Manager.*

[FR Doc. 2010–19983 Filed 8–12–10; 8:45 am]

**BILLING CODE 4310–GG–P**

## DEPARTMENT OF THE INTERIOR

### National Park Service

### National Register of Historic Places; Notification of Pending Nominations and Related Actions

Nominations for the following properties being considered for listing or related actions in the National Register were received by the National Park Service before July 24, 2010. Pursuant to section 60.13 of 36 CFR part 60, written comments are being accepted concerning the significance of the nominated properties under the National Register criteria for evaluation. Comments may be forwarded by United States Postal Service, to the National Register of Historic Places, National Park Service, 1849 C St., NW., 2280, Washington, DC 20240; by all other carriers, National Register of Historic Places, National Park Service, 1201 Eye St., NW., 8th Floor, Washington, DC 20005; or by fax, 202–371–6447. Written or faxed comments should be submitted by August 30, 2010.

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.

**J. Paul Loether,**

*Chief, National Register of Historic Places/ National Historic Landmarks Program.*

**IOWA**

**Clinton County**

St. Irenaeus Church, 2811 N 2nd St., Clinton, 96001589

**MICHIGAN**

**Genesee County**

Glenwood Cemetery, 2500 W Court St., Flint, 10000616

**Menominee County**

Janson, Charles G., Garage, 524 10th Ave, Menominee, 10000615

**Wayne County**

Arthur, Clara B., School, (Public Schools of Detroit MPS) 10125 King Richard Ave, Detroit, 10000634
Atkinson, Edmund, School, (Public Schools of Detroit MPS) 4900 E Hildale Ave, Detroit, 10000635
Bagley, John J., School, (Public Schools of Detroit MPS) 8100 Curtis St., Detroit, 10000636
Balch, George Washington, School, (Public Schools of Detroit MPS) 5536 St. Antoine St., Detroit, 10000637
Barton, Clara, School, (Public Schools of Detroit MPS) 8530 Joy Rd, Detroit, 10000638
Brady, George Newton, School, (Public Schools of Detroit MPS) 2920 Joy Rd, Detroit, 10000639
Burbank, Luther, School, (Public Schools of Detroit MPS) 15600 E State Fair St., Detroit, 10000640
Burton, Clarence M., School, (Public Schools of Detroit MPS) 3420 Cass Ave, Detroit, 10000641
Carleton, Will, School, (Public Schools of Detroit MPS) 11724 Casino St., Detroit, 10000642
Carstens, Hattie M., School, (Public Schools of Detroit MPS) 2592 Coplin St., Detroit, 10000643
Cass, Lewis, Technical High School, (Public Schools of Detroit MPS) 2421 Second Ave, Detroit, 10000644
Cerveny, Edward, School, (Public Schools of Detroit MPS) 15850 Strathmoor Ave, Detroit, 10000645
Chaney, Henry A., School, (Public Schools of Detroit MPS) 2750 Selden St., Detroit, 10000646
Cleveland, Elizabeth, Intermediate School, (Public Schools of Detroit MPS) 13322 Conant St., Detroit, 10000648
Clinton, DeWitt, School, (Public Schools of Detroit MPS) 8145 Chalfonte St., Detroit, 10000647

Columbus, Christopher, School, (Public Schools of Detroit MPS) 18025 Brock St., Detroit, 10000649
Cooley, Thomas M., High School, (Public Schools of Detroit MPS) 15055 Hubbell Ave, Detroit, 10000651
Crary, Isaac, School, (Public Schools of Detroit MPS) 16164 Asbury Park, Detroit, 10000650
Crossman, Caroline, School, (Public Schools of Detroit MPS) 9027 John C. Lodge HWY, Detroit, 10000653
Custer, General George A., School, (Public Schools of Detroit MPS) 15531 Linwood St., Detroit, 10000652
Doty, Duane, School, (Public Schools of Detroit MPS) 10225 3rd St., Detroit, 10000654
Dow, Alex, Intermediate School, (Public Schools of Detroit MPS) 19900 McIntyre St., Detroit, 10000656
Duffield, D. Bethune, School, (Public Schools of Detroit MPS) 2715 Macomb St., Detroit, 10000655
Everett, Edward, School, (Public Schools of Detroit MPS) 18445 Cathedral St., Detroit, 10000657
Finney, Jared W., School and George H. Cannon Community Center, (Public Schools of Detroit MPS) 17200 Southampton St., Detroit, 10000658
Fitzgerald, Ella, and Loren M. Post Intermediate School Complex, (Public Schools of Detroit MPS) 8145 Puritan and 8200 Midland Ave, Detroit, 10000659
Ford, Henry, High School, (Public Schools of Detroit MPS) 20000 Evergreen Rd, Detroit, 10000660
Grayling School, (Public Schools of Detroit MPS) 744 W Adeline St., Detroit, 10000661
Greenfield Union School, (Public Schools of Detroit MPS) 420 W 7 Mile Rd, Detroit, 10000662
Guyton, Joseph W., School, (Public Schools of Detroit MPS) 355 Philip St., Detroit, 10000663
Halley, P. J. M., Magnet Middle School, (Public Schools of Detroit MPS) 2585 Grove Ave, Detroit, 10000664
Hamilton, Alexander, School, (Public Schools of Detroit MPS) 14223 Southampton St., Detroit, 10000665
Hampton, Emma Stark, School, (Public Schools of Detroit MPS) 3901 Margareta Ave, Detroit, 10000666
Hanstein, Frederick A., School, (Public Schools of Detroit MPS) 4290 Marseilles St., Detroit, 10000667
Harding, Warren G., and Dr. E. L. Shurly School Complex, (Public Schools of Detroit MPS) 14450 Burt Rd; 20830 Acacia Ave, Detroit, 10000668
Harms, Theodore, School, (Public Schools of Detroit MPS) 1400 Central Ave, Detroit, 10000669
Herman, S. James, School, (Public Schools of Detroit MPS) 16400 Tireman St., Detroit, 10000670
Higginbotham, William E., School, (Public Schools of Detroit MPS) 20119 Wisconsin St., Detroit, 10000671
Holcomb, Samuel B., School, (Public Schools of Detroit MPS) 18100 Bentler St., Detroit, 10000672
Hutchins, Harry B., Intermediate School, (Public Schools of Detroit MPS) 8820 Woodrow Wilson Ave, Detroit, 10000673
Jackson, Andrew, Intermediate School, (Public Schools of Detroit MPS) 4180 Marlborough St., Detroit, 10000674
Joyce, Anna M., Junior High and Levi T. Barbour Intermediate School Complex, (Public Schools of Detroit MPS) 8425 Sylvester St. and 4209 Seneca St., Detroit, 10000675
Kosciusko, Thaddeus, School, (Public Schools of Detroit MPS) 20220 Tireman St., Detroit, 10000676
Larned, Abner E., School, (Public Schools of Detroit MPS) 23700 Clarita Ave, Detroit, 10000677
Lynch, John, School, (Public Schools of Detroit MPS) 7601 Palmetto St., Detroit, 10000678
MacCulloch, Margaret, School, (Public Schools of Detroit MPS) 13120 Wildemere Ave, Detroit, 10000679
MacDowell, Edward, School, (Public Schools of Detroit MPS) 4021 W Outer Dr, Detroit, 10000680
Mackenzie, David L., High School, (Public Schools of Detroit MPS) 9275 Wyoming St., Detroit, 10000681
Macomb, Alexander, School, (Public Schools of Detroit MPS) 12021 Evanston St., Detroit, 10000682
Marshall, John C., School, (Public Schools of Detroit MPS) 1225 E State Fair St., Detroit, 10000683
Maybury, William C., School, (Public Schools of Detroit MPS) 4410 Porter St., Detroit, 10000684
McColl, Jay R., School, (Public Schools of Detroit MPS) 20550 Cathedral St., Detroit, 10000685
McKerrow, Helen W., School, (Public Schools of Detroit MPS) 4800 Collingwood St., Detroit, 10000686
McKinstry School, (Public Schools of Detroit MPS) 1981 McKinstry St., Detroit, 10000687
Mettetal, Eugenia, School, (Public Library Facilities of Wisconsin MPS) 19355 Edinborough Rd, Detroit, 10000688
Miller, Sidney D., Junior High and High School, (Public Schools of Detroit MPS) 2322 DuBois St., Detroit, 10000689
Mumford, Samuel C., High School, (Public Schools of Detroit MPS) 17525 Wyoming Ave, Detroit, 10000690
Munger, Louise Emma, Intermediate and Charles E. Chadsey High Schools Complex, (Public Schools of Detroit MPS) 5525–5535 Martin Ave, Detroit, 10000691
Neinas, Frank C., School, (Public Schools of Detroit MPS) 6021 McMillan St., Detroit, 10000692
Noble, Edna Chaffee, School, (Public Schools of Detroit MPS) 8646 Fullerton Ave, Detroit, 10000693
Nolan, Benjamin A., School, (Public Schools of Detroit MPS) 1150 E Lantz St., Detroit, 10000694
North Strathmore—Robert Burns School, (Public Schools of Detroit MPS) 14350 Terry St., Detroit, 10000695
Northern High School, (Public Schools of Detroit MPS) 9026 Woodward Ave, Detroit, 10000696
Oakman, Dr. Charles H., School for Crippled Children, (Public Schools of Detroit MPS) 12920 Wadsworth St., Detroit, 10000697
Parkman, Francis, School, (Public Schools of Detroit MPS) 15000 MacKenzie St., Detroit, 10000698
Pershing, John J., High School, (Public Schools of Detroit MPS) 18875 Ryan Rd, Detroit, 10000699
Pitcher, Zina, School, (Public Schools of Detroit MPS) 19799 Stahelin Ave, Detroit, 10000700
Ruddiman, William, School, (Public Schools of Detroit MPS) 7350 Southfield Fwy, Detroit, 10000705
Redford High School, (Public Schools of Detroit MPS) 21431 Grand River Ave, Detroit, 10000701
Richard, Gabriel, School, (Public Schools of Detroit MPS) 13840 Lappin St., Detroit, 10000702
Roosevelt Group of Schools, (Public Schools of Detroit MPS) 2425 Tuxedo St. and 2470 Collingwood St., Detroit, 10000703
Rose, M. M., School, (Public Schools of Detroit MPS) 5505 Van Dyke St., Detroit, 10000704
Ruthruff, William, School, (Public Schools of Detroit MPS) 6311 W Chicago St., Detroit, 10000706
Sampson, William T., School, (Public Schools of Detroit MPS) 6075 Begole St., Detroit, 10000707
Sherrill, Edwin S., School, (Public Schools of Detroit MPS) 7300 Garden St., Detroit, 10000708
Southeastern High and Ferdinand Foch Intermediate School Complex, (Public Schools of Detroit MPS) 2932–3030 Fairview St., Detroit, 10000709
Stellwagen, Augustus C., School, (Public Schools of Detroit MPS) 11450 E Outer Dr, Detroit, 10000710
Stephens, Albert L., School, (Public Schools of Detroit MPS) 6006 Seneca St., Detroit, 10000711
Thirkell, Isabel F., School, (Public Schools of Detroit MPS) 7724 14th St., Detroit, 10000712
Van Steuben, Frederick William, School, (Public Schools of Detroit MPS) 12300 Linnhurst St., Detroit, 10000714
Vernor, James, School, (Public Schools of Detroit MPS) 13726 Pembroke Ave, Detroit, 10000713
Wayne, Anthony, School, (Public Schools of Detroit MPS) 10633 Courville Ave, Detroit, 10000715
Western High School, (Public Schools of Detroit MPS) 1500 Scotten St., Detroit, 10000716
White, Katherine B., School, (Public Schools of Detroit MPS) 5161 Charles St., Detroit, 10000717
Wingert, Fannie E., School, (Public Schools of Detroit MPS) 1851 W Grand Blvd, Detroit, 10000718
Winterhalter, Albert G., School, (Public Schools of Detroit MPS) 12121 Broadstreet Ave, Detroit, 10000719

**MONTANA**

**Flathead County**

Kalispell Main Street Historic District Addendum and Boundary Increase, (Kalispell MPS) Roughly bounded by Center St. to N, 5th St. to the S, and the N and N running alleys to the E of Main St., Kalispell, 10000633

**NEBRASKA**

**Lancaster County**

Park Hill, 1913 S 41St. St., Lincoln, 10000628

**Sheridan County**

Spade Ranch Store, W Side of SHWY 27/Lot 5 of Ellsworth, Ellsworth, 10000629

**NORTH CAROLINA**

**Cleveland County**

WeSt. End Historic District, Bounded by W Mountain St., W Gold St., S Cansler St., S Tracy St., S Watterson St., and S Goforth St., Kings Mountain, 10000630

**Durham County**

Burch Avenue Historic District, (Durham MRA) Roughly bounded by S Buchanan Blvd, W Chapel Hill St., Duke University Rd, Burch Ave, and Rome Ave, Durham, 10000631

**Wake County**

Madonna Acres Historic District, (Post.-World War II and Modern Architecture in Raleigh, North Carolina, 1945–1965) Delany Dr, Dillon, Summerville, and Tierney Circles, Raleigh, 10000632

**OKLAHOMA**

**Cherokee County**

American Baptist Home Mission House, 530 Summit St., Tahlequah, 10000621

**Grant County**

Pond Creek Masonic Lodge #125, 126 Broadway Ave, Pond Creek, 10000622

**Kay County**

Wentz Camp, Intersection of L.A. Cann Dr and E. Prospect Ave., Ponca City, 10000620

**Latimer County**

Administration Building, 831 SE 172 Rd, Wilburton, 10000626

**Major County**

First United Methodist Church, 118 N 7th, Fairview, 10000624

**Nowata County**

Moore Ranch, 6 mi W of Nowata on N4070 Rd, Oklahoma, 10000617

**Payne County**

White Cloud Lodge, 820 E 146th, Perkins, 10000619

**Pottawatomie County**

Squirrel Creek Bridge, Carries Rangeline Rd over Squirrel Creek, Shawnee, 10000625

**Tulsa County**

Brady Historic District, Roughly along E/W Cameron and E/W Archer, from N Boulder to N Detroit, Tulsa, 10000618

Morrow Home Place, 13200 E 126th St. N, Collinsville, 10000627

**Woods County**

Nickel Ensor McClure House, 1301 Locust, Alva, 10000623

[FR Doc. 2010–20088 Filed 8–12–10; 8:45 am]

**BILLING CODE P**

## DEPARTMENT OF THE INTERIOR

### National Park Service

### National Register of Historic Places; Notification of Pending Removal of Listed Property

Pursuant to § 60.15 of 36 CFR part 60. Comments are being accepted on the following properties being considered for removal from the National Register of Historic Places. Comments may be forwarded by United States Postal Service, to the National Register of Historic Places, National Park Service, 1849 C St., NW., 2280, Washington, DC 20240; by all other carriers, National Register of Historic Places, National Park Service, 1201 Eye St., NW., 8th floor, Washington, DC 20005; or by fax, 202–371–6447. Written or faxed comments should be submitted by August 30, 2010.

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.

**J. Paul Loether,**

*Chief, National Register of Historic Places/National Historic Landmarks Program.*

Request for removal has been made for the following resource:

**MISSOURI**

**St. Louis [Independent City]**

Medart's, 7036 Clayton Ave., St. Louis, 09000410

[FR Doc. 2010–20091 Filed 8–12–10; 8:45 am]

**BILLING CODE P**

## INTERNATIONAL TRADE COMMISSION

**[Investigation No. 337–TA–617]**

### In the Matter of Certain Digital Television Products and Certain Products Containing Same and Methods of Using Same; Notice of Commission Determination To Rescind a Limited Exclusion Order and Cease and Desist Order Against Certain Respondents

**AGENCY:** U.S. International Trade Commission.

**ACTION:** Notice.

**SUMMARY:** Notice is hereby given that the U.S. International Trade Commission has determined to rescind a limited exclusion order and cease and desist order issued in the above-captioned investigation with respect to Vizio, Inc.("Vizio") and AmTran Technology Co., Ltd.("AmTran").

**FOR FURTHER INFORMATION CONTACT:** Megan M. Valentine, Office of the General Counsel, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436, telephone (202) 708–2301. Copies of non-confidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436, telephone (202) 205–2000. General information concerning the Commission may also be obtained by accessing its Internet server at *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*. Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810.

**SUPPLEMENTARY INFORMATION:** The Commission instituted this investigation on November 15, 2007, based on a complaint filed by Funai Electric Co., Ltd. of Japan and Funai Corporation of Rutherford, New Jersey (collectively "Funai") against several respondents including Vizio and AmTran. 72 FR 64240 (2007). The complaint alleged violations of Section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain digital television products and certain products containing same by reason of infringement of one or more claims of U.S. Patent Nos. 6,115,074 ("the '074 patent") and 5,329,369 ("the '369 patent").

On April 10, 2009, the Commission terminated this investigation with a finding of violation of Section 337 by reason of infringement of claims 1, 5, and 23 of the '074 patent. 74 FR 17511 (2009). The Commission determined that the appropriate form of relief is (1) a limited exclusion order under 19 U.S.C. 1337(d)(1) prohibiting the unlicensed entry of certain digital television products and certain products containing the same that infringe one or more of claims 1, 5, and 23 of the '074 patent, and are manufactured abroad by

or on behalf of, or imported by or on behalf of the respondents, including Vizio and AmTran, or any of their affiliated companies, parents, subsidiaries, or other related business entities, or any of their successors or assigns; and (2) cease and desist orders directed to several respondents, including Vizio.

On August 14, 2009, Funai filed a complaint, asserting that certain respondents, including and Suzhou Raken Technology, Ltd. ("Suzhou"), have violated the Commission's limited exclusion order and cease and desist orders and seeking enforcement under Commission Rule 210.75 (19 CFR 210.75) and temporary emergency action under Commission Rule 210.77 (19 CFR 210.77). Suzhou is a joint venture company established in September 2009 by AmTran and LG Display Co., Ltd. Funai included Suzhou in its enforcement complaint pursuant to the provisions in the limited exclusion order that cover "affiliated companies, parents, subsidiaries, or other related business entities" and the provisions in the Cease and Desist orders that applies to "controlled (whether by stock ownership or otherwise) and majority owned business entities engaging in [prohibited conduct], for, with, or otherwise on behalf of" a named Respondent. Funai accused Suzhou of selling infringing digital televisions sold under at least the brand names Vizio® and Gallevia® in China and then importing them into the United States.

On May 25, 2010, Funai and Vizio, AmTran, and Suzhou (collectively "the Vizio Respondents") filed a joint motion to terminate the investigation and the enforcement proceeding as to the Vizio Respondents based on a settlement agreement. On May 28, 2010, the ALJ issued an ID granting the joint motion. On June 18, 2010, the Commission determined not to review the ID.

On June 29, 2010, Funai and the Vizio Respondents filed a joint motion for rescission of the remedial orders against Vizio and AmTran pursuant to the settlement agreement. On July 7, 2010, the Commission investigative attorney filed a response supporting the motion.

Having reviewed the parties' submissions, the Commission has determined that the settlement agreement satisfies the requirement of Commission Rule 210.76 (a)(1) (19 CFR 210.76(a)(1)) that there be changed conditions of fact or law. The Commission therefore has issued an order rescinding the limited exclusion order and cease and desist orders previously issued in this investigation with respect to Vizio and AmTran.

The authority for the Commission's determination is contained in Section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and in section 210.76(a)(1) of the Commission's Rules of Practice and Procedure (19 CFR 210.76(a)(1)).

By order of the Commission.

Issued: August 9, 2010.

**Marilyn R. Abbott,**

*Secretary to the Commission.*

[FR Doc. 2010–19982 Filed 8–12–10; 8:45 am]

**BILLING CODE 7020–02–P**

## INTERNATIONAL TRADE COMMISSION

**[Investigation No. 337–TA–709]**

### In the Matter of Certain Integrated Circuits, Chipsets, and Products Containing Same Including Televisions, Media Players, and Cameras; Notice of Commission Determination Not To Review an Initial Determination Granting a Motion To Amend the Complaint and Notice of Investigation

**AGENCY:** U.S. International Trade Commission.

**ACTION:** Notice.

**SUMMARY:** Notice is hereby given that the U.S. International Trade Commission has determined not to review an initial determination ("ID") (Order No. 10) issued by the presiding administrative law judge ("ALJ") granting a motion filed by complainant Freescale Semiconductor, Inc. ("Freescale") for leave to amend its complaint and the notice of investigation.

**FOR FURTHER INFORMATION CONTACT:** Paul M. Bartkowski, Office of the General Counsel, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436, telephone (202) 708–5432. Copies of non-confidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436, telephone (202) 205–2000. General information concerning the Commission may also be obtained by accessing its Internet server at *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.* Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810.

**SUPPLEMENTARY INFORMATION:** The Commission instituted this investigation on April 2, 2010, based on a complaint filed by Freescale Semiconductor of Austin, Texas ("Freescale"). 75 FR 16837–38. The complaint alleges violations of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain integrated circuits, chipsets, and products containing same including televisions, media players, and cameras by reason of infringement of certain claims of U.S. Patent Nos. 5,467,455; 5,715,014; and 7,199,306 ("the '306 patent"). The Commission's notice of investigation named numerous respondents ("Respondents").

The ALJ issued the subject ID on July 8, 2010, granting a motion filed by complainant Freescale for leave to amend its complaint to (1) correct "clear typographical errors"; (2) replace one respondent whose counsel has represented that it does not sell for importation, import, or sell after importation any accused products; and (3) add a dependent claim of the '306 patent to the investigation. Respondents filed a petition for review of the ID. Freescale and the Commission investigative attorney filed responses in opposition to Respondents' petition. The Commission has determined not to review the subject ID.

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and in part 210 of the Commission's Rules of Practice and Procedure (19 CFR part 210).

Issued: August 9, 2010.

By order of the Commission.

**Marilyn R. Abbott,**

*Secretary to the Commission.*

[FR Doc. 2010–19984 Filed 8–12–10; 8:45 am]

**BILLING CODE 7020–02–P**

## DEPARTMENT OF LABOR

### Employment and Training Administration

**[TA–W–73,695]**

### Woodland Mills Corporation, Mill Spring, NC; Notice of Affirmative Determination Regarding Application for Reconsideration

By application dated July 22, 2010, petitioners requested administrative

reconsideration of the negative determination regarding workers' eligibility to apply for Trade Adjustment Assistance (TAA) applicable to workers and former workers of the subject firm. The determination was issued on June 24, 2010. The Notice of Determination was published in the **Federal Register** on July 7, 2010 (75 FR 39049).

Workers are engaged in employment related to the production of spun yarn. The initial determination was based on the findings that worker separations are not attributable to increased imports or a shift/acquisition by the workers' firm to a foreign country.

In the request for reconsideration, the petitioner provided additional information pertaining to subject firm operations and an alleged shift in production abroad.

The Department has carefully reviewed the request for reconsideration and the existing record, and has determined that the Department will conduct further investigation to determine if the workers meet the eligibility requirements of the Trade Act of 1974, as amended.

**Conclusion**

After careful review of the application, I conclude that the claim is of sufficient weight to justify reconsideration of the U.S. Department of Labor's prior decision. The application is, therefore, granted.

Signed at Washington, DC, this 4th day of August, 2010.

**Del Min Amy Chen,**

*Certifying Officer, Division of Trade Adjustment Assistance.*

[FR Doc. 2010–20033 Filed 8–12–10; 8:45 am]

**BILLING CODE 4510–FN–P**

## DEPARTMENT OF LABOR

### Employment and Training Administration

**[TA–W–72,781]**

### World Color (USA), LLC Formerly Known as Quebecor World World Color Covington Including On-Site Leased Workers From Randstad Temporary Agency and IH Services; Covington, TN; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974, as amended ("Act"), 19 U.S.C. 2273, the Department of Labor issued a Certification of Eligibility to Apply for Worker Adjustment Assistance on May 14, 2010, applicable to workers of World Color (USA), LLC, formerly known as Quebecor World, World Color Covington, Dyersburg Facility, including on-site leased workers from Randstad Temporary Agency, Covington, Tennessee. The notice was published in the **Federal Register** on March 5, 2010 (75 FR 30067). At the request of the petitioners, the Department reviewed the certification for workers of the subject firm. The workers are engaged in activities related to the production of magazines.

The company reports that workers leased from IH Services were employed on-site at the Covington, Tennessee, location of World Color (USA), LLC, formerly known as Quebecor World, World Color Covington. The Department has determined that these workers were sufficiently under the control of the subject firm to be considered leased workers.

Based on these findings, the Department is amending this certification to include workers leased from IH Services working on-site at the Covington, Tennessee, location of World Color (USA), LLC, formerly known as Quebecor World, World Color Covington.

The intent of the Department's certification is to include all workers employed at World Color (USA), LLC, formerly known as Quebecor World, World Color Covington who were adversely affected by a shift in production of magazines to Columbia and Canada.

The amended notice applicable to TA–W–72,781 is hereby issued as follows:

"All workers of World Color (USA), LLC, Formerly known as Quebecor World, World Color Covington, including on-site leased workers Randstad Temporary Agency and IH Services, Covington, Tennessee, who became totally or partially separated from employment on or after November 4, 2008, through May 14, 2012, and all workers in the group threatened with total or partial separation from employment on the date of certification through two years from the date of certification, are eligible to apply for adjustment assistance under Chapter 2 of Title II of the Trade Act of 1974, as amended."

Signed at Washington, DC, this 30th day of July 2010.

**Michael W. Jaffe,**

*Certifying Officer, Division of Trade Adjustment Assistance.*

[FR Doc. 2010–20030 Filed 8–12–10; 8:45 am]

**BILLING CODE 4510–FN–P**

## DEPARTMENT OF LABOR

### Employment and Training Administration

**[TA–W–70,724]**

### Komatsu Reman Division of Komatsu America Corporation a Subsidiary of Komatsu Limited Including On-Site Leased Workers From KENCO; Lexington, KY; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance

In accordance with section 223 of the Trade Act of 1974, as amended ("Act"), 19 U.S.C. 2273, the Department of Labor issued a Certification of Eligibility to Apply for Worker Adjustment Assistance on July 30, 2009, applicable to workers of Komatsu Reman, a division of Komatsu America Corporation, a subsidiary of Komatsu Limited, Lexington, Kentucky. The notice was published in the **Federal Register** on September 22, 2009 (74 FR 48303).

At the request of a company official, the Department reviewed the certification for workers of the subject firm. The workers are engaged in the production of remanufactured mining and construction equipment component parts.

The company reports that workers leased from Kenco were employed on-site at the Lexington, Kentucky, location of Komatsu Reman, a division of Komatsu America Corporation, a subsidiary of Komatsu Limited. The Department has determined that these workers were sufficiently under the control of the subject firm to be considered leased workers.

Based on these findings, the Department is amending this certification to include workers leased from Kenco working on-site at the Lexington, Kentucky location of the firm.

The amended notice applicable to TA–W–70,724 is hereby issued as follows:

"All workers of Komatsu Reman, a division of Komatsu America Corporation, a subsidiary of Komatsu Limited, including on-site leased workers from Kenco, Lexington, Kentucky, who became totally or partially separated from employment on or after May 18, 2008, through July 30, 2011, and all workers in the group threatened with total or partial separation from employment on the date of certification through two years from the date of certification, are eligible to apply for adjustment assistance under Chapter 2 of Title II of the Trade Act of 1974, as amended."

Signed at Washington, DC, this 30th day of July 2010.

**Michael W. Jaffe,**

*Certifying Officer, Division of Trade Adjustment Assistance.*

[FR Doc. 2010–20042 Filed 8–12–10; 8:45 am]

**BILLING CODE 4510–FN–P**

## DEPARTMENT OF LABOR

### Employment and Training Administration

**[TA–W–70,232; TA–W–70,232A]**

### Halliburton Company, Duncan Mfg., Including On-Site Leased Workers from Express Personnel, Clayton Personnel Service, and Manpower Planning, Duncan, OK; Halliburton Company, Technology and Engineering Division, Finance and Administration Division, Duncan, OK; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974, as amended (''Act''), 19 U.S.C. 2273, the Department of Labor issued a Certification of Eligibility to Apply for Worker Adjustment Assistance on August 21, 2009, applicable to workers of Halliburton Company, Duncan Mfg., including on-site leased workers from Express Personnel, Clayton Personnel Service and Manpower Planning, Duncan, Oklahoma. The notice was published in the **Federal Register** on September 22, 2009 (74 FR 48300).

At the request of the State Agency, the Department reviewed the certification for workers of the Technology and Engineering Division, and Finance and Administration Division.

Additional information revealed that workers of the Technology and Engineering Division, and Finance and Administration Division were adversely affected by the firm's shift in production of oil field service equipment from the Duncan, Oklahoma facility to India, China, Malaysia and Mexico, which was the basis for certification of TA–W–70,232. In addition, a significant number or proportion of workers of the Technology and Engineering Division and Finance and Administration Division were separated during the relevant period.

Workers of Halliburton Company, Technology and Engineering Division, and Finance and Administration Division, Duncan, Oklahoma, were certified eligible for trade adjustment assistance in a subsequent investigation, TA–W–73,525 and TA–W–73,525A, respectively. The impact date for both certifications is February 17, 2009. Halliburton Company also employs a separate group of workers in the Duncan Field Camp Division, who did not support the production of oil field service equipment. Workers of Duncan Field Camp Division were denied eligibility for trade adjustment assistance per TA–W–73,525B and are not subject to this amendment.

The intent of the Department's amended certification is to cover workers in the Technology and Engineering Division and Finance and Administration Division who were separated on or after the impact date of TA–W–70,232 on May 19, 2008 through the impact date of TA–W–73,525 and TA–W–73,525A on February 17, 2009.

The amended notice applicable to TA–W–70,232 is hereby issued as follows:

All workers Halliburton Company, Duncan Mfg., including on-site leased workers from Express Personnel, Clayton Personnel Service and Manpower Planning, Duncan, Oklahoma (TA–W–70,232) who became totally or partially separated from employment on or after May 19, 2008, through August 21, 2011, and all workers in the group threatened with total or partial separation from employment on the date of certification through two years from the date of certification, are eligible to apply for adjustment assistance under Chapter 2 of Title II of the Trade Act of 1974, as amended, and all workers Halliburton Company, Technology and Engineering Division, and Finance and Administration Division, Duncan, Oklahoma (TA–W–70,232A) who became totally or partially separated from employment on or after May 19, 2008 through February 16, 2009 are eligible to apply for adjustment assistance under Chapter 2 of Title II of the Trade Act of 1974, as amended.

Signed in Washington, DC, this 2nd day of August, 2010.

**Michael W. Jaffe,**

*Certifying Officer, Office of Trade Adjustment Assistance.*

[FR Doc. 2010–20041 Filed 8–12–10; 8:45 am]

**BILLING CODE 4510–FN–P**

## DEPARTMENT OF LABOR

### Employment and Training Administration

**[TA–W–71,855; TA–W–71,855A]**

### Freescale Semiconductor, Inc., Technical Information Center, Tempe, AZ; Freescale Semiconductor, Inc., Technical Information Center, Woburn, MA; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974, as amended (''Act''), 19 U.S.C. 2273, the Department of Labor issued a Certification of Eligibility to Apply for Worker Adjustment Assistance on October 1, 2009, applicable to workers of Freescale Semiconductor, Inc., Technical Information Center, Tempe, Arizona. The notice was published in the **Federal Register** on November 17, 2009 (74 FR 59249).

At the request of the petitioners, the Department reviewed the certification for workers of the subject firm. The workers are engaged in activities related to technical customer support.

The Woburn, Massachusetts employees, who provided technical customer support, belonged to the same worker group as workers at the Tempe, Arizona site, and were effected by the same company-wide shift of services to a foreign country.

Accordingly, the Department is amending the certification to include workers of the Woburn, Massachusetts location of Freescale Semiconductor, Inc., Technical Information Center. The intent of the Department's certification is to include all workers of the subject firm who were adversely affected by a shift of services to a foreign country.

The amended notice applicable to TA–W–71,855 is hereby issued as follows:

''All workers of Freescale Semiconductor, Technical Information Center, Tempe, Arizona (TA–W–71,855) and Freescale Semiconductor, Technical Information Center, Woburn, Massachusetts (TA–W–71,855A), who became totally or partially separated from employment on or after July 23, 2008, through October 1, 2011, and all workers in the group threatened with total or partial separation from employment on the date of certification through two years from the date of certification, are eligible to apply for adjustment assistance under Chapter 2 of Title II of the Trade Act of 1974, as amended.''

Signed in Washington, DC, this 30th day of July 2010.

**Michael W. Jaffe,**

*Certifying Officer, Division of Trade Adjustment Assistance.*

[FR Doc. 2010–20028 Filed 8–12–10; 8:45 am]

**BILLING CODE 4510–FN–P**

## DEPARTMENT OF LABOR

### Employment and Training Administration

**[TA–W–72,319]**

### General Motors Company Formerly Known as General Motors Corporation, Willow Run Transmission Plant Including On-Site Leased Workers From Aerotek; Ypsilanti, MI; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974, as amended ("Act"), 19 U.S.C. 2273, the Department of Labor issued a Certification of Eligibility to Apply for Worker Adjustment Assistance on July 7, 2010, applicable to workers of General Motors Company, formerly known as General Motors Corporation, Willow Run Transmission Plant, Ypsilanti, Michigan. The notice was published in the **Federal Register** on July 26, 2010. (75 FR 43558).

At the request of the state, the Department reviewed the certification for workers of the subject firm. The workers are engaged in the production of automotive transmissions and transmission components.

The company reports that workers leased from Aerotek, were employed on-site at the Ypsilanti, Michigan location of General Motors Company, formerly known as General Motors Corporation, Willow Run Transmission Plant. The Department has determined that these workers were sufficiently under the control of the subject firm to be considered leased workers.

Based on these findings, the Department is amending this certification to include workers leased from Aerotek, working on-site at the Ypsilanti, Michigan location of General Motors Company, formerly known as General Motors Corporation, Willow Run Transmission Plant.

The amended notice applicable to TA–W–72,319 is hereby issued as follows:

All workers from General Motors Company, formerly known as General Motors Corporation, Willow Run Transmission Plant, including on-site leased workers from Aerotek, Ypsilanti, Michigan, who became totally or partially separated from employment on or after September 14, 2008, through July 7, 2012, and all workers in the group threatened with total or partial separation from employment on the date of certification through two years from the date of certification, are eligible to apply for adjustment assistance under Chapter 2 of Title II of the Trade Act of 1974, as amended.

Signed at Washington, DC, this 30th day of July 2010.

**Michael W. Jaffe,**

*Certifying Officer, Division of Trade Adjustment Assistance.*

[FR Doc. 2010–20029 Filed 8–12–10; 8:45 am]

**BILLING CODE 4510–FN–P**

## DEPARTMENT OF LABOR

### Employment and Training Administration

**[TA–W–63,441]**

### Metaldyne Corporation, Metaldyne Tubular Products, Currently Known as Flexible Metal, Inc., Powertrain Division, Hamburg, MI; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance

In accordance with section 223 of the Trade Act of 1974, (19 U.S.C. 2273), and section 246 of the Trade Act of 1974 (26 U.S.C. 2813), as amended, the Department of Labor issued a Certification of Eligibility to Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance on July 3, 2008, applicable to workers of Metaldyne Corporation, Powertrain Division, Hamburg, Michigan. The notice was published in the **Federal Register** on July 21, 2008 (73 FR 42370).

At the request of the State agency, the Department reviewed the certification for workers of the subject firm. The workers are engaged in the production of exhaust manifolds and turbo tubes for the automotive industry.

Information shows that on June 10, 2010, Flexible Metals, Inc. purchased Metaldyne Corporation, Metaldyne Tubular Products, Powertrain Div. and is currently known as Flexible Metals, Inc., Powertrain Division. Some workers separated from employment at the subject firms have their wages reported under a separate unemployment insurance (UI) tax accounts for Flexible Metals, Inc., Powertrain Division.

Accordingly, the Department is amending this certification to properly reflect this matter.

The intent of the Department's certification is to include all workers of the subject firm who were adversely affected by increased customer imports of exhaust manifolds and turbo tubes for the automotive industry.

The amended notice applicable to TA–W–63,441 is hereby issued as follows:

"All workers of Metaldyne Corporation, Metaldyne Tubular Products, Powertrain Division, currently known as Flexible Metals, Inc., Powertrain Division, Hamburg, Michigan, who became totally or partially separated from employment on or after May 27, 2007 through July 3, 2010, are eligible to apply for adjustment assistance under Section 223 of the Trade Act of 1974, are also eligible to apply for alternative trade adjustment assistance under Section 246 of the Trade act of 1974."

Signed at Washington, DC, this 3rd day of August 2010.

**Elliott S. Kushner,**

*Certifying Officer, Division of Trade Adjustment Assistance.*

[FR Doc. 2010–20040 Filed 8–12–10; 8:45 am]

**BILLING CODE 4510–FN–P**

## DEPARTMENT OF LABOR

### Employment and Training Administration

**[TA–W–74,195]**

### Caps Visual Communications, LLC; Black Dot Group; Formerly Known as Caps Group Acquisition, LLC Chicago, IL; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974, as amended ("Act"), 19 U.S.C. 2273, the Department of Labor issued a Certification of Eligibility to Apply for Worker Adjustment Assistance on June 24, 2010, applicable to workers of Caps Visual Communications, LLC, Black Dot Group, formerly known as Caps Group Acquisition, LLC, Chicago, Illinois. The notice is soon to be published in the **Federal Register**.

At the request of the State Agency, the Department reviewed the certification for workers of the subject firm. The workers are engaged in activities related to prepress services.

New information shows that the subject firm is experiencing employment declines due to a shift of prepress services to India and the Philippines prior to the impact date stated on the certification. Further, additional information revealed that a certification granted to workers of an affiliate location, Caps Visual Communications, LLC, Black Dot Group, formerly known as Caps Group Acquisition, LLC, Chicago, Illinois (TA–W–63,585) does not cover the group of workers in question.

Based on these findings, the Department is amending this certification to reflect an impact date one year prior to the date of petition (May 26, 2010).

The amended notice applicable to TA–W–74,195 is hereby issued as follows:

''All workers Caps Visual Communications, LLC, Black Dot Group, formerly known as Caps Group Acquisition, LLC, Chicago, Illinois who became totally or partially separated from employment on or after May 26, 2009, through June 24, 2010, and all workers in the group threatened with total or partial separation from employment on the date of certification through two years from the date of certification, are eligible to apply for adjustment assistance under Chapter 2 of Title II of the Trade Act of 1974, as amended.''

Signed at Washington, DC, this 30th day of July 2010.

**Elliott S. Kushner,**

*Certifying Officer, Division of Trade Adjustment Assistance.*

[FR Doc. 2010–20036 Filed 8–12–10; 8:45 am]

**BILLING CODE 4510–FN–P**

## DEPARTMENT OF LABOR

### Employment and Training Administration

**[TA–W–73,370]**

### Thomson Reuters Legal, Legal Editorial Operations Cleveland Office Including Workers Whose Unemployment Insurance (UI) Wages Are Paid Through West Services, Inc. and West Publishing Corporation; Independence, OH; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974, as amended (''Act''), 19 U.S.C. 2273, the Department of Labor issued a Certification of Eligibility to Apply for Worker Adjustment Assistance on June 22, 2010, applicable to workers of Thomson Reuters Legal, Legal Editorial Operations, Cleveland Office, Independence, Ohio. The notice was published in the **Federal Register** on July 7, 2010 (75 FR 39047). The notice was amended on July 27, 2010 to include workers whose unemployment insurance (UI) are paid through West Services, Inc. The notice will be published soon in the **Federal Register**.

At the request of the State agency, the Department reviewed the certification for workers of the subject firm. The workers are engaged in activities related to legal information and editorial services.

Information shows that some workers separated from employment at the Independence, Ohio location of Thomson Reuters Legal, Legal Editorial Operations, Cleveland Office had their wages reported under a separated unemployment insurance (UI) tax account under the name West Publishing Corporation, a Thomson Reuters Business.

Accordingly, the Department is amending this certification to properly reflect this matter.

The intent of the Department's certification is to include all workers of the subject firm who were adversely affected by a shift in editorial services to the Philippines and India.

The amended notice applicable to TA–W–73,370 is hereby issued as follows:

''All workers of Thomas Reuters Legal, Legal Editorial Operations, Cleveland Office, including workers whose unemployment insurance (UI) wages are paid through West Services, Inc., and West Publishing Corporation, Independence, Ohio, who became totally or partially separated from employment on or after January 26, 2009 through June 22, 2012, and all workers in the group threatened with total or partial separation from employment on date of certification through two years from the date of certification, are eligible to apply for adjustment assistance under Chapter 2 of Title II of the Trade Act of 1974, as amended.''

Signed at Washington, DC, this 4th day of August 2010.

**Elliott S. Kushner,**

*Certifying Officer, Division of Trade Adjustment Assistance.*

[FR Doc. 2010–20032 Filed 8–12–10; 8:45 am]

**BILLING CODE 4510–FN–P**

## DEPARTMENT OF LABOR

### Employment and Training Administration

**[TA–W–73,859]**

### Watkins Shepard Trucking, Inc. Including Individuals Under Its Operation Control, Missoula, MT; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974, as amended (''Act''), 19 U.S.C. 2273, the Department of Labor issued a Certification of Eligibility to Apply for Worker Adjustment Assistance on July 14, 2010, applicable to workers of Watkins Shepard Trucking, Inc., Missoula, Montana. The Department's Notice of determination will soon be published in the **Federal Register.** The certification included independent contractors working on-site at the subject firm.

At the request of the State of Montana, the Department reviewed the certification for workers of the subject firm.

By definition, independent contractors are not under the operation control of another entity. Accordingly, the Department is amending the certification to exclude independent contractors.

The intent of the Department's certification is to include all workers of Watkins Shepard Trucking, Inc., Missoula, Montana and all individuals under the operation control of the subject firm who are adversely affected secondary workers.

The amended notice applicable to TA–W–73,859 is hereby issued as follows:

''All workers of Watkins Shepard Trucking, Inc., including individuals under its operational control, Missoula, Montana, who became totally or partially separated from employment on or after March 23, 2009, through July 14, 2012, and all workers in the group threatened with total or partial separation from employment on the date of certification through two years from the date of certification, are eligible to apply for adjustment assistance under Chapter 2 of Title II of the Trade Act of 1974, as amended.''

Signed at Washington, DC, this 28th day of July 2010.

**Del Min Amy Chen,**

*Certifying Officer, Division of Trade Adjustment Assistance.*

[FR Doc. 2010–20035 Filed 8–12–10; 8:45 am]

**BILLING CODE 4510–FN–P**

## DEPARTMENT OF LABOR

### Employment and Training Administration

**[TA–W–71,551A]**

### Freescale Semiconductor, Inc., Networking and Multimedia Group (''NMG'') Excluding the Multimedia Applications Division Including On-Site Leased Workers of Synergy Services, Craftcorp, Directions Engineering Company, Netpolarity, Inc., TAC Worldwide and Manpower; Austin, TX; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974, as amended (''Act''), 19 U.S.C. 2273, the Department of Labor issued a Certification of Eligibility to Apply for Worker Adjustment Assistance on June 17, 2010, applicable to workers of Freescale Semiconductor, Inc., Networking and Multimedia Group (''NMG''), excluding the Multimedia Applications Division, including on-site workers of Synergy Services, Craftcorp, Directions Engineering Company, Netpolarity, Inc. and Tac Worldwide, Austin, Texas. The notice was

published in the **Federal Register** on July 1, 2010 (75 FR 38141).

At the request of the petitioners, the Department reviewed the certification for workers of the subject firm. The workers are engaged in internal design and engineering services for chips used in networking and multimedia products.

The company reports that workers leased from Manpower, were employed on-site at the Austin, Texas location of Freescale Semiconductor, Inc., Networking and Multimedia Group ("NMG"), excluding the Multimedia Applications Division, including on-site workers of Synergy Services, Craftcorp, Directions Engineering Company, Netpolarity, Inc. and Tac Worldwide. The Department has determined that these workers were sufficiently under the control of the subject firm to be considered leased workers.

Based on these findings, the Department is amending this certification to include workers leased from Manpower, working on-site at the Austin, Texas location of Freescale Semiconductor, Inc., Networking and Multimedia Group ("NMG"), excluding the Multimedia Applications Division, including on-site workers of Synergy Services, Craftcorp, Directions Engineering Company, Netpolarity, Inc. and Tac Worldwide.

The amended notice applicable to TA–W–71,551A is hereby issued as follows:

"All workers of Freescale Semiconductor, Inc., Networking and Multimedia Group ("NMG"), excluding the Multimedia Applications Division, including on-site workers of Synergy Services, Craftcorp, Directions Engineering Company, Netpolarity, Inc., Tac Worldwide and Manpower, Austin, Texas, who became totally or partially separated from employment on or after July 1, 2008 through June 17, 2012, and all workers in the group threatened with total or partial separation from employment on the date of certification through two years from the date of certification, are eligible to apply for adjustment assistance under Chapter 2 of Title II of the Trade Act of 1974, as amended."

Signed at Washington, DC, this 3rd day of August 2010.

**Elliott S. Kushner,**

*Certifying Officer, Division of Trade Adjustment Assistance.*

[FR Doc. 2010–20027 Filed 8–12–10; 8:45 am]

**BILLING CODE 4510–FN–P**

## DEPARTMENT OF LABOR

### Employment and Training Administration

### Notice of Determinations Regarding Eligibility To Apply for Worker Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974, as amended (19 U.S.C. 2273) the Department of Labor herein presents summaries of determinations regarding eligibility to apply for trade adjustment assistance for workers by (TA–W) number issued during the period of July 26, 2010 through July 30, 2010.

In order for an affirmative determination to be made for workers of a primary firm and a certification issued regarding eligibility to apply for worker adjustment assistance, each of the group eligibility requirements of Section 222(a) of the Act must be met.

I. Under Section 222(a)(2)(A), the following must be satisfied:

(1) A significant number or proportion of the workers in such workers' firm have become totally or partially separated, or are threatened to become totally or partially separated;

(2) The sales or production, or both, of such firm have decreased absolutely; and

(3) One of the following must be satisfied:

(A) Imports of articles or services like or directly competitive with articles produced or services supplied by such firm have increased;

(B) Imports of articles like or directly competitive with articles into which one or more component parts produced by such firm are directly incorporated, have increased;

(C) Imports of articles directly incorporating one or more component parts produced outside the United States that are like or directly competitive with imports of articles incorporating one or more component parts produced by such firm have increased;

(D) Imports of articles like or directly competitive with articles which are produced directly using services supplied by such firm, have increased; and

(4) The increase in imports contributed importantly to such workers' separation or threat of separation and to the decline in the sales or production of such firm; or

II. Section 222(a)(2)(B) all of the following must be satisfied:

(1) A significant number or proportion of the workers in such workers' firm have become totally or partially separated, or are threatened to become totally or partially separated;

(2) One of the following must be satisfied:

(A) There has been a shift by the workers' firm to a foreign country in the production of articles or supply of services like or directly competitive with those produced/supplied by the workers' firm;

(B) There has been an acquisition from a foreign country by the workers' firm of articles/services that are like or directly competitive with those produced/supplied by the workers' firm; and

(3) The shift/acquisition contributed importantly to the workers' separation or threat of separation.

In order for an affirmative determination to be made for adversely affected workers in public agencies and a certification issued regarding eligibility to apply for worker adjustment assistance, each of the group eligibility requirements of Section 222(b) of the Act must be met.

(1) A significant number or proportion of the workers in the public agency have become totally or partially separated, or are threatened to become totally or partially separated;

(2) The public agency has acquired from a foreign country services like or directly competitive with services which are supplied by such agency; and

(3) The acquisition of services contributed importantly to such workers' separation or threat of separation.

In order for an affirmative determination to be made for adversely affected secondary workers of a firm and a certification issued regarding eligibility to apply for worker adjustment assistance, each of the group eligibility requirements of Section 222(c) of the Act must be met.

(1) A significant number or proportion of the workers in the workers' firm have become totally or partially separated, or are threatened to become totally or partially separated;

(2) The workers' firm is a Supplier or Downstream Producer to a firm that employed a group of workers who received a certification of eligibility under Section 222(a) of the Act, and such supply or production is related to the article or service that was the basis for such certification; and

(3) Either—

(A) The workers' firm is a supplier and the component parts it supplied to the firm described in paragraph (2) accounted for at least 20 percent of the production or sales of the workers' firm; or

(B) A loss of business by the workers' firm with the firm described in paragraph (2) contributed importantly to the workers' separation or threat of separation.

In order for an affirmative determination to be made for adversely affected workers in firms identified by the International Trade Commission and a certification issued regarding eligibility to apply for worker adjustment assistance, each of the group eligibility requirements of Section 222(f) of the Act must be met.

(1) The workers' firm is publicly identified by name by the International Trade Commission as a member of a domestic industry in an investigation resulting in—

(A) An affirmative determination of serious injury or threat thereof under section 202(b)(1);

(B) An affirmative determination of market disruption or threat thereof under section 421(b)(1); or

(C) An affirmative final determination of material injury or threat thereof under section 705(b)(1)(A) or 735(b)(1)(A) of the Tariff Act of 1930 (19 U.S.C. 1671d(b)(1)(A) and 1673d(b)(1)(A));

(2) The petition is filed during the 1-year period beginning on the date on which—

(A) A summary of the report submitted to the President by the International Trade Commission under section 202(f)(1) with respect to the affirmative determination described in paragraph (1)(A) is published in the Federal Register under section 202(f)(3); or

(B) Notice of an affirmative determination described in subparagraph (1) is published in the **Federal Register**; and

(3) The workers have become totally or partially separated from the workers' firm within—

(A) The 1-year period described in paragraph (2); or

(B) Notwithstanding section 223(b)(1), the 1-year period preceding the 1-year period described in paragraph (2).

**Affirmative Determinations for Worker Adjustment Assistance**

The following certifications have been issued. The date following the company name and location of each determination references the impact date for all workers of such determination.

The following certifications have been issued. The requirements of Section 222(a)(2)(A) (increased imports) of the Trade Act have been met.

| TA–W No. | Subject firm | Location | Impact date |
|---|---|---|---|
| 72,362 | P.M. Kelly, Inc., Realty Road | Ashland, ME | September 18, 2008. |
| 72,653 | Da-Tech Corporation, Leased Workers from Judge Technical Services, Synerfac Technical, etc. | Ivyland, PA | September 24, 2008. |
| 72,905 | Precision Mold & Engineering, Inc. | Warren, MI | November 19, 2008. |
| 72,996 | Sunrise Tool and Die, Inc. | Henderson, KY | November 20, 2008. |
| 73,040 | Thyssenkrupp Presta Steering Group | Ladson, SC | December 1, 2008. |
| 73,469 | Charles D. Owen Mfg. Co. Inc., Springs Global U.S., Inc. | Swannanoa, NC | February 2, 2009. |
| 73,557 | Narriot Industries, LLC | Boykins, VA | February 22, 2009. |
| 73,769 | Flexsteel Industries, Inc., Leased Workers from Sedona Staffing | Dubuque, IA | February 12, 2010. |
| 73,771 | Technicolor Video Cassette of Michigan, Thomson, Home Entertainment Services, Leased Workers Select Staffing, etc. | Detroit, MI | March 1, 2009. |
| 73,964 | Prestolite Wire Corporation, Leased Workers from Express Services and Staffmark. | Paragould, AR | April 14, 2009. |
| 74,081 | General Motors Vehicle Manufacturing, General Motors Corp., Leased Workers Aerotek and Kelly Services. | Shreveport, LA | August 28, 2010. |

The following certifications have been issued. The requirements of Section 222(a)(2)(B) (shift in production or services) of the Trade Act have been met.

| TA–W No. | Subject firm | Location | Impact date |
|---|---|---|---|
| 72,377 | Match.Com, Workers Whose Wages are Reported Under PRC | Jacksonville, NC | September 21, 2008. |
| 72,408 | Capmark Capital, Inc., Capmark Financial Group, Debtor in Possession, Leased Workers Spherion and ACS. | Granville, OH | September 24, 2008. |
| 72,716 | Freeport-McMoran Safford, Inc., Including All Reclamation Group Employees. | Safford, AZ | October 21, 2008. |
| 72,829 | Circuit Services Worldwide, Subsidiary of Pan-Co International Company, Ltd. | Bellevue, WA | November 9, 2008. |
| 73,248 | Ellcon National, Machine Shop In Plant One, Faverly Transport, Leased On-Site Workers Aerotek. | Greenville, SC | January 10, 2009. |
| 73,271 | Dakota Imaging | El Paso, TX | January 12, 2009. |
| 73,376 | Wacker Neuson Corporation, Wacher Neuson SE | Menomonee Falls, WI | January 27, 2009. |
| 73,379 | Bombardier Transportation, Bombardier Mass Transit, Leased Workers form Eastern Technical Services. | Plattsburgh, NY | January 26, 2009. |
| 73,491 | Farley's & Sathers Candy Company, Inc., Leased Workers from Select Staffing. | Chattanooga, TN | February 4, 2009. |
| 73,493 | MEMC Electronic Materials, Inc., Southwest, Leased Workers from Kelly Services. | Sherman, TX | February 5, 2009. |
| 73,652 | Robert Bosch, LLC, Leased Workers from Aerotek, Cucor U.S., etc. | Plymouth, MI | February 10, 2009. |
| 73,652A | Robert Bosch, LLC, Leased Workers from Aerotek, Cucor U.S., etc. | Farmington Hills, MI | February 10, 2009. |
| 73,679 | Liz Claiborne, Inc., Finance Division | North Bergen, NJ | February 18, 2009. |
| 73,768 | Local Insight Media, Inc., Corporate Services Division | Englewood, CO | March 22, 2009. |

| TA–W No. | Subject firm | Location | Impact date |
|---|---|---|---|
| 73,824 | Honeywell International, Inc., Automation and Control Solutions Division. | Rock Island, IL | March 29, 2009. |
| 73,870 | Amphenol TCS | Milpitas, CA | April 6, 2009. |
| 73,872 | Goodrich Corporation, Landing Gear Division | Cleveland, OH | March 18, 2009. |
| 73,914 | Damco USA, Inc., Finance Division | Madison, NJ | April 13, 2009. |
| 74,033 | SuperMedia, Inc., Formerly Idearc Media LLC, Publishing Operations Group. | St. Petersburg, FL | May 2, 2009. |
| 74,051 | Bowne Technology Enterprise, LLC, Bowne and Company, Inc., Help Desk Division. | Piscataway, NJ | May 5, 2009. |
| 74,105 | Liz Claiborne, Inc., Corporate Manufacturing Department | North Bergen, NJ | May 12, 2009. |
| 74,144 | Hoffmann-LaRoche, Inc., Pharmaceutical Manufacturing, Technical Operations and Quality Management. | Nutley, NJ | May 11, 2009. |
| 74,178 | Microsemi Corp. Massachusetts, Testing Services | Lawrence, MA | May 19, 2009. |
| 74,266 | Prudential Insurance Company of America, Prudential Retirement | Moosic, PA | June 17, 2009. |
| 74,266A | Prudential Insurance Company of America, Prudential Retirement | Dubuque, IA | June 17, 2009. |
| 74,283 | Highland Lakes Software, Inc. | Austin, TX | June 15, 2009. |
| 74,287 | National Sales Company, Stanley Black and Decker, Leased Workers of Lumea Staffing. | Sterling, IL | June 21, 2009. |
| 74,288 | National Manufacturing Company, Stanley Black & Decker, Stanley National Hardware, Leased Workers Lumea Staff. | Rock Falls, IL | June 21, 2009. |
| 74,298 | The Travelers Indemnity Company, Travelers Companies, Workers' Compensation Statistical Reporting. | Hartford, CT | June 22, 2009. |
| 74,306 | HAVI Logistics, North America, Havi Group, LP | Livonia, MI | June 25, 2009. |
| 74,313 | Becton, Dickinson, and Company, BD Medical; Sharps Disposal Systems, Leased Workers The Eastridge Group, etc. | Oceanside, CA | June 8, 2009. |
| 74,322 | PerTronix, Inc. | Rancho Dominguez, CA | June 25, 2009. |
| 74,332 | Andrew Wireless Solution, CommScope, Leased Workers Manpower and Griffith Security. | Newton, NC | June 29, 2009. |
| 74,420 | Frank Russell Company, Administrative Service Center | Tacoma, WA | July 21, 2009. |

The following certifications have been issued. The requirements of Section 222(c) (supplier to a firm whose workers are certified eligible to apply for TAA) of the Trade Act have been met.

| TA–W No. | Subject firm | Location | Impact date |
|---|---|---|---|
| 72,850 | Kasto, Inc., Keuro Besitz GMBH & Co, Leased Workers of Industrial Employees, etc. | Export, PA | November 13, 2008. |
| 73,348 | Hayes Enterprises, Inc. | Potomac, MT | January 18, 2009. |
| 73,910 | Cranberry Lumber Company | Beckley, WV | April 14, 2009. |
| 74,026 | Form Tech Fraser | Fraser, MI | April 8, 2009. |

The following certifications have been issued. The requirements of Section 222(c) (downstream producer for a firm whose workers are certified eligible to apply for TAA) of the Trade Act have been met.

| TA–W No. | Subject firm | Location | Impact date |
|---|---|---|---|
| 72,222 | YRC, Inc., YRC Worldwide, Inc. | Richfield, OH | September 3, 2008. |

**Negative Determinations for Worker Adjustment Assistance**

In the following cases, the investigation revealed that the eligibility criteria for worker adjustment assistance have not been met for the reasons specified.

The investigation revealed that the criterion under paragraph (a)(1), or (b)(1), or (c)(1) (employment decline or threat of separation) of section 222 has not been met.

| TA–W No. | Subject firm | Location | Impact date |
|---|---|---|---|
| 72,901 | Sequel Software, Inc. | Durango, CO. | |
| 73,939 | C3I, Inc., Leased Workers from Manpower and Express | Wilkes-Barre, PA. | |

The investigation revealed that the criteria under paragraphs (a)(2)(A)(i) (decline in sales or production, or both) and (a)(2)(B) (shift in production or services to a foreign country) of section 222 have not been met.

| TA–W No. | Subject firm | Location | Impact date |
|---|---|---|---|
| 74,270 | Lockheed Martin Systems Integration | Owego, NY. | |
| 74,270A | Lockheed Martin Systems Integration | Endicott, NY. | |
| 74,270B | Lockheed Martin Systems Integration | Endicott, NY. | |
| 74,270C | Lockheed Martin Systems Integration | Apalachin, NY. | |
| 74,270D | Lockheed Martin Systems Integration | Owego, NY. | |

The investigation revealed that the criteria under paragraphs(a)(2)(A) (increased imports) and (a)(2)(B) (shift in production or services to a foreign country) of section 222 have not been met.

| TA–W No. | Subject firm | Location | Impact date |
|---|---|---|---|
| 72,249 | CJ's Wholesale Socks, Inc. | Fort Payne, AL. | |
| 72,359 | Nielsen Hardware, Actuant Corporation | Berlin, CT. | |
| 72,515 | Precision Custom Coatings | Totowa, NJ. | |
| 72,917 | Circuit City, Inc., Bethlehem Distribution Center | Bethlehem, PA. | |
| 73,005 | Camcar Aerospace | Rockford, IL. | |
| 73,154 | Transcom Enhanced Services, Inc. | Fort Worth, TX. | |
| 73,156 | American Spring Wire Corp. | Kankakee, IL. | |
| 73,161 | Oglebay Norton Industrial Sands, Inc., D/B/A Carmeuse Industrial Sands. | Brady, TX. | |
| 73,212 | Ryko Manufacturing Co. | Grimes, IA. | |
| 73,285 | Bowne of Chicago, Inc., dba Bowne of Minneapolis, Leased Workers Randstad Staffing Services, etc. | Minneapolis, MN. | |
| 73,301 | Shieldalloy Metallurgical Corp., A Subsidiary of AMG | Newfield, NJ. | |
| 73,401 | DEP, Inc., DBA Edward Ferrel/Lewis Mittman, Leased Workers from Graham Personelle. | High Point, NC. | |
| 73,841 | HSBC Finance Corporation, HSBC North America Holdings, Inc. | Dayton, OH. | |
| 73,894 | United Auto Workers Local 2244 | Fremont, CA. | |
| 74,334 | Buehler Motor, Inc., Buhler Motor GMBH, Leased Workers From Manpower. | Morrisville, NC. | |
| 74,415 | New Page Corporation, Kimberly Mill | Kimberly, WI. | |

The investigation revealed that the criteria under paragraphs (b)(2) and (b)(3) (public agency acquisition of services from a foreign country) of section 222 have not been met.

| TA–W No. | Subject firm | Location | Impact date |
|---|---|---|---|
| 74,029 | Mohican Juvenile Correctional Facility | Perrysville, OH. | |

**Determinations Terminating Investigations of Petitions for Worker Adjustment Assistance**

After notice of the petitions was published in the **Federal Register** and on the Department's Web site, as required by Section 221 of the Act (19 U.S.C. 2271), the Department initiated investigations of these petitions.

The following determinations terminating investigations were issued because the petitioner has requested that the petition be withdrawn.

| TA–W No. | Subject firm | Location | Impact date |
|---|---|---|---|
| 72,537 | McQuay International | Verona, VA. | |
| 72,645 | Enterprise Tool and Die | Grandville, MI. | |
| 73,886 | Burton Snowboards, Inc | South Burlington, VT. | |
| 74,043 | American Superconductor Corporation | West Mifflin, PA. | |
| 74,083 | Siemens | Ballefontaine, OH. | |
| 74,190 | Dyrsmith, LLC, DBA Precision-works Manufacturing | Auburn, CA. | |
| 74,360 | CR Compressors, LLC | Decatur, AL. | |
| 74,361 | CR Compressors, LLC | Hartselle, AL. | |

The following determinations terminating investigations were issued because the petitioning groups of workers are covered by active certifications. Consequently, further investigation in these cases would serve no purpose since the petitioning group of workers cannot be covered by more than one certification at a time.

| TA–W No. | Subject firm | Location | Impact date |
|---|---|---|---|
| 73,998 | Dupont Performance Coatings, On-Site at New United Motor Manufacturing, Inc. | Fremont, CA. | |

The following determinations terminating investigations were issued because the petitions are the subject of ongoing investigations under petitions filed earlier covering the same petitioners.

| TA–W No. | Subject firm | Location | Impact date |
|---|---|---|---|
| 74,344 | Hanes Brands, Inc | Winston Salem, NC. | |

The following determinations terminating investigations were issued because the Department issued a negative determination on petitions related to the relevant investigation period applicable to the same worker group. The duplicative petitions did not present new information or a change in circumstances that would result in a reversal of the Department's previous negative determination, and therefore, further investigation would duplicate efforts and serve no purpose.

| TA–W No. | Subject firm | Location | Impact date |
|---|---|---|---|
| 73,741 | Kenco | Lexington, KY. | |
| 73,953 | Freescale Semiconductor, Inc | Woburn, MA. | |

I hereby certify that the aforementioned determinations were issued during the period of July 26, 2010 through July 30, 2010. Copies of these determinations may be requested under the Freedom of Information Act. Requests may be submitted by fax, courier services, or mail to FOIA Disclosure Officer, Office of Trade Adjustment Assistance (ETA), U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210 or *tofoiarequest@dol.gov.* These determinations also are available on the Department's Web site at *http://www.doleta.gov/tradeact* under the searchable listing of determinations.

Dated: August 4, 2010.

**Elliott S. Kushner,**

*Certifying Officer, Division of Trade Adjustment Assistance .*

[FR Doc. 2010–20039 Filed 8–12–10; 8:45 am]

**BILLING CODE 4510–FN–P**

## DEPARTMENT OF LABOR

### Employment and Training Administration

### Investigations Regarding Certifications of Eligibility To Apply for Worker Adjustment Assistance

Petitions have been filed with the Secretary of Labor under Section 221(a) of the Trade Act of 1974 ("the Act") and are identified in the Appendix to this notice. Upon receipt of these petitions, the Director of the Division of Trade Adjustment Assistance, Employment and Training Administration, has instituted investigations pursuant to Section 221(a) of the Act.

The purpose of each of the investigations is to determine whether the workers are eligible to apply for adjustment assistance under Title II, Chapter 2, of the Act. The investigations will further relate, as appropriate, to the determination of the date on which total or partial separations began or threatened to begin and the subdivision of the firm involved.

The petitioners or any other persons showing a substantial interest in the subject matter of the investigations may request a public hearing, provided such request is filed in writing with the Director, Division of Trade Adjustment Assistance, at the address shown below, not later than August 23, 2010.

Interested persons are invited to submit written comments regarding the subject matter of the investigations to the Director, Division of Trade Adjustment Assistance, at the address shown below, not later than August 23, 2010.

Copies of these petitions may be requested under the Freedom of Information Act. Requests may be submitted by fax, courier services, or mail, to FOIA Disclosure Officer, Office of Trade Adjustment Assistance (ETA), U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210 or to *foiarequest@dol.gov.*

Signed at Washington, DC, this 5th of August 2010.

**Michael Jaffe,**

*Certifying Officer, Division of Trade Adjustment Assistance.*

**APPENDIX**

TAA Petitions Instituted Between 7/26/10 and 7/30/10

| TA–W | Subject firm (Petitioners) | Location | Date of institution | Date of petition |
|---|---|---|---|---|
| 74430 | Tasman Hartford, LLC (Company) | Hartford, WI | 07/26/10 | 07/22/10 |
| 74431 | Evonik Cyro, LLC (Company) | Sanford, ME | 07/26/10 | 07/22/10 |
| 74432 | D–Tech USA, LLC (Workers) | Plano, TX | 07/27/10 | 07/23/10 |
| 74433 | Prudential Financial (State/One-Stop) | Hartford, CT | 07/27/10 | 07/26/10 |
| 74434 | Williams International, LLC (State/One-Stop) | Commerce Township, MI | 07/27/10 | 07/16/10 |
| 74435 | Philips Lighting (Company) | Union, NJ | 07/28/10 | 07/21/10 |
| 74436 | Faurecia Automotive Seating Group (State/One-Stop). | Troy, MI | 07/28/10 | 07/06/10 |

TAA PETITIONS INSTITUTED BETWEEN 7/26/10 AND 7/30/10—Continued

| TA–W | Subject firm (Petitioners) | Location | Date of institution | Date of petition |
|---|---|---|---|---|
| 74437 | Deloitte Services, LP (State/One-Stop) | Wilton, CT | 07/29/10 | 07/28/10 |
| 74438 | Bruss North America (State/One-Stop) | Orion, MI | 07/29/10 | 07/17/10 |
| 74439 | Bruss North America (Company) | Russell Springs, KY | 07/29/10 | 07/17/10 |
| 74440 | Hagemeyer North America (Comp) | Charleston, SC | 07/29/10 | 07/19/10 |
| 74441 | Hagemeyer North America (Company) | El Paso, TX | 07/29/10 | 07/19/10 |
| 74442 | Hagemeyer North America (Company) | McAllen, TX | 07/29/10 | 07/19/10 |
| 74443 | StarTek USA, Inc. (Company) | Denver, CO | 07/30/10 | 07/19/10 |
| 74444 | StarTek USA, Inc. (Company) | Collinsville, VA | 07/30/10 | 07/19/10 |
| 74445 | StarTek USA, Inc. (Company) | Decatur, IL | 07/30/10 | 07/19/10 |
| 74446 | StarTek USA, Inc. (Company) | Jonesboro, AR | 07/30/10 | 07/19/10 |
| 74447 | StarTek USA, Inc. (Company) | Mansfield, OH | 07/30/10 | 07/19/10 |
| 74448 | StarTek USA, Inc. (Company) | Lynchburg, VA | 07/30/10 | 07/19/10 |
| 74449 | StarTek USA, Inc. (Company) | Enid, OK | 07/30/10 | 07/19/10 |
| 74450 | StarTek USA, Inc. (Company) | Grand Junction, CO | 07/30/10 | 07/19/10 |
| 4451 | StarTek USA, Inc. (Company) | Denver, CO | 07/30/10 | 07/19/10 |

[FR Doc. 2010–20038 Filed 8–12–10; 8:45 am]

**BILLING CODE 4510–FN–P**

## DEPARTMENT OF LABOR

### Employment and Training Administration

### Investigations Regarding Certifications of Eligibility To Apply for Worker Adjustment Assistance

Petitions have been filed with the Secretary of Labor under Section 221(a) of the Trade Act of 1974 ("the Act") and are identified in the Appendix to this notice. Upon receipt of these petitions, the Director of the Division of Trade Adjustment Assistance, Employment and Training Administration, has instituted investigations pursuant to Section 221(a) of the Act.

The purpose of each of the investigations is to determine whether the workers are eligible to apply for adjustment assistance under Title II, Chapter 2, of the Act. The investigations will further relate, as appropriate, to the determination of the date on which total or partial separations began or threatened to begin and the subdivision of the firm involved.

The petitioners or any other persons showing a substantial interest in the subject matter of the investigations may request a public hearing, provided such request is filed in writing with the Director, Division of Trade Adjustment Assistance, at the address shown below, not later than August 23, 2010.

Interested persons are invited to submit written comments regarding the subject matter of the investigations to the Director, Division of Trade Adjustment Assistance, at the address shown below, not later than August 23, 2010.

Copies of these petitions may be requested under the Freedom of Information Act. Requests may be submitted by fax, courier services, or mail, to FOIA Disclosure Officer, Office of Trade Adjustment Assistance (ETA), U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210 or to *foiarequest@dol.gov.*

Signed at Washington, DC, this 29th of July 2010.

**Michael Jaffe,**

*Certifying Officer, Division of Trade Adjustment Assistance.*

### Appendix

TAA PETITIONS INSTITUTED BETWEEN 7/19/10 AND 7/23/10

| TA–W | Subject firm (Petitioners) | Location | Date of institution | Date of petition |
|---|---|---|---|---|
| 74389 | Domtar Paper Company, Inc. (Union) | Cerritos, CA | 07/19/10 | 07/16/10 |
| 74390 | Haldex Brake Products Corporation (Company) | Iola, KS | 07/19/10 | 07/15/10 |
| 74391 | Travelers Insurance (Workers) | Wyomissing, PA | 07/19/10 | 07/13/10 |
| 74392 | Beckman Coulter, Inc. (Company) | Webster, TX | 07/19/10 | 07/12/10 |
| 74393 | Henkel of America, Inc. (State/One-Stop) | Rocky Hill, CT | 07/19/10 | 07/15/10 |
| 74394 | Laserwords U.S., Inc. (Workers) | Lewiston, ME | 07/19/10 | 06/11/10 |
| 74395 | FTCA (Workers) | Somerset, PA | 07/19/10 | 07/15/10 |
| 74396 | The Hartford (State/One-Stop) | Farmington, CT | 07/19/10 | 07/15/10 |
| 74397 | Progress Software Corporation and DataDirect Technologies (Company). | Bedford, MA | 07/20/10 | 07/12/10 |
| 74398 | Progress Software Corporation (Company) | El Segundo, CA | 07/20/10 | 07/12/10 |
| 74399 | Progress Software Corporation (Company) | San Francisco, CA | 07/20/10 | 07/12/10 |
| 74400 | Progress Software Corporation (Company) | Nashua, NH | 07/20/10 | 07/12/10 |
| 74401 | Savvion, a Progress Software Company (Company). | Santa Clara, CA | 07/20/10 | 07/12/10 |
| 74402 | DataDirect Technologies (Company) | Los Gatos, CA | 07/20/10 | 07/12/10 |
| 74403 | Progress Software Corporation (Company) | Oak Brook, IL | 07/20/10 | 07/12/10 |
| 74404 | Progress Software Corporation (Company) | Largo, MD | 07/20/10 | 07/12/10 |
| 74405 | Progress Software Corporation (Company) | New York, NY | 07/20/10 | 07/12/10 |
| 74406 | DataDirect Technologies Headquarter (Company) | Morrisville, NC | 07/20/10 | 07/12/10 |
| 74407 | Progress Software Corporation (Company) | Austin, TX | 07/20/10 | 07/12/10 |
| 74408 | DataDirect Technologies (Company) | Sugar Land, TX | 07/20/10 | 07/12/10 |
| 74409 | DataDirect Technologies (Company) | Fairfax, VA | 07/20/10 | 07/12/10 |

TAA PETITIONS INSTITUTED BETWEEN 7/19/10 AND 7/23/10—Continued

| TA–W | Subject firm (Petitioners) | Location | Date of institution | Date of petition |
|---|---|---|---|---|
| 74410 | DataDirect Technologies (Company) | Norfolk, VA | 07/20/10 | 07/12/10 |
| 74411 | Avaya (Wkrs) | Basking Ridge, NJ | 07/20/10 | 07/08/10 |
| 74412 | Convergys (Wkrs) | Albuquerque, NM | 07/20/10 | 06/29/10 |
| 74413 | McGuire Furniture Company (Wkrs) | San Francisco, CA | 07/20/10 | 07/08/10 |
| 74414 | PricewaterhouseCoopers (Workers) | Cleveland, OH | 07/20/10 | 07/13/10 |
| 74415 | New Page Corporation (Company) | Kimberly, WI | 07/20/10 | 07/19/10 |
| 74416 | Ainak (Company) | Winchester, KY | 07/20/10 | 07/12/10 |
| 74417 | Good Harbor Fillet (State/One-Stop) | Gloucester, MA | 07/21/10 | 07/19/10 |
| 74418 | Husqvarna Outdoor Products (Workers) | Texarkana, TX | 07/21/10 | 06/30/10 |
| 74419 | Huntington Foam LLC (Workers) | Brockway, PA | 07/21/10 | 07/14/10 |
| 74420 | Russell Investments (Workers) | Tacoma, WA | 07/21/10 | 07/21/10 |
| 74421 | Fairfield Chair Company (Company) | Lenoir, NC | 07/22/10 | 07/19/10 |
| 74422 | World Color (USA), LLC (Company) | Dyersburg, TN | 07/22/10 | 07/16/10 |
| 74423 | Kennametal/Extrude Hone (Workers) | Irwin, PA | 07/22/10 | 07/15/10 |
| 74424 | Unisource Worldwide, Inc. (Company) | Wisconsin Rapids, WI | 07/23/10 | 07/21/10 |
| 74425 | Douglas Corporation (State/One-Stop) | Eden Prairie, MN | 07/23/10 | 07/22/10 |
| 74426 | International Business Machines (State/One-Stop) | Rochester, MN | 07/23/10 | 07/22/10 |
| 74427 | Mattel, Inc. (Workers) | El Sequndo, CA | 07/23/10 | 07/20/10 |
| 74428 | MH Technologies, LLC (Company) | Mount Holly Springs, PA | 07/23/10 | 05/19/10 |
| 74429 | Tyden Brooks Security Products Group (Workers) | Livingston, NJ | 07/23/10 | 07/01/10 |

[FR Doc. 2010–20037 Filed 8–12–10; 8:45 am]

BILLING CODE 4510–FN–P

## DEPARTMENT OF LABOR

### Employment and Training Administration

**[TA–W–72,908]**

### Carolina Telephone and Telegraph Company LLC, a Wholly Owned Subsidiary of Embarq Corporation, a Subsidiary of Centurylink, Inc., New Bern Call Center, New Bern, NC; Notice of Negative Determination Regarding Application for Reconsideration

By application dated July 14, 2010, petitioners requested administrative reconsideration of the Department's negative determination regarding eligibility to apply for Trade Adjustment Assistance (TAA), applicable to workers and former workers of the subject firm. The determination was issued on June 16, 2010. The Department's Notice of determination was published in the **Federal Register** on July 1, 2010 (75 FR 38142). The petition alleges that a merger of the subject firm with another firm led to duplication of services (call center support services for landline telephone, Internet, and related data communications) and, thus, the closure of the subject facility.

Pursuant to 29 CFR 90.18(c) reconsideration may be granted under the following circumstances:

(1) If it appears on the basis of facts not previously considered that the determination complained of was erroneous;

(2) If it appears that the determination complained of was based on a mistake in the determination of facts not previously considered; or

(3) If in the opinion of the Certifying Officer, a mis-interpretation of facts or of the law justified reconsideration of the decision.

The negative determination was based on the findings that the subject firm did not shift to/acquire from a foreign country services like or directly competitive with the call center support activities provided by the subject workers, nor did the workers supply a service that was used in the production of an article or the supply of a service by a firm whose workers are currently eligible to apply for TAA on the basis of that article or service.

In the request for reconsideration, the petitioner paraphrased the findings as presented in the negative determination and agreed that "[T]here was no shift in work to a foreign country nor was Embarq [parent company of the subject firm] acquired by a foreign country."

The petitioner did not supply facts not previously considered; nor provide additional documentation indicating that there was either (1) a mistake in the determination of facts not previously considered or (2) a misinterpretation of facts or of the law justifying reconsideration of the initial determination.

After careful review of the request for reconsideration, the Department determines that 29 CFR 90.18(c) has not been met.

**Conclusion**

After review of the application and investigative findings, I conclude that there has been no error or misinterpretation of the law or of the facts which would justify reconsideration of the Department of Labor's prior decision. Accordingly, the application is denied.

Signed in Washington, DC, this 4th day of August, 2010.

**Del Min Amy Chen,**

*Certifying Officer, Division of Trade Adjustment Assistance.*

[FR Doc. 2010–20031 Filed 8–12–10; 8:45 am]

BILLING CODE 4510–FN–P

## DEPARTMENT OF LABOR

### Employment and Training Administration

**[TA–W–73,840]**

### Lochmoor Chrysler Jeep; Detroit, MI; Notice of Negative Determination Regarding Application for Reconsideration

By application dated July 6, 2010, the petitioners requested administrative reconsideration of the Department's negative determination regarding eligibility to apply for Trade Adjustment Assistance (TAA), applicable to workers and former workers of the subject firm. The determination was signed on June 17, 2010. The Notice of determination was published in the **Federal Register** on July 1, 2010 (75 FR 38142).

Pursuant to 29 CFR 90.18(c), reconsideration may be granted under the following circumstances:

(1) If it appears on the basis of facts not previously considered that the determination complained of was erroneous;

(2) if it appears that the determination complained of was based on a mistake in the determination of facts not previously considered; or

(3) if in the opinion of the Certifying Officer, a misinterpretation of facts or of the law justified reconsideration of the decision.

The negative determination applicable to workers and former workers at Lochmoor Chrysler Jeep, Detroit, Michigan, was based on the findings that the subject firm did not, during the period under investigation, shift to a foreign country sales services like or directly competitive with the sales services supplied by the workers or acquire these services from a foreign country; that the workers' separation, or threat of separation, was not related to any increase in imports of like or directly competitive services; and that the workers did not supply a service that was directly used in the production of an article or the supply of service by a firm that employed a worker group that is eligible to apply for TAA based on the aforementioned article or service.

In the request for reconsideration, the petitioner states that the "trend of Americans buying foreign cars has caused the fortunes of Chrysler to enter bankruptcy * * * causing the car sales companies like Lochmoor to lose there dealerships * * * foreign car sales lots have opened up in its place."

During the initial investigation, the Department obtained information from the subject firm that revealed that the sales services supplied by the workers were not shifted abroad by the subject firm or acquired from a foreign source.

Production of automobiles is not directly competitive with the sales services provided by the workers. Further, the workers did not supply a service that was used by a firm with TAA-certified workers in the production of an article or supply of a service that was the basis for TAA-certification.

The petitioner did not supply facts not previously considered; nor provide additional documentation indicating that there was either (1) a mistake in the determination of facts not previously considered or (2) a misinterpretation of facts or of the law justifying reconsideration of the initial determination.

After careful review of the request for reconsideration, the Department determines that 29 CFR 90.18(c) has not been met.

**Conclusion**

After review of the application and investigative findings, I conclude that there has been no error or misinterpretation of the law or of the facts which would justify reconsideration of the Department of Labor's prior decision. Accordingly, the application is denied.

Signed in Washington, DC, this 4th day of August, 2010.

**Del Min Amy Chen,**

*Certifying Officer, Division of Trade Adjustment Assistance.*

[FR Doc. 2010–20034 Filed 8–12–10; 8:45 am]

**BILLING CODE 4510–FN–P**

## DEPARTMENT OF LABOR

### Mine Safety and Health Administration

### Petitions for Modification of Existing Mandatory Safety Standards

**AGENCY:** Mine Safety and Health Administration (MSHA), Labor.

**ACTION:** Notice.

**SUMMARY:** Section 101(c) of the Federal Mine Safety and Health Act of 1977 and 30 CFR part 44 govern the application, processing, and disposition of petitions for modification. This notice is a summary of petitions for modification filed by the parties listed below to modify the application of existing mandatory safety standards published in Title 30 of the Code of Federal Regulations.

**DATES:** All comments on the petitions must be received by the Office of Standards, Regulations and Variances on or before September 13, 2010.

**ADDRESSES:** You may submit your comments, identified by "docket number" on the subject line, by any of the following methods:

1. *Electronic Mail: Standards-Petitions@dol.gov.*

2. *Facsimile:* 1–202–693–9441.

3. *Regular Mail:* MSHA, Office of Standards, Regulations and Variances, 1100 Wilson Boulevard, Room 2350, Arlington, Virginia 22209–3939, *Attention:* Patricia W. Silvey, Director, Office of Standards, Regulations and Variances.

4. *Hand-Delivery or Courier:* MSHA, Office of Standards, Regulations and Variances, 1100 Wilson Boulevard, Room 2350, Arlington, Virginia 22209–3939, *Attention:* Patricia W. Silvey, Director, Office of Standards, Regulations and Variances.

MSHA will consider only comments postmarked by the U.S. Postal Service or proof of delivery from another delivery service such as UPS or Federal Express on or before the deadline for comments. Individuals who submit comments by hand-delivery are required to check in at the receptionist desk on the 21st floor.

Individuals may inspect copies of the petitions and comments during normal business hours at the address listed above.

**FOR FURTHER INFORMATION CONTACT:** Barbara Barron, Office of Standards, Regulations and Variances at 202–693–9447 (Voice), *barron.barbara@dol.gov* (E-mail), or 202–693–9441 (Telefax). [These are not toll-free numbers.]

**SUPPLEMENTARY INFORMATION:**

**I. Background**

Section 101(c) of the Federal Mine Safety and Health Act of 1977 (Mine Act) allows the mine operator or representative of miners to file a petition to modify the application of any mandatory safety standard to a coal or other mine if the Secretary determines that: (1) An alternative method of achieving the result of such standard exists which will at all times guarantee no less than the same measure of protection afforded the miners of such mine by such standard; or (2) that the application of such standard to such mine will result in a diminution of safety to the miners in such mine. In addition, the regulations at 30 CFR 44.10 and 44.11 establish the requirements and procedures for filing petitions for modification.

**II. Petitions for Modification**

*Docket Number:* M–2010–031–C.

*Petitioner:* D & C Mining Corporation, P.O. Box 148, Fries, Virginia 24330.

*Mine:* D & C Mining Corporation Mine, MSHA I.D. No. 15–18182, located in Harlan, County, Kentucky.

*Regulation Affected:* 30 CFR 75.507–1(a) (Electric equipment other than power-connection points; outby the last open crosscut; return air; permissibility requirements) and 30 CFR 18.35(a)(5)(i)(ii) (Portable (trailing) cables and cords).

*Modification Request:* The petitioner requests a modification of the existing standard to permit an increase in the maximum length of trailing cables supplying power to permissible pumps at the mine. The petitioner states that: (1) This petition will apply only to trailing cables supplying three-phase, 480-volt power for permissible pumps; (2) the maximum length of the 480-volt power for permissible pumps will be 2100 feet; (3) the 480-volt power for permissible pump trailing cables will not be smaller than #6 American Wire Gauge (AWG); (4) all circuit breakers used to protect trailing cables exceeding the pump approval length or Table 9 of 30 CFR Part 18 will have an instantaneous trip unit calibrated to trip at 70 percent of phase-to-phase short-

circuit current. The trip setting of these circuit breakers will be sealed or locked, and these circuit breakers will have permanent, legible labels. Each label will identify the circuit breaker as being suitable for protecting the trailing cables. This label will be maintained legible; (5) replacement instantaneous trip units, used to protect pump trailing cables exceeding the length of item #4 will be calibrated to trip at 70 percent of the available phase to phase short-circuit current and this setting will be sealed or locked; (6) permanent warning labels will be installed and maintained on the covers of the power center to identify the location of each sealed or locked short-circuit protection device. These labels will warn miners not to change or alter these short-circuit settings; (7) all future pump installations with excessive cable lengths will have a short-circuit survey conducted and items 1–6 will be implemented. A copy of each pumps short-circuit survey will be available at the mine site for inspection; (8) the proposed alternative method will not be implemented until miners who have been designated to examine the integrity of seals or locks, verify the short-circuit settings, and proper procedures for examining trailing cable for defects and damage have received training in the following elements: (a) Training in mining methods and operating procedures that will protect the trailing cables against damage; (b) training in the proper procedures for examining the trailing cables to ensure the cables are in safe operating condition; (c) training in hazards of setting the instantaneous circuit breakers too high to adequately protect the trailing cables, and (d) training in how to verify the circuit interrupting device(s) protecting the trailing cable(s) are properly set and maintained; and (9) within sixty days after this petition is granted, proposed revisions for approved 30 CFR part 48 training plans will be submitted to the District Manager for the area in which the mine is located. The petitioner further states that the procedures of 30 CFR 48.3 for approval of proposed revisions to already approved training plans will apply. The petitioner asserts that the proposed alternative method will at all times guarantee no less than the same measure of protection to all miners than is provided by the existing standards.

*Docket Number:* M–2010–032–C.

*Petitioner:* M–Class Mining Company, P.O. Box 227, Johnston City, Illinois 62951.

*Mine:* MC No. 1 Mine, MSHA I.D. No. 11–03189, located in Franklin County, Illinois.

*Regulation Affected:* 30 CFR 75.1700 (Oil and gas wells).

*Modification Request:* The petitioner requests a modification of the existing standard to permit cleaning out, preparing, plugging and replugging of oil and gas wells utilizing the following terms and conditions: 1. District Manager Approval; (a) a safety barrier of 300 feet in diameter (150 feet between any mined area and a well) will be maintained around all oil and gas wells to include all active, inactive, abandoned, shut-in, previously plugged wells, and water injection wells, until approval to proceed with mining has been obtained from the District Manager. After District Manager approval, the mine operator will then mine within the safety barrier of the well, subject to the terms and conditions of this petition. 2. Plugging, and Replugging or Gas Wells; (1) the operator will completely clean out the well from the surface to at least 200 feet below the base of the lowest mineable coal seam, unless the District Manager requires cleaning to a greater depth based on his judgment as to what is required due to the geological strata or due to the pressure within the well (the operator will provide the District Manager with all information it possesses concerning the geologic nature of the strata and the pressure of the well). The operator will remove all material from the entire diameter of the well, wall to wall; (2) the operator will prepare down-hole logs for each well. They will consist of a caliper survey and log(s) suitable for determining the top, bottom, and thickness of all coal seams and potential hydrocarbon producing strata and the location for a bridge plug. In addition, a journal will be maintained describing the depth and nature of each material encountered. The bit size and type used to drill each portion of the hole; length and type of each material used to plug the well; length of casing(s) removed, perforated or ripped or left in place, any sections where casing was cut or milled; and other pertinent information concerning cleaning and sealing the well. Invoices, work-orders, and other records relating to all work on the well will be maintained as part of this journal and provided to MSHA upon request; (3) When cleaning out the well, the operator will make a diligent effort to remove all of the casing in the well. If it is not possible to remove all of the casing, the operator will take appropriate steps to ensure that the annulus between the casing and between the casings and the well walls are filled with expanding (minimum 0.5% expansion upon setting) cement and contain no voids. The casing will be cut or milled at all mineable coal seam levels if it cannot be removed. Any casing that remains will be perforated or ripped. If the operator, using a casing bond log, can demonstrate to the satisfaction of the District Manager that all annuli in the well are already adequately sealed with cement, the operator will not be required to perforate or rip the casing for that particular well. When multiple casing and tubing strings are present in the coal horizon, any casing that remains will be ripped or perforated and filled with expanding cement as indicated above. An acceptable casing bond log for each casing and tubing string is needed if used in lieu of ripping or perforating multiple strings. The petitioner has listed a complete list of procedures that will be utilized when cleaning out, preparing, plugging, and replugging oil or gas wells. Persons may review these procedures at the MSHA address listed in this notice. The petitioner states that: (1) Within 30 days after this petition becomes final, revisions for the 30 CFR part 48 training plan will be submitted to the District Manager. The proposed revisions will include initial and refresher training regarding compliance with the terms and conditions stated in this petition. All miners in the mine-through of a well will be provided with training regarding the requirements of this petition prior to mining within 150 feet of the next well to be mined through; (2) the responsible person required by 30 CFR 75.1501 will be responsible for well intersection emergencies. The well intersection procedures will be reviewed by the responsible person prior to any planned intersection; and (3) within 30 days after this petition becomes final, the operator will submit proposed revisions for its approved mine emergency evacuation and firefighting plan required by 30 CFR 75.1501. The operator will revise the plans to include the hazards and evacuation procedures to be used for well intersections. All underground miners will be trained in the revised plans within 30 days of submittal of the revised evacuation plans. The petitioner asserts that the proposed alternative method will at all times guarantee no less than the same measure of protection afforded to the miners under 30 CFR 75.1700.

**Patricia W. Silvey,**

*Director, Office of Standards, Regulations and Variances.*

[FR Doc. 2010–19944 Filed 8–12–10; 8:45 am]

**BILLING CODE 4510–43–P**

## DEPARTMENT OF LABOR

### Employment and Training Administration

**[TA–W–71,291]**

### Modine Manufacturing Company; Pemberville, OH; Notice of Revised Determination on Reconsideration

By application dated March 10, 2010 a petitioner requested administrative reconsideration of the Department's negative determination regarding the eligibility of workers and former workers of Modine Manufacturing Company, Pemberville, Ohio, to apply for Trade Adjustment Assistance (TAA). On April 1, 2010, the Department issued a Notice of Affirmative Determination Regarding Application for Reconsideration. The Department's Notice was published in the **Federal Register** on April 19, 2010 (75 FR 20382). Workers at the subject firm are engaged in employment related to the production of radiators and service parts.

During the reconsideration investigation, the Department obtained additional information from the subject firm that support a finding that workers of the subject firm meet the criteria as Suppliers for secondary worker certification.

The Department determined that the loss of business by the subject firm with firms that employed worker groups that are currently eligible to apply for TAA, with respect to radiators and service parts sold to the TAA-certified firms, contributed importantly to worker separations at the subject firm.

**Conclusion**

After careful review of the additional facts obtained during the reconsideration investigation, I determine that workers of Modine Manufacturing Company, Pemberville, Ohio, who are engaged in employment related to radiators and service parts, meet the worker group certification criteria under Section 222(c) of the Act, 19 U.S.C. 2272(c). In accordance with Section 223 of the Act, 19 U.S.C. 2273, I make the following certification:

"All workers of Modine Manufacturing Company, Pemberville, Ohio, who became totally or partially separated from employment on or after June 12, 2008, through two years from the date of this revised certification, and all workers in the group threatened with total or partial separation from employment on date of certification through two years from the date of certification, are eligible to apply for adjustment assistance under Chapter 2 of Title II of the Trade Act of 1974, as amended."

Signed in Washington, DC, this 30th day of July 2010.

**Del Min Amy Chen,**

*Certifying Officer, Division of Trade Adjustment Assistance.*

[FR Doc. 2010–20026 Filed 8–12–10; 8:45 am]

**BILLING CODE 4510–FN–P**

## DEPARTMENT OF LABOR

### Employment and Training Administration

**[TA–W–70,827]**

### Formtech Industries, LLC, Minerva Division, Minerva, OH; Notice of Revised Determination on Reconsideration

On January 21, 2010, the Department issued a Notice of Affirmative Determination Regarding Application for Reconsideration applicable to workers of Formtech Industries, LLC, Minerva Division, Minerva, Ohio. The Department's Notice was published in the **Federal Register** on February 16, 2010 (75 FR 7030).

During the reconsideration investigation, the Department investigated the allegations that imports of like or directly competitive articles had increased and that the subject firm supplied component parts (steel forgings) to several firms that employed worker groups that are eligible to apply for Trade Adjustment Assistance (TAA).

While the reconsideration investigation did not reveal increased imports of articles like or directly competitive with the steel forgings produced at the subject firm, the Department did confirm that the subject firm did supply component parts to several firms that employed worker groups that are eligible to apply for TAA, and that one of the firms employed a worker group that was eligible to apply for TAA during the relevant period.

Based on the information obtained during the reconsideration investigation, the Department has determined that the workers of the subject firm are eligible to apply for TAA as adversely affected secondary workers.

**Conclusion**

After careful review of the additional facts obtained during the reconsideration investigation, I determine that workers of FormTech Industries, LLC, Minerva Division, Minerva, Ohio, meet the worker group certification criteria under Section 222(c) of the Act, 19 U.S.C. 2272(c). In accordance with Section 223 of the Act, 19 U.S.C. 2273, I make the following certification:

"All workers of FormTech Industries, LLC, Minerva Division, Minerva, Ohio, who became totally or partially separated from employment on or after May 21, 2008, through two years from the date of this revised certification, and all workers in the group threatened with total or partial separation from employment on date of certification through two years from the date of certification, are eligible to apply for adjustment assistance under Chapter 2 of Title II of the Trade Act of 1974, as amended."

Signed in Washington, DC, this 30th day of July 2010.

**Del Min Amy Chen,**

*Certifying Officer, Division of Trade Adjustment Assistance.*

[FR Doc. 2010–20025 Filed 8–12–10; 8:45 am]

**BILLING CODE 4510–FN–P**

## NATIONAL SCIENCE FOUNDATION

### National Science Board; Sunshine Act Meetings; Notice

The National Science Board's Committee on Strategy and Budget, pursuant to NSF regulations (45 CFR part 614), the National Science Foundation Act, as amended (42 U.S.C. 1862n–5), and the Government in the Sunshine Act (5 U.S.C. 552b), hereby gives notice in regard to the scheduling of a meeting for the transaction of National Science Board business and other matters specified, as follows:

**DATE AND TIME:** August 20, 2010 at 2:30 p.m. to 3 p.m.

**SUBJECT MATTER:** Review, discussion and recommendation of the NSF Future year budget.

**STATUS:** Closed.

**LOCATION:** This meeting will be held at National Science Foundation, 4201 Wilson Blvd., Arlington, VA 22230.

**UPDATES AND POINT OF CONTACT:** Please refer to the National Science Board Web site *http://www.nsf.gov/nsb* for additional information and schedule updates (time, place, subject matter or status of meeting) may be found at *http://www.nsf.gov/nsb/notices/*. Point of contact for this meeting is: Blane Dahl, National Science Board Office, 4201 Wilson Blvd., Arlington, VA 22230. Telephone: (703) 292–7000.

**Daniel A. Lauretano,**

*Counsel to the National Science Board.*

[FR Doc. 2010–20111 Filed 8–11–10; 11:15 am]

**BILLING CODE 7555–01–P**

## NUCLEAR REGULATORY COMMISSION

**[Docket No. 52–043; NRC–2010–0215]**

### PSEG Power, LLC and PSEG Nuclear, LLC Acceptance for Docketing of an Application for an Early Site Permit for the PSEG Site

By letter dated May 25, 2010, as supplemented by letters dated June 22, 2010, July 6, 2010, July 7, 2010, and July 29, 2010, PSEG Power, LLC and PSEG Nuclear, LLC filed with the U.S. Nuclear Regulatory Commission (NRC, the Commission) pursuant to Section 103 of the Atomic Energy Act and title 10 of the Code of Federal Regulations (10 CFR) part 52, "Licenses, Certifications, and Approvals for Nuclear Power Plants," an application for an early site permit (ESP) for the PSEG Site which is located on the southern part of Artificial Island on the east bank of the Delaware River in Lower Alloways Creek Township, Salem County, New Jersey. A notice of receipt and availability of this application was previously published in the **Federal Register** (75 FR 34794) on June 18, 2010. Other existing nuclear facilities licensed by the NRC located at this site are Salem Generating Station (SGS) Units 1 and 2 and Hope Creek Generating Station (HCGS) Unit 1.

An applicant may seek an ESP in accordance with subpart A of 10 CFR part 52 separate from the filing of an application for a construction permit (CP) or combined license (COL) for a nuclear power facility. The ESP process allows resolution of issues relating to siting. At any time during the duration of an ESP (up to 20 years), the permit holder may reference the permit in a CP or COL application.

The NRC staff has determined that PSEG has submitted information in accordance with 10 CFR parts 2, "Rules of Practice for Domestic Licensing Proceedings and Issuance of Orders," and 10 CFR part 52 that is sufficiently complete and acceptable for docketing. The Docket Number established for this application is 52–043.

The NRC staff will perform a detailed technical review of the application, and docketing of the ESP application does not preclude the NRC from requesting additional information from the applicant as the review proceeds, nor does it predict whether the Commission will grant or deny the application. The Commission will conduct a hearing in accordance with 10 CFR 52.21 and will receive a report on the application from the Advisory Committee on Reactor Safeguards in accordance with 10 CFR 52.23. If the Commission then finds that the application meets the applicable standards of the Atomic Energy Act and the Commission's regulations, and that required notifications to other agencies and bodies have been made, the Commission will issue an ESP, in the form and containing conditions and limitations that the Commission finds appropriate and necessary.

In accordance with 10 CFR part 51, the Commission will also prepare an environmental impact statement for the proposed action. Pursuant to 10 CFR 51.26, and as part of the environmental scoping process, the staff intends to hold a public scoping meeting. Detailed information regarding this meeting will be included in a future **Federal Register** notice.

Finally, the Commission will announce, in a future **Federal Register** notice, the opportunity to petition for leave to intervene in the hearing required for this application by 10 CFR 52.21.

A copy of the PSEG Site ESP application is available for public inspection at the Commission's Public Document Room located at One White Flint North, 11555 Rockville Pike (first floor), Rockville, Maryland, at the Penns Grove-Carneys Point Public Library, Penns Grove, New Jersey, and at the Salem Free Public Library, Salem, New Jersey. It is also accessible on the NRC Web site at *http://www.nrc.gov/reactors/new-reactors/esp/pseg.html.* The application submittal cover letter is available 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* (ADAMS Accession No. ML101480484). Persons who do not have access to ADAMS, or who encounter problems in accessing the documents located in ADAMS, should contact the NRC Public Document Room staff by telephone at 1–800–397–4209, 301–415–4737 or by e-mail to *pdr@nrc.gov.*

Dated at Rockville, Maryland, this 4th day of August 2010.

For the Nuclear Regulatory Commission.

**David B. Matthews,**

*Director, Division of New Reactor Licensing, Office of New Reactors.*

[FR Doc. 2010–20004 Filed 8–12–10; 8:45 am]

**BILLING CODE 7590–01–P**

## NUCLEAR REGULATORY COMMISSION

**[Docket Nos. 52–029 and 52–030; NRC–2008–0558]**

### Notice of Availability of the Draft Environmental Impact Statement for the Combined Licenses for Levy Nuclear Plant Units 1 and 2

Notice is hereby given that the U.S. Nuclear Regulatory Commission (NRC) and the U.S. Army Corps of Engineers (USACE), Jacksonville District, have published NUREG–1941, "Draft Environmental Impact Statement for Combined Licenses (COL) for Levy Nuclear Plant Units 1 and 2". The site is located in Levy County, Florida, 7.9 miles east of the Gulf of Mexico and 30.1 miles west of Ocala, Florida. The application for the COLs was submitted by letter dated July 28, 2008, pursuant to title 10 of the Code of Federal Regulations (10 CFR) part 52. A notice of receipt and availability of the application, which included the environmental report, and a notice of acceptance for docketing of the COL application were published in the **Federal Register** on October 14, 2008 (73 FR 60726). A notice of intent to prepare a draft environmental impact statement (DEIS) and to conduct the scoping process was published in the **Federal Register** on October 24, 2008 (73 FR 63517). A COL is an authorization to construct and (with specified conditions) operate a nuclear power plant at a specific site in accordance with established laws and regulations.

The purpose of this notice is to inform the public that NUREG–1941 is available for public inspection. The DEIS can be accessed: (1) Online at *http://www.nrc.gov/reactors/new-reactors/col/levy.html,* (2) in the NRC's Public Document Room (PDR) located at One White Flint North, 11555 Rockville Pike (first floor), Public File Area O1–F21, Rockville, Maryland 20852, or (3) from NRC's Agencywide Documents Access and Management System (ADAMS). ADAMS is accessible from the NRC Web site at *http://www.nrc.gov/reading-rm/adams.html.* The accession numbers for the DEIS are ML102140231 and ML102140235. Persons who do not have access to ADAMS, or who encounter difficulty accessing the documents located in ADAMS, should contact the PDR reference staff at 1–800–397–4209 or 301–415–4737, or via e-mail to *pdr.resource@nrc.gov.* In addition, the following four public libraries have agreed to make the DEIS available to the public: the Citrus County Coastal Region Library, located

at 8619 West Crystal Street, Crystal River, Florida; the Dunnellon Branch Library, located at 20351 Robinson Road, Dunnellon, Florida; the AF Knotts Public Library, located at 11 56th Street, Yankeetown, Florida; and the Bronson Public Library, located at 600 Gilbert Street, Bronson, Florida.

Any interested party may submit comments on the DEIS for consideration by the NRC staff. Comments may be accompanied by additional relevant information or supporting data. This draft report is being issued with a 75-day comment period. The comment period begins on the date that the U.S. Environmental Protection Agency publishes a Notice of Filing in the **Federal Register**, which is expected to be August 13, 2010; such Notices are published every Friday. The Notice will identify the end date of the comment period. To be considered, written comments should be postmarked by the end date of the comment period. Members of the public may submit comments on the DEIS by e-mail or mail. Comments submitted via e-mail should be sent to *Levy.COLEIS@nrc.gov*. Electronic submissions should be sent no later than the end date of the comment period. Written comments on the DEIS should be mailed to the Chief, Rules, Announcements, and Directives Branch, Division of Administrative Services, Office of Administration, Mailstop TWB–05–B01M, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, or by fax at (301) 492–3446, and should cite the publication date and page number of this **Federal Register** Notice. Comments submitted in writing or in electronic form will be posted on the NRC Web site and on the Federal rulemaking Web site *http://www.Regulations.gov*.

Comments will not be edited to remove any identifying or contact information, therefore, the NRC cautions against including any information that should not 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 comments or remove any identifying or contact information, and therefore, they should not include any information in their comments that they do not want publicly disclosed.

The NRC and USACE staff will hold two public meetings to present an overview of the DEIS and to accept public comments on the document on Thursday, September 23, 2010, at the Plantation Inn, 9301 West Fort Island Trail, Crystal River, Florida. The first meeting will convene at 1:30 p.m. and will continue until 4:30 p.m., as necessary. The second meeting will convene at 7 p.m., with a repeat of the overview portions of the first meeting, and will continue until 10 p.m., as necessary. The meetings will be transcribed and will include a presentation of the contents of the DEIS and the opportunity for interested government agencies, organizations, and individuals to provide comments on the draft report. To be considered, comments must be provided, either orally or in writing, during the transcribed public meeting. Additionally, the NRC and USACE staff will host informal discussions one hour before the start of each meeting during which members of the public may meet and talk with NRC and USACE staff members on an informal basis. No formal comments on the DEIS will be accepted during these informal discussions.

Persons may pre-register to attend or present oral comments at the meeting by contacting Mr. Douglas Bruner by telephone at 1–800–368–5642, extension 2730, or via e-mail to *Levy.COLEIS@nrc.gov* no later than September 16, 2010. Members of the public may also register to speak at the meeting within 15 minutes of the start of the meeting. Individual oral comments may be limited by the time available, depending on the number of persons who register. Members of the public who have not registered may also have an opportunity to speak, if time permits. Mr. Bruner will need to be contacted no later than September 16, 2010, if special equipment or accommodations are needed to attend or present information at the public meeting, so that the NRC staff can determine whether the request can be accommodated.

**FOR FURTHER INFORMATION CONTACT:** Mr. Douglas Bruner, Environmental Projects Branch 3, U.S. Nuclear Regulatory Commission, Mail Stop T7–E18, Washington, DC 20555–0001. Mr. Bruner may also be contacted at the aforementioned telephone number or e-mail address.

Dated at Rockville, Maryland, this 9th day of August 2010.

For The Nuclear Regulatory Commission.

**Scott C. Flanders,**

*Director, Division of Site and Environmental Reviews, Office of New Reactors.*

[FR Doc. 2010–20005 Filed 8–12–10; 8:45 am]

**BILLING CODE 7590–01–P**

## SMALL BUSINESS ADMINISTRATION

**[Disaster Declaration #12242 and #12243]**

### Kentucky Disaster Number KY–00035

**AGENCY:** U.S. Small Business Administration.

**ACTION:** Amendment 2.

**SUMMARY:** This is an amendment of the Presidential declaration of a major disaster for the State of Kentucky (FEMA–1925–DR), dated 07/23/2010.

*Incident:* Severe Storms, Flooding, and Mudslides.

*Incident Period:* 07/17/2010 through 07/30/2010.

*Effective Date:* 08/05/2010.

*Physical Loan Application Deadline Date:* 09/21/2010.

*EIDL Loan Application Deadline Date:* 04/25/2011.

**ADDRESSES:** Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

**FOR FURTHER INFORMATION CONTACT:** A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street, SW., Suite 6050, Washington, DC 20416.

**SUPPLEMENTARY INFORMATION:** The notice of the Presidential disaster declaration for the State of Kentucky, dated 07/23/2010 is hereby amended to include the following areas as adversely affected by the disaster:

*Primary Counties: (Physical Damage and Economic Injury Loans):* Carter, Lewis.

*Contiguous Counties: (Economic Injury Loans Only):*

Kentucky: Boyd, Elliott, Fleming, Greenup, Lawrence, Mason, Rowan.

Ohio: Adams, Scioto.

All other information in the original declaration remains unchanged.

(Catalog of Federal Domestic Assistance Numbers 59002 and 59008)

**Roger B. Garland,**

*Acting Associate Administrator for Disaster Assistance.*

[FR Doc. 2010–19963 Filed 8–12–10; 8:45 am]

**BILLING CODE 8025–01–P**

## SMALL BUSINESS ADMINISTRATION

**[Disaster Declaration #12244 and #12245]**

### Kentucky Disaster Number KY–00036

**AGENCY:** U.S. Small Business Administration.

**ACTION:** Amendment 3.

**SUMMARY:** This is an amendment of the Presidential declaration of a major

disaster for Public Assistance Only for the State of Kentucky (FEMA—1925—DR), dated 07/23/2010.

*Incident:* Severe Storms, Flooding, and Mudslides.

*Incident Period:* 07/17/2010 through 07/30/2010.

*Effective Date:* 08/05/2010.

*Physical Loan Application Deadline Date:* 09/21/2010.

*Economic Injury (EIDL) Loan Application Deadline Date:* 04/25/2011.

**ADDRESSES:** Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

**FOR FURTHER INFORMATION CONTACT:** A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street, SW., Suite 6050, Washington, DC 20416.

**SUPPLEMENTARY INFORMATION:** The notice of the President's major disaster declaration for Private Non-Profit organizations in the State of Kentucky, dated 07/23/2010, is hereby amended to include the following areas as adversely affected by the disaster.

Primary Counties: Carter, Elliott, Lewis.

All other information in the original declaration remains unchanged.

(Catalog of Federal Domestic Assistance Numbers 59002 and 59008)

**Roger B. Garland,**

*Acting Associate Administrator for Disaster Assistance.*

[FR Doc. 2010–19964 Filed 8–12–10; 8:45 am]

**BILLING CODE 8025–01–P**

## SECURITIES AND EXCHANGE COMMISSION

### Proposed Collection; Comment Request

*Upon Written Request, Copies Available From:* Securities and Exchange Commission, Office of Investor Education and Advocacy, Washington, DC 20549–0213.

*Extension:*

Rule 7d–2; SEC File No. 270–464; OMB Control No. 3235–0527.

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520), the Securities and Exchange Commission (the "Commission") is soliciting comments on the collection of information summarized below. The Commission plans to submit this existing collection of information to the Office of Management and Budget for extension and approval.

In Canada, as in the United States, individuals can invest a portion of their earnings in tax-deferred retirement savings accounts ("Canadian retirement accounts"). These accounts, which operate in a manner similar to individual retirement accounts in the United States, encourage retirement savings by permitting savings on a tax-deferred basis. Individuals who establish Canadian retirement accounts while living and working in Canada and who later move to the United States ("Canadian-U.S. Participants" or "participants") often continue to hold their retirement assets in their Canadian retirement accounts rather than prematurely withdrawing (or "cashing out") those assets, which would result in immediate taxation in Canada.

Once in the United States, however, these participants historically have been unable to manage their Canadian retirement account investments. Most investment companies ("funds") that are "qualified companies" for Canadian retirement accounts are not registered under the U.S. securities laws. Securities of those unregistered funds, therefore, generally cannot be publicly offered and sold in the United States without violating the registration requirement of the Investment Company Act of 1940 ("Investment Company Act").[1] As a result of this registration requirement, Canadian-U.S. Participants previously were not able to purchase or exchange securities for their Canadian retirement accounts as needed to meet their changing investment goals or income needs.

The Commission issued a rulemaking in 2000 that enabled Canadian-U.S. Participants to manage the assets in their Canadian retirement accounts by providing relief from the U.S. registration requirements for offers of securities of foreign issuers to Canadian-U.S. Participants and sales to Canadian retirement accounts.[2] Rule 7d–2 under the Investment Company Act [3] permits foreign funds to offer securities to Canadian-U.S. Participants and sell securities to Canadian retirement accounts without registering as investment companies under the Investment Company Act.

Rule 7d–2 contains a "collection of information" requirement within the meaning of the Paperwork Reduction Act of 1995.[4] Rule 7d–2 requires written offering materials for securities offered or sold in reliance on that rule to disclose prominently that those securities and the fund issuing those securities are not registered with the Commission, and that those securities and the fund issuing those securities are exempt from registration under U.S. securities laws. Rule 7d–2 does not require any documents to be filed with the Commission.

Rule 7d–2 requires written offering documents for securities offered or sold in reliance on the rule to disclose prominently that the securities are not registered with the Commission and may not be offered or sold in the United States unless registered or exempt from registration under the U.S. securities laws, and also to disclose prominently that the fund that issued the securities is not registered with the Commission. The burden under the rule associated with adding this disclosure to written offering documents is minimal and is non-recurring. The foreign issuer, underwriter, or broker-dealer can redraft an existing prospectus or other written offering material to add this disclosure statement, or may draft a sticker or supplement containing this disclosure to be added to existing offering materials. In either case, based on discussions with representatives of the Canadian fund industry, the staff estimates that it would take an average of 10 minutes per document to draft the requisite disclosure statement.

The staff estimates that there are 2075 publicly offered Canadian funds that potentially would rely on the rule to offer securities to participants and sell securities to their Canadian retirement accounts without registering under the Investment Company Act.[5] Most of these funds have already relied upon the rule and have made the one-time change to their offering documents required to rely on the rule. The staff estimates that 104 (5 percent) additional Canadian funds may newly rely on the rule each year to offer securities to Canadian-U.S. Participants and sell securities to their Canadian retirement accounts, thus incurring the paperwork burden required under the rule. The staff estimates that each of those funds, on average, distributes 3 different written offering documents concerning

[1] 15 U.S.C. 80a. In addition, the offering and selling of securities that are not registered pursuant to the Securities Act of 1933 ("Securities Act") is generally prohibited by U.S. securities laws. 15 U.S.C. 77.

[2] *See* Offer and Sale of Securities to Canadian Tax-Deferred Retirement Savings Accounts, Release Nos. 33–7860, 34–42905, IC–24491 (June 7, 2000) [65 FR 37672 (June 15, 2000)]. This rulemaking also included new rule 237 under the Securities Act, permitting securities of foreign issuers to be offered to Canadian-U.S. Participants and sold to Canadian retirement accounts without being registered under the Securities Act. 17 CFR 230.237.

[3] 17 CFR 270.7d–2.

[4] 44 U.S.C. 3501–3502.

[5] Investment Company Institute, 2010 Investment Company Fact Book (2010) at 183, tbl. 60.

those securities, for a total of 312 offering documents. The staff therefore estimates that 104 respondents would make 312 responses by adding the new disclosure statement to approximately 312 written offering documents. The staff therefore estimates that the annual burden associated with the rule 7d–2 disclosure requirement would be 52 hours (312 offering documents × 10 minutes per document). The total annual cost of these burden hours is estimated to be $16,432 (52 hours × $316 per hour of attorney time).[6]

These burden hour estimates are based upon the Commission staff's experience and discussions with the fund industry. The estimates of average burden hours are made solely for the purposes of the Paperwork Reduction Act. These estimates are not derived from a comprehensive or even a representative survey or study of the costs of Commission rules.

Compliance with the collection of information requirements of the rule is mandatory and is necessary to comply with the requirements of the rule in general. 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 control number.

Written comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the Commission, including whether the information has practical utility; (b) the accuracy of the Commission's estimate of the burdens of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burdens of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted in writing within 60 days of this publication.

Please direct your written comments to Charles Boucher, Director/CIO, Securities and Exchange Commission, c/o Shirley Martinson, 6432 General Green Way, Alexandria, VA, 22312; or send an e-mail to: *PRA_Mailbox@sec.gov.*

[6] The Commission's estimate concerning the wage rate for attorney time is based on salary information for the securities industry compiled by the Securities Industry and Financial Markets Association ("SIFMA"). The $316 per hour figure for an attorney is from SIFMA's *Management & Professional Earnings in the Securities Industry 2009,* modified by Commission staff to account for an 1800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead.

Dated: August 9, 2010.

**Florence E. Harmon,**

*Deputy Secretary.*

[FR Doc. 2010–19973 Filed 8–12–10; 8:45 am]

**BILLING CODE 8010–01–P**

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–62664; File No. SR–FINRA–2010–037]**

## Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of Proposed Rule Change To Amend FINRA Rule 5190 (Notification Requirements for Offering Participants)

August 9, 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 July 27, 2010, 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 substantially been prepared by FINRA. 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 amend FINRA Rule 5190 (Notification Requirements for Offering Participants) relating to the notice requirements applicable to distributions of "actively traded" securities, as defined under SEC Regulation M.

The text of the proposed rule change is available on FINRA's Web site at *http://www.finra.org,* 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

FINRA Rule 5190 imposes certain notice requirements on members participating in distributions of listed and unlisted securities and is designed to ensure that FINRA receives pertinent distribution-related information from its members in a timely fashion to facilitate its Regulation M compliance program.

Rule 5190(d) sets forth the notice requirements applicable to distributions of securities that are considered "actively traded" and thus are not subject to a restricted period under Rule 101 of Regulation M.[3] In connection with such distributions, pursuant to Rule 5190(d)(1), members are required to provide written notice to FINRA of the member's determination that no restricted period applies and the basis for such determination. Members must provide such notice at least one business day prior to the pricing of the distribution, unless later notification is necessary under specific circumstances. Rule 5190(d)(2) requires that upon pricing a distribution of an "actively traded" security, members provide written notice to FINRA, along with pricing-related information such as the offering price, the last sale before the distribution and the pricing basis. Notice of pricing must be provided no later than the close of business the next business day following the pricing of the distribution, unless later notification is necessary under specific circumstances.

FINRA is proposing to amend Rule 5190(d) to require that notice under subparagraphs (1) and (2) be provided at the same time; specifically, no later than the close of business the next business day following the pricing of the distribution. While the timing of notice under subparagraph (1) would change, the information required would not change. Thus, pursuant to the proposed rule change, members will be required to provide a single notice after pricing of the distribution and will be required to provide all of the same information that they provide today.

FINRA has determined that it will be sufficient for members to provide notice

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The exclusion for "actively traded" securities removes from Rule 101 of Regulation M securities with an "ADTV" value, as defined in Rule 100 of Regulation M, of at least $1 million where the issuer's common equity securities have a public float value of at least $150 million.

of their determination that no restricted period applies following the pricing of the distribution. The proposed rule change will not impact FINRA's Regulation M surveillance program.[4]

Additionally, a significant number of distributions of "actively traded" securities evolve quickly after the market close and are priced overnight before the next trading session. Thus, members frequently do not have sufficient advance knowledge of their participation in the distribution to provide notice to FINRA at least one business day prior to pricing and in such instances are unable to comply with the express terms of Rule 5190(d)(1). FINRA then must make a determination whether later notification was necessary under the circumstances, in accordance with the rule. The proposed rule change will clarify members' notice obligations in the context of such distributions.

The proposed rule change will be effective on the date of Commission approval.

2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,[5] 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 the proposed rule change will streamline FINRA's Regulation M-related notice requirements and, combined with FINRA's existing Regulation M compliance program, will protect investors.[6]

*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 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.

[4] *See* e-mail from Lisa Horrigan, Asssociate General Counsel, FINRA, to Elizabeth Sandoe, Branch Chief and Brad Gude, Special Counsel, Division of Trading and Markets, Commission, dated August 6, 2010 ("FINRA Email").

[5] 15 U.S.C. 78*o*–3(b)(6).

[6] *See* FINRA E-mail, *supra* note 4.

**III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period up to 90 days (i) as the Commission may designate 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 or disapprove 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 Number SR–FINRA–2010–037 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–2010–037. 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 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–2010–037 and should be submitted on or before September 3, 2010.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[7]

**Florence E. Harmon,**

*Deputy Secretary.*

[FR Doc. 2010–19966 Filed 8–12–10; 8:45 am]

**BILLING CODE 8010–01–P**

[7] 17 CFR 200.30–3(a)(12).

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–62663; File No. SR–NASDAQ–2010–077]**

## Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Order Approving a Proposed Rule Change Relating to Pricing for Direct Circuit Connections

August 9, 2010.

On June 21, 2010, The NASDAQ Stock Market LLC ("NASDAQ" 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 to establish pricing for 10Gb direct circuit connections and codify pricing for 1Gb direct circuit connections for customers who are not co-located in NASDAQ's datacenter. The proposed rule change was published for comment in the **Federal Register** on July 6, 2010.[3] The Commission received no comment letters on the proposal. This order approves the proposed rule change.

In its proposal, NASDAQ proposed to establish fees for direct 10Gb circuit connections, and codify fees for direct circuit connections capable of supporting up to 1Gb, for customers who are not co-located at the Exchange's datacenter. NASDAQ represented that it already makes available to co-located customers a 10Gb circuit connection and charges for each a $1000 initial installation charge as well as an ongoing

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 62392 (July 6, 2010), 75 FR 38857 ("Notice").

monthly fee of $5000. The Exchange proposed to establish the same fees for non-co-located customers with a 10Gb circuit connection.[4]

NASDAQ represented that it also already makes available to both co-located and non-co-located customers direct connections capable of supporting up to 1Gb, with per connection monthly fees of $500 for co-located customers and $1000 for non co-located customers. According to the Exchange, monthly fees are higher for non-co-located customers because direct connections require NASDAQ to provide cabinet space and middleware for those customers' third-party vendors to connect into the datacenter and, ultimately, to the trading system. Finally, the Exchange represented that for non-co-located customers, it charges an optional installation fee of $925 if the customer chooses to use an on-site router.

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.[5] In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(4) of the Act,[6] 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,[7] 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 fees for 10Gb and 1Gb direct circuit connections are reasonable and equitably allocated insofar as they are applied on the same terms to similarly-situated market participants. In addition, the Commission believes that the connectivity options described in the proposed rule change are not unfairly discriminatory because NASDAQ makes the 10Gb and 1Gb direct circuit connections uniformly available to all non-co-located customers who voluntarily request them and pay the fees as detailed in the proposal. As represented by NASDAQ, these fees are uniform for all such customers and are either the same as fees charged to co-located customers, or vary due to different costs incurred by NASDAQ associated with providing service to the two different customer types. Finally, the Commission believes that the proposal will further the protection of investors and the public interest because it will provide greater transparency regarding the connectivity options available to market participants.

*It is therefore ordered,* pursuant to Section 19(b)(2) of the Act,[8] that the proposed rule change (SR–NASDAQ–2010–077) be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[9]

**Florence E. Harmon,**

*Deputy Secretary.*

[FR Doc. 2010–19972 Filed 8–12–10; 8:45 am]

**BILLING CODE 8010–01–P**

[4] According to the Exchange, NASDAQ provides an additional 1Gb copper connection option for co-located customers. NASDAQ represented that, given the technological constraints of copper connections over longer distances, it does not offer a copper connection option to users outside of its datacenter.

[5] 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).

[6] 15 U.S.C. 78f(b)(4).

[7] 15 U.S.C. 78f(b)(5).

[8] 15 U.S.C. 78s(b)(2).

[9] 17 CFR 200.30–3(a)(12).

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–62661; File No. SR–Phlx–2010–110]**

## Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by NASDAQ OMX PHLX, Inc. Relating to Billing Policies

August 6, 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 August 4, 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, 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.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

### I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend its Fee Schedule to: (i) Require members and member organizations to identify accounts to properly identify joint back-office ("JBO") participant transactions; (ii) specify certain policies to dispute billing invoices; and (iii) amend the index to rearrange the order of fees on the Fee Schedule.

The text of the proposed rule change is available on the Exchange's Web site at *http://nasdaqtrader.com/micro.aspx?id=PHLXfilings,* 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

The purpose of the proposed rule change is to memorialize current practices for the Exchange to clearly identify orders that are not subject to the Firm Related Equity Option Cap in order to ensure that members and member organizations are being properly billed the Exchange fees and also to modify the time requirements to dispute Exchange dues and fees to reduce the Exchange's operational costs. The Exchange proposes to memorialize an existing process that requires members and member organizations to identify certain trades which are not subject to the Firm Related Equity Option Cap and to set concrete timelines to dispute any assessed Exchange dues and fees.

Currently, the Firms are subject to a maximum fee of $75,000 also known as the Firm Related Equity Option Cap. Firm equity option transaction charges, in the aggregate, for one billing month cannot exceed the Firm Related Equity

Option Cap per member organization, except for orders of JBO Participants.[3] Therefore, Exchange accounts used for JBO Participant orders are not subject to the Firm Related Equity Option Cap. The Exchange proposes to memorialize the current practice of requiring members and member organizations to notify the Exchange in writing [4] and indicate which accounts are used to segregate orders of JBO participants from other Firm orders. The Exchange believes that memorializing the policy within the Fee Schedule will eliminate any confusion as to which orders are JBO Participant orders and not subject to the Firm Related Equity Option Cap. Further the Exchange proposes to create a new billing practice with respect to JBO transactions. The Exchange proposes to indicate on the Fee Schedule that the Exchange will not make any adjustments to billing invoices where JBO transactions are commingled with other Firm orders in Exchange accounts, which are designated by the member organization as not subject to the Firm Related Equity Option Cap. The Exchange believes that this practice would not create an undue burden on its members and/or member organizations and would ensure a more efficient billing process.

The Exchange also proposes to establish a billing practice to prevent members and member organizations from disputing billing invoices after sixty (60) days. The Exchange proposes to state on its Fee Schedule that all billing disputes must be submitted to the Exchange in writing [5] and must be accompanied by supporting documentation. All disputes must be submitted no later than sixty (60) days after receipt of an Exchange invoice. The Exchange proposes to exclude the following types of fee disputes: NASDAQ OMX PSX Fees, Proprietary Data Feed Fees and Co-Location Services Fees.[6] The Exchange is excluding these types of fees because these fees are billed separately to Exchange members and Exchange members do not have the same type of notice as all other fees on the Fee Schedule, as they do not receive reports for certain fees. The Exchange believes that members and member organizations should be aware of any billing errors within two months of receiving an invoice.[7] The Exchange further believes that this practice will conserve Exchange resources which are expended when untimely billing disputes require staff to research applicable fees and order information beyond two months after the transaction occurred.

Finally, the Exchange proposes to rearrange its Fee Schedule to relocate the Routing Fees and PSX Fees in the Fee Schedule to eliminate sequential numbering discrepancies in the Index which arose when the Fee Schedule was reformatted.

2. Statutory Basis

The Exchange believes that its proposal to amend its Fee Schedule is consistent with Section 6(b) of the Act [8] in general, and furthers the objectives of Section 6(b)(4) of the Act [9] in particular, in that it is an equitable allocation of reasonable fees and other charges among Exchange members. The Exchange believes that the proposal to memorialize the current practice concerning JBO accounts is reasonable to ensure that the Firm Related Equity Option Cap is properly applied in billing members and member organizations. The Exchange believes that the proposal is equitable because the process of notifying the Exchange of accounts used for JBO orders is currently being employed and would therefore not create an undue burden.

The Exchange believes that the proposed amendment to billing practices, the proposal to not adjust commingled JBO orders, is reasonable because members and member organizations are currently required to properly account for these type of orders. The proposal is equitable because this practice will apply to all members and member organizations transacting JBO business.

Additionally, the Exchange believes the requirement that all billing disputes must be submitted within 60 days from receipt of the invoice, with the exception of certain fees, is reasonable because the Exchange provides ample tools to properly and swiftly monitor and account for various charges incurred in a given month. Also, the proposal is equitable because it equally applies to all members and member organizations. The Exchange's administrative costs would also be lowered as a result of this policy. Finally the Exchange believes that the proposal to rearrange the Fee Schedule is both reasonable and equitable because it clarifies the Fee Schedule.

*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**

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act [10] and subparagraph (f) of Rule 19b–4 [11] thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend 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:

[3] A JBO participant is a Member, Member Organization or non-member organization that maintains a JBO arrangement with a clearing broker-dealer ("JBO Broker") subject to the requirements of Regulation T Section 220.7 of the Federal Reserve System. *See also* Exchange Rule 703. JBO participant orders are not subject to the Firm Related Equity Option Cap because the Exchange is unable to differentiate orders of a JBO participant from orders of its JBO Broker and therefore is unable to aggregate the JBO participant's orders. JBO participant orders may employ the F-account type and qualify for the Firm charge, but are not eligible for the Monthly Firm Cap.

[4] The Exchange will issue an Options Regulatory Alert to specify the proper Exchange contacts to notify the Exchange.

[5] The Exchange invoice specifies the Exchange contact persons with whom to dispute the invoice.

[6] These fees are not included in the reports described in footnote 7.

[7] The Exchange provides members and member organizations the ability to sign-up to receive certain daily reports (*i.e.* daily traded against report, daily cancel fees, etc. * * *), which provides the members and member organizations with trade data to determine fees prior to receiving a billing invoice. In addition, members and member organizations have access to *myphlx.com,* a password protected Web site, which provides members an electronic copy of current and historical invoices, as well as the supporting details for assessed charges. Members will have the ability to retrieve trade information from this Web site on a T +1 basis no later than September 30, 2010 This new enhancement will provide members and member organizations the ability to see information about their trades and billing information prior to receiving the final month-end invoice.

[8] 15 U.S.C. 78f(b).

[9] 15 U.S.C. 78f(b)(4).

[10] 15 U.S.C. 78s(b)(3)(A)(ii).

[11] 17 CFR 240.19b–4(f)(2).

*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–2010–110 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–2010–110. 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 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–2010–110 and should be submitted on or before September 3, 2010.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[12]

**Florence E. Harmon,**

*Deputy Secretary.*

[FR Doc. 2010–19971 Filed 8–12–10; 8:45 am]

**BILLING CODE 8010–01–P**

[12] 17 CFR 200.30–3(a)(12).

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–62670; File No. SR–NYSEArca–2010–77]**

## Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by NYSE Arca, Inc. Amending Its Fee Schedule

August 9, 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 August 4, 2010, NYSE Arca, Inc. ("NYSE Arca" or the "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 amend its Schedule of Fees and Charges for Exchange Services (the "Schedule"). While changes to the Schedule pursuant to this proposal will be effective upon filing, the changes will become operative on August 4, 2010. The amended section of the Schedule is included as Exhibit 5 to the 19b–4 form. A copy of this filing 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.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

*A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change*

1. Purpose

The purpose of this filing is to amend the Schedule to reflect new transaction pricing that will become operative on August 4, 2010.

The Exchange proposes to eliminate the fees charged to Firms that manually facilitate their customer order flow. Currently, all Firm proprietary manual transactions are charged $0.18 per contract and are further capped at $2,000 per issue per day.

NYSE Arca proposes to eliminate fees charged for any transaction involving a Firm's proprietary trading account that has a customer of that same Firm on the contra side of the transaction. Under the revised Schedule, all such transactions, known as Firm Facilitation—Manual trades, will be subject to a rate of $0.00 per contract.

With the reduction of Firm Facilitation—Manual trades to $0.00 the transaction fee for all other Firm proprietary manual trades will be $0.25 per contract. The fee for Firm proprietary electronic transactions will continue to be $0.50 per contract. Firm transaction fees will be applied on the same basis as all other Broker Dealer transaction fees.

Additionally, there will no longer be a daily cap on Firm proprietary manual transactions in the same option class.

The fees for electronic complex orders, where two complex orders trade against each other, will be reduced to $0.00 when the same Firm represents both sides.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6(b) of the Act,[3] in general, and Section 6(b)(4) of the Act,[4] 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.

*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.

[3] 15 U.S.C. 78f(b).

[4] 15 U.S.C. 78f(b)(4).

*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)[5] of the Act and subparagraph (f)(2) of Rule 19b–4[6] 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 summarily may temporarily suspend 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–2010–77 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–2010–77. 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 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–2010–77 and should be submitted on or before September 3, 2010.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[7]

**Florence E. Harmon,**

*Deputy Secretary.*

[FR Doc. 2010–20003 Filed 8–12–10; 8:45 am]

**BILLING CODE 8010–01–P**

[5] 15 U.S.C. 78s(b)(3)(A).

[6] 17 CFR 240.19b–4(f)(2).

[7] 17 CFR 200.30–3(a)(12).

## DEPARTMENT OF STATE

**[Public Notice 7103]**

### Renewal of the Charter of the United States International Telecommunication Advisory Committee

**SUMMARY:** The Charter of the International Telecommunication Advisory Committee (ITAC) has been renewed for an additional two years on July 29, 2010.

The ITAC was established pursuant to the Federal Advisory Committee Act under the general authority of the Secretary of State and the Department of State as set forth in Title 22, sections 2656 and 2707 of the United States Code. The purpose of the ITAC is to advise the Department of State with respect to, and provide strategic planning recommendations on, telecommunication and information policy matters related to the United States' participation in the work of the International Telecommunication Union, the Permanent Consultative Committees of the Organization of American States Inter-American Telecommunication Commission, the Organization of Economic Cooperation and Development, and other international bodies addressing telecommunications.

*For Additional Information Contact:* Julian Minard in the Office of Multilateral Affairs, International Communications and Information Policy, Bureau of Economic, Energy and Business Affairs, Department of State, at *minardje@state.gov* or at (202) 647–5202. Anyone interested in the work of this advisory committee may subscribe to an e-mail service that provides time-sensitive information about preparations for upcoming international meetings. This service is free. To sign up, contact Mr. Minard.

Dated: August 9, 2010.

**James G. Ennis,**

*International Communications & Information Policy, U.S. Department of State.*

[FR Doc. 2010–20024 Filed 8–12–10; 8:45 am]

**BILLING CODE 4710–07–P**

## DEPARTMENT OF TRANSPORTATION

### Federal Highway Administration

### Notice of Final Federal Agency Actions on Proposed Highway in Indiana

**AGENCY:** Federal Highway Administration (FHWA), DOT.

**ACTION:** Notice of Limitation on Claims for Judicial Review of Actions by FHWA, United States Fish and Wildlife Service (USFWS), DOI, and United States Army Corps of Engineers (USACE), DOD.

**SUMMARY:** This notice announces actions taken by the FHWA, the USFWS, and the USACE that are final within the meaning of 23 U.S.C. 139(l)(1). The actions relate to proposed highway projects for a 28.7 mile segment of I–69 in the Counties of Gibson, Pike and Daviess, State of Indiana, and a 25.73 mile segment of I–69 in the Counties of Daviess and Greene, State of Indiana, and grant licenses, permits, and approvals for the projects.

**DATES:** By this notice, the FHWA is advising the public that the FHWA, the USACE, and the USFWS have made decisions that are subject to 23 U.S.C. 139(l)(1) and are final within the meaning of that law. A claim seeking judicial review of those Federal agency decisions on the proposed highway project will be barred unless the claim is filed on or before February 9, 2011. If the Federal law that authorizes judicial review of a claim provides a time period of less than 180 days for filing such claim, then the shorter time period applies.

**FOR FURTHER INFORMATION CONTACT:** For the FHWA: Ms. Janice Osadczuk, Federal Highway Administration, Indiana Division, 575 North Pennsylvania Street, Room 254, Indianapolis, IN 46204–1576; telephone: (317) 226–7486; e-mail: *Janice.Osadczuk@dot.gov.* The FHWA Indiana Division Office's normal business hours are 7:30 a.m. to 4 p.m., e.t. For the USFWS: Mr. Scott Pruitt, Field Supervisor, Bloomington Field Office, USFWS, 620 South Walker Street, Bloomington, IN 47403–2121; telephone: 812–334–4261; e-mail: *Scott_Pruitt@fws.gov.* Normal business hours for the USFWS Bloomington Field Office are: 8 a.m. to 4:30 p.m., e.t. For the USACE: Mr. Greg Mckay, Chief, North Section Regulatory Branch, Louisville District, United States Army Corps of Engineers, P.O. Box 59, Louisville, KY 40201–0059; telephone: (502) 315–6685; e-mail: *gregory.a.mckay@usace.army.mil.* Normal business hours are 8 a.m. to 5 p.m., e.t. You may also contact Mr. Thomas Seeman, Project Manager, Indiana Department of Transportation (INDOT), 100 North Senate Avenue, Indianapolis, IN 46204; telephone: (317) 232–5336; e-mail: *TSeeman@indot.IN.gov.* Normal business hours for the Indiana Department of Transportation are: 8 a.m. to 4:30 p.m., e.t.

**SUPPLEMENTARY INFORMATION:** Notice is hereby given that the FHWA and other Federal agencies have taken final agency actions by issuing licenses, permits, and approvals for the highway projects in the State of Indiana that are listed below. The actions by the Federal agencies on a project, and the laws under which such actions were taken, are described in the Record of Decision (ROD), Reevaluation Documents to the final environmental impact statements (FEIS) issued in connection with the projects, Section 404 Water Quality Permit and Regional General Permit letters, and in other documents in the FHWA administrative record for the project. The ROD and other documents from the FHWA administrative record files for the listed projects are available by contacting the FHWA or the Indiana Department of Transportation (INDOT) at the addresses provided above. Project information may also be available through the INDOT I–69 Project Web site at *http://www.i69indyevn.org/.* People unable to access the Web site may contact FHWA or INDOT at the addresses listed above. This notice applies to all Federal agency decisions on the listed project as of the issuance date of this notice and all laws under which such actions were taken, including but not limited to: 1. National Environmental Policy Act (NEPA) [42 U.S.C. 4321–4351]. 2. Endangered Species Act [16 U.S.C. 1531–1544]. 3. Federal-Aid Highway Act [23 U.S.C. 109 and 23 U.S.C. 128]. 4. Clean Air Act, 42 U.S.C. 7401–7671(q). 5. Section 4(f) of the Department of Transportation Act of 1966 [49 U.S.C. 303]. 6. Section 106 of the National Historic Preservation Act of 1966, as amended [16 U.S.C. 470(f) *et seq.*]. 7. Bald and Golden Eagle Protection Act [16 U.S.C. 688–688d]. 8. Clean Water Act, 33 U.S.C. 1251–1377 (Section 404, Section 402, Section 401, Section 319). Previous actions taken by the USFWS for the Tier 1, I–69 project, pursuant to the Endangered Species Act, 16 U.S.C. 1531–1544, included its concurrence with the FHWA's determination that the I–69 project was not likely to adversely affect the eastern fanshell mussel (*Cyprogenia stegaria*) and that the project was likely to adversely affect, but not jeopardize, the bald eagle. The USFWS also concluded that the project was not likely to jeopardize the continued existence of the Indiana bat and was not likely to adversely modify the bat's designated Critical Habitat. These USFWS decisions were described in the Programmatic Biological Opinion issued on December 3, 2003, the Revised Programmatic Biological Opinion issued on August 24, 2006, and other documents in the Tier 1 project records. A Notice of Limitation on Claims for Judicial Review of these actions and decisions by the USFWS, DOI, was published in the **Federal Register** on April 17, 2007. A claim seeking judicial review of the Tier 1 decisions must have been filed by October 15, 2007, to avoid being barred under 23 U.S.C. 139(l).

The projects subject to this notice are:

1. *Project:* Section 2 of the I–69 highway project from Evansville to Indianapolis. Location: Oakland City, Indiana to Washington, Indiana, Gibson, Pike and Daviess Counties. Notice is hereby given that the FHWA has approved a Tier 2 Final Environmental Impact Statement (FEIS) for Section 2 of the I–69 highway project from Evansville to Indianapolis and issued a Record of Decision (Section 2 ROD) for Section 2 on April 30, 2010. Section 2 of the I–69 project extends from approximately one-half mile north of SR 64 near Oakland City to US 50 east of Washington. Section 2 is a new alignment, fully access-controlled highway. As approved in the Tier 1 ROD, the corridor is generally 2000-feet wide, but corridor width varies and is at its narrowest crossing the Patoka River, where it narrows to 420 feet. The Section 2 ROD selected Refined Preferred Alternative 1 for Section 2, as described in the *I–69 Evansville to Indianapolis, Indiana, Tier 2 Final Environmental Impact Statement, Oakland City to Washington, Indiana* (FEIS), available at *http://www.i69indyevn.org/section2_FEIS.html.* The Section 2 ROD also approved the locations of the interchanges, grade separations, and access roads (which include new roads, road relocations, and realignments). The FHWA had previously issued a Tier 1 FEIS and ROD for the entire I–69 project from Evansville to Indianapolis, Indiana. A Notice of Limitation on Claims for Judicial Review of Actions by FHWA and United States Fish and Wildlife Service (USFWS), DOI, was published in the **Federal Register** on April 17, 2007. A claim seeking judicial review of the Tier 1 decisions must have been filed by October 15, 2007, to avoid being barred under 23 U.S.C. 139(l). Decisions in the FHWA Tier 1 ROD that were cited in that **Federal Register** notice included, but were not limited to, the following:

1. Purpose and need for the project.
2. Range of alternatives for analysis.
3. Selection of the Interstate highway build alternative and highway corridor for the project, as Alternative 3C.
4. Elimination of other alternatives from consideration in Tier 2 NEPA proceedings.
5. Process for completing the Tier 2 alternatives analysis and studies for the project, including the designation of six Tier 2 sections and a decision to prepare a separate environmental impact statement for each Tier 2 section.

The Tier 1 ROD and Notice specifically noted that the ultimate alignment of the highway within the corridor, and the location and number of interchanges and rest areas would be evaluated in the Tier 2 NEPA proceedings. Those proceedings for Section 2 of the I–69 project from Evansville to Indianapolis have culminated in the April 30, 2010, ROD and this Notice. Interested parties may consult the Tier 2, Section 2 ROD and FEIS for details about each of the decisions described above and for information on other issues decided. The Tier 2, Section 2 ROD can be viewed and downloaded from the project Web site at *http://www.i69indyevn.org/.*

For the Tier 2, Section 2, 28.7 mile I–69 project in Gibson, Pike and Daviess Counties, an individual Biological Opinion by the USFWS was issued in February 2010 that concluded that the Section 2 project was not likely to jeopardize the continued existence of

the Indiana bat and was not likely to adversely modify the bat's designated Critical Habitat. In addition, the USFWS issued an Incidental Take Statement subject to specified terms and conditions. The biological opinions and other project records relating to the USFWS actions, taken pursuant to the Endangered Species Act, 16 U.S.C. 1531–1544, are available by contacting the FHWA, INDOT, or USFWS at the addresses provided above. The Tier 2, Section 2, Biological Opinion can be viewed and downloaded from the project Web site at *http://www.deis.i69indyevn.org/FEIS_Sec2/2F_Appendix_Y2.pdf.*

2. *Project:* Section 3 of the I–69 highway project from Evansville to Indianapolis. Location: U.S. 50 east of the city of Washington, Indiana to U.S. 231 near the Crane NSWC, Daviess and Greene Counties. Notice is hereby given that the FHWA has approved four Reevaluations of the Tier 2, Section 3 Record of Decision issued on January 28, 2010. Section 3 of the I–69 project extends from U.S. 50 east of the city of Washington, Indiana to U.S. 231 near the Crane NSWC. Section 3 is a new alignment, fully access-controlled highway. As approved in the Tier 1 ROD, the corridor is generally 2000-feet wide. The corridor width varies at two locations within Section 3. It narrows to 1200-feet wide near First Creek and expands to 6400-feet wide near the Thousand Acre Woods. The ROD selected Refined Preferred Alternative 1 for Section 3, as described in the *I–69 Evansville to Indianapolis, Indiana, Tier 2 Final Environmental Impact Statement, Washington to Crane NSWC, Indiana* (FEIS), available at *http://www.i69indyevn.org/section3_FEIS.html.* The ROD also approved the locations of the interchanges, grade separations, and access roads (which include new roads, road relocations, and realignments). A Notice of Limitation on Claims for Judicial Review of Actions by FHWA and United States Fish and Wildlife Service (USFWS), DOI, was published in the **Federal Register** on February 25, 2010 (75 FR 8786–01). A claim seeking judicial review of the Tier 2, Section 3 decisions must be filed by August 24, 2010, to avoid being barred under 23 U.S.C. 139(l). The four Reevaluations of the Tier 2, Section 3 ROD include: (1) The June 15, 2010 Reevaluation, which was prepared to evaluate the impacts of additional right-of-way areas made necessary as a result of final design of Section 3 that were not analyzed in the Tier 2 Section 3 ROD or FEIS; (2) the April 18, 2010 Revaluation, which was prepared to analyze the impacts of additional right-of-way areas made necessary based on final design Section 3 that were not analyzed in the Tier 2 Section 3 ROD or FEIS (approved April 18, 2010); (3) the February 18, 2010 Reevaluation, which was prepared to evaluate the impacts of additional right-of-way to accommodate grade separation, drive construction and building removal, made necessary based on final design of several bridges; and (4) the May 6, 2010 Reevaluation, which was prepared to evaluate the impacts of minor bridge design changes and acquisition of additional permanent flood easements made necessary based on final design that were not analyzed in the Tier 2 Section 3 ROD or FEIS. The analysis in each of the four reevaluations completed supports the FHWA's conclusions that none of the changes examined will have impacts sufficient to require preparation of a Supplemental Environmental Impact Statement (SEIS) or an additional Draft Environmental Impact Statement (DEIS) for Section 3. The detailed analysis of the reevaluation documents along with the Federal decision of minimal impact can be found on the project Web site at *http://www.i69indyevn.org/reevaluation.html.*

In addition, the United States Army Corps of Engineers (USACE) has taken final agency action by issuing a permit and approval for the Section 3, 25.73 mile I–69 project in Daviess and Greene Counties. On January 7, 2010, INDOT filed an application with the USACE for authorization under Section 404 of the Clean Water Act, 33 U.S.C. 1344, to construct the 25.73 mile Section 3 of I–69. As part of the Section 3 project, which begins at the terminus of the Section 2 project, there are six crossings of water resources requiring individual permits from the USACE, including streams, open water and emergent, scrub-shrub and forested wetlands. Subject to the permit conditions, INDOT is permitted to discharge fill material below the Ordinary Highway Water mark of 8,925 linear feet of Doan's Creek and intermittent and ephemeral tributaries of Eagan Ditch and Doan's Creek, and to discharge fill material into 4.64 acres of open water and emergent, scrub-shrub and forested wetlands adjacent to First Creek and Doan's Creek in constructing these crossings. The action taken by the USACE, related final actions by other Federal agencies, and the laws under which such actions were taken are described in the USACE decision and its administrative record for the Projects, referenced as Section 404 Water Quality Permit Number LRL–2010–39–djd, issued on July 14, 2010. In addition, in two letters dated January 20, 2010 and May 4, 2010, the USACE has authorized impacts at 32 other sites under their jurisdiction within Section 3 of the I–69 project in Daviess and Greene Counties via the Regional General Permit No. 1 issued jointly by the Louisville and Chicago Districts on December 15, 2009. All of this information is available on the project Web site at *http://www.i69indyevn.org/404permits.html,* or by contacting the USACE at the address provided above.

(Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program.)

**Authority:** 23 U.S.C. 139(*l*)(1).

**Robert F. Tally Jr.,**

*Division Administrator, Indianapolis, Indiana.*

[FR Doc. 2010–19979 Filed 8–12–10; 8:45 am]

**BILLING CODE P**

## DEPARTMENT OF TRANSPORTATION

### Surface Transportation Board

**[Docket No. FD 35397]**

### ABC & D Recycling, Inc.—Lease and Operation Exemption—a Line of Railroad in Ware, MA

ABC & D Recycling, Inc. (ABC & D), a noncarrier, has filed a verified notice of exemption under 49 CFR 1150.31 to lease from O'Riley Family Trust (O'Riley), and to operate, 773 feet of rail line located at milepost 12.8, in Ware, Mass.[1] The line is currently operated by the Massachusetts Central Railroad Corporation.[2]

ABC & D states that it has been engaged in handling construction and demolition debris, having obtained all required state and local permits, and intends to continue handling these materials. ABC & D further states its understanding that, if it wishes to handle solid waste as defined in the Clean Railroads Act of 2008, Public Law 110–432, div. A, title VI, 122 Stat. 4900, it must: (1) Obtain all state and local

[1] ABC & D earlier filed a verified notice of exemption concerning lease and operation of this trackage in FD 35356, *ABC & D Recycling, Inc.—Lease and Operation Exemption—a Line of Railroad in Ware, Massachusetts* (STB served Mar. 12, 2010), which ABC & D later withdrew. *See id.* (STB served Apr. 1, 2010) (dismissing ABC & D's notice of exemption without prejudice).

[2] According to ABC & D, an agreement has been reached with O'Riley to lease and operate the railroad trackage owned by O'Riley.

permits necessary in order to handle such solid waste; or (2) obtain a land-use exemption from the Board for any permits that it is unable to obtain from the state or local government.

ABC & D certifies that its projected annual revenues as a result of the transaction will not exceed those that would qualify it as a Class III rail carrier, and further certifies that its projected annual revenues will not exceed $5 million.

The transaction is expected to be consummated on August 27, 2010, the effective date of the exemption (30 days after the exemption was filed).

If the verified notice contains false or misleading information, the exemption is void *ab initio.* Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the effectiveness of the exemption. Petitions for stay must be filed no later than August 20, 2010 (at least 7 days before the exemption becomes effective).

An original and 10 copies of all pleadings, referring to Docket No. FD 35397, must be filed with the Surface Transportation Board, 395 E Street, SW., Washington, DC 20423–0001. In addition, a copy of each pleading must be served on Leonard M. Singer, Office of Leonard M. Singer, 101 Arch Street, Ninth Floor, Boston, MA 02110.

Board decisions and notices are available on our Web site at *http://www.stb.dot.gov.*

Decided: August 9, 2010.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.

**Kulunie L. Cannon,**

*Clearance Clerk.*

[FR Doc. 2010–19990 Filed 8–12–10; 8:45 am]

**BILLING CODE 4915–01–P**

## DEPARTMENT OF TRANSPORTATION

### Research and Innovative Technology Administration

### Notice of Meeting

**AGENCY:** Research and Innovative Technology Administration, DOT.

**ACTION:** Notice.

**SUMMARY:** The U.S. Department of Transportation is providing notice that it intends to hold a Distracted Driving Summit (The Summit) to exchange information and ideas on the best possible methods to reduce the number of crashes and deaths due to distracted driving.

*Meeting Date:* September 21, 2010.

**ADDRESSES:** The Summit will be held at Renaissance Hotel in Washington, DC. The Department welcomes comments or questions prior to and during the Summit. If you would like to submit a comment or question prior to the Summit, you may submit comments/questions identified by DOT Docket ID Number RITA 2010–0003 by any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *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 or Courier:* West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., between 9 a.m. and 5 p.m. ET, Monday through Friday, except Federal holidays.
- *Fax:* 202–493–2251

*Instructions:* Identify docket number, RITA 2010–0003, at the beginning of your comments. To receive confirmation that DOT received your comments, include a self-addressed stamped postcard. Internet users may access all comments received by DOT at *http://www.regulations.gov.* All comments/questions will be posted electronically without charge or edits, including any personal information provided.

*Privacy Act:* Anyone is able to search the electronic form of all comments/questions filed in our dockets by the name of the individual submitting the comment or question (or signing the comment, if submitted on behalf of an association, corporation, business entity, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78) or you may visit *http://DocketInfo.dot.gov.*

*Docket:* For access to the docket to read background documents or comments received, go to *http://www.regulations.gov.* or the street address listed above. Follow the online instructions for accessing the dockets.

**FOR FURTHER INFORMATION CONTACT:** Thomas Bolle, Office of Governmental, International and Public Affairs, RTG–20, Research and Innovative Technology Administration, Telephone Number (202) 366–0665, Fax Number (202) 366–1134 EMAIL—*distracteddriving@dot.gov.*

**SUPPLEMENTARY INFORMATION:**

### Background

The Summit will build on the momentum from last year's summit bringing together senior transportation officials, elected officials, safety advocates, law enforcement representatives, private sector representatives and academics to address a range of issues related to reducing accidents through enforcement, public awareness and education. Authoritative speakers from around the nation will lead interactive panel discussions on a number of key topics including the extent and impact of distracted driving, current research, regulations and best practices.

The U.S. Department of Transportation is committed to providing equal access to this Summit. Based on limited seating and to accommodate the strong interest outside the Washington area, the Summit will be available live by Webcast and members of the public will be given the opportunity to submit questions or comments online for each individual panel discussion. The Department has also created a Web site to provide information and updates on the Summit as details become available: *http://www.distraction.gov/2010summit/.* If you need alternative formats or services because of a disability, please contact Thomas Bolle with your specific request by September 13, 2010.

Exhibit Space for this year's Summit will be handled separately by the National Organizations for Youth Safety. Thus, anyone who wishes to request exhibit space for the Summit should contact the National Organizations for Youth Safety directly. Questions pertaining to exhibit space should be directed to Nicole Graziosi by phone at 571–377–0903 or by e-mail at *ngraziosi@noys.org.*

Issued in Washington, DC, on August 6, 2010.

**Peter H. Appel,**

*Administrator.*

[FR Doc. 2010–19988 Filed 8–12–10; 8:45 am]

**BILLING CODE 4910–HY–P**

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

### Fifth Meeting: RTCA Special Committee 219: Attitude and Heading Reference System (AHRS)

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

**ACTION:** Notice of RTCA Special Committee 219: Attitude and Heading Reference System (AHRS).

**SUMMARY:** The FAA is issuing this notice to advise the public of a meeting of

RTCA Special Committee 219: Attitude and Heading Reference System (AHRS).

**DATES:** The meeting will be held September 14–16, 2010 from 9 a.m. to 5 p.m.

**ADDRESSES:** The meeting will be held at RTCA, Inc., 1828 L Street, NW., Suite 805, Washington, DC 20036.

**FOR FURTHER INFORMATION CONTACT:** RTCA Secretariat, 1828 L Street, NW., Suite 805, Washington, DC 20036; telephone (202) 833–9339; fax (202) 833–9434; Web site *http://www.rtca.org.*

**SUPPLEMENTARY INFORMATION:** Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463, 5 U.S.C., Appendix 2), notice is hereby given for a Special Committee 219: Attitude and Heading Reference System (AHRS) meeting. The agenda will include:

- Welcome/Introductions/Administrative Remarks.
- Agenda overview.
- Review/Approve Fourth Meeting Summary, RTCA Paper No. 087–10/SC219–008.
- Review Summary from last working group meeting.
- Review current state of the final document.
- Plan working group sessions for the week.
- Working group sessions.
- Reassemble final document for distribution outside of committee.
- Re-evaluate dates, location, and agendas for next couple of working group and Plenary meetings.
- Other business.

Attendance is open to the interested public but limited to space availability. With the approval of the chairmen, members of the public may present oral statements at the meeting. Persons wishing to present statements or obtain information should contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section. Members of the public may present a written statement to the committee at any time.

Issued in Washington, DC, on August 9, 2010.

**Francisco Estrada C.,**

*RTCA Advisory Committee.*

[FR Doc. 2010–19991 Filed 8–12–10; 8:45 am]

**BILLING CODE 4910–13–P**

## DEPARTMENT OF TRANSPORTATION

### Federal Railroad Administration

### Petition for Waiver of Compliance

Pursuant to title 49 Code of Federal Regulations (CFR) part 235 and 49 U.S.C. 20502(a), the following railroad has petitioned the Federal Railroad Administration (FRA) seeking approval for the discontinuance or modification of the signal system or relief from the requirements of 49 CFR part 236, as detailed below.

**Docket Number FRA–1998–4821**

*Applicant:* Mr. Timothy R. Luhm, Canadian National, Manager S&C, 17641 South Ashland Avenue, Homewood, Illinois 60430.

The Canadian National (CN) seeks an extension for an additional 5 years of a waiver on the former Duluth, Missabe and Iron Range Railway Company (DMIR) that permits the railroad to utilize wheel counters to detect trains over the spans of their steel deck bridges. This waiver was granted by FRA on January 29, 2001, was renewed on April 25, 2006, and will currently expire on April 25, 2011. In addition to the extension, CN requests that the allowable maximum authorized speed over the subject bridges be increased from 25 miles per hour (mph) to 40 mph.

The Applicant's justification for the request is that during the past 10 years in which the wheel counters have been in service on the DMIR, no incidents have occurred at the location of the wheel counter devices. Any failures in the wheel counter devices have been failsafe, resulting in train operations at restricted speed. During the past 10 years, no broken rails occurred on the bridges where such systems are installed. As for the increase in maximum authorized speed from 25 to 40 mph, CN states that train handling will be improved and safety enhanced due to less frequent speed transitions. In addition, steel-deck bridges on the DMIR in signaled territory that have traditional signal system trap circuits are not restricted in maximum authorized speed.

Any interested party desiring to protest the granting of an application shall set forth specifically the grounds upon which the protest is made, and include a concise statement of the interest of the party in the proceeding. Additionally, one copy of the protest shall be furnished to the applicant at the address listed above.

FRA expects to be able to determine these matters without an oral hearing. However, if a specific request for an oral hearing is accompanied by a showing that the party is unable to adequately present his or her position by written statements, an application may be set for public hearing.

All communications concerning this proceeding should be identified by Docket Number FRA–1998–4821 and may be submitted by one of the following methods:

- Web site: *http://www.regulations.gov* Follow the instructions for submitting comments on the DOT electronic site;
- Fax: 202–493–2251;
- Mail: Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., West Building Ground Floor, Room W12–140, Washington, DC 20590; or
- Hand Delivery: Room W12–140 of the U.S. Department of Transportation West Building Ground Floor, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Communications received within 30 days of the date of this notice will be considered by FRA before final action is taken. Comments received after that date will be considered as far as practicable. All written communications concerning these proceedings are available for examination during regular business hours (9 a.m.–5 p.m.) at the above facility. All documents in the public docket are also available for inspection and copying on the Internet at the docket facility's Web site at *http://www.regulations.gov.*

FRA wishes to inform all potential commenters that anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477) or at *http://www.dot.gov/privacy.html.*

Issued in Washington, DC, on August 9, 2010.

**Robert C. Lauby,**

*Deputy Associate Administrator for Regulatory and Legislative Operations.*

[FR Doc. 2010–19998 Filed 8–12–10; 8:45 am]

**BILLING CODE 4910–06–P**

## DEPARTMENT OF TRANSPORTATION

### Federal Railroad Administration

### Petition for Waiver of Compliance

In accordance with part 211 of title 49 Code of Federal Regulations (CFR), notice is hereby given that the Federal Railroad Administration (FRA) has received a request for a waiver of compliance from certain requirements of its safety standards. The individual petition is described below, including the party seeking relief, the regulatory

provisions involved, the nature of the relief being requested, and the petitioner's arguments in favor of relief.

**Walden's Ridge Railroad Company; Heritage Railroad; Southern Appalachia Railway Museum**

[Waiver Petition Docket Number FRA–2010–0118]

The Walden's Ridge Railroad Company (WRRC), Heritage Railroad (HR), and Southern Appalachia Railway Museum (SARM) of Roane County, Tennessee, seeks a waiver of compliance from *Control of Alcohol and Drug Use,* 49 CFR part 219 subparts D through G, which require a railroad to conduct reasonable suspicion alcohol and/or drug testing, pre-employment drug testing, random alcohol and drug testing, and to have voluntary referral and co-worker report policies. The three railroads combined have less than 16 hours of service employees, and the waiver is sought until such time as they jointly have 16 or more hours of service employees.

HR has contracted its freight operations out to WRRC, which has 3 part-time employees and historically handles 500 or fewer annual carloads. SARM has 6 hours of service employees who are part-time volunteers and who operate a passenger train on the HR, transporting about 5,000 passengers each year. The employees and volunteers are used interchangeably among the freight and passenger operations.

Interested parties are invited to participate in these proceedings by submitting written views, data, or comments. FRA does not anticipate scheduling a public hearing in connection with these proceedings since the facts do not appear to warrant a hearing. If any interested party desires an opportunity for oral comment, they should notify FRA, in writing, before the end of the comment period and specify the basis for their request.

All communications concerning these proceedings should identify the appropriate docket number (*e.g.,* Waiver Petition Docket Number FRA–2010–0118) and may be submitted by any of the following methods:

- *Web site: http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* Docket Operations Facility, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., W12–140, Washington, DC 20590.
- *Hand Delivery:* 1200 New Jersey Avenue, SE., Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Communications received within 45 days of the date of this notice will be considered by FRA before final action is taken. Comments received after that date will be considered as far as practicable. All written communications concerning these proceedings are available for examination during regular business hours (9 a.m.–5 p.m.) at the above facility. All documents in the public docket are also available for inspection and copying on the Internet at the docket facility's Web site at *http://www.regulations.gov.*

Anyone is able to search the electronic form of any written communications and comments received into any of our dockets by the name of the individual submitting the document (or signing the document, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Page 19477) or at *http://www.dot.gov/privacy.html.*

Issued in Washington, DC, on August 9, 2010.

**Robert C. Lauby,**

*Deputy Associate Administrator for Regulatory and Legislative Operations.*

[FR Doc. 2010–19997 Filed 8–12–10; 8:45 am]

**BILLING CODE 4910–06–P**

## DEPARTMENT OF TRANSPORTATION

### Federal Railroad Administration

### Petition for Waiver of Compliance

In accordance with part 211 of title 49 Code of Federal Regulations (CFR), notice is hereby given that the Federal Railroad Administration (FRA) has received a request for a waiver of compliance from certain requirements of its safety standards. The individual petition is described below, including the party seeking relief, the regulatory provisions involved, the nature of the relief being requested, and the petitioner's arguments in favor of relief.

**Bluewater Michigan Chapter, Inc.**

[Docket Number FRA–2009–0081]

The Bluewater Michigan Chapter, Inc. National Railway Historical Society (Bluewater), requests a waiver from compliance from the requirements related to the glazing installed on seven passenger cars used in tourist/excursion service. The cars covered by this petition were built between 1947 and 1957, and all carry the same reporting mark, BMCX. They are numbered: 857—52-seat passenger coach, 829—52-seat passenger coach, 832—52-seat passenger coach, 899—40-seat dining car, 9486—14-roomette sleeping/baggage car, 6604—48-seat round-end passenger car, and 9646—baggage car.

Specifically, the petitioner requests this relief from the requirements of 49 CFR 223.15(c), *Requirements for existing passenger cars,* including the requirement to install at least four emergency windows. Bluewater offers these passenger cars for occasional tourist/excursions over several host railroads: The Lake State Railroad, Great Lakes Central Railroad, Rail America, The Chesapeake and Indiana Railroad Company, Saginaw Bay Southern Railroad, and the Ohio Central Railroad. These cars will operate over mostly single-track railroad lines in rural areas, and at speeds less than 45 mph.

Bluewater believes that the operation of these cars in tourist/excursion service are exposed to a low potential for damage to the existing glazing from debris from surrounding structures, or from track-side vandals. Further, they are not aware of any incidents of broken windows, or any other passenger safety issues caused by the windows in the above listed cars while in operation over their host railroads. As a Chapter of the National Railroad Historical Society, a non-profit organization dedicated to the preservation of railroad history, most of the society's annual revenue is derived from the operation of these cars in tourist/excursion service. As stated in their petition, Bluewater's cost estimate to replace all the current windows, thus bringing the glazing into compliance with the CFR's requirements, would meet or exceed the total value of the cars. A requirement to replace all the windows in all the cars will result in their permanent retirement, as the Chapter does not have the financial ability to replace the glazing on all cars. The loss of revenue from tourist/excursion use of these cars would cause severe harm to the Bluewater organization and to neighboring organizations who also benefit from their excursions.

Interested parties are invited to participate in these proceedings by submitting written views, data, or comments. FRA does not anticipate scheduling a public hearing in connection with these proceedings since the facts do not appear to warrant a hearing. If any interested party desires an opportunity for oral comment, they should notify FRA, in writing, before the end of the comment period and specify the basis for their request.

All communications concerning these proceedings should identify the

appropriate docket number (*e.g.,* Waiver Petition Docket Number FRA–2009–0081) and may be submitted by any of the following methods:

- *Web site: http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* Docket Operations Facility, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., W12–140, Washington, DC 20590.
- *Hand Delivery:* 1200 New Jersey Avenue, SE., Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Communications received within 45 days of the date of this notice will be considered by FRA before final action is taken. Comments received after that date will be considered as far as practicable. All written communications concerning these proceedings are available for examination during regular business hours (9 a.m.–5 p.m.) at the above facility. All documents in the public docket are also available for inspection and copying on the Internet at the docket facility's Web site at *http://www.regulations.gov.*

Anyone is able to search the electronic form of any written communications and comments received into any of our dockets by the name of the individual submitting the document (or signing the document, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477) or at *http://www.dot.gov/privacy.html.*

Issued in Washington, DC, on August 9, 2010.

**Robert C. Lauby,**

*Deputy Associate Administrator for Regulatory and Legislative Operations.*

[FR Doc. 2010–19996 Filed 8–12–10; 8:45 am]

**BILLING CODE 4910–06–P**

## DEPARTMENT OF TRANSPORTATION

### Maritime Administration

**[Docket No. MARAD–2010–0072]**

### Requested Administrative Waiver of the Coastwise Trade Laws

**AGENCY:** Maritime Administration, Department of Transportation.

**ACTION:** Invitation for public comments on a requested administrative waiver of the Coastwise Trade Laws for the vessel ENDLESS SUMMER.

**SUMMARY:** As authorized by 46 U.S.C. 12121, the Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to grant waivers of the U.S.-build requirement of the coastwise laws under certain circumstances. A request for such a waiver has been received by MARAD. The vessel, and a brief description of the proposed service, is listed below. The complete application is given in DOT docket MARAD–2010–0072 at *http://www.regulations.gov*. Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with 46 U.S.C. 12121 and MARAD's regulations at 46 CFR part 388 (68 FR 23084; April 30, 2003), that the issuance of the waiver will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, a waiver will not be granted. Comments should refer to the docket number of this notice and the vessel name in order for MARAD to properly consider the comments. Comments should also state the commenter's interest in the waiver application, and address the waiver criteria given in § 388.4 of MARAD's regulations at 46 CFR part 388.

**DATES:** Submit comments on or before September 13, 2010.

**ADDRESSES:** Comments should refer to docket number MARAD–2010–0072. Written comments may be submitted by hand or by mail to the Docket Clerk, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590. You may also send comments electronically via the Internet at *http://www.regulations.gov*. All comments will become part of this docket and will be available for inspection and copying at the above address between 10 a.m. and 5 p.m., E.T., Monday through Friday, except Federal holidays. An electronic version of this document and all documents entered into this docket is available on the World Wide Web at *http://www.regulations.gov*.

**FOR FURTHER INFORMATION CONTACT:** Joann Spittle, U.S. Department of Transportation, Maritime Administration, 1200 New Jersey Avenue, SE., Room W21–203, Washington, DC 20590. Telephone 202–366–5979.

**SUPPLEMENTARY INFORMATION:**

As described by the applicant the intended service of the vessel ENDLESS SUMMER is:

*Intended Commercial Use of Vessel:* "Sightseeing harbor and coastal cruises for 12 passengers or less."

*Geographic Region:* "California."

### Privacy Act

Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78).

By Order of the Maritime Administrator.

Dated: August 4, 2010.

**Christine Gurland,**

*Secretary, Maritime Administration.*

[FR Doc. 2010–19968 Filed 8–12–10; 8:45 am]

**BILLING CODE 4910–81–P**


Federal Register

**Friday,**

**August 13, 2010**

## Part II

# Environmental Protection Agency

**40 CFR Chapter 1**

**EPA's Denial of the Petitions To Reconsider the Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act; Final Rule**

**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Chapter 1**

**[EPA–HQ–OAR–2009–0171; FRL–9184–8]**

## EPA's Denial of the Petitions To Reconsider the Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act

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

**ACTION:** Notice, denial of petitions to reconsider.

**SUMMARY:** The Environmental Protection Agency (EPA) is denying the petitions to reconsider the Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act. The Findings were signed by the Administrator on December 7, 2009. EPA has carefully reviewed all of the petitions and revisited both the scientific record and the Administrator's decision process underlying the Findings in light of these petitions. EPA's analysis of the petitions reveals that the petitioners have provided inadequate and generally unscientific arguments and evidence that the underlying science supporting the Findings is flawed, misinterpreted or inappropriately applied by EPA. The petitioners' arguments fail to meet the criteria for reconsideration under the Clean Air Act. The science supporting the Administrator's finding that elevated concentrations of greenhouse gases in the atmosphere may reasonably be anticipated to endanger the public health and welfare of current and future U.S. generations is robust, voluminous, and compelling, and has been strongly affirmed by the recent science assessment of the U.S. National Academy of Sciences.

**DATES:** This denial is effective July 29, 2010.

**ADDRESSES:** EPA's docket for this action is Docket ID No. EPA–HQ–OAR–2009–0171: All documents in the docket are listed on the *http://www.regulations.gov* Web site. Although listed in the index, some information is not publicly available, *e.g.,* confidential business information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through *http://www.regulations.gov* or in hard copy at EPA's Docket Center, Public Reading Room, EPA West Building, Room 3334, 1301 Constitution Avenue, NW., Washington, DC 20004. This Docket Facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the Air Docket is (202) 566–1742.

**FOR FURTHER INFORMATION CONTACT:** Jeremy Martinich, Climate Change Division, Office of Atmospheric Programs (MC–6207J), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number: (202) 343–9927; fax number: (202) 343–2202; e-mail address: *ghgendangerment@epa.gov.* For additional information regarding this Notice, please go to the Web site *http://www.epa.gov/climatechange/endangerment.html.*

**SUPPLEMENTARY INFORMATION:**

*Acronyms and Abbreviations.* The following acronyms and abbreviations are used in this Decision.

ACUS Administrative Conference of the United States
ANPR Advance Notice of Proposed Rulemaking
APA Administrative Procedure Act
CAA Clean Air Act
CAFE Corporate Average Fuel Economy
CAIT Climate Analysis Indicators Tool
CBI confidential business information
CCSP Climate Change Science Program
CFR Code of Federal Regulations
$CH_4$ methane
$CO_2$ carbon dioxide
CRU Climatic Research Unit
DOT U.S. Department of Transportation
EISA Energy Independence and Security Act
EO Executive Order
EPA U.S. Environmental Protection Agency
EPCA Energy Policy and Conservation Act
FOIA Freedom of Information Act
FR Federal Register
GHG greenhouse gas
HadCRUT Climatic Research Unit (CRU) temperature record
ICTA International Center For Technology Assessment
IPCC Intergovernmental Panel on Climate Change
MWP Medieval Warm Period
$N_2O$ nitrous oxide
NAAQS National Ambient Air Quality Standards
NAS National Academy of Sciences
NASA National Aeronautics and Space Administration
NHTSA National Highway Traffic Safety Administration
NOAA National Oceanic and Atmospheric Administration
$NO_x$ nitrogen oxide
NRC National Research Council
NSPS new source performance standards
PM particulate matter
PSD Prevention of Significant Deterioration
TSD technical support document
U.S. United States
UNFCCC United Nations Framework Convention on Climate Change
USGCRP U.S. Global Change Research Program
WMO World Meteorological Organization

**Table of Contents**

## I. Introduction

### A. Summary

This is EPA's response denying the petitions to reconsider the Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act ("Findings" or the "Endangerment Finding") (74 FR 66496, December 15, 2009). EPA has considered all 10 petitions, including the arguments presented therein and the supplemental information provided by the petitioners as supporting evidence of their claims. EPA has evaluated the merit of the petitioners' arguments in the context of the entire body of scientific and other evidence before the Agency. This response (hereafter "Denial" or "Decision") provides EPA's scientific and legal justification for denying these petitions. This Denial is accompanied by a 3-volume, roughly 360-page Response to Petitions (RTP) document (*http://www.epa.gov/climatechange/endangerment.html*), containing further responses and technical detail concerning every significant claim and assertion made by the petitioners. Section III of this Decision summarizes many of the responses provided in the RTP document.

After a comprehensive, careful review and analysis of the petitions, EPA has determined that the petitioners' arguments and evidence are inadequate, generally unscientific, and do not show that the underlying science supporting the Endangerment Finding is flawed, misinterpreted by EPA, or inappropriately applied by EPA. The science supporting the Administrator's finding that elevated concentrations of greenhouse gases in the atmosphere may reasonably be anticipated to endanger the public health and welfare of current and future U.S. generations is robust, voluminous, and compelling. The most recent science assessment by the U.S. National Academy of Sciences strongly affirms this view. In addition, the approach and procedures used by EPA to evaluate the underlying science demonstrate that the Findings remain robust and appropriate.

Petitioners generally argue that recent revelations show that the science supporting EPA's Endangerment Finding was flawed or questionable, and that EPA should therefore reconsider the Endangerment Finding. The petitioners' arguments and claims are based largely on disclosed private communications among various scientists, a limited number of errors and claimed errors in the 2007 Intergovernmental Panel on Climate Change (IPCC) Fourth Assessment Report (AR4),[1] and submissions of a limited number of additional studies not previously considered as part of the scientific record of the Endangerment Finding.

As discussed in detail throughout this Decision and in fuller detail in the RTP document, petitioners' claims and the information they submit do not change or undermine our understanding of how anthropogenic emissions of greenhouse gases cause climate change and how human-induced climate change generates risks and impacts to public health and welfare. This understanding has been decades in the making and has become more clear over time with the accumulation of evidence. The information provided by petitioners does not change any of the scientific conclusions that underlie the Administrator's Findings, nor do the petitions lower the degrees of confidence associated with each of these major scientific conclusions.

More specifically, the petitions do not change EPA's proper characterization of the current body of knowledge and our ability to state with confidence our conclusions in the following key areas of greenhouse gas and climate change science: (1) That anthropogenic emissions of greenhouse gases are causing atmospheric levels of greenhouse gases in our atmosphere to rise to essentially unprecedented levels in human history; (2) that the accumulation of greenhouse gases in our atmosphere is exerting a warming effect on the global climate; (3) that there are multiple lines of evidence, including increasing average global surface temperatures, rising ocean temperatures and sea levels, and shrinking Arctic ice, all showing that climate change is occurring, and that the observed rate of climate change stands out as significant compared to recent historical rates of climate change; (4) that there is compelling evidence that anthropogenic emissions of greenhouse gases are the primary driver of recent observed increases in average global temperature; (5) that atmospheric levels of greenhouse gases are expected to continue to rise for the foreseeable future; and (6) that risks and impacts to public health and welfare are expected to grow as climate change continues, and that climate change over this century is expected to be greater compared to observed climate change over the past century.

The core defect in petitioners' arguments is that these arguments are not based on consideration of the body of scientific evidence. Petitioners fail to address the breadth and depth of the scientific evidence and instead rely on an assumption of inaccuracy in the science that they extend even to the body of science that is not directly addressed by information they provide or by arguments they make. This assumption of error is based on various statements and views expressed in some of the e-mail communications between scientists at the Climatic Research Unit (CRU) of the University of East Anglia in the United Kingdom and several other scientists ("the CRU e-mails")[2]. As EPA's review and analysis shows, the petitioners routinely take these private e-mail communications out of context and assert they are "smoking gun" evidence of wrongdoing and scientific manipulation of data. EPA's careful examination of the e-mails and their context shows that the petitioners' claims are exaggerated, are often contradicted by other evidence, and are not a material or reliable basis to question the validity and credibility of the body of science underlying the Administrator's Endangerment Finding or the Administrator's decision process articulated in the Findings themselves Petitioners' assumptions and subjective assertions regarding what the e-mails purport to show about the state of climate change science are clearly inadequate pieces of evidence to challenge the voluminous and well documented body of science that is the technical foundation of the Administrator's Endangerment Finding.

Inquiries from the UK House of Commons, Science and Technology Committee, the University of East Anglia, Oxburgh Panel, the Pennsylvania State University, and the University of East Anglia, Russell Panel,[3] all entirely independent from EPA, have examined the issues and many of the same allegations brought forward by the petitioners as a result of the disclosure of the private CRU e-mails. These inquiries are now complete. Their conclusions are in line with EPA's review and analysis of these same CRU e-mails. The inquiries have

[1] IPCC (2007). Fourth Assessment Report: Climate Change 2007. Cambridge University Press, Cambridge, United Kingdom and New York, NY, USA.

[2] All of the disclosed CRU e-mails at issue in this Decision can be found in full in EPA's docket for the Endangerment Finding. See Docket ID No. EPA–HQ–OAR–2009–0171, "CRU E-mails 1996–2009."

[3] These inquires plus another addressing IPCC AR4 issues are referred to throughout this Decision and the RTP document. Every inquiry is provided in full in EPA's docket for the Endangerment Finding. See Docket ID No. EPA–HQ–OAR–2009–0171, "Recent Inquiries and Investigations of the CRU E-mails and the IPCC Fourth Assessment Report."

found no evidence of scientific misconduct or intentional data manipulation on the part of the climate researchers associated with the CRU e-mails. The recommendation for more transparent procedures concerning availability of underlying data appears appropriate, but it has not cast doubt on the underlying body of science developed by these researchers. These inquiries lend further credence to EPA's conclusion that petitioners' claims that the CRU e-mails show the underlying science cannot or should not be trusted are exaggerated and unsupported.

Petitioners' also point to a limited number of factual mistakes in IPCC AR4, some confirmed, some alleged, to argue that the climate science supporting the Administrator's Endangerment Finding is flawed. EPA's review confirmed two factual mistakes. These two confirmed instances of factual mistakes are tangential and minor and do not change the key IPCC AR4 conclusions that are central to the Administrator's Endangerment Finding. While it is unfortunate that IPCC's review process did not catch these errors, in the context of a report of this size and scope (almost 3,000 pages), it is an inappropriate and unfounded exaggeration to claim that these two confirmed mistakes delegitimize all of the scientific statements and findings contained in IPCC AR4. To the contrary, given the scrutiny to which IPCC AR4 has been subjected, the limited nature of these mistakes demonstrates that the IPCC review procedures have been highly effective and very robust.

In a limited number of cases, the petitioners identify new scientific studies and data, published since the Endangerment Finding was finalized, which they claim require EPA to reconsider the Endangerment Finding. Some petitioners also argue that EPA ignored or misinterpreted scientific data that were significant and available when the Finding was made. EPA's review of these claims shows that in many cases the issues raised by the petitioners are not new, but were in fact considered prior to issuing the Endangerment Finding. In other cases, the petitioners have misinterpreted or misrepresented the meaning and significance of recent scientific literature, findings, and data. Finally, there are instances in which the petitioners have failed to acknowledge other new studies in making their arguments. The RTP document contains study-by-study analysis of these failed arguments on the part of petitioners.

Finally, in May 2010, the National Research Council (NRC) of the U.S. National Academy of Sciences published its comprehensive assessment, "Advancing the Science of Climate Change [4]" (NRC, 2010). It concluded that "climate change is occurring, is caused largely by human activities, and poses significant risks for—and in many cases is already affecting—a broad range of human and natural systems." Furthermore, the NRC stated that this conclusion is based on findings that are "consistent with the conclusions of recent assessments by the U.S. Global Change Research Program, the Intergovernmental Panel on Climate Change's Fourth Assessment Report, and other assessments of the state of scientific knowledge on climate change." These are the same assessments that served as the primary scientific references underlying the Administrator's Endangerment Finding. Importantly, this recent NRC assessment represents another independent and critical inquiry of the state of climate change science, separate and apart from the previous IPCC and U.S. Global Change Research Program (USGCRP) assessments. The NRC assessment is a clear affirmation that the scientific underpinnings of the Administrator's Endangerment Finding are robust, credible, and appropriately characterized by EPA.

The endangerment to public health and welfare from atmospheric concentrations of greenhouse gases and associated climate change is too important an issue to be decided on any grounds other than a close and comprehensive scrutiny of the entire body of the scientific evidence. This principle calls for an outright rejection of the petitioners' arguments. The petitioners' arguments amount to a request that EPA ignore the deep body of science that has been built up over several decades and the direction it points in, and to do so based not on a careful and comprehensive analysis of the science, but instead on what amount to assertions and leaps in logic, unsupported by a rigorous examination of the science itself. The petitioners do not provide any substantial support for the argument that the Endangerment Finding should be revised. Therefore, none of the petitioners' objections are of central relevance to the considerations that led to the final Endangerment Finding. In addition, in many cases these arguments by the petitioners either were or could have been raised during the comment period on the Endangerment Finding. In summary, EPA's thorough review of petitioners' arguments shows that the petitioners have not met the criteria for reconsideration under section 307(d) the Clean Air Act (CAA).[5]

*B. Background*

The Findings were signed by the Administrator on December 7, 2009, were published in the **Federal Register** on December 15, 2009, and became effective January 14, 2010. The Administrator's Endangerment Finding concluded that atmospheric concentrations of the group of six greenhouse gases are reasonably anticipated to endanger both the public health and public welfare of current and future U.S. generations. The Administrator also decided that the combined emissions of greenhouse gases from new motor vehicles and new motor vehicle engines contribute to the greenhouse gas air pollution that endangers both public health and public welfare (*i.e.,* the second finding or "cause or contribute" finding). These Findings were made under CAA section 202(a). The Findings were also supported by a Technical Support Document (TSD) (Docket EPA–HQ–OAR–2009–0171–11645), containing the underlying greenhouse gas emissions data and a synthesis of climate change science, as well as an 11-volume RTC document (Docket EPA–HQ–OAR–2009–0171) that provides EPA's responses to all significant public comments that had been received during the 60-day public comment period following the Administrator's proposed Findings, signed April 17, 2009.

Since finalization of the Findings in December 2009, EPA has received 10 petitions and supplements thereto requesting that EPA reconsider the Findings. The general bases of the petitions are the following: (1) Recent disclosure of private e-mail communications among some scientists who were involved in constructing one of the global temperature records and were involved in certain sections of IPCC AR4; (2) alleged and confirmed mistakes or alleged unsupported statements in the IPCC AR4; and (3) some new scientific studies not previously considered as part of the scientific record of the Endangerment Finding. Petitioners claim these pieces of evidence show that the science underlying the Administrator's Endangerment Finding is potentially

[4] National Research Council (NRC) (2010). Advancing the Science of Climate Change. National Academy Press. Washington, DC.

[5] Some petitioners also raise objections to EPA's Endangerment Finding based on legal arguments related to other EPA or National Highway Traffic Safety Administration actions. For the reasons discussed in Section IV of this Decision, those objections also fail to meet the standard for reconsideration and are denied.

flawed, and that therefore EPA should reopen the process and reconsider the Endangerment Finding. For reasons stated above and throughout this Decision and accompanying RTP document, EPA is denying the request to reconsider the Findings.

As discussed further in sections III and IV of this Decision, some of the objections raised in the petitions fail to demonstrate that it was impracticable to raise the objections during the comment period following the proposed Findings, or that the grounds for the objections arose after the period for judicial review. For all issues and arguments presented by the petitioners, the objections are not of central relevance to the outcome of the Findings, as explained in detail below. Thus, none of the objections meet the criteria for reconsideration under the CAA. EPA is also denying two requests to stay the Findings pending reconsideration.

1. The ICTA Petition and Massachusetts v. EPA

a. ICTA Petition

In October 1999, the International Center for Technology Assessment (ICTA) and 18 other organizations filed a petition with EPA, requesting that EPA issue emission standards for emissions of carbon dioxide, methane, nitrous oxide, and hydrofluorocarbons from motor vehicles under CAA section 202(a) (ICTA Petition). The ICTA Petition alleged that emissions of these four greenhouse gases—$CO_2$, $CH_4$, $N_2O$, and HFCs—constituted emissions of "air pollutants" under section 302(g) of the Act, 42 U.S.C. 7602(g). The ICTA Petition further argued that emissions of these gases from motor vehicles fully met the criteria for regulation under CAA section 202(a)(1), 42 U.S.C. 7521(a)(1), and claimed that it would be feasible for EPA to regulate greenhouse gas emissions from mobile sources.

After soliciting and considering approximately 50,000 public comments on the ICTA Petition, *see* 66 FR 7486, January 23, 2001), the Agency ultimately denied it on several independent grounds. EPA first explained that Congress did not intend in the CAA to provide the Agency with authority to regulate $CO_2$ and other greenhouse gases to address global climate change (68 FR 52925–29). For a variety of reasons, EPA determined that it was unreasonable to read the Act as providing the Agency with authority to regulate emissions of $CO_2$ and other greenhouse gases to address global climate change. *Id.* at 52928. Based on this conclusion, the Agency also determined that greenhouse gases could not be considered air pollutants for purposes of the CAA's regulatory provisions for any contribution they may make to climate change. *Id.*

The Agency also explained why, even if it had the authority to issue such regulations, it still believed that the ICTA Petition should be denied. To begin with, EPA found that requiring passenger cars and light trucks to emit less $CO_2$, the predominant greenhouse gas, would be tantamount to imposing more stringent fuel economy standards on those vehicles. *Id.* at 52929. The Agency pointed out, however, that the Energy Policy and Conservation Act (EPCA) authorizes only the Department of Transportation (DOT) to increase the stringency of motor vehicle fuel economy standards, and specifies a detailed regulatory regime that an EPA requirement to significantly reduce motor vehicle $CO_2$ emissions would unavoidably abrogate. *Id.; see also* 49 U.S.C. 32902 (relevant provision of EPCA).

EPA also disagreed with the petitioners' view that, assuming the Act gives EPA authority to regulate $CO_2$ and other greenhouse gases to address global climate change, the Agency had already made statements that triggered a mandatory duty to issue motor vehicle standards for $CO_2$ and other greenhouse gases (68 FR 52929, September 8, 2003). After summarizing the findings of a 2001 report on global climate change by the National Academy of Sciences (NAS), the Agency concluded that "[u]ntil more is understood about the causes, extent and significance of climate change and the potential options for addressing it, EPA believes it is inappropriate to regulate [greenhouse gas] emissions from motor vehicles." *Id.* at 52,931.

b. *Massachusetts* v. *EPA*

EPA's initial denial of the ICTA petition (68 FR 52922, September 8, 2003) was the basis for the U.S. Supreme Court's decision in *Massachusetts* v. *EPA,* 549 U.S. 497 (2007). In *Massachusetts* v. *EPA,* the Supreme Court held that EPA had improperly denied the petition. The Court held that greenhouse gases meet the definition of air pollutant in the CAA, and that the grounds EPA gave for denying the petition were "divorced from the statutory text" and hence improper. Specifically, the Court held that carbon dioxide, methane, nitrous oxide, and hydrofluorocarbons fit the CAA's "sweeping definition of 'air pollutant'" since they are "without a doubt 'physical [and] chemical * * * substances which [are] emitted into * * * the ambient air.' The statute is unambiguous." *Id.* at 529. The Court also rejected the argument that EPA could not regulate motor vehicle emissions of the chief greenhouse gas, carbon dioxide, because doing so would essentially require control of vehicle fuel economy, and Congress delegated that authority to the Department of Transportation in the Energy Policy and Conservation Act. The Court held that the fact "that DOT sets mileage standards in no way licenses EPA to shirk its environmental responsibilities. EPA has been charged with protecting the public's 'health' and 'welfare,' 42 U.S.C. 7521(a)(1), a statutory obligation wholly independent of DOT's mandate to promote energy efficiency." *Id.* at 532 (citation omitted). The two obligations may overlap "but there is no reason to think the two agencies cannot both administer their obligations and yet avoid inconsistency." *Id.*

Turning to EPA's alternative grounds for denial, the Court held that EPA's decision on whether or not to grant the petition must relate to "whether an air pollutant 'causes, or contributes to, air pollution which may reasonably be anticipated to endanger public health or welfare.'" *Id.* at 532–33. Thus, "[u]nder the clear terms of the Clean Air Act, EPA can avoid taking further action only if it determines that greenhouse gases do not contribute to climate change or if it provides some reasonable explanation as to why it cannot or will not exercise its discretion to determine whether they do." *Id.* at 533. The Court held that three of the four reasons EPA advanced as alternative grounds for denying the petition were unrelated to whether greenhouse gas emissions from new motor vehicles cause or contribute to air pollution that may reasonably be anticipated to endanger public health or welfare. Thus, EPA had failed to offer a reasoned explanation for its action. The Court further held that EPA's generalized concerns about scientific uncertainty were likewise insufficient unless "the scientific uncertainty is so profound that it precludes EPA from making a reasoned judgment as to whether greenhouse gases contribute to global warming," in which case EPA must so find. *Id.* at 534.

The Supreme Court was careful to note that it was not dictating EPA's action on remand, and was not deciding whether or not EPA must find that greenhouse gases endanger public health or welfare. Nor did the Court rule on "whether policy concerns can inform EPA's actions in the event that it makes such a finding." *Id.* at 534–35. The Court also observed that under CAA section 202(a), "EPA no doubt has significant latitude as to the manner, timing,

content, and coordination of its regulations with those of other agencies." *Id.* at 533. Nonetheless, any EPA decisions concerning the endangerment and cause or contribute criteria must be grounded in the requirements of CAA section 202(a).

On September 17, 2007, EPA's denial of the ICTA petition was vacated and remanded to EPA for further proceedings consistent with the Supreme Court's opinion.

2. *Post-Massachusetts* v. *EPA*

In response to a May 2007 Executive Order (EO 13432) and instructions from then-President Bush, EPA began working closely with the Departments of Transportation, Energy and Agriculture to develop, under the CAA, proposals for greenhouse gas standards for motor vehicles and renewable and alternative fuel requirements for gasoline.

However, after enactment of the Energy Independence and Security Act of 2007 (EISA) in late December 2007, work in response to the Supreme Court's decision shifted. Rather than moving forward with the proposed endangerment determination and attendant greenhouse gas vehicle standards under the CAA, EPA developed an Advance Notice of Proposed Rulemaking (ANPR) on "Regulating Greenhouse Gas Emissions under the Clean Air Act," which was published on July 30, 2008 (73 FR 44354). The ANPR presented information relevant to, and solicited public comment on, a wide variety of issues regarding the potential regulation of greenhouse gases under the CAA, including EPA's response to the Supreme Court's decision in *Massachusetts* v. *EPA*. Section V of the ANPR contained an earlier version of much of the material in the Findings, including the legal framework, a summary of the science of climate change, and an illustration of how the Administrator could analyze the cause or contribute element using information regarding the greenhouse gas emissions of the portion of the U.S. transportation sector covered by CAA section 202(a). A July 2008 version of the TSD for the endangerment finding was also in the docket for the ANPR (EPA–HQ–OAR–2008–0318).

The comment period for the ANPR was 120 days, and it provided an opportunity for EPA to hear from the public with regard to the issues involved in endangerment and cause or contribute findings, as well as the supporting science. EPA received, reviewed, and considered numerous comments at that time and this public input was reflected in the Findings that the Administrator proposed in April 2009. In addition, many comments were received on the TSD released with the ANPR. These comments are reflected in revisions to the TSD that was released in April 2009 to accompany the Administrator's proposal.

3. Proposed and Final Endangerment and Cause or Contribute Findings

In April 2009, the Administrator proposed to find under CAA section 202(a) that the mix of six key greenhouse gases in the atmosphere may reasonably be anticipated to endanger public health and welfare. Specifically, the Administrator proposed to define the "air pollution" referred to in CAA section 202(a) to be the mix of six key directly emitted and long-lived greenhouse gases: Carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride (74 FR 18886, April 24, 2009). The Administrator further proposed to find that combined greenhouse gas emissions from new motor vehicles and new motor vehicle engines contribute to this air pollution that endangers public health and welfare.

The Administrator's proposal was subject to a 60-day public comment period, which ended June 23, 2009, and also included two public hearings. Over 380,000 public comments were received on the Administrator's proposed endangerment and cause or contribute findings, including comments on the elements of the Administrator's April 2009 proposal, the legal issues pertaining to the Administrator's decisions, and the underlying TSD containing the scientific and technical information.

After carefully reviewing the public comments and all the information before her, on December 7, 2009, the Administrator signed the final Findings (74 FR 66496, December 15, 2009). Specifically, she found under CAA section 202(a) that atmospheric concentrations of the six greenhouse gases taken in combination may reasonably be anticipated to endanger both the public health and the public welfare of current and future generations. The Administrator also found that the combined emissions of these greenhouse gases from new motor vehicles and new motor vehicle engines contribute to the greenhouse gas air pollution that endangers public health and welfare under CAA section 202(a).

The July 2008 ANPR and the April 2009 proposed Findings were accompanied by draft versions of the TSD and the Findings were supported by the final TSD. The TSD provided an overview of all the major scientific assessments available at the time of each action, and greenhouse gas emission inventory data relevant to the contribution finding. Each of these three versions of the TSD were subject to review by Federal climate experts to ensure that they represented an accurate summary of the major scientific assessments. Moreover, the July 2008 and the April 2009 versions of the TSD were subject to public review as part of the public comment periods for the ANPR and proposed Findings.

4. Petitions for Reconsideration and Stay Requests

Between December 2009 and March 2010, EPA received 10 petitions (and supplements thereto) to reconsider the Findings.[6] Nine of these petitions base their requests on allegations that developments since the close of the comment period on the proposed Findings call into question the science underlying the Findings. One petition focuses on statements since the close of the comment period regarding the impact of regulating stationary sources under the CAA, and the relationship between EPA's proposed Light-Duty Vehicle Rule (see below) and the National Highway Transportation Safety Administration's (NHTSA) proposed Corporate Average Fuel Economy (CAFE) rule as a basis for their request that EPA reconsider the Findings. Each significant objection in the petitions is discussed in detail below and the accompanying RTP document. Note that when more than one petitioner raised an objection, our response to that objection is provided only once.

In addition, EPA received two requests to administratively stay the final Findings. One administrative stay request under CAA section 307(d)(7)(b) was tied to a petition to reconsider the findings based on concerns about the science and requested that EPA stay the final Findings for three months. The other administrative stay request was filed under CAA section 307(d)(7)(B), the Administrative Procedures Act (APA) section 705, and Federal Rule of Appellate Procedure 18(a)(1) as part of the petition for reconsideration relating to stationary source concerns, and requested a stay pending EPA's completion of its reconsideration of the final Findings.

## II. Standard for Reconsideration

Section 307(d)(7)(B) of the CAA strictly limits petitions for

[6] The West Virginia Coal Association also filed a letter in support of the existing petitions for reconsideration.

reconsideration both in time and scope. It states that: "Only an objection to a rule or procedure which was raised with reasonable specificity during the period for public comment (including any public hearing) may be raised during judicial review. If the person raising an objection can demonstrate to the Administrator that it was impracticable to raise such objection within such time or if the grounds for such objection arose after the period for public comment (but within the time specified for judicial review) and if such objection is of central relevance to the outcome of the rule, the Administrator shall convene a proceeding for reconsideration of the rule and provide the same procedural rights as would have been afforded had the information been available at the time the rule was proposed. If the Administrator refuses to convene such a proceeding, such person may seek review of such refusal in the United States court of appeals for the appropriate circuit (as provided in subsection (b)). Such reconsideration shall not postpone the effectiveness of the rule. The effectiveness of the rule may be stayed during such reconsideration, however, by the Administrator or the court for a period not to exceed three months."

Thus the requirement to convene a proceeding to reconsider a rule is based on the petitioner demonstrating to EPA: (1) That it was impracticable to raise the objection during the comment period, or that the grounds for such objection arose after the comment period but within the time specified for judicial review (i.e., within 60 days after publication of the final rulemaking notice in the **Federal Register**, see CAA section 307(b)(1); and (2) that the objection is of central relevance to the outcome of the rule.

As to the first procedural criterion for reconsideration, a petitioner must show why the issue could not have been presented during the comment period, either because it was impracticable to raise the issue during that time or because the grounds for the issue arose after the period for public comment (but within 60 days of publication of the final action). Thus, CAA section 307(d)(7)(B) does not provide a forum to request EPA to reconsider issues that actually were raised, or could have been raised, prior to promulgation of the final rule.

In EPA's view, an objection is of central relevance to the outcome of the rule only if it provides substantial support for the argument that the regulation should be revised. See Denial of Petition to Reconsider, 68 FR 63021 (November 7, 2003), Technical Support Document for Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NSR): Reconsideration at 5 (Oct. 30, 2003) (EPA–456/R–03–005) (available at *http://www.epa.gov/nsr/documents/petitionresponses10-30-03.pdf);* Denial of Petition to Reconsider NAAQS for PM, 53 FR 52698, 52700 (December 29, 1988), citing Denial of Petition to Revise NSPS for Stationary Gas Turbines, 45 FR 81653–54 (December 11, 1980), and decisions cited therein.

This interpretation is clearly appropriate in light of the criteria adopted by Congress in this and other provisions in section 307(d). Section 307(d)(4)(B)(i) provides that "[a]ll documents which become available after the proposed rule has been published and which the Administrator determines are of central relevance to the rulemaking shall be placed in the docket as soon as possible after their availability." This provision draws a distinction between comments and other information submitted during the comment period, and other documents which become available after publication of the proposed rule. The former are docketed irrespective of their relevance or merit, while the latter must be docketed only if a higher hurdle of central relevance to the rulemaking is met. Congress also used the phrase "central relevance" in sections 307(d)(7)(B) and (d)(8), and in both cases Congress set a more stringent hurdle than in section 307(d)(4). Under section 307(d)(7)(B), the Administrator is required to reconsider a rule only if the objection is "of central relevance to the outcome of the rule." Likewise, section 307(d)(8) authorizes a court to invalidate a rule for procedural errors only if the errors were "so serious and related to matters of such central relevance to the rule that there is a substantial likelihood that the rule would have been substantially changed if such errors had not been made." In both of these provisions, it is not enough that the objection or error be of central relevance to the issues involved in the rulemaking, as in section 307(d)(4). Instead, the objection has to be of central relevance "to the outcome of the rule" itself, and the procedural error has to be of such central relevance that it presents a "substantial likelihood that the rule would have been substantially changed." Central relevance to the issues involved in the rulemaking is not enough to meet the criteria Congress set under sections 307(d)(7) or (d)(8). Both of those provisions require that the objection or error be central to the substantive decision that is the outcome of the rulemaking. This difference is significant, and indicates that Congress set a much higher hurdle for disturbing a final rule that has already been issued, as compared to the less stringent criteria for docketing of documents before a decision has been made and a rule has been issued.

In this context, EPA's interpretation of section 307(d)(7)(B) gives full and appropriate meaning to the criteria adopted by Congress. An objection is considered of central relevance to the outcome of the rule only if it provides substantial support for the argument that the regulation should be revised. This properly links the criteria to the outcome of the rulemaking, not just the issues in the rulemaking. It requires that the objection be of such substance and merit that it can be considered central to the outcome of the rulemaking. This interpretation is consistent with section 307(d)(8), which also ties central relevance to the outcome of the rulemaking, in terms of a "substantial likelihood" that the rule would be "substantially changed." This interpretation gives proper weight to the approach throughout section 307(b) and (d) of the importance Congress attributed to preserving the finality of agency rulemaking decisions. This interpretation is also consistent with the case law, as discussed below.

As discussed in this Decision, EPA is denying the petitions because they fail to meet these criteria. In many cases, the objections raised in the petitions to reconsider were or could have been raised during the comment period of the proposed Findings. In all cases, the objections are not of central relevance to the outcome of the rule because they do not provide substantial support for the argument that the Endangerment Finding should be revised.

Pacific Legal Foundation (PLF) argues that its objections are of central relevance because the CRU documents and e-mails "cast substantial uncertainty over" the final Endangerment Finding, and that EPA is required to grant the petition or reconsider "if information not available in the rulemaking record for public comment casts substantial uncertainty over the final regulation." PLF Pet at 8–9. They argue that this is the case even if one does not assume or even argue that the statements in the CRU documents and e-mails are true. PLF Pet. at 6. They base this claim on *Kennecott Corp.* v. *EPA,* 684 F.2d 1007, 1017–20 (DC Cir. 1982).

PLF's view of *Kennecott* fails to account for the specific procedural issues that were central to that case. In *Kennecott,* petitioners objected that EPA had not provided adequate notice and

an opportunity for comment in the underlying rulemaking, in violation of various CAA section 307(d) provisions. Petitioners had two different notice and comment objections. First, they objected to EPA's failure to include certain documents in the docket at the time of the proposal, including various EPA financial analyses performed prior to the proposal. The court found that these documents were part of the basis for the proposed regulations and needed to be docketed so comment could be taken on them during the comment period. The court found that the failure to submit these documents to the docket at the time of the proposal was a procedural violation of CAA section 307(d)'s notice and comment requirements, because the documents EPA failed to docket made impossible any meaningful comment on the merits of EPA's proposal. The missing documents led to uncertainty over EPA's basis for the proposal, which the documents could clarify. This procedural violation met the test under CAA section 307(d)(9) for reversible error, because it indicated a "substantial likelihood" that the regulations would "have been significantly changed." *Kennecott,* 684 F.2d at 1018–1019.[7]

Petitioners in *Kennecott* also objected to EPA's submission to the docket, one week prior to promulgation of the final rule, of certain economic forecast data upon which EPA relied for the final rule, where the forecast data differed significantly from the forecast data provided during the pubic comment period. The court found that this late submission of important information relied on by EPA, without an opportunity to comment, also violated the notice and comment requirements of CAA section 307(d). *Id.* at 1019.

Given these two violations of the notice and comment requirements of CAA section 307(d), the court determined that consideration of a petition to reconsider after promulgation of the final rule was not an adequate substitute for the statutory required notice and opportunity to comment prior to promulgation of the rule. EPA failed to provide adequate notice and an opportunity to comment during the rulemaking process, and could not cure that by later considering the merits of the petitioner's comments post-promulgation, through a petition to reconsider, where the issues involved were critical to the central issues involved in the rule. *Id.* at 1019.

EPA's failure to provide adequate notice and an opportunity to comment in violation of CAA section 307(d) was the critical underpinning for the court's determination that in that case consideration of the merits of the objections through a post-promulgation petition to reconsider was not an adequate substitute for providing the required procedural rights prior to promulgation. That, however, is not the case here. Petitioners are not claiming that the CRU e-mails or other documents show that EPA failed to provide adequate notice and an opportunity to comment because EPA failed to docket any documents or EPA docketed late any documents used to support EPA's final Endangerment Finding. Instead, petitioners are claiming that EPA should reopen the rulemaking and reconsider the Endangerment Finding based on new documents and arguments that petitioners bring to EPA, which they claim undermine the basis for EPA's Endangerment Finding.[8] There is no basis for treating the court's decision in *Kennecott* as precedent here, where there is no comparable procedural notice and comment violation by EPA. There is no reason to limit EPA's ability to consider the merits of the petitioners' objections through a post-promulgation petition to reconsider, whereas in this case there is no violation of a statutory right to notice and comment and EPA's consideration of the merits of the petitioners' objections is not being used as an improper substitute or cure for an EPA failure to provide adequate notice and an opportunity to comment prior to promulgation of the final rule. Unlike the situation in *Kennecott,* EPA's consideration of the petitions to reconsider is focused on whether the claimed new evidence and arguments warrant a reopening of a prior, properly noticed rulemaking. Absent a demonstration that the objections raised by petitioners provide substantial support for the argument that the regulation should be revised, such reopening is not warranted. Nothing in *Kennecott* holds otherwise.

*Appalachian Power Company et al.* v. *EPA,* 249 F.3d 1032 (D.C. Cir. 2001) clearly supports this view. In that case, petitioners presented comments to EPA requesting that EPA consider various materials concerning the issue of substantial contribution under section 126. Because EPA had already promulgated a rule that addressed the issue of significant contribution, EPA properly treated the request as a petition to reconsider the prior rule. EPA evaluated the evidence and its relevance to the section 126 rule and for a variety of reasons rejected it on the merits as a basis for reopening the rule. The court upheld EPA's decision, stating that "[g]iven the deferential standard employed in this context, the EPA's refusal to reopen and reconsider its significant contribution findings must be upheld." *Id.* at 1060.

Part III of this Decision explains why EPA is denying the petitions with respect to the objections set forth in these petitions for reconsideration. With respect to some of these issues, the petitioners clearly have not met the procedural predicate for reconsideration. That is, the petitioners have not demonstrated that it was impracticable to raise these objections during the comment period, or that the grounds for these objections arose after the close of the comment period but within 60 days after publication of the final rule. As such, they do not meet the statutory criteria for administrative reconsideration under CAA section 307(d)(7)(B).[9] For all of the objections, whether or not the petitions might be considered to meet the procedural criterion for reconsideration, the petitioners' objections and arguments in terms of substance are not "of central relevance" to the outcome of the rulemaking. Thus, none of the objections meet the criteria for reconsideration under the CAA.

As noted in Section I.B.4 of this Decision, EPA also received two requests to administratively stay the final Findings. Two petitioners requested an administrative stay under

[7] It is this discussion of uncertainty that is cited by PLF. However this concerns the criteria for reversible error under CAA section 307(d)(9)(D)(iii) for a procedural violation. The court did not address this as the test for CAA section 307(d)(7)(B), and certainly did not do so for cases where there is no procedural violation.

[8] Southeastern Legal Foundation, Inc. (SLF) inappropriately points to the docketing requirements under CAA section 307(d)(3) related to a proposed rule, SLF at 3–5. However, the documents SLF refers to are not EPA documents, were not part of the basis for EPA's proposal, and arose after the comment period, not prior to proposal. The provisions for a petition to reconsider under CAA section 307(d)(7), not the provisions of CAA section 307(d)(3), apply to the concerns raised by SLF with respect to the arguments and documents submitted to the agency after the end of the comment period, in the petitions to reconsider.

[9] The Chamber of Commerce's petition was based on grounds that it claims arose after the time period for seeking judicial review of the underlying rulemaking. The Chamber argues that EPA should grant reconsideration in its discretion, even if it is not required to do so under section 307(d). The failure of the Chamber to file timely objections or to demonstrate that the objections it raises provide substantial support for the argument that the regulation should be revised are a fully adequate basis for EPA to deny the Chamber's petition. In any case, even if the petition were timely, EPA has considered the objections raised by the Chamber and is denying their petition as discussed in more detail herein.

CAA section 307(d)(7)(B), tied to the petitions to reconsider the findings, requesting that EPA stay the Findings for three months. Southeastern Legal Foundation at 8, Chamber of Commerce at 1. EPA has authority to issue a stay for up to 3 months if it grants a petition to reconsider under CAA section 307(d)(7)(B). As described below, EPA is denying the petitions to reconsider, hence there is no basis for issuance of an administrative stay under this provision.

One of the administrative stay requests was filed under section 705 of the Administrative Procedure Act (APA) as part of the petition for reconsideration relating to stationary source concerns, and requested a stay pending EPA's completion of its reconsideration of the final Findings. Chamber at 23–34. 5 U.S.C. 705 authorizes an agency to postpone the effective date of an agency action pending judicial review when the agency finds that justice so requires. In this case, the Endangerment Finding was effective as of January 14, 2010. The request for an administrative stay was submitted by petition dated March 15, 2010, after the Endangerment Finding was effective. Even if EPA believed that an administrative stay was warranted, which it does not, it is not clear whether EPA would have the authority under APA section 705 to stay an agency action that has already gone into effect. Postponing an effective date implies acting before the effective date occurs.

In any case, an administrative stay of the Endangerment Finding is not warranted. In response to the arguments raised by the Chamber, (1) the Chamber has not made a strong showing on the merits, for all of the reasons upon which EPA is denying the petitions to reconsider; (2) the Chamber's arguments concerning irreparable harm fail to adequately account for the proposed or recently issued Final Prevention of Significant Deterioration (PSD) and Title V Greenhouse Gas Tailoring Rule (75 FR 31518, 31579–84; June 3, 2010) (Final Tailoring Rule), and present general, unspecific, and unsupported arguments; (3) the Chamber's arguments that EPA's standards for emissions of GHGs from light-duty vehicles would have no important benefit because of the related NHTSA CAFE rule are rejected for the reasons discussed in Section IV.B of this Notice, and (4) the Chamber's arguments concerning the public interest, which repeat its prior arguments, are rejected for the same reasons.

## III. Science Related Issues

### *A. General Summary of Petitioners' Arguments*

The petitioners generally claim that the science underlying the Administrator's Endangerment Finding is flawed and/or that EPA did not follow an appropriate or robust process in evaluating the underlying science for purposes of making an endangerment finding for greenhouse gases. Many of the 10 petitions present similar arguments. Some of the petitioners' arguments were raised during the 60-day public comment period following the proposed Findings (74 FR 18886, April 24, 2009).

Many of the petitioners critique specific elements of the underlying science that support the Findings, primarily the HadCRUT temperature record showing increases in global surface temperatures. There are many elements of the underlying science that support the Administrator's Endangerment Finding that are not addressed by the petitioners. Petitioners assert that the global temperature record is so central to all greenhouse gas and climate change science that the problems with a global surface temperature record essentially mean all scientific knowledge linking greenhouse gases and climate change, and by extension all public health and welfare risks associated with human-induced climate change, must also be called into question. Petitioners also question the credibility of the IPCC and, by extension, EPA's use of IPCC AR4 as a significant reference document supporting the Findings.

The primary information provided by the petitioners to back their arguments are:

(1) A set of disclosed private e-mail communications among some scientists associated with the HadCRUT temperature record and associated with certain sections of IPCC AR4.

(2) A small number of factual mistakes and claimed factual mistakes and alleged unsupported statements in the voluminous, 2,927-page IPCC AR4.

(3) A limited number of new studies for EPA to consider.

EPA's responses to the petitioners' evidence, arguments, and claims are summarized in this section of this Decision and provided in fuller technical detail in the accompanying three-volume RTP document. More specifically, the petitioners' arguments can generally be grouped into three broad categories:

- Climate science and data issues, including (1) the validity of the reconstructed surface temperature record from the distant past and whether or not recent observations of global warming are unusual; (2) the validity of the more recent surface temperature record and whether recent temperature changes can be attributed to human emissions of greenhouse gases; (3) the validity of the HadCRUT surface temperature record of the Climatic Research Unit (CRU); (4) the validity of the recent surface temperature records constructed by the National Oceanographic and Atmospheric Administration (NOAA) and National Aeronautics and Space Administration (NASA); and (5) the implications of new studies not previously considered.
- Issues raised by EPA's use of IPCC reports, including: (1) Claims that recently found errors and claimed errors in IPCC AR4 undermine IPCC's credibility and therefore EPA's use of IPCC AR4 as a primary reference document; and (2) claims that IPCC has a policy agenda and is not an objective scientific body.
- Process and other issues, including claims that: (1) The USGCRP and the NRC are not separate and independent assessments from IPCC; (2) EPA's process to develop the scientific support for the Findings was inappropriate; (3) there are improper peer-review processes in the underlying scientific literature used by the major assessments; and (4) certain scientists did not adhere to UK and U.S. Freedom of Information Act Requests.

### *B. Summary of the Science Underlying the Administrator's Endangerment Finding in Light of the Petitioners' Claims*

Before addressing the petitioners' general and specific assertions, this section briefly describes the major scientific conclusions and data that support the Administrator's Endangerment Finding that elevated atmospheric concentrations of the group of six key greenhouse gases are reasonably anticipated to endanger the public health and public welfare of current and future generations. As noted above, the petitioners do not take issue with the large body of scientific evidence. Rather, they focus most of their attention on questioning the validity of the global surface temperature record—specifically the HadCRUT temperature record, one of the three major global surface temperature records used by climate researchers—which show that temperatures are increasing. This section puts the global temperature record in the broader context of greenhouse gas and climate change

science, and demonstrates the limited scope of the petitioners' arguments.

There is a causal chain linking atmospheric concentrations of greenhouse gases to impacts and risks to public health and welfare. The elements of this causal chain are:

- What effects do greenhouse gases have on the environment and on climate in particular?
- Are human activities changing the amount of greenhouse gases in our atmosphere?
- What is the evidence indicating that average temperatures are increasing and that climate change is occurring, consistent with the direction one would expect from increasing greenhouse gases in our atmosphere?
- What is the evidence linking observed temperature changes and climate change to the anthropogenic increase in greenhouse gases?
- How are public health and welfare threatened by these changes to climate and the environment, now and in the future?

Each element of the causal chain is discussed below. Evidence related to each element is based on the underlying scientific assessments (e.g., IPCC and USGCRP) that EPA relied on to develop the TSD to support the Administrator's Endangerment Finding, and, where noted, is also based on the most recent scientific assessment, published in May 2010, of the NRC.[10]

1. What effects do greenhouse gases have on the environment and on climate in particular?

The physical effect of greenhouse gases on climate and the environment remains a basic scientific fact—greenhouse gases slow the loss of Earth's heat, which would otherwise escape to space. Much like a blanket keeps a person warm by preventing heat loss, greenhouse gases blanket the planet and warm the Earth by trapping in heat that would otherwise escape to space. This is the Earth's natural greenhouse effect. An increase in the amount of greenhouse gases in our atmosphere intensifies the natural greenhouse effect and thus exerts a warming effect on the global climate. These are well-established physical properties of greenhouse gases. The six greenhouse gases grouped together in the Administrator's Endangerment Finding are long-lived in the atmosphere and, once emitted, can remain in the atmosphere for decades to centuries. Carbon dioxide has other non-climate effects as well. Increases in atmospheric carbon dioxide concentrations can affect oceanic acidity and the growth rates of crops, weeds, and trees. Petitioners have not presented information challenging the basic physical properties of how the six greenhouse gases affect the climate and the environment.

2. How are human activities changing the amount of greenhouse gases in our atmosphere?

It is a well-documented and straightforward observation that levels of carbon dioxide and other greenhouse gases are increasing in our atmosphere. The six key greenhouse gases included in the Administrator's Findings are at essentially unprecedented levels compared to the recent and distant past. Their concentrations are climbing, and this is projected to continue well into this century. The two most important directly emitted greenhouse gases, carbon dioxide and methane, are well above the natural range of atmospheric concentrations compared to at least the last 650,000 years (see TSD EPA–HQ–OAR–2009–0171–11645). The most recent report of the NRC states that carbon dioxide levels are now at 388 parts per million and increasing by almost two parts per million per year.

The fact that greenhouse concentrations are now at such high levels is absolutely central to the Administrator's Endangerment Finding. Without such a large and ever-increasing buildup of atmospheric levels of greenhouse gases there would be less concern about the potential future warming caused by human activities. Greenhouse gases are at such high levels in our atmosphere and continue to climb because human activities are adding greenhouse gases to the atmosphere in larger quantities and more quickly than the environment can handle. Our annual emissions from fossil fuel combustion, deforestation, and other sources are overwhelming the natural removal systems in the ocean, atmosphere, and terrestrial biosphere (e.g., trees and other vegetation).

Furthermore, human activities are unambiguously the driver of the increase in atmospheric levels of greenhouse gases. The EPA TSD states: "The global atmospheric $CO_2$ concentration has increased about 38% from pre-industrial levels to 2009, and almost all of the increase is due to anthropogenic emissions." This is supported by the most recent NRC report, which states that, "We know that this increase is largely the result of human activities because the chemical signature of excess $CO_2$ in the atmosphere can be linked to the composition of the $CO_2$ emissions from fossil fuel burning. Moreover, analyses of bubbles trapped in ice cores from Greenland and Antarctica reveal that atmospheric $CO_2$ levels have been rising steadily since the start of the Industrial Revolution." Petitioners do not provide any evidence that cause EPA to question this scientific conclusion.

3. What is the evidence indicating that average temperatures are increasing and climate change is occurring consistent with the direction one would expect with increasing greenhouse gases in our atmosphere?

The scientific literature is clear that the heating effect caused by the buildup of greenhouse gases is warming the climate system. As summarized in the TSD:

- The global average net effect of the increase in atmospheric GHG concentrations, plus other human activities (e.g., land-use change and aerosol emissions), on the global energy balance since 1750 has been one of warming. This total net heating effect, referred to as forcing, is estimated to be +1.6 (+0.6 to +2.4) watts per square meter ($W/m^2$), with much of the range surrounding this estimate due to uncertainties about the cooling and warming effects of aerosols.
- Warming of the climate system is unequivocal, as is now evident from observations of increases in global average air and ocean temperatures, widespread melting of snow and ice, and rising global average sea level. Global mean surface temperatures have risen by 1.3 ± 0.32 °F (0.74 °C ± 0.18 °C) over the last 100 years. Eight of the 10 warmest years on record have occurred since 2001. Global mean surface temperature was higher during the last few decades of the 20th century than during any comparable period during the preceding four centuries.
- U.S. temperatures also warmed during the 20th and into the 21st century; temperatures are now approximately 1.3 °F (0.7 °C) warmer than at the start of the 20th century, with an increased rate of warming over the past 30 years. Both the IPCC and the USGCRP[11] reports attributed recent North American warming to elevated GHG concentrations. In the U.S. Climate Change Science Program (CCSP) (2008)[12] report, the authors find that for

[10] National Research Council (2010) Advancing the Science of Climate Change: America's Climate Choices, National Academies Press, Washington, DC.

[11] USGCRP now encompasses the former Climate Change Science Program (CCSP) under the previous Administration.

[12] CCSP (2008). Reanalysis of Historical Climate Data for Key Atmospheric Features: Implications for Attribution of Causes of Observed Change. A Report

North America, "more than half of this warming [for the period 1951–2006] is likely the result of human-caused GHG forcing of climate change."

- Widespread changes in extreme temperatures have been observed in the last 50 years across all world regions, including the United States. Cold days, cold nights, and frost have become less frequent, while hot days, hot nights, and heat waves have become more frequent.
- There is strong evidence that global sea level gradually rose in the 20th century and is currently rising at an increased rate.
- Satellite data since 1979 show that annual average Arctic sea ice extent has shrunk by 4.1% per decade.
- Observational evidence from all continents and most oceans shows that many natural systems are being affected by regional climate change, particularly temperature increases.
- Observations show that climate change is currently affecting U.S. physical and biological systems in significant ways.
- Ocean $CO_2$ uptake has lowered the average ocean pH (increased acidity) level by approximately 0.1 since 1750.

These conclusions are consistent with, or strengthened by, the most recent NRC report which states the following: "Earth is warming. Detailed observations of surface temperature assembled and analyzed by several different research groups show that the planet's average surface temperature was 1.4 °F (0.8 °C) warmer during the first decade of the 21st century than during the first decade of the 20th century, with the most pronounced warming over the last three decades. These data are corroborated by a variety of independent observations that indicate warming in other parts of the Earth system, including the cryosphere (snow and ice covered regions), the lower atmosphere, and the oceans."

These multiple lines of evidence highlight a number of things. First, there is well-documented evidence that the buildup of greenhouse gases in our atmosphere is exerting, as expected, a significant heating effect called radiative forcing. This is not to be confused with temperature change or the temperature data that is the subject of many of the petitions. This heating effect or radiative forcing refers to a change in the energy balance of the planet, and is thus the driver of temperature change.

The magnitude of this heating effect caused by the buildup in atmospheric greenhouse gases has been quantified in the scientific literature. The petitioners do not challenge these estimates and do not challenge the fact that the observed buildup of greenhouse gases is having a clear and quantifiable heating effect on the planet. This is a fundamental pillar of climate change science, and is a fundamental piece of supporting evidence for the Administrator's Endangerment Finding.

Second, the underlying science indicates that there is significant and unambiguous warming for the Earth and for North America. This is the first place along the causal chain where the petitioners question the science. Many petitioners question the validity of the global temperature evidence by pointing to the CRU e-mails and their impact on the scientific assessment reports used by EPA. This particular critique is addressed below and in fuller detail in Volume 1 of the RTP document.

Third, the evidence of climate change caused by human activities goes beyond average increases in global and continental temperatures. There are well-documented increases in sea level, declines in sea ice, and changes to physical and biological systems, all primarily driven by, and therefore showing further evidence of, increases in average temperatures. These changes are documented by datasets other than temperature datasets, and bear no relation to the particular CRU temperature dataset that is the primary focus of many of the petitioners.

Similarly, the observation that elevated levels of carbon dioxide are increasing the acidity of the world's oceans is direct evidence of a large-scale and significant environmental effect that does not depend on any evidence from a temperature dataset. This particular effect was considered supporting evidence by the Administrator in the Endangerment Finding. This documented effect is not challenged by any of the petitioners.

4. What is the evidence linking observed temperature changes and climate change to the anthropogenic increase in greenhouse gases?

The underlying science has clearly attributed the observed warming to the buildup of greenhouse gases in our atmosphere. Summarized here is the underlying science that shows that increases in average global and continental temperatures, as well as other climatic changes, can confidently be attributed to the increases in greenhouse gas emissions from human activities. The extent to which observed warming can be attributed to the human-induced buildup of greenhouse gases in the atmosphere is the second area of the causal chain where some petitioners question the science.

IPCC statements on the linkage between greenhouse gases and temperatures have strengthened since the organization's early assessments (Solomon et al., 2007).[13] The IPCC's *First Assessment Report* in 1990 contained little observational evidence of a detectable anthropogenic influence on climate (IPCC, 1990).[14] In its *Second Assessment Report* in 1995, the IPCC stated that the balance of evidence suggests a discernible human influence on the climate of the 20th century (IPCC, 1996).[15] The *Third Assessment Report* in 2001 concluded that most of the observed warming over the last 50 years is likely to have been due to the increase in greenhouse gas concentrations (IPCC, 2001b).[16] The conclusion in IPCC's 2007 *Fourth Assessment Report* (2007b)[17] is the strongest yet: "Most of the observed increase in global average temperatures since the mid-20th century is very likely[18] due to the observed increase in anthropogenic GHG concentrations."

The strength of this statement reflects our current, much better understanding

by the U.S. Climate Change Science Program and the Subcommittee on Global Change Research [Randall Dole, Martin Hoerling, and Siegfried Schubert (eds.)]. Asheville, NC: National Oceanic and Atmospheric Administration, National Climatic Data Center. 156 pp.

[13] Solomon, S., D. Qin, M. Manning, R.B. Alley, T. Berntsen, N.L. Bindoff, Z. Chen, A. Chidthaisong, J.M. Gregory, G.C. Hegerl, M. Heimann, B. Hewitson, B.J. Hoskins, F. Joos, J. Jouzel, V. Kattsov, U. Lohmann, T. Matsuno, M. Molina, N. Nicholls, J. Overpeck, G. Raga, V. Ramaswamy, J. Ren, M. Rusticucci, R. Somerville, T.F. Stocker, P. Whetton, R.A. Wood and D. Wratt (2007). Technical Summary. In: Climate Change 2007: The Physical Science Basis. Contribution of Working Group I to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change [Solomon, S., D. Qin, M. Manning, Z. Chen, M. Marquis, K.B. Averyt, M. Tignor, and H.L. Miller (eds.)]. Cambridge University Press, Cambridge, United Kingdom and New York, NY, USA, 996 pp.

[14] IPCC (1990). First Assessment Report: Climate Change 1990. Cambridge University Press, Cambridge, United Kingdom and New York, NY, USA.

[15] IPCC (1996). Climate Change 1995: The Science of Climate Change. Intergovernmental Panel on Climate Change [J.T. Houghton, L.G. Meira Filho, B.A. Callander, N. Harris, A. Kattenberg, and K. Maskell (eds)]. Cambridge University Press. Cambridge, United Kingdom.

[16] IPCC (2001b). Summary for Policymakers. In. Climate Change 2001: The Scientific Basis. Contribution of Working Group I to the Third Assessment Report of the Intergovernmental Panel on Climate Change [J.T. Houghton et al. (eds.)]. Cambridge University Press, Cambridge, United Kingdom and New York, NY, USA.

[17] IPCC (2007b). Climate Change 2007: Synthesis Report. Contribution of Working Groups I, II and III to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change [Core Writing Team, Pachauri, R.K and Reisinger, A. (eds.)]. IPCC, Geneva, Switzerland, 104 pp.

[18] According to IPCC terminology, "very likely" conveys a 90 to 99% probability of occurrence. See Box 1.2 of the TSD for a full description of IPCC's uncertainty terms.

of all the factors, not just greenhouse gases, that influence temperature fluctuations and other climatic changes. On this point, EPA's TSD (citing Hegerl *et al.,* 2007) [19] listed the major scientific advances between the Third and Fourth Assessment Reports of the IPCC that led to this increased confidence in the ability to attribute observed temperature and other climate changes to anthropogenic greenhouse gases:

- An expanded and improved range of observations allowing attribution of warming to be more fully addressed jointly with other changes in the climate system.
- Improvements in the simulation of many aspects of present mean climate and its variability on seasonal to inter-decadal time scales.
- More detailed representations of processes related to aerosol and other forcings (i.e., heating and cooling effects) in models.
- Simulations of 20th-century climate change that use many more models and much more complete anthropogenic and natural forcings.
- Multi-model ensembles that increase confidence in attribution results by providing an improved representation of model uncertainty.

Climate model simulations suggest that natural heating factors alone cannot explain the observed warming for the entire globe, the global land, or the global ocean. The observed warming can only be reproduced with models that contain both natural and anthropogenic heating and cooling influences.

EPA's TSD, based on the underlying assessment literature, states that if the additional heating effect of elevated levels of greenhouse gases were the only external influence on the global climate, this likely would have resulted in warming greater than observed. This statement is made because our understanding of the climate system is sophisticated enough to consider and model multiple and simultaneous influences on the global climate. For example, there are known and quantifiable cooling effects from human emissions of aerosols and natural forcings (e.g., volcanic eruptions and solar variability) that have offset some of the greenhouse gas-induced warming during the past half century.

The sophistication of climate models that examine the influence of human emissions of greenhouse gases has increased. Confidence in these models comes from their foundation in accepted physical principles and from their ability to reproduce observed features of current climate and past climate changes (IPCC, 2007a).[20] One petitioner questions the reliability of the models by pointing to certain CRU e-mails. Questions regarding the reliability of climate models are addressed in Volume 4 of the RTC document and in Volume 1 of the RTP document.

Furthermore, warming of the climate system has been detected in changes of surface and atmospheric temperatures, in the upper several hundred meters of the ocean (as evident by the observed increase in ocean heat content), and in contributions to sea level rise. The scientific assessments have established human contributions to all of these changes.

Not only has an anthropogenic warming signal been detected for the surface temperatures, but evidence has also accumulated of an anthropogenic influence throughout different layers of the atmosphere. Some petitioners have raised one potential inconsistency between observed warming and modeled warming higher in the atmosphere over the tropics. Karl *et al.* (2009) [21] state that when uncertainties in models and observations are properly accounted for, newer observational datasets are in agreement with climate model results. A detailed discussion of this issue is contained in Volume 1, section 1.2 of the RTP document.

Lastly, evidence from climates in the geologic past, going back millions of years, also supports the conclusion that elevated levels of greenhouse gases in the atmosphere are expected to lead to warmer climates. Measurements show that climates from the geologic past have been both warmer and colder than present, and that warmer periods have generally coincided with high atmospheric carbon dioxide levels. Analyses of these paleoclimate data have increased confidence in the role of external influences on climate. Climate models for predicting future climate have been used to reproduce key features of past climates using conditions and radiative forcing for those periods.

Here too, these conclusions are reinforced by the most recent NRC report, which states:

> "Global warming can be attributed to human activities. Many lines of evidence support the conclusion that most of the observed warming since the start of the 20th century, and especially the last several decades, can be attributed to human activities, including the following:
> - Earth's surface temperature has clearly risen over the past 100 years, at the same time that human activities have resulted in sharp increases in $CO_2$ and other GHGs.
> - Both the physics of the greenhouse effect and more detailed calculations dictate that increases in atmospheric GHGs should lead to warming of Earth's surface and lower atmosphere.
> - The vertical pattern of observed warming—with warming in the bottommost layer of the atmosphere and cooling immediately above—is consistent with warming caused by GHG increases, and inconsistent with other possible causes.
> - Detailed simulations with state-of-the-art computer-based models of the climate system are able to reproduce the observed warming tend and patterns only when human-induced GHG emissions are included.
>
> Based on these and other lines of evidence, the Panel on Advancing the Science of Climate Change—along with an overwhelming majority of scientists (Rosenberg *et al.,* 2010)—conclude that much of the observed warming since the start of the 20th century, and most of the warming over the last several decades, can be attributed to human activities" [NRC at 29].

The clear conclusion from all of this evidence is that the human-induced buildup of greenhouse gases in the atmosphere is primarily responsible for most of the observed warming and other climate changes occurring now. The information petitioners present to challenge this part of the scientific record is clearly inadequate.

- Petitioners provide no credible evidence to question the clear observation that greenhouse gases are increasing in our atmosphere to significant levels.
- The petitioners provide no information to question the quantified radiative forcing (heating effect) caused by this greenhouse gas buildup.
- Petitioners' objections about paleoclimate temperature reconstructions focus on one type of reconstruction (tree ring analysis). The objections, addressed in Volume 1 of the RTP document, do not withstand scrutiny, nor do they undermine our confidence in the conclusions of the studies. These conclusions, and the accompanying limitations and uncertainties, have been properly characterized in the assessment reports

[19] Hegerl, G.C., *et al.* (2007). Understanding and Attributing Climate Change. In: Climate Change 2007: The Physical Science Basis. Contribution of Working Group I to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change [Solomon, S., D. Qin, M. Manning, Z. Chen, M. Marquis, K.B. Averyt, M. Tignor, and H.L. Miller (eds.)]. Cambridge University Press, Cambridge, United Kingdom and New York, NY, USA.

[20] IPCC (2007a) Climate Change 2007: The Physical Science Basis. Contribution of Working Group I to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change. [Solomon, S., D. Qin, M. Manning, Z. Chen, M. Marquis, K.B. Averyt, M. Tignor, and H.L. Miller (eds.)]. Cambridge University Press, Cambridge, United Kingdom and New York, NY, USA.

[21] Karl, T., J. Melillo, and T. Peterson (Eds.) (2009) Global Climate Change Impacts in the United States. Cambridge University Press, Cambridge, United Kingdom.

and the Endangerment Finding. Petitioners do not contest or address the variety of other aspects of paleoclimate research supporting the attribution of recent warming to anthropogenic greenhouse gases.

• With respect to the variety of evidence on observed temperature change, the petitioners focus their criticism on the validity of one of three global surface temperature records, the HadCRUT temperature record. Petitioners' objections are addressed in detail below and in Volume 1 of the RTP document, as are the petitioners' related criticisms of the NOAA and NASA temperature datasets. Their objections do not withstand scrutiny, nor do they reduce our confidence in these temperature records, which have been properly characterized in the assessment reports and the Endangerment Finding. In addition, the petitioners ignore and do not address the clear information and observations showing that other elements of the climate system are undergoing changes consistent with these average temperature increases (e.g., ocean heating, sea level rise, Arctic ice loss). Petitioners do not show that these observations are in error or are the result of some other, unidentified mechanism.

• Petitioners focus their criticism on a possible discrepancy between model predictions and the vertical temperature structure of the atmosphere in the tropics; this criticism is not substantively supported, as discussed below and in Volume 1 of the RTP document.

• The petitioners do not attempt to provide an alternative explanation of the compellingly strong match between the observed magnitude and pattern of warming and the modeled simulations, which include all known factors, including the greenhouse gas buildup, the offsetting cooling influence of aerosols, and variability in solar output.

• Petitioners' arguments that a possible slowdown in the rate of warming over the last 10 years should weaken confidence in the fact that human emissions of greenhouse gases are the primary driver of recent warming are not valid. EPA addresses this issue more fully below and in Volume 1 of the RTP document.

5. How are public health and welfare threatened by these changes to climate and the environment, now and in the future?

The TSD summarizes a number of conclusions from the underlying science on this issue. In addition to documenting many of the key observed changes to atmospheric composition and climate, such as those outlined above, the TSD summarizes key findings about projected increases in greenhouse gas emissions and the future climate change associated with these future scenarios:

• Most future scenarios that assume no explicit greenhouse gas mitigation actions (beyond those already enacted) project increasing global greenhouse gas emissions over the century, with climbing greenhouse gas concentrations.

• Future warming over the course of the 21st century, even under scenarios of low-emission growth, is very likely to be greater than observed warming over the past century.

• All of the United States is very likely to warm during this century, and most areas of the United States are expected to warm by more than the global average.

• It is very likely that heat waves will become more intense, more frequent, and longer-lasting in a future warm climate, whereas cold episodes are projected to decrease significantly.

• Increases in the amount of precipitation are very likely in higher latitudes, while decreases are likely in most subtropical latitudes and in the southwestern United States, continuing observed patterns.

• Intensity of precipitation events is projected to increase in the United States and other regions of the world.

• It is likely that hurricanes will become more intense, with stronger peak winds and more heavy precipitation associated with ongoing increases of tropical sea surface temperatures. Frequency changes in hurricanes are currently too uncertain for confident projections.

• By the end of the century, global average sea level is projected by the IPCC to rise between 7.1 and 23 inches (18 and 59 centimeter [cm]), relative to around 1990, in the absence of increased dynamic ice sheet loss.

• Sea ice extent is projected to shrink in the Arctic under all IPCC emission scenarios.

The validity of these future climate change projections is not addressed by the petitioners, although some of the petitioners do call into question the climate models that are used to conduct these climate change projections. The petitioners claim that some of the models must be calibrated with the current temperature record, which in turn they assert appears to be flawed. EPA addresses this faulty critique of the models in Volume 1, section 1.2.3 of the RTP document, and had previously addressed similar critiques of climate models in Volume 4 of the RTC document.

It is important to note that none of the petitioners question the conclusion that atmospheric levels of greenhouse gases are expected to continue climbing for the foreseeable future, given the long-lived physical properties of the greenhouse gases themselves and the plausible pathways of human-emitting activities over the next few decades. Climate models aside, it is difficult to imagine a world where the heating effect of climbing greenhouse gas concentrations does not increase for the foreseeable future.

With regard to the impacts and risks to public health and welfare, the TSD and the Administrator's Findings stated the following:

• Severe heat waves are projected to intensify in magnitude and duration over the portions of the United States where these events already occur, with potential increases in mortality and morbidity, especially among the elderly, young, and frail.

• Some reduction in the risk of death related to extreme cold is expected. It is not clear whether reduced mortality from cold will be greater or less than increased heat-related mortality in the United States due to climate change. In addition, the latest USGCRP report refers to a study that analyzed daily mortality and weather data in 50 U.S. cities from 1989 to 2000 and found that, on average, cold snaps in the United States increased death rates by 1.6 percent, while heat waves triggered a 5.7 percent increase in death rates. The study concludes that increases in heat-related mortality due to global warming in the United States are unlikely to be compensated for by decreases in cold-related mortality.

• Increases in regional ozone pollution relative to ozone levels without climate change are expected due to higher temperatures and weaker circulation in the United States and other world cities relative to air quality levels without climate change.

• CCSP concludes that, with increased $CO_2$ and temperature, the life cycle of grain and oilseed crops will likely progress more rapidly. But, as temperature rises, these crops will increasingly begin to experience failure, especially if climate variability increases and precipitation lessens or becomes more variable.

• Higher temperatures will very likely reduce livestock production during the summer season in some areas, but these losses will very likely be partially offset by warmer temperatures during the winter season.

• Cold-water fisheries will likely be negatively affected; warm-water fisheries will generally benefit; and the

results for cool-water fisheries will be mixed, with gains in the northern and losses in the southern portions of ranges.

- Climate change has very likely increased the size and number of forest fires, insect outbreaks, and tree mortality in the interior West, the Southwest, and Alaska, and will continue to do so.
- Coastal communities and habitats will be increasingly stressed by climate change impacts interacting with development and pollution.
- Climate change will likely further constrain already overallocated water resources in some regions of the United States, increasing competition among agricultural, municipal, industrial, and ecological uses.
- Higher water temperatures, increased precipitation intensity, and longer periods of low flows will exacerbate many forms of water pollution, potentially making attainment of water quality goals more difficult.
- Ocean acidification is projected to continue, resulting in the reduced biological production of marine calcifiers, including corals.
- Climate change is likely to affect U.S. energy use and energy production and physical and institutional infrastructures.

Furthermore, the most recent NRC report from 2010 states that: "Global warming is closely associated with a broad spectrum of other climate changes, such as increases in the frequency of intense rainfall, decreases in snow cover and sea ice, more and increasingly intense heat waves, rising sea levels, and widespread ocean acidification. Individually and collectively, and in combination with the effects of other human activities, these changes pose risks for a wide range of human and environmental systems, including freshwater resources, the coastal environment, ecosystems, agriculture, fisheries, human health, and national security, among others."

The petitioners have not raised any objections to EPA's analysis and judgments concerning these risks and impacts to public health and welfare, which were the foundation of the Administrator's Endangerment Finding.

*C. Review of the Administrator's Findings*

Throughout this Decision, EPA explains why the petitioners' arguments and information fail to show that the scientific underpinnings of the Endangerment Finding are flawed. EPA remains convinced that the underlying science is robust, and that the Administrator appropriately interpreted the science to make the Endangerment Finding. This section summarizes the Administrator's December 2009 rationale and judgment based on the underlying science.

The Administrator exercised her judgment under CAA section 202(a) by evaluating what the body of scientific evidence indicates with respect to how greenhouse gases affect the climate, and the degree of scientific consensus about the appropriate conclusions to draw from this evidence. Based on this consideration, the Administrator proposed and took comment on her preliminary judgment of endangerment to public health and welfare. The Administrator found the case to be compelling that greenhouse gas air pollution endangers both public health and welfare within the United States. The underlying science that EPA relied on included careful qualifications and characterizations about the degree of certainty regarding the scientific conclusions that were germane to the Administrator's Findings. The Administrator's reasoning and decision-making process to reach the Findings make clear that there was full acknowledgement that certain elements of the science are known with virtual certainty and others are currently more uncertain.

A robust and comprehensive opportunity for comment allowed any and all objections regarding her judgment to be raised. After carefully reviewing the comments, the Administrator confirmed her judgment on endangerment and provided responses to the scientific, legal, and policy issues raised by commenters. The final rule explains in detail the basis for the Administrator's Endangerment Finding. Key elements of the Administrator's justification and decision process are summarized in the following 10 paragraphs from the December 15, 2009 Findings (74 FR 66523–24).

"As described in Section II of these Findings, the endangerment test under CAA section 202(a) does not require the Administrator to identify a bright line, quantitative threshold above which a positive endangerment finding can be made. The statutory language explicitly calls upon the Administrator to use her judgment. This section describes the general approach used by the Administrator in reaching the judgment that a positive endangerment finding should be made, as well as the specific rationale for finding that the greenhouse gas air pollution may reasonably be anticipated to endanger both public health and welfare.

First, the Administrator finds the scientific evidence linking human emissions and resulting elevated atmospheric concentrations of the six well-mixed greenhouse gases to observed global and regional temperature increases and other climate changes to be sufficiently robust and compelling. This evidence is briefly explained in more detail in Section V of these Findings. The Administrator recognizes that the climate change associated with elevated atmospheric concentrations of carbon dioxide and the other well-mixed greenhouse gases have the potential to affect essentially every aspect of human health, society, and the natural environment.

The Administrator is therefore not limiting her consideration of potential risks and impacts associated with human emissions of greenhouse gases to any one particular element of human health, sector of the economy, region of the country, or to any one particular aspect of the natural environment. Rather, the Administrator is basing her finding on the total weight of scientific evidence, and what the science has to say regarding the nature and potential magnitude of the risks and impacts across all climate-sensitive elements of public health and welfare, now and projected out into the foreseeable future. The Administrator has considered the state of the science on how human emissions and the resulting elevated atmospheric concentrations of well-mixed greenhouse gases may affect each of the major risk categories, i.e., those that are described in the TSD, which include human health, air quality, food production and agriculture, forestry, water resources, sea level rise and coastal areas, the energy sector, infrastructure and settlements, and ecosystems and wildlife. The Administrator understands that the nature and potential severity of impacts can vary across these different elements of public health and welfare, and that they can vary by region, as well as over time.

The Administrator is therefore aware that, because human-induced climate change has the potential to be far-reaching and multi-dimensional, not all risks and potential impacts can be characterized with a uniform level of quantification or understanding, nor can they be characterized with uniform metrics. Given this variety in not only the nature and potential magnitude of risks and impacts, but also in our ability to characterize, quantify and project into the future such impacts, the Administrator must use her judgment to weigh the threat in each of the risk categories, weigh the potential benefits where relevant, and ultimately judge whether these risks and benefits, when viewed in total, are judged to be endangerment to public health and/or welfare.

This has a number of implications for the Administrator's approach in assessing the nature and magnitude of risk and impacts across each of the risk categories. First, the Administrator has not established a specific threshold metric for each category of risk and impacts. Also, the Administrator is not necessarily placing the greatest weight on those risks and impacts, which have been the subject of the most study or quantification.

Part of the variation in risks and impacts is the fact that climbing atmospheric

concentrations of greenhouse gases and associated temperature increases can bring about some potential benefits to public health and welfare in addition to adverse risks. The current understanding of any potential benefits associated with human-induced climate change is described in the TSD and is taken into consideration here. The potential for both adverse and beneficial effects are considered, as well as the relative magnitude of such effects, to the extent that the relative magnitudes can be quantified or characterized. Furthermore, given the multiple ways in which the buildup of atmospheric greenhouse gases can cause effects (e.g., via elevated carbon dioxide concentrations, via temperature increases, via precipitation increases, via sea level rise, and via changes in extreme events), these multiple pathways are considered. For example, elevated carbon dioxide concentrations may be beneficial to crop yields, but changes in temperature and precipitation may be adverse and must also be considered. Likewise, modest temperature increases may have some public health benefits as well as harms, and other pathways such as changes in air quality and extreme events must also be considered.

The Administrator has balanced and weighed the varying risks and effects for each sector. She has judged whether there is a pattern across the sector that supports or does not support an endangerment finding, and if so, whether the support is of more or less weight. In cases where there is both a potential for benefits and risks of harm, the Administrator has balanced these factors by determining whether there appears to be any directional trend in the overall evidence that would support placing more weight on one than the other, taking into consideration all that is known about the likelihood of the various risks and effects and their seriousness. In all of these cases, the judgment is largely qualitative in nature, and is not reducible to precise metrics or quantification.

Regarding the timeframe for the endangerment test, it is the Administrator's view that both current and future conditions must be considered. The Administrator is thus taking the view that the endangerment period of analysis extend from the current time to the next several decades, and in some cases to the end of this century. This consideration is also consistent with the timeframes used in the underlying scientific assessments. The future timeframe under consideration is consistent with the atmospheric lifetime and climate effects of the six well-mixed greenhouse gases, and also with our ability to make reasonable and plausible projections of future conditions.

The Administrator acknowledges that some aspects of climate change science and the projected impacts are more certain than others. Our state of knowledge is strongest for recently observed, large-scale changes. Uncertainty tends to increase in characterizing changes at smaller (regional) scales relative to large (global) scales. Uncertainty also increases as the temporal scales move away from present, either backward, but more importantly, forward in time. Nonetheless, the current state of knowledge of observed and past climate changes and their causes enables projections of plausible future changes under different scenarios of anthropogenic forcing for a range of spatial and temporal scales.

In some cases, where the level of sensitivity to climate of a particular sector has been extensively studied, future impacts can be quantified whereas in other instances only a qualitative description of a directional change, if that, may be possible. The inherent uncertainty in the direction, magnitude, and/or rate of certain future climate change impacts opens up the possibility that some changes could be more or less severe than expected, and the possibility of unanticipated outcomes. In some cases, low probability, high impact outcomes (i.e., known unknowns) are possibilities but cannot be explicitly assessed."

The Findings show that the Administrator took a measured, balanced and systematic approach in judging the body of scientific evidence for the Endangerment Finding. The Administrator did not take a narrow view of the science, nor consider only those pieces of evidence that would support a positive endangerment finding.

In taking this approach, the Administrator determined that the body of scientific evidence compellingly supports a positive endangerment finding. The major assessments by the USGCRP, IPCC, and the NRC (published before 2010) served as the primary scientific basis supporting the Administrator's endangerment finding. The Administrator reached her determination by considering both observed and projected effects of greenhouse gases in the atmosphere, their effect on climate, and the public health and welfare risks and impacts associated with such climate change. The Administrator's assessment focused on public health and public welfare impacts within the United States. She also examined the evidence with respect to impacts in other world regions, and she concluded that these impacts strengthen the case for endangerment to public health and welfare because impacts in other world regions can in turn adversely affect the United States.

The Administrator considered how elevated concentrations of the well-mixed greenhouse gases and associated climate change affect public health by evaluating the risks associated with changes in air quality, increases in temperatures, changes in extreme weather events, increases in food- and water-borne pathogens, and changes in aeroallergens. The Administrator placed weight on the fact that certain groups, including children, the elderly, and the poor, are most vulnerable to these climate-related health effects.

The Administrator considered how elevated concentrations of the well-mixed greenhouse gases and associated climate change affect public welfare by evaluating numerous and far-ranging risks to food production and agriculture, forestry, water resources, sea level rise and coastal areas, energy, infrastructure, and settlements, and ecosystems and wildlife. For each of these sectors, the evidence provides support for a finding of endangerment to public welfare. The evidence concerning adverse impacts in the areas of water resources and sea level rise and coastal areas provides the clearest and strongest support for an endangerment finding, both for current and future generations. Strong support is also found in the evidence concerning infrastructure and settlements, as well as ecosystems and wildlife. Across the sectors, the potential serious adverse impacts of extreme events, such as wildfires, flooding, drought, and extreme weather conditions, provide strong support for such a finding.

The petitioners have not provided information that would lead EPA to believe that the Administrator's approach, briefly summarized here and explained in full in the December 2009 Findings, was flawed, should have been carried out differently, or should have led to a different conclusion.

*D. General Response to the Petitioners' Scientific Arguments in Light of the Full Body of Scientific Evidence*

EPA's overarching conclusion is that there is no material or reliable basis to question the validity and credibility of the body of science underlying the Administrator's Endangerment Finding or the Administrator's decision process articulated in the Findings themselves. The large body of scientific evidence and the Administrator's conclusions drawn from this evidence, including the appropriate characterizations as to the degrees of certainty and uncertainty in the underlying science, has not been changed by the arguments presented by the petitioners. While the petitioners largely rely on making broad assertions about the science based on private communications, EPA's focus is on the actual science itself, and the petitioners have not presented a valid basis supporting the view that the credibility or reliability of either the science or the scientific conclusions that petitioners contest have been undermined or changed in any material way.

The petitioners present very little scientific evidence or scientific arguments to support their views. As demonstrated above, they do not rely on an in-depth and comprehensive analysis of the science and make arguments on

that basis. Instead they largely rely on a small number of statements from the CRU e-mails in which certain scientists expressed various thoughts and feelings, such as frustration and disrespect for other scientists, along with strong views on scientific issues and what constitutes good science. From this evidence, the petitioners conclude that the scientists acted together to distort the review and presentation of the body of science, and presented false, inaccurate, or misleading conclusions about what the body of scientific studies tells us about various aspects of climate change.

Petitioners do not argue their case by marshalling and synthesizing the breadth of the body of scientific evidence and demonstrating why it leads to a different conclusion than that presented in the underlying science supporting the Findings. Instead, they largely argue that the state of mind of these scientists and their private remarks must lead to the conclusions drawn by the petitioners. They also conclude, based on a selective reading of the CRU e-mails, that the state of the science must be much more uncertain than how it is characterized in the underlying assessment reports used by EPA and the Endangerment Finding. Other than the conduct of sending e-mails that evidence strong emotions or unprofessional language, the petitioners present almost no evidence of any actual conduct by the scientists that support their conclusion that the science was assessed inaccurately. Most of the conduct that is identified, such as statements about the professional challenges of working as an IPCC lead author or the discussion with a journal editor to delay the paper publication (but not the online publication) of a study, is of no relevance to the evaluation of the science involved in the assessment reports and the EPA rulemaking.

Petitioners' claims of distortion of data, withholding of temperature data, or abuses in data analysis also do not withstand scrutiny. These issues are addressed in fuller detail in volumes 1 and 3 of the RTP document. In addition, some of these issues were raised and addressed by EPA during the public comment period, and thus fail to meet the test in CAA 307(d). Petitioners have shown no evidence that the HadCRUT temperature record based on the underlying raw temperature data was flawed in any way, or that CRU's lack of possession of a small portion of the raw temperature data impedes the ability of other researchers to check the publically available data, or that it changes the scientific validity of the analyses performed by CRU. The HadCRUT temperature record remains consistent with all of the other evidence of warming, including other surface temperature analyses as well as other evidence of warming, such as satellite data, ocean temperature data, and physical and biological evidence of the effects of warming.

The petitioners ask EPA to reject the comprehensive and well-documented views reflecting a synthesis of the body of scientific evidence produced by the U.S. and the world's climate science community, and instead accept assertions and three profound leaps in logic, based on a very limited discussion of the underlying science. The first leap is that petitioners' objections to the HadCRUT surface temperature record and objections to reconstructions of past global temperatures are correct, and that as a result all other elements of greenhouse gas and climate change science indicating temperatures are increasing and that anthropogenic greenhouse gases are the primary driver should be called into question. The second leap is that some errors found in the IPCC AR4—errors that are both minor and tangential to EPA's Endangerment Finding—mean that any and all information from that report should be called into question. The third is that any other assessment report that relies on or references the IPCC AR4 in any way is also suspect and cannot serve as a foundation for the Endangerment Finding. EPA's review, discussed in the following sections and in fuller detail in the three volumes of the RTP document, plus the latest conclusions of the May 2010 NRC scientific assessment, lead us to the firm conclusion that the petitioners' specific arguments and broad claims must be rejected for their lack of supporting evidence and absence of comprehensive and clear scientific reasoning.

As stated in one of the findings of the Independent Climate Change E-mails Review, "In particular, we did not find any evidence of behaviour that might undermine the conclusions of the IPCC assessments." EPA's review and analysis leads to this same conclusion.

### *E. Specific Responses to the Claims and Arguments Raised by Petitioners*

EPA's responses to the petitioners' specific claims and arguments are summarized here, and provided in more detail in the RTP document. The more general conclusions provided in this Decision, articulated above, are based on EPA's detailed analysis of and responses to the petitioners' issues contained in the RTP document. As stated previously, the science-based objections raised by petitioners fall into three categories: Climate science and data issues; issues raised by EPA's use of IPCC AR4; and process issues. This section and the three volumes of the RTP document are organized around these three categories.

#### 1. Climate Science and Data Issues Raised by the Petitioners

The climate science and data issues raised by the petitioners include (a) the validity of the temperature record from the distant past and whether or not recent observations of global warming are unusual; (b) the validity of the more recent surface temperature record; (c) the validity of the HadCRUT surface temperature record and other CRU datasets; (d) the validity of the recent surface temperature record as constructed by the National Oceanographic and Atmospheric Administration (NOAA) and National Aeronautics and Space Administration (NASA); and (e) the implications of new studies not previously considered. Each of these issues is addressed in general here and in fuller detail in the Volume 1 of the RTP document.

##### a. Validity of Paleoclimate Temperature Reconstructions and Attribution of Observed Temperature Trends to Greenhouse Gases

Petitioners raise various claims about the comparisons of current temperatures with historic temperatures of the distant past (called paleoclimate temperature reconstructions). Petitioners use these claims to contest the view that current warming is unusual and argue that EPA should not rely on this evidence to support the statement in the Endangerment Finding that recent warming can be primarily attributed to increased atmospheric concentrations of greenhouse gases caused by human emissions. EPA addresses these claims in Volume 1, section 1.1 of the RTP document, and summarizes the responses here.

As background, surface temperature records based on observation have global coverage over approximately the last 150 years. To determine temperatures in time periods before the instrumental record, climate scientists use indirect methods called "proxies." These indirect methods include examining tree rings, pollen, plankton records in sediment cores, and other proxies such as atomic isotope ratios in corals and other marine organisms. The statistical relationships found between the proxy and regional temperatures over the past 150 years (*i.e.,* the period when the datasets overlap) are then used to extrapolate over the hundreds or thousands of years before instrumental

records. Researchers combine a number of different proxies from around the world to develop their temperature reconstructions of the past. The further back in the past, the fewer proxies that exist and the greater the uncertainty becomes about estimating past temperatures. These reconstructions contribute to our understanding of historical temperatures and variability and enable comparison of present changes to changes in the past. They also allow testing of climate models and our understanding of how the climate system responded to historical conditions. The term "divergence" refers to a certain subset of the tree ring records whose growth in recent decades no longer correlates with (*i.e.,* it "diverges" from) temperature change in recent decades.

Petitioners claim the CRU e-mails provide new reason to highlight this divergence issue as it may undermine the use of historical temperature reconstructions. EPA disagrees, and finds that the CRU e-mails demonstrate that the scientists were well aware of the divergence issue and addressed it appropriately in their research and publications. A cursory examination of this literature and the assessment reports makes clear that the science community has long been aware of the tree ring divergence issue, as well as other issues concerning the certainty of proxy reconstructions. The uncertainties in the proxy reconstructions were fully presented in the assessment literature, and were considered by EPA in making the Endangerment Finding. In fact, during public comment on the proposed Finding, EPA evaluated and responded to these issues (See EPA RTC, Volume 2, comments 2–64 and 2–67). A recent NRC assessment (2006)[22] focused specifically on surface temperature reconstructions and it found that divergence is not an issue with all tree ring proxies, much less the many non-tree ring proxies used in the temperature reconstructions. The petitioners cite some studies[23] in support of their views that the divergence issue was hidden and not appropriately acknowledged. These studies do not support the petitioners' arguments, instead stating that the divergence problem is neither new nor hidden, that it is actually "widely perceived" and that the "potential consequences [are] discussed (*e.g.,* IPCC, 2007)."

Nonetheless, petitioners allege that a number of the CRU e-mails suggest that these temperature reconstructions were manipulated and that data has been hidden. Several petitioners refer to an e-mail including the phrase "Mike's Nature trick", claiming that this quote is evidence of deception. However, this e-mail about how to connect tree ring data and thermometer data was written in 1999, prior to the publication of the IPCC Third Assessment Report from 2001. The e-mail refers to a graph prepared for the front cover of World Meteorological Organization (WMO) report, unrelated to IPCC, published in 2000. This graph and underlying analysis that is being objected to by petitioners has no relevance to the discussion in either IPCC AR4 or EPA's TSD, and therefore did not enter into the Administrator's consideration for the Endangerment Finding. The IPCC AR4 and other assessment literature very transparently document, illustrate, and discuss the divergence issue, as did EPA in the TSD and RTC document. See Figure 4.3, TSD. Other quotes provided by the petitioners do not support a claim of "deliberate manipulation" or "artificial adjustments" when considered in context. This issue of historic temperature reconstructions is discussed in detail in Volume 1 of the RTP document. The UK Independent Climate Change E-Mails Review reached a similar conclusion to EPA's, stating that they "do not find that the way that data derived from tree rings is described and presented in IPCC AR4 and shown in its Figure 6.10 is misleading" and regarding the phenomenon of divergence that they "are satisfied that it is not hidden and that the subject is openly and extensively discussed in the literature, including CRU papers."

Petitioners also claim that the Medieval Warming Period may have been warmer than present temperatures, undermining the conclusion that greenhouse gases are a primary cause of current warming. Issues involving the Medieval Warming Period were addressed during the public comment period (see Response 2–62 of the RTC document). Petitioners raise this issue again because of their assertion that the CRU e-mails indicate that the current temperature record may be faulty, which to them gives the Medieval Warming Period new significance. In making their case, petitioners cite a temperature reconstruction without tree rings, notably a study that could have been submitted during the public comment period.[24] However, that paper uses an improper methodology, a straight average of 18 proxies, apparently without weighting them to account for geographic distribution or the strength of the data to detect temperature changes. In contrast, another study using a more sophisticated methodology[25] found that recent Northern Hemispheric warmth was anomalous regardless of whether tree ring data were included.

Petitioners argue that if the current warming is not "unprecedented," our ability to attribute the current warming to greenhouse gases is undermined, and that EPA has not provided "compelling" evidence that the current temperatures are unusual compared to the last 1,000 years. Petitioners misstate EPA's conclusions and overstate the role of this line of evidence. EPA has not claimed that current warming is "unprecedented"; the Administrator's Endangerment Finding stated that "The second line of evidence arises from indirect, historical estimates of past climate changes that suggest that the changes in global surface temperature over the last several decades are unusual." (74 FR 66518) EPA found the scientific evidence "supports" this conclusion (see for example section 4 of the TSD), not that it compels it, as petitioners incorrectly assert. EPA clearly characterized the uncertainty in this line of the evidence, properly stating that there is significant uncertainty in the temperature record prior to 1600 A.D. (see section 4(b) of the TSD).

This comparison to past temperature estimates is also only one part of the paleoclimate evidence. Other parts, not contested by petitioners, include (1) the correlation and interactions over time between periods of higher greenhouse gas concentrations and higher temperatures, and (2) the use of temperature reconstructions to evaluate and improve climate models. Overall, this comparison of current to past temperatures is but one part of one line of evidence in attributing current warming to greenhouse gases; it is not the primary line of evidence. The petitioners have not shown that EPA failed to properly characterize this evidence, and the petitioners' assertions regarding EPA's treatment and reliance

[22] National Research Council (NRC) (2006). Surface Temperature Reconstructions For the Last 2,000 Years. National Academy Press. Washington, DC.

[23] D'Arrigo, R. *et al.* (2008). On the "divergence problem" in northern forests: a review of the tree-ring evidence and possible causes, 60 Glob. Planet. Chng. 289. Esper, J. and D. Frank (2009). Divergence pitfalls in tree-ring research. Clim. Chng. 94: 261, 262.

[24] Loehle, C. and J. H. McCulloch, 2008. Correction to: A 200-year global temperature reconstruction based on non-tree proxies. Energy & Environment. 19(1): 93–100.

[25] Mann, M.E. *et al.* (2008). Proxy-based reconstructions of hemispheric and global surface temperature variations over the past two millennia. PNAS. 105:36.

on this evidence are inaccurate and misleading.

Petitioners claim that characteristics of trends in the vertical temperature profile of the atmosphere should present a "fingerprint" of human-induced warming, and that this expected fingerprint has not been observed in the tropics, and that therefore the attribution of recent warming to human causes is placed into doubt. However, EPA recognized and already addressed this issue in the TSD (see section 5(a) of the TSD) which notes newer data sets are in general agreement with climate models in the tropics and therefore there is no longer an inconsistency. In addition, petitioners do not contest any of the other important pieces of evidence that link current warming to greenhouse gases, such as rates of sea level rise and Arctic ice loss.

Petitioners claim that the projections from climate models do not support attribution to greenhouse gases because the models have not explained why there may have been a slowdown in the rate of warming over the last 10 or so years. First, according to the latest NOAA (2010) data,[26] the decade spanning 2000–2009 was substantially warmer than the prior decade (1990–1999) (see also the figure in Response 1–22 in Volume 1 of the RTP document). The exact rate of warming in the past decade depends on one's choice of temperature record and the start and stop date chosen for computing a trend in that record. Second, whether models can reproduce a short-term slowdown in the warming in no way invalidates their use for attributing or projecting long-term changes in global climate from anthropogenic forcing of the climate system. The latter long-term projections are their primary purpose, not year-to-year projections of changes over a period of around a decade or less. In addition, recent studies indicate that short-term trends can run counter to overall long term trends, and the climate models can reproduce this.

The IPCC, NRC, and EPA's TSD appropriately reflect the state of the science and discussed the areas of uncertainty in temperature reconstructions. They fully considered the entire body of evidence, including the kinds of evidence and arguments presented by petitioners. In contrast, petitioners generally have not considered the breadth of evidence on these issues, and they fail to acknowledge the comprehensive treatment of these issues in the assessment reports. They have instead relied upon a limited selection of information that does not warrant the broad conclusions they draw.

Petitioners' evidence does not materially change or warrant any less reliance on the other important lines of evidence linking greenhouse gases and climate change: Our basic physical understanding of the effects of changing greenhouse gas concentrations and other factors; the broad, qualitative consistency between observed changes in climate and the computer model simulations of how climate would be expected to change in response to anthropogenic emissions of greenhouse gases (and aerosols); as well as other important evidence of an anthropogenic fingerprint in the observed warming.

b. Validity of the HadCRUT Surface Temperature Record

Petitioners present five major arguments regarding the validity and use of the HadCRUT temperature record. In particular, they claim that: (1) Alleged destruction of raw data for the HadCRUT temperature record renders the scientific data on surface temperature worthless and makes replication of temperature trends impossible; (2) comments within code and log files are evidence of manipulation that "undercuts the credibility of CRU databases;" (3) a report allegedly claims to show that the Russian stations used in the HadCRUT temperature record were selectively chosen to show increased warming; (4) the IPCC improperly relied on Jones *et al.* (1990)[27] for its conclusions about the magnitude of the urban heat island effect; and (5) the allegedly faulty HadCRUT temperature record is the primary basis for the conclusion of "unprecedented" warming and the foundation of anthropogenic global warming analyses. In effect petitioners use these claims to contest the existence or amount of recent warming.

As background, monitoring the changes in the Earth's surface temperature is only one of several key components of studying climate change. Other indicators of climate change include receding glaciers, shrinking Arctic sea ice, and sea level rise, as well as a number of other temperature-sensitive physical and biological changes, such as bird migration patterns and changes in the length of the growing season.

Surface temperature records are built on data collected from thousands of weather stations around the world, as well as sea surface temperature records taken by ships crossing the ocean on different routes, with some data going back more than 100 years. Because the data originates from many international sources, some quality control is required such as checking for and deleting data that are shown to be duplicate, or adjusting to account for inconsistent reporting methodologies. Additionally, these weather stations and their data were not originally intended to be used for long-term climate monitoring, and sometimes adjustments are necessary to avoid confusing a local artificial temperature change (e.g., due to a shift in the elevation of a monitoring station) with large-scale or global temperature patterns.

The three major temperature record developers, CRU, NOAA, and NASA, all use different approaches for these adjustments. The approach by CRU is the only one of the three that relies on a substantial set of manual adjustments globally. NOAA uses an automated algorithm to adjust for discontinuities such as might be expected from station moves, with additional corrections in the U.S. because a large number of stations changed measurement instrumentation as well as the time of day of temperature readings. NASA uses NOAA's adjustments for the U.S. as an input, but uses an algorithm that identifies urban centers based on satellite observations and adjusts those urban centers to have trends that are consistent with nearby rural stations. In addition, the data are not evenly situated around the planet, and need to be extrapolated and averaged so that areas with many stations are not overrepresented and areas with few stations are not underrepresented. The kinds of adjustments made to the underlying raw data are designed so that the surface temperature analyses reflect as much as possible the actual direction and magnitude of any change in surface temperature and do not reflect other changes, such as changes in measurement devices.

The temperature reconstructions generally do not evaluate the average actual surface temperature, but rather determine the changes in temperature, both regionally and globally. The emphasis on changes in temperature is important, because they are better correlated with large regional changes. For example, two nearby stations—one on top of a mountain and one in the valley—will likely have different absolute temperatures, but are likely to

[26] *http://www.ncdc.noaa.gov/sotc/?report=global&year=2009&month=13&submitted=Get+Report#gtemp.*

[27] Jones, P.D., P.Y. Groisman, M. Coughlan, N. Plummer, W.-C. Wang, and T.R. Karl (1990). Assessment of urbanization effects in time series of surface air temperature over land. Nature 347:169–172.

have similar changes in temperature over time.

CRU also maintains a dataset known as TS3.0, with TS2.1 as an older version. This dataset is different from HadCRUT, and includes various climate metrics and data information not in HadCRUT. TS2.1 is referred to in IPCC AR4 only twice in relation to historical precipitation data. Almost all of the references to global temperatures over time that refer to CRU data refer to the HadCRUT temperature record, and not the TS3.0 or 2.1 datasets.

(i) Raw Data.

Several petitioners claim that CRU has not kept all of the raw data from the surface weather stations, only the adjusted data, e.g. corrected for station moves and measurement changes, and therefore the evidence for warming in the past century is questionable and cannot be independently replicated.

CRU acknowledges that it did not keep a small percent of the raw weather station data collected since the 1980s and that it cannot release other raw data because of agreements with national meteorological organizations. CRU has provided a detailed explanation for its handling of the data, and EPA already addressed this issue at length in Response 2–39 of the RTC. Not retaining a small amount of the raw data does not interfere in a material way with replication or development of independent estimates of global or regional surface temperature history. The vast majority of the raw weather station data is indeed publicly available from the Global Historical Climate Network (GHCN) and other public data sources, contrary to the petitioners' assertions. An independent estimate of global temperatures can be generated, as NASA/GISS, NOAA/NCDC, and other groups have done. The separate NASA and NOAA analyses of global surface temperature records find similar temperature increases and strongly support the conclusion that the HadCRUT surface temperature record accurately reflects the changes in temperature. The UK Independent Climate Change E-Mails Review was able to download raw data and produce global temperature trend results similar to the other analyses in less than two days. In addition, the major conclusions about warming based on the HadCRUT temperature record have remained robust, even as CRU integrated more data and refined its methodologies over two decades.

The petitioners do not provide any global analysis of the available data from temperature stations that yields a different result. Further, they have provided no evidence that an additional or different analysis using the publicly available temperature data would yield a different result from the warming reflected in the HadCRUT, NOAA and NASA analyses of global surface temperature. It is an unwarranted leap in logic to assume these analyses have no merit because a small percentage of the underlying raw data is no longer in CRU's possession.

(ii) Biased Methods.

Petitioners claim the various methods that CRU used to integrate and adjust the surface temperature data introduce biases in the temperature record that were designed to support the view that global surface temperatures are increasing faster than they actually are. The petitioners refer to this as "manipulation" and cite several CRU e-mails and other documents as support. A couple of fragments of code and a debugging log (*HARRY_READ_ME.txt*) are quoted extensively as support for these claims.

EPA has thoroughly reviewed all of the disclosed CRU e-mails in light of the petitioners' claims, and EPA responds to all of the petitioners arguments in detail in Volume 1 of the RTP document. Here, EPA focuses on two of the most well-known CRU documents: *BRIFFA_SEPT98_.PRO* and *HARRY_READ_ME.txt.*

The code fragment *BRIFFA_SEPT98_E.PRO* that includes a comment in the header for the code that states that the code "APPLIES A VERY ARTIFICIAL CORRECTION FOR DECLINE" is over a decade old and appears to be provisional test code. The comments in capital letters are to remind the programmer to replace the temporary fudge factors with more valid adjustments before the code is used for public products. It further appears that the "fudge" factor highlighted by petitioners is not related to the HadCRUT temperature record, but instead refers to the divergence issue discussed above and the unrelated WMO report. The petitioners do not show that the *BRIFFA_SEPT98_E.PRO* code has any relationship to the HadCRUT temperature record or that it was actually used for any public final product.

The *HARRY_READ_ME.txt* debugging notes are a record of attempts to update the CRU TS product by merging six years of additional data to an old data set and migrating the code to a new computer system at the same time. The petitioners fail to acknowledge that the CRU TS products are different from the HadCRUT temperature record that is referred to in the assessment reports and the EPA TSD, and they improperly assert that issues with the TS products directly call into question the HadCRUT temperature record. The file referred to by petitioners does indicate that there were a number of difficult quality control issues that had to be addressed concerning new data, the code written for the updating process, and the old code for producing TS2.1. The full debugging log demonstrates that a number of the identified problems were successfully fixed. Many of the quotes highlighted by petitioners were expressions of frustration that were not related to the quality of the product. A number of the problems were related to inconsistencies involving reported WMO codes used to identify weather stations. These inconsistencies have previously been highlighted in the literature, and the approach to address them as related in the log file was similar to the approaches detailed in previous papers. In sum, the *HARRY_READ_ME.txt* file is focused on issues that do not relate to the HadCRUT temperature record and contains no evidence of any attempts to bias any output data.

(iii) Biased Dataset.

Petitioners claim that CRU scientists selectively chose Russian data stations to create a biased dataset that would show more warming than would the full dataset. To support this argument, they provide a link to a translation (hosted at a blog) of a report written in Russian by the Institute for Economic Analysis in Moscow (Pivovarova, 2009).[28]

Examination of this document indicates that the Moscow Institute for Economic Analysis temperature record using the full set of Russian stations agrees well after 1955 with the temperature record that the Institute derived from the set of stations used in the HadCRUT temperature record, and that the difference between temperature records derived from the two datasets is mainly in the 1850 to 1950 portion. However, the method used by the Institute for Economic Analysis to compare the two temperature datasets was an improper comparison of apples and oranges (i.e., the HadCRUT temperature record uses a different geographic weighting approach than did the Institute for Economic Analysis, which is more important when the data is sparse as it is before 1955).

Petitioners also do not support their claim that CRU selectively picked stations. EPA has found no evidence in

[28] Pivovarova, N. (2009). Institute for Economic Analysis (IEA): How warming is made. The case of Russia. (December 15, 2009). Available at: *http://www.iea.ru/article/kioto_order/15.12.2009.pdf;* translation at: *http://climateaudit.files.wordpress.com/2009/12/iea1.pdf.* Last accessed on April 26, 2010.

the CRU e-mails or the information provided by petitioners to indicate that stations were chosen by CRU scientists. CRU uses a number of data sources and the petitioners did not assess whether these data sources included the missing Russian stations, or whether the stations met criteria discussed in published papers (see volume 1 of the RTP document).

(iv) Urban Heat Island Corrections.

Petitioners criticize the urban heat island corrections as another alleged example of temperature data manipulation.

This issue is not new. EPA addressed urban heat island issues in responses 2–28 through 2–30 of the RTC document. Referencing Jones *et al.* (1990) [29] and other studies, IPCC AR4 concludes that "urban heat island effects are real but local, and have not biased the large-scale trends." In addition, satellite records are not susceptible to urban heat island effects and globally show similar trends to land-based measurements over their overlapping time period. EPA summarized this information in the TSD. EPA's specific responses to the petitioners' arguments are provided in Volume 1 of the RTP document.

(v) Faulty Temperature Record Used by IPCC.

Petitioners claim the allegedly faulty HadCRUT temperature record is the primary or core support for IPCC conclusions on current warming, attribution, and projections of future warming, thus calling into question the fundamental conclusions of IPCC AR4 and EPA's use of IPCC AR4 as a primary reference to support the Endangerment Finding.

First, for reasons stated above and detailed further in Volume 1 of the RTP document, EPA disagrees with the petitioners' claims that the HadCRUT temperature record is faulty. Second, as noted previously, multiple independent assessments of climate change science by not only the IPCC but also USGCRP and NRC have concluded that warming of the climate system in recent decades is "unequivocal." This conclusion is not drawn from any one source of data, but is based on a review of multiple sources of data and information, which includes the HadCRUT temperature record, additional temperature records from other sources, and numerous other independent indicators of global warming (see section 4 of EPA's TSD).

NOAA and NASA surface temperature records show nearly identical warming trends to the HadCRUT temperature record, despite different analysis methodologies. Moreover, entirely independent records of lower tropospheric temperature measured by both weather balloons and satellites demonstrate strong agreement with the surface temperature records of all three organizations. The TSD also discussed the following additional indicators of global warming:

- Increasing global ocean heat content (Section 4(f) of the TSD).
- Rising global sea levels (Section 4(f) of the TSD).
- Shrinking glaciers worldwide (Section 4(i) of the TSD).

Changes in biological systems, including poleward and elevational range shifts of flora and fauna; the earlier onset of spring events, migration, and lengthening of the growing season; and changes in abundance of certain species (Section 4(i) of the TSD).

It is this entire body of evidence that supports the conclusion that there is an unambiguous warming trend over the last 100 years, with the greatest warming occurring over the past 30 years. Contrary to petitioners' claims, the models used to generate projections of future warming described in IPCC AR4 do not directly rely on the HadCRUT or other surface temperature records. These models are driven by physical equations describing the radiative properties and dynamics of the atmosphere and oceans and parameterizations of small-scale processes, not observed temperature data.

In summary, EPA disagrees with the premise of this claim—that the HadCRUT temperature record is faulty—and therefore disagrees that use of the HadCRUT temperature record within IPCC AR4 has somehow corrupted the IPCC's conclusions. In addition, the petitioners' claim that the HadCRUT temperature record is such a central thread to the entire IPCC AR4 that this would then invalidate all IPCC AR4 conclusions is unsupported and exaggerated.

c. Validity of NOAA and NASA Temperature Records

A number of petitioners question the validity of NOAA and NASA surface temperature records, raising claims concerning station "drop-out," flawed or manipulative adjustments to data, and a lack of independence between the three major surface temperature records. EPA's response clearly shows that (1) petitioners rely on a questionable, non-peer-reviewed source which contains a number of inaccurate statements and relies on a scientifically flawed analysis; (2) petitioners demonstrate a fundamental scientific misunderstanding of what issues actually would lead to either a warming or cooling bias in the temperature record; and (3) petitioners fail to acknowledge that climatic records other than land surface temperature records also show clear warming trends.

As background, one of the sources of data for the HadCRUT temperature record is the GHCN, which was developed and is maintained by NOAA. The GCHN dataset is also used by both NOAA and NASA in their surface temperature records. NOAA, NASA, and CRU each calculate global surface temperature trends from a combination of GHCN data and other data sources. Each group performs different adjustments and corrections to the data, and in some cases uses different subsets of the GHCN data or includes other outside datasets.

Petitioners contest certain individual aspects or details of the surface temperature evidence, and in general raise objections that fail to recognize the various approaches used to develop the global surface temperature record. Many of the issues raised by the petitioners are not new, and have been addressed previously within the TSD and RTC document. Some objections fail to recognize that the change in temperature is being evaluated, not the absolute temperature level. Other objections misconstrue the underlying studies cited by the petitioners. In several cases, petitioners object that various adjustments to the raw data have the effect of changing the data, but they fail to consider that adjustments are appropriately performed, for example, to account for circumstances that otherwise would interfere with accurately isolating and determining a real trend in surface temperature. Petitioners fail to address the reasons behind the adjustments and fail to explain or show that the types of adjustments made in developing such datasets from multiple sources of data are not appropriate. Likewise, petitioners fail to account for the valid data-driven reasons that have led to a reduction over time in the number of weather stations used for the surface temperature analysis, fail to explain or show that the reductions have biased the temperature record, and overstate the magnitude of the temperature station reductions in some cases.

Consistency between all three separate surface temperature records (NASA, NOAA, CRU), as well as consistency between the three surface temperature records and other evidence of warming, such as satellite data, ocean

[29] Jones, P.D., P.Y. Groisman, M. Coughlan, N. Plummer, W.-C. Wang, and T.R. Karl (1990). Assessment of urbanization effects in time series of surface air temperature over land. Nature 347:169–172.

temperature data, and physical evidence of the effects of warming, should be seen as confirmation of the evidence of warming. Petitioners appear to assume that all of this evidence must be wrong because they, incorrectly (see above), allege that some of it is.

(i) Station Drop-out.

Petitioners raise a number of issues regarding the alleged "drop-out" of stations after 1990, and the extrapolation of data from "warmer" areas to "colder" areas due to this drop-out or for other reasons. They claim this leads to bias in the global surface temperature record. Volume 1, section 1.4.3.1 of the RTP document addresses these claims in detail, and EPA's summary of the issue follows.

Many of the petitioners' arguments rely on a non-peer-reviewed document by D'Aleo and Watts (2010).[30] However, the study and the source upon which it relies do not support petitioners' claims and conclusions. D'Aleo and Watts (2010) provide no evidence that there was a systematic and purposeful "weeding out" process. Peterson and Vose (1997),[31] the paper describing the GHCN dataset, describes the procedures for updating the GHCN database and explains that there are fewer measuring stations post-1992 than during the 1980s because only three of the data sources were being be updated on a regular basis.

The D'Aleo and Watts study assumed that dropping stations at higher latitudes and in colder climates would result in a biased, warmer temperature trend. This unfounded assumption is a misunderstanding of the basic methodology used in analyzing surface temperature data. The surface temperature record sets evaluate the change in temperature over time at the various stations, not the absolute temperature level. The change in temperature over time is what indicates whether warming is occurring, not just the absolute temperature itself; for example, the Arctic region has been experiencing the highest rates of warming in the world, yet average Arctic temperatures are obviously still considerably colder than temperatures in most other world regions where average temperatures may not have increased as much. Petitioners incorrectly assume and do not explain why dropping these stations would bias the trend in the change in temperature toward greater warmth. In fact, petitioners fail to acknowledge that colder, high latitude areas are the regions of the world where the most warming is occurring, and is expected to continue occurring. If one were to accept this line of the petitioners' original argument, there should have been concern about a bias towards less warming, not more warming.

Moreover, the D'Aleo and Watts study used simple averages of absolute temperatures at the stations—without, apparently, taking into account their geographic distribution, much less calculating the change in temperature at the stations. This improper methodology is a significant error that undermines the petitioners' critique of the temperature records.

Furthermore, satellite data is available for the time periods of land-based station "drop-out", and the satellite temperature record is broadly consistent with surface temperature trends throughout the period when the "drop out" was occurring, confirming that the reduction in the number of data stations has not created a warming bias. Additionally, analyses using only stations with continuous records are almost identical to analyses using only stations which were "dropped" over the decades before the "drop-out", further undermining the petitioners' claim that a warming bias was introduced by the station "drop-out".

(ii) Improper Heat Island Adjustments.

Petitioners assert that the urban heat island adjustments performed by NASA are insufficient or improperly applied, both globally and in the U.S. Southeastern Legal Foundation points to the study Long (2010) [32] as support for this assertion. These assertions are addressed in detail in volume 1, section 1.4.3.2 of the RTP document, and EPA's general response is summarized here.

The Long (2010) study found that the net effect of NOAA adjustments to the raw data led to more warming in rural stations (the NOAA adjustments for the U.S. are also used in developing the NASA temperature record). Neither the petitioners nor Long show, however, that the adjustments to rural stations were inappropriate. (As stated above, adjustments are sometimes necessary to ensure a real, and not artificial, temperature change is being recorded when, for example, there might be a change in the elevation of the station or the daily timing of temperature readings.) Importantly, Long does not take into account either the changes in the time of observation or the changes in instrumentation at many rural stations, both of which led to temperature discontinuities that must be accounted for (*e.g.,* through adjustments) in order to accurately portray the actual long-term temperature trend.

With respect to the claimed failure to account for the urban heat island effect (where metropolitan areas tend to be warmer than surrounding areas due to built up land surfaces and building materials that retain heat), this issue was raised previously during the public comment period and EPA has addressed this in the RTC document. Response 2–28 of the RTC document makes clear that all of the different surface temperature datasets shown or cited in the TSD account for the urban heat island effect, either directly and/or indirectly. The TSD, citing IPCC (Trenberth *et al.,* 2007), summarized this issue as the following: " * * * urban heat island effects are real but local, and have not biased the large-scale trends." Note also that the oceans are warming and that the most rapid land-based warming is occurring in the Arctic, two areas where urban heat island effects are obviously not an issue.

(iii) Data Adjustments.

Petitioners cite the records of some individual stations that they claim show inappropriate manipulation, referring to stations in Australia and New Zealand.

The evidence and arguments about data adjustments in New Zealand do not support the claim that these adjustments were invalid, after taking into account station history and neighboring station records. While there is some evidence that the automated algorithm may have introduced a spurious trend in one station in Australia in the NOAA temperature record (but not in the CRU or NASA temperature records), there was at least one valid reason for adjustment, and there is no evidence that this error in one station biases the large-scale global temperature trends. There is certainly no evidence of "chicanery" involved in these adjustments, as one petitioner claimed.

Petitioners focus on individual stations or limited areas. It is not surprising that data from one station or one region would show a large difference between adjusted and unadjusted data. The important point is that when the stations and regions are combined for a global analysis, these

[30] D'Aleo and Watts (2010). Surface Temperature Records: Policy Driven Deception? Available at: *http://scienceandpublicpolicy.org/originals/policy_driven_deception.html.* Accessed: April 8, 2010.

[31] Peterson, T. C. and R. S. Vose (1997). An overview of the global historical climatology network temperature data base. Bull. Am. Met. Soc., 78: 2837–2849.

[32] Long, E.R. (2010). Contiguous U.S. Temperature Trends Using NCDC Raw and Adjusted Data for One-Per-State Rural and Urban Station Sets. Available at *http://scienceandpublicpolicy.org/images/stories/papers/originals/Rate_of_Temp_Change_Raw_and_Adjusted_NCDC_Data.pdf.* Accessed April 8, 2010.

kinds of effects are balanced out and do not produce a bias in the overall result. EPA addresses these issues for the specific station data at issue in New Zealand and Australia in greater detail in Volume 1, section 1.4.3.4 of the RTP document.

(iv) Independence of the NOAA and NASA Temperature Records. Some petitioners claim that the NOAA and NASA temperature records are not independent from the HadCRUT temperature record, developed by CRU, because they share some of the same raw data, and thus are assumed to also share some of the same alleged problems. EPA addresses these claims in volume 1, section 1.4.3.5 of the RTP document, and summarizes the response here.

The three major temperature records do rely on a large amount of raw data obtained from GHCN, though the HadCRUT temperature record in particular integrates additional data obtained from other, independent sources. As discussed above and throughout volume 1 of the RTP document, petitioners have not demonstrated any major flaws in the raw data. In addition, the processing of the GHCN data by the three groups is carried out independently from one another; therefore the similarities of the final temperature trends among the three groups provide additional confidence in those independent processing methodologies, and additional confidence in the consistent result that average global temperatures are increasing.

d. Implications of New Studies and Data Submitted by the Petitioners

Several petitioners identify scientific studies most (but not all) of which were published around the time of or shortly after the Administrator's December 2009 Endangerment Finding, as well as data not previously considered as part of the scientific record for the Endangerment Finding. Petitioners argue these studies and data have the potential to alter our understanding of key aspects of the science and therefore warrant reconsideration of the Findings. Petitioners also argue that EPA ignored or misinterpreted scientific data that were significant and available when the Finding was made. These studies and data issues involve:

- Implications of a new study on stratospheric water vapor.
- Implications of material concerning whether carbon dioxide is well-mixed in the atmosphere and whether the airborne fraction of carbon dioxide has changed.
- Implications of new tropical cyclone studies.
- Implications of new data on observational snow cover trends.
- A claim that EPA ignored a satellite dataset.

Though some of these studies are new, they do not raise new issues that had not already been accounted for in the assessment literature used by EPA. Furthermore, petitioners misinterpret the findings of these new studies, make unsupportable claims, rely on incomplete and biased analyses, do not acknowledge important results, and, at times, ignore EPA's record. Contrary to the petitioners' claims, the new science cited by the petitioners does not undermine the key findings and conclusions that were reached in the assessment literature and the scientific foundation for the Administrator's Findings. EPA's study-by-study responses to the petitioners' assertions can be found in volume 1, section 1.5 of the RTP document.

2. Issues Raised by EPA's Use of the IPCC AR4 Assessment

The objections raised by petitioners involving EPA's use of IPCC AR4 include (a) claims that recently found errors in IPCC AR4 undermine the IPCC's credibility and therefore EPA's use of IPCC AR4 as a primary reference document to support the Findings; and (b) claims that the IPCC has a policy agenda and is not an objective scientific body. These issues are addressed here and in greater detail in volume 2 of the RTP document.

a. Claims That Errors Undermine the IPCC AR4 Findings and Technical Support for Endangerment

The petitioners allege certain errors and unsupported statements in IPCC AR4 show that the science EPA relied upon is uncertain and/or not credible. Petitioners focus on the errors found regarding the timing of future projected melting of Himalayan glaciers, the percentage of the Netherlands below sea level, and a few more minor issues highlighted in the petitions. Each of these identified and alleged errors in IPCC AR4 has been examined in detail by EPA in Volume 2 of the RTP document; the general response is provided here.

EPA has reviewed these IPCC AR4 issues in the context of the key IPCC AR4 conclusions that were germane to the Administrator's Endangerment Finding. The small number of errors and alleged errors in the IPCC AR4 report are not materially relevant for EPA's Endangerment Finding. Neither of the two errors that are verifiable (Netherlands sea level and Himalayan glaciers) are relevant to impacts in the United States and neither are part of the basis for the Endangerment Finding. Furthermore, there is no evidence that these two confirmed minor errors are an indication of a more serious problem with the quality and reliability of any other findings and conclusions from the IPCC AR4, including those that are relevant for the Endangerment Finding.

The remaining alleged errors, taken from non-peer-reviewed ("gray") literature, do not appear to be errors according to EPA's review. The IPCC provides guidance on how and when to use gray literature, and petitioners do not demonstrate that the guidance was not followed. Gray literature is not automatically incorrect or suspect, and an examination of the particular gray literature sources demonstrates that the petitioners' allegations regarding these alleged errors are unfounded. Furthermore, the IPCC AR4 statements at issue have no material relevance to EPA's Findings. Below are brief responses as to why the petitioners' assertions based on these known and alleged errors are unfounded and exaggerated. Additional detail on these issues is contained in Section 2.1, Volume 2 of the RTP document.

(i) Percent of the Netherlands Below Sea Level

The IPCC AR4 erroneously stated that 55 percent of the Netherlands is below sea level, whereas the actual number is only 26 percent. The statistic quoted in the AR4 was inaccurate, and a correction was published by the Netherlands Environmental Assessment Agency. What should have been stated is that 55 percent of the Netherlands is at risk of flooding; 26 percent of the country is below sea level, and 29 percent is susceptible to river flooding. The error originated with the Netherlands Environmental Assessment Agency, not the IPCC. The IPCC published an official erratum (IPCC, 2010b) [33] correcting the mistake, and noted "The sea level statistic was used for background information only, and the updated information remains consistent with the overall conclusions."

EPA does not refer to or rely on this statistic in the Findings and the percentage of the Netherlands below sea level does not pertain to the endangerment of public health and welfare in the United States. This error is very minor and has no impact on the

[33] IPCC (2010b). Fourth Assessment Report: Working Group II Erratum. Intergovernmental Panel on Climate Change (IPCC). 26 Jan. 2010. *http://www.ipcc.ch/publications_and_data/ar4/wg2/en/erratataserrata-errata.html.*

climate science and health and welfare impacts supporting EPA's Endangerment Finding. Furthermore, there is no evidence that this minor error is somehow, as the petitioner would allege, an indication of flawed science and poor quality control practices sweeping across all conclusions of IPCC AR4.

(ii) Himalayan Glacier Projection

Several petitioners state that the IPCC AR4 erred in projecting that glaciers in the Himalayas would disappear by 2035, and that EPA relied on this projection.

The IPCC did inaccurately state the year 2035 in that particular statement. The IPCC issued a correction concerning the melting of Himalayan glaciers (IPCC, 2010c) [34] which also found that its general conclusion (provided below) on this issue remains robust and "entirely consistent with the underlying science."

Widespread mass losses from glaciers and reductions in snow cover over recent decades are projected to accelerate throughout the 21st century, reducing water availability, hydropower potential, and changing seasonality of flows in regions supplied by meltwater from major mountain ranges (e.g., Hindu-Kush, Himalaya, Andes), where more than one-sixth of the world population currently lives.

EPA did not refer to the original IPCC projection in either its TSD or in the Administrator's Endangerment Finding. It does not impact climate change science findings or have any meaningful implication for the issue of endangerment in the United States. Furthermore, Volume 2, section 2.1.3 of the RTP document shows that EPA reviewed the entire discussion of glacial effects in IPCC AR4 and concludes that this single faulty projection does not compromise the IPCC's overall assessment of observed glacier loss, projected glacier loss, and the impacts of glacier loss on water resources in the Himalayas.

(iii) Characterization of Climate Change and Disaster Losses

The Southeastern Legal Foundation asserts that the IPCC AR4 mischaracterized the findings of a study on climate change and historic disaster losses. EPA addresses the specific study at issue in Volume 2, section 2.1.4 of the RTP document and provides its more general response to this study and this issue here.

First, EPA never cited or relied on the study at issue in its TSD. EPA did not discuss the link between climate change and the historic trends in the economic magnitude of disaster losses in the TSD. To support the Endangerment Finding, EPA cited the potential future impacts of climate change on the number and severity of extreme weather events, for which the Southeastern Legal Foundation levels no criticism. There are many different factors influencing the economic losses from a disaster, making it difficult to determine the impact of climate change from historic data on trends in economic disaster loss. Therefore, contrary to petitioners' claims, EPA did not rely on historic trends of economic disaster losses (the subject of the study at issue) to evaluate the likelihood that climate change would lead to an increase in the number or frequency of such weather events. EPA instead focused on the physical and environmental (not the economic) impacts associated with climate change. The Administrator's Endangerment Finding was clear that it was more forward-looking on this issue, stating:

> The evidence concerning how human-induced climate change may alter extreme weather events also clearly supports a finding of endangerment, given the serious adverse impacts that can result from such events and the increase in risk, even if small, of the occurrence and intensity of events such as hurricanes and floods. (74 FR 66526)

Furthermore, EPA's review of the particular study at issue in Volume 2, section 2.1.4 of the RTP document shows that IPCC did not mischaracterize this study (*e.g.,* IPCC included the appropriate caveats that were also stated in the underlying study), and that there were valid reasons for IPCC to use the study (*e.g.,* as the most recent study of its kind at the time).

(iv) Validity of Alps, Andes, and African Mountain Snow Impacts

Several petitioners argue that IPCC claims of glacier melt in the Andes, the Alps, and parts of Africa arise from a magazine article and a Master's thesis, and thus should not be viewed as credible. This particular issue is addressed in Volume 2, section 2.1.5 of the RTP document, and EPA's response is summarized here.

First, the extent to which snow and glaciers in the Andes, Alps and parts of Africa are melting or are projected to melt is an issue that is tangential to the Administrator's decision that public health and welfare are endangered within the United States. Second, the petitioners mischaracterize these references within IPCC AR4, as these are actually references to "loss of ice climbs," not reductions in mountain glaciers. Loss of ice climbs is an indicator of warming over ice-covered areas. EPA acknowledges that these references come from gray literature but these citations are appropriate and within the IPCC's guidelines for use of gray literature. They provide additional evidence consistent with the peer-review-supported conclusion that in most places snowpack is declining and glaciers are melting worldwide. Furthermore, EPA did not rely on these references or refer to "loss of ice climbs" as an indicator of climate change.

(v) Validity of Amazon Rainforest Dieback Projection

Petitioners challenge the IPCC's statement that "[U]p to 40 percent of the Amazonian forests could react drastically to even a slight reduction in precipitation," alleging that it is unsubstantiated gray literature. EPA reviews this issue in Volume 2, section 2.1.6 of the RTP document and provides its general response here.

The IPCC AR4 statement in question about the Amazon appears to have been inadequately referenced but the content of the statement is correct according to the underlying literature. For this statement, the IPCC did cite gray literature [35], which itself cited a peer-reviewed study [36] and relied on other peer-reviewed literature. It is worth noting that a newspaper that originally reported this alleged problem with the IPCC's representation of this Amazon issue recently reversed itself and printed a correction on June 20, 2010.[37] Morever, this issue is not discussed in the TSD and is of no relevance to the Findings.

(vi) Validity of African Rain-Fed Agriculture Projection

Some petitioners object that a statement in EPA's TSD based on a statement in IPCC AR4 concerning reduction of yields from rain-fed agriculture in some countries in Africa was from gray literature and is therefore not credible. EPA reviews this issue in Volume 2, section 2.1.7 of the RTP document and provides its general response here.

There is no evidence that the IPCC statement in question regarding African

[34] IPCC, 2010c. IPCC Statement on the Melting of Himalayan Glaciers, January 20, 2010. *http://www.ipcc.ch/pdf/presentations/himalaya-statement-20january2010.pdf.*

[35] Rowell, A. and P.F. Moore (2000). Global Review of Forest Fires. World Wildlife Federation and The World Conservation Union. available at: *http://data.iucn.org/dbtw-wpd/edocs/2000-047.pdf.* (last accessed April 12, 2010).

[36] Nepstad, D. C., *et al.* (1999). Large-scale impoverishment of Amazonian forests by logging and fire. Nature 398:505–508.

[37] Sunday Times correction. *http://www.thesundaytimes.co.uk/sto/news/uk_news/Environment/article322890.ece.*

rain-fed agricultural yields is not credible, based on the underlying studies, nor is there any evidence that IPCC authors acted inappropriately by citing the material on which this statement is based. The IPCC statement cites a report [38] published by the International Institute for Sustainable Development funded by Canada, U.S. AID, and other public and private institutions. The percent reduction number was obtained from vulnerability studies prepared under the UN Environmental Programme Global Environment Fund and National Communications of three African countries to the UNFCCC. This study was included due to the paucity of peer-reviewed material relating to some parts of the world, particularly Africa. This is consistent with the IPCC's guidance on the use of gray literature. Furthermore, the statement relates to impacts outside the United States, and it did not materially impact the Administrator's determination of endangerment of public health and welfare in the United States.

b. Response to Claims That the IPCC Has a Policy Agenda and is Not Objective and Impartial

Several petitioners raise various arguments to support their allegation that IPCC AR4 is advancing a policy agenda and is not an objective and impartial scientific body, thus questioning EPA's use of IPCC AR4 as a significant reference document to support the Administrator's Findings.

EPA reviews and responds to each of these claims in Volume 2, section 2.2 of the RTP document, and provides the more general responses here. EPA also previously responded to public comments about IPCC's report development procedures in the RTC document (see Volume 1, section 1 and Appendix A, "IPCC Principles and Procedures").

The petitioners submit four objections along with excerpts from the CRU e-mails related to: (1) Authorship and reviewer roles among IPCC personnel; (2) a CRU e-mail allegedly showing that IPCC authors were aware that citing their own papers could be seen as using the IPCC process to advance their own views rather than to present a neutral overview of the science; (3) allegations that the IPCC is a biased organization, including claims that IPCC lead authors encouraged other authors to focus on policy-prescriptive science; and (4) allegations that IPCC authors forced consensus and altered the contents of the assessment reports to eliminate any suggestion of non-consensus.

After reviewing the petitioners' arguments, EPA finds that the evidence and arguments provided by petitioners do not support their serious allegation that the peer-review and assessment report processes employed by the IPCC were "fundamentally corrupt" and policy prescriptive. The petitioners' arguments, which heavily rely on the selective use and narrow reading of CRU e-mails, as well as some newspaper articles, do not demonstrate that the IPCC peer-review and report development processes were inadequately designed or that they were not properly implemented. These allegations by the petitioners are devoid of any scientific evidence or scientific argument that would cause EPA to find that the key conclusions of IPCC AR4 are inaccurate or that they do not appropriately reflect the degree of scientific consensus on the scientific issues germane to the Administrator's Endangerment Finding. Therefore, petitioners' evidence and arguments do not support changing EPA's position, as stated in the Endangerment Finding, that the assessment literature, including IPCC AR4, represents the "best reference materials for determining the general state of knowledge on the scientific and technical issues before the agency in making an endangerment decision."

Volume 2, section 2.2.3.1 of the RTP document, for example, demonstrates that, contrary to petitioners' assertions, a few scientists that were not named as contributing authors for Chapter 6 of IPCC AR4, Working Group I [39] did not contribute significantly to the writing and editorial decisions of that chapter. Given their very limited role in the chapter (*e.g.,* providing input on a single figure), it is entirely reasonable that they were not named contributing authors, who are charged with writing parts of the report. Therefore, EPA finds that there is no basis for the claim that IPCC reviewer and author procedures were circumvented. EPA's review of this issue is consistent with the finding of the Independent Climate Change E-mails Review [40] which stated, among other things, that "There is no proscription in the IPCC rules to prevent the author team seeking expert advice when and where needed."

Petitioners appear concerned about the contributing author designation because these few scientists were expert reviewers of the IPCC AR4, and the petitioners believe that the act of providing even a limited amount of information, in addition to their reviewer roles, would have given them undo power to shape the report. This argument is baseless. EPA notes that although the expert review comments are available to the public [41], petitioners did not provide a single example from the comments of these individuals to support their claim of undo influence or abuse of their purported "power" over IPCC AR4 conclusions.

Volume 2, section 2.2.3.2 of the RTP document examines the allegation by petitioners that the frequency with which IPCC authors cite their own studies should be viewed as unacceptable and seen as evidence that IPCC AR4 lacks objectivity. First, it should come as no surprise that for some of these fairly specialized fields of climate change science authors who publish the most on these topics would in turn be selected by IPCC to author chapters on those same topics. EPA finds the frequency with which IPCC authors cite their own peer-reviewed studies to be entirely acceptable and reasonable. Again, petitioners completely fail to show why this underlying cited literature itself is flawed or why the IPCC AR4 conclusions, based on this underlying literature, are flawed. Importantly, one of the CRU e-mails that petititioners use as purported evidence of IPCC authors engaged in foul play to cite their own work actually shows an IPCC coordinating lead author explicitly encouraging his IPCC co-authors to minimize citations to their own work, and to do so only "unless they are absolutely needed."

Volume 2, section 2.2.3.3 of the RTP document examines the petitioners' assertion that IPCC is biased and that IPCC authors worked to produce policy-prescriptive science and to reach preconceived conclusions. Here too, the petitioners do not address any of the IPCC AR4 science directly. Rather, petitioners refer to a selection of CRU e-mails by IPCC authors who wrote to other IPCC co-authors to urge them, for example, to focus on "policy relevant" science. First, "policy relevant" by no means implies "policy prescriptive" or scientifically biased. It is, in fact, policy informative and neutral, in direct contrast to the goal of policy

[38] Agoumi, A. (2003). Vulnerability of North African Countries to Climatic Changes. International Institute for Sustainable Development and the Climate Change Knowledge Network. (2003). Available at: *http://www.cckn.net//pdf/north_africa.pdf.* Accessed April 12, 2010.

[39] Jansen *et al.,* 2007.

[40] Russell, 2010.

[41] Reviewer comments and author responses for draft chapters of IPCC AR4 Working Group I and II volumes (the primary volumes at issue for the Endangerment Finding) are publically available at the following Web sites, respectively: *http://hcl.harvard.edu/collections/ipcc/* and *http://ipcc-wg2.gov/publications/AR4/ar4review.html.*

prescriptive statements. Second, petitioners do not identify how specific information in IPCC AR4 should be considered biased as a result of the private e-mail exchanges. Petitioners do not highlight the specific statements in the IPCC AR4 that are supposedly "policy prescriptive," never explain what policy agenda was being advanced, and never describe how the CRU e-mails support their claim that the science was actually manipulated in service of this unspecified agenda. The IPCC's own guidelines [42] state that its mission is to produce information that is "policy relevant and policy neutral, never policy prescriptive." There is no evidence provided by petitioners that IPCC authors deviated from this practice.

In another example in Volume 2, section 2.2.3.3 of the RTP document, petitioners claim that a CRU e-mail exchange demonstrates that IPCC authors were colluding to make a strong case about a certain scientific conclusion rather than working to produce neutral science. EPA's review shows that there is no support for this claim. EPA's review shows that the CRU e-mails, in their full context, speak for themselves and simply show a small group of scientists working on various alternative ways to present a figure that was comprehensive and offered key contextual information on temperature trends over the past several centuries. Petitioners do not show that these alternatives—which are discussed in the e-mails—are biased, or explain why the option that was selected is not "neutral." If fact, the e-mail record shows that the alternative selected was the most comprehensive and transparent of the options.

In Volume 2, section 2.2.3.4 of the RTP document, EPA reviews petitioners' claim that certain IPCC authors kept out some studies with the goal of hiding any non-consensus on key issues. The CRU e-mail exchanges among some IPCC authors are the only pieces of evidence offered by petitioners to support this allegation. EPA's review of this issue demonstrates that the CRU e-mails simply do not show that the contents of the IPCC chapter in question, let alone the contents of the entire IPCC AR4, were altered to eliminate a suggestion of non-consensus, or IPCC authors actively tried to suppress (or were successful in suppressing) external challenges to consensus. It is not uncommon for scientists to critique the work of others, and the e-mails do not provide evidence that the IPCC authors acted unethically. Section 2.2.3.4 of the RTP document also addresses the now oft-cited e-mail where an IPCC author states, "I tried hard to balance the needs of the science and the IPCC, which were not always the same." Petitioners claim this e-mail demonstrates a biased IPCC process. A simple reading of the entire e-mail exchange reveals a different story. In fact, this IPCC author gets complimented from another for his objectivity and even-handedness in handling the challenges of working on IPCC AR4. This IPCC author also expressed frustration with the time spent away from doing new science, which is not the primary job of an IPCC chapter author or of the IPCC in general; the primary role of the IPCC is to assess existing science already published in the literature, *i.e.,* in this author's words, "the needs of the science and the IPCC" are not always the same. In context, it is clear that the needs of the IPCC in this case are the requirements of doing assessments of existing literature rather than producing "original and substantive" work. EPA's review demonstrates that when the e-mails are read in their full context, it is clear that the authors of these e-mails sought to convey the science accurately and address disagreements in a fair and even-handed way. Again, petitioners have selectively picked excerpts from these e-mails to make assertions attacking the underlying science of the Endangerment Finding, but these assertions simply have no support.

3. Process and Other Issues Raised by the Petitioners

The process and other issues raised by the petitioners include claims that (a) the USGCRP and the NRC are not separate and independent assessments from IPCC; (b) EPA's process to develop the scientific support for the Findings is flawed; (c) there are improper peer-review processes in the underlying scientific literature used by the major assessments; and (d) certain scientists did not adhere to Freedom of Information Act requests. Each of these issues is addressed below and in more detail in Volume 3 of the RTP document.

a. Claims That the Assessments by the USGCRP and NRC Are Not Separate and Independent Assessments

Two petitioners argue that the assessment reports upon which EPA relied are not from three separate, independent groups. They claim that the USGCRP and NRC assessment reports are not separate and independent because they are based on the findings of IPCC AR4. Petitioners claim the USGCRP and NRC reports regularly cite and rely on data, resources, and conclusions in the IPCC reports, contradicting arguments that all three of the assessments are separate and independent. The petitioners argue that because of this the USGCRP and NRC assessments must be flawed in the same way that IPCC AR4 is purported to be flawed by the petitioners. Volume 3, section 3.2 of the RTP document addresses this claim and EPA summarizes its response here.

EPA finds no merit to this argument. The organizational and personnel differences, and the detailed and robust report development procedures employed by the IPCC, USGCRP, and NRC demonstrate that these assessment reports are separate and independent. Petitioners' claims to the contrary are insufficient and unsubstantiated.

The similarity of the conclusions among the assessment reports from the three bodies, for example, provides evidence of the strength of the science in that it consistently points different scientific reviewers in the same direction. The fact that each of these bodies referenced many of the same studies and IPCC AR4 or arrived at consistent conclusions is not evidence that these reports are not independent assessments of the available science related to climate change. The test of separation and independence is not whether an assessment reaches a different result or conclusion, it is whether independent discretion and judgment were exercised. To assert, as the petitioners do, that consistency of results represents a weakness rather than a strength of the underlying science is an unwarranted argument that assumes fundamental flaws in the IPCC and a resulting grand ripple effect across all the major assessments used by EPA. EPA discusses above and further demonstrates throughout the RTP document that there is no material or reliable basis to question the validity and credibility of the body of science underlying the Administrator's Endangerment Finding, including the IPCC AR4 conclusions and its underlying studies, and therefore EPA rejects the premise of this argument.

Furthermore, the USGCRP, the IPCC, and NRC have their own, separate report development procedures. These separate processes have already been described in the TSD and in the RTC document, Volume 1. The differences in the organizations, the groups of scientists who developed the assessments, and scope of the assessments produced by each body is discussed in detail in Volume 1 of the RTC document.

[42] IPCC, 2010c.

• The IPCC, created in 1988 by the United Nations Environment Programme and the World Meteorological Organization (WMO), is open to all member countries of the United Nations and the WMO. At regular intervals, the IPCC prepares comprehensive assessments of scientific, technical, and socio-economic information relevant for the understanding of human-induced climate change, potential impacts of climate change, and options for mitigation and adaptation all at global and regional scales. The most recent assessment—the AR4—included thousands of scientists from all over the world, who participated on a voluntary basis as authors, contributors, and reviewers (IPCC, 2007a). While many federal and nonfederal scientists from the United States were involved in the development of the AR4, the United States is just one of 194 countries that contribute to the assessments.

• The USGCRP is part of the United States Executive Branch. Thirteen departments and agencies participate in the USGCRP, including EPA. A critical role of the interagency program is to coordinate research and integrate and synthesize information to achieve results that no single agency, or small group of agencies, could attain. Between 2004 and 2009, the USGCRP produced 21 synthesis and assessment reports on a wide range of topics (e.g., temperature trends in the lower atmosphere; weather and climate extremes in a changing climate; and the effects of climate change on agriculture, land resources, water resources, and biodiversity). The USGCRP assessment reports are developed to enhance understanding of natural and human-induced changes in the Earth's global environmental system; to monitor, understand, and predict global change in the United States; and to provide a sound scientific basis for national and international decision-making. Each of these reports had a unique team of authors, drawn from relevant disciplines. Many authors were federal scientists, and in some cases, nonfederal scientists contributed their expertise to the process. While some of the USGCRP authors participated in the development of the IPCC AR4, most did not.

• The NRC is an independent scientific organization that is not affiliated with either the IPCC or USGCRP. As described in Appendix C of Volume 1 of the RTC document, the NRC:

> enlist(s) the nation's foremost scientists, engineers, health professionals, and other experts to address the scientific and technical aspects of society's most pressing problems. Each year, more than 6,000 of these experts are selected to serve on hundreds of study committees that are convened to answer specific sets of questions. All serve without pay. Federal agencies are the primary financial sponsors of the Academies' work. Additional studies are funded by state agencies, foundations, other private sponsors, and the National Academies endowment. The Academies provide independent advice; the external sponsors have no control over the conduct of a study once the statement of task and budget are finalized. Study committees gather information from many sources in public meetings but they carry out their deliberations in private in order to avoid political, special interest, and sponsor influence.

Ten NRC reports are cited in the Endangerment Finding and TSD. Each of these reports has a unique author committee, selected based on their areas of expertise. While some of the NRC study committee members have participated in either the IPCC or USGCRP report development processes, many have not.

The USGCRP and NRC reports on which EPA relied were the result of an objective review and assessment of the scientific literature available at the time of their development (including any previously published assessments), related to the effects of greenhouse gas emissions on the climate system and the impacts of these changes on ecosystems and society. The organizations conducting the reviews were distinct and separate, and neither organization had control or supervision over the other. The groups of scientists involved in the reviews overlapped to some degree, but significant numbers of scientists were involved with one but not other reports. In all cases, personnel at NRC who supervised the review and preparation of the final reports were different from those who performed these functions for USGCRP.

Like the IPCC, the USGCRP and NRC provide public opportunities to provide input and comment during report development (see RTC document, Volume 1). In addition, the NRC reports undergo a rigorous, independent external review by experts whose comments are provided anonymously to the committee members.

Separate and apart from the issue of the independence of these assessment reports, the petitioners provide no information to demonstrate that the key scientific conclusions of the IPCC, USGCRP, and NRC are wrong or that EPA erred in relying upon them. The specific science issues raised by petitioners are discussed throughout this Decision and in the RTP document. Thus, whether or not the various assessment reports are separate and independent, EPA reasonably relied upon them as reflecting the current state of the science and the degree of broad consensus within the science community on these issues.

Bolstering the case that the IPCC, USGCRP and NRC assessments available at the time of the final Endangerment Finding in December 2009 were robust and appropriate for EPA to use, the May 2010 assessment of the NRC, "Advancing the Science of Climate Change," states that its major scientific conclusion is "consistent with the conclusions" of those previous assessments. Note also that this May 2010 NRC assessment was able to incorporate scientific literature published since EPA completed its scientific record to finalize the 2009 Endangerment Finding.

b. Approaches and Processes Used To Develop the Scientific Support for the Findings

Several petitioners object to the process and approach EPA used in developing the scientific support for the Endangerment Finding. One of these specific arguments is new whereby the petitioners allege that EPA ignored public concerns about the implications of the e-mails involving scientists at the CRU, and instead "plowed ahead with compromised data, undermining its core conclusions in the process." EPA discusses and responds to this issue in section (i) below and in section 3.1.2 of the RTP document. The petitioners also raise issues that EPA already responded to in Volume 1 of the RTC document. Some of the concerns submitted are supported with "new information" and some are not. In (ii) below, EPA summarizes the response to the claim that EPA did not independently judge the underlying science, and in (iii) below EPA concludes that the Agency did not violate the Information Quality Act (IQA, or the Data Quality Act), as alleged by petitioners. Section 3.1.3 of the RTP document more fully responds to these three allegations and other related concerns raised by the petitioners regarding the process and approach EPA used in developing the scientific support for the Endangerment Finding.

(i) Issues Regarding Consideration of the CRU E-mails

The sole new argument raised by petitioners regarding the approach and process EPA used into develop the Findings is that EPA ignored public concerns about the implications of the e-mails involving scientists at CRU, and instead "plowed ahead with compromised data, undermining its core

conclusions in the process." EPA responds to this issue in Volume 3, section 3.1.2 of the RTP document and summarizes its response here.

Prior to finalizing the Endangerment Finding, EPA carefully reviewed many of the CRU e-mails, and determined that many of the issues raised therein had also been raised through the public comments on the proposed Findings. EPA reviewed the underlying scientific issues that were presented to EPA at the time (see, for example, RTC Volume 2). Based on that initial review, EPA concluded that the fundamental conclusions of the assessment literature remained sound as to the state of the science on greenhouse gases and climate change. EPA did not inappropriately "plow ahead;" EPA assessed the issues raised by commenters and the CRU e-mails in light of our comprehensive review of climate science and all of the objections to the science raised by commenters, and concluded that our review of the science and the conclusions based on it were sound.

Petitioners have now raised more specific concerns with respect to the CRU e-mails. EPA has reviewed all of the CRU e-mails, and our responses to the particular science issues raised by petitioners in light of these e-mails are provided in other sections of this Decision and in the RTP document. As discussed there, petitioners have routinely misunderstood or mischaracterized the scientific issues, drawn faulty scientific conclusions, resorted to hyperbole, impugned the ethics of climate scientists in general, characterized actions as "falsification" and "manipulation" with no basis or support, and placed an inordinate reliance on blogs, news stories, and literature that is often neither peer reviewed nor accurately summarized in their petitions. Petitioners often "cherry-pick" language that creates the suggestion or appearance of impropriety, without looking deeper into the issues or providing corroborating evidence that improper action actually occurred.

(ii) Claims That EPA Did Not Independently Judge the Underlying Science

Several petitioners argue that the Administrator did not independently judge the primary scientific literature and data. Instead, they claim that she improperly relied on summary scientific reports produced by third parties or "foreign entities." This is not a new issue brought to EPA, but was raised and addressed during the public comment period. Section III.A of the Findings responds to comments that EPA should have conducted its own independent assessment of the primary scientific literature and not relied on scientific reports produced by third parties such as the USGCRP, NRC or IPCC. See also Volume 1 of RTC document, particularly Response 1–1.

It is useful to describe the process EPA followed in exercising its scientific judgment in making the Endangerment Finding. EPA did not passively and uncritically accept a scientific judgment and finding of endangerment supplied to it by outsiders. Instead, EPA evaluated all of the scientific information before it, determined the current state of the science on greenhouse gases, the extent to which they cause climate change, how climate change can impact public health and public welfare, and the degree of scientific consensus on this science. EPA applied this science to the legal criteria for determining endangerment, *i.e.,* whether greenhouses gases cause, or contribute to, air pollution that may reasonably be anticipated to endanger public health or welfare. EPA did this after presenting its scientific views before the public for comment and evaluating and considering all comments received, as well as documenting responses to all significant public comments (see volumes 1–11 of the RTC document). EPA properly and carefully exercised its own judgment in all matters related to the Endangerment Finding.

The core of petitioners' objection is that they do not agree with important parts of the scientific information upon which EPA relied. They frame this as a failure of EPA to exercise its own judgment, or as EPA ceding to an outside body its responsibility to exercise independent judgment. It is clear from the record for the Findings that EPA exercised its own judgment and did not cede its authority or judgment to anyone. The fact that petitioners disagree with the information EPA relied upon and EPA's conclusions is not evidence of a lack of exercise of discretion or judgment.

EPA relied on the existing assessment reports of the USGCRP, IPCC, and NRC as a primary source for determining the current state of the science relating to greenhouse gases and climate change, and for determining the degree of scientific consensus on these issues. EPA's view then and now is that these assessment reports represent the best primary references to provide the scientific underpinnings to inform the Administrator's judgment regarding endangerment. These assessment reports provide exactly the kind of information that is required, *i.e.,* they demonstrate how greenhouse gases are affecting the climate now, are projected to affect climate in the future, and how these current and projected climate changes impact public health and welfare. These assessment reports also bring together and synthesize the numerous individual studies in the scientific literature to draw overarching conclusions about the state of the science. Finally, each of these assessment reports go through rigorous and transparent peer-review processes, such that the conclusions carry significant weight in a way that is typically not possible for one individual study in a scientific journal. EPA's review of the objections raised by petitioners to the process and the substance of the various assessment reports does not support changing this view.

The petitioners appear to imply that EPA would have drawn different conclusions had it conducted its own separate assessment. After examining the breadth and quality of the USGCRP, IPCC, and NRC assessments, EPA disagrees. These reports already reflect the body of underlying scientific literature that EPA itself would have had to synthesize had it decided to conduct yet another assessment, independent from USGCRP, IPCC and NRC. These assessments have been reviewed and formally accepted by, commissioned by, and in some cases authored by U.S. government agencies and individual government scientists. By relying on the assessment literature, EPA is benefitting from the confidence and strength of an entire federal research enterprise. There is no reason to think that these assessments do not represent the best primary source material to determine the state of science on the relevant issues.

Petitioners disagree with some of the conclusions of the assessment literature and believe that not all scientific points of view were fully considered therein. However, there was a robust public comment process on EPA's proposed Endangerment Finding, which provided an opportunity for the public to evaluate and comment on EPA's preliminary scientific conclusions. Many commenters provided literature and/or arguments to support their views and EPA reviewed such literature and arguments in the Agency's responses. EPA's final judgment was based on EPA's evaluation of both the assessment literature and the additional information and views provided through public comment. EPA has no reason to believe that putting this significant body of work aside and attempting to develop a new and separate assessment would

provide any better scientific basis for making the endangerment decision.

(iii) Claims That EPA Violated the Information Quality Act

EPA already provided a detailed response to arguments of alleged IQA violations in RTC Volume 1. The petitioners now make essentially the same general argument that EPA's use of third-party assessment reports violates the IQA. EPA notes that the petitioners are re-raising this issue in the petitions for reconsideration because they believe that the CRU e-mails show that "IPCC authors deleted information and hid behind foreign laws to avoid disclosure of key data" and that EPA would not have been able to obtain the data anyway. EPA responds to allegations involving the behavior of CRU scientists, including the allegation that data was destroyed, in (c) below, Volume 1 of the RTP document and Sections 3.3 and 3.4 of the RTP document. As stated in these sections, the evidence submitted by the petitioners in the form of the CRU e-mails does not support their allegation that data were destroyed. Therefore, the "new" information presented by the petitioners does not call into question the overall integrity of the science, nor does it call into question the process EPA used in developing the Findings. As noted in RTC Volume 1, the IQA requires that an agency issue guidelines regarding data quality and ensure their implementation. EPA complied with the IQA by issuing its *Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility and Integrity of Information Disseminated by the Environmental Protection Agency* (U.S. EPA, 2002) [43] and has acted consistently with these guidelines in developing the Findings. As stated in RTC Volume 1, EPA's use of the assessment literature "is consistent with these guidelines because we thoroughly reviewed and evaluated the author selection, report preparation, expert review, public review, information quality, and approval procedures of IPCC, USGCRP/CCSP, and NRC to ensure the information adhered to a basic standard of quality, including objectivity, utility, and integrity."

The CRU e-mails cited by the petitioners do not undermine this view. EPA's responses on the science issues raised by petitioners concerning these e-mails are discussed in detail in several other sections of this Decision as well as in the RTP document. As our detailed responses show, petitioners' science-based claims do not support the conclusion that the IPCC or other assessment reports were biased, inaccurate, or scientifically incorrect.

c. Freedom of Information Act Issues

Several petitioners claim that the CRU e-mails provide evidence that leading climate scientists deliberately withheld key data and computer codes and attempted to obstruct or avoid UK Freedom of Information (FOI) and U.S. Freedom of Information Act (FOIA) requests from "climate skeptics." These claims are addressed in Volume 3, section 3.4 of the RTP document and EPA's response is summarized here.

EPA's review of the CRU e-mails indicates that in many cases, the data at issue were in fact released by the scientists, including data concerning a human "fingerprint" in the tropics, data underlying the HadCRUT temperature record, and data concerning historic temperature reconstructions. In addition, significant data were publicly available. Petitioners have not explained or shown why the amount of data and other information that was available was not adequate for researchers to replicate or otherwise evaluate key findings, or to conduct other research. In addition, there was a robust and public process to submit, review, and publicly respond to comments on the scientific issues involved in all parts of the IPCC AR4. Petitioners do not rely on science or science based arguments to support their claim that the assessment report resulting from this robust process should not be relied upon by EPA. Instead, they rely on unsupported conclusions drawn from e-mails concerning a FOI request for personal communications between various scientists, where it appears that the appropriate University FOI officers had determined that these e-mails were exempt from release. This evidence does not support petitioners' claims that the IPCC AR4 should not be considered as part of the scientific basis for the Endangerment Finding.

EPA agrees with the results of the various investigations, which found that the scientists at issue conducted their research with scientific integrity and rigor, the research utilized methods which are fair and satisfactory, and that their actions were consistent with the common practice in climate research at that time. EPA also agrees with the recommendations of the Independent Climate Change E-mails Review supporting greater transparency in the future in this area of climate research. Petitioners' evidence, however, does not support their conclusions that the research produced by these scientists was suspect, flawed, or biased, or that IPCC AR4 or other assessment reports were suspect, flawed, or biased. Their evidence does not support the conclusion that the science at issue should not be relied upon by EPA.

EPA has reviewed the petitioners' claims and the e-mails and finds that in many cases, the petitioners make overly broad generalizations based on suggestions of inappropriate actions that are not supported by the evidence provided by the petitioners. Regarding the quote from the UK Information Commissioner's Office, the recent inquiry by the UK House of Commons Science and Technology Committee (2010) [44] concluded that this statement was the personal opinion of the Deputy Information Commissioner and was not based on the results of a formal government investigation.

EPA finds that most of the language in the CRU e-mails that petitioners allege shows impropriety is taken out of context. Petitioners do not provide corroborating evidence that improper action actually occurred, let alone evidence that any alleged improper action led to biased or inaccurate science that was ultimately used by EPA to support the Findings. Based on our review of the e-mails, the authors were dismayed at what they viewed as frivolous requests that were wasting their time, not that the requestors were going to uncover "fraud" or "wrongdoing" with regard to their research, as has been alleged by the petitioners.

EPA finds from its review that the e-mail authors expressed significant frustration at repeated requests for specific explanations and computer codes when the basic data had already been made available and the methodology for replicating particular studies had already been published in the literature. This type of approach was considered to be common practice at the time, as the UK House of Commons Science and Technology Committee (2010) [45] also found in their analysis of the CRU e-mails: "In the context of the sharing of data and methodologies, we consider that Professor Jones's actions

[43] U.S. EPA (2002). Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by the Environmental Protection Agency. Washington, DC: U.S. Environmental Protection Agency. EPA/260/R–02/008.

[44] UK Parliamentary (2010). House of Commons, Science and Technology Memoranda. Available at: *http://www.publications.parliament.uk/pa/cm200910/cmselect/cmsctech/memo/climatedata/contents.htm.*

[45] UK Parliamentary (2010). House of Commons, Science and Technology Memoranda. Available at: *http://www.publications.parliament.uk/pa/cm200910/cmselect/cmsctech/memo/climatedata/contents.htm.*

were in line with common practice in the climate science community. It is not standard practice in climate science to publish the raw data and the computer code in academic papers." EPA finds that the petitioners' evidence does not provide a basis to question the scientific integrity or conclusions of the climate change research conducted by CRU researchers.

d. Integrity of Peer-Reviewed Literature

Several petitioners claim that the CRU e-mails provide evidence that leading climate scientists engaged in actions to suppress dissenting views about anthropogenic global warming. Specifically, petitioners claim that these scientists unfairly gave favorable reviews of each other's manuscripts while providing negative reviews of manuscripts authored by "climate skeptics," made efforts to unfairly expedite publication of their responses to papers by "climate skeptics," conspired to remove editors of prominent journals that had published dissenting views of climate change, and boycotted the journals in reprisal. The petitioners argue that the cumulative effect of these alleged actions with regard to peer-reviewed literature has been to create an artificial consensus about anthropogenic climate change that has "tainted [climate change literature] in favor of desired papers." Some petitioners conclude that EPA has lost the basis for its Findings because the Agency assumed a "legitimate, objective 'consensus' regarding anthropogenic global warming" existed among scientists and disregarded any contrary views or contrary evidence. EPA responds to these claims in Volume 3, section 3.3 and summarizes its response here.

Petitioners' claims are not based on scientific analysis or arguments, and their evidence does not support changing or revising EPA's use of the major assessments of peer-reviewed literature or the overall scientific conclusions about climate change reached from the thousands of papers considered in the assessments. The objections raised by the petitioners have not called into question or changed EPA's conclusion that the science supporting the Endangerment Findings is robust, compelling, and has been appropriately characterized by EPA.

EPA disagrees with the petitioners' argument that the Findings were based on a false consensus regarding anthropogenic climate change, and that EPA disregarded contrary views or evidence including those not represented in the peer-reviewed literature. For reasons stated throughout this Decision and section 3.3 of the RTP document, EPA's view is that the state of the science has been carefully and appropriately characterized by EPA and properly interpreted by the Administrator in the Endangerment Finding.

Many diverging viewpoints and a variety of findings are represented in the scientific literature on climate change. The assessment reports routinely identified the degree of certainty around any conclusion and recognized the existence of ongoing debate within the scientific community on all of these issues, as is the norm in all science endeavors. The Administrator's Endangerment Finding relied on a careful consideration of the full weight of scientific evidence and a thorough review of hundreds of thousands of public comments, which contained many different opinions and interpretations of the science. Therefore, to claim, as the petitioners do, that these e-mails demonstrate that EPA did not take into account any dissenting views on the subject of climate change science is a gross mischaracterization of the total record that supports the Administrator's Findings.

The petitioners rely upon some CRU e-mails (typically taken out of context), a small number of papers, and both actual and alleged events regarding scientific journals to claim that leading climate scientists conspired to keep dissenting views of climate change out of the broad body of peer-reviewed literature and create an artificial consensus about anthropogenic climate change. In all cases presented by the petitioners it appears the scientists involved were making their scientific objections known, and were basing their objections on the science and not on assumptions or speculation. The evidence presented by petitioners does not support their claims of bias, either for the specific papers and individuals at issue, or for the much broader and sweeping challenges made concerning the integrity of all peer-reviewed climate literature.

For the few papers at issue, the petitioners do not argue based on scientific merits, and instead assume that the few papers they cite received unjustified unfavorable reviews and were unfairly rejected for publication without providing supporting evidence. Petitioners do not address the possibility that these papers were scientifically inadequate and that the scientists were justified in recommending that they not be published. EPA notes that there is no evidence presented beyond these few papers of the claimed general effort to manipulate the peer-reviewed journal publication process.

The evidence provided by the petitioners also does not show that the scientists engaged in improper behavior or sabotage of the two journals that are discussed in the e-mails, or their editors, nor is there evidence to conclude that any action on the part of these scientists involved in the e-mail correspondence resulted in the replacement of the journal editors. Our review of the full discussion of the e-mails indicates, again, that petitioners have exaggerated the significance of actual or purported events in an attempt to cast doubt on the underlying science and the processes relied upon to produce the science.

*F. Petitioners' Arguments Do Not Meet the Standard for Reconsideration*

As discussed above, petitioners must demonstrate that their objections are of central relevance to the outcome of the underlying decision, and must demonstrate either that it was impracticable to raise the objections during the public comment period or that the grounds for raising such objections arose after the close of the comment period (but within the time specified for judicial review). The above analysis shows that science-based and other objections discussed in this Section III and the accompanying support document are not of central relevance to the Administrator's decision on endangerment and thus reconsideration is properly denied.

An objection is of central relevance if it provides substantial support for the argument that the underlying decision should be revised. As shown above, none of the petitioners' arguments related to climate science and data issues, issues raised by EPA's use of IPCC AR4, and process issues provide substantial support for the argument that the Administrator's Endangerment Finding should be revised. The petitioners' arguments and evidence are inadequate, generally unscientific, and do not show that the underlying science supporting the Endangerment Finding is flawed, misinterpreted by EPA, or inappropriately applied by EPA. Importantly, petitioners' claims and the information they submit do not change or undermine our understanding of how human emissions of greenhouse gases cause climate change and how human-induced climate change generates risks and impacts to public health and welfare. The information provided by petitioners does not change any of the scientific conclusions that underlie the Administrator's Findings, nor do the petitions lower the degrees of

confidence associated with each of these major scientific conclusions.

A petition for reconsideration cannot merely cite to new information and claim that is sufficient to require initiating a reconsideration process, attendant with the same procedures as the original decision. Mere allegations that information is of central relevance will not suffice. New information, even new information related to an agency decision, does not by itself warrant undermining the finality of agency decision making. To justify reconsideration a petitioner must show why the new information demonstrates that the agency's decision should be changed.

Petitioners fail to do this. The core defect in petitioners' arguments is that these arguments are not based on consideration of the body of scientific evidence. Petitioners fail to address the breadth and depth of the scientific evidence and instead rely on an assumption of inaccuracy in the science that they extend even to the body of science that is not directly addressed by information they provide or by arguments they make. Petitioners routinely take private e-mail communications out of context and assert they are "smoking gun" evidence of wrongdoing and scientific manipulation of data. In contrast, EPA's careful examination of the e-mails and their full context shows that the petitioners' claims are exaggerated and are not a material or reliable basis to question the validity and credibility of the body of science underlying the Administrator's Endangerment Finding or the Administrator's decision process articulated in the Findings themselves. Petitioners' assumptions and subjective assertions regarding what the e-mails purport to show about the state of climate change science are woefully inadequate pieces of evidence to challenge the voluminous and well documented body of science that is the technical foundation of the Administrator's Endangerment Finding.

Petitioners' objections that a limited number of factual mistakes now identified in the IPCC AR4, as well as other claimed mistakes, call into question the climate science supporting the Administrator's Endangerment Finding, are similarly flawed. The two factual mistakes in IPCC AR4 confirmed by EPA's review are tangential and minor and do not change the key IPCC AR4 conclusions that are central to the Administrator's Endangerment Finding.

Finally, as shown above, regarding objections based on allegedly new scientific studies and data, EPA's review of these claims shows that in many cases the issues raised by the petitioners are not new, but were in fact considered prior to issuing the Endangerment Finding. In other cases, the petitioners have misinterpreted or misrepresented the meaning and significance of recent scientific literature, findings, and data. Finally, there are instances where the petitioners have failed to acknowledge other new studies in making their arguments. Thus, petitioners have failed to demonstrate that their objections related to climate science and data issues, issues raised by EPA's use of IPCC AR4, and process issues provide substantial support for the argument that the Administrator's decision on endangerment should be revised.

Moreover, regarding many of their objections, petitioners also fail to demonstrate that it was impracticable to raise the objections during the public comment period or that the grounds for raising such objections arose after the close of the comment period (but within the time specified for judicial review). In many but not all cases EPA has identified instances where petitioners fail to base an objection on such new information. Given the volume of individualized comments and objections, EPA is identifying some of the types of situations where the objection, or grounds for the objection, raised by a petitioner does not satisfy this requirement for reconsideration. Several types of objections are premised on studies and other information that were available before the close of the comment period. In some cases petitioners basically repeat or raise the same arguments that were raised and responded to in the rulemaking. In other cases, petitioners raise allegedly new grounds, such as CRU e-mails, that they claim should cause EPA to reconsider a prior comment, or that justifies petitioners' raising a new issue for the first time in the reconsideration petition. But as explained above and throughout this Denial and supporting documents, the allegedly new information is not of central relevance, and therefore, EPA essentially is left with arguments that either were made previously during the comment period, or could have been raised during the comment period. Thus, many of the petitioners' objections not only are not of central relevance, but they also fail to meet the temporal requirement for a petition for reconsideration.

## IV. Other Issues

In this section, EPA responds to various objections to the Endangerment Finding based on concerns raised with respect to the impact of stationary source permitting requirements, the relationship of the Findings to NHTSA's recent CAFE rule, the effects of the Findings and subsequent rulemakings on states and businesses, the need for a Formal Rulemaking Process, and EPA's justification for its exercise of discretion in making the Endangerment Finding.

### *A. The Tailoring Rule/Impacts of PSD and Title V Permitting Are Not of Central Relevance to the Findings*

Several petitioners raise objections based on EPA's proposed rule to tailor the Prevention of Significant Deterioration (PSD) and title V permit programs for greenhouse gases. Proposed Prevention of Significant Deterioration (PSD) and Title V Greenhouse Gas Tailoring Rule, 74 FR 55292 (Oct. 27, 2009) (Proposed Tailoring Rule).[46] Specifically, petitioners argue that EPA's statements in the Proposed Tailoring Rule demonstrate that the Findings are contrary to law and/or arbitrary and capricious. Because the Proposed Tailoring Rule was issued after the close of the comment period, but before the period for judicial review ran, petitioners argue that it presents reasons for EPA to reconsider the Findings in general.

Petitioners argue that the Proposed Tailoring Rule is of central relevance to the Findings because it involves the PSD and title V permitting requirements that flow as an inevitable result of the Findings, and the impacts of such permitting are relevant to the Findings. *e.g.,* SLF 5th Supp. at 15; Ohio Coal Assn. at 4. They point to the fact that the Tailoring Rule was proposed, and comments thereon were received, after the close of the comment period for the Findings, and request that EPA grant reconsideration and re-open the Findings docket "to allow the public to comment on the implications of the Tailoring Rule[sic] to the form and content of the Endangerment Finding," SLF 5th Supp. at 15, and to "further explore the extent to which implementation of the Endangerment Finding is practically impossible * * * since impossibility calls into question all justification for the Endangerment Finding." Ohio Coal Assn. at 4.

At least one petitioner points to the alleged implementation problems identified in the Proposed Tailoring Rule and comments received thereon as a basis for reconsidering the appropriateness of the Findings. Ohio Coal Assn. at 6–9. The petitioner argues

[46] The Final Prevention of Significant Deterioration (PSD) and Title V Greenhouse Gas Tailoring Rule was signed on May 13, 2010, and published June 3, 2010. 75 FR 31514 (June 3, 2010).

that despite statements in the final Findings that EPA did not consider, and indeed could not have considered, policy concerns about the repercussions of impact of the finding when making the endangerment finding, EPA did "give credence and expression" and "did in fact consider the widespread and economically crippling" PSD permitting implementation issues. Ohio Coal Supp. at 15, 18. Therefore, the petitioner continues, new information about EPA's ability to tailor the PSD program justifies granting reconsideration. Specifically, the petitioner cites to comments filed by state permitting authorities that they allege call into question the approach EPA proposed in the Tailoring Rule to address the negative impacts that EPA acknowledges "would inexorably flow from the Endangerment Finding—that is, triggering the PSD and Title V permitting requirements at the low applicability levels provided under the Clean Air Act." Ohio Coal Supp. at 16–18. They claim that statements made by state permitting agencies about the ability of the proposal to address state law concerns, and the remaining burden even at the higher thresholds all undermine EPA's claim that it can fashion a reasonable and common-sense solution to the perceived problem. Thus, petitioners conclude, the "most viable and sensible option" would be instead for EPA to withdraw the Findings until the impacts of the PSD and title V permitting programs can be fully assessed and resolved. Ohio Coal Assn. at 8; Ohio Coal Supp. at 22.

Another petitioner provides slightly different reasons for claiming the Proposed Tailoring Rule necessitates granting reconsideration and re-opening the Findings for comment.[47] This petitioner argues that the Proposed Tailoring Rule reflects an acknowledgement by EPA that regulating GHG under the CAA is absurd. Chamber at 3. The petitioner also argues that new information demonstrates that some of the public health and welfare effects from stationary source emission reductions that EPA expected when issuing the Findings will be legally unavailable. *Id.* at 9–10. The petitioner alleges that EPA recognized the "ill-fit" between pollutants like greenhouse gases, which become well-mixed in the atmosphere and cause global problems, and the existing structure of the CAA. The petitioner further claims that it was because of this ill-fit that EPA crafted the Tailoring Rule in order to avoid the absurd result of trying to regulate GHGs under part of the CAA. Petitioner's suggested solution is for EPA to reconsider the Findings in light of EPA's recognition that regulation of GHGs under the CAA is "absurd." In so doing, the petitioner reiterates comments it, and others, submitted during the public comment period arguing that EPA retains discretion under *Massachusetts* to consider, among other things, the impacts of an endangerment finding when deciding whether to issue an endangerment findings. Chamber at 10–12.

More specifically, the petitioners argue that the Supreme Court decision did not address the issue of whether GHGs could be regulated under the CAA consistent with Congress' intent and without triggering absurd results. Chamber at 11. Rather, they contend, the Supreme Court decision was about the narrow issue of whether GHGs were air pollutants under CAA section 202(a). Chamber at 11. Some petitioners argue that EPA should have informed the Supreme Court of the impact of a positive endangerment finding under CAA section 202(a) on stationary source permitting, and the fact that it may require EPA to resort to the absurdity doctrine; if EPA had, they continue, the Court may have issued a different opinion. CEI Supp. at 4–5. Another petitioner argues that the Supreme Court left open the option of EPA declining to make an endangerment finding, and that in making its decision EPA must adhere to the customary mode of statutory interpretation in *Chevron* v. *NRDC,* 467 U.S. 837 (1984), considering all relevant statutory language, legislative history and absurd results that may apply when regulating GHGs under the CAA. Chamber at 12.

Based on this alleged premise, the petition then turns to EPA's statements in the Proposed Tailoring Rule concerning the potential absurd results that could result from applying the statutory permitting thresholds of 100 and 250 tons per year (tpy) to GHGs, and the additional administrative impossibility that would result from applying these statutory thresholds immediately when GHGs are regulated under CAA section 202(a). Petitioner submits additional evidence it alleges demonstrates the absurdity of regulating GHGs from stationary sources: (1) The PSD program is designed to address pollutants with localized impacts in specific geographic areas (*e.g.,* the NAAQS), and not global pollutants like GHGs; (2) the statutory thresholds would require burdensome, expensive, individualized emissions controls at hundreds of thousands of small emissions sources, contrary to Congressional intent; and (3) the application of permitting to GHGs would jeopardize economic growth, which would be particularly absurd in the current economic situation. Chamber at 15–17.

Thus, according to this and other petitioners, EPA must reconsider the Findings in light of the absurd results that would result from GHGs being regulated pollutants under the PSD and title V permitting programs. See, *e.g.,* Chamber at 18; CEI Supp. at 5. Specifically, petitioners argue that the absurdity doctrine demands that EPA consider whether regulating GHGs under the CAA as a whole is absurd or not, but that EPA completely ignored this possibility when developing the Findings. Rather than relying on the absurd results doctrine to merely "tailor" the PSD and title V permitting programs, petitioners argue that EPA should rely on it to avoid creating the permitting program dilemma in the first place, or at the very least take comment on that option. Chamber at 18–19; CEI Supp. at 5. At least one petitioner contends that case law regarding the absurd results doctrine requires adopting the narrowest, most restrictive interpretation of the statute, and that there may be an interpretation that authorizes EPA to avoid making the endangerment finding in the first place, not one that merely addresses the PSD and title V statutory thresholds (*e.g.,* by interpreting "emissions" or "major emitting facility" narrowly). Chamber at 18–19. Petitioners argue that given EPA's failure to consider this alternative, coupled with the alleged acknowledgement that the CAA motor vehicle rules are not necessary to achieve public health and welfare advantages in light of the NHTSA CAFE rule (see below), EPA must reconsider the Findings. *See, e.g.,* Chamber at 23.

Finally, other petitioners argue that the Proposed Tailoring Rule itself is illegal, pointing to numerous industry comments filed on the proposal. They contend that since the Tailoring Rule is illegal, it is "a patently unconstitutional attempt by the Executive Branch to unilaterally amend a statute." SLF 5th Supp. at 16. In summary, they conclude that since EPA cannot regulate GHGs under the CAA without ignoring part of the statute, it cannot regulate GHGs in a manner consistent with the CAA and

[47] This petitioner also stated in its petition that if EPA had neither "granted the petition nor contacted the [petitioner] to establish a mutually agreeable schedule for reconsideration by April 14, 2010, such inaction will be deemed a denial of the petition." Chamber at 1. No EPA action, or inaction, other than this Decision and supporting material constitutes a denial of the petitions. *See, e.g.,* Final LDVR, 75 FR at 25402; EPA's Combined Opposition to Remand (filed April 29, 2010 in DC Cir. No. 09–1322).

any attempt to do so is beyond EPA's legal authority, arbitrary and capricious, and an abuse of discretion. *Id.* at 17–19. The petitioners also contend that EPA's Endangerment Finding is arbitrary and capricious and an abuse of discretion because, they allege, it is climatically pointless as well. They state that rather than undertake a course of illegal action, especially one that they allege does not have any detectable effect, EPA should start over and reconsider the Findings. *Id.*

EPA is denying the petitions for reconsideration that raise objections based on the Proposed Tailoring Rule because these objections are not of central relevance to the outcome of the final Findings and/or could have been raised during the public comment period.

These objections are not of central relevance to the Findings for three primary reasons discussed in more detail below. First, as EPA noted in the Findings, the impact of regulations that may flow from a positive endangerment finding, even if absurd, is not a relevant consideration to the science based question of whether air pollution may reasonably be anticipated to endangerment public health or welfare. *See,* 74 FR at 66501, 66515–16; RTC volume 11 at 4–5. Thus, EPA disagrees with a fundamental basis for petitioners' objections based on the Proposed Tailoring Rule—*i.e.,* that EPA could or must decline to issue an endangerment finding under CAA section 202(a), regardless of the scientific evidence relevant to determining endangerment, based on concerns with implementing stationary source permitting. Second, even if the absurd results doctrine could influence EPA's interpretation of CAA section 202(a) after the Supreme Court's decision in *Massachusetts,* EPA's approach to resolving the absurdity is reasonable because it focuses narrowly on that part of the CAA where the absurdity originates while giving effect to other statutory provisions, in order to balance the goal of improving public health and the environment with the goal of avoiding absurd results. Third, EPA disagrees with the petitioners who argue that because EPA is relying on the absurd results doctrine as a result of the Findings, the Findings themselves must therefore be illegal. Reliance on a doctrine of administrative law when interpreting a statute is not an indication of the illegality of agency action; indeed, it shows just the opposite. By applying, *inter alia,* the doctrines of absurd results and administrative necessity, EPA has been able to issue effective regulations addressing greenhouse gases while avoiding the absurd results that could arise from immediately applying the statutory thresholds for PSD and title V to greenhouse gases. Thus, petitioners' objections do not provide substantial support for the argument that the final Findings should be revised.

More specifically, EPA stated the following in the Findings in response to comments urging EPA to delay making an endangerment finding based on, among other things, concerns about the impact of the PSD program:

> "EPA agrees with the commenters who argue that the Supreme Court decision held that EPA is limited to consideration of science when undertaking an endangerment finding, and that EPA cannot delay issuing a finding due to policy concerns if the science is sufficiently certain (as it is here). The Supreme Court stated that "EPA can avoid taking further action only if it determines that greenhouse gases do not contribute to climate change or if it provides some reasonable explanation as to why it cannot or will not exercise its discretion to determine whether they do" 549 U.S. at 533. Some commenters point to this last provision, arguing that the policy reasons they provide are a "reasonable explanation" for not moving forward at this time. However, this ignores other language in the decision that clearly indicates that the Court interprets the statute to allow for the consideration only of science. For example, in rejecting the policy concerns expressed by EPA in its 2003 denial of the rulemaking petition, the Court noted that "it is evident [the policy considerations] have nothing to do with whether greenhouse gas emissions contribute to climate change. Still less do they amount to a reasoned justification for declining to form *a scientific judgment. Id.* at 533–34 (emphasis added).

Moreover, the Court also held that "[t]he statutory question is whether sufficient information exists to make an endangerment finding" *Id.* at 534. Taken as a whole, the Supreme Court's decision clearly indicates that policy reasons do not justify the Administrator avoiding taking further action on the question here" (74 FR 66501, December 15, 2009).

Furthermore, EPA noted the following when responding to comments arguing that EPA should consider the impact of regulating GHGs when determining whether they endanger public health and welfare:

> "At their core, these comments are not about whether commenters believe greenhouse gases may reasonably be anticipated to endanger public health or welfare, but rather about commenters' dissatisfaction with the decisions that Congress made regarding *the response* to any endangerment finding that EPA makes under CAA section 202(a). * * *
>
> What these comments object to is that Congress has already made some decisions about next steps after a finding of endangerment, and the commenters are displeased with the results. But if this is the case, commenters should take up their concerns with Congress, not EPA. EPA's charge is to issue new motor vehicle standards under CAA section 202(a) applicable to emissions of air pollutants that cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare. It is not to find that there is no endangerment in order to avoid issuing those standards, and dealing with any additional regulatory impact.
>
> Indeed, commenters' argument would insert policy considerations into the endangerment decision, an approach already rejected by the Supreme Court. First, as discussed in Section I.B of these Findings, in *Massachusetts* v. *EPA,* the court clearly indicated that the Administrator's decision must be a "scientific judgment." 549 U.S. at 534. She must base her decision about endangerment on the science, and not on policy considerations about the repercussions or impact of such a finding" 74 FR at 66515; December 15, 2009).

Thus, petitioners are wrong in their claim that either EPA statements in the Proposed Tailoring Rule, or comments received thereon, regarding potential implementation difficulties in the PSD or title V permitting programs are legally relevant at all, let alone of central relevance, to EPA's Endangerment Findings.[48] The agency's statements in the Findings that it "does not believe that the impact of regulation under the CAA as a whole * * * will lead to the panoply of adverse consequences that commenters predict," and that "EPA has and will continue to take a measured approach to address greenhouse gas emissions" do not mean that EPA gave "credence and expression to one key negative impact" as one petitioner alleges. Ohio Coal Supp. at 15. These statements, which immediately follow EPA's explanation of how the Administrator must look at the science and not policy consideration, are merely EPA's response to the dire predictions submitted by commenters. EPA did not and could not consider such impacts in making its science based judgment on endangerment.

EPA further disagrees with the arguments that it must grant

[48] We note that EPA has addressed the concerns about the approach set forth in the Proposed Tailoring Rule raised by state permitting authorities. In response to the very comments raised by petitioners here, as well as other comments, EPA revised its approach for implementing its tailoring rule approach to allow for faster state adoption of the solution. Final Prevention of Significant Deterioration (PSD) and Title V Greenhouse Gas Tailoring Rule 75 FR at 31518, 31579–84 (June 3, 2010) (Final Tailoring Rule). Moreover, EPA also finalized applicability thresholds that are higher than those proposed, and otherwise refined the phase-in of permitting for GHGs to better accommodate the workload. *Id.* at 31523–25.

reconsideration and reopen the Findings because since the close of the comment period EPA has recognized that the Findings would lead to the LDVR, which triggers the PSD and title V requirements, which in turn would give rise to "absurd results" in the permitting provisions applicable to some stationary sources. The fact that the impacts from PSD and title V permitting may be absurd does not mean that EPA can reinterpret section 202(a) to allow the consideration of those absurd results, and then find no endangerment or avoid making a determination on endangerment.

What petitioners fail to analyze is how, given the overwhelming science supporting the endangerment finding (see above), EPA could decline to issue the Findings because of policy/implementation concerns unrelated to the science and unrelated to the question of whether there is endangerment, and not violate the Supreme Court's decision in *Massachusetts* v. *EPA.* As discussed above, EPA disagrees with petitioners who argue that "*Massachusetts* requires EPA to carefully consider [the absurdity doctrine] implications for the Agency's overall statutory interpretation." Chamber at 13. The Supreme Court was clear that GHG fit within the definition of "air pollutant" under the CAA, and that when considering the question of endangerment the Administrator may consider only the science. EPA "must ground its reasons for action or inaction in the statute," and the statutory endangerment provision in section 202(a) required that EPA's "exercise of judgment must relate to whether an air pollutant 'cause[s], or contribute[s] to, endangerment." This was a "direction to exercise discretion within defined statutory limits," and the Court explicitly rejected EPA's authority to exercise its judgment for policy reasons not related to "compl[iance] with this clear statutory command." *Massachusetts* at 532–533. Petitioners would have us ignore the clear mandate of the Court's decision on the premise that if the case had been argued differently, the Court would have rendered a different opinion. EPA reasonably followed the instructions from the Supreme Court as provided in *Massachusetts.*

Even if EPA had the authority and could reconsider its statutory authority under CAA section 202(a) in light of the absurdity doctrine, rather than follow petitioners' implied approach, EPA would follow the approach set out in the Final Tailoring Rule—a narrow solution that focuses on that part of the CAA where the absurdity originates. EPA's approach balances the goal of improving public health and the environment by tackling air pollution problems with the goal of avoiding absurd results.[49] Petitioners would apply the absurd results doctrine too broadly, undertaking a sweeping approach that negates any and all regulation of GHGs under the CAA in order to avoid problems that have arisen in specific programs. EPA's targeted use of the absurd results doctrine in the Tailoring Rule is the better approach to reconciling all its obligations under the CAA. EPA has interpreted the statute as a whole, and interpreted it in a manner that does not allow difficulties in one program to nullify the various other Congressional provisions that may be relevant to climate change under the CAA.

Applying the Chevron two step test, EPA must, at Step 1, determine Congressional intent. *Chevron U.S.A.* v. *NRDC,* 467 U.S. 837 (1984). Under the absurd results doctrine "the literal meaning of statutory requirements should not be considered to indicate Congressional intent if that literal meaning would produce a result that is senseless or that is otherwise inconsistent with—and especially one that undermines—underlying congressional purpose." Final Tailoring Rule, 75 FR at 31517. Looking at section 202(a) of the CAA, congressional intent appears clear, under *Chevron* Step 1, that Congress intended the Administrator to regulate emissions of air pollutants from new motor vehicles if the Administrator found that such emissions cause or contribute to air pollution which endangered public health or welfare. The Supreme Court stated that "[i]f EPA makes a finding of endangerment, the Clean Air Act requires the agency to regulate emissions of the deleterious pollutant from new motor vehicles." *Massachusetts* at 533. Moreover, the Supreme Court has held that when making the endangerment finding the Administrator must look only at the science. There are no absurd results in the specific actions under section 202(a) of either issuing an endangerment finding itself or in issuing standards applicable to GHG emissions from new motor vehicles. The absurd results stem from the contents of other statutory provisions, the PSD and Title V provisions discussed in the Tailoring Rule, not section 202(a). Even for those provisions, in the Final Tailoring Rule EPA specifically determined that the PSD and title V provisions indicate a clear congressional intent to cover at least the largest sources of GHGs under these programs. *Id.* at 31517. Taking all of these facts together, EPA's approach to utilization of the absurdity doctrine gives the greatest effect to the various provisions of the CAA and the overall congressional intent under the CAA, by minimizing the scope of limitation on statutory provisions in the application of the absurd results doctrine.

As EPA discussed in the Tailoring Rule:

> "[i]n determining and implementing congressional intent, it is important that the statutory provisions at issue be considered together—(1) The obligation to make a determination on endangerment and contribution under CAA section 202(a); (2) if affirmative endangerment/cause or contribute findings are made, the obligation to promulgate standards applicable to the emissions of any such air pollutant from new motor vehicles or new motor vehicle engines under CAA section 202(a); and (3) the PSD and title V applicability provisions. The most appropriate reading, and certainly a reasonable reading, is that we are required to take the action we have taken, that is to issue the findings, promulgate the LDVR, and promulgate the Tailoring Rule. Our approach gives effect to as much of Congress's intent for each of these provisions, and the CAA as whole, as possible.
>
> With respect to the endangerment/cause or contribute findings under CAA section 202(a), congressional intent is clear that, as we stated in making the Findings and the Supreme Court held in *Massachusetts* v. *EPA,* we are precluded from considering factors other than the science based factors relevant to determining the health and welfare effects of the air pollution in question. Accordingly, as discussed above, EPA determined that the Agency was precluded from deferring or foregoing the findings due to concern over impacts on stationary sources affected by PSD or title V requirements. *See* 74 FR at 66496, 66500–01 ("Taken as a whole, the Supreme Court's decision clearly indicates that policy reasons do not justify the Administrator avoiding taking further action on the questions here."); see also *Massachusetts* v. *EPA,* 549 U.S. at 533; see also (74 FR 66515–16, December 9, 2009) (The Administrator "must base her decision about endangerment on the science,

[49] In response to objections which are based in part on allegations that EPA must reconsider its final decision because new evidence allegedly shows that the LDVR will not get meaningful reductions, EPA has already stated in the final Findings that it does not need to find that any attendant regulations flowing from an endangerment finding would "fruitfully attack" or prevent at least a substantial part of the danger in order to find endangerment. 74 FR at 66507–08.

Moreover, contrary to one petitioner's implied allegation, EPA did not consider the benefits resulting from stationary source emissions reductions when issuing the Findings, and the petitioner did not point to any evidence that EPA did base the Findings on such considerations. Finally, to the extent petitioners are arguing that EPA should reevaluate its approach to absurd results because there is little environment or public health benefit from the LDVR which followed the Findings, EPA disagrees. See Section IV.B responding to comments regarding NHTSA rules.

and not on the policy considerations about the repercussions or impact of such a finding."). Moreover, as EPA also noted, "EPA has the ability to fashion a reasonable and common-sense approach to address greenhouse gas emissions and climate change. 74 FR at 66516." (75 FR 31574, June 3, 2010)(footnote omitted).[50]

The petitioners merely continue to disagree with EPA's interpretation of the Supreme Court decision and question EPA's ability to address permitting concerns, rather than provide anything new in their petitions on this topic.

To the extent the petitioners are requesting that EPA reconsider and defer or forego issuance of the Findings to avoid causing an absurd result from implementation of the separate PSD and title V programs until such time as EPA could fully implement these programs without an absurd result, underlying this claim is the assumption that this approach would allow EPA to avoid the "absurd results" that are discussed in the Tailoring Rule, which states:

"* * * there is no basis at this point to determine that streamlining will ultimately allow full compliance with the PSD and title V requirements. Rather, it is possible that EPA may conclude that none of the available streamlining techniques will allow all GHG sources at the statutory thresholds to comply with PSD and title V requirements in a manner that does not impose undue costs on the sources or undue administrative burdens on the permitting authorities. Under these circumstances, EPA may then permanently exclude GHG source categories from PSD or title V applicability under the absurd results doctrine. Moreover, it may well take many years before EPA is in a position to come to a conclusion about the extent to which streamlining will be effective and therefore be able to come to a conclusion as to whether any source categories should be permanently excluded from PSD or title V applicability. In our rulemaking today, we describe what actions we expect to take in the first 6 years after PSD and title V are triggered for GHG sources, and we may well be in a situation in which we continue to evaluate streamlining measures and PSD and title V applicability to GHG sources after this 6-year period.

Accordingly, deferring the endangerment/cause or contribute findings and LDVR until such time that PSD and title V streamlining would allow full implementation of these programs at the statutory limits would serve only to delay the benefits of the LDVR, as well as the benefits that come from phasing in implementation of the PSD program to cover larger sources first. It would rely on an assumption that is unfounded at this point, that is, that such full compliance will be required at some point in the future. Delaying the emissions benefits of the LDVR and the related emissions benefits from partial implementation of the PSD program fails to implement Congress' intent that the endangerment/cause or contribute findings "shall" lead to emissions standards for new motor vehicles contributing to the endangerment, and related emissions controls for the same air pollutant under the PSD program. EPA need not determine at this time what approach would be appropriate if there was a determination that full compliance with PSD and title V would in fact occur at some point in the future. In this case, absent such a determination, it would be improper to rely on speculation of such a future possibility as a basis under section 202(a) to defer or forego issuance of the LDVR on the grounds that EPA should defer or forego the LDVR to avoid causing an absurd result. Likewise there is no basis to defer proceeding at this time with the streamlining of the PSD and title V programs.

With respect to the PSD and title V applicability requirements, as we discuss elsewhere, we believe that Congress expressed a clear intent to apply PSD and title V to GHG sources and that the phase-in approach incorporated in the Tailoring Rule is fully appropriate. Proceeding now with the endangerment/contribution findings and LDVR, even if phasing-in of the PSD and title V programs is required, is consistent with our interpretation of the PSD and title V applicability requirements. Delaying the endangerment/contribution findings or LDVR, and thereby delaying the triggering of PSD and title V requirements for GHG sources, would lead to the loss of a practicable opportunity to implement the PSD and title V requirements in important part, and thereby lead to the loss of important benefits. As discussed elsewhere, promulgating the LDVR and applying the PSD and title V requirements to the largest GHG sources, as we do in this Tailoring Rule, is practicable because the sources that would be affected by the initial implementation steps we promulgate in this rule are able to bear the costs and the permitting authorities are able to bear the associated administrative burdens. Promulgating the LDVR now provides important advantages because the sources that would be affected by the initial steps are responsible for most of the GHG emissions from stationary sources.

It should also be noted that as discussed elsewhere in this rulemaking, our ability to develop appropriate streamlining techniques for PSD and title V requirements is best done within the context of actual implementation of the permitting programs, and not in isolation of them. That is, because the great majority of GHG sources have not been subject to PSD and title V requirements, we will need to rely on the early experience in implementing the permitting requirements for the very large sources that initially will be subject to those requirements in order to develop streamlining techniques for smaller sources. It is the real world experience gained from this initial phase that will allow EPA to develop any further modifications that might be necessary. This would not and could not occur if the LDVR were delayed indefinitely or permanently, so that PSD and title V requirements were not triggered. It is unrealistic to expect that delaying action until a future tailoring rule could resolve all of the problems identified in this rulemaking, absent any real world implementation experience.

At its core, commenters' argument is that EPA should delay (if not forego altogether) doing anything to address GHG emissions and the problems they cause until it can do so in a way that does not cause any implementation challenges, even if that delay results in continued endangerment to public health and welfare. EPA does not take such a myopic view of its duties and responsibilities under the CAA. Congress wrote the CAA to, among other things, promote the public health and welfare and the productive capacity of the population. CAA § 101(b)(1). EPA's path forward does just this. Thus, proceeding with the endangerment/cause or contribute findings, the LDVR, and with PSD and title V through the phase-in approach of the Tailoring Rule maximizes the ability of EPA to achieve the Congressional goals underlying CAA sections 202(a) and the PSD and title V provisions, and the overarching CAA goal of protecting public health and welfare. Congress called for EPA (1) to determine whether emissions from new motor vehicles contribute to air pollution that endangers, (2) if that the determination is affirmative, to issue emissions standards for new motor vehicles to address the endangerment, and (3) to implement the PSD and Title V program to address similar emissions in their permitting program as another tool to address the air pollutant at issue. Delaying both the LDVR and PSD/title V implementation, as commenters have called for, would run directly counter to these Congressional expectations. Commenters' calls for deferral or foregoing of the findings or LDVR are generally phrased in a conclusory fashion, and do not demonstrate how EPA could take the required CAA actions concerning GHGs while remaining within the requirements of each of the various CAA provisions, and achieving the overall goals of the CAA. As such the comments do not provide a valid basis for the deferral of agency action they suggest." (75 FR 31575–56; June 3, 2010).

As explained above, EPA is resolving the absurdity caused by the statutory thresholds in the PSD and title V permitting programs not by avoiding an endangerment finding or avoiding all regulation under the CAA, but rather by interpreting the statute in a way that gives effect to the greatest extent possible to both section 202(a) and the applicable permitting provisions. This gives the greatest effect possible to the congressional intent about addressing air pollutant problems that endanger public health and welfare, while also focusing the permitting programs, at least initially, on large stationary sources. EPA's targeted use of the absurd results doctrine in the Tailoring Rule is a reasonable approach to reconcile the various statutory obligations under the CAA at issue here.

[50] This reasonable and common-sense approach includes the kind of step by step approach that includes regulation of GHG emissions from new motor vehicles, as described by Justice Stevens in *Massachusetts,* when discussing the issue of standing. Id. at 524.

EPA also disagrees with petitioners who argue either implicitly or explicitly that EPA has admitted, through its invocation of the absurd results doctrine in the Proposed Tailoring Rule, that it cannot regulate GHGs under the CAA without violating the statute. While, in the Tailoring Rule, EPA has noted that applying the statutory thresholds in the PSD and title V programs to greenhouse gases immediately for all sources would present problems, and may indeed lead to absurd results even in the long run, EPA did not and does not take the position that all regulation of GHGs under the CAA leads to absurd results or is illegal. In fact, just the opposite is true. EPA has issued reasonable, effective GHG emissions standards for light duty vehicles, and has announced plans for further GHG emissions standards for later model year light-duty vehicles. EPA also plans to propose the same for heavy-duty motor vehicles. Moreover, by applying, *inter alia,* the doctrines of absurd results and administrative necessity, EPA has been able to avoid the absurd results that could arise from applying the statutory thresholds for PSD and title V to greenhouse gases.[51] The concept behind the absurd results doctrine is that an agency can (if not must) ignore the literal meaning of a statute in order to effectuate congressional intent. That is exactly what EPA's approach does—ignore only the statutory thresholds for PSD and title V in order to effectuate congressional intent under the CAA as a whole. EPA's reliance on one or more doctrines of administrative law when interpreting the statute is not evidence of the illegality of EPA's actions; rather it is evidence of the reasonable approach EPA took to interpreting and implementing the statute.

Finally, EPA is also denying the petitions because, while the Tailoring Rule was proposed after the close of the comment period for the Findings, EPA discussed the impact of applying the PSD and title V statutory thresholds to GHGs, and the potential need to tailor those programs as appropriate, in the July 2008 ANPR. 73 FR 44354, 44497–514, 44503 ("we have identified two legal doctrines that may provide EPA with discretion to tailor the PSD program to GHGs: Absurd results and administrative necessity."), 44512 (discussing same legal theories in context of title V). Indeed, EPA received comments from some of the same entities that are petitioning for reconsideration now regarding the Agency's position about its ability to craft a reasonable approach to addressing GHGs under the CAA, including the CAA permitting programs. See, e.g., Comments submitted by Marlo Lewis for the Competitive Enterprise Institute (EPA–HQ–OAR–2009–0171–2898.1). Thus, while EPA itself may have elaborated regarding the potential for absurd results from GHG permitting at the statutory thresholds in the Proposed Tailoring Rule, the issue was not raised for the first time in the Tailoring Rule; it had already been raised in the ANPR, and there was nothing preventing petitioners from commenting on the issue in their comments on the proposed Findings (as indeed some did). Commenters on the proposed Findings also argued that the Supreme Court was unaware of the impacts of the permitting programs when deciding *Massachusetts.* RTC Volume 11 at 5. Thus, objections based on the need to apply the absurd results doctrine to the PSD and title V programs, and on arguments related to how EPA defended its actions in *Massachusetts,* could have been (and indeed were) raised during the comment period on the Findings and are not appropriately raised in petitions for reconsideration.

*B. NHTSA Rule*

The Chamber of Commerce raised objections based on the authority of the National Highway Traffic Safety Administration (NHTSA) to issue Corporate Average Fuel Economy (CAFE) standards for new motor vehicles. Specifically, the Chamber argued that the federal government must choose between two alternative regulatory approaches: Seeking to regulate GHG emissions using NHTSA's authority, under EPCA as revised by EISA or, alternatively, regulating such emissions on authority of Title II of the CAA. According to the Chamber, NHTSA has recently acknowledged it has adequate legal authority under EPCA and EISA to regulate greenhouse gas emissions, independent from EPA's authority under CAA section 202(a), therefore EPA must reconsider the Endangerment Finding because it cannot claim to generate the public health benefits from CAA mobile source GHG emissions reductions. The Chamber argues that according to EPA, the Endangerment Finding, standing alone, produces no current public health or welfare benefits but will instead produce such benefits in the future, but only if it effectively serves as a precondition for the regulation of GHG emissions from new motor vehicles or some other category of emission sources. Thus, the Chamber concludes, EPA has justified the Endangerment Finding as a means to the end of new motor vehicle regulation.

The Chamber claims that this core rationale for EPA's Endangerment Finding and regulatory program can no longer bear scrutiny. It argues that if EPA affirmatively wishes to pursue an Endangerment Finding to regulate emissions from new motor vehicles, it must explain what it can add to a NHTSA-only rulemaking. According to the Chamber, EPA may not rely on a presumed need for motor vehicle regulations that could be accomplished through NHTSA regulations alone. (Chamber, 19–23)

Petitioner claims that EPA issued and justified the Endangerment Finding based on the need for emissions reductions from EPA regulation of new motor vehicles, and the expectation that such EPA regulation would achieve the expected emissions reductions. That argument mischaracterizes EPA's position.

Consistent with the statutory language, legislative history and Supreme Court case law, EPA determined whether atmospheric concentrations of greenhouse gases are reasonably anticipated to endanger public health or welfare, and based that determination on the scientific and other evidence relevant to the issues of endangerment. As EPA made clear, CAA section 202(a) limited the issues EPA could consider in making a determination concerning endangerment, and they did not include consideration of the degree of reductions that would reasonably be achieved by regulations to control emissions from new motor vehicles. EPA clearly stated that:

"As the Supreme Court made clear in *Massachusetts* v. *EPA,* EPA's judgment in making the endangerment and contribution findings is constrained by the statute, and EPA is to decide these issues based solely on the scientific and other evidence relevant to that decision. EPA may not "rest[] on reasoning divorced from the statutory text," and instead EPA's exercise of judgment must relate to whether an air pollutant causes or contributes to air pollution that endangers. *Massachusetts* v. *EPA,* 549 U.S. at 532. As the Supreme Court noted, EPA must "exercise discretion within defined statutory limits." *Id.* at 533. EPA's belief one way or

[51] Contrary to one petitioner's argument, EPA did not craft the Tailoring Rule in response to the global nature of greenhouse gas concentrations and climate change. Rather, it is the much higher amounts at which greenhouse gases are emitted by stationary sources, compared to existing criteria and other regulated air pollutants, that necessitated EPA's reasonable approach to permitting. The absurdity that EPA was trying to avoid was permitting stationary sources much smaller than Congress intended when writing the permitting provisions of the CAA. The global nature of greenhouse gases and climate change was not the reason for the Tailoring Rule.

the other regarding whether regulation of greenhouse gases from new motor vehicles would be "effective" is irrelevant in making the endangerment and contribution decisions before EPA. *Id.* Instead "[t]he statutory question is whether sufficient information exists to make an endangerment finding" *Id.* at 534.

The effectiveness of a potential future control strategy is not relevant to deciding whether air pollution levels in the atmosphere endanger. It is also not relevant to deciding whether emissions of greenhouse gases from new motor vehicles contribute to such air pollution. Commenters argue that Congress implicitly imposed a third requirement, that the future control strategy have a certain degree of effectiveness in reducing the endangerment before EPA could make the affirmative findings that would authorize such regulation. There is no statutory text that supports such an interpretation, and the Supreme Court makes it clear that EPA has no discretion to read this kind of additional factor into CAA section 202(a)'s endangerment and contribution criteria. In fact, the Supreme Court rejected similar arguments that EPA had the discretion to consider various other factors besides endangerment and contribution in deciding whether to deny a petition. *Massachusetts* v. *EPA,* 549 U.S. at 532–35." (74 FR 66496, 66507–8; December 15, 2009).

This excerpt was in response to comments arguing that EPA should take into account the emissions impacts of EPA's then upcoming rule to control emissions of greenhouse gases from light-duty vehicles and trucks, and consider that the CAFE standards issued by NHTSA would effectively achieve the same reductions. *Id.* at 66501, 66507. Just as the effectiveness of future motor vehicle regulations was not relevant to determining endangerment, EPA made it clear that CAA section 202(a) did not allow EPA to consider issues such as future adaptation and mitigation, which reflected how society responded to the issue of endangerment, not whether endangerment existed. *Id.* at 66512–514.

Thus, it is clear that EPA did not justify or base its Endangerment Finding on either the need for emissions reductions from EPA regulations of new motor vehicles, or the expectation that such an EPA regulation would achieve emissions reductions. EPA rejected suggestions during the rulemaking that EPA refrain from issuing and Endangerment Finding because NHTSA has the authority to issue CAFE standards that also reduce greenhouse gases, as discussed above. The Chamber is raising basically the same issue raised in the rulemaking, and has presented no reason that would support any different response. EPA is rejecting Chamber's request for the same reasons it rejected these same kinds of requests in the rulemaking.

It is also clear that it was eminently practicable for the Chamber to raise this issue in the comment period. As described above, various commenters pointed to NHTSA's separate authority, and argued that NHTSA would effectively achieve the same reductions as EPA, undermining the basis for EPA's Endangerment Finding. *Id.* at 66507. Also see 66544, in the context of the Contribution Finding. The Chamber raises the same kind of objection here, and could have raised it during the comment period. While they point to a subsequent statement by NHTSA indicating that NHTSA's statutory authority is separate from EPA's, that is not new or different information concerning NHTSA's authority and does not change the nature of the Chamber's objection. Their failure to raise their objection in a timely manner is another reason to reject their request to reconsider on these grounds.

As part of their argument, the Chamber claims that EPA must explain what it can add to a NHTSA-only rulemaking. This is one part of the argument raised above, and is rejected for the same reasons. As with the arguments discussed above, the Chamber could have raised this argument during the comment period, and the failure to do so is another reason to reject their request to reconsider on these grounds.

In any case, EPA has explained in detail how the recently issued regulations under CAA section 202(a) to control emission of greenhouse gases from light-duty vehicles and trucks differ from NHTSA's CAFE program for the same vehicles, and why it was important for EPA to issue its rule. In the final rule issuing greenhouse gas emissions standards for new motor vehicles, EPA responded to comments that it should delay issuance of the motor vehicle standards until a later time, to avoid concerns over stationary source permitting impacts. EPA stated:

> "[The Supreme Court in *Massachusetts*] stated that under section 202(a), "[i]f EPA makes [the endangerment and cause or contribute findings], the Clean Air Act requires the agency to regulate emissions of the deleterious pollutant." 549 U.S. at 534. As discussed above, EPA has made the two findings on contribution and endangerment. 74 FR 66496 (December 15, 2009). Thus, EPA is required to issue standards applicable to emissions of this air pollutant from new motor vehicles.
>
> The Court properly noted that EPA retained "significant latitude" as to the "timing * * * and coordination of its regulations with those of other agencies" (id.). However it has now been nearly three years since the Court issued its opinion, and the time for delay has passed. In the absence of these final standards, there would be three separate Federal and State regimes independently regulating light-duty vehicles to increase fuel economy and reduce GHG emissions: NHTSA's CAFE standards, EPA's GHG standards, and the GHG standards applicable in California and other states adopting the California standards. This joint EPA–NHTSA program will allow automakers to meet all of these requirements with a single national fleet because California has indicated that it will accept compliance with EPA's GHG standards as compliance with California's GHG standards. 74 FR at 49460. California has not indicated that it would accept NHTSA's CAFE standards by themselves. Without EPA's vehicle GHG standards, the states will not offer the Federal program as an alternative compliance option to automakers and the benefits of a harmonized national program will be lost. California and several other states have expressed strong concern that, without comparable Federal vehicle GHG standards, the states will not offer the Federal program as an alternative compliance option to automakers. Letter dated February 23, 2010 from Commissioners of California, Maine, New Mexico, Oregon and Washington to Senators Harry Reid and Mitch McConnell (Docket EPA–HQ–OAR–2009–0472–11400). The automobile industry also strongly supports issuance of these rules to allow implementation of the national program and avoid "a myriad of problems for the auto industry in terms of product planning, vehicle distribution, adverse economic impacts and, most importantly, adverse consequences for their dealers and customers." Letter dated March 17, 2010 from Alliance of Automobile Manufacturers to Senators Harry Reid and Mitch McConnell, and Representatives Nancy Pelosi and John Boehner (Docket EPA–HQ–OAR–2009–0472–11368). Thus, without EPA's GHG standards as part of a Federal harmonized program, important GHG reductions as well as benefits to the automakers and to consumers would be lost. In addition, delaying the rule would impose significant burdens and uncertainty on automakers, who are already well into planning for production of MY 2012 vehicles, relying on the ability to produce a single national fleet. Delaying the issuance of this final rule would very seriously disrupt the industry's plans" (75 FR 25314, 25402; May 7, 2010).

EPA also noted that the greenhouse gas standards issued by EPA achieved greater overall reductions in greenhouse gases than NHTSA's CAFE standards. *Id* at n.165, 25402; also see 25397, 25549–50. Thus, EPA has explained in full the reasons for refusing to delay issuance of EPA's motor vehicle emissions standards, and what EPA's rule adds to NHTSA's CAFE rule. As noted above, these issues are not relevant to the issues EPA considers in making a determination on endangerment under CAA section 202(a).

*C. Other Issues*

1. Effects of the Findings and Subsequent Rulemakings on States and Businesses

Many of the petitioners provide detailed information regarding the impact that they allege would flow from the Findings; these discussions are in addition to arguments based on the Proposed Tailoring Rule (see Section IV.A of this Notice for the response to the arguments based on the Proposed Tailoring Rule). For example, the State of Texas, in addition to providing information regarding efforts the State has made to address GHGs, details harm it predicted could occur to the State through allegedly adverse impacts to its farming and ranching, mineral interest revenue stream, and oil and gas sector. Texas at 5–7, 32–34. The State also discusses what it describes as the "fallout" from the Findings. *Id.* at 34–38. More specifically, the State of Texas discusses resolutions and bills that have been introduced in the U.S. House of Representatives and the U.S. Senate, comments from the Small Business Administration's Office of Advocacy on the Proposed Tailoring Rule,[52] and various inquiries into, or statements about, the CRU e-mails and IPCC.

The State of Virginia, while not providing any additional information regarding the alleged impacts of the Findings, states that "EPA's remote finding of endangerment to health and welfare fail to consider and properly weigh the offsetting harms to health and welfare necessarily flowing from economically destructive regulation." Virginia at 3.

The petitioners' information regarding the impact to petitioners and others often follows sections of the petitions in which petitioners raise allegedly new concerns with the science underlying the Findings. The information regarding the impact from the Findings is most often provided in order to emphasize to EPA the necessity of reconsidering the Findings based on those earlier concerns.[53] *See, e.g.,* Texas at 35 ("In light of these * * * concerns * * * the Administrator's improper handling of the scientific assessment process takes on an even greater meaning."); Letter from WV Coal Assn. at 1 ("EPA's findings would have a grave impact on our industry and the thousands of West Virginians who depend on the production and use of our high quality coal everyday * * *. This makes it all the more important that EPA suspend its decision and reconsider it in light of these important new developments.").

The objections based either explicitly or implicitly on EPA's decision to not consider the impacts of greenhouse gas regulations when making the Findings could have been, and indeed were, raised during the public comment period on the Findings. Thus, they are not properly raised in CAA section 307(d) petition for reconsideration and are therefore denied.

Moreover, as discussed elsewhere in this Decision and supporting material, this information is essentially irrelevant to the scientific based questions before EPA when making the endangerment and contribution findings. EPA already explained in the Findings how the potential impacts from the regulations that may follow an endangerment finding are not proper considerations when determining whether GHGs may reasonably be anticipated to endanger public health or welfare. See generally, *74 FR at 66515–16;* see also *id. at 66515* (The Administrator "must base her decision about endangerment on the science, and not on policy considerations about the repercussions or impact of such a finding."); *id. at 66516* ("Therefore, it is reasonable to interpret the endangerment test as not requiring the consideration of the impacts of implementing the statute in the event of an endangerment finding as part of the endangerment finding itself.").

Finally, as detailed elsewhere in this Decision and RTP document, the CRU e-mails and other scientific information provided by the petitioners do not call into question the underlying science, EPA's reliance on it, or the Administrator's final determination.

2. A Formal Rulemaking Process Is Not Required

One petitioner discusses why EPA should not only reconsider the Findings, but also utilize the formal rulemaking process in the reconsideration proceedings. Peabody Energy at IX–9 to IX–18. Essentially, the petitioner believes that the questions raised by the CRU e-mails and errors in IPCC AR4 are so serious that EPA's responsibilities to address them can be discharged only through granting reconsideration, and undertaking a formal rulemaking process. More specifically, the petitioner states that "[a]n on-the-record proceeding is necessary to rectify the substantial flaws in the process that EPA has employed, flaws that stem from the abuses infecting the studies on which the Endangerment Finding is principally based." Peabody Energy at IX–9.

In support of its argument, petitioner first notes that while EPA may not be required by the CAA to undertake an on-the-record proceeding, nothing prohibits EPA from undertaking more process than is required by statute. *Id. at IX–9 to IX–10.* The petitioner then argues that case law and "other authoritative guidance," specifically guidance from the Administrative Conference of the United States (ACUS), "make clear than an evidentiary hearing" on the petitions for reconsideration is warranted. *Id.* at IX–10. The petitioner contends that a formal evidentiary hearing will fix EPA's record, which they claim is "wholly inadequate" and cannot justify finding endangerment to public health.[54] More specifically, they claim that a "responsive thrust and parry" about the science underlying the Administrator's decision, including "secondary sources" such as the IPCC, should occur and that the informal rulemaking proceeding EPA undertook does not allow for this. Peabody Energy at IX–16.

Comments suggesting that EPA undertake a formal rulemaking process, not only could have been raised, but were raised, during the comment period for the Findings. 74 FR at 66504–05, 66510–12. Thus, they are not appropriately raised in petitions for reconsideration. Please see the above portions of the Findings, RTC Volume 1, and Section III of this Decision for further discussion on why EPA's denial of the request for formal hearing in the Findings, and the agency's continued reliance on the assessment reports, is reasonable.

To the extent that the petitioners are re-raising these comments in light of the CRU e-mails and IPCC developments, and asking for EPA to reconsider its prior denial of the request for a formal rulemaking hearing, for the reasons explained elsewhere in this Decision and supporting materials, these materials do not necessitate EPA granting reconsideration, let alone initiating the exceedingly rare process of a formal, on-the-record rulemaking. When all is said and done, the CRU e-mails and IPCC errors do not call into question the science supporting the Administrator's decision. They surely do not rise to the level of "extremely

[52] The State of Texas stated that this letter was provided to the endangerment docket (EPA–HQ–OAR–2009–0171), but it was actually submitted to the docket for the Proposed Tailoring Rule (EPA–HQ–OAR–2009–0571).

[53] Petitioners also provide this information in the context of requesting an administrative stay of the Findings from EPA. See Section II for a discussion of EPA's denial of these stay requests.

[54] EPA responds to the argument regarding the public health finding in section IV.B.I of the Findings and Volume 5 of the RTC document.

compelling circumstances" that petitioner argues would justify a court dictating that EPA undertake formal rulemaking procedures. Peabody Energy at IX–10.

Petitioner argues that while EPA is not required by the CAA to follow a formal rulemaking process, EPA has the authority to convene such a hearing and nothing in the CAA should be read to "limit EPA's discretion in deciding whether to do so." Peabody Energy at IX–9. n. 494. The petition also notes that EPA is equipped to undertake such a hearing, citing the existing procedures for adjudications, 40 CFR 22.3(a). While EPA may have the discretion to provide more process than the minimum required by CAA section 307(d), EPA notes that the petition does not discuss how a formal on-the-record hearing process would fit within the informal rulemaking proceedings mandated by the CAA. *See* 74 FR at 66505 (noting that original request also did not discuss how a formal hearing would fit with CAA requirements). Nor does it discuss how the 40 CFR part 22 regulations, which are entitled "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and Revocation/Termination or Suspension of Permits" and cover administrative adjudicatory proceedings for specifically delineated civil penalty or permit actions, would authorize the type of hearing petitioner suggests, or even how they would work assuming EPA chose to apply them as suggested by petitioner.

The cases cited by petitioner stand for the unsurprising proposition that some circumstances justify more or different procedures than others. But they do not, as petitioner alleges, lead to the inevitable conclusion that the only reasonable recourse for EPA is to undertake a formal rulemaking process.[55] Indeed, that would be a departure "from the very basic tenet of administrative law that agencies should be free to fashion their own rules of procedure." *Vermont Yankee Nuclear Power Corp.* v. *NRDC,* 435 U.S. 519, 544 (1978). In *Vermont Yankee* the Supreme Court rejected an argument similar to that being made by petitioner here—that the issues before the agency were so complex and important that they necessitated more process, including cross-examination, even if such procedures were beyond the minimum required. *Id.* at 539–49. Also see *Kennecott,* 684 F.2d at 1020 fn 33.

To the extent that petitioner argues that EPA's record is inadequate if it does not include the "thrust and parry" of a formal rulemaking hearing, with cross examination, EPA disagrees. Congress clearly indicated that the robust informal rulemaking procedures of CAA section 307(d) are appropriate for the myriad complex issues that EPA must address when issuing particular CAA rules. Nothing that petitioners have provided call into question EPA's decision to follow the clear direction provided in section 307(d).

Indeed, the robust informal rulemaking requirements of section 307(d) of the CAA ensure adequate and appropriate notice and comment for CAA decisions. *See* generally 74 FR 66500–05 (discussing the public involvement in development of the Findings, including EPA's careful review and response to more than 380,000 public comments). Moreover, the section 307(d) reconsideration process provides ample opportunity for petitioners, and any other interested party, to submit to EPA for consideration new information which they believe is of central relevance to the Administrator's final decision, and hence necessitates reconsideration of that decision. Other than continuing to disagree with EPA's denial of the original request for a formal rulemaking, and continuing to state its opinion that the science and regulatory impact from an endangerment finding demands more process, petitioner has not demonstrated why the clearly applicable procedures of section 307(d) are inadequate, let alone why only the rarely-used formal rulemaking process is the only reasonable path forward. Petitioners have submitted over 500 pages of reconsideration petitions, as well as attachments consisting of hundreds of pages that contain information including dozens of studies, more than 300 pages of computer code, and more than 1000 e-mails. Peabody Energy and other petitioners have had a full opportunity, both in the underlying rulemaking and in the reconsideration process, to submit whatever information or evidence they want concerning the variety of scientific and other issues of concern to them, such as those identified at Peabody IX–12. EPA's lengthy and detailed Denial, including this document and the RTP document, carefully examines each objection raised and explains why each objection is untimely and/or not of central relevance. The CAA reconsideration process provides ample opportunity for interested parties to present new information to EPA, and for EPA to examine that information. Petitioner has not identified what cross examination it thinks is required to "ensure that results reached by EPA reflect scientific truths". For example, do they envision cross examination of all of the authors of the thousands of studies discussed in the rulemaking, or discussed in an assessment report? Cross examination of every author and other participant in an assessment report? Cross examination of agency scientists? And for all of these, on what subjects and issues? The administrative record includes the assessment reports and their integration of the science within areas of climate research and across various areas of climate research, as well as EPA's TSD and additional reports and studies provided by commenters. The proposed and final Findings also included the Administrator's judgments and conclusions on all of this evidence. Petitioners have failed to explain what facts they would like cross examination on, what witnesses they envision cross examining, and how any such examination would add in any way, much less a practical way, to the ability they already have, through submission of comments and petitions to reconsider, to attack and contest at length any and all of these parts of the informal rulemaking record. They have failed to demonstrate how their broad, general assertions of a better process would actually work as a practical way to better ensure the scientific integrity of the record before the Agency. It is quite reasonable for EPA to rely on the robust and in-depth informal rulemaking procedures followed in this rulemaking, as mandated by Congress, rather than embark on the rarely-used formal rulemaking pathway.

As discussed in the final Findings, the ACUS guidelines are non-binding recommendations regarding "important circumstances tending to suggest the desirability of such procedural devices". 1 U.S.C. 305.76–3(1). EPA notes that the ACUS recommendations cited by petitioner are not specifically for the formal rulemaking proceedings

[55] The extremely compelling circumstances found by courts in the cases cited by petitioners do not exist here. *See People of the State of Illinois* v. *United States,* 666 F.2d 1066, 1082–83 (7th Cir. 1981) (court relied upon a combination of unique factors including that the Interstate Commerce Commission had allowed cross-examination on some information in an adjudicatory proceeding, but not other similar information, and the cross-examination had been found to be "critical to achieving an accurate determination of the facts."); *National Wildlife Federation* v. *Marsh,* 721 F.2d 767, (11th Cir. 1983) (the court merely required the Army Corps of Engineers to follow its own longstanding internal procedures when issuing a permit). EPA also notes that two of the cases the petitioner cites for the proposition that "cross examination is the most effective way to ascertain the truth," Peabody at IX–15, are criminal cases, therefore it is not surprising that cross-examination was at issue. The third, discussed above, involved a decision in which the agency had already decided to allow cross-examination. *People,* 666 at 1083.

suggested by petitioner. Rather, they are more general, for "[h]earing argument and other oral presentation, when the presiding agency official or officials may ask questions, including questions submitted by interested persons." 1 U.S.C. 305.76–3(1)(f). The CAA requires a hearing and opportunity for oral presentation, CAA section 307(d)(5), and EPA held two hearings during which interested parties could present their arguments and information and EPA could ask questions. Thus, EPA has already undertaken procedures similar to those recommended by the ACUS.

Last, part of the recommendation of the ACUS not raised by petitioner is the following:

> An agency should employ any of the devices specified in paragraph 1 or permit cross-examination only to the extent that it believes that the anticipated costs (including those related to increasing the time involved and the deployment of additional agency resources) are offset by anticipated gains in the quality of the rule and the extent to which the rulemaking procedure will be perceived as having been fair.

1 U.S.C. 305.76–3(3).

For all the reasons stated above, in the final Findings, and elsewhere in this document and supporting material, EPA does not believe that the potential for gains in the quality of the Administrator's decision, if any, would offset the costs, both in terms of agency resources and delay. Moreover, the section 307(d) rulemaking process is quite fair, providing adequate opportunity for everyone, and not just parties who could afford to participate in a formal hearing, to present their views. Contrary to petitioner's argument, it resulted in a record that is both scientifically sound and adequate.

For all the foregoing reasons, the request to reconsider its prior decision and undertake a formal rulemaking, evidentiary hearing process, is denied.

3. Discretion in Making an Endangerment Finding

Peabody Energy argues that whatever discretion EPA may have in making an Endangerment Finding, it must justify and defend the specific findings of endangerment it actually made. More specifically, Peabody Energy argues that EPA did not assess the danger as low risk/high magnitude. It found instead both a high risk and high magnitude of harm, citing the following quotes from the Findings—"[t]he scientific evidence is compelling that elevated concentrations of heat-trapping greenhouse gases are the root cause of recently observed climate change" and "[m]ost of the observed increase in global average temperatures since the mid-20th century is very likely due to the observed increase in anthropogenic GHG concentrations," with "very likely" defined as 90–99% probability. Thus, they conclude, EPA must now defend its high risk/high harm conclusion, even if arguendo it had discretion to make a lower finding of endangerment.

Peabody Energy argues that this distinction between the Endangerment Finding that EPA might be authorized to make and the Endangerment Finding it actually made is crucial in light of the CRU material. Peabody contends that even if EPA might still be able to make an Endangerment Finding of some kind (a fact that Peabody does not concede), that would not justify the Endangerment Finding that EPA actually made and would not form a sufficient basis to allow EPA to deny the petitions for reconsideration. Peabody argues that the regulation that EPA ultimately proposes must be guided by the nature and extent of the endangerment that EPA has found, because a high risk/high magnitude endangerment finding might justify one level of regulation, while a different finding might justify a different level. Thus, Peabody Energy claims the question that EPA must answer at the endangerment phase is not just "endangerment, yes or no?," but specifically what type of endangerment. In that context, Peabody Energy argues that the revelations in the CRU material mean that EPA must reconsider its Endangerment Finding no matter what level of legal discretion the Agency has. Peabody Energy at IX–6 to 9.

Peabody Energy vastly oversimplifies the basis for EPA's Endangerment Finding, characterizing it as a simple "high risk/high magnitude" decision. With respect to existence of climate changes and attribution to anthropogenic emissions of greenhouse gases, the Administrator concluded that:

> the scientific evidence linking human emissions and resulting elevated atmospheric concentrations of the six well-mixed greenhouse gases to observed global and regional temperature increases and other climate changes to be sufficiently robust and compelling.

74 FR at 66523.

Based on this, the Administrator considered a wide variety of categories of public health and welfare that could be affected by the climate changes. The Administrator:

> considered the state of the science on how human emissions and the resulting elevated atmospheric concentrations of well mixed greenhouse gases may affect each of the major risk categories, i.e., those that are described in the TSD, which include human health, air quality, food production and agriculture, forestry, water resources, sea level rise and coastal areas, the energy sector, infrastructure and settlements, and ecosystems and wildlife. The Administrator understands that the nature and potential severity of impacts can vary across these different elements of public health and welfare, and that they can vary by region, as well as over time.

Id at 66509.

For each of these categories the Administrator took into account the varying degree of certainty of an impact as well as the potential magnitude of an impact. She considered both beneficial as well as adverse impacts. Id at 66524–537. There was no simple "high risk/high magnitude" paradigm. Instead, the Administrator was aware that:

> because human-induced climate change has the potential to be far reaching and multi-dimensional, not all risks and potential impacts can be characterized with a uniform level of quantification or understanding, nor can they be characterized with uniform metrics. Given this variety in not only the nature and potential magnitude of risks and impacts, but also in our ability to characterize, quantify and project into the future such impacts, the Administrator must use her judgment to weigh the threat in each of the risk categories, weigh the potential benefits where relevant, and ultimately judge whether these risks and benefits, when viewed in total, are judged to be endangerment to public health and/or welfare.

Id at 66523–24.

Instead of the simple approach described by Peabody Energy, the Administrator properly exercised her judgment by taking into consideration the complexity and breadth of the range of risks and harms presented by the evidence.

In this context, Peabody Energy and other petitioners focus their arguments and claims almost exclusively on the question of the existence of climate change and its attribution to anthropogenic emissions of greenhouse gases. After considering their claims, EPA is denying the petitions to reconsider for the reasons described above. They have not provided substantial support for the argument that the Endangerment Finding should be revised, and EPA continues to find that the "scientific evidence linking human emissions and resulting elevated atmospheric concentrations of the six well-mixed greenhouse gases to observed global and regional temperature increases and other climate changes to be sufficiently robust and compelling."

In sum, contrary to Peabody Energy's assertion EPA did not employ a simplified "high risk/high magnitude" paradigm in making the Endangerment Finding. Instead the Administrator

carefully and comprehensively considered the recognized broad range of varying risks and harms across multiple sectors of public health and welfare. In addition, EPA is not now changing its Endangerment Finding or using its discretion under section 202(a) to base it on a "lower finding of endangerment".

## V. Conclusion

For all of the reasons discussed above and in the accompanying RTP document, the petitions to reconsider the Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act are denied, as are the petitions for an administrative stay.

Dated: July 29, 2010.

**Lisa P. Jackson,**

*Administrator.*

[FR Doc. 2010–19153 Filed 8–12–10; 8:45 am]

**BILLING CODE 6560–50–P**

Federal Register

Friday,
August 13, 2010

# Part III

# Department of Labor

## Office of Workers' Compensation Programs

## 20 CFR Parts 1, 10, and 25

## Performance of Functions; Claims for Compensation Under the Federal Employees' Compensation Act; Compensation for Disability and Death of Noncitizen Federal Employees Outside the United States; Proposed Rule

**DEPARTMENT OF LABOR**

**Office of Workers' Compensation Programs**

**20 CFR Parts 1, 10, and 25**

**RIN 1240–AA03**

## Performance of Functions; Claims for Compensation Under the Federal Employees' Compensation Act; Compensation for Disability and Death of Noncitizen Federal Employees Outside the United States

**AGENCY:** Office of Workers' Compensation Programs, Department of Labor.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Department of Labor proposes to amend the regulations governing the administration of the Federal Employees' Compensation Act (FECA), which provides benefits to all civilian Federal employees and certain other groups of employees and individuals who are injured or killed while performing their jobs. The Department of Labor also proposes to revise the regulations establishing the authority of the Office of Workers' Compensation Programs (OWCP) which administers the FECA.

The existing rules have been amended to acknowledge a change in the organization of the OWCP and amendments to the FECA which have occurred since the last time the regulations were amended in 1999. These changes also update the regulations by taking into account changes in technology and other changes to improve administrative efficiency. As many FECA claimants are not represented, the regulations are revised to insert FECA statutory references as a frame of reference for clarity and ease of use. The regulations include adding the skin as an organ pursuant to 5 U.S.C. 8107(c)(22). The regulations also create a new special schedule covering injuries to non-citizen non-resident Federal employees outside the United States. Finally, the regulations covering the processing of medical bills have been updated to provide for greater use of technology in that process to reduce costs and to clarify requirements for such submissions.

**DATES:** Written comments must be submitted on or before October 12, 2010.

**ADDRESSES:** You may submit comments on the proposed rule, identified by Regulatory Information Number (RIN) 1240–AA03, by one of the following methods:

- *Federal e-Rulemaking Portal:* The Internet address to submit comments on the rule is *http://www.regulations.gov.* Follow the Web site instructions for submitting comments.
- *Mail:* Submit written comments to Shelby Hallmark, Director, Office of Workers' Compensation Programs, U.S. Department of Labor, Room S–3524, 200 Constitution Avenue, NW., Washington, DC 20210. Because of security measures, mail directed to Washington, DC is sometimes delayed. We will only consider comments postmarked by the U.S. Postal Service or other delivery service on or before the deadline for comments.

*Instructions:* All comments must include the RIN 1240–AA03 for this rulemaking. Receipt of any comments, whether by mail or Internet, will not be acknowledged. Because DOL continues to experience delays in receiving postal mail in the Washington, DC area, commenters are encouraged to submit any comments by mail early.

Comments on the proposed rule will be available for public inspection during normal business hours at the address listed above for mailed comments. Persons who need assistance to review the comments will be provided with appropriate aids such as readers or print magnifiers. Copies of this proposed rule may be obtained in alternative formats (*e.g.,* large print, audiotape or disk) upon request. To schedule an appointment to review the comments and/or to obtain the proposed rule in an alternative format, contact OWCP at 202–693–0031 (this is not a toll-free number).

Written comments on the information collection requirements described in this proposed rule should be sent to the Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: Desk Officer for Office of Workers' Compensation Programs, Washington, DC 20503.

**FOR FURTHER INFORMATION CONTACT:** Shelby Hallmark, Director, Office of Workers' Compensation Programs, U.S. Department of Labor, Room S–3524, 200 Constitution Avenue, NW., Washington, DC 20210, Telephone: 202–693–0031 (this is not a toll-free number).

Individuals with hearing or speech impairments may access this telephone number via TTY by calling the toll-free Federal Information Relay Service at 1–800–877–8339.

**SUPPLEMENTARY INFORMATION:**

### I. Background

The FECA provides compensation for wage loss, medical care, and vocational rehabilitation to Federal employees and certain other individuals who are injured in the performance of their duties, or who develop illnesses as a result of factors of their Federal employment. It also provides monetary benefits to the survivors of employees who are killed in the performance of duty or die as the result of factors of their Federal employment.

### II. Overview of the Regulations

The program's regulations were last substantially revised in 1999. Since then, the organization and authority of OWCP has changed. Furthermore, new provisions have been added to the statute, and experience has shown that certain parts of the regulations need clarification or revision to promote fairness and efficiency in the claims process. In addition, technological advances that may help preserve administrative resources and improve efficiency in the claims process have been made since the last update of the regulations. Accordingly, OWCP has determined that the regulations governing the administration of claims under FECA require updating.

As many sections of the regulations are based on longstanding interpretations and program practice and do not require revision, this is not a wholesale revision of the existing regulations. However, consistent with past practice on FECA regulatory revisions, the entire regulation is being republished for ease of use. A detailed listing of the regulations changed and a description of those changes follows.

*20 CFR Part 1*

This part has been amended to reflect the change in organization at the Department of Labor that occurred on November 8, 2009, when the Employment Standards Administration (ESA) was dissolved and the authority that the Secretary of Labor had previously delegated under the FECA to ESA was delegated by the Secretary to the Director, OWCP.

*20 CFR Part 10*

Subpart A—General Provisions

This subpart is substantially the same as current subpart A (§§ 10.0 through 10.18). The majority of the changes to this subpart involve updating the regulations as a result of the addition of the new death gratuity benefit which was added to the FECA by 5 U.S.C. 8102a and by adding clarification language in a number of sections, as described below.

Definitions and Forms

Section 10.1 has been modified by deleting the references to the Assistant Secretary for Employment Standards, as that position no longer exists.

Section 10.2 now includes the new subpart J of this part which administers the new death gratuity benefit that was added to the FECA in 2008 by 5 U.S.C. 8102a.

Section 10.3 has been revised to update the list of OMB control numbers to include the new death gratuity forms and the subrogation forms.

Section 10.5 has been revised to restore statutory definitions and citations, as experience has shown that the absence of these citations caused confusion regarding what definitions were applicable and to clarify the definition of a recurrence of disability in paragraph (x).

Section 10.6 now includes a reference to the special definitions for survivorship and dependency that apply only to the new death gratuity benefit to promote clarity.

Section 10.7 has been updated to list all new forms described above and to eliminate forms that are no longer in use.

Information in Program Records

Section 10.10 has been amended to state that information may be released under the Privacy Act through the routine uses that apply to the records if such release is consistent with the purpose for which the records were created. This change has been made to clarify that there are certain situations where release of claim files is not appropriate under the Privacy Act.

Rights and Penalties

These sections have been updated to reflect current provisions that impose civil penalties on false claims under the FECA and to affirmatively require submission of documentation where appropriate.

Section 10.16 has been revised to note that a civil action may be maintained under the False Claims Act to recover erroneous payments under the FECA.

Section 10.17 has been revised to clarify when benefits are terminated for defrauding the Federal Government to eliminate confusion concerning what day should be used when a guilty plea has been entered. The addition specifies what date to use in such a situation. This section has also been revised to provide an affirmative duty for the employing agency (which may be fulfilled by the employing agency's Office of Inspector General (OIG) in a case where the agency OIG is actively involved) to submit this information to OWCP.

Section 10.18 has been revised to provide an affirmative duty for a beneficiary to report to OWCP any incarceration based on a felony conviction that would result in forfeiture of that beneficiary's right to compensation during incarceration.

Subpart B—Filing Notices and Claims; Submitting Evidence

This subpart is substantially the same as the current subpart B (§§ 10.100 through 10.127). Most changes involve the electronic submission of forms, a method of submission that was not feasible when the regulations were last changed. Other changes include the administration of the change to the waiting period for employees of the United States Postal Service necessitated by a statutory amendment in 5 U.S.C. 8117.

Notices and Claims for Injury, Disease, and Death—Employee or Survivor's Actions

Sections 10.100, 10.101, 10.102, 10.103 and 10.105 all have been revised by an identical provision that allows for electronic submission of notices and claims forms. This change includes a provision that all agencies should create a method to submit such forms electronically by December 31, 2012, by which time OWCP will have implemented a method to enhance the agencies' ability to file forms electronically. Electronic filing will speed OWCP's processing of claim forms.

Section 10.102 was also revised to clarify the language specifying that CA–7 should be used to claim compensation for additional periods of disability.

Section 10.103 has been revised to provide authority to create a separate form for schedule award claims under 5 U.S.C. 8107.

Section 10.104 was revised to make clear what constitutes a recurrence of disability and to explain the basis for a modification of a loss of wage-earning capacity determination. The addition of paragraph (c) to this section clarifies the distinction by incorporating longstanding case law from the Employees' Compensation Appeals Board.

Notices and Claims for Injury, Disease, and Death—Employer's Actions

Section 10.111 has been amended to reflect the change in law regarding waiting periods and Postal Service employees incorporated in the amendment to 5 U.S.C. 8117.

Evidence and Burden of Proof

Section 10.115 has been revised to clearly state that the burden of proof remains with the claimant even when OWCP requests additional information, as provided by ECAB case law.

Section 10.116 has been amended to reflect current OWCP practice, in that OWCP does not require the submission of the checklist in all situations.

Decisions on Entitlement to Benefits

Section 10.127 has been amended to remove the language stating that service of a decision on either the claimant or the representative would count as service to both, as this no longer reflects current practice of the OWCP. OWCP serves decisions on entitlement on both the claimant and the representative.

Subpart C—Continuation of Pay

Subpart C (§§ 10.200 through 10.224) continues unchanged from the previous regulations, except for a change to § 10.200. The change to this section reflects the change to continuation of pay to Postal Service employees as a result of the statutory change to 5 U.S.C. 8117 which provides that Postal Service employees are not entitled to continuation of pay for the first 3 days of temporary disability unless that disability exceeds 14 days or is followed by permanent disability.

Subpart D—Medical and Related Benefits

Subpart D (§§ 10.300 through 10.337) is mostly unchanged. Most of the changes involve technological advances since the last update of the regulations; these advances caused procedures to be changed. Other changes clarify the prior regulations or codify current practice. Additionally, OWCP seeks to codify authority to make changes to the manner in which durable medical equipment and other non-physician services are provided.

Emergency Medical Care

Section 10.300 has been amended to clarify that the Form CA–16, which provides authorization for initial medical treatment, authorizes treatment from the date of injury, not the date the form is signed. This change corrects situations where this form has not been signed immediately—this posed difficulties for employees obtaining treatment at the time of injury.

Medical Treatment and Related Issues

Section 10.310 has been amended in a number of places. First, this section was amended to cross-reference the sections of this part that provide for medical billing and authorization. This

section has also been modified to codify OWCP's authority to utilize field nurses in facilitating and coordinating medical care. Furthermore, this section has been modified to codify OWCP's authority to contract with specific providers to provide services and appliances; OWCP has determined that providing such services in this method may aid in delivering such benefits as well as controlling medical costs. This section has also been amended to clearly state that certain non-physician providers provide authorized services to injured employees, to the extent allowed under Federal and state law including licensure by any appropriate regulating body for that profession. This change was made to clarify that OWCP pays for such services.

Section 10.310 has also been amended to add a new paragraph (c) that covers durable medical equipment. This paragraph provides first that any provider of such equipment must be registered in Medicare's Durable Medical Equipment, Prosthetics, Orthotics and Supplies Competitive Bidding Process. This requirement provides OWCP a measure of reliability (including financial security) in such providers, while helping OWCP avoid using scarce program resources to police all such providers. Furthermore, this paragraph allows OWCP, when purchasing such equipment, to offset the costs of prior rental payments against a future purchase and provide refurbished equipment when appropriate. Both of these additions were done to help control the cost of providing this equipment.

Section 10.311(d) has been amended to clarify that, for a chiropractor's service to be under the direction of a qualified physician, that physician must prescribe those services.

Section 10.314 relating to attendant services has been substantially shortened from the prior regulation. As the number of attendant services provided in cases prior to January 4, 1999 has decreased and since the current policy has been successfully in place for over a decade, the extended discussion is no longer necessary.

Section 10.315 has been substantially modified, increasing the reasonable distance of travel up to a roundtrip distance of 100 miles. OWCP encountered situations where employees no longer had doctors within the old distance of 25 miles and determined that such an increase is needed. This section has also been amended to explain procedures regarding types and manner of transport allowed.

Directed Medical Examinations

Section 10.320 has been amended to add language allowing another person to be present at an OWCP directed examination where there is rationalized medical evidence demonstrating that such a person is needed in addition to situations such as where a translator or sign language interpreter is needed to aid communication. This change is in response to a number of claims where such a person may be needed. This language sets forth one method to meet the "exceptional circumstances" test for allowing an additional person in the examination where medically indicated.

Section 10.321 has been updated to add the word "impartial" to the referee medical review to conform with terminology normally used by OWCP and ECAB.

Section 10.323 has been amended by expressly noting that examinations required by OWCP includes testing such as functional capacity evaluations and by adding a new paragraph (b) which details the process of how OWCP suspends compensation for obstructing a medical examination, as well as to explain how the employee can end that obstruction. This paragraph was added to provide additional guidance to claimants and to consolidate all such information in one location.

Medical Reports

Section 10.333 has been amended to provide a cross reference to the information necessary to support an award for loss to a scheduled member and to include additional language used in the *AMA Guides.*

Medical Bills

Section 10.335 has been amended to bring this section in line with current OWCP procedures, and to provide notice that OWCP may contract with a third party for bill payment processing.

Section 10.337 has been amended to update the cross-references contained in that section.

Subpart E—Compensation and Related Benefits

Subpart E (§§ 10.400 through 10.441) also is largely unchanged. Of the changes made to this subpart, most are to clarify the prior regulation by codifying ECAB case law or promoting administrative efficiency by changing practices that experience has shown waste program resources. A few additions have been made, including the addition of the skin as a scheduled member and including language regarding electronic payments and their effect on overpayments.

Section 10.400 has been amended to include the statutory citation for when permanent total disability is presumed to clarify the origin of that definition.

Section 10.401 has been amended to reflect the change in when the waiting period begins for Postal Service employees after the amendment to 5 U.S.C 8117 as described above.

Section 10.403 has been amended to restore the factors used in determining wage-earning capacity where actual earnings do not fairly and reasonably represent that capacity as described in 5 U.S.C. 8115 to facilitate ease of use of that section.

Section 10.404, which describes how compensation is paid for loss to scheduled members under 5 U.S.C. 8107, has been revised to include the statutory scheduled members as well as those that have been added by regulation. Furthermore, Section 10.404 has been amended to include the skin as a schedule member, for up to 205 weeks of compensation, for injuries sustained on or after September 11, 2001. In determining compensation payable for the skin, OWCP considered a number of factors, including relative percentage impairments of the other scheduled members under the *AMA Guides,* as well as the length of compensation that had been previously given for members added by regulation. After considering these factors, OWCP determined that the skin should be given the maximum amount of compensation that had been previously given when adding new members. As to the date of applicability of this section, OWCP determined that use of September 11, 2001 would allow individuals who had sustained severe burns or other skin conditions on or after September 11, 2001 to file schedule award claims. OWCP further determined that use of an earlier date would create problems of proof and eligibility under § 10.413 of this section.

Compensation for Death

Section 10.410 has been amended to clarify that survivor's benefits under 5 U.S.C. 8133 are separate and distinct from the death gratuity benefits under 5 U.S.C. 8102a.

Section 10.412 has been amended to include statutory citations to the amounts provided for burial and related expenses.

Section 10.413 has been amended to codify in the regulations the requirement of 5 U.S.C. 8109 and ECAB case law which states a claim for a schedule award must be filed while the claimant is still alive in order for the claim to be paid.

Section 10.415 has been amended to modernize the regulation to provide additional detail on handling the increasing number of governmental payments made by electronic fund transfer (EFT).

Section 10.417 has been revised to streamline the process by which employees establish the dependency for adult children who are incapable of self-support. In this section, OWCP has reduced the reporting requirements in those instances to once each year, while placing an affirmative duty on the employee to report any change in the conditions to OWCP. This change will promote efficiency for OWCP when, in a number of instances, the circumstance of such dependency will not change more than annually. Furthermore, this section was amended to add a new section allowing an employee to establish the permanency of an adult child's mental or physical disability; such a change will save OWCP administrative resources while eliminating an employee's burden to continuously submit reports for an adult child with permanent mental or physical disabilities.

Adjustments to Compensation

Section 10.421 has been amended to reflect the change in language to 5 U.S.C. 8116 made after the repeal of 5 U.S.C. 5532.

Section 10.422 has been amended to note that the availability of lump sum payments for non-citizen non-resident employees will be addressed in Part 25 of this title.

Section 10.423 has been amended to delete the discussion that suggests claims for compensation are subject to garnishment from claims from other Federal agencies. The authority for this language is unclear and has not been used.

Section 10.425 has been amended to clarify that leave donated to an employee through an employing agency's leave program is not leave that may be restored through the leave buy back process.

Overpayments

Since the last time the regulations were updated, most recipients of FECA benefits have been moved to electronic payment (EFT). This has created questions as to when an employee has knowledge of receipt of their FECA benefits. Accordingly, § 10.430 has been amended to reflect a growing concern regarding when a claimant receives, or has knowledge of, an electronic payment. This section has been amended to add the normal business transaction definition of such receipt, where a payee is presumed to have knowledge of any payment once the payee has had the opportunity to receive a bank statement from the payee's financial institution.

Section 10.433 was likewise amended to reflect that an employee is required to review such bank statements in order to ensure proper receipt of FECA benefits.

Section 10.440 was amended to include District Court and ECAB case law which allow OWCP to pursue collection of a debt while any such determination is pending before ECAB.

Section 10.441 was amended to describe the process used by OWCP to collect overpayment debts following the death of an employee.

Subpart F—Continuing Benefits

Subpart F (§§ 10.500 through 10.541) is largely unchanged. Most changes clarify the prior regulations by further describing the procedures and policies of OWCP and by including ECAB case law explaining those prior regulations.

Section 10.500 was amended to clarify the difference between light duty work and a suitable work determination and to restore statutory citations to the regulations.

Section 10.501 was amended to include a new subparagraph (2), which allows OWCP to require less medical documentation for continuing benefits where circumstances merit such reduced documentation, reducing the burden on those employees and the OWCP in administering their claims.

Section 10.502 was revised to update the language used to describe the impartial referee examination to bring the terminology in line with OWCP and ECAB usage.

Return to Work—Employer's Responsibilities

Section 10.509 was also modified by splitting that section into two sections, §§ 10.509 and 10.510. Section 10.509 now covers only situations involving the effect of downsizing of a light duty position on compensation. New § 10.510 describes when a light duty job may be used as a basis for a loss of wage-earning capacity determination.

Section 10.511 is a new section that codifies longstanding ECAB case law which delineates the only circumstances under which a loss of wage-earning capacity determination may be modified.

Return to Work—Employee's Responsibilities

Section 10.517 has been modified to make clear that, when an employee refuses to seek or accept suitable work, the resulting termination of compensation applies to any prior injuries in which compensation may be payable as well as the claim under which compensation has ended. Consistent with longstanding program practice, medical benefits remain payable in all cases following such termination.

Sections 10.518 and 10.519 have been modified to delete references to registered nurses under the vocational rehabilitation of employees, as ECAB ruled that the sanctions for failing to cooperate with vocational rehabilitation do not apply to nurse services.

New § 10.521 has been added to explain the process followed by OWCP when an employee that is involved in the vocational rehabilitation process or other return to work effort elects to receive benefits from the Office of Personnel Management instead of FECA benefits, and is no longer participating in the vocational rehabilitation process. In such instances, OWCP may use the evidence of file to perform a loss of wage-earning capacity determination.

Reports of Earnings From Employment and Self-Employment

Section 10.525 has been amended to clarify that an employee must report all employment activities, including all outside employment, as such employment is material to a disability determination. This is so even where such earnings from concurrent dissimilar employment held at the time of injury do not reduce compensation payable but may still assist OWCP in assessing disability for work.

Section 10.526 has been amended to clarify that, in reporting volunteer activities, the fact that the employee received no monetary compensation for those activities is not a basis for not reporting those activities to OWCP under ECAB case law.

Reports of Dependents

Section 10.537 was amended to reflect the change in reporting for non-minor children to once a year as described above in the discussion regarding § 10.417.

Reduction and Termination of Compensation

Section 10.540 has been reorganized by splitting paragraph (a) into new paragraphs (a) and (b), to promote clarity and ease of use of the section.

Subpart G—Appeals Process

Subpart G (§§ 10.600 through 10.626) also continues largely unchanged; the changes that have been made were made to promote clarity and update the

regulations to reflect changes in practice and technology that have taken place since the regulations were last updated.

Reconsiderations and Reviews by the Director

Section 10.606 has been modified to add language requiring that reconsideration requests be signed and dated. This change has been made to clarify when such requests have been made and to allow OWCP to ascertain that the person (such as a representative) requesting reconsideration is authorized to do so at the time such request is made.

Section 10.607 has been modified by changing the date of the reconsideration request for timeliness purposes from the date mailed to the date received by OWCP. This change has been made to promote efficiency in administering these requests; current electronic case files and associated scanning procedures and resources would be unnecessarily strained by the requirement to scan in every envelope from every letter sent to OWCP. Accordingly, the prior regulation which referenced the date of mailing on the envelope led to some uncertainty regarding when a request was filed. Rather than reduce the amount of time given to file the reconsideration request, OWCP has chosen simply to require that the request must have been received by OWCP within the one year period, a period which provides more than ample time to obtain the necessary evidence or make the legal arguments in support of a reconsideration request.

Section 10.609 has been modified to note that OWCP will not wait for comments from an employing agency regarding a request for reconsideration when comments from the agency are not germane to the issue being resolved on reconsideration.

Hearings

The sections governing hearings before the OWCP's Branch of Hearings and Review (BHR) have been modified to reference that procedures are available for reasonable accommodation in the hearing process. The sections include procedures for BHR to conduct hearings by teleconference and videoconference. Such methods although permissible under the regulations were not in active use at the time of the last regulation update. These sections have also been modified to clarify certain policies related to such processes and to provide discretion to utilize other technology to conduct hearings as it may become available. OWCP has found that use of teleconferences and videoconferences allows hearings to be held more quickly.

Section 10.616 has been modified to accommodate the alternative types of hearings as described above.

Section 10.617 has been amended to cover a number of policies that were previously not contained in the regulation. First, this section has been amended to note how an employee may request accommodations from BHR. This section has also been amended to note that hearings are generally limited to one hour, and to note that the transcript is the official record of the hearing. This section has also been modified to clarify the time limits for submitting comments following a hearing. Finally, a new paragraph (h) has been inserted as a reference to a statutory section that allows an OWCP hearing representative to certify any misconduct to a District Court for appropriate handling.

Section 10.618 has been amended to clarify that when an employee requests that a hearing be changed to a review of the written record, all evidence should be submitted with that request.

Section 10.619 has been amended to clarify that, if a request for a subpoena has been made, the requestor must explain why that subpoena is necessary at the time the request is made.

Section 10.621 has been amended to clarify that it is in the discretion of the hearing representative whether the employing agency may be allowed to have more than one representative attend the hearing.

Section 10.622 has been amended to accommodate the alternative forms of hearings discussed above and to explain how these types of hearings are handled with a monthly docket. Furthermore, this section has been amended to add new paragraph (d) which restores prior regulatory language addressing abandonment of hearings, as experience since that language was removed has shown that this section is necessary.

Review by the Employees' Compensation Appeals Board (ECAB)

Section 10.626 has been amended to cross reference ECAB's rules of procedure to promote ease of use of these regulations.

Subpart H—Special Provisions

While a majority of the provisions in subpart H (§§ 10.700 through 10.741) remain unchanged, some extensive changes have been made to certain portions of this subpart. This subpart has been changed to reference that an attorney associated with a law firm may represent claimants and to explicitly state that OWCP will communicate with the law firm. The regulation clarifies OWCP policy that contingency fees are not allowed under any circumstances. The FECA subrogation sections have been expanded to codify current practice; to promote transparency and clarity where a third party is responsible for an injury or death; and to better explain how subsequent FECA subrogation claims are handled. Finally, the provision relating to coverage of Peace Corps volunteers has been amended to restore statutory language concerning such coverage.

Representation

Section 10.700 has been amended to clarify that where a claimant's representative is an attorney, OWCP may communicate with any attorney or employee in the attorney's law firm. This change has been made to comport with the normal practice of law firms, and to promote efficient administration of the program.

Section 10.702 has been amended to clearly state that contingency fees are not allowed when representing beneficiaries under the FECA. This explicit language addressing contingency fees was removed during the last regulatory update; however, experience since that update has shown that the removal of this language caused some to believe that the ban on contingency fees had been removed as well.

Section 10.703 has been amended to make clear that OWCP can only approve representative's fees for services that have been performed before OWCP and references that ECAB must approve fees for services performed in front of ECAB. This section has also been amended to clarify that contingency fees will not be approved for any reason. Contingency fees are not subject to the deemed approved process where a fee may be approved if a claimant concurs with such a fee. If the fee is disputed, the regulations provide that OWCP will consider the customary local charge for a representative with similar qualifications in considering what constitutes a reasonable fee.

New § 10.704 takes a sentence that was formerly the last sentence of § 10.702 and makes that language its own section in the regulations to highlight that a person who collects a fee without OWCP approval may be charged with a misdemeanor. OWCP believes that adding this section is useful to provide notice of the potential consequences for failing to comport with the OWCP fee approval process.

Third Party Liability

Section 10.705 has been amended to give the full address where information on subrogation claims may be sent.

Section 10.707 has been amended to require that certain information be submitted in circumstances where the employee is not the only plaintiff in a suit.

The provisions in 10.711 have been moved to 10.712 and the provisions in 10.712 have been moved to 10.711. The new order reflects the process of calculating the refund and surplus in accordance with the statement of recovery form CA–1108. New section 10.711 substantially revises existing 10.712 by setting out in greater detail the manner in which the amount of recovery of the employee is determined including situations where property loss is part of the recovery or where loss of consortium or wrongful death and survival actions have been asserted. New section 10.711 reflects the procedures that have been in place for a number of years. New section 10.712 clarifies that the crediting of a surplus is done against both wage-loss compensation and medical benefits, sets out in greater detail the steps to follow in calculating the refund and surplus, and provides additional examples of how these calculations are made, including cases where loss of consortium and wrongful death and survival actions have been asserted.

Section 10.714 has been amended to clarify that OWCP may seek reimbursement for all types of benefits paid to an employee when that employee has successfully sued a third party for that injury. This section was also amended to clarify how that employee may obtain a copy of the disbursements made by OWCP in their claim.

Peace Corps Volunteers

Section 10.730 has been amended to restore the statutory language applicable to coverage of claims involving Peace Corps volunteers. The statutory language is a recognition of the difficulties for such volunteers to establish that certain injuries or illness are related to their covered activities. The change in language allows OWCP to consider evidence that controverts coverage, while still allowing the volunteer to establish the claim, and clarifies that a temporary aggravation of a preexisting condition may be paid without the necessity of accepting all disability related to that condition.

Subpart I—Information for Medical Providers

A number of changes have been made to subpart I. The majority of these changes have been made to address OWCP's electronic bill processing system and to comport this processing with that done in other compensation programs administered by OWCP. This subpart has also been revised to modify the process by which OWCP excludes medical providers by including the Department of Labor's Office of Inspector General (DOL OIG) in the process.

Medical Records and Bills

Section 10.800 has been amended to describe OWCP's provider enrollment process and automated bill processing and authorization system, which has been substantially revised since the last time the regulations were updated.

Section 10.801 has been amended to clarify how medical bills are currently processed. In addition to those changes, this section has been amended to codify that OWCP may require nursing homes to abide by a fee schedule for admissions made after the effective date of the regulations, which will standardize billing practices and promote cost containment. This change was made to allow additional modifications to restrain medical costs. This section has also been amended to provide language making it clear that providers must adhere to accepted industry standards when billing. Since the advent of the automated bill processing system, OWCP wishes to make clear that billing practices such as upcoding and unbundling are not in accord with industry standards and such attempts to circumvent the fee schedule through practices described in that language are prohibited under the regulations.

Section 10.802 has been amended to clarify how an injured employee currently seeks reimbursement for out of pocket expenses.

Medical Fee Schedule

Section 10.805 has been revised in order to give the Director of OWCP the express authority to determine a fee schedule for services provided by nursing homes.

Sections 10.806, 10.807 and 10.810 have been revised to update the indices used in determining maximum fees.

Section 10.809 has been revised to clarify that the fee schedule regarding medicinal drugs applies whether the drugs are dispensed by a pharmacy or by a doctor in his office. This section has also been modified by providing OWCP the authority to require the use of a specific contract provider for medicinal drugs. This language has been added so that OWCP may explore the use of such providers to contract for better prices on such drugs. Finally, the authority to require the use of generic drugs has been moved to this section as new paragraph (c).

Section 10.811 has been amended to clarify that OWCP will not correct procedure or diagnosis codes on submitted bills. Instead those bills will be returned to the provider for correction as the responsibility for proper submission lies with the provider.

Exclusion of Providers

Section 10.815 has been amended by adding new sections (i) and (j) which set out additional reasons for excluding providers. These new reasons are failure to update a change in provider status and having engaged in conduct found by OWCP to be misleading, deceptive or unfair. Experience has shown that a number of ambiguities existed in the exclusion process. These new reasons for exclusion are meant to address any perceived loopholes.

Section 10.816 has been amended to add new section (c), which clarifies that a provider may be voluntarily excluded without the exclusion procedures being initiated. This clarification is meant to address situations where providers agree to be excluded, for example, where a provider may be faced with criminal charges.

Section 10.817 has been amended to provide that the DOL OIG is primarily responsible for investigating possible exclusions of providers. This duty was previously handled by OWCP; OWCP has no investigatory arm and lacks resources to carry out this responsibility. Accordingly, this change in the exclusion process has been made in an effort to improve administrative efficiency of this process.

Sections 10.818 through 10.821 have been revised to change the deciding official in exclusion matters from just the Regional Director to the Regional Director or any other official specified by the Director of the Division of Federal Employees' Compensation. This change has been made in recognition of the fact that there may be instances (such as where more than one region is involved) where the Regional Director should not be the deciding official. These sections have also been modified to recognize the role of DOL OIG.

Sections 10.823 through 10.824 have been modified to change the manner in which the administrative law judge's recommended decision becomes final.

Previously, the decision became final if no objection was filed, which could lead to confusion regarding the finality of this decision. Accordingly, these sections were changed to reflect that no recommended decision regarding exclusion will become final until the Director of OWCP issues the decision in final form.

Section 10.825 has been amended to reflect current practices of OWCP, as OWCP may use discretion in determining who should receive the notice of exclusion.

Section 10.826 has been modified to correct terminology and to clarify that the Director of OWCP can order reinstatement of excluded providers.

Subpart J—Death Gratuity

Subpart J (§§ 10.900 through 10.916) is unchanged.

*20 CFR Part 25*

Section 8137 provides the conditions and parameters for FECA coverage for non-citizen non-resident employees of the United States, any territory, or Canada. Part 25 describes how benefits will be paid to such employees. Since the last time the regulations were revised in 1999, OWCP encountered a number of situations where the current regulatory scheme proved difficult to administer. Although payment of FECA compensation across the board in all such cases remains substantially disproportionate, benefits payable under local law may be insufficient. Moreover, many of the distinctions and definitions such as those for third country and fourth country nationals do not comport with the current governmental hiring realities for non-citizen non-resident employees. In conducting the comparison required by the current regulations between compensation payable under local law and that paid under FECA, OWCP encountered situations where the families of employees who were killed received very limited compensation under local law. However, payment of ongoing FECA benefits in such cases would result in disproportionately high payments and would pose administrative challenges in managing such cases on an ongoing basis. Under the statute, the Director has authority to create a special schedule. In the interests of fairness, the Director has created a new more comprehensive special schedule for disability that will pay benefits on an ongoing basis for up to two years and will pay a lump sum thereafter for cases of permanent total disability. Payment for death benefits will also be paid in a lump sum to facilitate benefit delivery and to ease administrative burdens.

Subpart A—General Provisions

Section 25.1 has been revised to reflect a change in policy in the payment of compensation under the FECA to employees of the United States who are neither citizens nor residents of the United States, any territory or Canada, as well as any dependents of such employees. The proposed revision would modify the benefit structure for foreign nationals by using the authority under section 8137 to create a special schedule of compensation for foreign nationals to provide a reduced percentage of FECA benefits.

Section 25.2(a) has been revised to provide that the special schedule set forth in subpart B would apply to any non-citizen non-resident federal employee who is neither hired nor employed in the United States, Canada or in a possession or territory of the United States, with respect to any injury (or injury resulting in death) occurring subsequent to the effective date of the publication of the final rule in the **Federal Register**. This paragraph has also been amended to provide that the benefit provisions adopted under this paragraph shall apply to injuries that occur on or after 60 days after the publication of the final rule in the **Federal Register**.

Section 25.2(b) has been revised to provide that the special schedule in subpart B shall apply to cases unless the injured non-citizen non-resident employee receives compensation pursuant to a specific separate agreement between the United States and another government (or similar compensation from another sovereign government); or the employee receives compensation pursuant to the special schedule under subpart C; or the employee otherwise establishes entitlement to compensation under local law pursuant to section 25.100(e) of this part.

Section 25.2(c) has been revised to provide that compensation in all cases of such non-citizen non-resident employees paid and closed prior to 60 days after the publication of the final rule in the **Federal Register** are deemed paid in full under 5 U.S.C. 8137.

Section 25.2(d) has been revised to provide that the compensation received under the special schedule set forth in subpart B or as otherwise specified in 25.2(b) is the exclusive measure of compensation in cases of injury (or death from injury) to non-citizen non-resident employees of the United States.

Section 25.2(e) was revised to clarify the information in former section 25.2(e) that compensation for disability and death of non-citizen non-resident employees outside the United States under this part shall in no event exceed that generally payable under the FECA.

Section 25.3 remains unchanged, providing that the Director has the authority to make lump-sum awards (in the manner prescribed by 5 U.S.C. 8135) to settle claims pursuant to section 8137 of the FECA.

Section 25.4 remains unchanged except for section (c) which is revised to read "Verification of the employment and casualty by Department of Defense personnel" instead of military personnel to reflect the responsibility for providing the type of evidence necessary to make a claim under this section resides with that department.

Section 25.5 has been renumbered but otherwise remains unchanged, providing that an employee who is a permanent resident of any United States possession, territory, commonwealth or trust territory will receive full FECA benefits.

Subpart B—the Special Schedule of Compensation

Section 25.100 has been amended to provide that the definitions under this subpart are generally the same as those provided under the rest of the FECA statute and regulations.

25.101 has been modified to describe how compensation for temporary total and partial disability, and permanent total and permanent partial disability are paid to non-citizen non-resident employees. Provisions under the former section 25.101 for death benefits have been revised and currently appear in section 25.102.

Section 25.101(a) has been amended to provide for temporary total disability, where the injured employee is disabled for less than two years. Under this provision, the employee receives 50 percent of the monthly pay during the period of such disability.

Section 25.101(b) has been amended to provide for temporary partial disability, where the injured employee is unable to earn equivalent wages to those earned at the time of injury, but is not totally disabled for work. Under this section, the injured employee receives a proportional amount of compensation for the period of disability. The compensation amount is that portion of compensation for temporary total disability, as determined under paragraph (a) of this section, which is equal in percentage to the degree or percentage of physical impairment caused by the disability.

Section 25.101(c) has been amended to provide for permanent total

disability, where the injured employee will be disabled for greater than two years. This section provides that the injured employee will receive a lump sum settlement, made by the manner prescribed under 5 U.S.C. 8135, based on compensation equaling 50 percent of the monthly pay.

Section 25.101(d) has been amended to provide for permanent partial disability, where there is permanent impairment involving the loss, or loss of use, of a member or function of the body. This section describes how compensation is paid for loss to scheduled members, and has been revised to be consistent with the time periods listed under 5 U.S.C. 8107 and the regulations listed in 20 CFR 10.404. In addition to the revision of the time periods, this section has been amended to include the skin as a schedule member, for up to 205 weeks of compensation. This change is consistent with changes made under Part 10. The employee will be paid in a lump sum according to 5 U.S.C. 8135, at 50 percent of the monthly pay.

Section 25.101(e) has been amended to provide that if a beneficiary can show that the amount payable under the special schedule would be demonstrably less than the amount payable under the law of his home country, the Director has the discretion to pay an amount in excess of the special schedule of compensation under 5 U.S.C. 8137(a)(2)(A), not to exceed the amount payable under FECA. This section provides that to request such benefits, the beneficiary must submit the following information: translated copies of the applicable local statute as well as any regulations, policies and procedures the beneficiary asserts are applicable; and a translated copy of an opinion rendered by an attorney licensed in that jurisdiction or an advisory opinion from a court or administrative tribunal that explains the benefits payable to the beneficiary.

Section 25.102 has been amended to describe how compensation for death of a non-citizen non-resident employee is paid. Section 25.102(a) has been amended to provide for burial expenses not to exceed $800. Sections 25.102(b)–(i) remain similar in the distribution of death benefits (as delineated in former sections 25.101(a)–(i)) but have been limited to a total of 50 percent of monthly pay. Section 25.102(j) has been added to provide that death benefits should be paid in a lump sum where practicable pursuant to 5 U.S.C. 8135.

Section 25.102(k) has been added to provide if a beneficiary can show that the amount payable under the special schedule would be demonstrably less than the amount payable under the law of his home country, the Director has the discretion to pay an amount in excess of the special schedule under 5 U.S.C. 8137(a)(2)(A), not to exceed the amount payable under FECA. This section provides that the beneficiary must submit the same information as noted in section 25.101(e).

Section 25.102(l) has been added to inform claimants that a FECA death gratuity of $65,000 may be payable for the death of a non-citizen non-resident employee should the death be a result of injury incurred in connection with service with an Armed Force in a contingency operation as set forth in subpart J of part 10.

Subpart C

The provisions of subpart C are largely unchanged in this regulatory revision. Section 25.202 has been amended to adjust the maximum amount of compensation payable under that section for inflation, and to provide an automatic, yearly escalator to that amount.

Section 25.203 has been amended to apply the special schedule created by subpart B to non-citizen, non-resident employees in the Territory of Guam, without the modifications contained in the prior regulations.

**III. Administrative Requirements for the Proposed Rulemaking**

*Executive Order 12866*

This proposed regulatory action constitutes a "significant" rule within the meaning of Executive Order 12866 in that any executive agency could be required to participate in the development of claims for benefits under this regulatory action. The Department believes, however, that as this regulatory action merely updates existing regulations, this regulatory action will not have a significant economic impact on the economy, or any person or organization subject to the proposed changes. The Department has projected that the addition of the skin as an organ under the schedule award provision as well as the revision of the part 25 compensation for non-citizen non-resident employees will result in additional expenditures of $10,893,434 over ten years.

This projection is based on a very limited amount of data and a single significant event could result in substantially higher than projected expenditures. This has been reviewed by the Office of Management and Budget for consistency with the President's priorities and the principles set forth in Executive Order 12866.

*Regulatory Flexibility Act of 1980*

This proposed rule has been reviewed in accordance with the Regulatory Flexibility Act of 1980, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. 601–612. The Department has concluded that the rule does not involve regulatory and informational requirements regarding businesses, organizations, and governmental jurisdictions subject to regulation.

*Paperwork Reduction Act (PRA)*

This rule contains information collection requirements subject to the Paperwork Reduction Act (PRA) of 1995, 44 U.S.C. 3501, *et seq.* The requirements set out in this rule were both submitted to and approved by the OMB under the OMB Control Numbers 1240–0001, 1240–0007, 1240–0008, 1240–0009, 1240–0012, 1240–0013, 1240–0015, 1240–0016, 1240–0017, 1240–0018, 1240–0019, 1240–0022, 1240–0044, 1240–0045, 1240–0046, 1240–0047, 1240–0049, 1240–0050 and 1240–0051.

*The National Environmental Policy Act of 1969*

The Department certifies that this proposed rule has been assessed in accordance with the requirements of the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.* (NEPA). The Department concludes that NEPA requirements do not apply to this rulemaking because this proposed rule includes no provisions impacting the maintenance, preservation, or enhancement of a healthful environment.

*Federal Regulations and Policies on Families*

The Department has reviewed this proposed rule in accordance with the requirements of section 654 of the Treasury and General Government Appropriations Act of 1999, 5 U.S.C. 601 note. These proposed regulations were not found to have a potential negative effect on family well-being as it is defined thereunder.

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

The Department certifies that this proposed rule has been assessed regarding environmental health risks and safety risks that may disproportionately affect children. These proposed regulations were not found to have a potential negative effect on the health or safety of children.

*Unfunded Mandates Reform Act of 1995 and Executive Order 13132*

The Department has reviewed this proposed rule in accordance with the requirements of Executive Order 13132, 64 FR 43225 (Aug. 10, 1999), and the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1501 *et seq.,* and has found no potential or 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 there is no Federal mandate contained herein that could result in increased expenditures by State, local, or tribal governments or by the private sector, the Department has not prepared a budgetary impact statement.

*Executive Order 13175: Consultation and Coordination With Indian Tribal Governments*

The Department has reviewed this proposed rule in accordance with Executive Order 13175, 65 FR 67249 (Nov. 9, 2000), and has determined that it does not have "tribal implications." The proposed rule does not "have substantial direct effects 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."

*Executive Order 12630: Governmental Actions and Interference With Constitutionally Protected Property Rights*

The Department has reviewed this proposed rule in accordance with Executive Order 12630, 53 FR 8859 (Mar. 15, 1988), and has determined that it does not contain any "policies that have takings implications" in regard to the "licensing, permitting, or other condition requirements or limitations on private property use, or that require dedications or exactions from owners of private property."

*Executive Order 13211: Energy Supply, Distribution, or Use*

The Department has reviewed this proposed regulation and has determined that the provisions of Executive Order 13211, 66 FR 28355 (May 18, 2001), are not applicable as there are no direct or implied effects on energy supply, distribution, or use.

*The Privacy Act of 1974, 5 U.S.C. 552a, as Amended*

Claims filed under these regulations are subject to the current Privacy Act System of Records, DOL/GOVT–1, Office of Workers' Compensation Programs, Federal Employees' Compensation Act File, 67 FR 16826 (April 8, 2002).

*Clarity of This Regulation*

Executive Order 12866, 58 FR 51735 (September 30, 1993), and the President's memorandum of June 1, 1998, require each agency to write all rules in plain language. The Department invites comments on how to make this proposed rule easier to understand.

**List of Subjects in 20 CFR Parts 1, 10, and 25**

Administrative practice and procedure, Claims, Government employees, Labor, Workers' compensation.

For reasons set forth in the preamble, the Office of Workers' Compensation Programs, Department of Labor, amends 20 CFR chapter I as follows:

1. Part 1 is revised to read as follows:

## PART 1—PERFORMANCE OF FUNCTIONS

Sec.



**Authority:** 5 U.S.C. 301, 8145 and 8149 (Reorganization Plan No. 6 of 1950, 15 FR 3174, 3 CFR, 1949–1953 Comp., p. 1004, 64 Stat. 1263); 42 U.S.C. 7384d and 7385s–10; E.O. 13179, 65 FR 77487, 3 CFR, 2000 Comp., p. 321; Secretary of Labor's Order No. 13–71, 36 FR 8155; Employment Standards Order No. 2–74, 39 FR 34722; Secretary of Labor's Order No. 10–2009, 74 FR 218.

### § 1.1 Under what authority does the Office of Workers' Compensation Programs operate?

(a) The Assistant Secretary of Labor for Employment Standards, by authority vested in him by the Secretary of Labor in Secretary's Order No. 13–71 (36 FR 8755), established in the Employment Standards Administration (ESA) an Office of Workers' Compensation Programs (OWCP) by Employment Standards Order No. 2–74 (39 FR 34722). The Assistant Secretary subsequently designated as the head thereof a Director who, under the general supervision of the Assistant Secretary, administered the programs assigned to OWCP by the Assistant Secretary.

(b) Effective November 8, 2009, ESA was dissolved into its four component parts, including OWCP. Secretary of Labor's Order 10–2009 (74 FR 218) cancelled or modified all prior orders and directives referencing ESA, devolved certain authorities and responsibilities of ESA to OWCP, and delegated authority to the Director, OWCP, to administer the programs now assigned directly to OWCP.

### § 1.2 What functions are assigned to OWCP?

The Secretary of Labor has delegated authority and assigned responsibility to the Director of OWCP for the Department of Labor's programs under the following statutes:

(a) The Federal Employees' Compensation Act, as amended and extended (5 U.S.C. 8101 *et seq.*), except 5 U.S.C. 8149 as it pertains to the Employees' Compensation Appeals Board.

(b) The War Hazards Compensation Act, as amended (42 U.S.C. 1701 *et seq.*).

(c) The War Claims Act of 1948, as amended (50 U.S.C. App. 2003 *et seq.*).

(d) The Energy Employees Occupational Illness Compensation Program Act of 2000, as amended (42 U.S.C. 7384 *et seq.*), except 42 U.S.C. 7385s–15 as it pertains to the Office of the Ombudsman, and activities, pursuant to Executive Order 13179 ("Providing Compensation to America's Nuclear Weapons Workers") of December 7, 2000, assigned to the Secretary of Health and Human Services, the Secretary of Energy and the Attorney General.

(e) The Longshore and Harbor Workers' Compensation Act, as amended and extended (33 U.S.C. 901 *et seq.*), except: 33 U.S.C. 919(d) with respect to administrative law judges in the Office of Administrative Law Judges; 33 U.S.C. 921(b) as it pertains to the Benefits Review Board; and activities, pursuant to 33 U.S.C. 941, assigned to the Assistant Secretary of Labor for Occupational Safety and Health.

(f) The Black Lung Benefits Act, as amended (30 U.S.C. 901 *et seq.*)., including 26 U.S.C. 9501, except: 33 U.S.C. 919(d) as incorporated by 30 U.S.C. 932(a), with respect to administrative law judges in the Office of Administrative Law Judges; and 33 U.S.C. 921(b) as incorporated by 30 U.S.C. 932(a), as it applies to the Benefits Review Board.

### § 1.3 What rules are contained in this chapter?

The rules in this chapter are those governing the OWCP functions under the Federal Employees' Compensation Act, the War Hazards Compensation

Act, the War Claims Act and the Energy Employees Occupational Illness Compensation Program Act of 2000.

**§ 1.4 Where are other rules concerning OWCP functions found?**

(a) The rules of OWCP governing its functions under the Longshore and Harbor Workers' Compensation Act and its extensions are set forth in subchapter A of chapter VI of this title.

(b) The rules of OWCP governing its functions under the Black Lung Benefits Act program are set forth in subchapter B of chapter VI of this title.

(c) The rules and regulations of the Employees' Compensation Appeals Board are set forth in chapter IV of this title.

(d) The rules and regulations of the Benefits Review Board are set forth in Chapter VII of this title.

**§ 1.5 When was the former Bureau of Employees' Compensation abolished?**

By Secretary of Labor's Order issued September 23, 1974 (39 FR 34723), issued concurrently with Employment Standards Order 2–74 (39 FR 34722), the Secretary revoked the prior Secretary's Order No. 18–67 (32 FR 12979), which had delegated authority and assigned responsibility for the various workers' compensation programs enumerated in § 1.2, except the Black Lung Benefits Program and the Energy Employees Occupational Illness Compensation Program not then in existence, to the Director of the former Bureau of Employees' Compensation.

**§ 1.6 How were many of OWCP's current functions administered in the past?**

(a) Administration of the Federal Employees' Compensation Act and the Longshore and Harbor Workers' Compensation Act was initially vested in an independent establishment known as the U.S. Employees' Compensation Commission. By Reorganization Plan No. 2 of 1946 (3 CFR, 1943–1949 Comp., p. 1064; 60 Stat. 1095, effective July 16, 1946), the Commission was abolished and its functions were transferred to the Federal Security Agency to be performed by a newly created Bureau of Employees' Compensation within such Agency. By Reorganization Plan No. 19 of 1950 (15 FR 3178, 3 CFR, 1949–1954 Comp., page 1010, 64 Stat. 1271), said Bureau was transferred to the Department of Labor (DOL), and the authority formerly vested in the Administrator, Federal Security Agency, was vested in the Secretary of Labor. By Reorganization Plan No. 6 of 1950 (15 FR 3174, 3 CFR, 1949–1953 Comp., page 1004, 64 Stat. 1263), the Secretary of Labor was authorized to make from time to time such provisions as he shall deem appropriate, authorizing the performance of any of his functions by any other officer, agency, or employee of the DOL.

(b) In 1972, two separate organizational units were established within the Bureau: an Office of Workmen's Compensation Programs (37 FR 20533) and an Office of Federal Employees' Compensation (37 FR 22979). In 1974, these two units were abolished and one organizational unit, the Office of Workers' Compensation Programs, was established in lieu of the Bureau of Employees' Compensation (39 FR 34722).

2. Part 10 is revised to read as follows:

## PART 10—CLAIMS FOR COMPENSATION UNDER THE FEDERAL EMPLOYEES' COMPENSATION ACT, AS AMENDED

### Subpart A—General Provisions

Sec.

**Authority:** 5 U.S.C. 301, 8102a, 8103, 8145 and 8149; 31 U.S.C. 3716 and 3717; Reorganization Plan No. 6 of 1950, 15 FR 3174, 64 Stat. 1263; Secretary of Labor's Order No. 10–2009, 74 FR 218.

## Subpart A—General Provisions

### Introduction

#### § 10.0 What are the provisions of the FECA, in general?

The Federal Employees' Compensation Act (FECA) as amended (5 U.S.C. 8101 *et seq.*) provides for the payment of workers' compensation benefits to civilian officers and employees of all branches of the Government of the United States. The regulations in this part describe the rules for filing, processing, and paying claims for benefits under the FECA. Proceedings under the FECA are non-adversarial in nature.

(a) The FECA has been amended and extended a number of times to provide workers' compensation benefits to volunteers in the Civil Air Patrol (5 U.S.C. 8141), members of the Reserve Officers' Training Corps (5 U.S.C. 8140), Peace Corps Volunteers (5 U.S.C. 8142), Job Corps enrollees and Volunteers in Service to America (5 U.S.C. 8143), members of the National Teachers Corps (5 U.S.C. 8143a), certain student employees (5 U.S.C. 5351 and 8144), certain law enforcement officers not employed by the United States (5 U.S.C. 8191–8193), and various other classes of persons who provide or have provided services to the Government of the United States.

(b) The FECA provides for payment of several types of benefits, including compensation for wage loss, schedule awards, medical and related benefits, and vocational rehabilitation services for conditions resulting from injuries sustained in performance of duty while in service to the United States.

(c) The FECA also provides for payment of monetary compensation to specified survivors of an employee whose death resulted from a work-related injury and for payment of certain burial expenses subject to the provisions of 5 U.S.C. 8134.

(d) All types of benefits and conditions of eligibility listed in this section are subject to the provisions of the FECA and of this part. This section shall not be construed to modify or enlarge upon the provisions of the FECA.

#### § 10.1 What rules govern the administration of the FECA and this chapter?

In accordance with 5 U.S.C. 8145 and Secretary's Order 5–96, the responsibility for administering the FECA, except for 5 U.S.C. 8149 as it pertains to the Employees' Compensation Appeals Board, has been delegated to the Director of the Office of Workers' Compensation Programs (OWCP). Except as otherwise provided by law, the Director, OWCP and his or her designees have the exclusive authority to administer, interpret and enforce the provisions of the Act.

#### § 10.2 What do these regulations contain?

This part 10 sets forth the regulations governing administration of all claims filed under the FECA, except to the extent specified in certain particular provisions. Its provisions are intended to assist persons seeking compensation benefits under the FECA, as well as personnel in the various Federal agencies and the Department of Labor who process claims filed under the FECA or who perform administrative functions with respect to the FECA. This part 10 applies to part 25 of this chapter except as modified by part 25. The various subparts of this part contain the following:

(a) *Subpart A.* The general statutory and administrative framework for processing claims under the FECA. It contains a statement of purpose and scope, together with definitions of terms, descriptions of basic forms, information about the disclosure of OWCP records, and a description of rights and penalties under the FECA, including convictions for fraud.

(b) *Subpart B.* The rules for filing notices of injury and claims for benefits under the FECA. It also addresses evidence and burden of proof, as well as the process of making decisions concerning eligibility for benefits.

(c) *Subpart C.* The rules governing claims for and payment of continuation of pay.

(d) *Subpart D.* The rules governing emergency and routine medical care, second opinion and referee medical examinations directed by OWCP, and medical reports and records in general. It also addresses the kinds of treatment which may be authorized and how medical bills are paid.

(e) *Subpart E.* The rules relating to the payment of monetary compensation benefits for disability, impairment and death. It includes the provisions for identifying and processing overpayments of compensation.

(f) *Subpart F.* The rules governing the payment of continuing compensation benefits. It includes provisions concerning the employee's and the employer's responsibilities in returning the employee to work. It also contains provisions governing reports of earnings and dependents, recurrences, and reduction and termination of compensation benefits.

(g) *Subpart G.* The rules governing the appeals of decisions under the FECA. It includes provisions relating to hearings, reconsiderations, and appeals before the Employees' Compensation Appeals Board.

(h) *Subpart H.* The rules concerning legal representation and for adjustment and recovery from a third party. It also contains provisions relevant to three groups of employees whose status requires special application of the provisions of the FECA: Federal grand and petit jurors, Peace Corps volunteers, and non-Federal law enforcement officers.

(i) *Subpart I.* Information for medical providers. It includes rules for medical reports, medical bills, and the OWCP medical fee schedule, as well as the provisions for exclusion of medical providers.

(j) *Subpart J.* Death Gratuity. The rules relating to the payment of the death gratuity benefit under 5 U.S.C. 8102a.

### § 10.3 Have the collection of information requirements of this part been approved by the Office of Management and Budget (OMB)?

The collection of information requirements in this part have been approved by OMB and assigned OMB control numbers 1240–0001, 1240–0007, 1240–0008, 1240–0009, 1240–0012, 1240–0013, 1240–0015, 1240–0016, 1240–0017, 1240–0018, 1240–0019, 1240–0022, 1240–0044, 1240–0045, 1240–0046, 1240–0047, 1240–0049, 1240–0050 and 1240–0051.

## Definitions and Forms

### § 10.5 What definitions apply to these regulations?

Certain words and phrases found in this part are defined in this section or in the FECA. Some other words and phrases that are used only in limited situations are defined in the later subparts of these regulations.

(a) *Benefits* or *Compensation* in these regulations means Compensation as defined by the FECA at 5 U.S.C. 8101(12), which is the money OWCP pays to or on behalf of a beneficiary from the Employees' Compensation Fund. The terms Benefits and Compensation include payments for lost wages, loss of wage-earning capacity, and permanent physical impairment. The terms Benefits and Compensation also include the money paid to beneficiaries for an employee's death, including both death benefits and any death gratuity benefit. These two terms also include any other amounts paid out of the Employees' Compensation Fund for such things as medical treatment, medical examinations conducted at the request of OWCP as part of the claims adjudication process, vocational rehabilitation services under 5 U.S.C. 8111, services of an attendant and funeral expenses under 5 U.S.C. 8134, but do not include continuation of pay as provided by 5 U.S.C. 8118.

(b) *Beneficiary* means an individual who is entitled to a benefit under the FECA and this part.

(c) *Claim* means a written assertion of an individual's entitlement to benefits under the FECA, submitted in a manner authorized by this part.

(d) *Claimant* means an individual whose claim has been filed.

(e) *Director* means the Director of OWCP or a person designated to carry out his or her functions.

(f) *Disability* means the incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of injury. It may be partial or total.

(g) *Earnings from employment or self-employment* means:

(1) Gross earnings or wages before any deductions and includes the value of subsistence, quarters, reimbursed expenses and any other goods or services received in kind as remuneration; or

(2) A reasonable estimate of the cost to have someone else perform the duties of an individual who accepts no remuneration. Neither lack of profits, nor the characterization of the duties as a hobby, removes an unremunerated individual's responsibility to report the estimated cost to have someone else perform his or her duties.

(h) *Employee* means, but is not limited to, an individual who fits within one of the following listed groups:

(1) A civil officer or employee in any branch of the Government of the United States, including an officer or employee of an instrumentality wholly owned by the United States pursuant to 5 U.S.C. 8101(1)(A);

(2) An individual rendering personal service to the United States similar to the service of a civil officer or employee of the United States, without pay or for nominal pay, when a statute authorizes the acceptance or use of the service, or authorizes payment of travel or other expenses of the individual pursuant to 5 U.S.C. 8101(1)(B);

(3) An individual, other than an independent contractor or an individual employed by an independent contractor, employed on the Menominee Indian Reservation in Wisconsin in operations conducted under a statute relating to tribal timber and logging operations on that reservation pursuant to 5 U.S.C. 8101(1)(C);

(4) An individual appointed to a position on the office staff of a former President under section 1(b) of the Act of August 25, 1958 (72 Stat. 838) pursuant to 5 U.S.C. 8101(1)(E); or

(5) An individual selected and serving as a Federal petit or grand juror pursuant to 5 U.S.C. 8101(1)(F).

(i) *Employer* or *Agency* means any civil agency or instrumentality of the United States Government, or any other organization, group or institution employing an individual defined as an "employee" by this section. These terms also refer to officers and employees of an employer having responsibility for the supervision, direction or control of employees of that employer as an "immediate superior," and to other employees designated by the employer to carry out the functions vested in the employer under the FECA and this part, including officers or employees delegated responsibility by an employer for authorizing medical treatment for injured employees.

(j) *Entitlement* means entitlement to benefits as determined by OWCP under the FECA and the procedures described in this part.

(k) *FECA* means the Federal Employees' Compensation Act, as amended.

(l) *Hospital services* means services and supplies provided by hospitals within the scope of their practice as defined by State law.

(m) *Impairment* means any anatomic or functional abnormality or loss. A permanent impairment is any such

abnormality or loss after maximum medical improvement has been achieved.

(n) *Knowingly* means with knowledge, consciously, willfully or intentionally.

(o) *Medical services* means services and supplies provided by or under the supervision of a physician. Reimbursable chiropractic services are limited to physical examinations (and related laboratory tests), x-rays performed to diagnose a subluxation of the spine and treatment consisting of manual manipulation of the spine to correct a subluxation.

(p) *Medical support services* means services, drugs, supplies and appliances provided by a person other than a physician or hospital.

(q) *Occupational disease or illness* means a condition produced by the work environment over a period longer than a single workday or shift.

(r) *OWCP* means the Office of Workers' Compensation Programs.

(s) *Pay rate for compensation purposes* means the employee's pay, as determined under 5 U.S.C. 8114, at the time of injury, the time disability begins or the time compensable disability recurs if the recurrence begins more than six months after the injured employee resumes regular full-time employment with the United States, whichever is greater, except as otherwise determined under 5 U.S.C. 8113 with respect to any period.

(t) *Physician* means an individual defined as such in 5 U.S.C. 8101(2), except during the period for which his or her license to practice medicine has been suspended or revoked by a State licensing or regulatory authority.

(u) *Qualified hospital* means any hospital licensed as such under State law which has not been excluded under the provisions of subpart I of this part. Except as otherwise provided by regulation, a qualified hospital shall be deemed to be designated or approved by OWCP.

(v) *Qualified physician* means any physician who has not been excluded under the provisions of subpart I of this part. Except as otherwise provided by regulation, a qualified physician shall be deemed to be designated or approved by OWCP.

(w) *Qualified provider of medical support services or supplies* means any person, other than a physician or a hospital, who provides services, drugs, supplies and appliances for which OWCP makes payment, who possesses any applicable licenses required under State law, and who has not been excluded under the provisions of subpart I of this part.

(x) *Recurrence of disability* means an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition which had resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness. This term also means an inability to work that takes place when a light-duty assignment made specifically to accommodate an employee's physical limitations due to his or her work-related injury or illness is withdrawn or when the physical requirements of such an assignment are altered so that they exceed his or her established physical limitations. A recurrence of disability does not apply when a light-duty assignment is withdrawn for reasons of misconduct, non-performance of job duties or other downsizing or where a loss of wage-earning capacity determination as provided by 5 U.S.C. 8115 is in place.

(y) *Recurrence of medical condition* means a documented need for further medical treatment after release from treatment for the accepted condition or injury when there is no accompanying work stoppage. Continuous treatment for the original condition or injury is not considered a "need for further medical treatment after release from treatment," nor is an examination without treatment.

(z) *Representative* means an individual or law firm properly authorized by a claimant in writing to act for the claimant in connection with a claim or proceeding under the FECA or this part.

(aa) *Student* means an individual defined at 5 U.S.C. 8101(17). Two terms used in that particular definition are further defined as follows:

(1) *Additional type of educational or training institution* means a technical, trade, vocational, business or professional school accredited or licensed by the United States Government or a State Government or any political subdivision thereof providing courses of not less than three months duration, that prepares the individual for a livelihood in a trade, industry, vocation or profession.

(2) *Year beyond the high school level* means:

(i) The 12-month period beginning the month after the individual graduates from high school, provided he or she had indicated an intention to continue schooling within four months of high school graduation, and each successive 12-month period in which there is school attendance or the payment of compensation based on such attendance; or

(ii) If the individual has indicated that he or she will not continue schooling within four months of high school graduation, the 12-month period beginning with the month that the individual enters school to continue his or her education, and each successive 12-month period in which there is school attendance or the payment of compensation based on such attendance.

(bb) *Subluxation* means an incomplete dislocation, off-centering, misalignment, fixation or abnormal spacing of the vertebrae which must be demonstrable on any x-ray film to an individual trained in the reading of x-rays.

(cc) *Surviving spouse* means the husband or wife living with or dependent for support upon a deceased employee at the time of his or her death, or living apart for reasonable cause or because of the deceased employee's desertion, unless otherwise defined under the FECA for the specific benefit such as the FECA death gratuity at 5 U.S.C. 8102a.

(dd) *Temporary aggravation of a pre-existing condition* means that factors of employment have directly caused that condition to be more severe for a limited period of time and have left no greater impairment than existed prior to the employment injury.

(ee) *Traumatic injury* means a condition of the body caused by a specific event or incident, or series of events or incidents, within a single workday or shift. Such condition must be caused by external force, including stress or strain, which is identifiable as to time and place of occurrence and member or function of the body affected.

**§ 10.6 What special statutory definitions apply to dependents and survivors?**

(a) 5 U.S.C. 8133 provides that certain benefits are payable to certain enumerated survivors of employees who have died from an injury sustained in the performance of duty.

(b) 5 U.S.C. 8148 also provides that certain other benefits may be payable to certain family members of employees who have been incarcerated due to a felony conviction.

(c) 5 U.S.C. 8110(b) further provides that any employee who is found to be eligible for a basic benefit shall be entitled to have such basic benefit augmented at a specified rate for certain persons who live in the beneficiary's household or who are dependent upon the beneficiary for support.

(d) 5 U.S.C. 8101, 8110, 8133, and 8148, which define the nature of such survivorship or dependency necessary

to qualify a beneficiary for a survivor's benefit or an augmented benefit, apply to the provisions of this part but not to the death gratuity provided under subpart J.

(e) 5 U.S.C. 8102a provides the definitions for survivorship or dependency necessary to qualify as a beneficiary for a death gratuity benefit as well as allowing half the death gratuity benefit to be paid to alternate beneficiary.

**§ 10.7 What forms are needed to process claims under the FECA?**

(a) Notice of injury, claims and certain specified reports shall be made on forms prescribed by OWCP. Employers shall not modify these forms or use substitute forms. Employers are expected to maintain an adequate supply of the basic forms needed for the proper recording and reporting of injuries.

| Form No. | Title |
|---|---|
| (1) CA–1 | Federal Employee's Notice of Traumatic Injury and Claim for Continuation of Pay/Compensation. |
| (2) CA–2 | Notice of Occupational Disease and Claim for Compensation. |
| (3) CA–2a | Notice of Employee's Recurrence of Disability and Claim for Pay/Compensation. |
| (4) CA–3 | Report of Work Status. |
| (5) CA–5 | Claim for Compensation by Widow, Widower and/or Children. |
| (6) CA–5b | Claim for Compensation by Parents, Brothers, Sisters, Grandparents, or Grandchildren. |
| (7) CA–6 | Official Superior's Report of Employee's Death. |
| (8) CA–7 | Claim for Compensation Due to Traumatic Injury or Occupational Disease. |
| (9) CA–7a | Time Analysis Form. |
| (10) CA–7b | Leave Buy Back (LBB) Worksheet/Certification and Election. |
| (11) CA–16 | Authorization of Examination and/or Treatment. |
| (12) CA–17 | Duty Status Report. |
| (13) CA–20 | Attending Physician's Report. |
| (14) CA–20a | Attending Physician's Supplemental Report. |
| (15) CA–40 | Designation of a Recipient of the Federal Employees' Compensation Act Death Gratuity Payment under Section 1105 of Public Law 110–181 (Section 8102a). |
| (16) CA–41 | Claim for Survivor Benefits Under the Federal Employees' Compensation Act Section 8102a Death Gratuity. |
| (17) CA–42 | Official Notice of Employees' Death for Purposes of FECA Section 8102a Death Gratuity. |
| (18) CA–1108 | Statement of Recovery Letter with Long Form. |
| (19) CA–1122 | Statement of Recovery Letter with Short Form. |

(b) Copies of the forms listed in this paragraph are available for public inspection at the Office of Workers' Compensation Programs, U.S. Department of Labor, Washington, DC 20210. They may also be obtained from district offices, employers (*i.e.,* safety and health offices, supervisors), and the Internet, at *http://www.dol.gov.*

**Information in Program Records**

**§ 10.10 Are all documents relating to claims filed under the FECA considered confidential?**

All records relating to claims for benefits, including copies of such records maintained by an employer, are considered confidential and may not be released, inspected, copied or otherwise disclosed except as provided in the Freedom of Information Act and the Privacy Act of 1974 or under the routine uses provided by DOL/GOVT–1 if such release is consistent with the purpose for which the record was created.

**§ 10.11 Who maintains custody and control of FECA records?**

All records relating to claims for benefits filed under the FECA, including any copies of such records maintained by an employing agency, are covered by the government-wide Privacy Act system of records entitled DOL/GOVT–1 (Office of Workers' Compensation Programs, Federal Employees' Compensation Act File). This system of records is maintained by and under the control of OWCP, and, as such, all records covered by DOL/GOVT–1 are official records of OWCP. The protection, release, inspection and copying of records covered by DOL/GOVT–1 shall be accomplished in accordance with the rules, guidelines and provisions of this part, as well as those contained in 29 CFR parts 70 and 71, and with the notice of the system of records and routine uses published in the **Federal Register**. All questions relating to access/disclosure, and/or amendment of FECA records maintained by OWCP or the employing agency, are to be resolved in accordance with this section.

**§ 10.12 How may a FECA claimant or beneficiary obtain copies of protected records?**

(a) A claimant seeking copies of his or her official FECA file should address a request to the District Director of the OWCP office having custody of the file. A claimant seeking copies of FECA-related documents in the custody of the employer should follow the procedures established by that agency.

(b)(1) While an employing agency may establish procedures that an injured employee or beneficiary should follow in requesting access to documents it maintains, any decision issued in response to such a request must comply with the rules and regulations of the Department of Labor which govern all other aspects of safeguarding these records.

(2) No employing agency has the authority to issue determinations with respect to requests for the correction or amendment of records contained in or covered by DOL/GOVT–1. That authority is within the exclusive control of OWCP. Thus, any request for correction or amendment received by an employing agency must be referred to OWCP for review and decision.

(3) Any administrative appeal taken from a denial issued by the employing agency or OWCP shall be filed with the Solicitor of Labor in accordance with 29 CFR 71.7 and 71.9.

**§ 10.13 What process is used by a person who wants to correct FECA-related documents?**

Any request to amend a record covered by DOL/GOVT–1 should be directed to the district office having custody of the official file. No employer has the authority to issue determinations with regard to requests for the correction of records contained in or covered by DOL/GOVT–1. Any request for correction received by an employer must be referred to OWCP for review and decision.

**Rights and Penalties**

**§ 10.15 May compensation rights be waived?**

No employer or other person may require an employee or other claimant to enter into any agreement, either before or after an injury or death, to waive his or her right to claim compensation under the FECA. No waiver of compensation rights shall be valid.

**§ 10.16 What criminal and civil penalties may be imposed in connection with a claim under the FECA?**

(a) A number of statutory provisions make it a crime to file a false or fraudulent claim or statement with the Government in connection with a claim under the FECA, or to wrongfully impede a FECA claim. Included among these provisions are sections 287, 1001, 1920, and 1922 of title 18, United States Code. Enforcement of these and other provisions that may apply to claims under the FECA are within the jurisdiction of the Department of Justice.

(b) In addition, administrative proceedings may be initiated under the Program Fraud Civil Remedies Act of 1986 (PFCRA), 31 U.S.C. 3801–12, to impose civil penalties and assessments against persons who make, submit, or present, or cause to be made, submitted or presented, false, fictitious or fraudulent claims or written statements to OWCP in connection with a claim under the FECA. The Department of Labor's regulations implementing the PFRCA are found at 29 CFR part 22. Furthermore, a civil action to recover benefits paid erroneously under the FECA may be maintained under the False Claims Act, 31 U.S.C. 3729–3733.

**§ 10.17 Is a beneficiary who defrauds the Government in connection with a claim for benefits still entitled to those benefits?**

When a beneficiary either pleads guilty to or is found guilty on either Federal or State criminal charges of defrauding the Federal Government in connection with a claim for benefits, the beneficiary's entitlement to any further compensation benefits will terminate effective the date of conviction, which is the date of the verdict or, in the case of a plea bargain, the date the claimant made the plea in open court (not the date of sentencing or the date court papers were signed). The employing agency may, upon request, be required to provide the documentation needed for termination under this section. Termination of entitlement under this section is not affected by any subsequent change in or recurrence of the beneficiary's medical condition.

**§ 10.18 Can a beneficiary who is incarcerated based on a felony conviction still receive benefits?**

(a) Whenever a beneficiary is incarcerated in a State or Federal jail, prison, penal institution or other correctional facility due to a State or Federal felony conviction, he or she forfeits all rights to compensation benefits during the period of incarceration. A beneficiary's right to compensation benefits for the period of his or her incarceration is not restored after such incarceration ends, even though payment of compensation benefits may resume. A beneficiary has an affirmative duty to provide notice of any conviction and imprisonment. The employing agency shall provide OWCP any information or documentation they may have concerning such matters.

(b) If the beneficiary has eligible dependents, OWCP will pay compensation to such dependents at a reduced rate during the period of his or her incarceration, by applying the percentages of 5 U.S.C. 8133(a)(1) through (5) to the beneficiary's gross current entitlement rather than to the beneficiary's monthly pay.

(c) If OWCP's decision on entitlement is pending when the period of incarceration begins, and compensation is due for a period of time prior to such incarceration, payment for that period will only be made to the beneficiary following his or her release.

**Subpart B—Filing Notices and Claims; Submitting Evidence**

**Notices and Claims for Injury, Disease, and Death—Employee or Survivor's Actions**

**§ 10.100 How and when is a notice of traumatic injury filed?**

(a) To claim benefits under the FECA, an employee who sustains a work-related traumatic injury must give notice of the injury in writing on Form CA–1, which may be obtained from the employer or from the Internet at *www.dol.gov* under forms. The employee must forward this notice to the employer. Another person, including the employer, may give notice of injury on the employee's behalf. The person submitting a notice shall include the Social Security Number (SSN) of the injured employee. All such notices should be submitted electronically wherever feasible to facilitate processing of such claims. All employers that currently do not have such capability should create such a method by December 31, 2012.

(b) For injuries sustained on or after September 7, 1974, a notice of injury must be filed within three years of the injury. (The form contains the necessary words of claim.) The requirements for filing notice are further described in 5 U.S.C. 8119. Also see § 10.205 concerning time requirements for filing claims for continuation of pay.

(1) If the claim is not filed within three years, compensation may still be allowed if notice of injury was given within 30 days or the employer had actual knowledge of the injury or death within 30 days after occurrence. This knowledge may consist of written records or verbal notification. An entry into an employee's medical record may also satisfy this requirement if it is sufficient to place the employer on notice of a possible work-related injury or disease.

(2) OWCP may excuse failure to comply with the three-year time requirement because of truly exceptional circumstances (for example, being held prisoner of war).

(3) The claimant may withdraw his or her claim (but not the notice of injury) by so requesting in writing to OWCP at any time before OWCP determines eligibility for benefits. Any continuation of pay (COP) granted to an employee after a claim is withdrawn must be charged to sick or annual leave, or considered an overpayment of pay consistent with 5 U.S.C. 5584, at the employee's option.

(c) However, in cases of latent disability, the time for filing claim does not begin to run until the employee has a compensable disability and is aware, or reasonably should have been aware, of the causal relationship between the disability and the employment (see 5 U.S.C. 8122(b)).

**§ 10.101 How and when is a notice of occupational disease filed?**

(a) To claim benefits under the FECA, an employee who has a disease which he or she believes to be work-related must give notice of the condition in writing on Form CA–2, which may be obtained from the employer or from the Internet at *www.dol.gov* under forms. The employee must forward this notice to the employer. Another person, including the employer, may do so on the employee's behalf. The person submitting a notice shall include the Social Security Number (SSN) of the injured employee. All such notices should be submitted electronically wherever feasible to facilitate processing of such claims. All employers that currently do not have such capability should create such a method by December 31, 2012. The claimant may withdraw his or her claim (but not the notice of occupational disease) by so requesting in writing to OWCP at any

time before OWCP determines eligibility for benefits.

(b) For occupational diseases sustained as a result of exposure to injurious work factors that occurs on or after September 7, 1974, a notice of occupational disease must be filed within three years of the onset of the condition. (The form contains the necessary words of claim.) The requirements for timely filing are described in § 10.100(b)(1) through (3).

(c) However, in cases of latent disability, the time for filing claim does not begin to run until the employee has a compensable disability and is aware, or reasonably should have been aware, of the causal relationship between the disability and the employment (see 5 U.S.C. 8122(b)).

**§ 10.102 How and when is a claim for wage loss compensation filed?**

(a) Form CA–7 is used to claim compensation for periods of disability not covered by COP.

(1) An employee who is disabled with loss of pay for more than three calendar days due to an injury, or someone acting on his or her behalf, must file Form CA–7 before compensation can be paid.

(2) The employee shall complete the front of Form CA–7 and submit the form to the employer for completion and transmission to OWCP. The form should be completed as soon as possible, but no more than 14 calendar days after the date pay stops due to the injury or disease. All such notices should be submitted electronically wherever feasible to facilitate processing of such claims. All employers that currently do not have such capability should create such a method by December 31, 2012.

(3) The requirements for filing claims are further described in 5 U.S.C. 8121.

(b) Form CA–7 is also used to claim compensation for additional periods of disability following the initial injury.

(1) It is the employee's responsibility to submit Form CA–7. Without receipt of such claim, OWCP has no knowledge of continuing wage loss. Therefore, while disability continues, the employee should submit a claim on Form CA–7 each two weeks until otherwise instructed by OWCP.

(2) The employee shall complete the front of Form CA–7 and submit the form to the employer for completion and transmission to OWCP.

(3) The employee is responsible for submitting, or arranging for the submittal of, medical evidence to OWCP which establishes both that disability continues and that the disability is due to the work-related injury. Form CA–20a is submitted with Form CA–7 for this purpose.

**§ 10.103 How and when is a claim for permanent impairment filed?**

Form CA–7 is used to claim compensation for impairment to a body part covered under the schedule established by 5 U.S.C. 8107. All such notices should be submitted electronically wherever feasible to facilitate processing of such claims. All employers that currently do not have such capability should create such a method by December 31, 2012. If Form CA–7 has already been filed to claim disability compensation, an employee may file a claim for such impairment by sending a letter to OWCP which specifies the nature of the benefit claimed. OWCP may create a form specifically for schedule award claims; if that form is created, only that form may be used to file a claim under 5 U.S.C. 8107.

**§ 10.104 How and when is a claim for recurrence filed?**

(a) A recurrence should be reported on Form CA–2a if it causes the employee to lose time from work and incur a wage loss, or if the employee experiences a renewed need for treatment after previously being released from care. However, a notice of recurrence should not be filed when a new injury, new occupational disease, or new event contributing to an already-existing occupational disease has occurred. In these instances, the employee should file Form CA–1 or CA–2.

(b) The employee has the burden of establishing by the weight of reliable, probative and substantial evidence that the recurrence of disability is causally related to the original injury.

(1) The employee must include a detailed factual statement as described on Form CA–2a. The employer may submit comments concerning the employee's statement.

(2) The employee should arrange for the submittal of a detailed medical report from the attending physician as described on Form CA–2a. The employee should also submit, or arrange for the submittal of, similar medical reports for any examination and/or treatment received after returning to work following the original injury.

(c) A claim for recurrence of disability is not available where OWCP has issued a loss of wage-earning capacity determination. Under that circumstance, the only method for claiming additional wage loss compensation is through a request to modify that determination. However, OWCP is not precluded from adjudicating a limited period of disability following the issuance of a loss of wage-earning capacity decision, i.e., where an employee has a demonstrated need for surgery.

**§ 10.105 How and when is a notice of death and claim for benefits filed?**

(a) If an employee dies from a work-related traumatic injury or an occupational disease, any survivor may file a claim for death benefits using Form CA–5 or CA–5b, which may be obtained from the employer or from the Internet at *http://www.dol.gov* under forms. The survivor must provide this notice in writing and forward it to the employer. Another person, including the employer, may do so on the survivor's behalf. The survivor may also submit the completed Form CA–5 or CA–5b directly to OWCP. The survivor shall disclose the SSNs of all survivors on whose behalf claim for benefits is made in addition to the SSN of the deceased employee. All such notices should be submitted electronically wherever feasible to facilitate processing of such claims. All employers that currently do not have such capability should create such a method by December 31, 2012. The survivor may withdraw his or her claim (but not the notice of death) by so requesting in writing to OWCP at any time before OWCP determines eligibility for benefits.

(b) For deaths that occur on or after September 7, 1974, a notice of death must be filed within three years of the death. The form contains the necessary words of claim. The requirements for timely filing are described in § 10.100(b)(1) through (3).

(c) However, in cases of death due to latent disability, the time for filing the claim does not begin to run until the survivor is aware, or reasonably should have been aware, of the causal relationship between the death and the employment (see 5 U.S.C. 8122(b)).

(d) The filing of a notice of injury or occupational disease will satisfy the time requirements for a death claim based on the same injury or occupational disease. If an injured employee or someone acting on the employee's behalf does not file a claim before the employee's death, the right to claim compensation for disability other than medical expenses ceases and does not survive.

(e) A survivor must be alive to receive any payment; there is no vested right to such payment. A report as described in § 10.414 of this part must be filed once each year to support continuing payments of compensation.

**Notices and Claims for Injury, Disease, and Death—Employer's Actions**

**§ 10.110 What should the employer do when an employee files a notice of traumatic injury or occupational disease?**

(a) The employer shall complete the agency portion of Form CA–1 (for traumatic injury) or CA–2 (for occupational disease) no more than 10 working days after receipt of notice from the employee. The employer shall also complete the Receipt of Notice and give it to the employee, along with copies of both sides of Form CA–1 or Form CA–2.

(b) The employer must complete and transmit the form to OWCP within 10 working days after receipt of notice from the employee if the injury or disease will likely result in:

(1) A medical charge against OWCP;

(2) Disability for work beyond the day or shift of injury;

(3) The need for more than two appointments for medical examination and/or treatment on separate days, leading to time loss from work;

(4) Future disability;

(5) Permanent impairment; or

(6) Continuation of pay pursuant to 5 U.S.C. 8118.

(c) The employer should not wait for submittal of supporting evidence before sending the form to OWCP.

(d) If none of the conditions in paragraph (b) of this section applies, the Form CA–1 or CA–2 shall be retained as a permanent record in the Employee Medical Folder in accordance with the guidelines established by the Office of Personnel Management.

**§ 10.111 What should the employer do when an employee files an initial claim for compensation due to disability or permanent impairment?**

(a) Except for employees covered by paragraph (d) of this section, when an employee is disabled by a work-related injury and loses pay for more than three calendar days, or has a permanent impairment or serious disfigurement as described in 5 U.S.C. 8107, the employer shall furnish the employee with Form CA–7 for the purpose of claiming compensation.

(b) If the employee is receiving continuation of pay (COP), the employer should give Form CA–7 to the employee by the 30th day of the COP period and submit the form to OWCP by the 40th day of the COP period. If the employee has not returned the form to the employer by the 40th day of the COP period, the employer should ask him or her to submit it as soon as possible.

(c) Upon receipt of Form CA–7 from the employee, or someone acting on his or her behalf, the employer shall complete the appropriate portions of the form. As soon as possible, but no more than five working days after receipt from the employee, the employer shall forward the completed Form CA–7 and any accompanying medical report to OWCP.

(d) Postal Service employees are not entitled to compensation or continuation of pay for the waiting period, the first three days of disability. Such employees may use annual leave, sick leave or leave without pay during that period; however, if the disability exceeds 14 days, the employee may have their sick leave or annual leave reinstated or receive pay for the time spent on leave without pay. This waiting period does not apply to the provision of medical care, and days of time loss for medical treatment only with no work-related disability do not count as part of the waiting period. A Postal Service employee seeking wage loss compensation for this period should utilize Form CA–7 to claim such benefits.

**§ 10.112 What should the employer do when an employee files a claim for continuing compensation due to disability?**

(a) If the employee continues in a leave-without-pay status due to a work-related injury after the period of compensation initially claimed on Form CA–7, the employer shall furnish the employee with another Form CA–7 for the purpose of claiming continuing compensation.

(b) Upon receipt of Form CA–7 from the employee, or someone acting on his or her behalf, the employer shall complete the appropriate portions of the form. As soon as possible, but no more than five working days after receipt from the employee, the employer shall forward the completed Form CA–7 and any accompanying medical report to OWCP.

**§ 10.113 What should the employer do when an employee dies from a work-related injury or disease?**

(a) The employer shall immediately report a death due to a work-related traumatic injury or occupational disease to OWCP by telephone, telegram, or facsimile (fax). No more than 10 working days after notification of the death, the employer shall complete and send Form CA–6 to OWCP.

(b) When possible, the employer shall furnish a Form CA–5 or CA–5b to all persons likely to be entitled to compensation for death of an employee. The employer should also supply information about completing and filing the form.

(c) The employer shall promptly transmit Form CA–5 or CA–5b to OWCP. The employer shall also promptly transmit to OWCP any other claim or paper submitted which appears to claim compensation on account of death.

**Evidence and Burden of Proof**

**§ 10.115 What evidence is needed to establish a claim?**

Forms CA–1, CA–2, CA–5 and CA–5b describe the basic evidence required. OWCP may send a request for additional evidence to the claimant and to his or her representative, if any; however the burden of proof still remains with the claimant. Evidence should be submitted in writing. The evidence submitted must be reliable, probative and substantial. Each claim for compensation must meet five requirements before OWCP can accept it. These requirements, which the employee must establish to meet his or her burden of proof, are as follows:

(a) The claim was filed within the time limits specified by the FECA;

(b) The injured person was, at the time of injury, an employee of the United States as defined in 5 U.S.C. 8101(1) and § 10.5(h) of this part;

(c) The fact that an injury, disease or death occurred;

(d) The injury, disease or death occurred while the employee was in the performance of duty; and

(e) The medical condition for which compensation or medical benefits is claimed is causally related to the claimed injury, disease or death. Neither the fact that the condition manifests itself during a period of Federal employment, nor the belief of the claimant that factors of employment caused or aggravated the condition, is sufficient in itself to establish causal relationship.

(f) In all claims, the claimant is responsible for submitting, or arranging for submittal of, a medical report from the attending physician. For wage loss benefits, the claimant must also submit medical evidence showing that the condition claimed is disabling. The rules for submitting medical reports are found in §§ 10.330 through 10.333.

**§ 10.116 What additional evidence is needed in cases based on occupational disease?**

(a) The employee must submit the specific detailed information described on Form CA–2 and should submit any checklist (Form CA–35, A–H) provided by the employer. OWCP has developed these checklists to address particular occupational diseases. The medical report should also include the information specified on the checklist for the particular disease claimed.

(b) The employer should submit the specific detailed information described on Form CA–2 and on any checklist pertaining to the claimed disease.

**§ 10.117 What happens if, in any claim, the employer contests any of the facts as stated by the claimant?**

(a) An employer who has reason to disagree with any aspect of the claimant's report shall submit a statement to OWCP that specifically describes the factual allegation or argument with which it disagrees and provide evidence or argument to support its position. The employer may include supporting documents such as witness statements, medical reports or records, or any other relevant information.

(b) Any such statement shall be submitted to OWCP with the notice of traumatic injury or death, or within 30 calendar days from the date notice of occupational disease or death is received from the claimant. If the employer does not submit a written explanation to support the disagreement, OWCP may accept the claimant's report of injury as established. The employer may not use a disagreement with an aspect of the claimant's report to delay forwarding the claim to OWCP or to compel or induce the claimant to change or withdraw the claim.

**§ 10.118 Does the employer participate in the claims process in any other way?**

(a) The employer is responsible for submitting to OWCP all relevant and probative factual and medical evidence in its possession, or which it may acquire through investigation or other means. Such evidence may be submitted at any time.

(b) The employer may ascertain the events surrounding an injury and the extent of disability where it appears that an employee who alleges total disability may be performing other work, or may be engaging in activities which would indicate less than total disability. This authority is in addition to that given in § 10.118(a). However, the provisions of the Privacy Act apply to any endeavor by the employer to ascertain the facts of the case (see §§ 10.10 and 10.11).

(c) The employer does not have the right, except as provided in subpart C of this part, to actively participate in the claims adjudication process.

**§ 10.119 What action will OWCP take with respect to information submitted by the employer?**

OWCP will consider all evidence submitted appropriately, and OWCP will inform the employee, the employee's representative, if any, and the employer of any action taken. Where an employer contests a claim within 30 days of the initial submittal and the claim is later approved, OWCP will notify the employer of the rationale for approving the claim.

**§ 10.120 May a claimant submit additional evidence?**

A claimant or a person acting on his or her behalf may submit to OWCP at any time any other evidence relevant to the claim.

**§ 10.121 What happens if OWCP needs more evidence from the claimant?**

If the claimant submits factual evidence, medical evidence, or both, but OWCP determines that this evidence is not sufficient to meet the burden of proof, OWCP will inform the claimant of the additional evidence needed. The claimant will be allowed at least 30 days to submit the evidence required. OWCP is not required to notify the claimant a second time if the evidence submitted in response to its first request is not sufficient to meet the burden of proof.

## Decisions on Entitlement to Benefits

**§ 10.125 How does OWCP determine entitlement to benefits?**

(a) In reaching any decision with respect to FECA coverage or entitlement, OWCP considers the claim presented by the claimant, the report by the employer, and the results of such investigation as OWCP may deem necessary.

(b) OWCP claims staff apply the law, the regulations, and its procedures to the facts as reported or obtained upon investigation. They also apply decisions of the Employees' Compensation Appeals Board and administrative decisions of OWCP as set forth in FECA Program Memoranda.

**§ 10.126 What does the decision contain?**

The decision shall contain findings of fact and a statement of reasons. It is accompanied by information about the claimant's appeal rights, which may include the right to a hearing, a reconsideration, and/or a review by the Employees' Compensation Appeals Board. (See subpart G of this part.)

**§ 10.127 To whom is the decision sent?**

A copy of the decision shall be mailed to the employee's last known address. If the employee has a designated representative before OWCP, a copy of the decision will also be mailed to the representative. A copy of the decision will also be sent to the employer.

## Subpart C—Continuation of Pay

**§ 10.200 What is continuation of pay?**

(a) For most employees who sustain a traumatic injury, the FECA provides that the employer must continue the employee's regular pay during any periods of resulting disability, up to a maximum of 45 calendar days. This is called continuation of pay, or COP. The employer, not OWCP, pays COP. Unlike wage loss benefits, COP is subject to taxes and all other payroll deductions that are made from regular income.

(b) The employer must continue the pay of an employee, except for Postal Service employees pursuant to 5 U.S.C. 8117 and as provided below in paragraph (c) of this section, who is eligible for COP, and may not require the employee to use his or her own sick or annual leave, unless the provisions of §§ 10.200(c), 10.220, or 10.222 apply. However, while continuing the employee's pay, the employer may controvert the employee's COP entitlement pending a final determination by OWCP. OWCP has the exclusive authority to determine questions of entitlement and all other issues relating to COP.

(c) Postal Service employees are not entitled to continuation of pay for the first 3 days of temporary disability and may use annual, sick or leave without pay during that period, except that if the disability exceeds 14 days or is followed by permanent disability, the Postal Service employee may have that leave restored.

(d) The FECA excludes certain persons from eligibility for COP. COP cannot be authorized for members of these excluded groups, which include but are not limited to: Persons rendering personal service to the United States similar to the service of a civil officer or employee of the United States, without pay or for nominal pay; volunteers (for instance, in the Civil Air Patrol and Peace Corps); Job Corps and Youth Conservation Corps enrollees; individuals in work- study programs, and grand or petit jurors (unless otherwise Federal employees).

## Eligibility for COP

**§ 10.205 What conditions must be met to receive COP?**

(a) To be eligible for COP, a person must:

(1) Have a "traumatic injury" as defined at § 10.5(ee) which is job-related and the cause of the disability, and/or the cause of lost time due to the need for medical examination and treatment;

(2) File Form CA–1 within 30 days of the date of the injury (but if that form

is not available, using another form would not alone preclude receipt); and

(3) Begin losing time from work due to the traumatic injury within 45 days of the injury.

(b) OWCP may find that the employee is not entitled to COP for other reasons consistent with the statute (see § 10.220).

**§ 10.206 May an employee who uses leave after an injury later decide to use COP instead?**

On Form CA–1, an employee may elect to use accumulated sick or annual leave, or leave advanced by the agency, instead of electing COP. The employee can change the election between leave and COP for prospective periods at any point while eligibility for COP remains. The employee may also change the election for past periods and request COP in lieu of leave already taken for the same period. In either situation, the following provisions apply:

(a) The request must be made to the employer within one year of the date the leave was used or the date of the written approval of the claim by OWCP (if written approval is issued), whichever is later.

(b) Where the employee is otherwise eligible, the agency shall restore leave taken in lieu of any of the 45 COP days. Where any of the 45 COP days remain unused, the agency shall continue pay prospectively.

(c) The use of leave may not be used to delay or extend the 45-day COP period or to otherwise affect the time limitation as provided by 5 U.S.C. 8117. Therefore, any leave used during the period of eligibility counts towards the 45-day maximum entitlement to COP.

**§ 10.207 May an employee who returns to work, then stops work again due to the effects of the injury, receive COP?**

If the employee recovers from disability and returns to work, then becomes disabled again and stops work, the employer shall pay any of the 45 days of entitlement to COP not used during the initial period of disability where:

(a) The employee completes Form CA–2a and elects to receive regular pay;

(b) OWCP did not deny the original claim for disability;

(c) The disability recurs and the employee stops work within 45 days of the time the employee first returned to work following the initial period of disability; and

(d) Pay has not been continued for the entire 45 days.

**Responsibilities**

**§ 10.210 What are the employee's responsibilities in COP cases?**

An employee who sustains a traumatic injury which he or she considers disabling, or someone authorized to act on his or her behalf, must take the following actions to ensure continuing eligibility for COP. The employee must:

(a) Complete and submit Form CA–1 to the employing agency as soon as possible, but no later than 30 days from the date the traumatic injury occurred.

(b) Ensure that medical evidence supporting disability resulting from the claimed traumatic injury, including a statement as to when the employee can return to his or her date of injury job, is provided to the employer within 10 calendar days after filing the claim for COP.

(c) Ensure that relevant medical evidence is submitted to OWCP, and cooperate with OWCP in developing the claim.

(d) Ensure that the treating physician specifies work limitations and provides them to the employer and/or representatives of OWCP.

(e) Provide to the treating physician a description of any specific alternative positions offered the employee, and ensure that the treating physician responds promptly to the employer and/or OWCP, with an opinion as to whether and how soon the employee could perform that or any other specific position.

**§ 10.211 What are the employer's responsibilities in COP cases?**

Once the employer learns of a traumatic injury sustained by an employee, it shall:

(a) Provide a Form CA–1 and Form CA–16 to authorize medical care in accordance with § 10.300. Failure to do so may mean that OWCP will not uphold any termination of COP by the employer.

(b) Advise the employee of the right to receive COP, and the need to elect among COP, annual or sick leave or leave without pay, for any period of disability.

(c) Inform the employee of any decision to controvert COP and/or terminate pay, and the basis for doing so.

(d) Complete Form CA–1 and transmit it, along with all other available pertinent information, (including the basis for any controversion), to OWCP within 10 working days after receiving the completed form from the employee.

**Calculation of COP**

**§ 10.215 How does OWCP compute the number of days of COP used?**

COP is payable for a maximum of 45 calendar days, and every day used is counted toward this maximum. The following rules apply:

(a) Time lost on the day or shift of the injury does not count toward COP. (Instead, the agency must keep the employee in a pay status for that period);

(b) The first COP day is the first day disability begins following the date of injury (providing it is within the 45 days following the date of injury), except where the injury occurs before the beginning of the work day or shift, in which case the date of injury is charged to COP;

(c) Any part of a day or shift (except for the day of the injury) counts as a full day toward the 45 calendar day total;

(d) Regular days off are included if COP has been used on the regular work days immediately preceding or following the regular day(s) off, and medical evidence supports disability; and

(e) Leave used during a period when COP is otherwise payable is counted toward the 45-day COP maximum as if the employee had been in a COP status.

(f) For employees with part-time or intermittent schedules, all calendar days on which medical evidence indicates disability are counted as COP days, regardless of whether the employee was or would have been scheduled to work on those days. The rate at which COP is paid for these employees is calculated according to § 10.216(b).

**§ 10.216 How is the pay rate for COP calculated?**

The employer shall calculate COP using the period of time and the weekly pay rate.

(a) The pay rate for COP purposes is equal to the employee's regular "weekly" pay (the average of the weekly pay over the preceding 52 weeks).

(1) The pay rate excludes overtime pay, but includes other applicable extra pay except to the extent prohibited by law.

(2) Changes in pay or salary (for example, promotion, demotion, within-grade increases, termination of a temporary detail, etc.) which would have otherwise occurred during the 45-day period are to be reflected in the weekly pay determination.

(b) The weekly pay for COP purposes is determined according to the following formulas:

(1) For full or part-time workers (permanent or temporary) who work the

same number of hours each week of the year (or of the appointment), the weekly pay rate is the hourly pay rate (A) in effect on the date of injury multiplied by (×) the number of hours worked each week (B): A × B = Weekly Pay Rate.

(2) For part-time workers (permanent or temporary) who do not work the same number of hours each week, but who do work each week of the year (or period of appointment), the weekly pay rate is an average of the weekly earnings, established by dividing (÷) the total earnings (excluding overtime) from the year immediately preceding the injury (A) by the number of weeks (or partial weeks) worked in that year (B): A ÷ B = Weekly Pay Rate.

(3) For intermittent and seasonal workers, whether permanent or temporary, who do not work either the same number of hours or every week of the year (or period of appointment), the weekly pay rate is the average weekly earnings established by dividing (÷) the total earnings during the full 12-month period immediately preceding the date of injury (excluding overtime) (A), by the number of weeks (or partial weeks) worked during that year (B) (that is, A ÷ B); or 150 times the average daily wage earned in the employment during the days employed within the full year immediately preceding the date of injury divided by 52 weeks, whichever is greater.

**§ 10.217 Is COP charged if the employee continues to work, but in a different job that pays less?**

If the employee cannot perform the duties of his or her regular position, but instead works in another job with different duties with no loss in pay, then COP is not chargeable. COP must be paid and the days counted against the 45 days authorized by law whenever an actual reduction of pay results from the injury, including a reduction of pay for the employee's normal administrative workweek that results from a change or diminution in his or her duties following an injury. However, this does not include a reduction of pay that is due solely to an employer being prohibited by law from paying extra pay to an employee for work he or she does not actually perform.

### Controversion and Termination of COP

**§ 10.220 When is an employer not required to pay COP?**

An employer shall continue the regular pay of an eligible employee without a break in time for up to 45 calendar days, except when, and only when:

(a) The disability was not caused by a traumatic injury;

(b) The employee is not a citizen of the United States or Canada;

(c) No written claim was filed within 30 days from the date of injury;

(d) The injury was not reported until after employment has been terminated;

(e) The injury occurred off the employing agency's premises and was otherwise not within the performance of official duties;

(f) The injury was caused by the employee's willful misconduct, intent to injure or kill himself or herself or another person, or was proximately caused by intoxication by alcohol or illegal drugs; or

(g) Work did not stop until more than 45 days following the injury.

**§ 10.221 How is a claim for COP controverted?**

When the employer stops an employee's pay for one of the reasons cited in § 10.220, the employer must controvert the claim for COP on Form CA–1, explaining in detail the basis for the refusal. The final determination on entitlement to COP always rests with OWCP.

**§ 10.222 When may an employer terminate COP which has already begun?**

(a) Where the employer has continued the pay of the employee, it may be stopped only when at least one of the following circumstances is present:

(1) Medical evidence which on its face supports disability due to a work-related injury is not received within 10 calendar days after the claim is submitted (unless the employer's own investigation shows disability to exist). Where the medical evidence is later provided, however, COP shall be reinstated retroactive to the date of termination;

(2) The medical evidence from the treating physician shows that the employee is not disabled from his or her regular position;

(3) Medical evidence from the treating physician shows that the employee is not totally disabled, and the employee refuses a written offer of a suitable alternative position which is approved by the attending physician. If OWCP later determines that the position was not suitable, OWCP will direct the employer to grant the employee COP retroactive to the termination date.

(4) The employee returns to work with no loss of pay;

(5) The employee's period of employment expires or employment is otherwise terminated (as established prior to the date of injury);

(6) OWCP directs the employer to stop COP; and/or

(7) COP has been paid for 45 calendar days.

(b) An employer may not interrupt or stop COP to which the employee is otherwise entitled because of a disciplinary action, unless a preliminary notice was issued to the employee before the date of injury and the action becomes final or otherwise takes effect during the COP period.

(c) An employer cannot otherwise stop COP unless it does so for one of the reasons found in this section or § 10.220. Where an employer stops COP, it must file a controversion with OWCP, setting forth the basis on which it terminated COP, no later than the effective date of the termination.

**§ 10.223 Are there other circumstances under which OWCP will not authorize payment of COP?**

When OWCP finds that an employee or his or her representative refuses or obstructs a medical examination required by OWCP, the right to COP is suspended until the refusal or obstruction ceases. COP already paid or payable for the period of suspension is forfeited. If already paid, the COP may be charged to annual or sick leave or considered an overpayment of pay consistent with 5 U.S.C. 5584.

**§ 10.224 What happens if OWCP finds that the employee is not entitled to COP after it has been paid?**

Where OWCP finds that the employee is not entitled to COP after it has been paid, the employee may chose to have the time charged to annual or sick leave, or considered an overpayment of pay under 5 U.S.C. 5584. The employer must correct any deficiencies in COP as directed by OWCP.

## Subpart D—Medical and Related Benefits

### Emergency Medical Care

**§ 10.300 What are the basic rules for authorizing emergency medical care?**

(a) When an employee sustains a work-related traumatic injury that requires medical examination, medical treatment, or both, the employer shall authorize such examination and/or treatment by issuing a Form CA–16. This form may be used for occupational disease or illness only if the employer has obtained prior permission from OWCP.

(b) The employer shall issue Form CA–16 within four hours of the claimed injury. If the employer gives verbal authorization for such care, he or she should issue a Form CA–16 within 48 hours. The employer is not required to issue a Form CA–16 more than one week after the occurrence of the claimed injury. The employer may not authorize

examination or medical or other treatment in any case that OWCP has disallowed.

(c) Form CA–16 must contain the full name and address of the qualified physician or qualified medical facility authorized to provide service. The authorizing official must sign and date the form and must state his or her title. Form CA–16 authorizes treatment for 60 days from the date of injury, unless OWCP terminates the authorization sooner.

(d) The employer should advise the employee of the right to his or her initial choice of physician. The employer shall allow the employee to select a qualified physician, after advising him or her of those physicians excluded under subpart I of this part. The physician may be in private practice, including a health maintenance organization (HMO), or employed by a Federal agency such as the Department of the Army, Navy, Air Force, or Veterans Affairs. Any qualified physician may provide initial treatment of a work-related injury in an emergency. See also § 10.825(b).

**§ 10.301 May the physician designated on Form CA–16 refer the employee to another medical specialist or medical facility?**

The physician designated on Form CA–16 may refer the employee for further examination, testing, or medical care. OWCP will pay this physician or facility's bill on the authority of Form CA–16. The employer should not issue a second Form CA–16.

**§ 10.302 Should the employer authorize medical care if he or she doubts that the injury occurred, or that it is work-related?**

If the employer doubts that the injury occurred, or that it is work-related, he or she should authorize medical care by completing Form CA–16 and checking block 6B of the form. If the medical and factual evidence sent to OWCP shows that the condition treated is not work-related, OWCP will notify the employee, the employer, and the physician or hospital that OWCP will not authorize payment for any further treatment.

**§ 10.303 Should the employer use a Form CA–16 to authorize medical testing when an employee is exposed to a workplace hazard just once?**

(a) Simple exposure to a workplace hazard, such as an infectious agent, does not constitute a work-related injury entitling an employee to medical treatment under the FECA. The employer therefore should not use a Form CA–16 to authorize medical testing for an employee who has merely been exposed to a workplace hazard, unless the employee has sustained an identifiable injury or medical condition as a result of that exposure. OWCP will authorize preventive treatment only under certain well-defined circumstances (see § 10.313).

(b) Employers may be required under other statutes or regulations to provide their employees with medical testing and/or other services in situations described in paragraph (a) of this section. For example, regulations issued by the Occupational Safety and Health Administration at 29 CFR chapter XVII require employers to provide their employees with medical consultations and/or examinations when they either exhibit symptoms consistent with exposure to a workplace hazard, or when an identifiable event such as a spill, leak or explosion occurs and results in the likelihood of exposure to a workplace hazard. In addition, 5 U.S.C. 7901 authorizes employers to establish health programs whose staff can perform tests for workplace hazards, counsel employees for exposure or feared exposure to such hazards, and provide health care screening and other associated services.

**§ 10.304 Are there any exceptions to these procedures for obtaining medical care?**

In cases involving emergencies or unusual circumstances, OWCP may authorize treatment in a manner other than as stated in this subpart.

## Medical Treatment and Related Issues

**§ 10.310 What are the basic rules for obtaining medical care?**

(a) The employee is entitled to receive all medical services, appliances or supplies which a qualified physician prescribes or recommends and which OWCP considers necessary to treat the work-related injury. Billing for these services is described in subpart I of this part. The employee need not be disabled to receive such treatment. If there is any doubt as to whether a specific service, appliance or supply is necessary to treat the work-related injury, the employee should consult OWCP prior to obtaining it through the automated authorization process described in § 10.800. OWCP may also utilize the services of a field nurse to facilitate and coordinate medical care for the employee. OWCP may contract with a specific provider or providers to supply such services or appliances, including durable medical equipment and prescribed medications.

(b) Any qualified physician or qualified hospital may provide such services, appliances and supplies. Non-physician providers such as physicians' assistants, nurse practitioners and physical therapists may also provide authorized services for injured employees to the extent allowed by applicable Federal and State law.

(c) Where OWCP has not contracted for the provision of appliances or supplies, only a supplier of durable medical equipment, which is a provider that is registered in Medicare's Durable Medical Equipment, Prosthetics, Orthotics and Supplies Competitive Bidding Process, may furnish such appliances and supplies. OWCP may apply a test of cost-effectiveness to appliances and supplies, may offset the cost of prior rental payments against a future purchase price, and may provide refurbished appliances where appropriate.

**§ 10.311 What are the special rules for the services of chiropractors?**

(a) The services of chiropractors that may be reimbursed are limited by the FECA to treatment to correct a spinal subluxation. The costs of physical and related laboratory tests performed by or required by a chiropractor to diagnose such a subluxation are also payable.

(b) In accordance with 5 U.S.C. 8101(3), a diagnosis of spinal "subluxation as demonstrated by X-ray to exist" must appear in the chiropractor's report before OWCP can consider payment of a chiropractor's bill.

(c) A chiropractor may interpret his or her x-rays to the same extent as any other physician. To be given any weight, the medical report must state that x-rays support the finding of spinal subluxation. OWCP will not necessarily require submittal of the x-ray, or a report of the x-ray, but the report must be available for submittal on request.

(d) A chiropractor may also provide services in the nature of physical therapy under the direction of, and as prescribed by, a qualified physician.

**§ 10.312 What are the special rules for the services of clinical psychologists?**

A clinical psychologist may serve as a physician only within the scope of his or her practice as defined by State law. Therefore, a clinical psychologist may not serve as a physician for conditions that include a physical component unless the applicable State law allows clinical psychologists to treat physical conditions. A clinical psychologist may also perform testing, evaluation and other services under the direction of a qualified physician.

**§ 10.313 Will OWCP pay for preventive treatment?**

The FECA does not authorize payment for preventive measures such as vaccines and inoculations, and in general, preventive treatment may be a responsibility of the employing agency

under the provisions of 5 U.S.C. 7901 (see § 10.303). However, OWCP can authorize treatment for the following conditions, even though such treatment is designed, in part, to prevent further injury:

(a) Complications of preventive measures which are provided or sponsored by the agency, such as an adverse reaction to prophylactic immunization.

(b) Actual or probable exposure to a known contaminant due to an injury, thereby requiring disease-specific measures against infection. Examples include the provision of tetanus antitoxin or booster toxoid injections for puncture wounds; administration of rabies vaccine for a bite from a rabid or potentially rabid animal; or appropriate measures where exposure to human immunodeficiency virus (HIV) has occurred.

(c) Conversion of tuberculin reaction from negative to positive following exposure to tuberculosis in the performance of duty. In this situation, the appropriate therapy may be authorized.

(d) Where injury to one eye has resulted in loss of vision, periodic examination of the uninjured eye to detect possible sympathetic involvement of the uninjured eye at an early stage.

**§ 10.314 Will OWCP pay for the services of an attendant?**

Yes, OWCP will pay for the services of an attendant where the need for such services has been medically documented. In the exercise of the discretion afforded by 5 U.S.C. 8111(a), the Director has determined that, except where attendant service payments were being made prior to January 4, 1999, direct payments to the claimant to cover such services will no longer be made. Rather, the cost of providing attendant services will be paid under section 8103 of the Act, and medical bills for these services will be considered under § 10.801, so long as the personal care services have been determined to be medically necessary and are provided by a home health aide, licensed practical nurse, or similarly trained individual, subject to requirements specified by OWCP. By paying for the services under section 8103, OWCP can better determine whether the services provided are necessary, and what type of provider is most qualified to provide adequate care to meet the needs of the injured employee. In addition, a system requiring the personal care provider to submit a bill to OWCP, where the amount billed will be subject to OWCP's fee schedule, will result in greater fiscal accountability.

**§ 10.315 Will OWCP pay for transportation to obtain medical treatment?**

(a) The employee is entitled to reimbursement of reasonable and necessary expenses, including transportation needed to obtain authorized medical services, appliances or supplies. To determine what is a reasonable distance to travel, OWCP will consider the availability of services, the employee's condition, and the means of transportation. Generally, a roundtrip distance of up to 100 miles is considered a reasonable distance to travel. Travel should be undertaken by the shortest route, and if practical, by public conveyance. If the medical evidence shows that the employee is unable to use these means of transportation, OWCP may authorize travel by taxi or special conveyance.

(b) For non-emergency medical treatment, if roundtrip travel of more than 100 miles is contemplated, or air transportation or overnight accommodations will be needed, the employee must submit a written request to OWCP for prior authorization with information describing the circumstances and necessity for such travel expenses. OWCP will approve the request if it determines that the travel expenses are reasonable and necessary, and are incident to obtaining authorized medical services, appliances or supplies. Requests for travel expenses that are often approved include those resulting from referrals to a specialist for further medical treatment, and those involving air transportation of an employee who lives in a remote geographical area with limited local medical services.

(c) If a claimant disagrees with the decision of OWCP that requested travel expenses are either not reasonable or necessary, or are not incident to obtaining authorized medical services or supplies, he or she may utilize the appeals process described in subpart G of this part.

(d) The standard form designated for medical travel refund requests is Form OWCP–957 and must be used to seek reimbursement under this section. This form can be obtained from OWCP.

**§ 10.316 After selecting a treating physician, may an employee choose to be treated by another physician instead?**

(a) When the physician originally selected to provide treatment for a work-related injury refers the employee to a specialist for further medical care, the employee need not consult OWCP for approval. In all other instances, however, the employee must submit a written request to OWCP with his or her reasons for desiring a change of physician.

(b) OWCP will approve the request if it determines that the reasons submitted are sufficient. Requests that are often approved include those for transfer of care from a general practitioner to a physician who specializes in treating conditions like the work-related one, or the need for a new physician when an employee has moved. The employer may not authorize a change of physicians.

**Directed Medical Examinations**

**§ 10.320 Can OWCP require an employee to be examined by another physician?**

OWCP sometimes needs a second opinion from a medical specialist. The employee must submit to examination by a qualified physician as often and at such times and places as OWCP considers reasonably necessary. The employee may have a qualified physician, paid by him or her, present at such examination. However, the employee is not entitled to have anyone else present at the examination unless there is rationalized medical evidence that establishes that someone else is needed in the room or OWCP decides that exceptional circumstances exist. Where an employee requires an accommodation, such as where a hearing-impaired employee needs an interpreter, the presence of an interpreter will be allowed. Also, OWCP may send a case file for second opinion review where actual examination is not needed, or where the employee is deceased.

**§ 10.321 What happens if the opinion of the physician selected by OWCP differs from the opinion of the physician selected by the employee?**

(a) If one medical opinion holds more probative value, OWCP will base its determination of entitlement on that medical conclusion (see § 10.502). A difference in medical opinion sufficient to be considered a conflict occurs when two reports of virtually equal weight and rationale reach opposing conclusions (see *James P. Roberts,* 31 ECAB 1010 (1980)).

(b) If a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an OWCP medical adviser or consultant, OWCP shall appoint a third physician to make an examination (see § 10.502). This is called a referee or impartial examination. OWCP will select a physician who is qualified in the appropriate specialty and who has had

no prior connection with the case. The employee is not entitled to have anyone present at the examination unless OWCP decides that exceptional circumstances exist. For example, where a hearing-impaired employee needs an interpreter, the presence of an interpreter would be allowed. Also, a case file may be sent for referee or impartial medical review where there is no need for an actual examination, or where the employee is deceased.

**§ 10.322 Who pays for second opinion and referee examinations?**

OWCP will pay second opinion and referee medical specialists directly. OWCP will reimburse the employee all necessary and reasonable expenses incident to such an examination, including transportation costs and actual wages lost for the time needed to submit to an examination required by OWCP.

**§ 10.323 What are the penalties for failing to report for or obstructing a second opinion or referee examination?**

(a) If an employee refuses to submit to or in any way obstructs an examination required by OWCP, including testing such as functional capacity determinations conducted in connection with an OWCP-directed medical examination, his or her right to compensation under the FECA is suspended under 5 U.S.C. 8123(d) until such refusal or obstruction stops. The action of the employee's representative is considered to be the action of the employee for purposes of this section. The employee will forfeit compensation otherwise paid or payable under the FECA for the period of the refusal or obstruction, and any compensation already paid for that period will be declared an overpayment and will be subject to recovery pursuant to 5 U.S.C. 8129.

(b) If the employee does not report for an OWCP-directed examination or in any way obstructs this examination, he or she may provide an explanation to OWCP within 14 days. If this explanation does not establish good cause for the employee's actions, entitlement to compensation will be suspended in accordance with 5 U.S.C. 8123(d). Should the employee subsequently agree to attend the examination or cease the obstruction (as expressed in writing or by telephone documented on Form CA–110), OWCP will restore any periodic benefits to which the employee is entitled when the employee actually reports for and cooperates with the examination. Payment is retroactive to the date the employee agreed to attend or cease obstruction of the examination.

**§ 10.324 May an employer require an employee to undergo a physical examination in connection with a work-related injury?**

The employer may have authority independent of the FECA to require the employee to undergo a medical examination to determine whether he or she meets the medical requirements of the position held or can perform the duties of that position. Nothing in the FECA or in this part affects such authority. However, no agency-required examination or related activity shall interfere with the employee's initial choice of physician or the provision of any authorized examination or treatment, including the issuance of Form CA–16.

## Medical Reports

**§ 10.330 What are the requirements for medical reports?**

In all cases reported to OWCP, a medical report from the attending physician is required. This report should include:

(a) Dates of examination and treatment;

(b) History given by the employee;

(c) Physical findings;

(d) Results of diagnostic tests;

(e) Diagnosis;

(f) Course of treatment;

(g) A description of any other conditions found but not due to the claimed injury;

(h) The treatment given or recommended for the claimed injury;

(i) The physician's opinion, with medical reasons, as to causal relationship between the diagnosed condition(s) and the factors or conditions of the employment;

(j) The extent of disability affecting the employee's ability to work due to the injury;

(k) The prognosis for recovery; and

(l) All other material findings.

**§ 10.331 How and when should the medical report be submitted?**

(a) Form CA–16 may be used for the initial medical report; Form CA–20 may be used for the initial report and for subsequent reports; and Form CA–20a may be used where continued compensation is claimed. Use of medical report forms is not required, however. The report may also be made in narrative form on the physician's letterhead stationery. The report should bear the physician's signature or signature stamp. OWCP may require an original signature on the report.

(b) The report shall be submitted directly to OWCP as soon as possible after medical examination or treatment is received, either by the employee or the physician. (See also § 10.210.) The employer may request a copy of the report from OWCP. The employer should use Form CA–17 to obtain interim reports concerning the duty status of an employee with a disabling injury.

**§ 10.332 What additional medical information will OWCP require to support continuing payment of benefits?**

In all cases of serious injury or disease, especially those requiring hospital treatment or prolonged care, OWCP will request detailed narrative reports from the attending physician at periodic intervals. The physician will be asked to describe continuing medical treatment for the condition accepted by OWCP, a prognosis, a description of work limitations, if any, and the physician's opinion as to the continuing causal relationship between the employee's condition and factors of his or her Federal employment.

**§ 10.333 What additional medical information will OWCP require to support a claim for a schedule award?**

To support a claim for a schedule award, a medical report must contain accurate measurements of the function of the organ or member, in accordance with the American Medical Association's *Guides to the Evaluation of Permanent Impairment* as described in § 10.404. These measurements may include: the actual degree of loss of active or passive motion or deformity; the amount of atrophy; the decrease, if any, in strength; the disturbance of sensation; pain due to nerve impairment; the diagnosis of the condition; and functional impairment ratings.

## Medical Bills

**§ 10.335 How are medical bills submitted?**

Usually, medical providers submit bills directly to OWCP or to a bill processing agent designated by OWCP. The rules for submitting and paying bills are stated in subpart I of this part. An employee claiming reimbursement of medical expenses should submit an itemized bill as described in § 10.802.

**§ 10.336 What are the time frames for submitting bills?**

To be considered for payment, bills must be submitted by the end of the calendar year after the year when the expense was incurred, or by the end of the calendar year after the year when OWCP first accepted the claim as compensable, whichever is later.

**§ 10.337 If an employee is only partially reimbursed for a medical expense, must the provider refund the balance of the amount paid to the employee?**

(a) The OWCP fee schedule sets maximum limits on the amounts payable for many services (see § 10.805). The employee may be only partially reimbursed for medical expenses because the amount he or she paid to the medical provider for a service exceeds the maximum allowable charge set by the OWCP fee schedule.

(b) If this happens, OWCP shall advise the employee of the maximum allowable charge for the service in question and of his or her responsibility to ask the provider to refund to the employee, or credit to the employee's account, the amount he or she paid which exceeds the maximum allowable charge. The provider may request reconsideration of the fee determination as set forth in §§ 10.812 and 10.813.

(c) If the provider does not refund to the employee or credit to his or her account the amount of money paid in excess of the charge which OWCP allows, the employee should submit documentation of the attempt to obtain such refund or credit to OWCP. OWCP may make reasonable reimbursement to the employee after reviewing the facts and circumstances of the case.

## Subpart E—Compensation and Related Benefits

### Compensation for Disability and Impairment

**§ 10.400 What is total disability?**

(a) Permanent total disability is presumed to result from the loss of use of both hands, both arms, both feet, or both legs, or the loss of sight of both eyes. 5 U.S.C. 8105(b). However, the presumption of permanent total disability as a result of such loss may be rebutted by evidence to the contrary, such as evidence of continued ability to work and to earn wages despite the loss.

(b) Temporary total disability is defined as the inability to return to the position held at the time of injury or earn equivalent wages, or to perform other gainful employment, due to the work-related injury. Except as presumed under paragraph (a) of this section, an employee's disability status is always considered temporary pending return to work.

**§ 10.401 When and how is compensation for total disability paid?**

(a) Compensation is payable when an employee starts to lose pay if the injury causes permanent disability or if pay loss continues for more than 14 calendar days. Otherwise, compensation is payable on the fourth day after pay stops pursuant to 5 U.S.C. 8117. Compensation may not be paid while an injured employee is in a continuation of pay status or receives pay for leave or, for Postal Service employees, for the first three days of temporary disability, except for medical or vocational rehabilitation benefits.

(b) Compensation for total disability is payable at the rate of 66⅔ percent of the pay rate if the employee has no dependents, or 75 percent of the pay rate if the employee has at least one dependent. ("Dependents" are defined at 5 U.S.C. 8110(a).)

**§ 10.402 What is partial disability?**

An injured employee who cannot return to the position held at the time of injury (or earn equivalent wages) due to the work-related injury, but who is not totally disabled for all gainful employment, is considered to be partially disabled.

**§ 10.403 When and how is compensation for partial disability paid?**

(a) 5 U.S.C. 8115 outlines how compensation for partial disability is determined. If the employee has actual earnings which fairly and reasonably represent his or her wage-earning capacity, those earnings will form the basis for payment of compensation for partial disability. (See §§ 10.500 through 10.521 concerning return to work.) If the employee's actual earnings do not fairly and reasonably represent his or her wage-earning capacity, or if the employee has no actual earnings, OWCP uses the factors stated in 5 U.S.C. 8115 to select a position which represents his or her wage-earning capacity, which include the nature of the injury, the degree of physical impairment, the usual employment, the age of the employee, the employee's qualifications for other employment and the availability of suitable employment. However, OWCP will not secure employment for the employee in the position selected for establishing a wage-earning capacity.

(b) Compensation for partial disability is payable as a percentage of the difference between the employee's pay rate for compensation purposes and the employee's wage-earning capacity. The percentage is 66⅔ percent of this difference if the employee has no dependents, or 75 percent of this difference if the employee has at least one dependent.

(c) The formula which OWCP uses to compute the compensation payable for partial disability employs the following terms: Pay rate for compensation purposes, which is defined in § 10.5(s) of this part; current pay rate, which means the salary or wages for the job held at the time of injury at the time of the determination; and earnings, which means the employee's actual earnings, or the salary or pay rate of the position selected by OWCP as representing the employee's wage-earning capacity.

(d) The employee's wage-earning capacity in terms of percentage is computed by dividing the employee's earnings by the current pay rate. The comparison of earnings and "current" pay rate for the job held at the time of injury need not be made as of the beginning of partial disability. OWCP may use any convenient date for making the comparison as long as both wage rates are in effect on the date used for comparison.

(e) The employee's wage-earning capacity in terms of dollars is computed by first multiplying the pay rate for compensation purposes by the percentage of wage-earning capacity. The resulting dollar amount is then subtracted from the pay rate for compensation purposes to obtain the employee's loss of wage-earning capacity.

**§ 10.404 When and how is compensation for a schedule impairment paid?**

Compensation is provided for specified periods of time for the permanent loss or loss of use of certain members, organs and functions of the body. Such loss or loss of use is known as permanent impairment. Compensation for proportionate periods of time is payable for partial loss or loss of use of each member, organ or function. 5 U.S.C. 8107(b)(19). OWCP evaluates the degree of impairment to schedule members, organs and functions as defined in 5 U.S.C. 8107 according to the standards set forth in the specified (by OWCP) edition of the American Medical Association's *Guides to the Evaluation of Permanent Impairment.*

(a) 5 U.S.C. 8107(c) provides compensation for loss to the following list of schedule members:

| Member | Weeks |
|---|---|
| Arm | 312 |
| Leg | 288 |
| Hand | 244 |
| Foot | 205 |
| Eye | 160 |
| Thumb | 75 |
| First Finger lost | 46 |
| Great toe | 38 |
| Second finger | 30 |
| Third finger | 25 |
| Toe other than great toe | 16 |
| Fourth finger | 15 |
| Hearing, one ear | 52 |

| Member | Weeks |
|---|---|
| Hearing, both ears | 200 |

(b) Pursuant to the authority provided by 5 U.S.C. 8107(c)(22), the Secretary has added the following organs to the compensation schedule for injuries that were sustained on or after September 7, 1974, except that a schedule award for the skin may be paid for injuries on or after September 11, 2001:

| Member | Weeks |
|---|---|
| Breast (one) | 52 |
| Kidney (one) | 156 |
| Larynx | 160 |
| Lung (one) | 156 |
| Penis | 205 |
| Testicle (one) | 52 |
| Tongue | 160 |
| Ovary (one) | 52 |
| Uterus/cervix and vulva/vagina | 205 |
| Skin | 205 |

(c) Compensation for schedule awards is payable at 66⅔ percent of the employee's pay, or 75 percent of the pay when the employee has at least one dependent.

(d) The period of compensation payable under 5 U.S.C. 8107(c) shall be reduced by the period of compensation paid or payable under the schedule for an earlier injury if:

(1) Compensation in both cases is for impairment of the same member or function or different parts of the same member or function, or for disfigurement; and

(2) OWCP finds that compensation payable for the later impairment in whole or in part would duplicate the compensation payable for the pre-existing impairment.

(e) Compensation not to exceed $3,500 may be paid for serious disfigurement of the face, head or neck which is likely to handicap a person in securing or maintaining employment. Under 5 U.S.C. 8107(21), a disfigurement award may be paid concurrently with schedule awards.

**§ 10.405 Who is considered a dependent in a claim based on disability or impairment?**

(a) Dependents include a wife or husband; an unmarried child under 18 years of age; an unmarried child over 18 who is incapable of self-support; a student, until he or she reaches 23 years of age or completes four years of school beyond the high school level; or a wholly dependent parent.

(b) Augmented compensation payable for an unmarried child, which would otherwise terminate when the child reached the age of 18, may be continued while the child is a student as defined in 5 U.S.C. 8101(17).

**§ 10.406 What are the maximum and minimum rates of compensation in disability cases?**

(a) Compensation for total or partial disability may not exceed 75 percent of the basic monthly pay of the highest step of grade 15 of the General Schedule. (Basic monthly pay does not include locality adjustments.) However, this limit does not apply to disability sustained in the performance of duty which was due to an assault which occurred during an attempted assassination of a Federal official described under 18 U.S.C. 351(a) or 1751(a).

(b) Compensation for total disability may not be less than 75 percent of the basic monthly pay of the first step of grade 2 of the General Schedule or actual pay, whichever is less. (Basic monthly pay does not include locality adjustments.)

## Compensation for Death

**§ 10.410 Who is entitled to compensation in case of death, and what are the rates of compensation payable in death cases?**

(a) Pursuant to 5 U.S.C. 8133, benefits may be paid to eligible dependents of an employee whose death results from an injury sustained in the performance of duty. This benefit is separate and distinct from a death gratuity benefit under 5 U.S.C. 8102a and subpart J of these regulations.

(b) If there is no child entitled to compensation, the employee's surviving spouse will receive compensation equal to 50 percent of the employee's monthly pay until death or remarriage before reaching age 55. Upon remarriage, the surviving spouse will be paid a lump sum equal to 24 times the monthly compensation payment (excluding compensation payable on account of another individual) to which the surviving spouse was entitled immediately before the remarriage. If remarriage occurs at age 55 or older, the lump-sum payment will not be paid and compensation will continue until death.

(c) If there is a child entitled to compensation, the compensation for the surviving spouse will equal 45 percent of the employee's monthly pay plus 15 percent for each child, but the total percentage may not exceed 75 percent.

(d) If there is a child entitled to compensation and no surviving spouse, compensation for one child will equal 40 percent of the employee's monthly pay. Fifteen percent will be awarded for each additional child, not to exceed 75 percent, the total amount to be shared equally among all children.

(e) If there is no child or surviving spouse entitled to compensation, the parents will receive compensation equal to 25 percent of the employee's monthly pay if one parent was wholly dependent on the employee at the time of death and the other was not dependent to any extent, or 20 percent each if both were wholly dependent on the employee, or a proportionate amount in the discretion of the Director if one or both were partially dependent on the employee. If there is a child or surviving spouse entitled to compensation, the parents will receive so much of the compensation described in the preceding sentence as, when added to the total percentages payable to the surviving spouse and children, will not exceed a total of 75 percent of the employee's monthly pay.

(f) If there is no child, surviving spouse or dependent parent entitled to compensation, the brothers, sisters, grandparents and grandchildren will receive compensation equal to 20 percent of the employee's monthly pay to such dependent if one was wholly dependent on the employee at the time of death; or 30 percent if more than one was wholly dependent, divided among such dependents equally; or 10 percent if no one was wholly dependent but one or more was partly dependent, divided among such dependents equally. If there is a child, surviving spouse or dependent parent entitled to compensation, the brothers, sisters, grandparents and grandchildren will receive so much of the compensation described in the preceding sentence as, when added to the total percentages payable to the children, surviving spouse and dependent parents, will not exceed a total of 75 percent of the employee's monthly pay.

(g) A child, brother, sister or grandchild may be entitled to receive death benefits until death, marriage, or reaching age 18. Regarding entitlement after reaching age 18, refer to § 10.417.

**§ 10.411 What are the maximum and minimum rates of compensation in death cases?**

(a) Compensation for death may not exceed the employee's pay or 75 percent of the basic monthly pay of the highest step of grade 15 of the General Schedule, except that compensation may exceed the employee's basic monthly pay if such excess is created by authorized cost-of-living increases. (Basic monthly pay does not include locality adjustments.) However, the maximum limit does not apply when the death occurred during an assassination of a Federal official described under 18 U.S.C. 351(a) or 18 U.S.C. 1751(a).

(b) Compensation for death is computed on a minimum pay rate equal

to the basic monthly pay of an employee at the first step of grade 2 of the General Schedule. (Basic monthly pay does not include locality adjustments.)

**§ 10.412 Will OWCP pay the costs of burial and transportation of the remains?**

In a case accepted for death benefits, OWCP will pay up to $800 for funeral and burial expenses. When an employee's home is within the United States and the employee dies outside the United States, or away from home or the official duty station, an additional amount may be paid for transporting the remains to the employee's home as set forth in 5 U.S.C. 8134. An additional amount of $200 is paid to the personal representative of the decedent for reimbursement of the costs of terminating the decedent's status as an employee of the United States in accordance with 5 U.S.C. 8133.

**§ 10.413 May a schedule award be paid after an employee's death?**

For a schedule award to be paid following the death of an employee, the employee must have filed a valid claim specifically for a schedule award prior to death; in addition, the employee must have died from a cause other than the injury before the end of the period specified in the schedule. The balance of the schedule award may be paid to an employee's survivors pursuant to the proportions and order of precedence described in 5 U.S.C. 8109.

**§ 10.414 What reports of dependents are needed in death cases?**

If a beneficiary is receiving compensation benefits on account of an employee's death, OWCP will ask him or her to complete a report once each year on Form CA–12. The report requires the beneficiary to note changes in marital status and dependents. If the beneficiary fails to submit the form (or an equivalent written statement) within 30 days of the date of request, OWCP shall suspend compensation until the requested form or equivalent written statement is received. The suspension will include compensation payable for or on behalf of another person (for example, compensation payable to a widow on behalf of a child). When the form or statement is received, compensation will be reinstated at the appropriate rate retroactive to the date of suspension, provided the beneficiary is entitled to such compensation.

**§ 10.415 What must a beneficiary do if the number of beneficiaries decreases?**

The circumstances under which compensation on account of death shall be terminated are described in 5 U.S.C. 8133(b). A beneficiary in a claim for death benefits should promptly notify OWCP of any event which would affect his or her entitlement to continued compensation. The terms "marriage" and "remarriage" include common-law marriage as recognized and defined by State law in the State where the beneficiary resides. If a beneficiary, or someone acting on his or her behalf, receives a check or electronic payment which includes payment of compensation for any period after the date when entitlement ended, he or she must promptly return such funds to OWCP.

**§ 10.416 How does a change in the number of beneficiaries affect the amount of compensation paid to the other beneficiaries?**

If compensation to a beneficiary is terminated, the amount of compensation payable to one or more of the remaining beneficiaries may be reapportioned. Similarly, the birth of a posthumous child may result in a reapportionment of the amount of compensation payable to other beneficiaries. The parent, or someone acting on the child's behalf, shall promptly notify OWCP of the birth and submit a copy of the birth certificate.

**§ 10.417 What reports are needed when compensation payments continue for children over age 18?**

(a) Compensation payable on behalf of a child, brother, sister, or grandchild, which would otherwise end when the person reaches 18 years of age, shall be continued if and for so long as he or she is not married and is either a student as defined in 5 U.S.C. 8101(17), or physically or mentally incapable of self-support.

(b) At least once each year, OWCP will ask a beneficiary receiving compensation based on the student status of a dependent to provide proof of continuing entitlement to such compensation, including certification of school enrollment. The beneficiary is required to report any changes to student status in the interim.

(c) Likewise, at least once each year unless otherwise provided in paragraph (d) of this section, OWCP will ask a beneficiary or legal guardian receiving compensation based on a dependent's physical or mental inability to support himself or herself to submit a medical report verifying that the dependent's medical condition persists and that it continues to preclude self-support. If there is a change in that condition, the beneficiary or legal guardian is required to immediately report that change to OWCP.

(d) In the case of a dependent incapable of self support due to that dependant's physical or mental disability where the status of that dependent is unlikely to change, a beneficiary or legal guardian may establish the permanency of that condition by submitting a well rationalized medical report which describes that condition and the ongoing prognosis of that condition. If the permanency of that condition is established by such a report, OWCP will not seek further information regarding that condition; however, if there is a change in that condition, the beneficiary or legal guardian is required to immediately report that change to OWCP.

**Adjustments to Compensation**

**§ 10.420 How are cost-of-living adjustments applied?**

(a) In cases of disability, a beneficiary is eligible for cost-of-living adjustments under 5 U.S.C. 8146a where injury-related disability began more than one year prior to the date the cost-of-living adjustment took effect. The employee's use of continuation of pay as provided by 5 U.S.C. 8118, or of sick or annual leave, during any part of the period of disability does not affect the computation of the one-year period.

(b) Where an injury does not result in disability but compensation is payable for permanent impairment of a covered member, organ or function of the body, a beneficiary is eligible for cost-of-living adjustments under 5 U.S.C. 8146a where the award for such impairment began more than one year prior to the date the cost-of-living adjustment took effect.

(c) In cases of recurrence of disability, where the pay rate for compensation purposes is the pay rate at the time disability recurs, a beneficiary is eligible for cost-of-living adjustments under 5 U.S.C. 8146a where the effective date of that pay rate began more than one year prior to the date the cost-of living adjustment took effect.

(d) In cases of death, entitlement to cost-of-living adjustments under 5 U.S.C. 8146a begins with the first such adjustment occurring more than one year after the date of death. However, if the death was preceded by a period of injury-related disability, compensation payable to the survivors will be increased by the same percentages as the cost-of-living adjustments paid or payable to the deceased employee for the period of disability, as well as by subsequent cost-of-living adjustments to which the survivors would otherwise be entitled.

**§ 10.421 May a beneficiary receive other kinds of payments from the Federal Government concurrently with compensation?**

(a) 5 U.S.C. 8116(a) provides that a beneficiary may not receive wage-loss compensation concurrently with a Federal retirement or survivor annuity. The beneficiary must elect the benefit that he or she wishes to receive, and the election, once made, is revocable.

(b) An employee may receive compensation concurrently with military retired pay, retirement pay, retainer pay or equivalent pay for service in the Armed Forces or other uniformed services.

(c) An employee may not receive compensation for total disability concurrently with severance pay or separation pay. However, an employee may concurrently receive compensation for partial disability or permanent impairment to a schedule member, organ or function with severance pay or separation pay.

(d) Pursuant to 5 U.S.C. 8116(d), a beneficiary may receive compensation under the FECA for either the death or disability of an employee concurrently with benefits under title II of the Social Security Act on account of the age or death of such employee. However, this provision of the FECA also requires OWCP to reduce the amount of any such compensation by the amount of any Social Security Act benefits that are attributable to the Federal service of the employee.

(e) To determine the employee's entitlement to compensation, OWCP may require an employee to submit an affidavit or statement as to the receipt of any federally funded or federally assisted benefits. If an employee fails to submit such affidavit or statement within 30 days of the date of the request, his or her right to compensation shall be suspended until such time as the requested affidavit or statement is received. At that time, compensation will be reinstated retroactive to the date of suspension provided the employee is entitled to such compensation.

**§ 10.422 May compensation payments be issued in a lump sum?**

(a) In exercise of the discretion afforded under 5 U.S.C. 8135(a), OWCP has determined that lump-sum payments will not be made to persons entitled to wage-loss benefits (that is, those payable under 5 U.S.C. 8105 and 8106). Therefore, when OWCP receives requests for lump-sum payments for wage-loss benefits, OWCP will not exercise further discretion in the matter. This determination is based on several factors, including:

(1) The purpose of the FECA, which is to replace lost wages;

(2) The prudence of providing wage-loss benefits on a regular, recurring basis; and

(3) The high cost of the long-term borrowing that is needed to pay out large lump sums.

(b) However, a lump-sum payment may be made to an employee entitled to a schedule award under 5 U.S.C. 8107 where OWCP determines that such a payment is in the employee's best interest. Lump-sum payments of schedule awards generally will be considered in the employee's best interest only where the employee does not rely upon compensation payments as a substitute for lost wages (that is, the employee is working or is receiving annuity payments). An employee possesses no absolute right to a lump-sum payment of benefits payable under 5 U.S.C. 8107.

(c) Lump-sum payments to surviving spouses are addressed in 5 U.S.C. 8135(b); payments to beneficiaries under 5 U.S.C. 8137 payable as a lump sum pursuant to 5 U.S.C. 8135 are addressed in part 25 of this title.

**§ 10.423 May compensation payments be assigned to, or attached by, creditors?**

(a) As a general rule, compensation and claims for compensation are exempt from the claims of private creditors. Further, any attempt by a FECA beneficiary to assign his or her claim is null and void. However, pursuant to provisions of the Social Security Act, 42 U.S.C. 659, and regulations issued by the Office of Personnel Management (OPM) at 5 CFR part 581, FECA benefits, including survivor's benefits, may be garnished to collect overdue alimony and child support payments.

(b) Garnishment for child support and alimony may be requested by providing a copy of the State agency or court order to the district office handling the FECA claim.

**§ 10.424 May someone other than the beneficiary be designated to receive compensation payments?**

A beneficiary may be incapable of managing or directing the management of his or her benefits because of a mental or physical disability, or because of legal incompetence, or because he or she is under 18 years of age. In this situation, absent the appointment of a guardian or other party to manage the financial affairs of the claimant by a court or administrative body authorized to do so, OWCP in its sole discretion may approve a person to serve as the representative payee for funds due the beneficiary. Where a guardian or other party has been appointed by a court or administrative body authorized to do so to manage the financial affairs of the claimant, OWCP will recognize that individual as the representative payee.

**§ 10.425 May compensation be claimed for periods of restorable leave?**

The employee may claim compensation for periods of annual and sick leave which are restorable in accordance with the rules of the employing agency. Forms CA–7a and CA–7b are used for this purpose. Leave donated to an employee by an employing agency leave bank is not restorable leave.

## Overpayments

**§ 10.430 How does OWCP notify an individual of a payment made?**

(a) In addition to providing narrative descriptions to recipients of benefits paid or payable, OWCP includes on each periodic check a clear indication of the period for which payment is being made. A form is sent to the recipient with each supplemental check which states the date and amount of the payment and the period for which payment is being made. For payments sent by electronic funds transfer (EFT), a notification of the date and amount of payment appears on the statement from the recipient's financial institution.

(b) By these means, OWCP puts the recipient on notice that a payment was made and the amount of the payment. If the amount received differs from the amount indicated on the written notice or bank statement, the recipient is responsible for notifying OWCP of the difference. Absent affirmative evidence to the contrary, the beneficiary will be presumed to have received the notice of payment, whether mailed or transmitted electronically. For EFT payments, OWCP is entitled to presume receipt and acceptance of that payment once a recipient has had an opportunity to receive a statement from their financial institution.

**§ 10.431 What does OWCP do when an overpayment is identified?**

Before seeking to recover an overpayment or adjust benefits, OWCP will advise the beneficiary in writing that:

(a) The overpayment exists, and the amount of overpayment;

(b) A preliminary finding shows either that the individual was or was not at fault in the creation of the overpayment;

(c) He or she has the right to inspect and copy Government records relating to the overpayment; and

(d) He or she has the right to present evidence which challenges the fact or amount of the overpayment, and/or challenges the preliminary finding that he or she was at fault in the creation of the overpayment. He or she may also request that recovery of the overpayment be waived.

**§ 10.432 How can an individual present evidence to OWCP in response to a preliminary notice of an overpayment?**

The individual may present this evidence to OWCP in writing or at a pre-recoupment hearing. The evidence must be presented or the hearing requested within 30 days of the date of the written notice of overpayment. Failure to request the hearing within this 30-day time period shall constitute a waiver of that right.

**§ 10.433 Under what circumstances can OWCP waive recovery of an overpayment?**

(a) OWCP may consider waiving an overpayment only if the individual to whom it was made was not at fault in accepting or creating the overpayment. Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she receives from OWCP are proper. The recipient must show good faith and exercise a high degree of care in regard to receipt of their benefits. Such care includes reporting events which may affect entitlement to or the amount of benefits, including reviewing their accounts and related statements (including electronic statements and records from their financial institutions involving EFT payments). A recipient who has done any of the following will be found to be at fault with respect to creating an overpayment:

(1) Made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; or

(2) Failed to provide information which he or she knew or should have known to be material; or

(3) Accepted a payment which the recipient knew or should have known to be incorrect. (This provision applies only to the overpaid individual.)

(b) Whether or not OWCP determines that an individual was at fault with respect to the creation of an overpayment depends on the circumstances surrounding the overpayment. The degree of care expected may vary with the complexity of those circumstances and the individual's capacity to realize that he or she is being overpaid.

**§ 10.434 If OWCP finds that the recipient of an overpayment was not at fault, what criteria are used to decide whether to waive recovery of it?**

If OWCP finds that the recipient of an overpayment was not at fault, repayment will still be required unless:

(a) Adjustment or recovery of the overpayment would defeat the purpose of the FECA (see § 10.436), or

(b) Adjustment or recovery of the overpayment would be against equity and good conscience (see § 10.437).

**§ 10.435 Is an individual responsible for an overpayment that resulted from an error made by OWCP or another Government agency?**

(a) The fact that OWCP may have erred in making the overpayment, or that the overpayment may have resulted from an error by another Government agency, does not by itself relieve the individual who received the overpayment from liability for repayment if the individual also was at fault in accepting the overpayment.

(b) However, OWCP may find that the individual was not at fault if failure to report an event affecting compensation benefits, or acceptance of an incorrect payment, occurred because:

(1) The individual relied on misinformation given in writing by OWCP (or by another Government agency which he or she had reason to believe was connected with the administration of benefits) as to the interpretation of a pertinent provision of the FECA or its regulations; or

(2) OWCP erred in calculating cost-of-living increases, schedule award length and/or percentage of impairment, or loss of wage-earning capacity.

**§ 10.436 Under what circumstances would recovery of an overpayment defeat the purpose of the FECA?**

Recovery of an overpayment will defeat the purpose of the FECA if such recovery would cause hardship to a currently or formerly entitled beneficiary because:

(a) The beneficiary from whom OWCP seeks recovery needs substantially all of his or her current income (including compensation benefits) to meet current ordinary and necessary living expenses; and

(b) The beneficiary's assets do not exceed a specified amount as determined by OWCP from data furnished by the Bureau of Labor Statistics. A higher amount is specified for a beneficiary with one or more dependents.

**§ 10.437 Under what circumstances would recovery of an overpayment be against equity and good conscience?**

(a) Recovery of an overpayment is considered to be against equity and good conscience when any individual who received an overpayment would experience severe financial hardship in attempting to repay the debt.

(b) Recovery of an overpayment is also considered to be against equity and good conscience when any individual, in reliance on such payments or on notice that such payments would be made, gives up a valuable right or changes his or her position for the worse. In making such a decision, OWCP does not consider the individual's current ability to repay the overpayment.

(1) To establish that a valuable right has been relinquished, it must be shown that the right was in fact valuable, that it cannot be regained, and that the action was based chiefly or solely in reliance on the payments or on the notice of payment. Donations to charitable causes or gratuitous transfers of funds to other individuals are not considered relinquishments of valuable rights.

(2) To establish that an individual's position has changed for the worse, it must be shown that the decision made would not otherwise have been made but for the receipt of benefits, and that this decision resulted in a loss.

**§ 10.438 Can OWCP require the individual who received the overpayment to submit additional financial information?**

(a) The individual who received the overpayment is responsible for providing information about income, expenses and assets as specified by OWCP. This information is needed to determine whether or not recovery of an overpayment would defeat the purpose of the FECA, or be against equity and good conscience. This information will also be used to determine the repayment schedule, if necessary.

(b) Failure to submit the requested information within 30 days of the request shall result in denial of waiver, and no further request for waiver shall be considered until the requested information is furnished.

**§ 10.439 What is addressed at a pre-recoupment hearing?**

At a pre-recoupment hearing, the OWCP representative will consider all issues in the claim on which a formal decision has been issued. Such a hearing will thus fulfill OWCP's obligation to provide pre-recoupment rights and a hearing under 5 U.S.C. 8124(b). Pre-recoupment hearings shall

be conducted in exactly the same manner as provided in § 10.615 through § 10.622.

**§ 10.440 How does OWCP communicate its final decision concerning recovery of an overpayment, and what appeal right accompanies it?**

(a) OWCP will send a copy of the final decision to the individual from whom recovery is sought; his or her representative, if any; and the employing agency.

(b) The only review of a final decision concerning an overpayment is to the Employees' Compensation Appeals Board. The provisions of 5 U.S.C. 8124(b) (concerning hearings) and 5 U.S.C. 8128(a) (concerning reconsiderations) do not apply to such a decision. The pendency of an appeal with ECAB has no effect on the finality of the order being appealed; in the event ECAB reverses the final overpayment decision, any monies collected will be restored to the beneficiary.

**§ 10.441 How are overpayments collected?**

(a) When an overpayment has been made to an individual who is entitled to further payments, the individual shall refund to OWCP the amount of the overpayment as soon as the error is discovered or his or her attention is called to same. If no refund is made, OWCP shall decrease later payments of compensation, taking into account the probable extent of future payments, the rate of compensation, the financial circumstances of the individual, and any other relevant factors, so as to minimize any hardship. Should the individual die before collection has been completed, collection shall be made by decreasing later payments, if any, payable under the FECA with respect to the individual's death. If no further benefits are payable with respect to the individual's death, OWCP may also file a claim with the estate of the individual or seek repayment of the overpayment through other means including referral of the debt to the Treasury Department.

(b) When an overpayment has been made to an individual who is not entitled to further payments, the individual shall refund to OWCP the amount of the overpayment as soon as the error is discovered or his or her attention is called to same. The overpayment is subject to the provisions of the Federal Claims Collection Act of 1966 (as amended) and may be reported to the Internal Revenue Service as income. If the individual fails to make such refund, OWCP may recover the same through any available means, including offset of salary, annuity benefits, or other Federal payments, including tax refunds as authorized by the Tax Refund Offset Program, or referral of the debt to a collection agency or to the Department of Justice.

## Subpart F—Continuing Benefits

### Rules and Evidence

**§ 10.500 What are the basic rules governing continuing receipt of compensation benefits and return to work?**

(a) Benefits are available only while the effects of a work-related condition continue. Compensation for wage loss due to disability is available only for any periods during which an employee's work-related medical condition prevents him or her from earning the wages earned before the work-related injury. If the evidence establishes that light duty within an employee's work restrictions is available and that the employee was made aware that such duty was available, the employee was not prevented from earning the wages earned before the work-related injury for the hours such work was available. Payment of medical benefits is available for all treatment necessary due to a work-related medical condition.

(b) Each disabled employee is obligated to perform such work as he or she can, and OWCP's goal is to return each disabled employee to work as soon as he or she is medically able. In determining what constitutes appropriate work under 5 U.S.C. 8115 for determining the wage-earning capacity for a particular disabled employee, OWCP considers the employee's current physical limitations, whether the work is available within the employee's demonstrated commuting area, the employee's qualifications to perform such work, and other relevant factors. (See § 10.508 with respect to the payment of relocation expenses and § 10.509.)

**§ 10.501 What medical evidence is necessary to support continuing receipt of compensation benefits?**

(a) The employee is responsible for providing sufficient medical evidence to justify payment of any compensation sought.

(1) To support payment of continuing compensation where an employee has been found entitled to periodic benefits, narrative medical evidence must be submitted whenever OWCP requests it but ordinarily not less than once a year and with any filing of a form CA–1032. It must contain a physician's rationalized opinion as to whether the specific period of alleged disability is causally related to the employee's accepted injury or illness.

(2) For those employees with more serious conditions not likely to improve and for employees over the age of 65, OWCP may require less frequent documentation, but ordinarily not less than once every three years.

(3) The physician's opinion must be based on the facts of the case and the complete medical background of the employee, must be one of reasonable medical certainty and must include objective findings in support of its conclusions. Subjective complaints of pain are not sufficient, in and of themselves, to support payment of continuing compensation. Likewise, medical limitations based solely on the fear of a possible future injury are also not sufficient to support payment of continuing compensation. See § 10.330 for a fuller discussion of medical evidence.

(b) OWCP may require any kind of non-invasive testing to determine the employee's functional capacity. Failure to undergo such testing will result in a suspension of benefits. In addition, OWCP may direct the employee to undergo a second opinion or referee examination in any case it deems appropriate (see §§ 10.320 and 10.321).

**§ 10.502 How does OWCP evaluate evidence in support of continuing receipt of compensation benefits?**

In considering the medical and factual evidence, OWCP will weigh the probative value of the attending physician's report, any second opinion physician's report, any other medical reports, or any other evidence in the file. If OWCP determines that the medical evidence supporting one conclusion is more consistent, logical, and well-reasoned than evidence supporting a contrary conclusion, OWCP will use the conclusion that is supported by the weight of the medical evidence as the basis for awarding or denying further benefits. If medical reports that are equally well-reasoned support inconsistent determinations of an issue under consideration, OWCP will direct the employee to undergo a third, impartial referee examination to resolve the issue, which will be given special weight in determining the issue.

**§ 10.503 Under what circumstances may OWCP reduce or terminate compensation benefits?**

Once OWCP has advised the employee that it has accepted a claim and has either approved continuation of pay or paid medical benefits or compensation, benefits will not be terminated or reduced unless the weight of the evidence establishes that:

(a) The disability for which compensation was paid has ceased;

(b) The disabling condition is no longer causally related to the employment;

(c) The employee is only partially disabled;

(d) The employee has returned to work;

(e) The beneficiary was convicted of fraud in connection with a claim under the FECA, or the beneficiary was incarcerated based on any felony conviction; or

(f) OWCP's initial decision was in error.

**Return to Work—Employer's Responsibilities**

**§ 10.505 What actions must the employer take?**

Upon authorizing medical care, the employer should advise the employee in writing as soon as possible of his or her obligation to return to work under § 10.210 and as defined in this subpart. The term "return to work" as used in this subpart is not limited to returning to work at the employee's normal worksite or usual position, but may include returning to work at other locations and in other positions. In general, the employer should make all reasonable efforts to place the employee in his or her former or an equivalent position, in accordance with 5 U.S.C. 8151(b)(2), if the employee has fully recovered after one year. The Office of Personnel Management (not OWCP) administers this provision.

(a) Where the employer has specific alternative positions available for partially disabled employees, the employer should advise the employee in writing of the specific duties and physical requirements of those positions.

(b) Where the employer has no specific alternative positions available for an employee who can perform restricted or limited duties, the employer should advise the employee of any accommodations the agency can make to accommodate the employee's limitations due to the injury.

**§ 10.506 May the employer monitor the employee's medical care?**

The employer may monitor the employee's medical progress and duty status by obtaining periodic medical reports. Form CA–17 is usually adequate for this purpose.

To aid in returning an injured employee to suitable employment, the employer may also contact the employee's physician in writing concerning the work limitations imposed by the effects of the injury and possible job assignments. (However, the employer shall not contact the physician by telephone or through personal visit.) When such contact is made, the employer shall send a copy of any such correspondence to OWCP and the employee, as well as a copy of the physician's response when received. The employer may also contact the employee at reasonable intervals to request periodic medical reports addressing his or her ability to return to work.

**§ 10.507 How should the employer make an offer of suitable work?**

Where the attending physician or OWCP notifies the employer in writing that the employee is partially disabled (that is, the employee can perform some work but not return to the position held at date of injury), the employer should act as follows:

(a) If the employee can perform in a specific alternative position available in the agency, and the employer has advised the employee in writing of the specific duties and physical requirements, the employer shall notify the employee in writing immediately of the date of availability.

(b) If the employee can perform restricted or limited duties, the employer should determine whether such duties are available or whether an existing job can be modified. If so, the employer shall advise the employee in writing of the duties, their physical requirements and availability.

(c) The employer must make any job offer in writing. However, the employer may make a job offer verbally as long as it provides the job offer to the employee in writing within two business days of the verbal job offer.

(d) The offer must include a description of the duties of the position, the physical requirements of those duties, and the date by which the employee is either to return to work or notify the employer of his or her decision to accept or refuse the job offer. The employer must send a complete copy of any job offer to OWCP when it is sent to the employee.

**§ 10.508 May relocation expenses be paid for an employee who would need to move to accept an offer of reemployment?**

If possible, the employer should offer suitable reemployment in the location where the employee currently resides. If this is not practical, the employer may offer suitable reemployment at the employee's former duty station or other location. Where the distance between the location of the offered job and the location where the employee currently resides is at least 50 miles, OWCP may pay such relocation expenses as are considered reasonable and necessary if the employee has been terminated from the agency's employment rolls and would incur relocation expenses by accepting the offered reemployment. OWCP may also pay such relocation expenses when the new employer is other than a Federal employer. OWCP will notify the employee that relocation expenses are payable if it makes a finding that the job is suitable. To determine whether a relocation expense is reasonable and necessary, OWCP shall use as a guide the Federal travel regulations for permanent changes of duty station.

**§ 10.509 If an employee's light duty job is eliminated due to downsizing, what is the effect on compensation?**

In general, an employee will not be considered to have experienced a compensable recurrence of disability as defined in § 10.5(x) merely because his or her employer has eliminated the employee's light-duty position in a reduction-in-force or some other form of downsizing. When this occurs, OWCP will determine the employee's wage-earning capacity based on his or her actual earnings in such light-duty position if this determination is appropriate on the basis that such earnings fairly and reasonably represent the employee's wage-earning capacity and such a determination has not already been made and the employing agency has stated, in writing, that no other employment is available.

**§ 10.510 When may a light duty job form the basis of a loss of wage-earning capacity determination?**

A light-duty position may form the basis of a loss of wage-earning capacity determination if that light duty position is a classified position to which the injured employee has been formally reassigned. The position must conform to the established physical limitations of the injured employee; the employer must have a written position description outlining the duties and physical requirements; and the position must correlate to the type of appointment held by the injured employee at the time of injury. If these circumstances are present, a determination may be made that the position constitutes "regular" Federal employment. In the absence of a "light-duty position" as described in this paragraph, OWCP will assume that the employee was instead engaged in non-competitive, makeshift or odd lot employment which does not represent the employee's wage-earning capacity, i.e., work of the type provided to injured employees who cannot otherwise be

employed by the Federal Government or in any well-known branch of the general labor market.

**§ 10.511 How may a loss of wage-earning capacity determination be modified?**

If OWCP issues a formal loss of wage-earning capacity determination, including a finding of no loss of wage-earning capacity, that determination and rate of compensation, if applicable, remains in place until that determination is modified by OWCP.

Modification of such a determination is only warranted where the party seeking the modification establishes either that there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated, or the original determination was erroneous. However, OWCP is not precluded from adjudicating a limited period of disability following the issuance of a loss of wage-earning capacity decision, *i.e.,* where an employee has a demonstrated need for surgery.

**Return to Work—Employee's Responsibilities**

**§ 10.515 What actions must the employee take with respect to returning to work?**

(a) If an employee can resume regular Federal employment, he or she must do so. No further compensation for wage loss is payable once the employee has recovered from the work-related injury to the extent that he or she can perform the duties of the position held at the time of injury, or earn equivalent wages.

(b) If an employee cannot return to the job held at the time of injury due to partial disability from the effects of the work-related injury, but has recovered enough to perform some type of work, he or she must seek work. In the alternative, the employee must accept suitable work offered to him or her. (See § 10.500 for a definition of "suitable work".) This work may be with the original employer or through job placement efforts made by or on behalf of OWCP.

(c) If the employer has advised an employee in writing that specific alternative positions exist within the agency, the employee shall provide the description and physical requirements of such alternate positions to the attending physician and ask whether and when he or she will be able to perform such duties.

(d) If the employer has advised an employee that it is willing to accommodate his or her work limitations, the employee shall so advise the attending physician and ask him or her to specify the limitations imposed by the injury. The employee is responsible for advising the employer immediately of these limitations.

(e) From time to time, OWCP may require the employee to report his or her efforts to obtain suitable employment, whether with the Federal Government, State and local Governments, or in the private sector.

**§ 10.516 How will an employee know if OWCP considers a job to be suitable?**

OWCP shall advise the employee that it has found the offered work to be suitable and afford the employee 30 days to accept the job or present any reasons to counter OWCP's finding of suitability. If the employee presents such reasons, and OWCP determines that the reasons are unacceptable, it will notify the employee of that determination and that he or she has 15 days in which to accept the offered work without penalty. At that point in time, OWCP's notification need not state the reasons for finding that the employee's reasons are not acceptable.

**§ 10.517 What are the penalties for refusing to accept a suitable job offer?**

(a) 5 U.S.C. 8106(c) provides that a partially disabled employee who refuses to seek suitable work, or refuses to or neglects to work after suitable work is offered to or arranged for him or her, is not entitled to compensation. An employee who refuses or neglects to work after suitable work has been offered or secured for him or her has the burden to show that this refusal or failure to work was reasonable or justified.

(b) After providing the two notices described in § 10.516, OWCP will terminate the employee's entitlement to further compensation under 5 U.S.C. 8105, 8106, and 8107 on all claims where the injury occurred prior to the termination decision, as provided by 5 U.S.C. 8106(c)(2). However, the employee remains entitled to medical benefits as provided by 5 U.S.C. 8103.

**§ 10.518 Does OWCP provide services to help employees return to work?**

OWCP may, in its discretion, provide vocational rehabilitation services as authorized by 5 U.S.C. 8104. Vocational rehabilitation services may include vocational evaluation, testing, training, and placement services with either the original employer or a new employer, when the injured employee cannot return to the job held at the time of injury. These services also include functional capacity evaluations, which help to tailor individual rehabilitation programs to employees' physical reconditioning and behavioral modification needs, and help employees to meet the demands of current or potential jobs.

**§ 10.519 What action will OWCP take if an employee refuses to undergo vocational rehabilitation?**

Under 5 U.S.C. 8104(a), OWCP may direct a permanently disabled employee to undergo vocational rehabilitation. To ensure that vocational rehabilitation services are available to all who might be entitled to benefit from them, an injured employee who has a loss of wage-earning capacity shall be presumed to be "permanently disabled," for purposes of this section only, unless and until the employee proves that the disability is not permanent. If an employee without good cause fails or refuses to apply for, undergo, participate in, or continue to participate in a vocational rehabilitation effort when so directed, OWCP will act as follows:

(a) Where a suitable job has been identified, OWCP will reduce the employee's future monetary compensation based on the amount which would likely have been his or her wage-earning capacity had he or she undergone vocational rehabilitation. OWCP will determine this amount in accordance with the job identified through the vocational rehabilitation planning process, which includes meetings with the OWCP nurse and the employer. The reduction will remain in effect until such time as the employee acts in good faith to comply with the direction of OWCP.

(b) Where a suitable job has not been identified, because the failure or refusal occurred in the early but necessary stages of a vocational rehabilitation effort (that is, interviews, testing, counseling, functional capacity evaluations, and work evaluations), OWCP cannot determine what would have been the employee's wage-earning capacity.

(c) Under the circumstances identified in paragraph (b) of this section, in the absence of evidence to the contrary, OWCP will assume that the vocational rehabilitation effort would have resulted in a return to work with no loss of wage-earning capacity, and OWCP will reduce the employee's monetary compensation accordingly (that is, to zero). This reduction will remain in effect until such time as the employee acts in good faith to comply with the direction of OWCP.

**§ 10.520 How does OWCP determine compensation after an employee completes a vocational rehabilitation program?**

After completion of a vocational rehabilitation program, OWCP may adjust compensation to reflect the

injured worker's wage-earning capacity. Actual earnings will be used if they fairly and reasonably reflect the earning capacity. The position determined to be the goal of a training plan is assumed to represent the employee's earning capacity if it is suitable and performed in sufficient numbers so as to be reasonably available, whether or not the employee is placed in such a position.

**§ 10.521 If an employee elects to receive retirement benefits instead of FECA benefits, what effect may such an election have on that employee's entitlement to FECA compensation?**

Where an employee is undergoing vocational rehabilitation, or where OWCP is attempting to otherwise place that employee in a suitable job, and that employee elects to receive retirement benefits from the Office of Personnel Management instead of benefits under the FECA, the OWCP may proceed with a loss of wage-earning capacity determination which may reduce FECA entitlement as long as the determination is based on the evidence of record at the time of such election.

**Reports of Earnings From Employment and Self-Employment**

**§ 10.525 What information must the employee report?**

(a) An employee who is receiving compensation for partial or total disability must advise OWCP immediately of any return to work, either part-time or full-time. An employee must report all outside employment, including any concurrent dissimilar employment held at the time of injury, even if the injury did not result in any lost time in that position. In addition, an employee who is receiving compensation for partial or total disability will periodically be required to submit a report of earnings from employment or self-employment, either part-time or full-time. (See § 10.5(g) for a definition of "earnings.")

(b) The employee must report even those earnings which do not seem likely to affect his or her level of benefits. Many kinds of income, though not all, will result in reduction of compensation benefits. While earning income will not necessarily result in a reduction of compensation, failure to report income may result in forfeiture of all benefits paid during the reporting period.

**§ 10.526 Must the employee report volunteer activities?**

An employee who is receiving compensation for partial or total disability is periodically required to report volunteer activity or any other kind of activity which shows that the employee is no longer totally disabled for work. The fact that the employee did not receive any salary for this work is not a basis for failing to report this activity; instead the employee must report the cost if any to have someone else do the work or activity.

**§ 10.527 Does OWCP verify reports of earnings?**

To make proper determinations of an employee's entitlement to benefits, OWCP may verify the earnings reported by the employee through a variety of means, including but not limited to computer matches with the Office of Personnel Management and inquiries to the Social Security Administration. Also, OWCP may perform computer matches with records of State agencies, including but not limited to workers' compensation administrations, to determine whether private employers are paying workers' compensation insurance premiums for recipients of benefits under the FECA.

**§ 10.528 What action will OWCP take if the employee fails to file a report of activity indicating an ability to work?**

OWCP periodically requires each employee who is receiving compensation benefits to complete an affidavit as to any work, or activity indicating an ability to work, which the employee has performed for the prior 15 months. If an employee who is required to file such a report fails to do so within 30 days of the date of the request, his or her right to compensation for wage loss under 5 U.S.C. 8105 or 8106 is suspended until OWCP receives the requested report. At that time, OWCP will reinstate compensation retroactive to the date of suspension if the employee remains entitled to compensation.

**§ 10.529 What action will OWCP take if the employee files an incomplete report?**

(a) If an employee knowingly omits or understates any earnings or work activity in making a report, he or she shall forfeit the right to compensation with respect to any period for which the report was required. A false or evasive statement, omission, concealment, or misrepresentation with respect to employment activity or earnings in a report may also subject an employee to criminal prosecution.

(b) Where the right to compensation is forfeited, OWCP shall recover any compensation already paid for the period of forfeiture pursuant to 5 U.S.C. 8129 and other relevant statutes.

**Reports of Dependents**

**§ 10.535 How are dependents defined, and what information must the employee report?**

(a) Dependents in disability cases are defined in § 10.405. While the employee has one or more dependents, the employee's basic compensation for wage loss or for permanent impairment shall be augmented as provided in 5 U.S.C. 8110. (The rules for death claims are found in § 10.414.)

(b) An employee who is receiving augmented compensation on account of dependents must advise OWCP immediately of any change in the number or status of dependents. The employee should also promptly refund to OWCP any amounts received on account of augmented compensation after the right to receive augmented compensation has ceased. Any difference between actual entitlement and the amount already paid beyond the date entitlement ended is an overpayment of compensation and may be recovered pursuant to 5 U.S.C. 8129 and other relevant statutes.

(c) An employee who is receiving augmented compensation shall be periodically required to submit a statement as to any dependents, or to submit supporting documents such as birth or marriage certificates or court orders, to determine if he or she is still entitled to augmented compensation.

**§ 10.536 What is the penalty for failing to submit a report of dependents?**

If an employee fails to submit a requested statement or supporting document within 30 days of the date of the request, OWCP will suspend his or her right to augmented compensation until OWCP receives the requested statement or supporting document. At that time, OWCP will reinstate augmented compensation retroactive to the date of suspension, provided that the employee is entitled to receive augmented compensation.

**§ 10.537 What reports are needed when compensation payments continue for children over age 18?**

(a) Compensation payable on behalf of a child that would otherwise end when the child reaches 18 years of age will continue if and for so long as he or she is not married and is either a student as defined in 5 U.S.C. 8101(17), or physically or mentally incapable of self-support.

(b) At least once each year, OWCP will ask an employee who receives compensation based on the student status of a child to provide proof of continuing entitlement to such compensation, including certification of

school enrollment. The employee is required to report any changes to student status in the interim as soon as they occur.

(c) Likewise, at least once each year, OWCP will ask an employee who receives compensation based on a child's physical or mental inability to support himself or herself, and who is not covered by § 10.417(d) of this part, to submit a medical report verifying that the child's medical condition persists and that it continues to preclude self-support. The employee is required to report any changes to that status in the interim.

(d) If an employee fails to submit proof within 30 days of the date of the request, OWCP will suspend the employee's right to compensation until the requested information is received. At that time OWCP will reinstate compensation retroactive to the date of suspension, provided the employee is entitled to such compensation.

**Reduction and Termination of Compensation**

**§ 10.540 When and how is compensation reduced or terminated?**

(a) Except as provided in paragraphs (c), (d), and (e) of this section, where the evidence establishes that compensation should be either reduced or terminated, OWCP will provide the beneficiary with written notice of the proposed action and give him or her 30 days to submit relevant evidence or argument to support entitlement to continued payment of compensation.

(b) Notice provided under this section will include a description of the reasons for the proposed action and a copy of the specific evidence upon which OWCP is basing its determination. Payment of compensation will continue until any evidence or argument submitted has been reviewed and an appropriate decision has been issued, or until 30 days have elapsed if no additional evidence or argument is submitted.

(c) OWCP will not provide such written notice when the beneficiary has no reasonable basis to expect that payment of compensation will continue. For example, when a claim has been made for a specific period of time and that specific period expires, no written notice will be given.

(d) Written notice will also not be given when a beneficiary dies, when OWCP either reduces or terminates compensation upon an employee's return to work, when OWCP terminates only medical benefits after a physician indicates that further medical treatment is not necessary or has ended, or when OWCP denies payment for a particular medical expense.

(e) OWCP will also not provide such written notice when compensation is terminated, suspended or forfeited due to one of the following: A beneficiary's conviction for fraud in connection with a claim under the FECA; a beneficiary's incarceration based on any felony conviction; an employee's failure to report earnings from employment or self-employment; an employee's failure or refusal to either continue performing suitable work or to accept an offer of suitable work; or an employee's refusal to undergo or obstruction of a directed medical examination or treatment for substance abuse.

**§ 10.541 What action will OWCP take after issuing written notice of its intention to reduce or terminate compensation?**

(a) If the beneficiary submits evidence or argument prior to the issuance of the decision, OWCP will evaluate it in light of the proposed action and undertake such further development as it may deem appropriate, if any. Evidence or argument which is repetitious, cumulative, or irrelevant will not require any further development. If the beneficiary does not respond within 30 days of the written notice, OWCP will issue a decision consistent with its prior notice. OWCP will not grant any request for an extension of this 30-day period.

(b) Evidence or argument which refutes the evidence upon which the proposed action was based will result in the continued payment of compensation. If the beneficiary submits evidence or argument which fails to refute the evidence upon which the proposed action was based but which requires further development, OWCP will not provide the beneficiary with another notice of its proposed action upon completion of such development. Once any further development of the evidence is completed, OWCP will either continue payment or issue a decision consistent with its prior notice.

## Subpart G—Appeals Process

**§ 10.600 How can final decisions of OWCP be reviewed?**

There are three methods for reviewing a formal decision of the OWCP (§§ 10.125 through 10.127 discuss how decisions are made). These methods are: reconsideration by the district office; a hearing before an OWCP hearing representative; and appeal to the Employees' Compensation Appeals Board (ECAB). For each method there are time limitations and other restrictions which may apply, and not all options are available for all decisions, so the employee should consult the requirements set forth below. Further rules governing appeals to the ECAB are found at part 501 of this title.

**Reconsiderations and Reviews by the Director**

**§ 10.605 What is reconsideration?**

The FECA provides that the Director may review an award for or against compensation upon application by an employee (or his or her representative) who receives an adverse decision. The employee shall exercise this right through a request to the district office. The request, along with the supporting statements and evidence, is called the "application for reconsideration."

**§ 10.606 How does a claimant request reconsideration?**

(a) An employee (or representative) seeking reconsideration should send the application for reconsideration to the address as instructed by OWCP in the final decision.

(b) The application for reconsideration, including all supporting documents, must:

(1) Be submitted in writing;

(2) Be signed and dated by the claimant or the authorized representative; and

(3) Set forth arguments and contain evidence that either:

(i) Shows that OWCP erroneously applied or interpreted a specific point of law;

(ii) Advances a relevant legal argument not previously considered by OWCP; or

(iii) Constitutes relevant and pertinent new evidence not previously considered by OWCP.

**§ 10.607 What is the time limit for requesting reconsideration?**

(a) An application for reconsideration must be received by OWCP within one year of the date of the OWCP decision for which review is sought.

(b) OWCP will consider an untimely application for reconsideration only if the application demonstrates clear evidence of error on the part of OWCP in its most recent merit decision. The application must establish, on its face, that such decision was erroneous.

(c) The year in which a claimant has to timely request reconsideration shall not include any period subsequent to an OWCP decision for which the claimant can establish through probative medical evidence that he or she is unable to communicate in any way and that his or her testimony is necessary in order to obtain modification of the decision.

**§ 10.608 How does OWCP decide whether to grant or deny the request for reconsideration?**

(a) A timely request for reconsideration may be granted if OWCP determines that the employee has presented evidence and/or argument that meets at least one of the standards described in § 10.606(b)(3). If reconsideration is granted, the case is reopened and the case is reviewed on its merits (see § 10.609).

(b) Where the request is timely but fails to meet at least one of the standards described in § 10.606(b)(3), or where the request is untimely and fails to present any clear evidence of error, OWCP will deny the application for reconsideration without reopening the case for a review on the merits. A decision denying an application for reconsideration cannot be the subject of another application for reconsideration. The only review for this type of non-merit decision is an appeal to the ECAB (see § 10.625), and OWCP will not entertain a request for reconsideration or a hearing on this decision denying reconsideration.

**§ 10.609 How does OWCP decide whether new evidence requires modification of the prior decision?**

When application for reconsideration is granted, OWCP will review the decision for which reconsideration is sought on the merits and determine whether the new evidence or argument requires modification of the prior decision.

(a) After OWCP decides to grant reconsideration, but before undertaking the review, OWCP will send a copy of the reconsideration application to the employer, which will have 20 days from the date sent to comment or submit relevant documents. OWCP will provide any such comments to the employee, who will have 20 days from the date the comments are sent to him or her within which to comment. If no comments are received from the employer, OWCP will proceed with the merit review of the case. Where a reconsideration request pertains only to a medical issue (such as disability or a schedule award) not requiring comment from the employing agency, the employing agency will be notified that a request for reconsideration has been received, but OWCP is not required to wait 20 days for comment before reaching a determination, except when that claimant is deployed in an area of armed conflict.

(b) A claims examiner who did not participate in making the contested decision will conduct the merit review of the claim. When all evidence has been reviewed, OWCP will issue a new merit decision, based on all the evidence in the record. A copy of the decision will be provided to the agency.

(c) An employee dissatisfied with this new merit decision may again request reconsideration under this subpart or appeal to the ECAB. An employee may not request a hearing on this decision.

**§ 10.610 What is a review by the Director?**

The FECA specifies that an award for or against payment of compensation may be reviewed at any time on the Director's own motion. Such review may be made without regard to whether there is new evidence or information. If the Director determines that a review of the award is warranted (including, but not limited to circumstances indicating a mistake of fact or law or changed conditions), the Director (at any time and on the basis of existing evidence) may modify, rescind, decrease or increase compensation previously awarded, or award compensation previously denied. A review on the Director's own motion is not subject to a request or petition and none shall be entertained.

(a) The decision whether or not to review an award under this section is solely within the discretion of the Director. The Director's exercise of this discretion is not subject to review by the ECAB, nor can it be the subject of a reconsideration or hearing request.

(b) Where the Director reviews an award on his or her own motion, any resulting decision is subject as appropriate to reconsideration, a hearing and/or appeal to the ECAB. Jurisdiction on review or on appeal to ECAB is limited to a review of the merits of the resulting decision. The Director's determination to review the award is not reviewable.

**Hearings**

**§ 10.615 What is a hearing?**

A hearing is a review of an adverse decision by a hearing representative. Initially, the claimant can choose between two formats: An oral hearing or a review of the written record. At the discretion of the hearing representative, an oral hearing may be conducted by telephone, teleconference, videoconference or other electronic means. In addition to the evidence of record, the employee may submit new evidence to the hearing representative.

**§ 10.616 How does a claimant obtain a hearing?**

(a) A claimant, injured on or after July 4, 1966, who has received a final adverse decision by the district office may obtain a hearing by writing to the address specified in the decision. The hearing request must be sent within 30 days (as determined by postmark or other carrier's date marking) of the date of the decision for which a hearing is sought. The claimant must not have previously submitted a reconsideration request (whether or not it was granted) on the same decision.

(b) OWCP will schedule an oral hearing and determine whether the oral hearing will be conducted in person, including whether the in person hearing will be by teleconference, videoconference or other electronic means. The claimant can request a change in the format from a hearing to a review of the written record by making a written request to the Branch of Hearings and Review. OWCP will grant a request received by the Branch of Hearings and Review within 30 days of: The date OWCP acknowledges the initial hearing request, or the date OWCP issues a notice setting a date for an oral hearing, in cases where the initial request was for, or was treated as a request for, an oral hearing. A request received after those dates will be subject to OWCP's discretion. The decision to grant or deny a change of format from a hearing to a review of the written record is not reviewable.

**§ 10.617 How is an oral hearing conducted?**

(a) The hearing representative retains complete discretion to set the time, place and method of the hearing, including the amount of time allotted for the hearing, considering the issues to be resolved. Any requests for reasonable accommodation by individuals with disabilities should be made through the procedure described in the initial acknowledgement letter.

(b) Unless otherwise directed in writing by the claimant, the hearing representative will mail a notice of the time, place and method of the oral hearing to the claimant and any representative at least 30 days before the scheduled date. The employer will also be mailed a notice at least 30 days before the scheduled date.

(c) The hearing is an informal process, and the hearing representative is not bound by common law or statutory rules of evidence, by technical or formal rules of procedure or by section 5 of the Administrative Procedure Act, but the hearing representative may conduct the hearing in such manner as to best ascertain the rights of the claimant. During the hearing process, the claimant may state his or her arguments and present new written evidence in support of the claim. Hearings are limited to one hour; this limitation may be extended in

the discretion of the hearing representative.

(d) Testimony at oral hearings, including those conducted by teleconference, videoconference or other electronic means, is recorded, then transcribed and placed in the record. Oral testimony shall be made under oath. The transcript of the hearing is the official record of the hearing.

(e) OWCP will furnish a transcript of the oral hearing to the claimant and the employer, who have 20 days from the date it is sent to comment. The employer shall send any comments to OWCP and the claimant, who will have 20 more days from the date of the agency's certificate of service to comment.

(f) The hearing remains open for the submittal of additional evidence until 30 days after the hearing is held, unless the hearing representative, in his or her sole discretion, grants an extension. Only one such extension may be granted. A copy of the decision will be mailed to the claimant's last known address, to any representative, and to the employer.

(g) The hearing representative determines the conduct of the oral hearing and may terminate the hearing at any time he or she determines that all relevant evidence has been obtained, or because of misbehavior on the part of the claimant and/or representative.

(h) Pursuant to 5 U.S.C. 8126, if an individual disobeys or resists a lawful order or process in proceedings under this part, or misbehaves during a hearing or in a manner so as to obstruct the hearing, OWCP may certify the facts to the appropriate U.S. District Court, which may, if the evidence warrants, punish the individual in the same manner and to the same extent as for a contempt committed before the court, or commit the individual on the same conditions as if the forbidden act had occurred with reference to the process of or in the presence of the court.

**§ 10.618 How is a review of the written record conducted?**

(a) The hearing representative will review the official record and any additional evidence submitted by the claimant and by the agency. The hearing representative may also conduct whatever investigation is deemed necessary. New evidence and arguments are to be submitted at any time up to the time specified by OWCP, but they should be submitted as soon as possible to avoid delaying the hearing process.

(b) The claimant should submit, with his or her application for review, all evidence or argument that he or she wants to present to the hearing representative. If the claimant chooses to change the request from an oral hearing to a review of the written record, the claimant should submit all evidence or argument at that time. A copy of all pertinent material will be sent to the employer, which will have 20 days from the date it is sent to comment. (Medical evidence is not considered "pertinent" for review and comment by the agency, and it will therefore not be furnished to the agency. OWCP has sole responsibility for evaluating medical evidence.) The employer shall send any comments to OWCP and the claimant, who will have 20 more days from the date of the agency's certificate of service to comment.

**§ 10.619 May subpoenas be issued for witnesses and documents?**

A claimant may request a subpoena, but the decision to grant or deny such a request is within the discretion of the hearing representative. The hearing representative may issue subpoenas for the attendance and testimony of witnesses, and for the production of books, records, correspondence, papers or other relevant documents. Subpoenas are issued for documents only if they are relevant and cannot be obtained by other means, and for witnesses only where oral testimony is the best way to ascertain the facts.

(a) A claimant may request a subpoena only as part of the hearings process, and no subpoena will be issued under any other part of the claims process. To request a subpoena, the requestor must:

(1) Submit the request in writing and send it to the hearing representative as early as possible but no later than 60 days (as evidenced by postmark, electronic marker or other objective date mark) after the date of the original hearing request.

(2) Explain in the original request for a subpoena why the testimony or evidence is directly relevant to the issues at hand, and a subpoena is the best method or opportunity to obtain such evidence because there are no other means by which the documents or testimony could have been obtained.

(b) No subpoena will be issued for attendance of employees of OWCP acting in their official capacities as decision-makers or policy administrators. For hearings taking the form of a review of the written record, no subpoena for the appearance of witnesses will be considered.

(c) The hearing representative issues the subpoena under his or her own name. It may be served in person or by certified mail, return receipt requested, addressed to the person to be served at his or her last known principal place of business or residence. A decision to deny a subpoena can only be appealed as part of an appeal of any adverse decision which results from the hearing.

**§ 10.620 Who pays the costs associated with subpoenas?**

(a) Witnesses who are not employees or former employees of the Federal Government shall be paid the same fees and mileage as paid for like services in the District Court of the United States where the subpoena is returnable, except that expert witnesses shall be paid a fee not to exceed the local customary fee for such services.

(b) Where OWCP asked that the witness submit evidence into the case record or asked that the witness attend, OWCP shall pay the fees and mileage. Where the claimant requested the subpoena, and where the witness submitted evidence into the record at the request of the claimant, the claimant shall pay the fees and mileage.

**§ 10.621 What is the employer's role when an oral hearing has been requested?**

(a) The employer may send one (or more, if deemed appropriate by the hearing representative) representative(s) to observe the proceeding, but the agency representative cannot give testimony or argument or otherwise participate in the hearing, except where the claimant or the hearing representative specifically asks the agency representative to testify.

(b) The hearing representative may deny a request by the claimant that the agency representative testify where the claimant cannot show that the testimony would be relevant or where the agency representative does not have the appropriate level of knowledge to provide such evidence at the hearing. The employer may also comment on the hearing transcript, as described in § 10.617(e).

**§ 10.622 May a claimant withdraw a request for or postpone a hearing?**

(a) The claimant and/or representative may withdraw the hearing request at any time up to and including the day the hearing is held, or the decision issued. Withdrawing the hearing request means the record is returned to the jurisdiction of the district office and no further requests for a hearing on the underlying decision will be considered.

(b) OWCP will entertain any reasonable request for scheduling the oral hearing, including whether to participate by teleconference, videoconference or other electronic means, but such requests should be made at the time of the original

application for hearing. Scheduling is at the sole discretion of the hearing representative, and is not reviewable. Once the oral hearing is scheduled and OWCP has mailed appropriate written notice to the claimant, the oral hearing cannot be postponed at the claimant's request for any reason except those stated in paragraph (c) of this section, unless the hearing representative can reschedule the hearing on the hearing representative's same monthly docket. When the request to postpone a scheduled hearing does not meet the test of paragraph (c) of this section and cannot be accommodated on the docket, no further opportunity for an oral hearing will be provided. Instead, the hearing will take the form of a review of the written record and a decision issued accordingly.

(c) Where the claimant is hospitalized for a reason which is not elective, or where the death of the claimant's parent, spouse, or child prevents attendance at the hearing, a postponement may be granted upon proper documentation.

(d) A claimant who fails to appear at a scheduled hearing may request in writing within 10 days after the date set for the hearing that another hearing be scheduled. Where good cause for failure to appear is shown, another hearing will be scheduled. The failure of the claimant to request another hearing within 10 days, or the failure of the claimant to appear at the second scheduled hearing without good cause shown, shall constitute abandonment of the request for a hearing. Where good cause is shown for failure to appear at the second scheduled hearing, review of the matter will proceed as a review of the written record.

**Review by the Employees' Compensation Appeals Board (ECAB)**

**§ 10.625 What kinds of decisions may be appealed?**

Only final decisions of OWCP may be appealed to the ECAB. However, certain types of final decisions, described in this part as not subject to further review, cannot be appealed to the ECAB. Decisions that are not appealable to the ECAB include: Decisions concerning the amounts payable for medical services, decisions concerning exclusion and reinstatement of medical providers, decisions by the Director to review an award on his or her own motion, and denials of subpoenas independent of the appeal of the underlying decision. In appeals before the ECAB, attorneys from the Office of the Solicitor of Labor shall represent OWCP.

**§ 10.626 Who has jurisdiction of cases on appeal to the ECAB?**

While a case is on appeal to the ECAB, OWCP has no jurisdiction over the claim with respect to issues which directly relate to the issue or issues on appeal. The OWCP continues to administer the claim and retains jurisdiction over issues unrelated to the issue or issues on appeal and issues which arise after the appeal as a result of ongoing administration of the case. Such issues would include, for example, the ability to terminate benefits where an individual returns to work while an appeal is pending at the ECAB. ECAB's rules of procedure are found at part 501 of this title.

## Subpart H—Special Provisions

**Representation**

**§ 10.700 May a claimant designate a representative?**

(a) The claims process under the FECA is informal. Unlike many workers' compensation laws, the employer is not a party to the claim, and OWCP acts as an impartial evaluator of the evidence. Nevertheless, a claimant may appoint one individual to represent his or her interests, but the appointment must be in writing.

(b) There can be only one representative at any one time, so after one representative has been properly appointed, OWCP will not recognize another individual as representative until the claimant withdraws the authorization of the first individual. In addition, OWCP will recognize only certain types of individuals (see § 10.701); however if the representative is an attorney, OWCP may communicate with any member of that attorney's recognized law firm.

(c) A properly appointed representative who is recognized by OWCP may make a request or give direction to OWCP regarding the claims process, including a hearing. This authority includes presenting or eliciting evidence, making arguments on facts or the law, and obtaining information from the case file, to the same extent as the claimant.

**§ 10.701 Who may serve as a representative?**

A claimant may authorize any individual to represent him or her in regard to a claim under the FECA, unless that individual's service as a representative would violate any applicable provision of law (such as 18 U.S.C. 205 and 208). A Federal employee may act as a representative only:

(a) On behalf of immediate family members, defined as a spouse, children, parents, and siblings of the representative, provided no fee or gratuity is charged; or

(b) While acting as a union representative, defined as any officially sanctioned union official, and no fee or gratuity is charged.

**§ 10.702 How are fees for services paid?**

(a) A representative may charge the claimant a fee and other costs associated with the representation before OWCP. The claimant is solely responsible for paying the fee and other charges. The claimant will not be reimbursed by OWCP, nor is OWCP in any way liable for the amount of the fee. Contingency fees are not allowed in any form.

(b) Administrative costs (mailing, copying, messenger services, travel and the like, but not including secretarial services, paralegal and other activities) need not be approved before the representative collects them. Before any fee for services can be collected, however, the fee must be approved by the Secretary.

**§ 10.703 How are fee applications approved?**

(a) *Fee application.* The representative must submit the fee application to OWCP for services rendered before OWCP. (Representative services before ECAB must be approved by ECAB under 20 CFR part 501.) The application submitted to OWCP shall contain the following:

(1) An itemized statement showing the representative's hourly rate, the number of hours worked and specifically identifying the work performed and a total amount charged for the representation (excluding administrative costs).

(2) A statement of agreement or disagreement with the amount charged, signed by the claimant. The statement must also acknowledge that the claimant is aware that he or she must pay the fees and that OWCP is not responsible for paying the fee or other costs.

(b) *Approval where there is no dispute.* Where a fee application that describes the services rendered in accordance with paragraph (a)(1) of this section is accompanied by a signed statement indicating the claimant's agreement with the fee as described in paragraph (a)(2) of this section, the application is deemed approved except that no contingency fee arrangement may be considered deemed approved through this process.

(c) *Disputed requests.* (1) Where the claimant disagrees with the amount of

the fee, as indicated in the statement accompanying the submittal, OWCP will evaluate the objection and decide whether or not to approve the request. OWCP will provide a copy of the request to the claimant and ask him or her to submit any further information in support of the objection within 15 days from the date the request is forwarded. After that period has passed, OWCP will evaluate the information received to determine whether the amount of the fee is substantially in excess of the value of services received by looking at the following factors:

(i) Usefulness of the representative's services;

(ii) The nature and complexity of the claim;

(iii) The actual time spent on development and presentation of the claim; and

(iv) Customary local charges for services for a representative of similar background and experience.

(2) Where the claimant disputes the representative's request and files an objection with OWCP, an appealable decision will be issued.

**§ 10.704 What penalties apply to representatives who collect a fee without approval?**

Representatives who collect a fee without proper approval from OWCP may be charged with a misdemeanor under 18 U.S.C. 292.

**Third Party Liability**

**§ 10.705 When must an employee or other FECA beneficiary take action against a third party?**

(a) If an injury or death for which benefits are payable under the FECA is caused, wholly or partially, by someone other than a Federal employee acting within the scope of his or her employment, the claimant can be required to take action against that third party.

(b) The Office of the Solicitor of Labor (SOL) is hereby delegated authority to administer the subrogation aspects of certain FECA claims for OWCP. Either OWCP or SOL can require a FECA beneficiary to assign his or her claim for damages to the United States or to prosecute the claim in his or her own name. All information regarding subrogation claims administered by SOL should be submitted to Chief, Subrogation Unit, U.S. Department of Labor, Office of the Solicitor, 200 Constitution Avenue, NW., Room S4325, Washington, DC 20210.

**§ 10.706 How will a beneficiary know if OWCP or SOL has determined that action against a third party is required?**

When OWCP determines that an employee or other FECA beneficiary must take action against a third party, it will notify the employee or beneficiary in writing. If the case is transferred to SOL, a second notification may be issued.

**§ 10.707 What must a FECA beneficiary who is required to take action against a third party do to satisfy the requirement that the claim be "prosecuted"?**

At a minimum, a FECA beneficiary must do the following:

(a) Seek damages for the injury or death from the third party, either through an attorney or on his or her own behalf;

(b) Either initiate a lawsuit within the appropriate statute of limitations period or obtain a written release of this obligation from OWCP or SOL unless recovery is possible through a negotiated settlement prior to filing suit;

(c) Refuse to settle or dismiss the case for any amount less than the amount necessary to repay OWCP's refundable disbursements, as defined in § 10.714, without receiving permission from OWCP or SOL;

(d) Provide periodic status updates and other relevant information in response to requests from OWCP or SOL;

(e) Submit detailed information about the amount recovered and the costs of the suit on a "Statement of Recovery" form approved by OMB;

(f) Submit information regarding the names of all plaintiffs to the suit or settlement and their relationship to the injured employee, if not the same as the FECA beneficiary;

(g) If any portion of the settlement or judgment was paid to more than one individual, advise whether it was indicated in the settlement or judgment the amount each individual is to receive, and if so, the percentage of the total award;

(h) Advise whether any portion of the settlement or judgment was paid in more than one capacity, such as a joint payment to a husband and wife for personal injury and loss of consortium or a payment to a spouse representing both loss of consortium and wrongful death; and

(i) Pay any required refund.

**§ 10.708 Can a FECA beneficiary who refuses to comply with a request to assign a claim to the United States or to prosecute the claim in his or her own name be penalized?**

When a FECA beneficiary refuses a request to either assign a claim or prosecute a claim in his or her own name, OWCP may determine that he or she has forfeited his or her right to all past or future compensation for the injury with respect to which the request is made. Alternatively, OWCP may also suspend the FECA beneficiary's compensation payments until he or she complies with the request.

**§ 10.709 What happens if a beneficiary directed by OWCP or SOL to take action against a third party does not believe that a claim can be successfully prosecuted at a reasonable cost?**

If a beneficiary consults an attorney and is informed that a suit for damages against a third party for the injury or death for which benefits are payable is unlikely to prevail or that the costs of such a suit are not justified by the potential recovery, he or she should request that OWCP or SOL release him or her from the obligation to proceed. This request should be in writing and provide evidence of the attorney's opinion. If OWCP or SOL agrees, the beneficiary will not be required to take further action against the third party.

**§ 10.710 Under what circumstances must a recovery of money or other property in connection with an injury or death for which benefits are payable under the FECA be reported to OWCP or SOL?**

Any person who has filed a FECA claim that has been accepted by OWCP (whether or not compensation has been paid), or who has received FECA benefits in connection with a claim filed by another, is required to notify OWCP or SOL of the receipt of money or other property as a result of a settlement or judgment in connection with the circumstances of that claim. This includes an injured employee, and in the case of a claim involving the death of an employee, a spouse, children or other dependents entitled to receive survivor's benefits. OWCP or SOL should be notified in writing within 30 days of the receipt of such money or other property or the acceptance of the FECA claim, whichever occurs later.

**§ 10.711 How is the amount of the recovery of the FECA beneficiary determined?**

(a) When a FECA beneficiary is entitled to receive money as a result of a judgment entered in a lawsuit or settlement of a lawsuit or any other settlement or recovery from a responsible third party, the entire amount of the award is reported as the gross recovery. To determine the amount of the recovery of the FECA beneficiary, deductions are made for the portion representing damage to real or personal property, the portion

representing loss of consortium, the portion representing wrongful death and the portion representing a survival action. To make deductions for loss of consortium, wrongful death and survival action, it must be established that:

(1) These claims were asserted in the suit (or if there was no suit that these claims were included in the settlement or recovery); and

(2) That such claims are permissible under the state law where the action was brought.

(b) OWCP or SOL will determine the appropriate percentage of the total judgment or settlement that will be allocated for loss of consortium, wrongful death action and survival action. FECA beneficiaries may accept OWCP's or SOL's determination or demonstrate good cause in writing for a different allocation. Whether to accept a specific allocation is at the discretion of OWCP or SOL, even where it has been incorporated into the settlement agreement. OWCP or SOL will not determine the appropriate percentage to be allocated for loss of consortium, wrongful death action and survival action if a judge or jury specifies the percentage to be awarded of a contested verdict attributable to each of several plaintiffs; in such case, OWCP or SOL will accept that percentage allocation.

(c) The amount of the recovery of the FECA beneficiary will be determined as followed:

(1) If a settlement or judgment is paid to or for one individual, the recovery is the gross recovery less the portion representing damage to real or personal property. The portion representing damage to real or personal property must be established in writing and approved by OWCP or SOL.

(2) In any case involving an injury to an employee where a judgment or settlement is paid to or on behalf of more than one individual, the recovery is the gross recovery less the portion representing damage to real or personal property and less the portion representing loss of consortium. OWCP or SOL will allocate up to 25% for a spouse and up to 5% for each child not to exceed 15% for all children for loss of consortium.

(3) In any case involving the death of an employee, where both wrongful death and survival actions have been asserted, separate statements of recovery are completed for the deceased employee and the surviving FECA beneficiaries. For the deceased employee, the recovery is the gross recovery less the portion representing damage to real or personal property, less the portion representing loss of consortium, less the portion representing the wrongful death action. For the surviving spouse and children, the recovery is the gross recovery less the portion representing damage to real or personal property, less the portion representing loss of consortium, less the portion representing the survival action. OWCP or SOL will allocate the total judgment or settlement as follows:

(i) For loss of consortium, OWCP or SOL will allocate up to 15% for a spouse and up to 5% for each child not to exceed 10% for all children;

(ii) For the wrongful death action, OWCP or SOL will allocate 65% of the remainder after subtraction of the amounts attributed to loss of consortium;

(iii) For the survival action, OWCP or SOL will allocate 35% percent of the remainder after subtraction of the amounts attributed to loss of consortium.

(d) In any case involving an injury to an employee where a judgment or settlement is paid to or on behalf of more than one individual and in any case involving the death of an employee, court costs will be attributed using the same percentages as was used for loss of consortium, wrongful death action and survival action. Attorney fees will be determined using the same percentage that was used for the gross recovery. These calculations are used only for the purpose of determining the amount of the refund and if applicable the surplus.

**§ 10.712 How much of any settlement or judgment must be paid to the United States?**

The statute permits a FECA beneficiary to retain, as a minimum, one-fifth of the net amount of money or property remaining after a reasonable attorney's fee and the costs of litigation have been deducted from the third-party recovery. The United States shares in the attorney fees by allowing the beneficiary to retain, at the time of distribution, an amount equivalent to a reasonable attorney's fee proportionate to the refund due the United States. After the refund owed to the United States is calculated, the FECA beneficiary retains any surplus remaining, and this amount is credited, dollar for dollar, against future compensation including wage-loss compensation, schedule award benefits and medical benefits for the same injury, as defined in § 10.719. OWCP will resume the payment of compensation only after the FECA beneficiary has been awarded compensation which exceeds the amount of the surplus.

(a) The refund to the United States is calculated as follows, using the Statement of Recovery form approved by OMB:

(1) Determine the amount of the recovery of the FECA beneficiary as set forth in § 10.711 as follows:

(i) Set out the gross recovery which is the entire amount of the award;

(ii) Subtract the amount of award representing damage to real or personal property approved by OWCP or SOL (Subtotal A);

(iii) Multiply Subtotal A by the appropriate percentage in § 10.711(c), or if it is a contested verdict by the percentage allocated by the judge or jury, and subtract this amount from Subtotal A (Subtotal B);

(iv) If both a wrongful death action and survival action have been asserted, multiply Subtotal B by 65% to determine the amount allocated to the wrongful death case and multiply Subtotal B by 35% to determine the amount allocated to the survival action, or if it is a contested verdict, by the percentage allocated by the judge or jury. Separate Statements of Recovery must be completed for each cause of action. For the wrongful death action use the result of Subtotal B times 65% for Subtotal C and for the survival action use the result of Subtotal B times 35% for Subtotal C. If both a wrongful death and survival have not been asserted the amount in Subtotal B is used for Subtotal C;

(v) Subtotal C is the amount of recovery of the FECA beneficiary;

(2) Subtract the amount of attorney's fees actually paid, but not more than the maximum amount of attorney's fees considered by OWCP or SOL to be reasonable, from Subtotal C. This is calculated by first determining the attorney fee percentage which is determined by dividing the gross recovery into the amount of attorney's fees actually paid, but the attorney's fee amount must not be more than the maximum amount of attorney's fees considered to be reasonable by OWCP or SOL and must be approved by OWCP or SOL. Subtotal C is multiplied by the fee percentage and this amount is subtracted from Subtotal C (Subtotal D);

(3) Subtract the costs of litigation, as allowed by OWCP or SOL from Subtotal D (Subtotal E). If loss of consortium and/or wrongful death and survival actions are claimed, the costs of litigation are reduced first by the percentage used for loss of consortium and then by the percentage used for wrongful death or survival action as set forth in § 10.711;

(4) Multiply Subtotal E by 20% and subtract this amount from Subtotal E (Subtotal F);

(5) Compare Subtotal F and the refundable disbursements as defined in § 10.714. Subtotal G is the lower of the two amounts;

(6) Multiply Subtotal G by the percentage used for attorney's fees in paragraph (a)(2), to determine the Government's allowance for attorney's fees, and subtract this amount from Subtotal G. This is the amount of the refund.

(b) The credit against future benefits (also referred to as the surplus) is calculated as follows:

(1) If Subtotal F, as calculated according to paragraph (a)(4) of this section, is less than the refundable disbursements, as defined in § 10.714, there is no credit to be applied against future benefits (but the remainder of the unused disbursements must be applied to any future recovery for the same injury);

(2) If Subtotal F is greater than the refundable disbursements, the credit against future benefits (or surplus) amount is determined by subtracting the refundable disbursements from Subtotal F.

(c) Examples of how these calculations are made follows:

(1) In this example, a Federal employee sues another party for causing injuries for which the employee has received $22,000 in benefits under the FECA, subject to refund. The suit is settled and the injured employee receives $100,000, all of which was for his injury. The injured worker paid attorney's fees of $25,000 and costs for the litigation of $3,000.

| | |
|---|---|
| (i) Gross Recovery | $100,000.00 |
| (ii) Amount of Property Damage | 0.00 |
| (iii) Subtotal A (Line a minus Line b) | 100,000.00 |
| (iv) Amount Allocated for Loss of Consortium 0% of Line c | 0.00 |
| (v) Subtotal B (Line c minus Line d) | 100,000.00 |
| (vi) Amount Allocated for Wrongful Death 0% of Line e | 0.00 |
| (vii) Amount Allocated for Survival Action 0% of Line e | 0.00 |
| (viii) Subtotal C—If Wrongful Death use Line f, if survival action use Line g, otherwise use Subtotal B | 100,000.00 |
| (ix) Attorney's Fees 25% (Line h × .25) | 25,000.00 |
| (x) Subtotal D (Line h minus Line i) | 75,000.00 |
| (xi) Court costs | 3,000.00 |
| (xii) Subtotal E (Line j minus Line k) | 72,000.00 |
| (xiii) One-fifth of Subtotal E (Line l × .20) | 14,400.00 |
| (xiv) Subtotal F (Line l minus Line m) | 57,600.00 |
| (xv) Refundable Disbursements | 22,000.00 |
| (xvi) Subtotal G (lower of Subtotal F or refundable disbursements) | 22,000.00 |
| (xvii) Government's allowance for attorney's fees (attorney's fees percentage used to determine Subtotal D multiplied by Subtotal G) | 5,500.00 |
| (xviii) Refund to the United States (Line p minus Line q) | 16,500.00 |
| (xix) Credit against future benefits (If Subtotal F greater than refundable disbursements, Line n minus Line o) | 35,600.00 |

(2) In this example, a Federal employee who is married sues another party for causing injuries as a result of car accident where she was driving her personally owned vehicle on approved travel and the employee received $75,000 in disbursements. The suit includes a claim for loss of consortium which is permitted under the state law and for damage to her vehicle (documented at $50,000.00). A joint settlement is reached where the injured employee and her spouse receive $250,000 for all their claims. Attorney's fees were $83,325 and there were $25,000 in approved court costs.

| | |
|---|---|
| (i) Gross Recovery | $250,000.00 |
| (ii) Amount of Property Damage | 50,000.00 |
| (iii) Subtotal A (Line a minus Line b) | 200,000.00 |
| (iv) Amount Allocated for Loss of Consortium (25% of Line c) | 50,000.00 |
| (v) Subtotal B (Line c minus Line d) | 150,000.00 |
| (vi) Amount Allocated for Wrongful Death 0% of Line e | 0.00 |
| (vii) Amount Allocated for Survival Action 0% of Line e | 0.00 |
| (viii) Subtotal C—If Wrongful Death Use Line f, if survival action use Line g, otherwise use Subtotal B | 150,000.00 |
| (ix) Attorney's Fees 33.33% (line h × .3333) | 49,995.00 |
| (x) Subtotal D (Line h minus Line i) | 100,005.00 |
| (xi) Court costs are reduced by the amount allocated for the loss of consortium (in this example, $25,000–($25,000 × .25)) | 18,750.00 |
| (xii) Subtotal E (line j minus Line k) | 81,255.00 |
| (xiii) One-fifth of Subtotal E (Line l × .20) | 16,251.00 |
| (xiv) Subtotal F (Line l minus Line m) | 65,004.00 |
| (xv) Refundable Disbursements | 75,000.00 |
| (xvi) Subtotal G (lower of Subtotal F or refundable disbursements) | 65,004.00 |
| (xvii) Government's allowance for attorney's fees (attorney's fees percentage used to determine Subtotal D multiplied by subtotal G) | 21,665.83 |
| (xviii) Refund to the United States (Line p minus Line q) | 43,338.17 |
| (xix) Credit against future benefits (If Subtotal F is greater than refundable disbursements, Line n minus Line o) | 0.00 |

(3) In this example, a Federal employee who is married with two minor children is killed in the performance of duty. A suit for wrongful death and survival is filed which includes claims for loss of consortium all of which is permitted under state law. A joint settlement is reached for all claims and all parties in the amount of $1,000,000. There were court costs of $48,000 and attorney's fees of $300,000. Two Statements of Recovery are

completed one for the wrongful death claim and the other for the survival action. Disbursements in this case were $30,000 for the deceased employee and $100,000 for the surviving spouse and children.

(i) For the wrongful death claim the calculation is as follows:

| | |
|---|---|
| (A) Gross Recovery | $1,000,000.00 |
| (B) Amount of Property Damage | 0.00 |
| (C) Subtotal A (Line a minus Line b) | 1,000,000.00 |
| (D) Amount Allocated for Loss of Consortium (25% (15% for spouse, 5% for each child) of Line c) | 250,000.00 |
| (E) Subtotal B (Line c minus Line d) | 750,000.00 |
| (F) Amount Allocated for Wrongful Death 65% of Line e | 487,500.00 |
| (G) Amount Allocated for Survival Action 35% of Line e | 262,500.00 |
| (H) Subtotal C—If Wrongful Death Use Line f, if survival action use Line g, otherwise use Subtotal B | 487,500.00 |
| (I) Attorney's Fees 30% (Line h × .30) | 146,250.00 |
| (J) Subtotal D (Line h minus Line i) | 341,250.00 |
| (K) Court costs are reduced by the amount allocated for the loss of consortium (in this example, .25 × $48,000 = 12,000) and then by the amount allocated for survivor action, [(48,000–12,000) × .35 = 12,600], [48,000–12,000–12,600]) | 23,400.00 |
| (L) Subtotal E (Line j minus Line k) | 317,850.00 |
| (M) One-fifth of Subtotal E (Line l × .20) | 63,570.00 |
| (N) Subtotal F (Line l minus Line m) | 254,280.00 |
| (O) Refundable Disbursements | 100,000.00 |
| (P) Subtotal G (lower of Subtotal F or refundable disbursements) | 100,000.00 |
| (Q) Government's allowance for attorney's fees (attorney's fees percentage used to determine Subtotal D multiplied by subtotal G) | 30,000.00 |
| (R) Refund to the United States (Line p minus Line q) | 70,000.00 |
| (S) Credit against future benefits (If Subtotal F is greater than refundable disbursements, Line n minus Line o) | 154,280.00 |

(ii) For the survival claim the calculation is as follows:

| | |
|---|---|
| (A) Gross Recovery | $1,000,000.00 |
| (B) Amount of Property Damage | 0.00 |
| (C) Subtotal A (Line a minus Line b) | 1,000,000.00 |
| (D) Amount Allocated for Loss of Consortium (25% (15% for spouse, 5% for each child) of Line c) | 250,000.00 |
| (E) Subtotal B (Line c minus Line d) | 750,000.00 |
| (F) Amount Allocated for Wrongful Death 65% of Line e | 487,500.00 |
| (G) Amount Allocated for Survival Action 35% of Line e | 262,500.00 |
| (H) Subtotal C—If Wrongful Death Use Line f, if survival action use Line g, otherwise use Subtotal B | 262,500.00 |
| (I) Attorney's Fees 30% (line h × .30) | 78,750.00 |
| (J) Subtotal D (Line h minus Line i) | 183,750.00 |
| (K) Court costs are reduced by the amount allocated for the loss of consortium (in this example, .25 × $48,000 = 12,000) and then by the amount allocated for wrongful death, [(48,000–12,000) × .65 = 23,400], [48,000–12,000–23,400]) | 12,600.00 |
| (L) Subtotal E (Line j minus Line k) | 171,150.00 |
| (M) One-fifth of Subtotal E (Line l × .20) | 34,230.00 |
| (N) Subtotal F (Line l minus Line m) | 136,920.00 |
| (O) Refundable Disbursements | 30,000.00 |
| (P) Subtotal G (lower of Subtotal F or refundable disbursements) | 30,000.00 |
| (Q) Government's allowance for attorney's fees (attorney's fees percentage used to determine Subtotal D multiplied by subtotal G) | 9,000.00 |
| (R) Refund to the United States (Line p minus Line q) | 21,000.00 |
| (S) Credit against future benefits (If Subtotal F is greater than refundable disbursements, Line n minus Line o) | 106,920.00 |

**§ 10.713 How is a structured settlement (that is, a settlement providing for receipt of funds over a specified period of time) treated for purposes of reporting the gross recovery?**

In this situation, the gross recovery to be reported is the present value of the right to receive all of the payments included in the structured settlement, allocated in the case of multiple recipients in the same manner as single payment recoveries.

**§ 10.714 What amounts are included in the refundable disbursements?**

The refundable disbursements of a specific claim consist of the total money paid by OWCP from the Employees' Compensation Fund with respect to that claim to or on behalf of a FECA beneficiary including charges for field nurses, vocational rehabilitation, and second opinion and referee physicians, less charges for any medical file review (i.e., the physician does not examine the employee) done at the request of OWCP. Charges for medical examinations also may be subtracted if the FECA beneficiary establishes that the examinations were required to be made available to the employee under a statute other than the FECA by the employing agency or at the employing agency's cost. Requests for disbursements can be made to SOL or OWCP.

**§ 10.715 Is a beneficiary required to pay interest on the amount of the refund due to the United States?**

If the refund due to the United States is not submitted within 30 days of receiving a request for payment from SOL or OWCP, interest shall accrue on the refund due to the United States from the date of the request. The rate of interest assessed shall be the rate of the current value of funds to the United States Treasury as published in the **Federal Register** (as of the date the request for payment is sent). Waiver of the collection of interest shall be in accordance with the provisions of the Department of Labor regulations on

Federal Claims Collection governing waiver of interest, 29 CFR 20.61.

**§ 10.716 If the required refund is not paid within 30 days of the request for repayment, can it be collected from payments due under the FECA?**

If the required refund is not paid within 30 days of the request for payment, OWCP can, in its discretion, collect the refund by withholding all or part of any payments currently payable to the beneficiary under the FECA with respect to any injury. The waiver provisions of §§ 10.432 through 10.440 do not apply to such determinations.

**§ 10.717 Is a settlement or judgment received as a result of allegations of medical malpractice in treating an injury covered by the FECA a gross recovery that must be reported to OWCP or SOL?**

Since an injury caused by medical malpractice in treating an injury covered by the FECA is also an injury covered under the FECA, any recovery in a suit alleging such an injury is treated as a gross recovery that must be reported to OWCP or SOL.

**§ 10.718 Are payments to a beneficiary as a result of an insurance policy which the beneficiary has purchased a gross recovery that must be reported to OWCP or SOL?**

Since payments received by a FECA beneficiary pursuant to an insurance policy purchased by someone other than a liable third party are not payments in satisfaction of liability for causing an injury covered by the FECA, they are not considered a gross recovery covered by section 8132 that requires filing a Statement of Recovery and paying any required refund.

**§ 10.719 If a settlement or judgment is received for more than one wound or medical condition, can the refundable disbursements paid on a single FECA claim be attributed to different conditions for purposes of calculating the refund or credit owed to the United States?**

(a) All wounds, diseases or other medical conditions accepted by OWCP in connection with a single claim are treated as the same injury for the purpose of computing any required refund and any credit against future benefits in connection with the receipt of a recovery from a third party, except that an injury caused by medical malpractice in treating an injury covered under the FECA will be treated as a separate injury for purposes of section 8132.

(b) If an injury covered under the FECA is caused under circumstances creating a legal liability in more than one person, other than the United States, to pay damages, OWCP or SOL will determine whether recoveries received from one or more third parties should be attributed to separate conditions for which compensation is payable in connection with a single FECA claim. If such an attribution is both practicable and equitable, as determined by OWCP or SOL, in its discretion, the conditions will be treated as separate injuries for purposes of calculating the refund and credit owed to the United States under section 8132.

## Federal Grand and Petit Jurors

**§ 10.725 When is a Federal grand or petit juror covered under the FECA?**

(a) Federal grand and petit jurors are covered under the FECA when they are in performance of duty as a juror, which includes that time when a juror is:

(1) In attendance at court pursuant to a summons;

(2) In deliberation;

(3) Sequestered by order of a judge; or

(4) At a site, by order of the court, for the taking of a view.

(b) A juror is not considered to be in the performance of duty while traveling to or from home in connection with the activities enumerated in paragraphs (a)(1) through (4) of this section.

**§ 10.726 When does a juror's entitlement to disability compensation begin?**

Pursuant to 28 U.S.C. 1877, entitlement to disability compensation does not commence until the day after the date of termination of service as a juror.

**§ 10.727 What is the pay rate of jurors for compensation purposes?**

For the purpose of computing compensation payable for disability or death, a juror is deemed to receive pay at the minimum rate for Grade GS–2 of the General Schedule unless his or her actual pay as an "employee" of the United States while serving on court leave is higher, in which case the pay rate for compensation purposes is determined in accordance with 5 U.S.C. 8114.

## Peace Corps Volunteers

**§ 10.730 What are the conditions of coverage for Peace Corps volunteers and volunteer leaders injured while serving outside the United States?**

(a) Any injury sustained by a volunteer or volunteer leader while he or she is located abroad is deemed proximately caused by Peace Corps employment and will be found by OWCP to have been sustained in the performance of duty, and any illness contracted while that volunteer is located abroad will be found by OWCP to be proximately caused by the employment unless the evidence establishes:

(1) The injury or illness was caused by the claimant's willful misconduct, intent to bring about the injury or death of self or another, or was proximately caused by the intoxication by alcohol or illegal drugs of the injured claimant; or

(2) The illness is shown to have pre-existed the period of service abroad; or

(3) The injury or illness claimed is a manifestation of symptoms of, or consequent to, a pre-existing congenital defect or abnormality.

(b) If the OWCP finds that the evidence indicates that the injury or illness may not have been sustained in the performance of duty due to the circumstances enumerated in paragraph (a)(2) and (3) of this section, the claimant may still prove his claim by the submittal of substantial and probative evidence that such injury or illness was sustained in the performance of duty with the Peace Corps.

(c) If an injury or illness, or episode thereof, comes within one of the exceptions described in paragraph (a)(2) or (3) of this section, the claimant may nonetheless be entitled to compensation. This will be so provided he or she meets the burden of proving by the submittal of substantial, probative and rationalized medical evidence that the illness or injury was proximately caused by factors or conditions of Peace Corps service, or that it was materially aggravated, accelerated or precipitated by factors of Peace Corps service; if the injury or illness was temporarily aggravated by factors of Peace Corps service, disability compensation is payable for the period of such aggravation.

**§ 10.731 What is the pay rate of Peace Corps volunteers and volunteer leaders for compensation purposes?**

The pay rate for these claimants is defined as the pay rate in effect on the date following separation, provided that the rate equals or exceeds the pay rate on the date of injury. It is defined in accordance with 5 U.S.C. 8142(a), not 8101(4).

## Non-Federal Law Enforcement Officers

**§ 10.735 When is a non-Federal law enforcement officer (LEO) covered under the FECA?**

(a) A law enforcement officer (officer) includes an employee of a State or local Government, the Governments of U.S. possessions and territories, or an employee of the United States pensioned or pensionable under sections 521–535 of Title 4, D.C. Code,

whose functions include the activities listed in 5 U.S.C. 8191.

(b) Benefits are available to officers who are not "employees" under 5 U.S.C. 8101, and who are determined in the discretion of OWCP to have been engaged in the activities listed in 5 U.S.C. 8191 with respect to the enforcement of crimes against the United States. Individuals who only perform administrative functions in support of officers are not considered officers.

(c) Except as provided by 5 U.S.C. 8191 and 8192 and elsewhere in this part, the provisions of the FECA and of subparts A, B, and D through I of this part apply to officers.

**§ 10.736 What are the time limits for filing a LEO claim?**

OWCP must receive a claim for benefits under 5 U.S.C. 8191 within five years after the injury or death. This five-year limitation is not subject to waiver. The tolling provisions of 5 U.S.C. 8122(d) do not apply to these claims.

**§ 10.737 How is a LEO claim filed, and who can file a LEO claim?**

A claim for injury or occupational disease should be filed on Form CA–721; a death claim should be filed on Form CA–722. All claims should be submitted to the officer's employer for completion and forwarding to OWCP. A claim may be filed by the officer, the officer's survivor, or any person or association authorized to act on behalf of an officer or an officer's survivors.

**§ 10.738 Under what circumstances are benefits payable in LEO claims?**

(a) Benefits are payable when an officer is injured while apprehending, or attempting to apprehend, an individual for the commission of a Federal crime. However, either an actual Federal crime must be in progress or have been committed, or objective evidence (of which the officer is aware at the time of injury) must exist that a potential Federal crime was in progress or had already been committed. The actual or potential Federal crime must be an integral part of the criminal activity toward which the officer's actions are directed. The fact that an injury to an officer is related in some way to the commission of a Federal crime does not necessarily bring the injury within the coverage of the FECA. The FECA is not intended to cover officers who are merely enforcing local laws.

(b) For benefits to be payable when an officer is injured preventing, or attempting to prevent, a Federal crime, there must be objective evidence that a Federal crime is about to be committed. An officer's belief, unsupported by objective evidence, that he or she is acting to prevent the commission of a Federal crime will not result in coverage. Moreover, the officer's subjective intent, as measured by all available evidence (including the officer's own statements and testimony, if available), must have been directed toward the prevention of a Federal crime. In this context, an officer's own statements and testimony are relevant to, but do not control, the determination of coverage.

**§ 10.739 What kind of objective evidence of a potential Federal crime must exist for coverage to be extended?**

Based on the facts available at the time of the event, the officer must have an awareness of sufficient information which would lead a reasonable officer, under the circumstances, to conclude that a Federal crime was in progress, or was about to occur. This awareness need not extend to the precise particulars of the crime (the section of Title 18, United States Code, for example), but there must be sufficient evidence that the officer was in fact engaged in actual or attempted apprehension of a Federal criminal or prevention of a Federal crime.

**§ 10.740 In what situations will OWCP automatically presume that a law enforcement officer is covered by the FECA?**

(a) Where an officer is detailed by a competent State or local authority to assist a Federal law enforcement authority in the protection of the President of the United States, or any other person actually provided or entitled to U.S. Secret Service protection, coverage will be extended.

(b) Coverage for officers of the U.S. Park Police and those officers of the Uniformed Division of the U.S. Secret Service who participate in the District of Columbia Retirement System is adjudicated under the principles set forth in paragraph (a) of this section, and does not extend to numerous tangential activities of law enforcement (for example, reporting to work, changing clothes). However, officers of the Non-Uniformed Division of the U.S. Secret Service who participate in the District of Columbia Retirement System are covered under the FECA during the performance of all official duties.

**§ 10.741 How are benefits calculated in LEO claims?**

(a) Except for continuation of pay, eligible officers and survivors are entitled to the same benefits as if the officer had been an employee under 5 U.S.C. 8101. However, such benefits may be reduced or adjusted as OWCP in its discretion may deem appropriate to reflect comparable benefits which the officer or survivor received or would have been entitled to receive by virtue of the officer's employment.

(b) For the purpose of this section, a comparable benefit includes any benefit that the officer or survivor is entitled to receive because of the officer's employment, including pension and disability funds, State workers' compensation payments, Public Safety Officers' Benefits Act payments, and State and local lump-sum payments. Health benefits coverage and proceeds of life insurance policies purchased by the employer are not considered to be comparable benefits.

(c) The FECA provides that, where an officer receives comparable benefits, compensation benefits are to be reduced proportionally in a manner that reflects the relative percentage contribution of the officer and the officer's employer to the fund which is the source of the comparable benefit. Where the source of the comparable benefit is a retirement or other system which is not fully funded, the calculation of the amount of the reduction will be based on a per capita comparison between the contribution by the employer and the contribution by all covered officers during the year prior to the officer's injury or death.

(d) The non-receipt of compensation during a period where a dual benefit (such as a lump-sum payment on the death of an officer) is being offset against compensation entitlement does not result in an adjustment of the respective benefit percentages of remaining beneficiaries because of a cessation of compensation under 5 U.S.C. 8133(c).

## Subpart I—Information for Medical Providers

### Medical Records and Bills

**§ 10.800 How do providers enroll with OWCP for authorizations and billing?**

(a) All providers must enroll with OWCP or its designated bill processing agent (hereinafter OWCP in this subpart) to have access to the automated authorization system and to submit medical bills to OWCP. To enroll, the provider must complete and submit a Form OWCP–1168 to the appropriate location noted on that form. By completing and submitting this form, providers certify that they satisfy all applicable Federal and State licensure and regulatory requirements that apply to their specific provider or supplier type. The provider must maintain documentary evidence indicating that it satisfies those requirements. The provider is also required to notify

OWCP immediately if any information provided to OWCP in the enrollment process changes. Agency medical officers, private physicians and hospitals are also required to keep records of all cases treated by them under the FECA so they can supply OWCP with a history of the injury, a description of the nature and extent of injury, the results of any diagnostic studies performed, the nature of the treatment rendered and the degree of any impairment and/or disability arising from the injury.

(b) Where a medical provider intends to bill for a procedure where prior authorization is required, that provider must request such authorization from OWCP.

(c) After enrollment, a provider must submit all medical bills to OWCP through its bill processing portal and include the Provider Number/ID obtained through enrollment or other identifying number required by OWCP.

**§ 10.801 How are medical bills to be submitted?**

(a) All charges for medical and surgical treatment, appliances or supplies furnished to injured employees, except for treatment and supplies provided by nursing homes, shall be supported by medical evidence as provided in § 10.800. OWCP may withhold payment for services until such report or evidence is provided. The physician or provider shall itemize the charges on Form OWCP–1500 or CMS–1500 (for professional services or medicinal drugs dispensed in the office), Form OWCP–04 or UB–04 (for hospitals), an electronic or paper-based bill that includes required data elements (for pharmacies) or other form as warranted and accepted by OWCP, and submit the form promptly to OWCP.

(b) The provider shall identify each service performed using the Physician's Current Procedural Terminology (CPT) code, the Healthcare Common Procedure Coding System (HCPCS) code, the National Drug Code (NDC), or the Revenue Center Code (RCC) with a brief narrative description; OWCP has discretion to determine which of these codes may be utilized in the billing process. The Director also has the authority to create and supply specific procedure codes that will be used by OWCP to better describe and allow specific payments for special services. These OWCP-created codes will be issued to providers by OWCP as appropriate and may only be used as authorized by OWCP. For example, a physician conducting a referee or second opinion examination under 5 U.S.C. 8123 will be furnished an OWCP-created code; a provider may not use such an OWCP-created code for other types of medical examinations or services. Where no appropriate code is submitted to identify the services performed, the bill will be returned to the provider and/or denied.

(c) For professional charges billed on Form OWCP–1500 or CMS–1500, the provider shall also state each diagnosed condition and furnish the corresponding diagnostic code using the "International Classification of Disease, 9th Edition, Clinical Modification" (ICD–9–CM), or as revised. A separate bill shall be submitted when the employee is discharged from treatment or monthly, if treatment for the work-related condition is necessary for more than 30 days.

(1) (i) Hospitals shall submit charges for inpatient medical and surgical treatment or supplies promptly to OWCP on Form OWCP–04 or UB–04.

(ii) For outpatient billing, the provider shall identify each service performed, using Revenue Center Codes (RCCs) and HCPCS/CPT codes as warranted. The charge for each individual service, or the total charge for all identical services, should also appear on the form. OWCP may adopt an Outpatient Prospective Payment System (OWCP OPPS) (as developed and implemented by the Center for Medicare and Medicaid services (CMS) for Medicare, while modifying the allowable costs under Medicare to account for deductibles and other additional costs which are covered by FECA). Once adopted, hospital providers shall submit outpatient hospital bills on the current version of the Universal Billing Form (UB) and use HCPCS codes and other coding schemes in accordance with the OWCP OPPS.

(2) Pharmacies shall itemize charges for prescription medications, appliances, or supplies on electronic or paper-based bills and submit them promptly to OWCP. Bills for prescription medications must include the NDC assigned to the product, the generic or trade name of the drug provided, the prescription number, the quantity provided, and the date the prescription was filled.

(3) Nursing homes shall itemize charges for appliances, supplies or services on the provider's billhead stationery and submit them promptly to OWCP. Such charges shall be subject to any applicable OWCP fee schedule.

(d) By submitting a bill and/or accepting payment, the provider signifies that the service for which reimbursement is sought was performed as described, necessary, appropriate and properly billed in accordance with accepted industry standards. For example, accepted industry standards preclude upcoding billed services for extended medical appointments when the employee actually had a brief routine appointment, or charging for the services of a professional when a paraprofessional or aide performed the service; industry standards prohibit unbundling services to charge separately for services that should be billed as a single charge. In addition, the provider thereby agrees to comply with all regulations set forth in this subpart concerning the rendering of treatment and/or the process for seeking reimbursement for medical services, including the limitation imposed on the amount to be paid for such services.

(e) In summary, bills submitted by providers must: be itemized on the Health Insurance Claim Form (for physicians) or the OWCP–04 (for hospitals); contain the signature or signature stamp of the provider; and identify the procedures using HCPCS/CPT codes, RCCs, or NDCs. Otherwise, OWCP may deny the bill, and the provider must correct and resubmit the bill.

**§ 10.802 How should an employee prepare and submit requests for reimbursement for medical expenses, transportation costs, loss of wages, and incidental expenses?**

(a) If an employee has paid bills for medical, surgical or dental services, supplies or appliances due to an injury sustained in the performance of duty and seeks reimbursement for those expenses, he or she may submit a request for reimbursement on Form OWCP–915, together with an itemized bill on Form OWCP–1500, CMS–1500, OWCP–04 or UB–04 prepared by the provider and a medical report as provided in § 10.800, to OWCP.

(1) The provider of such service shall state each diagnosed condition and furnish the applicable ICD–9–CM code, or as revised, and identify each service performed using the applicable HCPCS/CPT code, with a brief narrative description of the service performed, or, where no code is applicable, a detailed description of that service. If no code or description is received, OWCP will deny the reimbursement request and correction and resubmission will be required.

(2) The reimbursement request must be accompanied by evidence that the provider received payment for the service from the employee and a statement of the amount paid. Acceptable evidence that payment was received includes, but is not limited to, a signed statement by the provider, a mechanical stamp or other device showing receipt of payment, a copy of

the employee's canceled check (both front and back) or a copy of the employee's credit card receipt or a form indicating a balance of zero to the provider.

(b) If services were provided by a hospital, pharmacy or nursing home, the employee should submit the bill in accordance with the provisions of § 10.801(a). Any request for reimbursement must be accompanied by evidence, as described in paragraph (a) of this section, that the provider received payment for the service from the employee and a statement of the amount paid.

(c) OWCP may waive the requirements of paragraphs (a) and (b) of this section if extensive delays in the filing or the adjudication of a claim make it unusually difficult for the employee to obtain the required information.

(d) OWCP will not accept copies of bills for reimbursement unless they bear the signature of the provider, with evidence of payment. Payment for medical and surgical treatment, appliances or supplies shall in general be no greater than the maximum allowable charge for such service determined by the Director, as set forth in § 10.805.

(e) An employee will be only partially reimbursed for a medical expense if the amount he or she paid to a provider for the service exceeds the maximum allowable charge set by the Director's schedule. If this happens, OWCP shall advise the employee of the maximum allowable charge for the service in question and of his or her responsibility to ask the provider to refund to the employee, or credit to the employee's account, the amount he or she paid which exceeds the maximum allowable charge. The provider may request reconsideration of the fee determination as set forth in § 10.812.

(f) If the provider fails to make appropriate refund to the employee, or to credit the employee's account, within 60 days after the employee requests a refund of any excess amount, or the date of a subsequent reconsideration decision which continues to disallow all or a portion of the appealed amount, the provider shall be subject to exclusion procedures as provided by § 10.815.

(g) If the provider does not refund to the employee or credit to his or her account the amount of money paid in excess of the charge which OWCP allows, the employee should submit documentation of the attempt to obtain such refund or credit to OWCP. OWCP may make reasonable reimbursement to the employee after reviewing the facts and circumstances of the case.

(h) If an employee seeks reimbursement for transportation costs, loss of wages or incidental expenses related to medical treatment under this part, that employee may submit such reimbursement request on the Medical Travel Refund Request OWCP–957 form to OWCP along with all proof of payment. Requests for reimbursement for lost wages under this subsection must include an official statement from the employing agency indicating the amount of wage loss.

#### § 10.803 What are the time limitations on OWCP's payment of bills?

OWCP will pay providers and reimburse employees promptly for all bills received on an approved form and in a timely manner. However, no bill will be paid for expenses incurred if the bill is submitted more than one year beyond the end of the calendar year in which the expense was incurred or the service or supply was provided, or more than one year beyond the end of the calendar year in which the claim was first accepted as compensable by OWCP, whichever is later.

### Medical Fee Schedule

#### § 10.805 What services are covered by the OWCP fee schedule?

(a) Payment for medical and other health services, devices and supplies furnished by physicians, hospitals, and other providers for work-related injuries shall not exceed a maximum allowable charge for such service as determined by the Director, except as provided in this section.

(b) The schedule of maximum allowable charges does not apply to charges for services provided in a nursing home for employees admitted to that nursing home prior to [EFFECTIVE DATE OF FINAL RULE], but does apply to all charges for services provided by a nursing home where the employee was admitted to that nursing home after that date. The schedule does apply to charges for treatment furnished in a nursing home by a physician or other medical professional at any time.

(c) The schedule of maximum allowable charges also does not apply to charges for appliances, supplies, services or treatment furnished by medical facilities of the U.S. Public Health Service or the Departments of the Army, Navy, Air Force and Veterans Affairs.

#### § 10.806 How are the maximum fees defined?

For professional medical services, the Director shall maintain a schedule of maximum allowable fees for procedures performed in a given locality. The schedule shall consist of: An assignment of Relative Value Units (RVU) to procedures identified by Healthcare Common Procedure Coding System/ Current Procedural Terminology (HCPCS/CPT) code which represents the relative skill, effort, risk and time required to perform the procedure, as compared to other procedures of the same general class; an assignment of Geographic Practice Cost Index (GPCI) values which represent the relative work, practice expenses and malpractice expenses relative to other localities throughout the country; and a monetary value assignment (conversion factor) for one unit of value for each coded service.

#### § 10.807 How are payments for particular services calculated?

Payment for a procedure, service or device identified by a HCPCS/CPT code shall not exceed the amount derived by multiplying the Relative Value Units (RVU) values for that procedure by the Geographic Practice Cost Index (GPCI) values for services in that area and by the conversion factor to arrive at a dollar amount assigned to one unit in that category of service.

(a) The "locality" which serves as a basis for the determination of cost is defined by the Office of Management and Budget Metropolitan Statistical Areas. The Director shall base the determination of the relative per capita cost of medical care in a locality using information about enrollment and medical cost per county, provided by the Centers for Medicare and Medicaid Services (CMS).

(b) The Director shall assign the RVUs published by CMS to all services for which CMS has made assignments, using the most recent revision. Where there are no RVUs assigned to a procedure, the Director may develop and assign any RVUs that he or she considers appropriate. The geographic adjustment factor shall be that designated by GPCI for Metropolitan Statistical Areas as devised for CMS and as updated or revised by CMS from time to time. The Director will devise conversion factors for each category of service as appropriate using OWCP's processing experience and internal data.

(c) For example, if the RVUs for a particular surgical procedure are 2.48 for physician's work (W), 3.63 for practice expense (PE), and 0.48 for malpractice insurance (MP), and the conversion factor assigned to one unit in that category of service (surgery) is $61.20, then the maximum allowable charge for one performance of that procedure is the product of the three RVUs times the corresponding GPCI values for the locality times the

conversion factor. If the GPCI values for the locality are 0.988 (W), 0.948 (PE), and 1.174 (MP), then the maximum payment calculation is:

$[(2.48)(0.988) + (3.63)(0.948) + (0.48)(1.174)] \times \$61.20$
$[2.45 + 3.44 + .56] \times \$61.20$
$6.45 \times \$61.20 = \$394.74$

**§ 10.808 Does the fee schedule apply to every kind of procedure?**

Where the time, effort and skill required to perform a particular procedure vary widely from one occasion to the next, the Director may choose not to assign a relative value to that procedure. In this case the allowable charge for the procedure will be set individually based on consideration of a detailed medical report and other evidence. At its discretion, OWCP may set fees without regard to schedule limits for specially authorized consultant examinations, for examinations performed under 5 U.S.C. 8123, and for other specially authorized services.

**§ 10.809 How are payments for medicinal drugs determined?**

Payment for medicinal drugs prescribed by physicians shall not exceed the amount derived by multiplying the average wholesale price, or as otherwise specified by OWCP, of the medication by the quantity or amount provided, plus a dispensing fee. OWCP may, in its discretion, contract for or require the use of specific providers for certain medications.

(a) All prescription medications identified by National Drug Code (NDC) will be assigned an average wholesale price representing the product's nationally recognized wholesale price as determined by surveys of manufacturers and wholesalers, or by other method designated by OWCP. The Director will establish the dispensing fee, which will not be affected by the location or type of provider dispensing the medication.

(b) The NDCs, the average wholesale prices, and the dispensing fee shall be reviewed from time to time and updated as necessary.

(c) With respect to prescribed medications, OWCP may require the use of generic equivalents where they are available.

**§ 10.810 How are payments for inpatient medical services determined?**

(a) OWCP will pay for inpatient medical services according to pre-determined, condition-specific rates based on the Inpatient Prospective Payment System (IPPS) devised by CMS (42 CFR parts 412, 413, 424, 485, and 489). Using this system, payment is derived by multiplying the diagnosis-related group (DRG) weight assigned to the hospital discharge by the provider-specific factors.

(1) All inpatient hospital discharges will be classified according to the DRGs prescribed by the CMS in the form of the DRG Grouper software program. Each DRG represents the average resources necessary to provide care in a case in that DRG relative to the national average of resources consumed per case.

(2) The provider-specific factors will be provided by CMS in the form of their PPS Pricer software program. The software takes into consideration the type of facility, census division, actual geographic location (MSA) of the hospital, case mix cost per discharge, number of hospital beds, intern/beds ratio, operating cost to charge ratio, and other factors used by CMS to determine the specific rate for a hospital discharge under their PPS. The Director may devise price adjustment factors as appropriate using OWCP's processing experience and internal data.

(3) OWCP will base payments to facilities excluded from CMS' IPPS on consideration of detailed medical reports and other evidence.

(4) The Director shall review the pre-determined hospital rates at least once a year, and may adjust any or all components when he or she deems it necessary or appropriate.

(b) The Director shall review the schedule of fees at least once a year, and may adjust the schedule or any of its components when he or she deems it necessary or appropriate.

**§ 10.811 When and how are fees reduced?**

(a) OWCP accepts a provider's designation of the code used to identify a billed procedure or service if the code is consistent with the medical and other evidence, and will pay no more than the maximum allowable fee for that procedure. If the code is not consistent with the medical evidence or where no code is supplied, the bill will be returned to the provider for correction and resubmission.

(b) If the charge submitted for a service supplied to an injured employee exceeds the maximum amount determined to be reasonable according to the schedule, OWCP shall pay the amount allowed by the schedule for that service and shall notify the provider in writing that payment was reduced for that service in accordance with the schedule. OWCP shall also notify the provider of the method for requesting reconsideration of the balance of the charge.

**§ 10.812 If OWCP reduces a fee, may a provider request reconsideration of the reduction?**

(a) A physician or other provider whose charge for service is only partially paid because it exceeds a maximum allowable amount set by the Director may, within 30 days, request reconsideration of the fee determination.

(1) The provider should make such a request to the OWCP district office with jurisdiction over the employee's claim. The request must be accompanied by documentary evidence that the procedure performed was incorrectly identified by the original code, that the presence of a severe or concomitant medical condition made treatment especially difficult, or that the provider possessed unusual qualifications. In itself, board-certification in a specialty is not sufficient evidence of unusual qualifications to justify an exception. These are the only three circumstances which will justify reevaluation of the paid amount.

(2) A list of OWCP district offices and their respective areas of jurisdiction is available upon request from the U.S. Department of Labor, Office of Workers' Compensation Programs, Washington, DC 20210, or from the Internet at *http://www.dol.gov./owcp.* Within 30 days of receiving the request for reconsideration, the OWCP district office shall respond in writing stating whether or not an additional amount will be allowed as reasonable, considering the evidence submitted.

(b) If the OWCP district office issues a decision which continues to disallow a contested amount, the provider may apply to the Regional Director of the region with jurisdiction over the OWCP district office. The application must be filed within 30 days of the date of such decision, and it may be accompanied by additional evidence. Within 60 days of receipt of such application, the Regional Director shall issue a decision in writing stating whether or not an additional amount will be allowed as reasonable, considering the evidence submitted. This decision shall be final, and shall not be subject to further review.

**§ 10.813 If OWCP reduces a fee, may a provider bill the claimant for the balance?**

A provider whose fee for service is partially paid by OWCP as a result of the application of its fee schedule or other tests for reasonableness in accordance with this part shall not request reimbursement from the employee for additional amounts.

(a) Where a provider's fee for a particular service or procedure is lower to the general public than as provided

by the schedule of maximum allowable charges, the provider shall bill at the lower rate. A fee for a particular service or procedure which is higher than the provider's fee to the general public for that same service or procedure will be considered a charge "substantially in excess of such provider's customary charges" for the purposes of § 10.815(d).

(b) A provider whose fee for service is partially paid by OWCP as the result of the application of the schedule of maximum allowable charges and who collects or attempts to collect from the employee, either directly or through a collection agent, any amount in excess of the charge allowed by OWCP, and who does not cease such action or make appropriate refund to the employee within 60 days of the date of the decision of OWCP, shall be subject to the exclusion procedures provided by § 10.815(h).

**Exclusion of Providers**

**§ 10.815 What are the grounds for excluding a provider from payment under the FECA?**

A physician, hospital, or provider of medical services, appliances or supplies shall be excluded from payment under the FECA if such physician, hospital or provider has:

(a) Been convicted under any criminal statute of fraudulent activities in connection with any Federal or State program for which payments are made to providers for similar medical, surgical or hospital services, appliances or supplies;

(b) Been excluded or suspended, or has resigned in lieu of exclusion or suspension, from participation in any Federal or State program referred to in paragraph (a) of this section;

(c) Knowingly made, or caused to be made, any false statement or misrepresentation of a material fact in connection with a determination of the right to reimbursement under the FECA, or in connection with a request for payment;

(d) Submitted, or caused to be submitted, three or more bills or requests for payment within a 12-month period under this subpart containing charges which OWCP finds to be substantially in excess of such provider's customary charges, unless OWCP finds there is good cause for the bills or requests containing such charges;

(e) Knowingly failed to timely reimburse employees for treatment, services or supplies furnished under this subpart and paid for by OWCP;

(f) Failed, neglected or refused on three or more occasions during a 12-month period to submit full and accurate medical reports, or to respond to requests by OWCP for additional reports or information, as required by the FECA and § 10.800;

(g) Knowingly furnished treatment, services or supplies which are substantially in excess of the employee's needs, or of a quality which fails to meet professionally recognized standards; or

(h) Collected or attempted to collect from the employee, either directly or through a collection agent, an amount in excess of the charge allowed by OWCP for the procedure performed, and has failed or refused to make appropriate refund to the employee, or to cease such collection attempts, within 60 days of the date of the decision of OWCP.

(i) Failed to inform OWCP of any change in their provider status as required in section 10.800 of this title.

(j) Engaged in conduct related to care of an employee's FECA covered injury that OWCP finds to be misleading, deceptive or unfair.

**§ 10.816 What will cause OWCP to automatically exclude a physician or other provider of medical services and supplies?**

(a) OWCP shall automatically exclude a physician, hospital, or provider of medical services or supplies who has been convicted of a crime described in § 10.815(a), or has been excluded or suspended, or has resigned in lieu of exclusion or suspension, from participation in any program as described in § 10.815(b).

(b) The exclusion applies to participating in the program and to seeking payment under the FECA for services performed after the date of the entry of the judgment of conviction or order of exclusion, suspension or resignation, as the case may be, by the court or agency concerned. Proof of the conviction, exclusion, suspension or resignation may consist of a copy thereof authenticated by the seal of the court or agency concerned.

(c) A provider may be excluded on a voluntary basis at any time.

**§ 10.817 How are OWCP's exclusion procedures initiated?**

(a) Upon receipt of information indicating that a physician, hospital or provider of medical services or supplies (hereinafter the provider) has or may have engaged in activities enumerated in § 10.815(c) through (j) OWCP will forward that information to the Department of Labor's Office of Inspector General (DOL OIG) for its consideration. If the information was provided directly to DOL OIG, DOL OIG will notify OWCP of its receipt and implement the appropriate action within its authority, unless such notification will or may compromise the identity of confidential sources, or compromise or prejudice an ongoing or potential criminal investigation.

(b) DOL OIG will conduct such action as it deems necessary, and, when appropriate, provide a written report as described in paragraph (c) of this section to OWCP. OWCP will then determine whether to initiate procedures to exclude the provider from participation in the FECA program. If DOL OIG determines not to take any further action, it will promptly notify OWCP.

(c) If DOL OIG discovers reasonable cause to believe that violations of § 10.815 have occurred, it shall, when appropriate, prepare a written report, *i.e.,* investigative memorandum, and forward that report along with supporting evidence to OWCP. The report shall be in the form of a single memorandum in narrative form with attachments.

(1) The report should contain all of the following elements:

(i) A brief description and explanation of the subject provider or providers;

(ii) A concise statement of the DOL OIG's findings upon which exclusion may be based;

(iii) A summary of the events that make up the DOL OIG's findings;

(iv) A discussion of the documentation supporting the DOL OIG's findings;

(v) A discussion of any other information that may have bearing upon the exclusion process; and

(vi) The supporting documentary evidence including any expert opinion rendered in the case.

(2) The attachments to the report should be provided in a manner that they may be easily referenced from the report.

**§ 10.818 How is a provider notified of OWCP's intent to exclude him or her?**

Following receipt of the investigative report, OWCP will determine if there exists a reasonable basis to exclude the provider or providers. If OWCP determines that such a basis exists, OWCP shall initiate the exclusion process by sending the provider a letter, by certified mail and with return receipt requested, which shall contain the following:

(a) A concise statement of the grounds upon which exclusion shall be based;

(b) A summary of the information, with supporting documentation, upon which OWCP has relied in reaching an initial decision that exclusion proceedings should begin;

(c) An invitation to the provider to:

(1) Resign voluntarily from eligibility for providing services under this part

without admitting or denying the allegations presented in the letter; or

(2) Request a decision on exclusion based upon the existing record and any additional documentary information the provider may wish to furnish;

(d) A notice of the provider's right, in the event of an adverse ruling by the deciding official, to request a formal hearing before an administrative law judge;

(e) A notice that should the provider fail to answer (as described in § 10.819) the letter of intent within 60 days of receipt, the deciding official may deem the allegations made therein to be true and may order exclusion of the provider without conducting any further proceedings; and

(f) The address to where the answer from the provider should be sent.

**§ 10.819 What requirements must the provider's answer and OWCP's decision meet?**

(a) The provider's answer shall be in writing and shall include an answer to OWCP's invitation to resign voluntarily. If the provider does not offer to resign, he or she shall request that a determination be made upon the existing record and any additional information provided.

(b) Should the provider fail to answer the letter of intent within 60 days of receipt, the deciding official may deem the allegations made therein to be true and may order exclusion of the provider.

(c) The provider may inspect or request copies of information in the record at any time prior to the deciding official's decision by making such request to OWCP within 20 days of receipt of the letter of intent.

(d) Any response from the provider will be forwarded to DOL OIG, which shall have 30 days to answer the provider's response. That answer will be forwarded to the provider, who shall then have 15 days to reply.

(e) The deciding official shall be the Regional Director in the region in which the provider is located unless otherwise specified by the Director of the Division of Federal Employees' Compensation.

(f) The deciding official shall issue his or her decision in writing, and shall send a copy of the decision to the provider by certified mail, return receipt requested. The decision shall advise the provider of his or her right to request, within 30 days of the date of an adverse decision, a formal hearing before an administrative law judge under the procedures set forth in §§ 10.820 through 10.823. The filing of a request for a hearing within the time specified shall stay the effectiveness of the decision to exclude.

**§ 10.820 How can an excluded provider request a hearing?**

A request for a hearing shall be sent to the deciding official and shall contain:

(a) A concise notice of the issues on which the provider desires to give evidence at the hearing;

(b) Any request for the presentation of oral argument or evidence; and

(c) Any request for a certification of questions concerning professional medical standards, medical ethics or medical regulation for an advisory opinion from a competent recognized professional organization or Federal, State or local regulatory body.

**§ 10.821 How are hearings assigned and scheduled?**

(a) If the deciding official receives a timely request for hearing, the OWCP representative shall refer the matter to the Chief Administrative Law Judge of the Department of Labor, who shall assign it for an expedited hearing. The administrative law judge assigned to the matter shall consider the request for hearing, act on all requests therein, and issue a Notice of Hearing and Hearing Schedule for the conduct of the hearing. A copy of the hearing notice shall be served on the provider by certified mail, return receipt requested. The Notice of Hearing and Hearing Schedule shall include:

(1) A ruling on each item raised in the request for hearing;

(2) A schedule for the prompt disposition of all preliminary matters, including requests for the certification of questions to advisory bodies; and

(3) A scheduled hearing date not less than 30 days after the date the schedule is issued, and not less than 15 days after the scheduled conclusion of preliminary matters, provided that the specific time and place of the hearing may be set on 10 days' notice.

(b) The provider is entitled to be heard on any matter placed in issue by his or her response to the Notice of Intent to Exclude, and may designate "all issues" for purposes of hearing. However, a specific designation of issues is required if the provider wishes to interpose affirmative defenses, or request the issuance of subpoenas or the certification of questions for an advisory opinion.

**§ 10.822 How are subpoenas or advisory opinions obtained?**

(a) The provider may apply to the administrative law judge for the issuance of subpoenas upon a showing of good cause therefor.

(b) A certification of a request for an advisory opinion concerning professional medical standards, medical ethics or medical regulation to a competent recognized or professional organization or Federal, State or local regulatory agency may be made:

(1) As to an issue properly designated by the provider, in the sound discretion of the administrative law judge, provided that the request will not unduly delay the proceedings;

(2) By OWCP on its own motion either before or after the institution of proceedings, and the results thereof shall be made available to the provider at the time that proceedings are instituted or, if after the proceedings are instituted, within a reasonable time after receipt. The opinion, if rendered by the organization or agency, is advisory only and not binding on the administrative law judge.

**§ 10.823 How will the administrative law judge conduct the hearing and issue the recommended decision?**

(a) To the extent appropriate, proceedings before the administrative law judge shall be governed by 29 CFR part 18.

(b) The administrative law judge shall receive such relevant evidence as may be adduced at the hearing. Parties to the hearing are the provider and OWCP. Evidence shall be presented under oath, orally or in the form of written statements. The administrative law judge shall consider the Notice and Response, including all pertinent documents accompanying them, and may also consider any evidence which refers to the provider or to any claim with respect to which the provider has provided medical services, hospital services, or medical services and supplies, and such other evidence as the administrative law judge may determine to be necessary or useful in evaluating the matter.

(c) All hearings shall be recorded and the original of the complete transcript shall become a permanent part of the official record of the proceedings.

(d) Pursuant to 5 U.S.C. 8126 and 29 CFR Part 18, the administrative law judge may issue subpoenas, administer oaths, and examine witnesses with respect to the proceedings.

(e) At the conclusion of the hearing, the administrative law judge shall issue a recommended decision and cause it to be served on all parties to the proceeding, their representatives and the Director of OWCP.

**§ 10.824 How does the recommended decision become final?**

(a) Within 30 days from the date the recommended decision is issued, each

party may state, in writing, whether the party objects to the recommended decision. This written statement should be filed with the Director of OWCP.

(b) For purposes of determining whether the written statement referred to in paragraph (a) of this section has been timely filed with the Director, the statement will be considered to be "filed" on the date that the provider mails it to the Director, as determined by postmark or the date that such written statement is actually received by the Director, whichever is earlier.

(c) Written statements objecting to the recommended decision may be filed upon one or more of the following grounds:

(1) A finding or conclusion of material fact is not supported by substantial evidence;

(2) A necessary legal conclusion is erroneous;

(3) The decision is contrary to law or to the duly promulgated rules or decisions of the Director;

(4) A substantial question of law, policy, or discretion is involved; or

(5) A prejudicial error of procedure was committed.

(d) Each issue shall be separately numbered and plainly and concisely stated, and shall be supported by detailed citations to the record when assignments of error are based on the record, and by statutes, regulations or principal authorities relied upon. Except for good cause shown, no assignment of error by any party shall rely on any question of fact or law upon which the administrative law judge had not been afforded an opportunity to pass.

(e) If a written statement of objection is filed within the allotted period of time, the Director will review the objection. The Director will forward the written objection to the DOL OIG, which will have 14 calendar days from that date to respond. Any response from DOL OIG will be forwarded to the provider, which will have 14 calendar days from that date to reply.

(f) The Director of OWCP will consider the recommended decision, the written record and any response or reply received and will then issue a written, final decision either upholding or reversing the exclusion.

(g) If no written statement of objection is filed within the allotted period of time, the Director of OWCP will issue a written, final decision accepting the recommendation of the administrative law judge.

(h) The decision of the Director of OWCP shall be final with respect to the provider's participation in the program, and shall not be subject to further review by any court or agency.

#### § 10.825 What are the effects of exclusion?

(a) OWCP may give notice of the exclusion of a physician, hospital or provider of medical services or supplies:

(1) All OWCP district offices;

(2) All Federal employers;

(3) The CMS;

(4) The State or local authority responsible for licensing or certifying the excluded party.

(b) Notwithstanding any exclusion of a physician, hospital, or provider of medical services or supplies under this subpart, OWCP shall not refuse an employee reimbursement for any otherwise reimbursable medical treatment, service or supply if:

(1) Such treatment, service or supply was rendered in an emergency by an excluded physician; or

(2) The employee could not reasonably have been expected to have known of such exclusion.

(c) An employee who is notified that his or her attending physician has been excluded shall have a new right to select a qualified physician.

#### § 10.826 How can an excluded provider be reinstated?

(a) If a physician, hospital, or provider of medical services or supplies has been automatically excluded pursuant to § 10.816, the provider excluded will automatically be reinstated upon notice to OWCP that the conviction or exclusion which formed the basis of the automatic exclusion has been reversed or withdrawn. However, an automatic reinstatement shall not preclude OWCP from instituting exclusion proceedings based upon the underlying facts of the matter.

(b) A physician, hospital, or provider of medical services or supplies excluded from participation as a result of an order issued pursuant to this subpart may apply for reinstatement one year after the entry of the order of exclusion, unless the order expressly provides for a shorter period. An application for reinstatement shall be addressed to the Director for Federal Employees' Compensation, and shall contain a concise statement of the basis for the application. The application should be accompanied by supporting documents and affidavits.

(c) A request for reinstatement may be accompanied by a request for an oral presentation. Oral presentations will be allowed only in unusual circumstances where it will materially aid the decision process.

(d) The Director of OWCP shall order reinstatement only in instances where such reinstatement is clearly consistent with the goal of this subpart to protect the FECA program against fraud and abuse. To satisfy this requirement the provider must provide reasonable assurances that the basis for the exclusion will not be repeated.

## Subpart J—Death Gratuity

#### § 10.900 What is the death gratuity under this subpart?

(a) The death gratuity authorized by 5 U.S.C. 8102a and payable pursuant to the provisions of this subpart is a payment to a claimant who is an eligible survivor (as defined in §§ 10.906 and 10.907) or a designated alternate beneficiary (as defined in §§ 10.908 and 10.909) of an employee who dies of injuries incurred in connection with the employee's service with an Armed Force in a contingency operation. This payment was authorized by section 1105 of Public Law 110–181 (2008). For the purposes of this subchapter, the term "Armed Force" means the Army, Navy, Air Force, Marine Corps, and Coast Guard.

(b) This death gratuity payment is a FECA benefit, as defined by § 10.5(a) of this part. All the provisions and definitions in this part apply to claims for payment under this subpart unless otherwise specified.

#### § 10.901 Which employees are covered under this subpart?

For purposes of this subpart, the term "employee" means all employees defined in 5 U.S.C. 8101 and § 10.5(h) of this part and all non-appropriated fund instrumentality employees as defined in section 1587(a)(1) of title 10 of the United States Code.

#### § 10.902 Does every employee's death due to injuries incurred in connection with his or her service with an Armed Force in a contingency operation qualify for the death gratuity?

Yes. All such deaths that occur on or after January 28, 2008 (the date of enactment of Public Law 110–181 (2008)) qualify for the death gratuity administered by this subpart.

#### § 10.903 Is the death gratuity payment applicable retroactively?

An employee's death qualifies for the death gratuity if the employee died on or after October 7, 2001, and before January 28, 2008, if the death was a result of injuries incurred in connection with the employee's service with an Armed Force in the theater of operations of Operation Enduring Freedom or Operation Iraqi Freedom.

**§ 10.904 Does a death as a result of occupational disease qualify for payment of the death gratuity?**

Yes—throughout this subpart, the word "injury" is defined as it is in 5 U.S.C. 8101(5), which includes a disease proximately caused by employment. If an employee's death results from an occupational disease incurred in connection with the employee's service in a contingency operation, the death qualifies for payment of the death gratuity under this subpart.

**§ 10.905 If an employee incurs a covered injury in connection with his or her service with an Armed Force in a contingency operation but does not die of the injury until years later, does the death qualify for payment of the death gratuity?**

Yes—as long as the employee's death is a result of injuries incurred in connection with the employee's service with an Armed Force in a contingency operation, the death qualifies for the death gratuity of this subpart regardless of how long after the injury the employee's death occurs.

**§ 10.906 What special statutory definitions apply to survivors under this subpart?**

For the purposes of paying the death gratuity to eligible survivors under this subpart, OWCP will use the following definitions:

(a) "Surviving spouse" means the person who was legally married to the deceased employee at the time of his or her death.

(b) "Children" means, without regard to age or marital status, the deceased employee's natural children and adopted children. It also includes any stepchildren who were a part of the decedent's household at the time of death.

(1) A stepchild will be considered part of the decedent's household if the decedent and the stepchild share the same principal place of abode in the year prior to the decedent's death. The decedent and stepchild will be considered as part of the same household notwithstanding temporary absences due to special circumstances such as illness, education, business travel, vacation travel, military service, or a written custody agreement under which the stepchild is absent from the employee's household for less than 180 days of the year.

(2) A natural child who is an illegitimate child of a male decedent is included in the definition of "children" under this subpart if:

(i) The child has been acknowledged in writing signed by the decedent;

(ii) The child has been judicially determined, before the decedent's death, to be his child;

(iii) The child has been otherwise proved, by evidence satisfactory to the employing agency, to be the decedent's child; or

(iv) The decedent had been judicially ordered to contribute to the child's support.

(c) "Parent" or "parents" mean the deceased employee's natural father and mother or father and mother through adoption. It also includes persons who stood in loco parentis to the decedent for a period of not less than one year at any time before the decedent became an employee.

(1) A person stood in loco parentis when the person assumed the status of parent toward the deceased employee. (Any person who takes a child of another into his or her home and treats the child as a member of his her family, providing parental supervision, support, and education as if the child were his or her own child, will be considered to stand in loco parentis.)

(2) Only one father and one mother, or their counterparts in loco parentis, may be recognized in any case.

(3) Preference will be given to those who exercised a parental relationship on the date, or most nearly before the date, on which the decedent became an employee.

(d) "Brother" and "sister" mean any person, without regard to age or marital status, who is a natural brother or sister of the decedent, a half-brother or half-sister, or a brother or sister through adoption. Step-brothers or step-sisters of the decedent are not considered a "brother" or a "sister."

**§ 10.907 What order of precedence will OWCP use to determine which survivors are entitled to receive the death gratuity payment under this subpart?**

If OWCP determines that an employee's death qualifies for the death gratuity, the FECA provides that the death gratuity payment will be disbursed to the living survivor(s) highest on the following list:

(a) The employee's surviving spouse.

(b) The employee's children, in equal shares.

(c) The employee's parents, brothers, and sisters, or any combination of them, if designated by the employee pursuant to the designation procedures in § 10.909.

(d) The employee's parents, in equal shares.

(e) The employee's brothers and sisters, in equal shares.

**§ 10.908 Can an employee designate alternate beneficiaries to receive a portion of the death gratuity payment?**

An employee may designate another person or persons to receive not more than 50 percent of the death gratuity payment pursuant to the designation procedures in § 10.909. Only living persons, rather than trusts, corporations or other legal entities, may be designated under this subsection. The balance of the death gratuity will be paid according to the order of precedence described in § 10.907.

**§ 10.909 How does an employee designate a variation in the order or percentage of gratuity payable to survivors and how does the employee designate alternate beneficiaries?**

(a) Form CA–40 must be used to make a variation in the order or percentages of survivors under § 10.907 and/or to make an alternate beneficiary designation under § 10.908. A designation may be made at any time before the employee's death, regardless of the time of injury. The form will not be valid unless it is signed by the employee and received and signed prior to the death of the employee by the supervisor of the employee or by another official of the employing agency authorized to do so.

(b) Alternatively, any paper executed prior to the effective date of this regulation that specifies an alternate beneficiary of the death gratuity payment will serve as a valid designation if it is in writing, completed before the employee's death, signed by the employee, and signed prior to the death of the employee by the supervisor of the employee or by another official of the employing agency authorized to do so.

(c) If an employee makes a survivor designation under § 10.907(c), but does not designate the portions to be received by each designated survivor, the death gratuity will be disbursed to the survivors in equal shares.

(d) An alternate beneficiary designation made under § 10.908 must indicate the percentage of the death gratuity, in 10 percent increments up to the maximum of 50 percent, that the designated person(s) will receive. No more than five alternate beneficiaries may be designated. If the designation fails to indicate the percentage to be paid to an alternate beneficiary, the designation to that person will be invalid.

**§ 10.910 What if a person entitled to a portion of the death gratuity payment dies after the death of the covered employee but before receiving his or her portion of the death gratuity?**

(a) If a person entitled to all or a portion of the death gratuity due to the order of precedence for survivors in § 10.907 dies after the death of the covered employee but before the person

receives the death gratuity, the portion will be paid to the living survivors otherwise eligible according to the order of precedence prescribed in that subsection.

(b) If a survivor designated under the survivor designation provision in § 10.907(c) dies after the death of the covered employee but before receiving his or her portion of the death gratuity, the survivor's designated portion will be paid to the next living survivors according to the order of precedence.

(c) If a person designated as an alternate beneficiary under § 10.908 dies after the death of the covered employee but before the person receives his or her designated portion of the death gratuity, the designation to that person will have no effect. The portion designated to that person will be paid according to the order of precedence prescribed in § 10.907.

(d) If there are no living survivors or alternate beneficiaries, the death gratuity will not be paid.

**§ 10.911 How is the death gratuity payment process initiated?**

(a) Either the employing agency or a living claimant (survivor or alternate beneficiary) may initiate the death gratuity payment process. If the death gratuity payment process is initiated by the employing agency notifying OWCP of the employee's death, each claimant must file a claim with OWCP in order to receive payment of the death gratuity. The legal representative or guardian of any minor child may file on the child's behalf. Alternatively, if a claimant initiates the death gratuity payment process by filing a claim, the employing agency must complete a death notification form and submit it to OWCP. Other claimants must also file a claim for their portion of the death gratuity.

(b) The employing agency must notify OWCP immediately upon learning of an employee's death that may be eligible for benefits under this subpart, by submitting form CA–42 to OWCP. The agency must also submit to OWCP any designation forms completed by the employee, and the agency must provide as much information as possible about any living survivors or alternate beneficiaries of which the agency is aware.

(1) OWCP will then contact any living survivor(s) or alternate beneficiary(ies) it is able to identify.

(2) OWCP will furnish claim form CA–41 to any identified survivor(s) or alternate beneficiary(ies) and OWCP will provide information to them explaining how to file a claim for the death gratuity.

(c) Alternatively, any claimant may file a claim for death gratuity benefits with OWCP. Form CA–41 may be used for this purpose. The claimant will be required to provide any information that he or she has regarding any other beneficiaries who may be entitled to the death gratuity payment. The claimant must disclose, in addition to the Social Security number (SSN) of the deceased employee, the SSNs (if known) and all known contact information of all other possible claimants who may be eligible to receive the death gratuity payment. The claimant must also identify, if known, the agency that employed the deceased employee when he or she incurred the injury that caused his or her death. OWCP will then contact the employing agency and notify the agency that it must complete and submit form CA–42 for the employee. OWCP will also contact any other living survivor(s) or alternate beneficiary(ies) it is able to identify, furnish to them claim form CA–41, and provide information explaining how to file a claim for the death gratuity.

(d) If a claimant submits a claim for the death gratuity to an employing agency, the agency must promptly transmit the claim to OWCP. This includes both claim forms CA–41 and any other claim or paper submitted which appears to claim compensation on account of the employee's death.

**§ 10.912 What is required to establish a claim for the death gratuity payment?**

Claim form CA–41 describes the basic requirements. Much of the required information will be provided by the employing agency when it completes notification form CA–42. However, the claimant bears the burden of proof to ensure that OWCP has the evidence needed to establish the claim. OWCP may send any request for additional evidence to the claimant and to his or her representative, if any. Evidence should be submitted in writing. The evidence submitted must be reliable, probative, and substantial. Each claim for the death gratuity must establish the following before OWCP can pay the gratuity:

(a) That the claim was filed within the time limits specified by the FECA, as prescribed in 5 U.S.C. 8122 and this part. Timeliness is based on the date that the claimant filed the claim for the death gratuity under § 10.911, not the date the employing agency submitted form CA–42. As procedures for accepting and paying retroactive claims were not available prior to the publication of the interim final rule, the applicable statute of limitations began to run for a retroactive payment under this subpart on August 18, 2009.

(b) That the injured person, at the time he or she incurred the injury or disease, was an employee of the United States as defined in 5 U.S.C. 8101(1) and § 10.5(h) of this part, or a non-appropriated fund instrumentality employee, as defined in 10 U.S.C. 1587(a)(1).

(c) That the injury or disease occurred and that the employee's death was causally related to that injury or disease. The death certificate of the employee must be provided. Often, the employing agency will provide the death certificate and any needed medical documentation. OWCP may request from the claimant any additional documentation that may be needed to establish the claim.

(d) That the employee incurred the injury or disease in connection with the employee's service with an Armed Force in a contingency operation. This will be determined from evidence provided by the employing agency or otherwise obtained by OWCP and from any evidence provided by the claimant.

(1) Section 8102a defines "contingency operation" to include humanitarian operations, peacekeeping operations, and similar operations. ("Similar operations" will be determined by OWCP.)

(i) A "contingency operation" is defined by 10 U.S.C. 101(a)(13) as a military operation that—

(A) Is designated by the Secretary of Defense as an operation in which members of the armed forces are or may become involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing military force; or

(B) Results in the call or order to, or retention on, active duty of members of the uniformed services under section 688, 12301(a), 12302, 12304, 12305, or 12406 of Title 10, chapter 15 of Title 10, or any other provision of law during a war or during a national emergency declared by the President or Congress.

(ii) A "humanitarian or peacekeeping operation" is defined by 10 U.S.C. 2302(8) as a military operation in support of the provision of humanitarian or foreign disaster assistance or in support of a peacekeeping operation under chapter VI or VII of the Charter of the United Nations. The term does not include routine training, force rotation, or stationing.

(iii) "Humanitarian assistance" is defined by 10 U.S.C. 401(e) to mean medical, surgical, dental, and veterinary care provided in areas of a country that are rural or are underserved by medical,

surgical, dental, and veterinary professionals, respectively, including education, training, and technical assistance related to the care provided; construction of rudimentary surface transportation systems; well drilling and construction of basic sanitation facilities; rudimentary construction and repair of public facilities.

(2) A contingency operation may take place within the United States or abroad. However, operations of the National Guard are only considered "contingency operations" for purposes of this subpart when the President, Secretary of the Army, or Secretary of the Air Force calls the members of the National Guard into service. A "contingency operation" does not include operations of the National Guard when called into service by a Governor of a State.

(3) To show that the injury or disease was incurred "in connection with" the employee's service with an Armed Force in a contingency operation, the claim must show that the employee incurred the injury or disease while in the performance of duty as that phrase is defined for the purposes of otherwise awarding benefits under FECA.

(4)(i) When the contingency operation occurs outside of the United States, OWCP will find that an employee's injury or disease was incurred "in connection with" the employee's service with an Armed Force in a contingency operation if the employee incurred the injury or disease while performing assignments in the same region as the operation, unless there is conclusive evidence that the employee's service was not supporting the Armed Force's operation.

(ii) Economic or social development projects, including service on Provincial Reconstruction Teams, undertaken by covered employees in regions where an Armed Force is engaged in a contingency operation will be considered to be supporting the Armed Force's operation.

(5) To show that an employee's injury or disease was incurred "in connection with" the employee's service with an Armed Force in a contingency operation, the claimant will be required to establish that the employee's service was supporting the Armed Force's operation. The death gratuity does not cover federal employees who are performing service within the United States that is not supporting activity being performed by an Armed Force.

(e) The claimant must establish his or her relationship to the deceased employee so that OWCP can determine whether the claimant is the survivor entitled to receive the death gratuity payment according to the order of precedence prescribed in § 10.907.

**§ 10.913 In what situations will OWCP consider that an employee incurred injury in connection with his or her service with an Armed Force in a contingency operation?**

(a) OWCP will consider that an employee incurred injury in connection with service with an Armed Force in a contingency operation if:

(1) The employee incurred injury while serving under the direction or supervision of an official of an Armed Force conducting a contingency operation; or

(2) The employee incurred injury while riding with members of an Armed Force in a vehicle or other conveyance deployed to further an Armed Force's objectives in a contingency operation.

(b) An employee may incur injury in connection with service with an Armed Force in a contingency operation in situations other than those listed above. Additional situations will be determined by OWCP on a case-by-case basis.

**§ 10.914 What are the responsibilities of the employing agency in the death gratuity payment process?**

Because some of the information needed to establish a claim under this subpart will not be readily available to the claimants, the employing agency of the deceased employee has significant responsibilities in the death gratuity claim process. These responsibilities are as follows:

(a) The agency must completely fill out form CA–42 immediately upon learning of an employee's death that may be eligible for benefits under this subpart. The agency must complete form CA–42 as promptly as possible if notified by OWCP that a survivor filed a claim based on the employee's death. The agency should provide as much information as possible regarding the circumstances of the employee's injury and his or her assigned duties at the time of the injury, so that OWCP can determine whether the injury was incurred in the performance of duty and whether the employee was performing service in connection with an Armed Force in a contingency operation at the time.

(b) The employing agency must promptly transmit any form CA–41's received from claimants to OWCP. The employer must also promptly transmit to OWCP any other claim or paper submitted that appears to claim compensation on account of the employee's death.

(c) The employing agency must maintain any designations completed by the employee and signed by a representative of the agency in the employee's official personnel file or a related system of records. The agency must forward any such forms to OWCP if the agency submits form CA–42 notifying OWCP of the employee's death. The agency must also forward any other paper signed by the employee and employing agency that appears to make designations of the death gratuity.

(d) If requested by OWCP, the employing agency must determine whether a survivor, who is claiming the death gratuity based on his or her status as an illegitimate child of a deceased male employee, has offered satisfactory evidence to show that he or she is in fact the employee's child.

(e) The employing agency must notify OWCP of any other death gratuity payments under any other law of the United States for which the employee's death qualifies. The employing agency also must notify OWCP of any other death gratuity payments that have been paid based on the employee's death.

(f) Non-appropriated fund instrumentalities must fulfill the same requirements under this subpart as any other employing agency.

**§ 10.915 What are the responsibilities of OWCP in the death gratuity payment process?**

(a) If the death gratuity payment process is initiated by the employing agency's submission of form CA–42, OWCP will identify living potential claimants. OWCP will make a reasonable effort to provide claim form CA–41's to any known potential claimants and provide instructions on how to file a claim for the death gratuity payment.

(b) If the death gratuity payment process is initiated by a claimant's submission of a claim, OWCP will contact the employing agency and prompt it to submit form CA–42. OWCP will then review the information provided by both the claim and form CA–42, and OWCP will attempt to identify all living survivors or alternate beneficiaries who may be eligible for payment of the gratuity.

(c) If OWCP determines that the evidence is not sufficient to meet the claimant's burden of proof, OWCP will notify the claimant of the additional evidence needed. The claimant will be allowed at least 30 days to submit the additional evidence required. OWCP may also request additional information from the employing agency.

(d) OWCP will review the information provided by the claimant and information provided by the employing agency to determine whether the claim

satisfies all the requirements listed in § 10.912.

(e) OWCP will calculate the amount of the death gratuity payment and pay the beneficiaries as soon as possible after accepting the claim.

**§ 10.916 How is the amount of the death gratuity calculated?**

The death gratuity payment under this subpart equals $100,000 minus the amount of any death gratuity payments that have been paid under any other law of the United States based on the same death. A death gratuity payment is a payment in the nature of a gift, beyond reimbursement for death and funeral expenses, relocation costs, or other similar death benefits. Only other death gratuity payments will reduce the amount of the death gratuity provided in this subpart. For this reason, death benefits provided to the same employee's survivors such as those under 5 U.S.C. 8133 as well as benefits paid under 5 U.S.C. 8134 are not death gratuity payments, and therefore have no effect on the amount of the death gratuity provided under this subpart.

(a) A payment provided under section 413 of the Foreign Service Act of 1980 (22 U.S.C. 3973), is a death gratuity payment, and if a deceased employee's survivors received that payment for the employee's death, the amount of the death gratuity paid to the survivors under this subpart would be reduced by the amount of the Foreign Service Act death gratuity. Other death gratuities that would affect the calculation of the amount payable include but are not limited to: the gratuity provision in section 1603 of the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Hurricane Recovery, 2006 (Pub. L. 109–234, June 15, 2006); the $10,000 death gratuity to the personal representative of civilian employees, at Title VI, Section 651 of the Omnibus Consolidated Appropriations Act of 1996 (Pub. L. 104–208, September 30, 1996); the death gratuity for members of the Armed Forces or any employee of the Department of Defense dying outside the United States while assigned to intelligence duties, at 10 U.S.C. 1489; and the death gratuity for employees of the Central Intelligence Agency, at 50 U.S.C. 403k.

(b) The amount of the death gratuity under this section will be calculated before it is disbursed to the employee's survivors or alternate beneficiaries, by taking into account any death gratuities paid by the time of disbursement. Therefore, any designations made by the employee under § 10.909 are only applicable to the amount of the death gratuity as described in paragraph (a) of this section. The following examples are intended to provide guidance in this administration of this subpart.

(1) *Example One.* An employee's survivors are entitled to the Foreign Service Act death gratuity; the employee's spouse received payment in the amount of $80,000 under that Act. A death gratuity is also payable under FECA; the amount of the FECA death gratuity that is payable is a total of $20,000. That employee, using Form CA–40 had designated 50% of the death gratuity under this subpart to be paid to his neighbor John Smith who is still living. So, 50% of the death gratuity will be paid to his spouse and the remaining 50% of the death gratuity paid under this subpart would be paid to John Smith. This means the surviving spouse will receive $10,000 and John Smith will receive $10,000.

(2) *Example Two.* Employee dies in circumstances that would qualify her for payment of the gratuity under this subpart; her agency has paid the $10,000 death gratuity pursuant to Public Law 104–208. The employee had not completed any designation form. The FECA death gratuity is reduced by the $10,000 death gratuity and employee's spouse receives $90,000.

(3) *Example Three.* An employee of the Foreign Service whose annual salary is $75,000 dies in circumstances that would qualify for payment of both the Foreign Service Act death gratuity and the death gratuity under this subpart. Before his death, the employee designated that 40% of the death gratuity under this subpart be paid to his cousin Jane Smith, pursuant to the alternate beneficiary designation provision at § 10.908 and that 10% be paid to his uncle John Doe who has since died. At the time of his death, the employee had no surviving spouse, children, parents, or siblings. Therefore, the Foreign Service Act death gratuity will not be paid, because no eligible survivors according to the Foreign Service Act provision exist. The death gratuity under this subpart would equal $100,000, because no other death gratuity has been paid, and Jane would receive $40,000 according to the employee's designation. As John Doe is deceased, no death gratuity may be paid pursuant to the designation of a share of the death gratuity to him.

3. Part 25 is revised to read as follows:

## PART 25—COMPENSATION FOR DISABILITY AND DEATH OF NONCITIZEN FEDERAL EMPLOYEES OUTSIDE THE UNITED STATES

### Subpart A—General Provisions

Sec.



### Subpart B—The Special Schedule of Compensation



### Subpart C—Extensions of the Special Schedule of Compensation



**Authority:** 5 U.S.C. 301, 8137, 8145 and 8149; 1946 Reorganization Plan No. 2, sec. 3, 3 CFR 1943–1948 Comp., p. 1064; 60 Stat. 1095; Reorganization Plan No. 19 of 1950, sec. 1, 3 CFR 1943–1953 Comp., p. 1010; 64 Stat. 1271; Secretary of Labor's Order No. 10–2009, 74 FR 218.

### Subpart A—General Provisions

**§ 25.1 How are claims of Federal employees who are neither citizens nor residents adjudicated?**

This part describes how OWCP pays compensation under the FECA to employees of the United States who are neither citizens nor residents of the United States, any territory or Canada, as well as to any dependents of such employees. It has been determined that the compensation provided under the FECA is substantially disproportionate to the compensation for disability or death which is payable in similar cases under local law, regulation, custom or otherwise, in areas outside the United States, any territory or Canada and therefore a special schedule should apply to such cases This special schedule applies to any non-citizen non-resident federal employee who is neither hired nor employed in the United States, Canada or in a possession or territory of the United States. Therefore, with respect to the claims of such employees whose injury (or injury resulting in death) has occurred subsequent to [DATE 60 DAYS AFTER DATE OF PUBLICATION OF FINAL RULE IN THE FEDERAL REGISTER], or may occur, the regulations in this part shall apply.

**§ 25.2 In general, what is the Director's policy regarding such claims?**

(a) Pursuant to 5 U.S.C. 8137(a)(2), a special schedule is established by subpart B of this part that applies to any non-citizen non-resident federal employee who is neither hired nor employed in the United States, Canada

or in a possession or territory of the United States (hereinafter non-citizen non-resident employees). The special schedule in subpart B of this part is subject to the exceptions set forth in paragraph (b) of this section. The special schedule set forth in subpart B of this part applies to claims of such employees whose injury (or injury resulting in death) occurred on or after [DATE 60 DAYS AFTER DATE OF PUBLICATION OF FINAL RULE IN THE FEDERAL REGISTER].

(b) This special schedule of compensation established by subpart B of this part shall apply to non-citizen non-resident employees outside of the United States unless:

(1) The injured employee receives compensation pursuant to a specific separate agreement between the United States and another government (or similar compensation from another sovereign government);

(2) The employee receives compensation pursuant to the special schedule under subpart C for the particular locality, or for a class of employees in that particular locality; or

(3) The employee otherwise establishes entitlement to compensation under local law pursuant to § 25.100(e).

(c) Compensation in all cases of such employees paid and closed prior to [DATE 60 DAYS AFTER DATE OF PUBLICATION OF FINAL RULE IN THE FEDERAL REGISTER] shall be deemed compromised and paid under 5 U.S.C. 8137. In all other cases, compensation may be adjusted to conform with the regulations in this part, or the beneficiary may by compromise or agreement with the Director have compensation continued on the basis of a previous adjustment of the claim.

(d) Compensation received by beneficiaries pursuant to 5 U.S.C. 8137 and the special schedule set forth in subpart B or as otherwise specified in paragraph (b) of this section is the exclusive measure of compensation in cases of injury (or death from injury) to non-citizen non-resident employees of the United States as specified in paragraph (a) of this section.

(e) Compensation for disability and death of non-citizen non-resident employees outside the United States under this part shall in no event exceed that generally payable under the FECA.

#### § 25.3 What is the authority to settle and pay such claims?

In addition to the authority to receive, process and pay claims, when delegated such representative or agency receiving delegation of authority shall, in respect to cases adjudicated under this part, and when so authorized by the Director, have authority to make lump-sum awards (in the manner prescribed by 5 U.S.C. 8135) whenever such authorized representative shall deem such settlement to be for the best interest of the United States, and to compromise and pay claims for any benefits provided for under this part, including claims in which there is a dispute as to questions of fact or law. The Director shall, in instructions to the particular representative concerned, establish such procedures in respect to action under this section as he or she may deem necessary, and may specify the scope of any administrative review of such action.

#### § 25.4 What type of evidence is required to establish a claim under this part?

Claims of non-citizen non-resident employees of the United States as specified in § 25.2(a), if otherwise compensable, shall be approved only upon evidence of the following nature without regard to the date of injury or death for which the claim is made:

(a) Appropriate certification by the Federal employing establishment; or

(b) An armed service's casualty or medical record; or

(c) Verification of the employment and casualty by Department of Defense personnel; or

(d) Recommendation of an armed service's "Claim Service" based on investigations conducted by it.

#### § 25.5 How does OWCP adjudicate claims of non-citizen residents of possessions or territories?

An employee who is a bona fide permanent resident of any United States possession, territory, commonwealth, or trust territory will receive the full benefits of the FECA, as amended, except that the application of the minimum benefit provisions provided therein shall be governed by the restrictions set forth in 5 U.S.C. 8138.

## Subpart B—The Special Schedule of Compensation

#### § 25.100 What general provisions does OWCP apply to the Special Schedule?

(a) The definitions of terms in the FECA, as amended, shall apply to terms used in this subpart.

(b) The provisions of the FECA, unless modified by this subpart or otherwise inapplicable, shall be applied whenever possible in the application of this subpart.

(c) The provisions of the regulations for the administration of the FECA, as amended or supplemented from time to time by instructions applicable to this subpart, shall apply in the administration of compensation under this subpart, whenever they can reasonably be applied.

#### § 25.101 How is compensation for disability paid?

Compensation for disability shall be paid to the non-citizen non-resident employee as follows:

(a) *Temporary total disability.* Where the injured employee is disabled and unable to earn wages equivalent to those earned at the time of injury for a period of time less than two years, the employee shall receive 50 percent of the monthly pay during the period of such disability.

(b) *Temporary partial disability.* Where the injured employee is disabled and unable to earn equivalent wages to those earned at the time of injury, but who is not totally disabled for work, the injured employee shall receive during the period of disability, that proportion of compensation for temporary total disability, as determined under paragraph (a) of this section, which is equal in percentage to the degree or percentage of physical impairment caused by the disability.

(c) *Permanent total disability.* Where it is found that the injured employee is disabled and will be or has been unable to earn equivalent wages to those earned at the time of injury for greater than two years, the employee is deemed permanently disabled. Such employee shall receive a lump sum settlement based on compensation equaling 50 percent of the monthly pay or a percentage proportionate to the extent of disability. The lump sum award shall be made by the manner prescribed by 5 U.S.C. 8135.

(d) *Permanent partial disability.* Where there is permanent disability (impairment) involving the loss, or loss of use, of a member or function of the body, the injured employee is entitled to schedule compensation at 50 percent of the monthly pay to be paid in a lump sum according to 5 U.S.C. 8135, for the following losses and periods:

(1) Arm lost: 312 weeks' compensation.

(2) Leg lost: 288 weeks' compensation.

(3) Hand lost: 244 weeks' compensation.

(4) Foot lost: 205 weeks' compensation.

(5) Eye lost: 160 weeks' compensation.

(6) Thumb lost: 75 weeks' compensation.

(7) First finger lost: 46 weeks' compensation.

(8) Great toe lost: 38 weeks' compensation.

(9) Second finger lost: 30 weeks' compensation.

(10) Third finger lost: 25 weeks' compensation.
(11) Toe, other than great toe, lost: 16 weeks' compensation.
(12) Fourth finger lost: 15 weeks' compensation.
(13) Loss of hearing: One ear, 52 weeks' compensation; both ears, 200 weeks' compensation.
(14) Breast (one) lost: 52 weeks' compensation.
(15) Kidney (one) lost: 156 weeks' compensation.
(16) Larynx lost: 160 weeks' compensation.
(17) Lung (one) lost: 156 weeks' compensation.
(18) Penis lost: 205 weeks' compensation.
(19) Testicle (one) lost: 52 weeks' compensation.
(20) Tongue lost: 160 weeks' compensation.
(21) Ovary (one) lost: 52 weeks' compensation.
(22) Uterus/cervix and vulva/vagina lost: 205 weeks' compensation.
(23) Skin: 205 weeks' compensation.
(24) Phalanges: Compensation for loss of more than one phalanx of a digit shall be the same as for the loss of the entire digit. Compensation for loss of the first phalanx shall be one-half of the compensation for the loss of the entire digit.
(25) Amputated arm or leg: Compensation for an arm or a leg, if amputated at or above the elbow or the knee, shall be the same as for the loss of the arm or leg; but, if amputated between the elbow and the wrist, or between the knee and the ankle, the compensation shall be the same as for the loss of the hand or the foot.
(26) Binocular vision or percent of vision: Compensation for loss of binocular vision, or for 80 percent or more of the vision of an eye shall be the same as for the loss of the eye.
(27) Two or more digits: Compensation for loss of two or more digits, one or more phalanges of two or more digits of a hand or foot may be proportioned to the loss of use of the hand or foot occasioned thereby, but shall not exceed the compensation for the loss of a hand or a foot.
(28) Total loss of use: Compensation for a permanent total loss of use of a member shall be the same as for loss of the member.
(29) Partial loss or partial loss of use: Compensation for permanent partial loss or loss of use of a member may be for proportionate loss of use of the member.
(30) Consecutive awards: In any case in which there occurs a loss or loss of use of more than one member or parts of more than one member set forth in paragraph (d) of this section, but not amounting to permanent total disability, the award of compensation shall be for the loss or loss of use of each such member or part thereof, which awards shall run consecutively.
(31) Other cases: In all other cases within this class of disability the compensation during the continuance of disability shall be that proportion of compensation for permanent total disability, as determined under paragraph (c) of this section, which is equal in percentage to the degree or percentage of physical impairment caused by the disability.
(32) Compensation under paragraph (d) of this section for permanent partial disability shall be in addition to any compensation for temporary total or temporary partial disability under this section, and awards for temporary total, temporary partial, and permanent partial disability shall run consecutively.
(e) In the event a beneficiary covered under subpart B can demonstrate that the amount payable under the special schedule would result in a payment that would be demonstrably less than the amount payable under the law of his home country, the Director retains the discretion to pay that amount of compensation under 5 U.S.C. 8137(a)(2)(A), not to exceed the amount payable under FECA. To request benefits under this paragraph, the beneficiary must submit the following:
(1) Translated copies of the applicable local statute as well as any regulations, policies and procedures the beneficiary avers are applicable; and
(2) A translated copy of an opinion rendered by an attorney licensed in that jurisdiction or an advisory opinion from a court or administrative tribunal that explains the benefits payable to the beneficiary.

**§ 25.102 How is compensation for death of a non-citizen non-resident employee paid?**

If the disability causes death, the compensation shall be payable in the amount and to or for the benefit of the following persons:
(a) To the undertaker or person entitled to reimbursement, reasonable funeral expenses not exceeding $800.
(b) To the surviving spouse, if there is no child, 30 percent of the monthly pay until his or her death or remarriage subject to the lump sum provisions of 5 U.S.C. 8135.
(c) To the surviving spouse, if there is a child, the compensation payable under paragraph (b) of this section, and in addition thereto 10 percent of the monthly wage for each child, not to exceed a total of 50 percent of the monthly pay for such surviving spouse and children subject to the lump sum provisions of 5 U.S.C. 8135. If a child has a guardian other than the surviving spouse, the compensation payable on account of such child shall be paid to such guardian. The compensation entitlement of any child shall cease when he or she dies, marries or reaches the age of 18 years, or if over such age and incapable of self-support, becomes capable of self-support.
(d) To the children, if there is no surviving spouse, 25 percent of the monthly pay for one child and 10 percent thereof for each additional child, not to exceed a total of 50 percent of the monthly pay thereof, divided among such children share and share alike subject to the lump sum provisions of 5 U.S.C. 8135. The compensation entitlement of each child shall cease when he or she dies, marries or reaches the age of 18, or if over such age and incapable of self-support, becomes capable of self-support. The compensation of a child under legal age shall be paid to its guardian, if there is one, otherwise to the person having the custody or care of such child, for such child, as the Director in his or her discretion shall determine.
(e) To the parents, if one is wholly dependent for support upon the deceased employee at the time of his or her death and the other is not dependent to any extent, 20 percent of the monthly pay; if both are wholly dependent, 10 percent thereof to each; if one is or both are partly dependent, a proportionate amount in the discretion of the Director. The compensation to a parent or parents in the percentages specified shall be paid if there is no surviving spouse or child, but if there is a surviving spouse or child, there shall be paid so much of such percentages for a parent or parents as, when added to the total of the percentages of the surviving spouse and children, will not exceed a total of 50 percent of the monthly pay. These payments are subject to the lump sum provision of 5 U.S.C. 8135.
(f) To the brothers, sisters, grandparents and grandchildren, if one is wholly dependent upon the deceased employee for support at the time of his or her death, 20 percent of the monthly pay to such dependent; if more than one are wholly dependent, 30 percent of such pay, divided among such dependents share and share alike; if there is no one of them wholly dependent, but one or more are partly dependent, 10 percent of such pay divided among such dependents share and share alike. The compensation to

such beneficiaries shall be paid if there is no surviving spouse, child or dependent parent. If there is a surviving spouse, child or dependent parent, there shall be paid so much of the above percentages as, when added to the total of the percentages payable to the surviving spouse, children and dependent parents, will not exceed a total of 50 percent of such pay. These payments are subject to the lump sum provision of 5 U.S.C. 8135.

(g) The compensation entitlement of each beneficiary under paragraphs (e) and (f) of this section shall be paid until he or she, if a parent or grandparent, dies, marries or ceases to be dependent, or, if a brother, sister or grandchild, dies, marries or reaches the age of 18 years, or if over such age and incapable of self-support, becomes capable of self-support. The compensation of a brother, sister or grandchild under legal age shall be paid to his or her guardian, if there is one, otherwise to the person having the custody or care of such person, for such person, as the Director in his or her discretion shall determine.

(h) Upon the cessation of any person's compensation for death under this subpart, the compensation of any remaining person entitled to continuing compensation in the same case shall remain the same so that the continuing compensation shall be at the same rate each person previously received.

(i) In cases where there are two or more classes of persons entitled to compensation for death under this subpart, and the apportionment of such compensation as provided in this section would result in injustice, the Director may in his or her discretion modify the apportionments to meet the requirements of the case.

(j) Compensation for death shall be paid where practicable in a lump sum pursuant to section 8135.

(k) In the event a beneficiary eligible for death benefits covered under subpart B can demonstrate that the amount payable under the special schedule would result in a payment that would be demonstrably less than the amount payable under the law of his home country, the Director retains the discretion to pay that amount of compensation under 5 U.S.C. 8137(a)(2)(A), not to exceed the amount payable under FECA. To request benefits under this paragraph, the beneficiary must submit the following:

(1) Translated copies of the applicable local statute as well as any regulations, policies and procedures the beneficiary asserts are applicable; and

(2) A translated copy of an opinion rendered by an attorney licensed in that jurisdiction or an advisory opinion from a court or administrative tribunal that explains the benefits payable to the beneficiary.

(l) A FECA death gratuity of $65,000 may be payable for the death of a non-citizen non-resident employee should the death be a result of injury incurred in connection with service with an Armed Force in a contingency operation as set forth in subpart J of Part 10.

## Subpart C—Extensions of the Special Schedule of Compensation

### § 25.200 How is the Special Schedule applied for employees in the Republic of the Philippines?

(a) *Modified special schedule of compensation.* Except for injury or death of direct-hire employees of the U.S. Military Forces covered by the Philippine Medical Care Program and the Employees' Compensation Program pursuant to the agreement signed by the United States and the Republic of the Philippines on March 10, 1982 who are also members of the Philippine Social Security System, the special schedule of compensation established in subpart B of this part shall apply, with the modifications or additions specified in paragraphs (b) through (k) of this section, in the Republic of the Philippines, to injury or death occurring on or after July 1, 1968, with the following limitations:

(1) *Temporary disability.* Benefits for payments accruing on and after July 1, 1969, for injuries causing temporary disability and which occurred on and after July 1, 1968, shall be payable at the rates in the special schedule as modified in this section.

(2) *Permanent disability and death.* Benefits for injuries occurring on and after July 1, 1968, which cause permanent disability or death, shall be payable at the rates specified in the special schedule as modified in this section for all awards not paid in full before July 1, 1969, and any award paid in full prior to July 1, 1969: Provided, that application for adjustment is made, and the adjustment will result in additional benefits of at least $10. In the case of injuries or death occurring on or after December 8, 1941 and prior to July 1, 1968, the special schedule as modified in this section may be applied to prospective awards for permanent disability or death, provided that the monthly and aggregate maximum provisions in effect at the time of injury or death shall prevail. These maxima are $50 and $4,000, respectively.

(b) *Death benefits.* 400 weeks' compensation at two-thirds of the weekly wage rate, shared equally by the eligible survivors in the same class.

(c) *Death beneficiaries.* Benefits are payable to the survivors in the following order of priority (all beneficiaries in the highest applicable classes are entitled to share equally):

(1) Surviving spouse and unmarried children under 18, or over 18 and totally incapable of self-support.

(2) Dependent parents.

(3) Dependent grandparents.

(4) Dependent grandchildren, brothers and sisters who are unmarried and under 18, or over 18 and totally incapable of self-support.

(d) *Burial allowance.* 14 weeks' wages or $400, whichever is less, payable to the eligible survivor(s), regardless of the actual expense. If there is no eligible survivor, actual burial expenses may be paid or reimbursed, in an amount not to exceed what would be paid to an eligible survivor.

(e) *Permanent total disability.* 400 weeks' compensation at two-thirds of the weekly wage rate.

(f) *Permanent partial disability.* Where applicable, the compensation provided in § 25.100(c)(1) through (19) subject to an aggregate limitation of 400 weeks' compensation. In all other cases, provided for permanent total disability that proportion of the compensation (paragraph (e) of this section) which is equivalent to the degree or percentage of physical impairment caused by the disability.

(g) *Temporary partial disability.* Two-thirds of the weekly loss of wage-earning capacity.

(h) *Compensation period for temporary disability.* Compensation for temporary disability is payable for a maximum period of 80 weeks.

(i) *Maximum compensation.* The total aggregate compensation payable in any case, for injury or death or both, shall not exceed $8,000, exclusive of medical costs and burial allowance. The weekly rate of compensation for disability or death shall not exceed $35.

(j) *Method of payment.* Only compensation for temporary disability shall be payable periodically. Compensation for permanent disability and death shall be payable in full at the time the extent of entitlement is established.

(k) *Exceptions.* The Director in his or her discretion may make exceptions to the regulations in this section by:

(1) Reapportioning death benefits, for the sake of equity.

(2) Excluding from consideration potential death beneficiaries who are not available to receive payment.

(3) Paying compensation for permanent disability or death on a periodic basis, where this method of

payment is considered to be in the best interest of the beneficiary.

**§ 25.201 How is the Special Schedule applied for employees in Australia?**

(a) The special schedule of compensation established by subpart B of this part shall apply in Australia with the modifications or additions specified in paragraph (b) of this section, as of December 8, 1941, in all cases of injury (or death from injury) which occurred between December 8, 1941 and December 31, 1961, inclusive, and shall be applied retrospectively in all such cases of injury (or death from injury). Compensation in all such cases pending as of July 15, 1946, shall be readjusted accordingly, with credit taken in the amount of compensation paid prior to such date. Refund of compensation shall not be required if the amount of compensation paid in any such case, otherwise than through fraud, misrepresentation or mistake, and prior to July 15, 1946, exceeds the amount provided for under this paragraph, and such case shall be deemed compromised and paid under 5 U.S.C. 8137.

(b) The total aggregate compensation payable in any case under paragraph (a) of this section, for injury or death or both, shall not exceed the sum of $4,000, exclusive of medical costs. The maximum monthly rate of compensation in any such case shall not exceed the sum of $50.

(c) The benefit amounts payable under the provisions of the Commonwealth Employees' Compensation Act of 1930–1964, Australia, shall apply as of January 1, 1962, in Australia, as the exclusive measure of compensation in cases of injury (or death from injury) according on and after January 1, 1962, and shall be applied retrospectively in all such cases, occurring on and after such date: Provided, that the compensation payable under the provisions of this paragraph shall in no event exceed that payable under the FECA.

**§ 25.202 How is the Special Schedule applied for Japanese seamen?**

(a) *General.* The special schedule of compensation established by subpart B of this part shall apply as of November 1, 1971, with the modifications or additions specified in paragraphs (b) through (i) of this section, to injuries sustained outside the continental United States or Canada by direct-hire Japanese seamen who are neither citizens nor residents of the United States or Canada and who are employed by the Military Sealift Command in Japan.

(b) *Temporary total disability.* Weekly compensation shall be paid at 75 percent of the weekly wage rate.

(c) *Temporary partial disability.* Weekly compensation shall be paid at 75 percent of the weekly loss of wage-earning capacity.

(d) *Permanent total disability.* Compensation shall be paid in a lump sum equivalent to 360 weeks' wages.

(e) *Permanent partial disability.* (1) The provisions of § 25.101 of this part shall apply to the types of permanent partial disability listed in paragraphs (d)(1) through (13) and (d)(24) through (29) of that section: Provided that weekly compensation shall be paid at 75 percent of the weekly wage rate and that the number of weeks allowed for specified losses shall be changed as follows:

(i) Arm lost: 312 weeks.
(ii) Leg lost: 288 weeks.
(iii) Hand lost: 244 weeks.
(iv) Foot lost: 205 weeks.
(v) Eye lost: 160 weeks.
(vi) Thumb lost: 75 weeks.
(vii) First finger lost: 46 weeks.
(viii) Second finger lost: 30 weeks.
(ix) Third finger lost: 25 weeks.
(x) Fourth finger lost: 15 weeks.
(xi) Great toe lost: 38 weeks.
(xii) Toe, other than great toe lost: 16 weeks.

(2) In all other cases, that proportion of the compensation provided for permanent total disability in paragraph (d) of this section which is equivalent to the degree or percentage of physical impairment caused by the injury.

(f) *Death.* If there are two or more eligible survivors, compensation equivalent to 360 weeks' wages shall be paid to the survivors, share and share alike. If there is only one eligible survivor, compensation equivalent to 300 weeks' wages shall be paid. The following survivors are eligible for death benefits:

(1) Spouse who lived with or was dependent upon the employee.

(2) Unmarried children under 21 who lived with or were dependent upon the employee.

(3) Adult children who were dependent upon the employee by reason of physical or mental disability.

(4) Dependent parents, grandparents and grandchildren.

(g) *Burial allowance.* $1,000 payable to the eligible survivor(s), regardless of actual expenses. If there are no eligible survivors, actual expenses may be paid or reimbursed, up to $1,000.

(h) *Method of payment.* Only compensation for temporary disability shall be payable periodically, as entitlement accrues. Compensation for permanent disability and death shall be payable in a lump sum.

(i) *Maxima.* In all cases, the maximum weekly benefit shall be $130. Also, except in cases of permanent total disability and death, the aggregate maximum compensation payable for any injury shall be $51,000. This amount will be adjusted annually on March 1 in accordance with the percentage amount determined by the cost of living adjustment under 5 U.S.C. 8146a.

(j) *Prior injury.* In cases where injury or death occurred prior to November 1, 1971, benefits will be paid in accordance with regulations promulgated, contained in 20 CFR parts 1–399, edition revised as of January 1, 1971.

**§ 25.203 How is the Special Schedule applied to non-resident aliens in the Territory of Guam?**

The special schedule of compensation established by subpart B of this part shall apply to an injury or death occurring on or after [DATE 60 DAYS FROM DATE OF PUBLICATION OF FINAL RULE] in the Territory of Guam to non-resident alien employees recruited in foreign countries for employment by the military departments in the Territory of Guam. This schedule shall not apply to any employee who becomes a bona fide permanent resident as such claims will be decided in accordance with § 25.5.

Signed at Washington, DC, this 28th of July 2010.

**Shelby Hallmark,**

*Director, Office of Workers' Compensation Programs.*

[FR Doc. 2010–18965 Filed 8–12–10; 8:45 am]

**BILLING CODE 4510–CH–P**

Federal Register

Friday,
August 13, 2010

Part IV

# Environmental Protection Agency

**40 CFR Parts 704, 710, and 711**
**TSCA Inventory Update Reporting Modifications; Proposed Rule**

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Parts 704, 710, and 711

**[EPA–HQ–OPPT–2009–0187; FRL–8833–5]**

**RIN 2070–AJ43**

## TSCA Inventory Update Reporting Modifications

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

**ACTION:** Proposed rule.

**SUMMARY:** The Toxic Substances Control Act (TSCA) Inventory Update Reporting (IUR) rule enables EPA to collect and then make public critical information on the manufacturing, processing, and use of commercial chemicals, including current information on volumes of chemical production, manufacturing facility data, and how the chemicals are used. This information helps the Agency determine whether chemicals may be dangerous to people or the environment. EPA proposes to amend the TSCA IUR rule, thereby providing improved information for EPA to better identify and, where appropriate, take steps to manage risks associated with chemical substances and mixtures (referred to hereafter as chemical substances). Additionally, improved information would be available for the public. The IUR rule, promulgated under TSCA section 8(a), requires manufacturers (including importers) of certain chemical substances on the TSCA Chemical Substance Inventory (TSCA Inventory) to report information about the manufacturing (including import), processing, and use of those chemical substances. EPA is proposing to require electronic reporting of IUR information and to modify IUR reporting requirements, including certain circumstances that trigger reporting, the specific data to be reported, the reporting standard for processing and use information, and Confidential Business Information (CBI) reporting procedures. These modifications would provide information to better address Agency and public information needs, improve the usability and reliability of the reported data, and ensure that data are available in a timely manner.

**DATES:** Comments must be received on or before October 12, 2010.

**ADDRESSES:** Submit your comments, identified by docket identification (ID) number EPA–HQ–OPPT–2009–0187, by one of the following methods:

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

• *Mail*: Document Control Office (7407M), Office of Pollution Prevention and Toxics (OPPT), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.

• *Hand Delivery*: OPPT Document Control Office (DCO), EPA East Bldg., Rm. 6428, 1201 Constitution Ave., NW., Washington, DC. Attention: Docket ID Number EPA–HQ–OPPT–2009–0187. 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–2009–0187. EPA's policy is that all comments received will be included in the docket without change and may be made available on-line at *http://www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be CBI or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through regulations.gov or e-mail. The regulations.gov website is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

*Docket*: All documents in the docket are listed in the docket index available at *http://www.regulations.gov*. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, 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*: Susan Sharkey, Chemical Control Division, (7405M), Office of Pollution Prevention and Toxics, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (202) 564–8789; e-mail address: *sharkey.susan @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?*

You may be potentially affected by this action if you manufacture (including manufacture as a byproduct) or import chemical substances listed on the TSCA Inventory. Potentially affected entities may include, but are not limited to:

• Chemical manufacturers and importers (NAICS codes 325 and 324110; e.g., chemical manufacturing and processing and petroleum refineries).

• Chemical users and processors who may manufacture a byproduct chemical substance (NAICS codes 22, 322, 331, and 3344; e.g., utilities, paper manufacturing, primary metal manufacturing, and semiconductor and other electronic component manufacturing).

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 CBI to EPA through regulations.gov or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD-ROM that you mail to EPA, mark the outside of the disk or CD-ROM as CBI and then identify electronically within the disk or CD-ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments.* When submitting comments, remember to:

i. Identify the document by docket ID number and other identifying information (subject heading, **Federal Register** date and page number).

ii. Follow directions. The Agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

iii. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

iv. Describe any assumptions and provide any technical information and/or data that you used.

v. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

vi. Provide specific examples to illustrate your concerns and suggest alternatives.

vii. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

viii. Make sure to submit your comments by the comment period deadline identified.

## II. Background

*A. What Action is the Agency Taking?*

In this action, EPA is proposing several amendments to the current IUR rule requirements, including moving the IUR rule text from 40 CFR part 710, subpart C, to a new part, 40 CFR part 711. Where applicable, the current regulatory text reference is followed by a parenthetical containing the proposed new reference. These amendments are described in more detail in Unit III.

1. EPA is proposing to amend 40 CFR 710.59 (proposed 40 CFR 711.35) to require electronic reporting of the IUR data, using an Agency-provided, web-based reporting software (e-IURweb) to submit IUR reports through the Internet to EPA's Central Data Exchange (CDX). After the final rule's effective date, paper submissions would no longer be accepted.

2. EPA is proposing to enhance the reported manufacturing data and the processing and use data.

3. EPA is proposing a new definition section in proposed 40 CFR 711.3, revisions to the definition for *manufacture* and *site*, and other needed definitional modifications and additions.

4. EPA is proposing to amend 40 CFR 710.53 (proposed 40 CFR 711.20) to change the reporting frequency from every 5 years to every 4 years.

5. EPA is proposing to amend 40 CFR 710.48(a) (proposed 40 CFR 711.8(a)) to modify the method used to determine whether a manufacturer or importer is subject to IUR reporting. Reporting would be required if the production volume of a chemical substance met or exceeded the 25,000 pound (lb.) threshold in any calendar year since the last principal reporting year (e.g., 2005).

6. EPA is proposing to amend 40 CFR 710.52(c) (proposed 40 CFR 711.15(c)) to eliminate the 300,000 lb. threshold for processing and use information, thereby requiring all reporters of non-excluded chemical substances to report information in all parts of the IUR reporting form (Form U).

7. EPA is proposing to amend 40 CFR 710.48(a) (proposed 40 CFR 711.8(a)) to eliminate the 25,000 lb. threshold for certain chemical substances that are the subject of particular TSCA rules and/or orders and to require manufacturers (including importers) of such chemical substances to report under the IUR rule, regardless of the production volume.

8. EPA is proposing to amend 40 CFR 710.46 (proposed 40 CFR 711.6) to make chemical substances for which an enforceable consent agreement (ECA) to conduct testing has been made under 40 CFR part 790 ineligible for exemptions, to provide a full exemption from IUR requirements for water, and to remove polymers that are already fully exempt from the partially exempt list of chemical substances at 40 CFR 710.46(b)(2)(iv) (proposed 40 CFR 711.6(b)(2)(iv)).

9. EPA is proposing to amend 40 CFR 710.52(c) (proposed 40 CFR 711.15(c)) to modify the reporting requirements of certain manufacturing data elements. Specifically, manufacturers (including importers) would be required to report:

i. The name and address belonging to the parent company.

ii. The current Chemical Abstracts (CA) Index Name, as used to list the chemical substance on the TSCA Inventory, as part of the chemical identity.

iii. The production volume for each of the years since the last principal reporting year.

iv. The production volume of a manufactured (including imported) chemical substance used at the reporting site.

v. Whether an imported chemical substance is physically present at the reporting site.

vi. The production volume directly exported and not domestically processed or used.

vii. When a manufactured chemical substance, such as a byproduct, is being recycled, remanufactured, reprocessed, reused, or reworked.

10. EPA is proposing to replace the "readily obtainable" reporting standard used for the reporting of processing and use information required by 40 CFR 710.52(c)(4) (proposed 40 CFR 711.15(b)(4)) with the "known to or reasonably ascertainable by" reporting standard.

11. EPA is proposing to amend 40 CFR 710.58 (proposed 40 CFR 711.30) to require upfront substantiation when processing and use information required by 40 CFR 710.52(c)(4) (proposed 40 CFR 711.15(b)(4)) is claimed as CBI.

12. EPA is proposing to disallow confidentiality claims for processing and use data elements identified as not "known to or reasonably ascertainable by" (40 CFR 710.52(c)(4) (proposed 40 CFR 711.15(b)(4))).

13. EPA is proposing to revise the list of industrial function categories for the reporting of processing and use information. EPA is also proposing to amend 40 CFR 710.52(c)(4)(i)(C) (proposed 40 CFR 711.15(b)(4)(i)(B)) to replace the 5-digit NAICS codes with 48 Industrial Sectors (IS).

14. EPA is proposing to amend 40 CFR 710.52(c)(4)(ii) (proposed 40 CFR 711.15(b)(4)(ii)) to revise the list of consumer and commercial product categories for the reporting of consumer and commercial use information. EPA is also proposing to require the separate reporting for consumer or commercial categories and reporting of the number of commercial workers reasonably likely

to be exposed to the subject chemical substance.

15. EPA is proposing to eliminate the gaps in the ranges used to report concentration in 40 CFR 710.52(c)(3) and(c)(4) (proposed 40 CFR 711.15(b)(3) and (b)(4)).

*B. What is the Agency's Authority for Taking this Action?*

EPA is required under TSCA section 8(b), 15 U.S.C. 2607(b), to compile and keep current an inventory of chemical substances manufactured or processed in the United States. This inventory is known as the TSCA Chemical Substance Inventory (TSCA Inventory). The Agency maintains the Master Inventory File as the authoritative list of all the chemical substances reported to EPA for inclusion on the TSCA Inventory. In 1977, EPA promulgated a rule published in the **Federal Register** issue of December 23, 1977 (Ref. 1) under TSCA section 8(a), 15 U.S.C. 2607(a), to compile an inventory of chemical substances in commerce at that time. In 1986, EPA promulgated the initial IUR rule under TSCA section 8(a) at 40 CFR part 710 published in the **Federal Register** issue of June 12, 1986 (Ref. 2) to facilitate the periodic updating of information on chemical substances listed on the TSCA Inventory and to support activities associated with the implementation of TSCA. In 2003, EPA promulgated extensive amendments to the IUR rule published in the **Federal Register** issue of January 7, 2003 (2003 Amendments) (Ref. 3) to collect exposure-related information associated with the manufacturing, processing, and use of eligible chemical substances and to make certain other changes.

Section 8(a)(1) of TSCA authorizes the EPA Administrator to promulgate rules under which manufacturers and processors of chemical substances must maintain such records and submit such information as the EPA Administrator may reasonably require. Section 8(a) of TSCA generally excludes small manufacturers and processors of chemical substances from the reporting requirements established in TSCA section 8(a). However, EPA is authorized by TSCA section 8(a)(3) to require TSCA section 8(a) reporting from small manufacturers and processors with respect to any chemical substance that is the subject of a rule proposed or promulgated under TSCA section 4, 5(b)(4), or 6, or that is the subject of an order in effect under TSCA section 5(e), or that is the subject of relief granted pursuant to a civil action under TSCA section 5 or 7. The standard for determining whether an entity qualifies as a small manufacturer for purposes of 40 CFR part 710 (proposed 40 CFR part 711) is found at 40 CFR 704.3. Processors are not currently subject to the rules at 40 CFR part 710 (proposed 40 CFR part 711).

*C. What is the Current TSCA Inventory Update Reporting (IUR) Rule?*

The IUR rule, as modified by the 2003 Amendments, requires U.S. manufacturers (including importers) of chemical substances listed on the TSCA Inventory to report to EPA every 5 years the identity of chemical substances manufactured (including imported) during the reporting year in quantities of 25,000 lb. or greater at any single site they own or control (see 40 CFR part 710, subpart C). IUR data were collected five times prior to the 2003 Amendments: 1986, 1990, 1994, 1998, and 2002, and one time after the 2003 Amendments, in 2006. EPA uses the TSCA Inventory and data reported under the IUR rule to support many TSCA-related activities and to provide overall support for a number of EPA and other Federal health, safety, and environmental protection activities. The Agency also makes the data available to the public, to the extent possible given CBI claims.

Persons manufacturing (including importing) chemical substances are required to report information such as company name, site location and other identifying information, production volume of the reportable chemical substance, and exposure-related information associated with the manufacture of each reportable chemical substance. This exposure-related information includes the physical form and maximum concentration of the chemical substance and the number of potentially exposed workers (40 CFR 710.52). Several groups of chemical substances are generally excluded from IUR reporting requirements: e.g., polymers, microorganisms, naturally occurring chemical substances, and certain natural gas substances (40 CFR 710.46).

Manufacturers (including importers) of chemicals in larger volumes (i.e., 300,000 lb. or greater manufactured (including imported) during the reporting year at any single site) are required also to report certain processing and use information (40 CFR 710.52(c)(4)). This information includes process or use category; NAICS code; industrial function category; percent production volume associated with each process or use category; number of use sites; number of potentially exposed workers; and consumer/commercial information such as use category, use in or on products intended for use by children, and maximum concentration.

The 2006 submission was the first instance where manufacturers (including importers) of inorganic chemical substances were required to report under the IUR rule. For the 2006 submission only, inorganic chemical substances were partially exempted from the IUR rule, and manufacturers of such chemicals were required to report the manufacturing information and not the processing and use information, regardless of production volume. A partial exemption means that a submitter is exempt from the processing and use reporting requirements described in 40 CFR 710.52(c)(4). Under the current rule, for future collections (i.e., for 2011 or 2016 IUR collections, etc.), the partial exemption for inorganic chemicals will no longer be applicable and submitters will report in the same manner as is required for organic chemicals, including processing and use information (40 CFR 710.46(b)(3)). In addition, starting with the 2006 collection and for future collections, specifically listed petroleum process streams and other specifically listed chemical substances are partially exempt, and manufacturers of such chemical substances are not required to report processing and use information. These partial exemptions will continue in subsequent submission periods (including 2011), for as long as the chemical substances remain on these partial exemption lists (40 CFR 710.46(b)(1) and (b)(2) (proposed 40 CFR 711.6(b)(1) and (b)(2)).

Non-confidential data, including both searchable and separately downloadable databases and a 2006 IUR data summary report are available for public use on the IUR website (*http://www.epa.gov/iur*).

*D. Why is the Agency Proposing Changes in the IUR Rule?*

EPA is proposing to modify the IUR rule to meet four primary goals:

1. To tailor the information collected to better meet the Agency's overall information needs.

2. To increase its ability to effectively provide public access to the information.

3. To obtain new and updated information relating to potential exposures to a subset of chemical substances listed on the TSCA Inventory.

4. To improve the usefulness of the information reported.

EPA believes that expanding the range of chemical substances for which comprehensive information is to be reported and adjusting the specific reported information, the method and

frequency of collecting the information, and CBI requirements will accomplish these goals.

These goals are supported by a policy outlined in TSCA section 2, which is that "adequate data should be developed with respect to the effect of chemical substances and mixtures on health and the environment and that the development of such data should be the responsibility of those who manufacture and those who process such chemical substances and mixtures" (TSCA section 2(b)(1)). Modifications to the IUR requirements by the 2003 Amendments provided many improvements to the data collected through that rule, and EPA's efforts to use the 2006 IUR data have identified areas where further improvements are needed. The modifications described in this proposed rule would change some of the reporting requirements in an effort by EPA to:

- Ensure the required information is properly reported and that the information in the Agency's database reflects the information provided in the IUR reports.
- Increase the usability of the collected information.
- Increase the availability of information for the public.
- Focus reporting on information that is most needed by the Agency.

In addition, these proposed changes will enable EPA and other Federal agencies to improve their risk screening capabilities, enabling them to better assess and manage risk, and improving public awareness of basic information about a large number of chemical substances.

EPA provided reporting software for the 2006 IUR submission period and encouraged electronic reporting through the Internet, using the Agency's CDX. EPA's experience with populating the IUR database and with using the 2006 IUR data provided insight into how well both the reporting software and submission methods worked. For instance, because of validations built into the reporting software, electronic submissions were able to be quickly assimilated into the IUR database. Other forms of submission required the documents to be scanned in or hand entered, and resulted in many introduced errors during the data entry process. Additionally, for the 2006 IUR, certain types of submissions (e.g., joint submissions) could not be reported electronically. Other problems, such as incorrect chemical identities, delayed the incorporation of the data into the database, resulting in the Agency's inability to begin using the 2006 IUR data and providing public access. The proposed modifications associated with reporting methods and changes to the reporting software will better ensure the information reported to the Agency is accurate and in compliance with the IUR requirements.

During the development of the 2003 Amendments, the Agency considered the data accuracy and reliability needed for screening level exposure analyses and took several steps to ensure the IUR data met those needs. Screening level data need not be precise, but should be accurate and reliable enough for the Agency to develop screening level assessments. The amended IUR rule supplies exposure-related information the Agency did not previously possess, recognizing that industry has a greater knowledge than EPA about its own operations and the uses of chemical substances it manufactures and sells.

EPA's extensive use of the 2006 IUR data in the Agency's Existing Chemicals Program is representative of how EPA envisioned the data would be used when the 2003 Amendments were promulgated. In 2007, the Agency began to develop and post screening-level hazard, exposure, and risk characterizations for high production volume (HPV) chemicals, which are those chemicals produced nationally at aggregated volumes of one million lb. or more per year. In developing these characterizations, EPA identified areas where the IUR data collection can be improved and enhanced. Improvements would allow EPA to better identify and take follow-up action on chemical substances that may pose potential risks to human health or the environment.

During its review of the IUR data, EPA identified numerous examples of CBI claims where the same or similar information to that claimed as CBI was already available to the public. In several cases, information on production volume and uses for a chemical substance or group of chemical substances was claimed CBI on Form U, while the same or similar information was submitted voluntarily by the company without such a claim under the HPV Challenge Program. In those cases, EPA had previously made the information publicly available through the High Production Volume Information System (HPVIS) or on EPA's Existing Chemicals website. Correct designation of reported information as non-confidential will facilitate reporting of this information to the public.

EPA Administrator Lisa P. Jackson has made it a priority to strengthen the Agency's chemical management program, including the development of new Regulatory Risk Management Actions, the development of Chemical Action Plans targeting the Agency's risk management efforts, requiring the reporting of information needed to understand chemical risks, and increasing public access to information about chemical substances (Ref. 4). The IUR provides exposure-related data needed to understand chemical risks. The proposed modifications to the IUR rule would enhance the capabilities of the Agency to ensure risk management actions are taken on chemical substances which may pose the greatest concern. More in-depth reporting of the processing and use data, more careful consideration of the need for confidentiality claims, and adjustments to the specific data elements are important aspects of this action. By enhancing the data supplied to the Agency, EPA expects to more effectively and expeditiously identify and address potential risks posed by chemical substances and provide improved access and information to the public.

An important and anticipated result of this action is that EPA would receive more publicly available, non-CBI information, therefore increasing the transparency and public accessibility of the chemical substance use and exposure information and ensuring consistency with the President's policy goals for government reliance on and public availability of scientific information.

## III. Modifications Affecting All Manufacturers (Including Importers)

As discussed in detail in Unit III.C., under this proposed rule, sites that manufactured (including imported) a reportable chemical substance in quantities of 25,000 lb. or more in any calendar year since the last IUR principal reporting year (e.g., 2005) would be required to complete all manufacturing (including production volume), processing, and use information for the principal reporting year (e.g., 2010), plus production volume information for all the preceding years since the last IUR principal reporting year (e.g., 2006 through 2009, for the principal reporting year 2010). Draft detailed instructions for completing the IUR submission are available in the docket established for this rulemaking (Ref. 5).

Persons making an IUR submission would be required to use e-IURweb, the Agency-provided web-based software designed to complete Form U (the IUR reporting form) and submit the information electronically over the Internet, through EPA's CDX. The 2011 e-IURweb will be similar in format to the 2006 e-IUR downloadable software,

and will include changes associated with the proposed amendments that are finalized, improved validation checks, and other improvements. A more detailed description of e-IURweb and the electronic submission process is provided in Unit III.B.

The following discussion describes the proposed changes to the IUR rule contained in this proposed rule.

*A. Technical Modifications to the Regulatory Text*

Currently, 40 CFR part 710 contains three subparts. Subpart A contains regulatory text associated with the original compilation of the TSCA Inventory; subpart B contains regulatory text associated with the IUR rule covering the update reporting in 2002; and subpart C contains the regulatory text associated with the IUR rule for 2006 and beyond. The chemical substances that are covered by the IUR rule are on the Master Inventory File, which includes chemical substances from the original TSCA Inventory compilation and those added subsequently through the notice requirements of TSCA section 5. Because the IUR rule applies to a list of chemical substances included on the original TSCA Inventory plus additional chemical substances added subsequently, and because the Agency from time to time has modified the IUR rule, the Agency believes the regulatory text associated with the IUR rule should be in its own section in the CFR, distinct from both the original TSCA Inventory rules and from the TSCA section 5 requirements. Where EPA is proposing to update the location of existing regulatory provisions, or to otherwise update regulatory provisions in a non-substantive fashion (e.g., to update cross-references to reflect the movement of referenced provisions) EPA does not thereby reopen the substance of such provisions for public comment, except where public comment is expressly requested.

1. *Moving the IUR regulatory text from 40 CFR part 710, subpart C, to 40 CFR part 711 and eliminating subpart divisions.* Subpart C of 40 CFR part 710, 40 CFR 710.43 to 710.59, contains the IUR regulatory text. EPA is proposing to move all of the subpart C text from 40 CFR part 710 to a new 40 CFR part 711 and would add a new scope and compliance section (40 CFR 711.1). Specific sections would be moved as follows: 40 CFR 710.43 would become 40 CFR 711.3; 40 CFR 710.45 would become 40 CFR 711.5; 40 CFR 710.46 would become 40 CFR 711.6; 40 CFR 710.48 would become 40 CFR 711.8; 40 CFR 710.49 would become 40 CFR 711.9; 40 CFR 710.50 would become 40 CFR 711.10; 40 CFR 710.52 would become 40 CFR 711.15; 40 CFR 710.53 would become 40 CFR 711.20; 40 CFR 710.55 would become 40 CFR 711.22; 40 CFR 710.57 would become 40 CFR 711.25; 40 CFR 710.58 would become 40 CFR 711.30; and 40 CFR 710.59 would become 40 CFR 711.35. Because all of the text of subpart C would be moved to 40 CFR part 711, 40 CFR part 710 would no longer have a subpart C. Neither 40 CFR part 710 or 40 CFR part 711 would have any subparts.

2. *Consolidation of definitions.* As part of moving the regulatory text from 40 CFR part 710, subpart C, to 40 CFR part 711, EPA is proposing to consolidate definitions copied from 40 CFR 710.3 and those currently found at 40 CFR 710.43 into the new 40 CFR 711.3, except where an appropriate definition is already in place in TSCA section 3 or at 40 CFR 704.3, and an additional definition of the term in 40 CFR 711.3 would therefore be unnecessarily duplicative. The definitions in TSCA section 3 and at 40 CFR 704.3 would be incorporated into 40 CFR 711.3, except insofar as 40 CFR 711.3 provides a modified definition of a term also defined at 40 CFR 704.3.

The term *mixture* is defined in both 40 CFR 710.3 and TSCA section 3. For purposes of the IUR rule, EPA is proposing to incorporate the definition of *mixture* from TSCA section 3. The TSCA mixture definition differs from the definition in 40 CFR 710.3 and 40 CFR 720.3, the regulations used to determine the chemical substances listed on the TSCA Inventory, in that it does not specifically address hydrates. While hydrates are not addressed specifically in the definition, a hydrate is a mixture of water and an anhydrous chemical substance. As with mixtures in general, the individual components of the mixture may be separately reportable at the time of their manufacture or import. EPA believes, for purposes of the IUR rule, it is not necessary to include hydrates separately in the definition of mixture. The Agency would continue to include such a discussion in the instructions (Ref. 5).

Unit III.C. contains further discussions about changes to specific definitions, in relation to the modifications included in this proposed rule. A summary of all IUR-related definitions is available in the docket (Ref. 6).

3. *Delete non-isolated intermediate definition from 40 CFR 710.3.* EPA added a definition to 40 CFR 710.43 for the term "non-isolated intermediate" as part of the 2003 Amendments. Subsequently, as part of the IUR Revisions Rule published in the **Federal Register** issue of December 19, 2005 (Ref. 7), EPA erroneously moved the definition to 40 CFR 710.3 from 40 CFR 710.43. EPA is proposing to delete the definition from 40 CFR 710.3 as this definition was not associated with the original TSCA Inventory, and therefore does not belong in 40 CFR 710.3. A definition of this term, codified elsewhere at 40 CFR 704.3, would be incorporated into the IUR definitions at proposed 40 CFR 711.3.

4. *Deleting subpart B text.* EPA is proposing to delete the regulatory text contained in 40 CFR part 710, 40 CFR 710.23 to 710.39 (subpart B). This text refers to IUR submission periods of 2002 and earlier and is obsolete. As noted in 40 CFR 710.1, the Agency expressed its intent to remove subpart B once the 2002 update was complete.

5. *Deleting superfluous text associated with reporting production volumes.* EPA is proposing to delete the phrase "provided that the reported figures are within ±10% of the actual volume" from the production volume reporting requirements currently found in 40 CFR 710.52(c)(3)(iv) (proposed 40 CFR 711.15(b)(3)(iv)). The revised wording would be "This amount must be reported to two significant figures of accuracy." The deleted phrase is superfluous because any number reported accurately to two significant figures is within 10% of the correct value.

6. *Correcting text associated with reporting number of sites and number of workers.* EPA is proposing to replace the phrase "less than" with the phrase "fewer than" in the ranges used to report the number of workers currently found in the table in 40 CFR 710.52(c)(3)(v) (proposed 40 CFR 711.15(b)(3)(vii)) and the number of sites currently found in the table in 40 CFR 710.52(c)(4)(i)(E) (proposed 40 CFR 711.15(b)(4)(i)(E)). This proposed change would make the phrases describing the ranges grammatically correct.

*B. Method of Submission*

The upcoming IUR submission period, during which submitters will be required to report the IUR information to EPA, will be June 1 to September 30, 2011. The Agency will make e-IURweb and associated guidance materials available to submitters prior to the start of the submission period. Draft instructions are included in the docket for this proposed rule.

EPA is proposing to require the mandatory use of Agency-provided, web-based reporting software (e-IURweb) to complete Form U and CDX to submit the completed Form U to the

Agency. Users of CDX are required to register and to submit an authorized signature agreement.

EPA accepted 2006 IUR submissions in several ways. Submissions could be completed and delivered electronically via the Internet and CDX, or submissions could be completed on paper or electronic media (i.e., as a file on a CD-ROM) and delivered by mail or a delivery service. Approximately one-third of the submissions were made electronically, and EPA was able to immediately process and quickly begin to use the information from those electronic submissions. Submissions sent as a file on a CD-ROM were printed and, along with paper submissions, scanned into an electronic system.

Due mostly to the time and resources needed to review and correct submitter- and scanning-related errors associated with non-electronic submissions, EPA required over 2 years to validate and process the data from the 2006 IUR. The Agency had to take extra steps in order to correct the data during that period, such as accessing the original submission instead of the information in the IUR database. In addition, EPA released the public database in December 2008 without information on approximately 5% of the reported chemical substances due to the high error rate experienced with the 2006 IUR data collection and receipt. A large number of errors were created through the scanning process and required correction by hand, which was very labor intensive. The introduced errors included incorrectly scanned chemical identities and indications of whether a data element was claimed CBI. An incorrectly recorded CBI claim could lead to the inadvertent disclosure of confidential information or to the non-release of non-confidential information.

EPA also detected significant errors not related to scanning on a substantial number of reporting forms and faced difficulties resolving issues pertaining to submissions with incorrect chemical identification information. Some of the errors included submitters not specifically identifying a chemical substance, providing chemical names and Chemical Abstracts Registry Numbers (CASRN) that did not match, or providing a CASRN that did not exist. Often, the submitted data did not conform to the reporting requirements described and explained in the IUR rule and 2006 guidance documents.

The 2006 IUR reporting software provided by the Agency contained a validation program designed to identify certain errors prior to submission. Sometimes a submitter used the software to prepare a submission, but printed the reporting form prior to completing the validation check because it was not able to pass the validation. Such reports typically contained incomplete or incorrect information, and EPA needed to contact the submitter or take other steps to correct the data prior to entering it into the database.

EPA believes the proposed requirement to use e-IURweb to report electronically would eliminate problems related to the scanning of paper documents, incorrect chemical identities, and other errors introduced by the submitter. These errors substantially delayed the availability of the IUR information to both internal EPA programs, such as the Existing Chemicals Program, and the public.

1. *Updated e-IURweb reporting software*. EPA developed e-IUR reporting software for use in preparing and submitting reports electronically during the 2006 IUR submission period (see *http://www.epa.gov/iur/tools/software.html*). For the 2011 IUR submission period, EPA will provide a free web-based application in place of the 2006 downloadable software. The 2011 e-IURweb software will feature several enhancements over the 2006 e-IUR software. These improvements include a sophisticated validation system, which would alert users when a required field on the form is either missing information or contains certain kinds of potentially incorrect information. Other updates are expected to include automated chemical identity checks, automated company and site identity checks, and the facilitation of joint submissions and amendments.

2. *Require electronic submissions over the Internet*. EPA is proposing to require that manufacturers (including importers) submit their IUR reports to the Agency through CDX via the Internet. EPA would require that all submissions be generated using e-IURweb, as described in Unit III.B.1. Electronic submissions would ensure that IUR data will have completed a basic validation check, could be quickly incorporated into a database and ready for immediate Agency use, and would not be subject to subsequent data entry errors. Furthermore, EPA believes the required use of e-IURweb and CDX would reduce the reporting burden on industry by reducing both the cost and the time required to review, edit, and transmit data to the Agency. After the final rule's effective date, EPA would no longer accept paper submissions or electronic media (i.e., as a file on a CD-ROM) for any IUR submission.

EPA is proposing that submission of IUR data through CDX become EPA's required submission method for several reasons. Electronic submission enables EPA to notify the submitter that the Agency has received its submission, it reduces reporting errors, and it enables data to be available for Agency and public use more quickly. During the comment period for the renewal of the Information Collection Request (ICR), which was published in the **Federal Register** issue of September 5, 2008 (Ref. 8), EPA received positive comments regarding the use of CDX, the encrypted Internet submission process, and the ability to use a secure electronic signature method to submit IUR reports.

EPA requests comment on whether there are circumstances in which a company may not have Internet access to report IUR data electronically.

3. *Electronic signature process*. In order to submit electronically to EPA via CDX, individuals acting on behalf of the submitter must first register with CDX. CDX registration is a requirement for all electronic submissions using CDX and is not being introduced with this proposal. During the 2006 IUR, submitters were required to complete an Electronic Signature Agreement (ESA) and to submit the agreement in hard copy with a wet ink signature to EPA in order to complete the CDX registration (Ref. 9). There was confusion among some submitters regarding the correct identity of the individual eligible to register for CDX and the individual required to sign the ESA.

EPA is making changes to the registration process in order to address problems identified during the 2006 IUR electronic reporting. For 2011 IUR reports, EPA is modifying the 2006 ESA to identify more clearly the individual(s) required to sign the agreement. The Agency is developing an ESA process similar to that of the New Chemical Program electronic submissions (Ref. 10). Each IUR submission must have an authorized official associated with the submission, who is the person signing the certification statement and submitting the IUR report via CDX. The authorized official would need to complete both an ESA and the CDX registration process.

EPA is requesting comment on whether some reporting sites may need or desire to have more than one individual complete an ESA, so that other individuals could add information to the IUR submission. The other individual may be a paid employee of the company, an outside consultant for the company, or an authorized representative agent for the company. While this individual would not be able to sign the certification statement required for the IUR submission, he or

she would be able to provide additional information, if needed, using CDX. For 2006 and prior IUR submissions, submitters were not able to provide additional information electronically.

EPA is considering developing a single ESA and CDX registration process that would be applicable to all TSCA programs. EPA believes a company or site may want to use the same authorized official for both Premanufacture Notice (PMN) submissions and IUR submissions. EPA is interested in obtaining comments on this approach. For example, would the authorized official responsible for signing both an IUR submission and a PMN submission be the same person?

*C. Modifications to Selected Definitions*

As part of developing the definition section for 40 CFR part 711, EPA is proposing to modify six definitions associated with the IUR rule and to add four new definitions. In 40 CFR 704.3 and 40 CFR 710.3, EPA is also proposing to modify the definition of *importer* by removing the citation to 19 CFR 1.11. The citation, which would correctly read 19 CFR 101.1, is not needed for this definition because it does not add additional information to the definition of importer.

1. *Manufacture and manufacturer*. In order to improve the information submitted through the IUR rule, EPA is proposing to modify the definition of manufacture by incorporating elements from the 40 CFR 720.3 definition for manufacturer. The proposed 40 CFR 711.3 definition of *manufacture* would allow persons contracting with a toll manufacturer to report the chemical physically manufactured at the toll manufacturer's site. Under the proposed definition of site, the site information would be the toll manufacturer's site (see Unit III.C.2.). Adopting this definition would allow the person contracting for the manufacture of a chemical substance to report the information on the industrial processing and use of a chemical substance and on the consumer and commercial uses of a product containing the chemical substance. Information on the uses of a chemical substance is often unavailable to a toll manufacturer who produces a chemical substance for another person. EPA is proposing to include a modified definition of *manufacture* in 40 CFR 711.3 instead of adopting the definition of *manufacturer* from 40 CFR 720.3 because the IUR rule does not use the term *manufacturer*. In order to avoid any confusion with the definitions of these terms found at 40 CFR 704.3, the Agency is also proposing to add a simple definition for the term *manufacturer* to 40 CFR 711.3. In addition to the proposed change to the definition of *manufacture*, EPA is proposing to add a paragraph (c) to the proposed regulation at 40 CFR 711.22 to clarify the reporting relationship between the contracting company and the toll manufacturer. The contracting company is primarily responsible for the IUR reporting, but in the event the contracting company does not report, the toll manufacturer must report. Both the contracting company and the toll manufacturer are liable if no report is made. Note that the contracting company and the toll manufacturer should confer with each other to avoid duplicate reporting.

With this proposal, the term *manufacture* therefore would be defined under the IUR rule to mean "to manufacture, produce, or import for commercial purposes. Manufacture includes the extraction, for commercial purposes, of a component chemical substance from a previously existing chemical substance or a complex combination of substances. When a chemical substance, manufactured other than by import, is:

(1) Produced exclusively for another person who contracts for such production.

(2) That other person specifies the identity of the chemical substance and controls the total amount produced and the basic technology for the plant process, that chemical substance is jointly manufactured by the producing manufacturer and the person contracting for such production."

Also with this proposal, the term *manufacturer* would be defined under the IUR rule to mean "a person who manufactures a chemical substance."

2. *Site*. EPA is proposing to amend the definition of *site* to:

i. Clarify that the importer's site must be a U.S. address.

ii. Accommodate manufacturing under contract.

iii. Accommodate portable manufacturing units.

See Unit III.I. for a further discussion of this proposal as it relates to importers. As described in Unit III.C.1., the proposed 40 CFR 711.3 definition of *manufacture* would allow persons contracting with a toll manufacturer to report the chemical substance physically manufactured at the toll manufacturer's site and the site identification information pertaining to the toll manufacturer's site.

EPA identified the need to accommodate portable manufacturing units during the 2006 IUR submission period. Two examples of portable manufacturing units are tanks used to manufacture calcium hydroxide slurry for use in building construction and road and highway projects, and tanks used to mix anhydrous ammonia and water to manufacture ammonium hydroxide prior to application to agricultural lands. EPA is interested in including chemical substance manufacturing that is, for instance, performed by road crews or is occurring at construction sites at which chemical substances are mixed on site in such a manner to create a different chemical substance, e.g., asphalt emulsifiers. The site of physical manufacturing could change on a frequent basis. Manufacturers would report the aggregated production volume for all of the portable manufacturing units sent out to different locations from a single distribution center. The address of the distribution center would be reported as the site location. EPA is interested in comments on whether the proposed definition addressing portable manufacturing units would result in reporting, under the IUR rule, for situations similar to those presented as examples.

With this proposal, the term *site* would be defined under the IUR rule to mean "a contiguous property unit. Property divided only by a public right-of-way shall be considered one site. More than one plant may be located on a single site.

(a) For chemical substances manufactured under contract, i.e., by a toll manufacturer, the site is the location where the chemical substance is physically manufactured.

(b) The site for an importer who imports a chemical substance described in 40 CFR 711.5 is the U.S. site of the operating unit within the person's organization that is directly responsible for importing the chemical substance. The import site, in some cases, may be the organization's headquarters in the United States. If there is no such operating unit or headquarters in the United States, the site address for the importer is the U.S. address of an agent acting on behalf of the importer who is authorized to accept service of process for the importer.

(c) For portable manufacturing units sent out to different locations from a single distribution center, the distribution center shall be considered the site."

3. *Electronic-reporting related definitions*. EPA is proposing to add two new terms, *Central Data Exchange (CDX)* and *e-IURweb*. The Agency is adding these terms to provide clarity to the proposed requirement for electronic reporting of IUR data. The term *CDX* means "EPA's centralized electronic

document receiving system, or its successors, including associated instructions for registering to submit electronic documents." The new definition would make the term consistent with the new PMN definition. The term *e-IURweb* means the "electronic, web-based IUR software provided by EPA for the completion and submission of the IUR data."

4. *Processing and use-related definitions.* EPA is proposing to amend the definitions of the terms *commercial use* and *consumer use* in order to make them more consistent with the definitions developed collaboratively by the United States and Canada. See Unit III.F.8. for further information. The proposed definitions for these two terms differ in wording from the Canadian version to ensure the use of terminology defined in IUR and related regulations, and EPA believes the basic application of these two terms would not differ from the basic application of the Canadian definitions (Ref. 11). The term *commercial use* would mean "the use of a chemical substance or a mixture containing a chemical substance (including as part of an article) in a commercial enterprise providing saleable goods or services." Examples included in the 40 CFR 710.43 definition would be eliminated. The slightly modified definition of *consumer use* would be "the use of a chemical substance or a mixture containing a chemical substance (including as part of an article) when sold to or made available to consumers for their use." The restrictions associated with where a consumer would use the product would be removed.

EPA is proposing to add a definition for the term *industrial function*. For the 2006 IUR, EPA defined *industrial use* and did not define *industrial function*. The inclusion of both definitions provides clarity for the industrial processing and use reporting requirements and would make the Agency's requirements consistent with those collaboratively developed with Canada (Ref. 11). Additional discussion of those requirements is in Unit III.F.7. With this proposal, *industrial function* would mean "the intended physical or chemical characteristic for which a chemical substance or mixture is consumed as a reactant; incorporated into a formulation, mixture, reaction product, or article; repackaged; or used."

5. *Principal reporting year and submission period.* As described in Unit II.A., EPA is proposing to change the reporting cycle from every 5 years to every 4 years and to require the reporting of production volumes for each calendar year since the last principal reporting year. EPA is proposing to modify the terms *reporting year* and *submission period* to reflect these changes.

The term *reporting year* would be modified to add the term "principal" and to replace the word "information" with "manufacturing, processing and use data." These changes are to indicate that the principal reporting year is the year in which most of the reported data are based. Under the current proposal, the principal reporting year is the latest complete calendar year preceeding the submission period. Additionally, EPA is proposing to remove the reference to "the calendar year at 5–year intervals thereafter" and to remove the reference to "calendar year 2005." With these changes, the term *principal reporting year* would be defined as "the lastest complete calendar year preceding the submission period."

The term *submission period* would be modified by deleting the phrase "generated during the reporting year." With this change, the definition of *submission period* would reflect that data for years in addition to the principal reporting year would be reported. With this change, the definition of *submission period* would mean "the period in which manufacturing, processing, and use data are submitted to EPA."

### *D. Modifications to Reporting Thresholds*

Reporting thresholds are used to determine when IUR reporting is required for a subject chemical substance at a manufacturing (including importing) site. Every person manufacturing (including importing) a non-excluded chemical substance at or above the 25,000 lb. threshold is required to report information in Parts I and II of Form U. Beginning with the 2006 IUR submission period, every person manufacturing (including importing) a non-excluded chemical substance at or above the 300,000 lb. threshold was required to report information in Part III of Form U, unless the chemical substance was partially exempt. EPA is proposing three changes related to the reporting thresholds:

- Determination of whether you meet the 25,000 lb. threshold.
- Elimination of the 300,000 lb. threshold for reporting information in Part III of Form U.
- Elimination of the 25,000 lb. threshold for certain chemical substances.

1. *Method for determining whether a person is subject to IUR reporting requirements.* Currently, a 1–year snap shot of manufacturing (including importing) is used to determine the need to report for the IUR rule. The method used to make the reporting determination involves identifying that a person manufactured (including imported) a chemical substance listed on the TSCA Inventory during the principal reporting year (e.g., 2005 for the 2006 IUR submission period); that the chemical substance was not otherwise exempt; and that the associated production volume (domestically manufactured plus imported volumes) met or exceeded 25,000 lb. for the principal reporting year (e.g., 2005 for the 2006 IUR submission period).

EPA is proposing to modify the method used to determine whether a person is subject to IUR reporting. The proposed method would be to determine whether, for any calendar year since the last principal reporting year, a chemical substance was manufactured (including imported) at a site in production volumes of 25,000 lb. or greater. The proposed method would be effective after the 2011 IUR submission period.

For example, assume the next submission period occurs in 2015. The principal reporting year for the 2011 IUR submission period is calendar year 2010. Therefore, for the 2015 IUR submission period, it would be necessary to examine the annual production volumes for the years 2011 to 2014 for the site. If the production volume for a reportable chemical substance were 25,000 lb. or greater for any calendar year during that 4–year period, then it would be necessary to report the chemical substance, unless it were otherwise exempt. For instance, a subject chemical substance with production volumes of 5,000 lb. in 2014 and 35,000 lb. in 2012 would be reported for the 2015 IUR. Regardless of the 2014 production volume, in this example scenario the 2015 IUR submission would contain detailed information based on manufacturing during the 2014 calendar year and production volume information only for the years 2011 through 2013, as described in Unit III.F.4.i.

EPA is proposing this change because of the mounting evidence that many chemical substances, even larger volume chemical substances, often experience wide fluctuations in manufacturing volume from year to year. This can result in the production volume of a chemical substance exceeding the threshold for several years, then falling below the threshold during the IUR principal reporting year. Consequently, previous IUR reporting has resulted in a change of

approximately 30% in the composition of the chemical substances being reported from one submission period to the next. Therefore, the 1–year snapshot of production volume does not provide an accurate picture of the chemical substances in commerce, and may provide an erroneous view of the exposure scenarios associated with a particular chemical substance.

An example of the wide fluctuations in manufacturing volume is found in the Agency's HPV Challenge Program (described in Unit III.D.1.). In this program, IUR data were used to determine the HPV chemical substances, or the chemical substances with nationally aggregated production volumes of one million lb. or more. As the HPV Challenge Program progressed, the Agency chose not to pursue certain chemical substances because new IUR reporting indicated that the nationally aggregated production volume had dropped below one million lb. However, based on the latest IUR, the production volume for some of the chemical substances the Agency was no longer pursuing had risen again to exceed one million lb.

Industry representatives have provided further evidence that capturing production volume for only the principal reporting year is resulting in the omission of information on chemical substances in current production. In comments submitted to the Agency in response to other programs, the industry representatives expressed concern that short reporting determination periods would drastically misrepresent the chemical substances that currently are in commerce. Industry representatives stated they manufactured or imported some chemical substances only occasionally, and that these chemical substances would not be captured if the reporting covered too short a period. Comments included statements such as "A longer time frame is necessary to capture the sporadically produced chemicals... As such, a 'snapshot' in time may not adequately identify the complete inventory requirements..." (Ref. 12). Another commenter agreed a longer timeframe to report chemical substances would capture those chemical substances that undergo periodic manufacture based upon customer-driven demand or other factors (e.g., variation in availability or cost of raw materials, cost of substitute materials, etc.) (Ref. 13) or chemical substances that are used infrequently and upon request when working with suppliers (Ref. 14).

In light of these comments and EPA's own experiences, the Agency believes that using production volume reporting for all years since the last principal reporting year to determine reporting obligations would yield a much more accurate picture of the chemical substances currently in commerce, ensuring proper review under EPA's risk screening, assessment, and management activities and providing better information to the public. EPA presents the estimated increase in industry costs and burden associated with this proposed amendment in Section 4.4.3 of the Economic Analysis (Ref. 15).

EPA requests comments on alternatives that would provide an equally accurate picture of chemical production, and whether 25,000 lb. in any 1 year is the appropriate reporting threshold. EPA also requests comment on whether this change should apply only to certain regulated chemical substances (see Unit III.D.3.).

2. *Eliminate 300,000 lb. threshold for processing and use information.* EPA is proposing to eliminate the 300,000 lb. threshold for processing and use information, thereby requiring all reporters of non-excluded chemical substances to report information in all parts of Form U. EPA is proposing to eliminate this reporting threshold in order to collect information necessary to complete screening-level exposure characterizations for IUR reportable chemical substances. The exposure information is an essential part of developing risk evaluations and, based on its experience in using this information, the Agency believes that collecting this exposure information is critical to its mission of characterizing exposure, identifying potential risks, and noting uncertainties for these lower production volume chemical substances. In addition, this change will provide the public with information on a greater number of chemical substances. In the 2003 Amendments final rule (Ref. 3), EPA acknowledged the value of information for chemical substances manufactured in lower volumes and stated that if the Agency were to find it necessary in the future, it would collect information on chemical substances at reporting thresholds below the thresholds that were introduced in that action (i.e., 25,000 lb. and 300,000 lb.).

The current 300,000 lb. threshold applies to each reportable chemical substance manufactured (including imported) at each individual reporting site and was selected with the intention that exposure-related processing and use information would be collected for HPV chemical substances. When EPA promulgated the 2003 Amendments, the Agency believed a 300,000 lb. per year site-specific reporting threshold would capture sufficient exposure-related information for substantially all HPV chemical substances. However, based on the 2006 data, approximately 23% of the reports submitted for known HPV chemical substances had reported production volumes below the 300,000 lb. threshold, and consequently did not contain exposure-related processing and use information. Therefore, EPA believes that the 300,000 lb. threshold was too high to provide sufficient processing and use data for the HPV chemical substances. The Agency explored setting the threshold for reporting processing and use information to an alternate level between the basic reporting threshold of 25,000 lb. and 300,000 lb. for this action, and requests comment on alternate levels. However, the need to complete characterizations for chemical substances manufactured (including imported) in volumes of 25,000 lb. to 300,000 lb. in any year led the Agency to believe that it would be best to eliminate the upper threshold and collect full information for all reported chemical substances. EPA presents the estimated increase in industry costs and burden associated with this proposed amendment in Section 4.4.4 of the Economic Analysis (Ref. 15).

3. *Elimination of the 25,000 lb. threshold for certain regulated chemical substances.* EPA is proposing to eliminate the 25,000 lb. reporting threshold for certain chemical substances that are the subject of particular TSCA rules and/or orders and to require manufacturers (including importers) of such chemical substances to report under the IUR rule, regardless of the production volume. This provision will ensure the availability of current information when EPA has expressed a concern in the form of regulatory action on those chemical substances, regardless of the production volume. EPA is proposing to eliminate the 25,000 lb. threshold for those chemical substances that are:

- The subject of a rule promulgated under TSCA section 5(a)(2), 5(b)(4), or 6,
- The subject of an order issued under TSCA section 5(e) or 5(f), or
- The subject of relief that has been granted under a civil action under TSCA section 5 or 7.

Under this proposal, for the 2011 IUR submission cycle, a manufacturer, including importer, of such chemical substances would be required to report information on the manufacturing, processing, and use of the chemical substances if it manufactured (including imported) any quantity of these

chemical substances during the principal reporting year (i.e., 2010) and would report the production volumes for each year from 2006 to 2010 and the full manufacturing, processing, and use information for 2010. For subsequent IUR submission cycles, a manufacturer, including importer, of such chemical substances would be required to report information on the manufacturing, processing, and use of the chemical substances if it manufactured (including imported) any quantity of these chemical substances during any of the years since the last principal reporting year, including quantities under 25,000 lb. For 2015 reporting, the manufacturer would need to consider the manufacture or import during the years 2011 through 2014; would report the production volumes for each year from 2011 to 2014; and would report the full manufacturing, processing, and use information for 2014.

Chemical substances that are the subject of particular TSCA rules and/or orders are of demonstrated high interest to the Agency. EPA will use the IUR data associated with these regulated chemical substances to monitor chemical substance production and compliance with the rules.

EPA requests comment on whether these chemical substances should include those that are the subject of a rule proposed under TSCA section 5(a)(2), 5(b)(4), or 6, thereby more closely paralleling the exception language in the introductory paragraph to 40 CFR 710.46 (proposed 40 CFR 711.6) and in 40 CFR 710.49 (proposed 40 CFR 711.9).

EPA presents the estimated increase in industry costs and burden associated with this proposed amendment in Section 4.4.5 of the Economic Analysis (Ref. 15).

EPA requests comment on whether a de minimus production volume threshold should be set for these chemical substances. EPA also requests comment on how best to set such a de minimus threshold.

*E. Changes to Chemical Substances Covered by IUR*

1. *Water.* Naturally occurring water is excluded from reporting under the IUR rule, but manufactured water, which is not naturally occurring, is a reportable chemical substance. EPA is proposing to fully exempt all (both naturally occurring and manufactured) water (CASRN 7732–18–5) and to remove water from the petroleum streams partial exemption (40 CFR 710.46(b)(1)).

EPA received approximately 43 IUR reports for water during the 2006 submission period. Therefore, this proposed exemption would likely result in a burden reduction for IUR submitters.

2. *Remove fully exempt polymers from partially exempt list.* Polymers are a class of chemical substances for which IUR reporting is not required (40 CFR 710.46(a)(1)) (proposed 40 CFR 711.6(a)(1)). However, three polymers are listed in the partially exempt list of chemical substances at 40 CFR 710.46(b)(2)(iv): Starch (CASRN 9005–25–8), Dextrin (CASRN 9004–53–9), and Maltodextrin (CASRN 9050–36–6). Improperly including chemical substances that meet the IUR definition of a polymer in the partially exempt list of chemical substances may be confusing to submitters and may lead to unnecessary reporting for these chemical substances. EPA is proposing to amend the partially exempt list of chemical substances at 40 CFR 710.46(b)(2)(iv) (proposed 40 CFR 711.6(b)(2)(iv)) to remove these three chemical substances which, as polymers, are fully exempt from reporting.

3. *Making chemical substances that are the subject of an Enforceable Consent Agreement (ECA) ineligible for exemptions.* EPA may enter into an ECA, pursuant to procedures at 40 CFR part 790, with a manufacturer of a chemical substance to obtain testing where a consensus exists among EPA, affected manufacturers and/or processors, and interested members of the public concerning the need for and scope of testing. Chemical substances covered by ECAs are of demonstrated high interest to EPA. The Agency has an interest in identifying the manufacturing, processing, and use of chemical substances under such agreements, and therefore is proposing to require that such chemical substances be reported for IUR purposes, regardless of whether the chemical substance otherwise meets the requirements listed in 40 CFR 710.46 (proposed 40 CFR 711.6) as an exempt or partially exempt chemical substance. This provision will ensure the availability of current information if EPA has expressed a concern in the form of an ECA on any chemical substance otherwise excluded from the IUR rule. EPA is therefore proposing to make chemical substances that are the subject of an ECA ineligible for IUR exemptions.

With this proposal, chemical substances that are the subject of an ECA would be included in the list of chemical substances that are ineligible for an IUR exemption, in the introductory paragraph of 40 CFR 710.46 (proposed 40 CFR 711.6) listing the other chemical substances that are likewise not eligible for an IUR exemption. The paragraph would state that a chemical substance "is not exempted from any of the reporting requirements of this part if that substance is the subject of a rule proposed or promulgated under section 4, 5(a)(2), 5(b)(4), or 6 of the Act, or is the subject of a consent agreement developed under the procedures of 40 CFR part 790, or is the subject of an order issued under section 5(e) or 5(f) of the Act , or is the subject of relief that has been granted under a civil action under section 5 or 7 of the Act."

*F. Modifications to Reportable Data Elements*

1. *Parent company and site identity.* Manufacturers (including importers) are required to report the company name and Dun and Bradstreet (D&B) number to identify the company associated with the plant site, and also to report the site name, address, and D&B number. If the company associated with the plant site does not have a D&B number, the manufacturer (including importer) must obtain a D&B number for the company. Likewise, if the plant site does not have a D&B number, the manufacturer (including importer) must obtain a D&B number for the site. EPA received a variety of questions concerning the correct company name to report during the 2006 IUR submission period. EPA is now clarifying what is meant by company name, by proposing to require that the company name provided be the ultimate domestic parent company name. EPA believes this change will reduce confusion by making this reporting requirement consistent with the Toxic Release Inventory (TRI) requirements for parent company name. The requirement that the ultimate domestic parent company name be reported does not affect the determination of small business status, which is not limited to domestic companies. Persons covered by the IUR rule should continue to base small business determinations on the ultimate parent company, regardless of whether that company is domestic or foreign.

The 2006 IUR submissions from different reporting sites contained varying D&B numbers for parent companies that appeared to be the same company. In order to better identify when reporting sites are under the same parent company, EPA is proposing to include the address as well as the D&B number of the parent company.

2. *Technical contact.* Manufacturers (including importers) are required to provide a technical contact for their IUR submission. The technical contact must be a person who can answer questions

EPA may have about the reported chemical substance and should be a person located at the manufacturing (including importing) site. Based on EPA's experience with contacting the reported technical contact with follow-up questions concerning 2006 IUR submissions, reporters often provide the names of individuals who are not directly connected to the reporting site, and therefore, are not knowledgeable about either the chemical or the submission. EPA has also seen situations where the technical contact is a contracted employee who is able to address subsequent concerns only if he or she remains under contract. Note that EPA may raise follow-up questions about an IUR submission, possibly years after the submission date. EPA is interested in any comments or suggestions regarding how to better identify the technical contact.

EPA is considering allowing multiple technical contacts on a chemical-by-chemical basis. The e-IURweb reporting software would allow the identification of several names associated with a submission. EPA is interested in any comment or suggestions regarding this consideration.

*3. Chemical identity*. Manufacturers (including importers) are required to submit the correct chemical identity for each subject chemical substance. For the 2006 IUR, the correct chemical identity included a specific chemical name and a corresponding identifying number. The identifying number could be the CASRN, the TSCA Accession Number, or the number assigned to the chemical's PMN number.

i. *Chemical name*. EPA is proposing to require the reporting of the CA Index Name currently used to list the chemical substance on the TSCA Inventory as the chemical name reported for IUR. Currently submitters are required to report a specific chemical name, with no further elaboration in the regulatory text. The Instructions for Reporting presently state that manufacturers should use CA Index Names or, if CA Index Names are not available, manufacturers should use nomenclature that completely and accurately describes the chemical substance.

EPA has found, however, that submitters sometimes supply a name that is somewhat generic or excludes parts of the specific chemical identity that distinguishes one chemical substance from another. EPA's experience from the 2006 IUR was that up to 5% of the reports submitted contained chemical identity problems serious enough that the Agency was unable to precisely identify the chemical substance. These problems resulted in the temporary exclusion of the information associated with the poorly or erroneously identified chemical substance from the IUR database until the Agency was able to obtain correct and specific chemical identity information from the submitter. EPA believes the requirement to use the chemical name as currently listed on the TSCA Inventory will greatly reduce the number of poorly identified chemical substances. EPA intends to include the CASRN and CA Index Names as part of e-IURweb, to the extent possible without jeopardizing confidentiality claims.

Manufacturers (including importers) will be allowed to supply an alternate chemical name, and in the case of importers, a trade name, in those instances where a supplier will not disclose to the submitter the specific chemical name of the imported TSCA Inventory chemical substance or a reactant used to manufacture the TSCA Inventory chemical substance. In these cases, the manufacturer (including importer) and the supplier report the information required in this part in a joint submission. In order to clarify this requirement, EPA is proposing an amendment to 40 CFR 710.52(c)(3)(i) (proposed 40 CFR 711.15(b)(3)(i)) to state that the importer must have the supplier of the confidential chemical substance directly provide EPA with the correct chemical identity, in a joint submission with the manufacturer. Furthermore, in the event the manufacturer submitting a report cannot provide the whole chemical identity because the reportable chemical substance is manufactured using a reactant having a specific chemical identity claimed as confidential by its supplier, the manufacturer must submit a report directly to EPA containing all other information known to or reasonably ascertainable by the manufacturer about the chemical identity of the reported chemical substance and must ensure that the supplier directly provides to EPA the correct chemical identity of the confidential reactant in a joint submission. See Unit III.I. for additional information regarding joint submissions. Detailed draft instructions regarding joint submissions are included in the draft Instructions included in the docket (Ref. 5). EPA is interested in any comments regarding the procedure under consideration.

ii. *Chemical identifying number*. As part of the chemical identity, submitters provide a chemical identifying number associated with the correct CA Index Name, as described in Unit III.F.3. For most chemical substances, the chemical identifying number is the CASRN correctly corresponding to the reported CA Index Name. If the CASRN number is not available because the chemical substance is listed on the confidential portion of the TSCA Inventory and a CASRN does not already exist for that substance, the submitter could report either the associated TSCA Accession Number or PMN number.

EPA is proposing to allow submitters to report only the CASRN as a chemical identifying number or, in the case of confidential chemical substances, the TSCA Accession Number. Note that in cases where a CASRN exists for a confidential chemical, it can be reported instead of the TSCA Accession Number and claimed as confidential for purposes of the IUR submission. EPA is proposing to remove the PMN number as an allowed chemical identifying number because each TSCA Inventory chemical substance has either (or both) a CASRN or a TSCA Accession Number, which are likely to be already known to the submitter. Furthermore, the Agency has to spend considerably more time and effort to access and review reported information that has been identified only by a PMN number.

Submitters who, in the past, have reported using the PMN number of a confidential substance may contact EPA, if necessary, to learn the TSCA Accession Number assigned when the Notice of Commencement (NOC) was submitted to the Agency.

4. *Production volume*. Manufacturers (including importers) are required to report production volume information for each chemical substance for which they submit an IUR report. For the 2006 IUR, production volume information consisted of the manufactured production volume; the imported production volume; an indication of whether the chemical substance was manufactured, imported, or both; and an indication of whether the chemical substance was site-limited. In instances where a single site both domestically manufactures and imports the same chemical substance, the site was to report the domestically manufactured and imported production volumes separately on one report. The combined total production volume was then used as the basis for determining the percentage of production volume in other areas of the report, such as for the physical form, the industrial process or use, or the consumer or commercial use.

EPA is proposing a number of changes to the reporting of production volume and associated information. The Agency believes these changes would improve the usefulness of the information for EPA and others, and would provide

clarity for the reporting obligations of the submitter.

i. *Report production volume for each of the years since the last principal reporting year*. EPA is proposing to require reporting of production volume for each of the 5 years since the last IUR principal reporting year. Thus, for the 2011 IUR submission period, manufacturers (including importers) of a chemical at or above the 25,000 lb. threshold would report the production volume of that chemical substance for each of the following calendar years: 2010, 2009, 2008, 2007, and 2006. This change would provide information EPA and others need as stated in Unit III.D. Collecting the production volume for multiple years would provide greater detail than the current once-every-five-years snapshot.

For the principal reporting year, e.g., 2010, the domestic manufacture and the import production volume would continue to be reported separately on the same report. EPA review and analysis of the 2006 IUR data has revealed that some submitters are erroneously submitting multiple reports for the same chemical substance, at times reporting the information associated with domestic manufacturing and importing in different reports. The submitter should complete only one report for each chemical substance.

EPA uses production volume data in several important ways. The data help the Agency to establish trends in chemical substance manufacturing; to determine the effectiveness of various Agency and other programs; to estimate the magnitude of consumer, worker, and environmental exposures; and to determine the costs (and financial impacts) of potential control strategies in economic analyses. As discussed in Unit III.D.2., the collection of annual production volume data would allow EPA to identify more consistently the HPV chemical substances. Voluntary EPA programs such as Design for the Environment (DfE) and other pollution prevention programs would use the annual production volume data to identify trends and program performance. Relying on a single snapshot of annual production volume in each reporting determination period hampers EPA's ability to identify the programs and techniques that are most effective, using measurable, readily identifiable production trend data.

Unit V. contains a series of requests for comments on additional ideas under consideration by the Agency. One of the ideas concerns the collection of more than just the production volume since the last principal reporting year. The Agency is interested in comments on this matter. Please see Unit V. for additional discussion.

ii. *Volume of chemical substance used on-site*. EPA is proposing to require that submitters report the volume of a manufactured (including imported) chemical substance used at the reporting site. The requirement to report the volume used on-site is replacing the requirement to indicate that the chemical substance is site-limited. Under this proposal, either domestically manufactured or imported chemical substances could be reported as used at the reporting site, whereas, under the current reporting requirements, only domestically manufactured chemical substances, consumed entirely at the site of manufacture, should be reported as site-limited.

EPA is proposing this change to simplify reporting and to collect information that better addresses the Agency's needs. In the past, submitters sometimes incorrectly reported their production volume separately to identify the portion of their chemical substance that was consumed at the site of manufacture. For the 2006 IUR, many submitters continued this practice and erroneously filed separate reports to identify that a portion of their production volume was site-limited. Filing separate reports resulted in the need to report processing and use information separately when the combined production volume was 300,000 lb. or greater. Reporting all production volumes on one report simplifies reporting for such submitters and results in a less complicated database, thereby making the data easier to use. In addition, reporting the volume used on-site provides valuable information related to potential exposures associated with the on-site volumes, providing the Agency with better information for exposure assessments and other data analyses.

iii. *Indicate whether imported chemical substances are physically at reporting site*. EPA is proposing to add a requirement to indicate whether an imported chemical substance is physically at the reporting site. Often, the site reporting an imported chemical substance never physically receives the chemical substance, but instead ships it directly to another location such as a warehouse, a processing or use site, or a customer's site. Identifying whether the chemical substance is physically at the reporting site provides more accurate information for screening-level analyses and other uses of the IUR data.

iv. *Report volume exported*. EPA is proposing to add a requirement to report the production volume directly exported and not domestically processed or used. This would allow EPA to better identify the proportion of the production volume accounted for by the use reporting, given that downstream reporting is not required for exported chemical substances.

5. *Identify whether a chemical substance is to be recycled, remanufactured, reprocessed, reused, or reworked*. EPA is proposing to add a requirement to indicate (via a check-box) whether a manufactured chemical substance, such as a byproduct, is to be recycled, remanufactured, reprocessed, reused, or reworked. Submitters would identify that their manufactured chemical substance, which otherwise would be disposed of as a waste, is being removed from the waste stream and has a commercial purpose (i.e., it is being recycled, remanufactured, reprocessed, reused, or reworked). EPA believes that such information will help the Agency to identify where these activities are already occurring, and can be used to encourage such activities. Collecting information on whether a chemical substance is being recycled, remanufactured, reprocessed, reused, or reworked and is not entering the waste stream provides valuable information to EPA and others regarding trends in chemical substance manufacturing. This information also can be used to help determine the effectiveness of various programs, such as EPA's Resource Conservation Challenge (RCC) Program. EPA launched the RCC Program in 2002, implementing Congress' instruction to prevent pollution and conserve natural resources and energy by managing materials more efficiently. The RCC Program's goals include promoting reuse and recycling and reducing chemicals of national concern in products and waste. Indicating that a manufactured chemical, such as a byproduct, is to be recycled, remanufactured, reprocessed, reused, or reworked does not affect the reporting requirements associated with any chemical substance manufactured from the byproduct. See Unit IV.B. for detailed information on byproduct reporting.

6. *Concentration ranges*. EPA is proposing to eliminate gaps in the ranges used to report concentration in 40 CFR 710.52(c)(3) and (4) (proposed 40 CFR 711.15(b)(3) and (4)). The current ranges result in gaps between 30 and 31% and 60 and 61%. The proposed ranges would be:

- Less than 1% by weight.
- At least 1% but less than 30% by weight.

• At least 30% but less than 60% by weight.
• At least 60% but less than 90% by weight.
• At least 90% by weight.

7. *Industrial processing and use information reporting.* In 2003, EPA added industrial processing and use data to the information collected through the IUR rule for chemical substances manufactured in quantities of 300,000 lb. or greater during the principal reporting year. The industrial processing and use information included industrial function categories and NAICS codes. EPA found that knowing these two data elements for a chemical substance was useful in selecting a scenario that characterizes the frequency, route, and duration of exposure to a chemical substance during manufacture, processing, and use of the chemical substance. These data are also useful when EPA characterizes the quantity of the chemical substance in wastes and emissions entering the environment and for anticipating the environmental media into which wastes will be released. The Agency is proposing to revise the list of industrial function categories and to replace the NAICS codes with industrial sector categories, as described in sections i. and ii.

i. *Industrial function categories.* EPA is proposing to revise the list of industrial function categories by combining categories that lead to common exposure scenarios and adding categories where the Agency believes the existing categories do not adequately describe potential uses. EPA worked with Environment Canada and Health Canada to develop the proposed set of categories, which would be used by both the United States and Canada for inventory reporting. Harmonization of the categories for reporting the industrial functions of chemical substances would facilitate the exchange of information between EPA and Canadian agencies and could serve as a model to be used by Mexico in developing an inventory of chemical substances. In addition, the harmonized categories would facilitate consistent reporting of chemical use information by industry in the United States and Canada (Ref. 11).

EPA is proposing to add eight new industrial function categories and to delete six existing categories from the current list; the total number of industrial function categories would increase to 35. Also, EPA is proposing to rename several of the industrial function categories to provide a more informative description of the function of chemical substances that should be reported in that category. Lastly, EPA is proposing to require that if a submitter selects the category "Other," the submitter must provide its own description of the industrial function of the chemical substance. EPA is proposing the industrial function categories listed in Table 1 of this unit:

TABLE 1.—CODES FOR REPORTING INDUSTRIAL FUNCTION CATEGORIES

| Code | Category |
|---|---|
| U001 | Abrasives |
| U002 | Adhesives and sealant chemicals |
| U003 | Adsorbents and absorbents |
| U004 | Agricultural chemicals (non-pesticidal) |
| U005 | Anti-adhesive agents |
| U006 | Bleaching agents |
| U007 | Corrosion inhibitors and anti-scaling agents |
| U008 | Dyes |
| U009 | Fillers |
| U010 | Finishing agents |
| U011 | Flame retardants |
| U012 | Fuels and fuel additives |
| U013 | Functional fluids (closed systems) |
| U014 | Functional fluids (open systems) |
| U015 | Intermediates |
| U016 | Ion exchange agents |
| U017 | Lubricants and lubricant additives |
| U018 | Odor agents |
| U019 | Oxidizing/reducing agents |
| U020 | Photosensitive chemicals |
| U021 | Pigments |
| U022 | Plasticizers |
| U023 | Plating agents and surface treating agents |
| U024 | Process regulators |
| U025 | Processing aids, specific to petroleum production |
| U026 | Processing aids, not otherwise listed |
| U027 | Propellants and blowing agents |
| U028 | Solids separation agents |
| U029 | Solvents (for cleaning or degreasing) |
| U030 | Solvents (which become part of product formulation or mixture) |
| U031 | Surface active agents |
| U032 | Viscosity adjustors |
| U033 | Laboratory chemicals |
| U034 | Paint additives and coating additives not described by other categories |
| U999 | Other (specify) |

ii. *Industrial sectors.* EPA is proposing to replace the 5–digit NAICS codes with 48 IS codes. The sectors were adapted from the European Union's (EU's) "Guidance on information requirements and chemical safety assessment." The IS codes divide the entire range of NAICS codes into sectors so that there is a sector corresponding to any NAICS code. The Agency believes this change would provide several benefits. First, the sectors would reduce reporting burden because submitters would not have to look up the NAICS code. Second, it would encourage more complete reporting by using terms that are already familiar to industry. Third, the sectors would reduce the likelihood of errors that result from the selection of miscellaneous or inappropriate NAICS codes. Fourth, it would reduce the number of codes that could apply to one chemical substance. Table 2 of this unit lists the proposed sectors. The rationale for selecting the sectors and the link between the sectors and the NAICS system is further described in "Inventory Update Reporting (IUR) Technical Support Document—Replacement of 5–digit NAICS Codes with Industrial Sector Codes" (Ref. 16).

One of the primary purposes of the IUR data collection is to group together similar data for priority setting exercises and activities. Respondents to the 2006 IUR submitted 342 unique 5–digit NAICS codes, which made it difficult for EPA to group chemical substances

based on industrial processing and use scenarios. The 2006 IUR database has 2,330 unique combinations of processing or use code, NAICS code, and industrial function category, in all. This large number of unique combinations increases the difficulty and time required by EPA to sort and classify chemical substances because EPA either would need to develop exposure scenarios for each unique combination, or determine which three–code combinations have similar exposure scenarios and can be grouped. The use of the sectors would reduce the number of unique combinations, thereby increasing the usability of the data, and also reducing the IUR reporting burden.

EPA is proposing the 48 sectors listed in Table 2 of this unit:

TABLE 2.—INDUSTRIAL SECTORS

| Code | Sector Description |
|---|---|
| IS1 | Agriculture, Forestry, Fishing and Hunting |
| IS2 | Oil and Gas Drilling, Extraction, and support activities |
| IS3 | Mining (except Oil and Gas) and support activities |
| IS4 | Utilities |
| IS5 | Construction |
| IS6 | Food, beverage, and tobacco product manufacturing |
| IS7 | Textiles, apparel, and leather manufacturing |
| IS8 | Wood Product Manufacturing |
| IS9 | Paper Manufacturing |
| IS10 | Printing and Related Support Activities |
| IS11 | Petroleum Refineries |
| IS12 | Asphalt Paving, Roofing, and Coating Materials Manufacturing |
| IS13 | Petroleum Lubricating Oil and Grease Manufacturing |
| IS14 | All other Petroleum and Coal Products Manufacturing |
| IS15 | Petrochemical Manufacturing |
| IS16 | Industrial Gas Manufacturing |
| IS17 | Synthetic Dye and Pigment Manufacturing |
| IS18 | Carbon Black Manufacturing |
| IS19 | All Other Basic Inorganic Chemical Manufacturing |
| IS20 | Cyclic Crude and Intermediate Manufacturing |
| IS21 | All Other Basic Organic Chemical Manufacturing |
| IS22 | Plastics Material and Resin Manufacturing |
| IS23 | Synthetic Rubber Manufacturing |
| IS24 | Organic Fiber Manufacturing |
| IS25 | Pesticide, Fertilizer, and Other Agricultural Chemical Manufacturing |
| IS26 | Pharmaceutical and Medicine Manufacturing |
| IS27 | Paint and Coating Manufacturing |
| IS28 | Adhesive Manufacturing |
| IS29 | Soap, Cleaning Compound, and Toilet Preparation Manufacturing |
| IS30 | Printing Ink Manufacturing |
| IS31 | Explosives Manufacturing |
| IS32 | Custom Compounding of Purchased Resins |
| IS33 | Photographic Film, Paper, Plate, and Chemical Manufacturing |
| IS34 | All Other Chemical Product and Preparation Manufacturing |
| IS35 | Plastics Product Manufacturing |
| IS36 | Rubber Product Manufacturing |
| IS37 | Non-metallic Mineral Product Manufacturing (includes clay, glass, cement, concrete, lime, gypsum, and other non-metallic mineral product manufacturing) |
| IS38 | Primary Metal Manufacturing |
| IS39 | Fabricated Metal Product Manufacturing |
| IS40 | Machinery Manufacturing |
| IS41 | Computer and Electronic Product Manufacturing |
| IS42 | Electrical Equipment, Appliance, and Component Manufacturing |
| IS43 | Transportation Equipment Manufacturing |
| IS44 | Furniture and Related Product Manufacturing |
| IS45 | Miscellaneous Manufacturing |
| IS46 | Wholesale and Retail Trade |
| IS47 | Services |
| IS48 | Other (requires additional information) |

When the category chosen for the IS code is "Other," a written description of the use of the chemical substance, which may include the NAICS code, would also need to be provided.

8. Consumer and commercial use reporting. In the 2003 Amendments, EPA added a reporting requirement for submitters to include information about the consumer and commercial uses of chemical substances they reported under the IUR rule. For the 2006 IUR, manufacturers (including importers) of subject chemical substances manufactured (including imported) in quantities of 300,000 lb. or more during calendar year 2005 were required to select up to 10 consumer and commercial product categories from a list of 20 categories that correspond to the actual use of the chemical substance they are reporting. For each category, submitters also were required to indicate whether the chemical substance was used in a product intended for use by children, to report the maximum concentration of the chemical substance in the product category, and to report the percentage of total production volume associated with the product category.

EPA is using the information provided by the 2006 IUR reports in the Existing Chemicals Program. While the Agency found that the information was useful in identifying when consumers and commercial users and children are potentially exposed populations, EPA also found that the data had significant limitations concerning the product categories and identification of potentially exposed populations. The Agency believes the limitations stem from two characteristics of the data:

• The lack of specificity in the product categories.

• The inability to distinguish between consumer and commercial uses.

In addition, because 29% of the reported categories were for the category "Other," EPA was constrained in its ability to characterize use and exposure scenarios. Also, consumer and commercial uses affect very different populations. The reported information was not useful in differentiating these populations when characterizing potential exposures.

To address these issues, EPA is proposing four changes to the consumer and commercial information required to be reported:

• A revised and expanded list of consumer and commercial product categories.

• The additional requirement to provide a description when the product category "Other" is selected.

• The identification of whether the use is a consumer or a commercial use, or both.

• The number of commercial workers reasonably likely to be exposed while using the reportable chemical substance. Reporting associated with children's use, the maximum concentration, and the percent production volume would remain unchanged.

i. *Consumer and commercial product categories*. EPA is proposing to revise the list of consumer and commercial product categories by combining categories that lead to common exposure scenarios and adding categories that were not adequately described in the initial set of categories. EPA worked with Environment Canada and Health Canada to develop the proposed categories. Harmonized categories for reporting the consumer and commercial uses of chemical substances would facilitate the exchange of information between EPA and Canadian agencies and would serve as a model to be used by Mexico in developing an inventory of chemical substances. In addition, the harmonized categories would facilitate consistent reporting of chemical substance use information by industry in the United States and Canada (Ref. 11).

During the development of the revised product category list, EPA and Canada considered existing product category schemes, such as the NAICS and Registration, Evaluation, Authorisation and Restriction of Chemical Substances (REACH) categories, but found them to be either too detailed or not right for the task at hand. The NAICS categories are defined for manufacturing processes, not for consumer and commercial products, and therefore did not address the situations of interest. The REACH Program collects detailed information on the use of chemical substances in consumer and commercial products sold in the EU; all of the codes used by REACH are represented in the harmonized industrial function and consumer and commercial codes.

The proposed list includes 33 product categories, including "Other." Examples of new categories which have been added include explosive materials, building/construction products not covered elsewhere, and air care products. The glass and ceramic products category had relatively few IUR submissions in 2006 and overlaps with proposed new categories, and so has been proposed for elimination. Also, several of the consumer and commercial product categories would be renamed to better describe the products that should be reported in those categories.

EPA believes that expanding the list of consumer and commercial product categories would provide persons submitting IUR information with a greater opportunity to characterize the product in which chemical substances they manufacture are used and would reduce the number of uses reported as "Other."

In addition to revising the overall product categories, narrower definitions and expanded lists of examples of products in which the chemical substance would be used would be added to each category descriptor. The examples were selected to include items that could have fit into other categories in order to address the overlap inherent in any product category list. The product categories were then placed into several broader groupings, e.g., "Chemicals with Agriculture and Outdoor Uses" based on the similarities of products. EPA believes that the user would find the proposed groupings easier to use than the alphabetical listing used for the 2006 IUR.

EPA is also proposing to require that if a submitter chooses the product category "Other," the submitter must include a text description for the consumer and commercial product containing the chemical substance. In the 2006 IUR reports, the category "Other" was reported with the greatest frequency, with 1,206 out of a total number of 4,157 reports containing consumer and commercial use information, resulting in a reporting rate of 29% for the category. Although one of EPA's objectives in revising the consumer and commercial product categories was to reduce the reporting frequency of "Other," EPA believes that in many cases where "Other" was reported, submitters may not have selected the correct categories for their situation. By requiring the submitters to supply a written description for "Other," EPA would be able to evaluate and improve the inclusiveness of future consumer and commercial category lists or descriptions. In addition, the descriptor information would be more useful than simply the selection of "Other" for EPA's Existing Chemicals and other programs.

EPA is proposing the consumer and commercial product categories listed in Table 3 of this unit:

TABLE 3.—CODES FOR REPORTING CONSUMER AND COMMERCIAL PRODUCT CATEGORIES

| Code | Category |
|---|---|
| **Chemical Substances in Furnishing, Cleaning, Treatment/Care Products** | |
| C101 | Floor Coverings |
| C102 | Foam Seating and Bedding Products |
| C103 | Furniture and Furnishings not covered elsewhere |
| C104 | Fabric, Textile, and Leather Products not covered elsewhere |
| C105 | Cleaning and Furnishing Care Products |
| C106 | Laundry and Dishwashing Products |
| C107 | Water Treatment Products |
| C108 | Personal Care Products |
| C109 | Air Care Products |
| C110 | Apparel and Footwear Care Products |
| **Chemical Substances in Construction, Paint, Electrical, and Metal Products** | |
| C201 | Adhesives and Sealants |
| C202 | Paints and Coatings |
| C203 | Building/Construction Materials - Wood and Engineered Wood Products |
| C204 | Building/Construction Materials not covered elsewhere |
| C205 | Electrical and Electronic Products |
| C206 | Metal Products not covered elsewhere |
| C207 | Batteries |

TABLE 3.—CODES FOR REPORTING CONSUMER AND COMMERCIAL PRODUCT CATEGORIES—Continued

| Code | Category |
|---|---|
| **Chemical Substances in Packaging, Paper, Plastic, Toys, Hobby Products** | |
| C301 | Food Packaging |
| C302 | Paper Products |
| C303 | Plastic and Rubber Products not covered elsewhere |
| C304 | Toys, Playground, and Sporting Equipment |
| C305 | Arts, Crafts, and Hobby Materials |
| C306 | Ink, Toner, and Colorant Products |
| C307 | Photographic Supplies, Film, and Photochemicals |
| **Chemical Substances in Automotive, Fuel, Agriculture, Outdoor Use Products** | |
| C401 | Automotive Care Products |
| C402 | Lubricants and Greases |
| C403 | Anti-Freeze and De-icing Products |
| C404 | Fuels and Related Products |
| C405 | Explosive Materials |
| C406 | Agricultural Products (non-pesticidal) |
| C407 | Lawn and Garden Care Products |
| **Chemical Substances in Products not Described by Other Codes** | |
| C980 | Non-TSCA Use |
| C909 | Other (specify) |

ii. *Designation of consumer or commercial use.* EPA is proposing to require submitters to designate, via a checkbox, whether the indicated product category is a consumer or a commercial use, or both. The Agency's experience using the 2006 IUR data identified a need to distinguish between potentially exposed consumer and commercial populations. The designation of consumer or commercial use, or both, would allow EPA to complete a better characterization of the potentially exposed populations.

iii. *Number of commercial workers reasonably likely to be exposed.* EPA is proposing to require that submitters report the total number of commercial workers, including those at sites not under the submitter's control, that are reasonably likely to be exposed while using the reportable chemical substance, with respect to each commercial use. The approximate number of workers would be reported using the same definitions and ranges used for manufacturing and industrial processing and use workers required by 40 CFR 710.52(c)(3)(v) and (4)(i)(F) (proposed 40 CFR 711.15(b)(3)(vii) and (4)(i)(F)), respectively. The ranges are:

- Fewer than 10 workers.
- At least 10 but fewer than 25 workers.
- At least 25 but fewer than 50 workers.
- At least 50 but fewer than 100 workers.
- At least 100 but fewer than 500 workers.
- At least 500 but fewer than 1,000 workers.
- At least 1,000 but fewer than 10,000 workers.
- At least 10,000 workers.

Information on the number of commercial workers reasonably likely to be exposed to the reportable chemical substance would be used to characterize the commercial population reasonably likely to be exposed to the subject chemical substance. The population characterization is important to the development of the overall exposure characterization.

EPA requests comment on the ability of submitters to provide this data with reasonable accuracy for each commercial use to which a chemical substance may be applied. Do submitters have sufficient information about the work practices of eventual commercial users to estimate this number? Note that the ranges proposed for commercial workers are the same as those ranges used for reporting manufacturing and industrial workers. Are these ranges also applicable to commercial workers?

*G. Changes to Standard for the Reporting of Processing and Use Information*

In order to collect more complete information regarding the industrial processing and industrial, commercial, and consumer use of chemicals, EPA is proposing in 40 CFR 711.15(b)(4) to replace the "readily obtainable" reporting standard used for reporting under 40 CFR 710.52(c)(4) in 2006 with the "known to or reasonably ascertainable by" reporting standard set forth under TSCA for this type of TSCA reporting. Section 8(a)(2) of TSCA authorizes EPA to require persons to report information that is "known to or reasonably ascertainable by" the submitter. This is the same standard that currently applies to the reporting of information described in the regulations at 40 CFR 710.52(c)(1), (c)(2), and (c)(3), and this standard would continue to apply to the reporting of such information under proposed 40 CFR 40 CFR 711.15(b)(1), (b)(2), and (b)(3). It covers all information in a person's possession or control, plus all information that a reasonable person similarly situated might be expected to possess, control, or know. The "known to or reasonably ascertainable by" reporting standard was the only standard used for IUR reporting purposes prior to the 2006 IUR submission period.

The 2006 IUR response rate for the processing and use information did not capture a sufficiently large portion of the production volume that the Agency believes actually was used for either industrial processing and use or consumer and commercial use. Thirty percent of the reports submitted for the 2006 IUR met the requirements (based on type of chemical and production volume) to trigger reporting of processing and use information. Of those, almost 13% contained no industrial processing and use information and almost half contained no commercial or consumer use information. For the reports that did contain some processing and use information, the portion of the production volume for which some information was reported is detailed in Table 4 of this unit. Note that a Form U submission contains one or more reports; each report is for a single chemical at a single site.

TABLE 4.—PERCENTAGE OF REPORTS PROVIDING PRODUCTION VOLUME INFORMATION RELATED TO PROCESSING AND USE OF CHEMICALS REPORTED FOR THE 2006 IUR

| Extent of Processing and/or Use Information Provided Based on Production Volume Reporting | Industrial Processing and Use (% of reports*) | Consumer and Commercial Use (% of reports*) |
|---|---|---|
| No processing and use information reported | 13 | 46 |
| Processing and/or use information provided, but the associated % PV information reported as zero, NRO, or left blank | 6 | 12 |
| % PV associated with the reported processing and/or use information accounted for more than 0% but less than 50% of the manufactured (including imported) production volume | 4 | 7 |
| % PV associated with the reported processing and/or use information accounted for 50% but less than 100% of the manufactured (including imported) production volume | 65 | 32 |
| % PV associated with the reported processing and/or use information accounted for 100% or more of the manufactured (including imported) production volume | 12 | 3 |

* The percentage is calculated as a fraction of the total number of reports that triggered the need to report processing and use information.

The Agency believes the percentage of missing processing and use information actually is larger than indicated by this analysis. As described in the 2003 Amendments final rule (Ref. 3), EPA anticipated that, on an individual report basis, the total percentages of production volumes associated with the industrial processing or use information may add up to more than 100% of the reported production volume. This could happen because the submitter reported on the distribution of a chemical substance to sites in its control as well as downstream sites, some of which were not immediate purchasers from the original manufacturing site. For example, consider the scenario where a certain volume of a reported chemical substance is reported as processed by a repackager, sent to another site that adds the chemical substance to a mixture, and then sent to a combination of industrial and commercial users. If the repackaged volume were 100% of the production volume, the total volume reported for the different processing and use scenarios could equal 300% of the production volume. EPA expected and anticipated this type of reporting, as each instance of processing or using the chemical substance created a different exposure scenario. As indicated in Table 4 of this unit, only 12% of the reports contained processing and use information that equaled or exceeded the production volume for their chemical substance. EPA expected this percentage to be significantly larger.

Focusing on the industrial processing and use information, a complete use scenario is comprised of 3 of the IUR data elements: The type of process or use, the NAICS codes, and the industrial function code. A report could contain up to 10 unique combinations of these 3 data elements (i.e., use scenarios). For the reports required to include processing and use information in 2006, submitters reported an average of slightly more than 2 use scenarios. For each unique combination of these 3 data elements, the manufacturer reports the percent production volume, the number of sites, and the number of reasonably likely to be exposed workers associated with the use scenario. In 2006, only about half of the reported use scenarios also included information for the number of sites, the number of workers, and a production volume that was greater than zero.

Reports for consumer and commercial use information included a product category, and, for that category, whether the chemical substance is used in products intended for children, the percent production volume, and the maximum concentration. A report could contain up to ten product categories. For the reports that were required to include processing and use information in 2006, submitters reported an average of slightly less than one product category. Much of the consumer and commercial information contained data elements reported as not readily obtainable (NRO) or were left blank. Specifically, 14% of product category information, 24% of children's information, and 40% of the maximum concentration were either reported as NRO or left blank. Overall, fewer than half of the consumer and commercial records (i.e., the individually reported product categories and associated information) contained complete data (e.g., where none of the data elements contained information reported as zero, NRO, or were left blank).

This low reporting rate also occurred on an individual chemical substance basis; 2006 IUR submitters did not report processing and use information even though they were required to report such information. This happened for 20% of the chemical substances for which the criteria for reporting processing and use information were met. For those chemical substances, EPA has no processing or use information reported through the IUR rule.

EPA is proposing this change to the reporting standard because reporting under the "readily obtainable" reporting standard did not generate sufficiently complete processing and use information, which limited the usefulness of the 2006 IUR processing and use data for screening level reviews. EPA believes the "readily obtainable" reporting standard was a major reason for the small amount of reporting processing and use data.

For over 30 years, the Agency's New Chemicals Program has successfully applied the "known to or reasonably ascertainable by" reporting standard. (See 40 CFR 720.45) Companies have used this standard to report to EPA information about how their chemical substances are processed and used by submitting more than 30,000 TSCA section 5 PMNs. Because of this experience, EPA believes that companies routinely have more information about how their chemical substances are processed and used than is reflected in the 2006 IUR data. PMNs routinely include extensive, detailed information on how a company's customers and others outside the company's control will process and use its chemical substances. EPA believes that the reporting under the Agency's New Chemical program indicates that companies generally do know the intended ultimate uses, as well as the intervening processing steps, for their products. In addition, EPA's experience

in the New Chemicals Program indicates that this reporting standard generates information sufficient for screening-level reviews. Therefore, the Agency believes that using this standard for reporting of IUR industrial processing and industrial, consumer, and commercial use information will improve reporting rates and assist EPA's efforts to characterize chemical substance uses and to predict potential exposure to these chemical substances.

The Agency's experience using the 2006 IUR data to develop exposure characterizations, coupled with the limited data EPA was able to publicly release, highlighted the incompleteness of the data and lead the Agency to determine that the data are insufficient, even for screening level purposes. Examples of documents using EPA's exposure characterizations can be found on the Agency's website, at *http://iaspub.epa.gov/oppthpv/existchem_hpv_prioritizations.INDEX_HTML*. Effective risk screening by EPA depends on the ability to accurately characterize chemical substance uses and to predict potential exposures. As described in Unit II.D., these data are used by EPA to prioritize work on existing chemicals. If the information provided does not include these data, EPA must make assumptions about the use of the unreported production volume. Incorrect assumptions may lead EPA to designate an inappropriately high or low priority level for the chemical substance, resulting in unnecessary effort and resource expenditures for both regulated parties and EPA in cases where more complete data would have led the Agency to act differently.

For the foregoing reasons, EPA believes that using the reporting standard "known to or reasonably ascertainable by" would result in companies reporting more consistent and complete processing and use information in their IUR reports, and that the information reported would better enable EPA to develop the exposure characterizations needed for the Agency's screening of existing chemical substances. EPA requests comment on whether and how this change will affect submitter behavior and the degree to which the quality of submissions will be improved.

### *H. Amendments to Requirements Concerning CBI*

Submitters may currently claim certain information reported under the IUR as CBI in accordance with 40 CFR part 2 and IUR rules at 40 CFR 710.38 (proposed 40 CFR 711.30). Submitters must assert claims of confidentiality at the time information is submitted to EPA. EPA's procedures for handling information claimed as confidential are set forth at 40 CFR part 2, subpart B. EPA strongly encourages submitters to review confidentiality claims carefully to ensure that the information in question falls within the parameters of TSCA section 14. CBI claims should be limited to only those data elements the release of which would likely cause substantial harm to the business' competitive position. Interested persons are reminded that with regard to chemical substance use information, EPA is interested in aggregated, general uses, not detailed uses associated with specific customers.

To claim information as confidential, a submitter must indicate its claim by both checking the appropriate box and signing the certification statement on the reporting form. A submitter must indicate its claims at the time the information is submitted. If a submitter fails to follow these procedures, EPA may release the information to the public without further notice to the submitter. By signing the certification statement the submitter attests to the secrecy and value of the information for which confidentiality claims have been asserted.

EPA expects that reducing the number of CBI claims would increase the amount of information available to the public and improve the timeliness of its public availability. As a result, the Agency would be able to publicly discuss and explain its risk management actions and decisions more clearly. Currently, much of the factual and data support for Agency decisions is claimed as CBI, which complicates the creation of publicly available documents. The public would be better informed and better able to understand and provide meaningful comment on Agency actions if less information were unnecessarily or inappropriately claimed as CBI. The Agency would also be able to provide other public and private organizations and individuals with better information for making their own decisions. Thus, EPA is proposing the changes described in Unit III.H.1., H.2., and H.3. with the belief that the proposed changes would reduce the number of unjustifiable CBI claims without hindering legitimate CBI claims.

1. *Chemical identity CBI claims.* Under the IUR, a submitter may assert a claim of confidentiality for data associated with the identity of the reported chemical substance when the chemical is listed on the confidential portion of the TSCA Inventory and when the submitter provides the required substantiation at the time the submitter makes the confidentiality assertion. See 40 CFR 710.58(b) (proposed 40 CFR 711.30(b)). At times a submitter will assert a claim of confidentiality for the chemical identity of a chemical substance that is listed on the public portion of the TSCA Inventory. Where the identity of a chemical substance is already contained on the public portion of the TSCA Inventory, which is publicly available from EPA's website (*http://www.epa.gov/opptintr/newchems/pubs/invntory.htm#files*), EPA believes that the identity itself, even assuming it might otherwise be CBI, as well as any information that might be derived from it about processes or portions, has already been disclosed. EPA is proposing that, when this occurs, the Agency may make the information available to the public without further notice to the submitter. See the proposed regulatory text at 40 CFR 711.30(e).

This action is part of a broader effort to increase transparency and provide more valuable information to the public by identifying programs where non-CBI may have been claimed and treated as CBI in the past. See the **Federal Register** issue of January 21, 2010 for a similar change concerning CBI claims of certain chemical identities submitted under TSCA section 8(e) (Ref. 17).

2. *Upfront substantiation for processing and use information CBI claims.* Under the IUR, a submitter may assert a claim of confidentiality for data associated with the processing and use of its chemical substance if the submitter has reason to believe that release of the information would reveal trade secrets, or confidential commercial or financial information, as provided by TSCA section 14 and 40 CFR part 2. During the 2006 IUR, submitters made confidentiality claims ranging from 25% (when considering individual data elements) to 50% (when considering data elements combined into use scenarios) of the reported processing and use information. While the Agency does not question that confidentiality claims are sometimes necessary, it encourages submitters to consider carefully whether such claims are in fact necessary before asserting them. The Agency has identified instances in which submitters have claimed the processing and use data as confidential, yet similar if not identical information was found in publicly available sources, such as company websites, published Material Safety Data Sheets (MSDSs), or information submitted to the Agency and posted on the Agency's HPVIS website (see Unit II.D. for more discussion). EPA can take

steps to challenge or verify confidentiality claims, but the Agency believes companies should limit their CBI claims to those that they are capable of adequately substantiating.

For the 2006 IUR reports, submitters were not required to provide upfront substantiation of CBI claims for processing and use data. In these proposed modifications to the IUR rule, EPA would require upfront substantiation for CBI claims for this information.

EPA believes that many of the CBI claims for processing and use data are inappropriate and that the new substantiation requirement would reduce the occurrence of unnecessary claims. The high number of confidentiality claims asserted for the reported 2006 IUR reports on industrial processing and use information impeded the release of important data. This included the number of processing sites, the number of potentially exposed industrial workers, and the percent production volume for each industrial processing or use scenario (Ref. 18). A decrease in the number of inappropriate CBI claims under the new substantiation requirement would improve EPA's ability to make current plant site information available to other Federal agencies and the public because more information submitted under IUR could be released publicly.

Under this proposed rule, in order to submit a claim of confidentiality for processing and use information data elements, the submitter would be required to both check the appropriate box on the reporting form and substantiate the claim in writing by answering certain questions provided in 40 CFR 711.30(d) of the proposed rule. Where a submitter fails to substantiate the processing and use CBI claim in accordance with the applicable rules (i.e., the submitter does not provide an answer to the required questions), EPA would consider the information not subject to a confidentiality claim and may make the information available to the public without further notice to the submitter.

3. *Limitation on confidentiality claims for data elements identified as "not known or reasonably ascertainable.*" Under the IUR rule, submitters provide information on the industrial processing and use and consumer and commercial use of the IUR reportable chemical substances they manufacture (including import). As described in Unit II.A., for the 2011 and future IUR collections, EPA is proposing that submitters be required to report this information to the extent that it is known to or reasonably ascertainable by them. For the 2006 IUR collection, submitters reported the processing and use information to the extent that it was readily obtainable, and were permitted to identify when such information was not readily obtainable by entering "NRO." EPA has observed that, on occasion, processing and use information has been claimed as confidential when a submitter determined that the information was not readily obtainable.

Section 14 of TSCA limits the disclosure of information entitled to confidential treatment under Exemption 4 of the Freedom of Information Act (FOIA). EPA has considered the NRO designation and its relationship to a potential CBI or trade secret claim. Given that a NRO assertion is an assertion that no information is available, the Agency does not believe that the designation conveys trade secret or confidential commercial or financial information. For this reason, EPA is proposing to prohibit claims of confidentiality pertaining to the designation that information is not "known to or reasonably ascertainable by" the submitter. EPA solicits comment on this issue.

*I. Modifications Specifically Affecting Importers*

Submitters report IUR data on chemical substances that they manufacture domestically and that they import into the United States. Current IUR regulations provide that the site responsible for reporting for imported chemical substances is the site of the operating unit that is directly responsible for importing the chemical substance and that controls the import transaction. In some cases, the import site may be the organization's headquarters in the United States. The regulations defining the site for importer reporting is found in both the definition for site in 40 CFR 710.3 and in paragraph 40 CFR 710.48(b).

EPA is proposing to eliminate unnecessary duplication in the IUR regulation by moving the additional information regarding the importer site from 40 CFR 710.48(b) into a revised definition for site, as described in Unit III.C.2., and eliminating 40 CFR 710.48(b).

In addition, EPA has observed that submitters occasionally use a foreign address as the site address for the importer. EPA now is proposing to require that submitters report a U.S. site address, by modifying the definition for site to state specifically that the site must be a U.S. site. The U.S. address of an agent acting on behalf of the importer, and authorized to accept service of process for the importer, may be reported as the importer's site address if the operating unit that is directly responsible for importing the chemical substance and that controls the import transaction has no U.S. address. The Agency expects that all importers will have a U.S. site, as defined in the proposed 40 CFR 711.3 definition for site, because, under Customs regulations at 19 CFR 141.18, a non-resident corporation is not permitted to enter merchandise for consumption unless it has a resident agent in the State where the port of entry is located, who is authorized to accept service of process against the corporation.

For purposes of IUR, submitters are currently allowed to report the IUR information jointly with the foreign manufacturer of the chemical substance. Importers may not know the specific chemical identity of a chemical substance because the foreign supplier chooses to keep it confidential. In such a situation, the importer is still responsible for ensuring that the IUR information is submitted to EPA and may do so by submitting a joint report. To do so, the U.S. importer, as the primary submitter, completes the majority of the required information, but supplies a trade name or other designation to identify the chemical substance. In addition, the primary submitter provides technical contact information for the foreign supplier. The primary submitter then contacts the foreign supplier, as the secondary submitter, to notify it of the need to report the specific chemical identity information to EPA. In addition to the chemical identity, the secondary submitter supplies its technical contact and company information but provides the primary submitter's site information.

Under this proposed rule, the process would be the same, except that submitters would be required to use CDX and e-IURweb for preparation and submission of joint submissions. See proposed 40 CFR 711.15(b)(3)(i)(A). Previously, joint submissions could not be made electronically. In order to submit electronically to EPA via CDX, individuals must first register with CDX. Therefore, the authorized officials of the jointly submitting companies would need to register in order to submit their reports to EPA.

For joint submissions to be submitted electronically, the primary submitter would use e-IURweb to identify the need to submit a joint report and would identify itself as a primary submitter. The primary submitter would then complete his or her portion of the report and provide the secondary submitter's

company information, along with select information on the chemical substance(s) that are manufactured using a chemical substance made by the secondary submitter. The primary submitter reports only the volume that it used. A secondary submitter would also need to use e-IURweb to identify the need to submit a joint report and would identify itself as a secondary submitter. It would provide the primary submitter's company information and its own technical contact information, and would identify the chemical substance(s) that is in its product, including the percentages. This information would be saved by the reporting tool and both submissions would be matched based upon company and chemical information. Once the forms are matched, the joint submission would be ready to be processed by EPA. The Agency is currently developing the process to submit joint reports electronically and welcomes any comments concerning this process.

For the 2006 IUR submission period, EPA set aside joint submissions until both reports were received and matched. Oftentimes, EPA had no way to determine whether a submission was a "joint" submission, which increased the time required for manual processing of the data. EPA anticipates that the use of the reporting tool will help to make joint IUR reporting easier for industry and streamline EPA processing of the IUR information submitted in the 2011 submission period.

*J. Change to Reporting Frequency*

Prior to the 2003 Amendments, the IUR collection occurred every 4 years. EPA reduced the reporting frequency from every 4 years to every 5 years starting with the 2006 IUR to reduce the burden associated with the amended IUR rule. For the reasons described in this section, the Agency has determined that reporting every 5 years is too infrequent, and now is proposing to return to reporting every 4 years.

As described in Unit III.D.1., a review of the previous reporting under IUR has revealed an approximately 30% change in the chemicals that are reported from one submission period to the next. While the less frequent reporting does reduce burden, EPA now believes that reporting every 5 years does not provide data sufficiently current to meet Agency and public needs. As described in Unit V.4.i., the Agency has been criticized for using outdated information. For instance, in its "Across the Pont" publication, the Environmental Defense Fund (EDF) stated "Given the dynamic nature of the chemical market, both from year to year and between 2005 and the present, some of the data we report here on chemicals, their production/import volumes and their associated companies may well have changed." (See *http://www.edf.org/document/8538_Across_Pond_Report.pdf*). EPA, therefore, also is considering increasing the frequency of reporting to every 3 years, or possibly to annual reporting. The Agency believes that efficiencies are gained with more frequent reporting, both for the submitter and for EPA. With more frequent reporting, companies would be able to establish standard systems and practices to collect the required information. For instance, for annual reporting the Agency estimates that submitters would reduce the burden for each reporting cycle by approximately 20%. (See Chapter 4 of the Economic Analysis, Ref. 15). EPA invites comment on the proposed return to 4–year reporting intervals, and also on more frequent reporting (i.e., every 3 years, biennial, or annual reporting). Further information is provided in Question 4.i. under Unit V., and the various reporting frequency alternatives are analyzed in the Economic Analysis. (See Chapter 4 and Appendix G of the Economic Analysis, Ref. 15)

## IV. Clarifications to Reporting Requirements

*A. Clarification of the Relationship Between Company Name and Site Identity CBI Claims*

Under the IUR, submitters are able to claim as CBI both the company name and site identity associated with a chemical substance for which they are reporting under the IUR. The submitter is required to provide an upfront substantiation for CBI claims for the site identity. EPA believes there is some confusion as to what is considered confidential when such claims are made, and is taking this opportunity to provide clarification.

The e-IURweb reporting software does not allow for blanket CBI claims for company and site identity information, since those are separate claims and in some cases one type of claim may be justified while the other is not. Rather, a submitter is permitted to assert its CBI claim for the company identity, the site identity, or both the company and site identity associated with each chemical substance for which they are submitting an IUR report. In addition, the submitter must provide separately the required upfront substantiation for the site identity CBI claims associated with each chemical substance. For instance, if the submitter is reporting for five chemical substances and wishes to claim its site information confidential for three of the five chemical substances, it must assert the claim and provide separate upfront substantiation three times, once for each of the three chemical substances. The CBI claim protects the link between the company and/or site identity and the particular chemical substance. If the company or site identity associated with a particular chemical substance is not claimed as CBI, EPA may make that information available to the public without further notice to the submitter. EPA will not impute the existence of a CBI claim for company identity or for site identity from a CBI claim associated with a different chemical substance.

EPA has also observed that submitters sometimes claim only their company identity, and not their site identity, as confidential. If the site identity for a particular chemical substance is not claimed as CBI, or is claimed but not substantiated pursuant to 40 CFR 710.58(c) (proposed 40 CFR 711.30(c)), EPA may make that information available to the public without further notice to the submitter. EPA will not impute the existence of a CBI claim for site identity from a CBI claim for company identity, even if the company name appears within the site identity information. To help ensure that submitters consider this issue, EPA plans to modify the e-IURweb reporting software so that it will provide a warning whenever the company identity is claimed as CBI for a particular chemical substance and the site identity is not also claimed as CBI for that chemical substance.

*B. Explanation of Byproduct Reporting*

During the 2006 submission period, EPA received questions about the requirements for reporting byproducts, including whether byproduct manufacturers (including importers) were required to report the byproducts under the IUR rule. These included some questions involving a manufacturer (including importer) that uses a chemical substance in the production of an article. Such manufacturing may produce a byproduct chemical substance that is chemically different from the starting chemical substance; the manufacturer therefore may incur reporting obligations under the IUR rule for that byproduct. The Small Business Administration (SBA) also communicated with EPA about related issues and questions, including ideas on how they could be potentially addressed (Ref. 19). Generally, the concerns included how to identify byproduct chemical substances, especially when such chemical substances were complex and variable mixtures; concerns about

the manufacturer's ability to determine the recycler's use of the byproduct; and identify the need to report, especially when the manufacturer does not consider itself a chemical substance manufacturer. In light of these and similar questions, EPA is providing additional information on byproduct reporting, including circumstances under which reporting is not required, in the draft instruction manual and in other guidance materials included in the docket for this proposed rule (Refs. 5, 20, and 21) in an effort to further clarify reporting obligations.

For purposes of IUR, a byproduct is a chemical substance produced without a separate commercial intent during the manufacture, processing, use or disposal of another chemical substance or mixture (40 CFR 704.3). Thus, for example, when a chemical substance or mixture is used for the purpose of manufacturing an article, and that manufacture results in the production of a different chemical substance, that different chemical substance is a byproduct for purposes of the IUR. Chemical substances that are byproducts of the manufacture, processing, use, or disposal of another chemical substance or mixture, like any other manufactured chemical substances, are subject to IUR reporting if they are manufactured, are listed in the TSCA Inventory, are not otherwise excluded from reporting, and their manufacturer is not specifically exempted from IUR reporting requirements.

For purposes of IUR, a byproduct is "manufactured" only if it is "manufactured for commercial purposes." See TSCA section 8(f). The 40 CFR 704.3 definition of *manufacture for commercial purposes* states that "[m]anufacture for commercial purposes also applies to substances that are produced coincidentally during the manufacture, processing, use, or disposal of another substance or mixture, including both byproducts that are separated from that other substance or mixture and impurities that remain in that substance or mixture. Such byproducts and impurities may, or may not, in themselves have commercial value. They are nonetheless produced for the purpose of obtaining a commercial advantage since they are part of the manufacture of a chemical product for a commercial purpose." Thus, byproducts of the manufacture, processing, use, or disposal of another chemical substance or mixture for a commercial purpose are themselves both "manufactured" and "manufactured for commercial purposes."

As with all manufactured chemical substances, IUR information on byproducts is of interest to the EPA because such exposure-related information is not otherwise available, and it is necessary for the Agency to manage risks associated with these chemical substances, to fulfill its mandate of protecting human health and the environment. EPA does not believe byproducts inherently pose lower exposures or risks than other manufactured chemical substances.

Byproducts that are manufactured (including imported) in volumes of 25,000 lb. or more at a single site are potentially subject to IUR requirements. However, 40 CFR 710.50(c) (proposed 40 CFR 711.10(c)) excludes from reporting those chemical substances meeting the requirements of 40 CFR 720.30(g) or (h). Manufacturers (including importers) of byproducts are not required to report the manufacture (including import) of a byproduct if the byproduct is not used for commercial purposes. See 40 CFR 720.30(h)(2). Thus, even where a byproduct is manufactured (including imported) for a commercial purpose, if the byproduct is not subsequently put to use for another commercial purpose, the byproduct is excluded from IUR reporting. Furthermore, if the byproduct's "only commercial purpose is for use by public or private organizations that: (1) burn it as a fuel, (2) dispose of it as a waste, including in a landfill or for enriching soil, or (3) extract component chemical substances from it for commercial purposes," 40 CFR 720.30(g), that byproduct is also excluded from IUR reporting. This exclusion applies only to the byproduct; it does not apply to the component chemical substances extracted from the byproduct.

Some manufacturers (including importers) of byproducts have expressed a belief that a chemical substance that is regulated by another EPA program, such as the Resource Conservation and Recovery Act (RCRA), or that is exempt from certain requirements by the other program based on certain treatments or disposals, should not be required to be reported for IUR purposes. However, when such chemical substances have a commercial purpose not exempted by 40 CFR 710.50(c) (proposed 40 CFR 711.10(c)), the manufacturer (including importer) of such a chemical substance does need to consider IUR requirements.

EPA requests comment on the draft guidance documents included in the docket for this proposed rule and on how best to inform companies that may not consider themselves to be manufacturers (including importers) of chemical substances of their potential need to report. In addition, EPA requests comment on how the substantive modifications of the IUR described in this proposed rule could be further modified to minimize reporting burden and costs for byproduct manufacturers (including importers) and recyclers, while still collecting the exposure-related information needed to fulfill EPA's mandate.

## V. Request for Comment

EPA requests comment on all substantive modifications of the IUR described in this proposed rule, all available alternatives that bear on such modifications, and the Economic Analysis prepared in support of this proposed rule (Ref. 15). Following is a list of additional issues on which the Agency is specifically requesting public comment. EPA encourages all interested persons to submit comments on these issues, and to identify any other relevant issues as well. This input will assist the Agency in developing a final rule that successfully addresses information needs while minimizing potential reporting burdens associated with the rule. EPA requests that commenters making specific recommendations include supporting documentation where appropriate.

1. EPA anticipates promulgating a final rule by the spring of 2011. Recognizing that this would be shortly before the next scheduled submission period (scheduled to run from June 1, 2011 through September 30, 2011), EPA solicits comment on the transition to new IUR requirements. Specifically, EPA would conduct the 2011 reporting based on the full set of data elements specified in this proposed rule (if finalized as proposed). Further reporting cycles would then recur every 4 years (or other interval as specified in the final rule), along the same lines and with the addition of determining compliance obligations based on manufacturing and import volume from the calendar years since the previous principal reporting year (e.g., reporting in 2015 information based on years 2011, 2012, 2013, and 2014). EPA is also considering changing the existing 2011 submission period to another 4–month period later in 2011.

2. As discussed in Unit II.D., EPA is increasing its emphasis on assessing, prioritizing, and taking action on existing chemical substances that pose unreasonable risks, with particular emphasis on protecting children. EPA is interested in receiving comments regarding how to use IUR data, including how to amend the rule, to best assist in this effort. Similarly, EPA seeks comment on how to tailor more

narrowly the substantive modifications to the IUR contained in this proposal so as to avoid gathering information which EPA or the public would not be able to use.

3. Through the IUR, EPA collects information on chemical substances for which the Agency is most likely to have an interest. Accordingly, to minimize reporting burdens, EPA developed exemptions from the IUR. From time to time, EPA adjusts these reporting exemptions in order to address its chemical substance management program needs.

In response to public comments received in response to the 1985 proposed IUR rule (Ref. 22), EPA established certain exclusions from these exemptions (Ref. 23). The exclusions were to ensure the Agency receives IUR information on chemical substances that are of interest to the Agency. The introductory paragraph to 40 CFR 710.46 (proposed 40 CFR 711.6) identifies that chemical substances that are the subject of proposed or promulgated TSCA section 4, 5(a)(2), 5(b)(4), or 6 rules are excluded from the chemical substance exemptions listed in the section. The introductory paragraph to 40 CFR 710.49 (proposed 40 CFR 711.9) identifies that small manufacturers of chemical substances that are the subject of proposed or promulgated TSCA section 4, 5(b)(4), or 6 rules are excluded from the small manufacturer exemption listed in the section.

As identified in Unit II.D., EPA's Administrator has made it a priority to strengthen the Agency's chemical management program. EPA uses IUR information on proposed rule chemical substances to inform final regulations, especially with respect to accurately responding to public comments; to determine the need for actions supplementing proposed rules, such as voluntary programs; to provide up-to-date, definitive identities of companies manufacturing (including importing) chemical substances potentially subject to a final rule; and to provide up-to-date, accurate information to the public about chemical substances for which the Agency has expressed an interest. For example, five chemical substances were excluded from the final OSHA dermal test rule published in the **Federal Register** issue of April 6, 2004 (Ref. 24) because IUR data collected indicated that there was no longer substantial production.

EPA is interested in receiving comments on whether EPA should continue to include chemical substances that are the subject of proposed rules in the list of exclusions at 40 CFR 710.46 (proposed 40 CFR 711.6) and 40 CFR 710.49 (proposed 40 CFR 711.9). If the proposed rule exclusion were no longer available, should EPA consider removing some or all of the reporting exemptions? This would allow EPA to obtain information on those chemical substances for which it is considering analysis or regulation, but which would otherwise be exempt. EPA also is interested in receiving comments on whether the Agency should: Add new exclusions to reporting exemptions; entirely eliminate certain reporting exemptions under circumstances other than those described in this unit; or leave the exclusions from the reporting exemptions unchanged.

4. The proposals discussed in Unit III.D.1. would result in a site reporting data on subject chemical substances exceeding the 25,000 lb. threshold for any calendar year since the last principal reporting year. The site would report manufacturing (including production volume), processing, and use information for the principal reporting year (e.g., 2010), as well as production volume information for all the years since the last IUR principal reporting year (i.e., 2006 through 2009, for principal reporting year 2010). In developing this proposal, EPA considered several other reporting options and is seeking comment on these options, which are described in Unit V.4.i.–4.iii.

i. EPA is proposing to return the reporting frequency to 4 years and is considering further increasing the frequency to every 3 years, biennially, or annually. (See Ref. 15 for burden and cost information.) More frequent reporting provides more current data. Eliminating the 5–year wait for current information would address concerns that IUR data are outdated and therefore less useful than if it were more current. EPA is particularly interested in the annual reporting option for several reasons. Annual reporting would enable EPA to better analyze trends, including ascertaining which chemical substances are manufactured on a consistent basis, which chemical substances have wide variations from year to year, and which chemical substances are increasing or decreasing in volume. Trend analyses measure the success of programs and can be used to proactively identify developing issues and generally provide a greater insight into the chemical industry. Obtaining this information annually, instead of the proposed option of reporting 4 years of production volume at one time, would allow for closer monitoring of trends and the more timely feedback on the success of programs than would be possible under the proposed option, although if processing and use data changes little year-on-year, it could significantly raise the burden of the IUR on submitters without providing EPA or the public with information benefits. In addition, annual reporting would provide the opportunity to tie-in more closely or actually integrate IUR reporting with the already-required annual TRI reporting.

ii. EPA requests comment on whether the reporting frequency should remain 5 years and whether the proposed requirement for annual production data resolves concerns that IUR data are outdated for its intended purpose. What is the marginal value of processing and use data gathered every 4 years versus every 5 years?

iii. EPA is also interested in comments regarding changing the reporting threshold from 25,000 lb. to 10,000 lb., but is not including this change in the regulatory text accompanying this proposal. (See Ref. 15 for burden and cost information.) Prior to the 2006 IUR, the threshold for determining the need to report was 10,000 lb., therefore this change in the reporting threshold would be a return to the status quo for the IUR. The Agency is interested in collecting information on chemical substances with nationally aggregated production volumes of 25,000 lb. or higher. Because chemical substances are often manufactured (including imported) at more that one site, chemical substances with site-specific production volumes that fall below the 25,000 lb. reporting threshold and therefore would not be reported for IUR may have aggregated production volumes of 25,000 lb. or greater. Are there other thresholds (higher or lower) that might be appropriate?

5. EPA requests comment on the draft economic analysis to 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.

6. EPA requests comment on 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.

7. EPA requests comment on how the substantive proposed revisions to the IUR could be further modified to enhance the quality, utility, and clarity of the information to be collected.

8. EPA requests comment on how best to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of

information technology, e.g., permitting electronic submission of responses.

9. EPA is considering collecting additional exposure-related data, similar to those collected under TSCA section 5 (New Chemicals Program), to enhance the Agency's capabilities in conducting screening-level exposure assessments of chemical substances reported to the IUR.

EPA, through its experience in using the IUR exposure-related and use information, has learned that the current IUR data are not sufficient for determining quantitative estimates of releases of and exposures to chemical substances. As a result of the available 2006 IUR data, EPA could develop only qualitative exposure characterizations with relative ranking of low, medium, or high for characterizing potential exposures to various populations. While the usefulness of these data was limited because data were only partially reported (see Unit III.G.), it was also limited because the specific data elements, as included in the 2006 IUR, were not detailed and comprehensive enough to enable EPA to generate a more robust estimate. For instance, the function and use categories used for processing and use information were broad, and the reported production volume information was insufficient to identify the volumes of chemical substance used at the manufacturing site or domestically processed or used. The Agency believes the proposed rule text changes will improve its ability to identify and manage risks associated with existing chemical substances, but also believes that supplementary, more in-depth exposure-related information (i.e., beyond the elements in the regulatory text of this proposed rule) would substantially improve EPA's ability to quantify chemical risks. The ability to quantify chemical risks would further improve the Agency's ability to identify and manage those risks. EPA therefore believes that, while the changes included in the proposed regulatory text address the limitations associated with qualitative characterizations, further changes would be needed to enable the more quantitative estimates.

If additional data identified in Table 5 of this unit were to be reported, EPA could use currently available assessment tools and methodologies to develop screening-level estimates of chemical substance environmental releases and concentrations to various environmental media (including air, water, and land) and exposures to the potentially exposed populations (such as workers, consumers, children, and the general population). Examples of the tools and methodologies include the Agency's Chemical Screening Tool For Exposures & Environmental Releases (ChemSTEER) (Ref. 25) and Exposure and Fate Assessment Screening Tool (EFAST) (Ref. 26). The Agency anticipates that the improved screening-level exposure assessments would be similar to what is developed for new chemical substances submitted to the Agency for review to identify chemicals of concern and potential risk management. The PMN Program Form 7710–25 (available at: *http://www.epa.gov/opptintr/newchems/pubs/pmnforms.htm*) (Ref. 27) was used to develop the additional potential exposure-related data elements and their brief descriptions listed in Table 5 of this unit:

TABLE 5.—ADDITIONAL EXPOSURE-RELATED DATA ELEMENTS UNDER CONSIDERATION BY EPA FOR IUR

| **Manufacturing Process** | |
|---|---|
| Description of manufacturing process | Provide a process flow diagram which describes the manufacturing operations involving the chemical substance. "Manufacturing operation" means a functional step in which chemical substances undergo chemical changes and/or changes in location, temperature, pressure, physical state, or similar characteristics. Include steps in which the chemical chemical substance is formulated into gels, mixtures, suspensions, solutions, etc. and in which the chemical substance is transferred into interim storage or shipping containers. Indicate in your diagram the entry and exit points of the chemical substance. Number all points from which the chemical substance will be released to the environment or to control equipment, including small or intermittent releases (e.g. some cleaning releases, drum residues, etc.) and trace amounts of the chemical substance. |
| Continuous or batch process | Indicate whether the chemical substance is manufactured in discrete batches or is produced by continuously adding reactants and removing the reaction product. |
| Amount of chemical substance produced per day or per batch | If the chemical substance is produced in discrete batches, indicate the amount of the chemical substance in pounds produced in each batch; if the chemical substance is produced in a continuous process, indicate the amount of chemical substance in pounds manufactured each day. |
| Batch or daily run time | If the chemical substance is produced in discrete batches, indicate the batch time (hours/batch); if the chemical substance is produced in a continuous process, indicate the daily run time (hours/day). |
| Days of operation per year or number of batches per year | If the chemical substance is produced in discrete batches, indicate the number of batches per year necessary to produce the reported production volume; if the chemical substance is produced in a continuous process, indicate the number of days of operation per year needed to produce the reported production volume. |
| Unit operations | List the unit operations needed to produce the chemical substance. Unit operation means a functional step in manufacturing, processing, or use operation where chemical substances undergo chemical changes, or changes in temperature, pressure, physical state, concentration, purity, or similar characteristics. Examples of unit operations include blending, distillation, filtration, and drying. |

TABLE 5.—ADDITIONAL EXPOSURE-RELATED DATA ELEMENTS UNDER CONSIDERATION BY EPA FOR IUR—Continued

| | |
|---|---|
| Storage and shipping containers | List the types of containers used to transport or store the chemical substance and their capacity. Examples of containers include 1–liter bottles; 5–gallon pails; 55–gallon drums; 200–pound totes; 5,000–gallon tank trucks; and 20,000–gallon railcars. |
| **Manufacturing Worker Exposures** | |
| Worker activities | Describe each specific activity in the operation during which workers may be exposed to the chemical substance. Such activities may include charging reactor vessels, sampling for quality control, transferring chemical substances from one container to another, changing filters, filling drums, loading and loading tank cars or trucks, etc. Activities must be described even when workers wear protective equipment. |
| Duration and frequency of worker exposure | For each worker activity, enter the maximum duration in hours per day and number of days per year that any one worker will engage in the activity during a normal work day based on the reported production volume. |
| Physical form | For each worker activity, indicate the physical form of the chemical substance at the time of exposure. |
| Maximum concentration | For each worker activity, indicate the maximum concentration of the chemical substance in the product at the time of exposure. |
| Personal protective equipment and engineering controls used by workers. | For each worker activity, identify the specific types of protective equipment and engineering controls that will be employed to protect the worker from potential exposure to the chemical substance, e.g., gloves, goggles, protective garment, local ventilation, respirator, etc. |
| Worker monitoring data available | Indicate whether monitoring data on occupational exposure of workers is available. |
| Summary of occupational exposure monitoring included | Indicate whether a summary of occupational exposure monitoring data is included. Summary should include information on the # of workers involved, # of samples taken, types of samples (area or personal), average and standard deviations of exposure. |
| **Manufacturing Releases to the Environment** | |
| Release source (or release point) | For each point of release containing the chemical substance, identify and describe the point in the process description at which the release occurs (e.g., releases due to spillage, residues, separation losses, and other sources from each batch or each day). |
| Media and type of release | For each release, indicate the type (gas or vapor, aqueous or liquid solution, or solid) and media (stack air, fugitive air, surface water, on-site or off-site land or incineration, POTW, or other (specify)) which describes the release stream containing the chemical. |
| Quantity of chemical substance released<br>a. Directly to the environment or<br>b. Into control technology to the environment | For each release, provide the quantity (in pounds) of chemical substance released<br>a. Directly to the environment or<br>b. Into control technology to the environment in pounds per day for continuous operation or pounds per batch for batch operations. |
| Control technology | For each release, describe the type of technology used to control the release of the chemical substance to the environment. Examples of control technologies include carbon filter, scrubber and biological treatment (primary, secondary, etc.). |
| Efficiency of control technology | Indicate the established efficiency of the control technology in removing or destroying the chemical substance. |
| Destination of release | For aqueous releases containing the chemical substance, indicate whether release enters a navigable waterway, a publicly owned treatment works (POTW), or other. Identify the name of the POTW and/or NPDES # as appropriate. For other releases, indicate whether the release goes to a municipal or hazardous waste landfill, a commercial incinerator, enters the atmosphere, or is otherwise disposed (specify). |
| Additional release related information attached | Indicate whether a description of the releases, calculations or monitoring data on the quantities of releases, or additional information on control technologies and/or treatment is attached. |

TABLE 5.—ADDITIONAL EXPOSURE-RELATED DATA ELEMENTS UNDER CONSIDERATION BY EPA FOR IUR—Continued

| | |
|---|---|
| **Industrial Processing or Use Activities** | |
| Description of Processing or Use | Provide a process flow diagram which describes the processing or use operation involving the chemical substance. "Unit operation" means a functional step in which chemical substances undergo chemical changes and/or changes in location, temperature, pressure, physical state, or similar characteristics. Include steps in which the chemical substance is formulated into gels, mixtures, suspensions, solutions, etc. and in which the chemical substance is transferred into interim storage or shipping containers. Indicate in your diagram the entry and exit points of the chemical substance. Number all points from which the chemical substance will be released to the environment or to control equipment, including small or intermittent releases (e.g., some cleaning releases, drum residues, etc.) and trace amounts of the chemical substance. |
| Processing or use at sites controlled by manufacturer | Indicate whether the sites at which the chemical is processed or used are owned by the manufacturer or others. |
| Continuous or batch process | Indicate whether the industrial process in which the chemical is processed or used in a batch or continuous process. |
| Amount of chemical substance processed per day or per batch | Provide the amount of the chemical substance in pounds processed or used per batch for batch operation or processed or used per day for continuous operation, respectively. |
| Batch or daily run time | If the chemical substance is processed in discrete batches, indicate the batch time (hours/batch); if the chemical substance is processed in a continuous process, indicate the daily run time (hours/day). |
| Days of operation per year or number of batches per year | If the chemical substance is processed in discrete batches, indicate the number of batches per year necessary to process the reported production volume; if the chemical substance is produced in a continuous process, indicate the number of days of operation per year needed to process the reported production volume. |
| Unit operations | List the unit operations needed to process the chemical substance. Unit operation means a functional step in manufacturing, processing, or use operation where chemical substances undergo chemical changes, or changes in temperature, pressure, physical state, concentration, purity, or similar characteristics. Examples of unit operations include blending, distillation, filtration, and drying. |
| Storage and shipping containers used | List the types of containers used to transport or store the chemical substance and their capacity. Examples of containers include 1–liter bottles; 5–gallon pails; 55–gallon drums; 5,000–gallon tank trucks; and 20,000–gallon railcars. |
| **Industrial Processing or Use Occupational Exposures** | |
| Worker activities | Describe each specific activity in the operation during which workers may be exposed to the chemical substance. Such activities may include charging reactor vessels, sampling for quality control, transferring chemical substances from one container to another, changing filters, filling drums, loading and loading tank cars or trucks, etc. Activities must be described even when workers wear protective equipment. |
| Duration and frequency of worker exposure | For each worker activity, provide the maximum duration in hours per day and the number of days per year during which any one worker will engage in the activity during a normal work day during in processing or use. |
| Physical form | For each worker activity, indicate the physical form of the chemical substance at the time of exposure. |
| Maximum concentration | For each worker activity, indicate the maximum concentration of the chemical substance in the product at the time of exposure. |
| Personal protective equipment and engineering controls used by workers. | For each worker activity, identify the specific types of protective equipment and engineering controls that will be employed to protect the worker from potential exposure to the chemical substance, e.g., gloves, goggles, protective garment, local ventilation, respirator, etc. |
| Worker monitoring data available | Indicate whether monitoring data on occupational exposure of workers is available. |
| Summary of occupational exposure monitoring included | Indicate whether a summary of occupational exposure monitoring data is included. Summary should include information on the # of workers involved, # of samples taken, types of samples (area or personal), average and standard deviations of exposure. |
| **Industrial Processing or Use Releases to the Environment** | |
| Release source (or point) | For each point of release containing the chemical substance, identify and describe the point in the process description at which the release occurs (e.g., releases due to spillage, residues, separation losses, and other sources from each batch or each day). |

TABLE 5.—ADDITIONAL EXPOSURE-RELATED DATA ELEMENTS UNDER CONSIDERATION BY EPA FOR IUR—Continued

| | |
|---|---|
| Media and type of release | For each release, indicate the type (gas or vapor, aqueous or liquid solution, or solid) and media (stack air, fugitive air, surface water, on-site or off-site land or incineration, POTW, or other (specify)) which describes the release stream containing the chemical. |
| Quantity of chemical substance released<br>a. Directly to the environment or<br>b. Into control technology to the environment | For each release, provide the quantity (in pounds) of chemical substance released<br>a. Directly to the environment or<br>b. Into control technology to the environment in pounds per day for continuous operation or pounds per batch for batch operations. |
| Control technology | For each release, describe the type of technology used to control the release of the chemical substance to the environment. Examples of control technologies include carbon filter, scrubber and biological treatment (primary, secondary, etc.). |
| Efficiency of control technology | Indicate the established efficiency of the control technology in removing or destroying the chemical substance. |
| Destination of release | For aqueous releases containing the chemical substance, indicate whether release enters a navigable waterway, a publicly owned treatment works (POTW), or other. Identify the name of the POTW and/or NPDES # as appropriate. For other releases, indicate whether the release goes to a municipal or hazardous waste landfill, a commercial incinerator, enters the atmosphere, or is otherwise disposed (specify). |
| Additional release related information attached | Indicate whether a description of the releases, calculations or monitoring data on the quantities of releases, or additional information on control technologies and/or treatment is attached. |
| **Commercial Use Occupational Exposure** | |
| Description of commercial use | Describe the commercial use(s) of products containing the chemical substance. |
| Function of chemical in commercial product | Describe the function of the chemical in the commercial product, e.g., dispersive dye, solvent, stabilizer, hardener, plasticizer, filler, etc. |
| Number of potentially exposed commercial workers | Indicate the number of workers in commercial establishments who are reasonably likely to be exposed to the chemical substance. |
| Physical form of commercial product | Indicate the physical form of the product containing the chemical substance. |
| Method of commercial product application | Describe the application method (e.g. sprayed applied via pump sprayer or aerosols, poured or applied manually) of the product containing the chemical chemical substance and whether the commercial use is destructive, contained, dispersive, etc. |
| Duration and frequency of commercial product use | Indicate the duration of use, e.g., 5 minutes or less, 30 minutes or less, 1 hour or less, etc. and frequency of commercial use, e.g., used more than once a day, used once a day, used several times a week, etc. |
| **Consumer Use and Exposure** | |
| Description of consumer use | Describe the consumer use(s) of products containing the chemical substance. |
| Function of chemical in consumer product | Describe the function of the chemical in the consumer product, e.g., dispersive dye, solvent, stabilizer, hardener, plasticizer, filler, etc. |
| Number of potentially exposed consumers | Indicate the number of consumers reasonably likely to be exposed to the chemical substance. |
| Physical form of consumer product(s) containing the chemical substance. | Indicate the physical form, e.g., gel, foam, powder, etc. of the consumer product containing the chemical substance. |
| Method of consumer product application | Describe the application of the consumer product containing the chemical substance, for example, chemical substances in products that will be sprayed via pump sprayer or aerosols; products that are poured, mixed, applied by hand/mechanical device; chemical substances that can be released via diffusion, evaporation, abrasion, etc., from articles; or chemical substances that are incorporated into articles with no potential for release, etc. |
| Duration and frequency of consumer product use | Indicate the duration of consumer use, e.g., used for 5 minutes or less, 30 minutes or less, less than 1 hour, etc. and frequency of consumer use, e.g., used more than once a day, used once a day, used several times a week, etc. |

EPA is soliciting comment on the data elements identified in Table 5 of this unit. Collecting these data would enable the Agency to develop more comprehensive and complete screening assessments of the exposures that may be encountered during the manufacture, processing, and use of chemical substances. The Agency also is interested in whether any additional data elements should be collected, and in any other considerations relating to the collection of additional data. Because these data elements are based on the data elements included in a PMN submission, EPA believes the burden a site would incur to provide these data for each chemical substance would be

similar to the burden incurred for a site to develop a single PMN submission, almost doubling the burden of the IUR program. EPA presents the estimated increase in industry costs and burden associated with change in Appendix H of the Economic Analysis (Ref. 15).

EPA is also soliciting comment on the best method to collect these data. The Agency is considering three approaches to collect these data from known manufacturers (including importers). These approaches are: Integrating these data elements into the IUR, promulgating a new reporting mechanism under TSCA section 8(a), or using TSCA section 11(c) subpoena authority. Integrating these data elements into the IUR would provide a more complete set of data, enabling the Agency to identify proactively potential exposure-based chemical risk management issues and to provide the public access to an enhanced database. The Agency is also soliciting comment on the appropriate scope of an IUR requirement to report these data elements. For instance, the scope could be based on chemical identity, and the Agency could provide a list of chemical substances for which these data would be reported. Alternatively, the scope could be based on production volume, and the Agency could identify the production volume range for which these data would be reported.

As a second option, the Agency is considering promulgating a new reporting mechanism under TSCA section 8(a) that would enable the collection of enhanced exposure-related data, described in this section, for about 100 chemical substances per year. For instance, EPA could notify manufacturers (including importers) of the need to submit additional information, e.g., via a **Federal Register** notice or individually via U.S. mail, with details on the data to report and the reporting criteria. (See Ref. 15 for burden and cost information.) This approach would enable the Agency to target the collection to those chemical substances of current priority for screening-level assessment. The Agency also solicits comment on the need to establish a complementing recordkeeping requirement. Such a recordkeeping requirement would ensure that the additional data subject to the new reporting mechanism would be more quickly available at the time that EPA requested them. However, without advance notice regarding the specific chemical substances for which information would be required, manufacturers (including importers) of all chemical substances subject to the IUR would be required to maintain the records.

As a third option, EPA is considering the use of TSCA section 11(c) subpoena authority to collect enhanced exposure-related data. Section 11(c) of TSCA gives the Agency broad authority to collect information for regulatory purposes and would, therefore, allow EPA to require, by subpoena, the submission of the enhanced exposure-related data. Among the circumstances in which the Agency is considering exercising this subpoena authority are those in which the enhanced data elements are not available through other means and are necessary for a more effective screening level review of chemical substances on a case by case basis.

10. EPA is considering collecting exposure-related information from processors in addition to collecting the data from manufacturers (including importers).

Currently, only manufacturers (including importers) are responsible for providing information required by the IUR rule. Section 8(a) of TSCA enables the Agency also to collect information from processors. EPA seeks comment on also requiring processors to report processing and use data under the three data collection approaches described in Unit V.9. (i.e., by modification of the IUR rule, via notification issued under a new data reporting mechanism, or using existing subpoena authority). (See Ref. 15 for burden and cost information.) The Agency believes that processors may be more familiar with the processing and use of the chemical substances than manufacturers (including importers), and therefore may be able to provide more complete and accurate exposure-related data.

## VI. References

As indicated under **ADDRESSES**, a docket has been established for this rulemaking under docket ID number EPA–HQ–OPPT–2009–0187. 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 in developing this proposed rule, 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 person listed under **FOR FURTHER INFORMATION CONTACT**.

1. EPA. Inventory Reporting Regulations; Final rule. **Federal Register** (42 FR 64572, December 23, 1977) (FRL–817–1).

2. EPA. Partial Updating of TSCA Inventory Data Base; Production and Site Reports; Final rule. **Federal Register** (51 FR 21438, June 12, 1986) (FRL–2973–3).

3. EPA. TSCA Inventory Update Rule Amendments; Final rule. **Federal Register** (68 FR 848, January 7, 2003) (FRL–6767–4).

4. EPA. OPPT. Enhancing EPA's Chemical Management Program. Available on-line at: *http//www.epa.gov/oppt/existingchemicals/pubs/enhanchems.html*.

5. EPA. Draft Instructions for 2011 Inventory Update Reporting, July 2010.

6. EPA. OPPT. IUR Modifications Rule: Development of Definitions for Proposed 40 CFR 711.3. July 8, 2010.

7. EPA. TSCA Inventory Update Reporting Revisions; Final rule. **Federal Register** (70 FR 75059, December 19, 2005) (FRL–7743–9).

8. EPA. Agency Information Collection Activities; Proposed Collection; Comment Request; Partial Update of the TSCA Section 8(b) Inventory Data Base, Production and Site Reports; EPA ICR No. 1884.04, OMB Control No. 2070–0162; Notice. **Federal Register** (73 FR 51805, September 5, 2008) (FRL–8370–3).

9. EPA. Development of CDX Workflow for Electronic Toxic Substances Control Act (eTSCA) Submissions: Draft User Guide (Version 1.0), CDX. November 13, 2008.

10. EPA. OPPT. Electronic Signature Agreement. August 2009.

11. EPA/Environment Canada/Health Canada, Overview of Harmonized U.S.-Canada Industrial Function and Consumer and Commercial Product Codes for Chemical Inventory Reporting. June 2009, Revised November 2009.

12. American Petroleum Institute, Letter to Docket ID No. EPA–HQ–OPPT–2008–0785 from Howard J. Feldman. December 8, 2008.

13. Proctor & Gamble, Letter to Docket ID No. EPA–HQ–OPPT–2008–0785, from Julie Froelicher. January 23, 2009.

14. Synthetic Organic Chemical Manufacturers Association, Comments submitted to Docket ID No. EPA–HQ–OPPT–2008–0785 from Daniel Newton. January 23, 2009.

15. EPA. OPPT. Economics, Exposure and Technology Division (EETD). Economic Analysis for the Proposed Inventory Update Reporting (IUR) Modifications Rule. July 20, 2010.

16. EPA. OPPT. EETD. Inventory Update Reporting (IUR) Technical Support Document — Replacement of

5–digit NAICS Codes with Industrial Sector (IS) Codes. October 2009.

17. EPA. Claims of Confidentiality of Certain Chemical Identities Submitted under Section 8(e) of the Toxic Substances Control Act; Notice. **Federal Register** (75 FR 3462, January 21, 2010) (FRL–8807–9).

18. EPA. OPPT. 2006 Inventory Update Reporting: Data Summary. EPA Report No. 740S08001. December 2008.

19. SBA. TSCA IUR Byproducts Reporting v_1 02_18_10.doc. E-mail to Wendy Cleland-Hamnett, EPA, from Keith Holman, SBA. March 9, 2010.

20. EPA. OPPT. Fact Sheet: Recycling and the TSCA Inventory of Chemical Substances Premanufacture Notification and Inventory Update Reporting Requirements. July 2010.

21. EPA. OPPT. Draft Q&A Document: Recycling and the TSCA Inventory of Chemical Substances Premanufacture Notification and Inventory Update Reporting Requirements. July 2010.

22. EPA. Partial Updating of TSCA Inventory Data Base, Production and Site Reports; Proposed rule. **Federal Register** (50 FR 9944, March 12, 1985) (FRL–2710–4).

23. EPA. Partial Updating of TSCA Inventory Data Base; Production and Site Reports; Final rule. **Federal Register** (51 FR 21438, June 12, 1986) (FRL–2973–3).

24. EPA. In Vitro Dermal Absorption Rate Testing of Certain Chemicals of Interest to the Occupational Safety and Health Administration; Final rule. **Federal Register** (69 FR 22402, April 26, 2004) (FRL–7312–2).

25. EPA. Chemical Screening Tool For Exposures & Environmental Releases. September 2009. Available on-line at: *http://www.epa.gov/oppt/exposure/pubs/chemsteer.htm*.

26. EPA. Exposure and Fate Assessment Screening Tool. September 2009. Available on-line: *http://www.epa.gov/oppt/exposure/pubs/efast.htm*,

27. EPA. Premanufacturing Notice Program Form 7710–25. Available on-line: *http://www.epa.gov/opptintr/newchems/pubs/pmnforms.htm*.

28. EPA. OPPT. Addendum to Information Collection Request 1884.04, OMB control number 2070–0162. July 2010.

## VII. Statutory and Executive Order Reviews

### *A. Regulatory Review*

Under Executive Order 12866, entitled *Regulatory Planning and Review* (58 FR 51735, October 4, 1993), this action has been designated a "significant regulatory action" by the Office of Management and Budget (OMB). Accordingly, EPA submitted this action to OMB for review under Executive Order 12866 and any changes made in response to OMB recommendations have been documented in the docket for this action.

In addition, EPA has prepared an economic analysis of the potential impacts associated with this action. A copy of this economic analysis, entitled, *Draft Economic Analysis for the Proposed Inventory Update Reporting (IUR) Modifications Rule* (Ref. 15), is available in the docket and is briefly summarized in this unit. The amendments in this proposal affect the number of reports submitted during a submission period, the burden to prepare a report, and the reporting frequency. EPA estimates that the combined impact of all the proposed amendments will increase the total burden and cost to industry associated with IUR reporting.

In its economic analysis, EPA estimated industry cost and burden on a per-report and a per-site basis and at the industry level. Industry cost and burden are incurred by performing activities to comply with the proposed amendments, including compliance determination, rule familiarization, preparation and submission of reports, and recordkeeping.

On a per-report basis, EPA estimated incremental increases of 4.28 hours and $350 for a site to complete a partial report for one chemical substance and 17.38 hours and $1,408 to complete a full report for one chemical substance, in the first reporting cycle after the effective date of the proposed rule amendments. A partial report includes Parts I and II of Form U. A full report includes Parts I, II, and III of Form U. For future reporting cycles, EPA estimated incremental increases of 3.28 hours and $275 for a site to complete a partial report for one chemical substance and 12.98 hours and $1,075 to complete a full report for one chemical substance.

As a result of the proposed amendments, EPA estimates that the average site will submit approximately 2.01 fewer partial reports and 2.98 additional full reports in a submission period. For the average site, this will increase the burden by 341 hours during the first reporting cycle and 264 hours for all subsequent reporting cycles. EPA estimates that the average site will incur a net cost increase of $22,493 during the first reporting cycle and $17,517 during all future reporting cycles.

At the industry level for all sites submitting a Form U, EPA estimates a net total burden increase of 1.39 million hours in the first reporting cycle, and 1.21 million hours for all subsequent reporting cycles. EPA estimates a net cost increase of $91.87 million in the first reporting cycle of the rule, and $79.29 million in all subsequent reporting cycles. When the reporting cycle costs are averaged over the proposed 4–year reporting cycle, the average annualized increase in industry cost attributable to the proposed amendments is approximately $21.61 million over a 25–year period (at a 3% discount rate).

EPA estimates that the Agency will experience a reduction in both burden and cost to administer the IUR rule as a result of the proposed amendments. Specifically, EPA expects to experience a net burden reduction of 1,721 hours in the first reporting cycle and all subsequent reporting cycles. The Agency estimates it will experience a net savings of $179,600 during each reporting cycle. This information will be reflected in the ICR that is submitted every three years to OMB under the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq*.

### *B. Paperwork Reduction Act*

The information collection requirements in 40 CFR part 710 related to the submission of Form Us are already approved by OMB under PRA. That ICR has been assigned EPA ICR No. 1884 and OMB control no. 2070–0162. Because this proposed rule involves new or revised information collection activities that require additional OMB approval, EPA has prepared an addendum to the currently approved ICR (Ref. 8). An agency may not conduct or sponsor, and a person is not required to respond to an information collection request subject to PRA, unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations are listed in 40 CFR part 9 and included on any related collection instrument (e.g., on the form or survey).

Under PRA, the term "burden" is interpreted as the total time, effort, or financial resources expended by people to generate, maintain, retain, disclose, or provide information to or for a Federal agency. This includes the time needed by regulated entities to review instructions and to develop, acquire, install, and use technology and systems to collect, validate, verify, and disclose information. Time taken to adjust existing ways to comply with any previously applicable instructions and requirements and to train personnel to respond to the information collection task is also included. In this analysis,

total industry burden hours represent the sum of time spent on reporting and on other administrative activities. Industry respondents will spend time on the following activities associated with the IUR rule: Compliance determination, rule familiarization, preparation and submission of reports, and recordkeeping.

As presented in the Economic Analysis (Ref. 15) and the addendum ICR, EPA estimates that the proposed rule would create a total incremental industry burden of 1.39 million hours in the first reporting cycle, if all proposed amendments are finalized as proposed. The burden for a site to complete a full IUR report for one chemical substance is estimated to be 140.38 hours, which is an incremental burden increase of 17.38 hours over the current estimated burden. The burden for a site to complete a partial IUR report for one chemical substance is estimated to be 57.36 hours, which is an incremental burden increase of 5.28 hours over the current estimated burden. For future reporting cycles, EPA estimates that the proposed rule would create a total incremental industry burden of 1.21 million hours. The burden for a full report is estimated to be 95.03 hours, which is an incremental increase of 12.98 hours over the current estimated future burden. The burden for a partial report is estimated to be 29.40 hours, which is an incremental increase of 3.28 hours over the current estimate.

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–2009–0187. 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 August 13, 2010, a comment to OMB is best assured of having its full effect if OMB receives it by September 13, 2010. The final rule will respond to any OMB or public comments on the information collection requirements contained in this proposed rule.

### *C. Small Entity Impacts*

Pursuant to section 605(b) of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*), the Agency hereby certifies that this action will not have a significant adverse economic impact on a substantial number of small entities. The Agency's basis is briefly summarized here and is detailed in the Economic Analysis (Ref. 15).

Under RFA, 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 as:

1. A small business, as defined by the SBA's 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.

Since the regulated community does not include small governmental jurisdictions or small not-for-profit organizations, the analysis focuses on small businesses.

The existing IUR rule, at 40 CFR 710.59, generally exempts from reporting small businesses, defined at 40 CFR 704.3 as entities with annual sales of less than $40 million and less than 100,000 lb. production of any given chemical substance at a site; or annual sales of less than $4 million. This exemption is maintained in the proposed amendments. A small business would be required to report under the proposed rule, however, if it produces any chemical substance that is the subject of a regulation proposed or promulgated under TSCA section 4, 5(b)(4), or 6, or that is the subject of an order under TSCA section 5(e), or that is the subject of relief that has been granted pursuant to a civil action under TSCA section 5 or 7. A small business may also report voluntarily.

EPA analyzed potential small business impacts from this proposed rule using both the SBA employee size standards and the TSCA sales-based definition of small business. EPA estimates that 466 small firms potentially would be affected by this proposed rule using the employment-based definition, and 280 small firms potentially would be affected using the sales-based definition. Based on costs annualized over a 4–year period and average sales data for the parent companies, EPA estimated that the cost-to-sales ratio of the proposed rule would be less than 0.1% for an average small company subject to the rule. For a company to have a cost-to-sales ratio larger than 1%, company sales would have to be less than $1.02 million. Because the small businesses affected by the proposed rule have average sales of more than $412.7 million under the employment-based definition, and $11.8 million under the sales-based definition, small entities will not be affected by the proposed amendments to the IUR rule at a cost-to-sales ratio of greater than 1% (Ref. 15).

EPA continues to be interested in the potential impacts of this proposed rule on small entities and welcomes comments on issues related to such impacts.

### *D. Unfunded Mandates*

This action does not contain any Federal mandates for State, local, or tribal governments or the private sector under the provisions of Title II of the Unfunded Mandates Reform Act (UMRA), 2 U.S.C. 1531–1538. EPA has determined that this regulatory action will not result in annual expenditures of $100 million or more for State, local, and tribal governments, in the aggregate, or for the private sector. The costs associated with this action are briefly described in Unit VII.A., and is contained in the Economic Analysis (Ref. 15).

Based on EPA's past experience, State, local, and tribal governments have not been affected by this reporting requirement, and EPA does not have any reason to believe that any State, local, or tribal government will be affected by this proposed rule. As such, EPA has determined that this proposed rule does not impose any enforceable duty, contain any unfunded mandate, or otherwise have any affect on small governments. Accordingly, this proposed rule is not subject to the requirements of sections 202, 203, or 205 of UMRA.

### *E. Federalism*

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 the Executive Order. This proposed rule simply amends the IUR rule in several ways to provide information to better address Agency and public information needs, improve the usability and reliability of the reported data, and ensure that data are available in a timely manner. Because EPA has no information to indicate that any State or local government manufactures or processes the chemical substances covered by this action, the proposed

rule does not apply directly to States and localities and will not affect State and local governments. Thus, Executive Order 13132 does not apply to the proposed rule.

*F. Tribal Implications*

As required by Executive Order 13175, entitled *Consultation and Coordination with Indian Tribal Governments* (65 FR 67249, November 9, 2000), EPA has determined that this proposed rule does not have tribal implications because it will not have any affect 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. Thus, Executive Order 13175 does not apply to this proposed rule.

*G. Children's Health*

EPA interprets Executive Order 13045, entitled *Protection of Children from Environmental Health Risks and Safety Risks* (62 FR 19885, April 23, 1997), as applying only to those regulatory actions that concern health or safety risks, such that the analysis required under section 5–501 of Executive Order 13045 has the potential to influence the regulation. This action is not subject to Executive Order 13045 because it does not establish an environmental standard intended to mitigate health or safety risks. Nevertheless, the information obtained by the reporting required by this proposed rule will be used to inform the Agency's decisionmaking process regarding chemical substances to which children may be disproportionately exposed. This information will also assist the Agency and others in determining whether the chemical substances in this proposed rule present potential risks, allowing the Agency and others to take appropriate action to investigate and mitigate those risks.

*H. Energy Effects*

This action 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 a significant adverse effect on the supply, distribution, or use of energy as described in the Executive Order.

*I. Technical Standards*

Since this action does not involve any technical standards, 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), does not apply to this action.

*J. Environmental Justice*

The proposed rule does not have an adverse impact on the environmental and health conditions in low-income and minority communities that require special consideration by the Agency under Executive Order 12898, entitled *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations* (59 FR 7629, February 16, 1994). The Agency believes that the information collected under this proposed rule, if finalized, will assist EPA and others in determining the potential hazards and risks associated with the chemical substances covered by the rule. Because the IUR rule is an information collection requirement, the information that will become available through the rule will enable the Agency to target educational, regulatory, or enforcement activities towards industries or chemical substances that pose the greatest risks and/or to target programs for geographic areas that are at the highest risk. Thus, the information to be gathered under the rule will help EPA make decisions that will benefit potentially at-risk communities, some of which may be disadvantaged.

The proposed rule is directed at manufacturers (including importers) of chemical substances. All consumers of these chemical products and all workers who come into contact with these chemical substances could benefit if data regarding the chemical substances' health and environmental effects were developed. Therefore, it does not appear that the costs and the benefits of the proposed rule will be disproportionately distributed across different geographic regions or among different categories of individuals.

**List of Subjects in 40 CFR Parts 704, 710, and 711**

Environmental protection, Chemicals, Confidential Business Information (CBI), Hazardous materials, Imports, Reporting and recordkeeping requirements.

Dated: August 5, 2010.

**Stephen A. Owens,**

*Assistant Administrator, Office of Chemical Safety and Pollution Prevention.*

Therefore, it is proposed that 40 CFR chapter I be amended as follows:

## PART 704—[AMENDED]

1. The authority citation for part 704 continues to read as follows:

**Authority:** 15 U.S.C. 2607(a).

**§ 704.3 [Amended]**

2. In § 704.3, remove the phrase "(as defined in 19 CFR 1.11)" in paragraph (1)(ii) of the definition *importer*.

## PART 710—COMPILATION OF THE TSCA CHEMICAL INVENTORY

3. The authority citation for part 710 continues to read as follows:

**Authority:** 15 U.S.C. 2607(a).

4. Revise the heading for part 710 to read as set forth above.

5. Remove the heading "Subpart A—General Provisions."

6. Revise paragraph (b) of § 710.1 to read as follows:

**§ 710.1 Scope and compliance.**

* * * * *

(b) This part applies to the activities associated with the compilation of the TSCA Chemical Substance Inventory (TSCA Inventory) and the update of information on a subset of the chemical substances included on the TSCA Inventory.

* * * * *

7. Section 710.3 is amended as follows:

i. Remove the phrase "(as defined in 19 CFR 1.11)" in paragraph (2) of the definition *importer*.

ii. Remove the definition *non-isolated intermediate*.

iii. Revise the introductory text of the section to read as follows:

**§ 710.3 Definitions.**

For purposes of this part:

* * * * *

**Subpart B (§§ 710.23–710.39) [Removed]**

8. Remove subpart B, consisting of §§ 710.23–710.39.

**Subpart C (§§ 710.43–710.59) [Removed]**

9. Remove subpart C, consisting of §§ 710.43–710.59.

10. Add new part 711 to subchapter R to read as follows:

## PART 711—TSCA INVENTORY UPDATE REPORTING REQUIREMENTS

Sec.

**Authority:** 15 U.S.C. 2607(a).

### § 711.1 Scope and compliance.

(a) This part specifies reporting and recordkeeping procedures under section 8(a) of the Toxic Substances Control Act (TSCA) (15 U.S.C. 2607(a)) for certain manufacturers (including importers) of chemical substances. Section 8(a) of TSCA authorizes the EPA Administrator to require reporting of information necessary for administration of TSCA, including issuing regulations for the purpose of compiling and keeping current the TSCA Chemical Substance Inventory (TSCA Inventory) manufactured or processed in the United States as required by TSCA section 8(b). In accordance with TSCA section 8(b), EPA amends the TSCA Inventory to include new chemical substances manufactured (including imported) in the United States and reported under TSCA section 5(a)(1). EPA also revises the categories of chemical substances and makes other amendments as appropriate.

(b) This part applies to the activities associated with the periodic update of information on a subset of the chemical substances included on the TSCA Inventory.

(c) Section 15(3) of TSCA makes it unlawful for any person to fail or refuse to submit information required under this part. In addition, TSCA section 15(3) makes it unlawful for any person to fail to keep, and permit access to, records required by this part. Section 16 of TSCA provides that any person who violates a provision of TSCA section 15 is liable to the United States for a civil penalty and may be criminally prosecuted. Pursuant to TSCA section 17, the Federal Government may seek judicial relief to compel submission of TSCA section 8(a) information and to otherwise restrain any violation of TSCA section 15. (EPA does not intend to concentrate its enforcement efforts on insignificant clerical errors in reporting.)

(d) Each person who reports under this part must maintain records that document information reported under this part and, in accordance with TSCA, permit access to, and the copying of, such records by EPA officials.

### § 711.3 Definitions.

The definitions in this section and the definitions in TSCA section 3 apply to this part. In addition, the definitions in 40 CFR 704.3 also apply to this part, except the definitions *manufacture* and *manufacturer* in 40 CFR 704.3.

*CDX or Central Data Exchange* means EPA's centralized electronic document receiving system, or its successors, including associated instructions for registering to submit electronic documents.

*Commercial use* means the use of a chemical substance or a mixture containing a chemical substance (including as part of an article) in a commercial enterprise providing saleable goods or services.

*Consumer use* means the use of a chemical substance or a mixture containing a chemical substance (including as part of an article) when sold to or made available to consumers for their use.

*e-IURweb* means the electronic, web-based IUR software provided by EPA for the completion and submission of the IUR data.

*Industrial function* means the intended physical or chemical characteristic for which a chemical substance or mixture is consumed as a reactant; incorporated into a formulation, mixture, reaction product, or article; repackaged; or used.

*Industrial use* means use at a site at which one or more chemical substances or mixtures are manufactured (including imported) or processed.

*Intended for use by children* means the chemical substance or mixture is used in or on a product that is specifically intended for use by children age 14 or younger. A chemical substance or mixture is intended for use by children when the submitter answers "yes" to at least one of the following questions for the product into which the submitter's chemical substance or mixture is incorporated:

(1) Is the product commonly recognized (i.e., by a reasonable person) as being intended for children age 14 or younger?

(2) Does the manufacturer of the product state through product labeling or other written materials that the product is intended for or will be used by children age 14 or younger?

(3) Is the advertising, promotion, or marketing of the product aimed at children age 14 or younger?

*Manufacture* means to manufacture, produce, or import for commercial purposes. Manufacture includes the extraction, for commercial purposes, of a component chemical substance from a previously existing chemical substance or complex combination of chemical substances. When a chemical substance, manufactured other than by import, is:

(1) Produced exclusively for another person who contracts for such production.

(2) That other person specifies the identity of the chemical substance and controls the total amount produced and the basic technology for the plant process, that chemical substance is jointly manufactured by the producing manufacturer and the person contracting for such production.

*Manufacturer* means a person who manufactures a chemical substance.

*Master Inventory File* means EPA's comprehensive list of chemical substances which constitute the TSCA Inventory compiled under TSCA section 8(b). It includes chemical substances reported under 40 CFR part 710 and substances reported under 40 CFR part 720 for which a Notice of Commencement of Manufacture or Import has been received under 40 CFR 720.120.

*Principal reporting year* means the latest complete calendar year preceding the submission period.

*Reasonably likely to be exposed* means an exposure to a chemical substance which, under foreseeable conditions of manufacture (including import), processing, distribution in commerce, or use of the chemical substance, is more likely to occur than not to occur. Such exposures would normally include, but would not be limited to, activities such as charging reactor vessels, drumming, bulk loading, cleaning equipment, maintenance operations, materials handling and transfers, and analytical operations. Covered exposures include exposures through any route of entry (inhalation, ingestion, skin contact, absorption, etc.), but excludes accidental or theoretical exposures.

*Repackaging* means the physical transfer of a chemical substance or mixture, as is, from one container to another container or containers in preparation for distribution of the chemical substance or mixture in commerce.

*Reportable chemical substance* means a chemical substance described in § 711.5.

*Site* means a contiguous property unit. Property divided only by a public right-of-way shall be considered one site. More than one plant may be located on a single site.

(1) For chemical substances manufactured under contract, i.e., by a toll manufacturer, the site is the location where the chemical substance is physically manufactured.

(2) The site for an importer who imports a chemical substance described in § 711.5 is the U.S. site of the operating unit within the person's organization that is directly responsible for importing the chemical substance.

The import site, in some cases, may be the organization's headquarters in the United States. If there is no such operating unit or headquarters in the United States, the site address for the importer is the U.S. address of an agent acting on behalf of the importer who is authorized to accept service of process for the importer.

(3) For portable manufacturing units sent out to different locations from a single distribution center, the distribution center shall be considered the site.

*Site-limited* means a chemical substance is manufactured and processed only within a site and is not distributed for commercial purposes as a chemical substance or as part of a mixture or article outside the site. Imported chemical substances are never site-limited. Although a site-limited chemical substance is not distributed for commercial purposes outside the site at which it is manufactured and processed, the chemical substance is considered to have been manufactured and processed for commercial purposes.

*Submission period* means the period in which the manufacturing, processing, and use data are submitted to EPA.

*Use* means any utilization of a chemical substance or mixture that is not otherwise covered by the terms manufacture or process. Relabeling or redistributing a container holding a chemical substance or mixture where no repackaging of the chemical substance or mixture occurs does not constitute use or processing of the chemical substance or mixture.

**§ 711.5 Chemical substances for which information must be reported.**

Any chemical substance which is in the Master Inventory File at the beginning of a submission period described in § 711.20, unless the chemical substance is specifically excluded by § 711.6.

**§ 711.6 Chemical substances for which information is not required.**

The following groups or categories of chemical substances are exempted from some or all of the reporting requirements of this part, with the following exception: A chemical substance described in paragraph (a)(1), (a)(2), or (a)(4), or (b) of this section is not exempted from any of the reporting requirements of this part if that chemical substance is the subject of a rule proposed or promulgated under TSCA section 4, 5(a)(2), 5(b)(4), or 6, or is the subject of a consent agreement developed under the procedures of 40 CFR part 790, or is the subject of an order issued under TSCA section 5(e) or 5(f), or is the subject of relief that has been granted under a civil action under TSCA section 5 or 7.

(a) *Full exemptions.* The following categories of chemical substances are exempted from the reporting requirements of this part.

(1) *Polymers*—(i) Any chemical substance described with the word fragments "*polym*," "*alkyd," or "*oxylated" in the Chemical Abstracts (CA) Index Name in the Master Inventory File, where the asterisk (*) in the listed word fragments indicates that any sets of characters may precede, or follow, the character string defined.

(ii) Any chemical substance which is identified in the Master Inventory File as siloxane and silicone, silsesquioxane, a protein (albumin, casein, gelatin, gluten, hemoglobin), an enzyme, a polysaccharide (starch, cellulose, gum), rubber, or lignin.

(iii) This exclusion does not apply to a polymeric substance that has been hydrolyzed, depolymerized, or otherwise chemically modified, except in cases where the intended product of this reaction is totally polymeric in structure.

(2) *Microorganisms.* Any combination of chemical substances that is a living organism, and that meets the definition of "microorganism" at 40 CFR 725.3. Any chemical substance produced from a living microorganism is reportable under this part unless otherwise excluded.

(3) *Naturally occurring chemical substances.* Any naturally occurring chemical substance, as described in 40 CFR 710.4(b). The applicability of this exclusion is determined in each case by the specific activities of the person who manufactures the chemical substance in question. Some chemical substances can be manufactured both as described in 40 CFR 710.4(b) and by means other than those described in 40 CFR 710.4(b). If a person described in § 711.8 manufactures a chemical substance by means other than those described in 40 CFR 710.4(b), the person must report regardless of whether the chemical substance also could have been produced as described in 40 CFR 710.4(b). Any chemical substance that is produced from such a naturally occurring chemical substance described in 40 CFR 710.4(b) is reportable unless otherwise excluded.

(4) *Certain forms of natural gas and water.* Chemical substances with the following CASRN: CASRN 64741–48–6, natural gas (petroleum), raw liq. mix; CASRN 68919–39–1, natural gas condensates; CASRN 8006–61–9, gasoline, natural; CASRN 68425–31–0, gasoline (natural gas), natural; CASRN 8006–14–2, natural gas; CASRN 68410–63–9, natural gas, dried; and CASRN 7732–18–5, water.

(b) *Partial exemptions.* The following groups of chemical substances are partially exempted from the reporting requirements of this part (i.e., the information described in § 711.15(b)(4) need not be reported for these chemical substances). Such chemical substances are not excluded from the other reporting requirements under this part.

(1) *Petroleum process streams.* EPA has designated the chemical substances listed in Table 1 of this paragraph by CASRN, as partially exempt from reporting under the IUR.

TABLE 1.—CAS REGISTRY NUMBERS OF PARTIALLY EXEMPT CHEMICAL SUBSTANCES TERMED "PETROLEUM PROCESS STREAMS" FOR PURPOSES OF INVENTORY UPDATE REPORTING

| CASRN | Product |
|---|---|
| 8002–05–9 | Petroleum |
| 8002–74–2 | Paraffin waxes and hydrocarbon waxes |
| 8006–20–0 | Fuel gases, low and medium B.T.U. |
| 8008–20–6 | Kerosine (petroleum) |
| 8009–03–8 | Petrolatum |
| 8012–95–1 | Paraffin oils |
| 8030–30–6 | Naphtha |
| 8032–32–4 | Ligroine |
| 8042–47–5 | White mineral oil (petroleum) |
| 8052–41–3 | Stoddard solvent |
| 8052–42–4 | Asphalt |
| 61789–60–4 | Pitch |
| 63231–60–7 | Paraffin waxes and hydrocarbon waxes, microcryst. |
| 64741–41–9 | Naphtha (petroleum), heavy straight-run |
| 64741–42–0 | Naphtha (petroleum), full-range straight-run |
| 64741–43–1 | Gas oils (petroleum), straight-run |
| 64741–44–2 | Distillates (petroleum), straight-run middle |
| 64741–45–3 | Residues (petroleum), atm. tower |

TABLE 1.—CAS REGISTRY NUMBERS OF PARTIALLY EXEMPT CHEMICAL SUBSTANCES TERMED "PETROLEUM PROCESS STREAMS" FOR PURPOSES OF INVENTORY UPDATE REPORTING—Continued

| CASRN | Product |
|---|---|
| 64741–46–4 | Naphtha (petroleum), light straight-run |
| 64741–47–5 | Natural gas condensates (petroleum) |
| 64741–49–7 | Condensates (petroleum), vacuum tower |
| 64741–50–0 | Distillates (petroleum), light paraffinic |
| 64741–51–1 | Distillates (petroleum), heavy paraffinic |
| 64741–52–2 | Distillates (petroleum), light naphthenic |
| 64741–53–3 | Distillates (petroleum), heavy naphthenic |
| 64741–54–4 | Naphtha (petroleum), heavy catalytic cracked |
| 64741–55–5 | Naphtha (petroleum), light catalytic cracked |
| 64741–56–6 | Residues (petroleum), vacuum |
| 64741–57–7 | Gas oils (petroleum), heavy vacuum |
| 64741–58–8 | Gas oils (petroleum), light vacuum |
| 64741–59–9 | Distillates (petroleum), light catalytic cracked |
| 64741–60–2 | Distillates (petroleum), intermediate catalytic cracked |
| 64741–61–3 | Distillates (petroleum), heavy catalytic cracked |
| 64741–62–4 | Clarified oils (petroleum), catalytic cracked |
| 64741–63–5 | Naphtha (petroleum), light catalytic reformed |
| 64741–64–6 | Naphtha (petroleum), full-range alkylate |
| 64741–65–7 | Naphtha (petroleum), heavy alkylate |

TABLE 1.—CAS REGISTRY NUMBERS OF PARTIALLY EXEMPT CHEMICAL SUBSTANCES TERMED "PETROLEUM PROCESS STREAMS" FOR PURPOSES OF INVENTORY UPDATE REPORTING—Continued

| CASRN | Product |
|---|---|
| 64741–66–8 | Naphtha (petroleum), light alkylate |
| 64741–67–9 | Residues (petroleum), catalytic reformer fractionator |
| 64741–68–0 | Naphtha (petroleum), heavy catalytic reformed |
| 64741–69–1 | Naphtha (petroleum), light hydrocracked |
| 64741–70–4 | Naphtha (petroleum), isomerization |
| 64741–73–7 | Distillates (petroleum), alkylate |
| 64741–74–8 | Naphtha (petroleum), light thermal cracked |
| 64741–75–9 | Residues (petroleum), hydrocracked |
| 64741–76–0 | Distillates (petroleum), heavy hydrocracked |
| 64741–77–1 | Distillates (petroleum), light hydrocracked |
| 64741–78–2 | Naphtha (petroleum), heavy hydrocracked |
| 64741–79–3 | Coke (petroleum) |
| 64741–80–6 | Residues (petroleum), thermal cracked |
| 64741–81–7 | Distillates (petroleum), heavy thermal cracked |
| 64741–82–8 | Distillates (petroleum), light thermal cracked |
| 64741–83–9 | Naphtha (petroleum), heavy thermal cracked |
| 64741–84–0 | Naphtha (petroleum), solvent-refined light |
| 64741–85–1 | Raffinates (petroleum), sorption process |
| 64741–86–2 | Distillates (petroleum), sweetened middle |

TABLE 1.—CAS REGISTRY NUMBERS OF PARTIALLY EXEMPT CHEMICAL SUBSTANCES TERMED "PETROLEUM PROCESS STREAMS" FOR PURPOSES OF INVENTORY UPDATE REPORTING—Continued

| CASRN | Product |
|---|---|
| 64741–87–3 | Naphtha (petroleum), sweetened |
| 64741–88–4 | Distillates (petroleum), solvent-refined heavy paraffinic |
| 64741–89–5 | Distillates (petroleum), solvent-refined light paraffinic |
| 64741–90–8 | Gas oils (petroleum), solvent-refined |
| 64741–91–9 | Distillates (petroleum), solvent-refined middle |
| 64741–92–0 | Naphtha (petroleum), solvent-refined heavy |
| 64741–95–3 | Residual oils (petroleum), solvent deasphalted |
| 64741–96–4 | Distillates (petroleum), solvent-refined heavy naphthenic |
| 64741–97–5 | Distillates (petroleum), solvent-refined light naphthenic |
| 64741–98–6 | Extracts (petroleum), heavy naphtha solvent |
| 64741–99–7 | Extracts (petroleum), light naphtha solvent |
| 64742–01–4 | Residual oils (petroleum), solvent-refined |
| 64742–03–6 | Extracts (petroleum), light naphthenic distillate solvent |
| 64742–04–7 | Extracts (petroleum), heavy paraffinic distillate solvent |
| 64742–05–8 | Extracts (petroleum), light paraffinic distillate solvent |
| 64742–06–9 | Extracts (petroleum), middle distillate solvent |
| 64742–07–0 | Raffinates (petroleum), residual oil decarbonization |
| 64742–08–1 | Raffinates (petroleum), heavy naphthenic distillate decarbonization |
| 64742–09–2 | Raffinates (petroleum), heavy paraffinic distillate decarbonization |

TABLE 1.—CAS REGISTRY NUMBERS OF PARTIALLY EXEMPT CHEMICAL SUBSTANCES TERMED "PETROLEUM PROCESS STREAMS" FOR PURPOSES OF INVENTORY UPDATE REPORTING—Continued

| CASRN | Product |
|---|---|
| 64742–10–5 | Extracts (petroleum), residual oil solvent |
| 64742–11–6 | Extracts (petroleum), heavy naphthenic distillate solvent |
| 64742–12–7 | Gas oils (petroleum), acid-treated |
| 64742–13–8 | Distillates (petroleum), acid-treated middle |
| 64742–14–9 | Distillates (petroleum), acid-treated light |
| 64742–15–0 | Naphtha (petroleum), acid-treated |
| 64742–16–1 | Petroleum resins |
| 64742–18–3 | Distillates (petroleum), acid-treated heavy naphthenic |
| 64742–19–4 | Distillates (petroleum), acid-treated light naphthenic |
| 64742–20–7 | Distillates (petroleum), acid-treated heavy paraffinic |
| 64742–21–8 | Distillates (petroleum), acid-treated light paraffinic |
| 64742–22–9 | Naphtha (petroleum), chemically neutralized heavy |
| 64742–23–0 | Naphtha (petroleum), chemically neutralized light |
| 64742–24–1 | Sludges (petroleum), acid |
| 64742–25–2 | Lubricating oils (petroleum), acid-treated spent |
| 64742–26–3 | Hydrocarbon waxes (petroleum), acid-treated |
| 64742–27–4 | Distillates (petroleum), chemically neutralized heavy paraffinic |
| 64742–28–5 | Distillates (petroleum), chemically neutralized light paraffinic |
| 64742–29–6 | Gas oils (petroleum), chemically neutralized |
| 64742–30–9 | Distillates (petroleum), chemically neutralized middle |

TABLE 1.—CAS REGISTRY NUMBERS OF PARTIALLY EXEMPT CHEMICAL SUBSTANCES TERMED "PETROLEUM PROCESS STREAMS" FOR PURPOSES OF INVENTORY UPDATE REPORTING—Continued

| CASRN | Product |
|---|---|
| 64742–31–0 | Distillates (petroleum), chemically neutralized light |
| 64742–32–1 | Lubricating oils (petroleum), chemically neutralized spent |
| 64742–33–2 | Hydrocarbon waxes (petroleum), chemically neutralized |
| 64742–34–3 | Distillates (petroleum), chemically neutralized heavy naphthenic |
| 64742–35–4 | Distillates (petroleum), chemically neutralized light naphthenic |
| 64742–36–5 | Distillates (petroleum), clay-treated heavy paraffinic |
| 64742–37–6 | Distillates (petroleum), clay-treated light paraffinic |
| 64742–38–7 | Distillates (petroleum), clay-treated middle |
| 64742–39–8 | Neutralizing agents (petroleum), spent sodium carbonate |
| 64742–40–1 | Neutralizing agents (petroleum), spent sodium hydroxide |
| 64742–41–2 | Residual oils (petroleum), clay-treated |
| 64742–42–3 | Hydrocarbon waxes (petroleum), clay-treated microcryst. |
| 64742–43–4 | Paraffin waxes (petroleum), clay-treated |
| 64742–44–5 | Distillates (petroleum), clay-treated heavy naphthenic |
| 64742–45–6 | Distillates (petroleum), clay-treated light naphthenic |
| 64742–46–7 | Distillates (petroleum), hydrotreated middle |
| 64742–47–8 | Distillates (petroleum), hydrotreated light |
| 64742–48–9 | Naphtha (petroleum), hydrotreated heavy |
| 64742–49–0 | Naphtha (petroleum), hydrotreated light |

TABLE 1.—CAS REGISTRY NUMBERS OF PARTIALLY EXEMPT CHEMICAL SUBSTANCES TERMED "PETROLEUM PROCESS STREAMS" FOR PURPOSES OF INVENTORY UPDATE REPORTING—Continued

| CASRN | Product |
|---|---|
| 64742–50–3 | Lubricating oils (petroleum), clay-treated spent |
| 64742–51–4 | Paraffin waxes (petroleum), hydrotreated |
| 64742–52–5 | Distillates (petroleum), hydrotreated heavy naphthenic |
| 64742–53–6 | Distillates (petroleum), hydrotreated light naphthenic |
| 64742–54–7 | Distillates (petroleum), hydrotreated heavy paraffinic |
| 64742–55–8 | Distillates (petroleum), hydrotreated light paraffinic |
| 64742–56–9 | Distillates (petroleum), solvent-dewaxed light paraffinic |
| 64742–57–0 | Residual oils (petroleum), hydrotreated |
| 64742–58–1 | Lubricating oils (petroleum), hydrotreated spent |
| 64742–59–2 | Gas oils (petroleum), hydrotreated vacuum |
| 64742–60–5 | Hydrocarbon waxes (petroleum), hydrotreated microcryst. |
| 64742–61–6 | Slack wax (petroleum) |
| 64742–62–7 | Residual oils (petroleum), solvent-dewaxed |
| 64742–63–8 | Distillates (petroleum), solvent-dewaxed heavy naphthenic |
| 64742–64–9 | Distillates (petroleum), solvent-dewaxed light naphthenic |
| 64742–65–0 | Distillates (petroleum), solvent-dewaxed heavy paraffinic |
| 64742–67–2 | Foots oil (petroleum) |

TABLE 1.—CAS REGISTRY NUMBERS OF PARTIALLY EXEMPT CHEMICAL SUBSTANCES TERMED "PETROLEUM PROCESS STREAMS" FOR PURPOSES OF INVENTORY UPDATE REPORTING—Continued

| CASRN | Product |
|---|---|
| 64742–68–3 | Naphthenic oils (petroleum), catalytic dewaxed heavy |
| 64742–69–4 | Naphthenic oils (petroleum), catalytic dewaxed light |
| 64742–70–7 | Paraffin oils (petroleum), catalytic dewaxed heavy |
| 64742–71–8 | Paraffin oils (petroleum), catalytic dewaxed light |
| 64742–72–9 | Distillates (petroleum), catalytic dewaxed middle |
| 64742–73–0 | Naphtha (petroleum), hydrodesulfurized light |
| 64742–75–2 | Naphthenic oils (petroleum), complex dewaxed heavy |
| 64742–76–3 | Naphthenic oils (petroleum), complex dewaxed light |
| 64742–78–5 | Residues (petroleum), hydrodesulfurized atmospheric tower |
| 64742–79–6 | Gas oils (petroleum), hydrodesulfurized |
| 64742–80–9 | Distillates (petroleum), hydrodesulfurized middle |
| 64742–81–0 | Kerosine (petroleum), hydrodesulfurized |
| 64742–82–1 | Naphtha (petroleum), hydrodesulfurized heavy |
| 64742–83–2 | Naphtha (petroleum), light steam-cracked |
| 64742–85–4 | Residues (petroleum), hydrodesulfurized vacuum |
| 64742–86–5 | Gas oils (petroleum), hydrodesulfurized heavy vacuum |
| 64742–87–6 | Gas oils (petroleum), hydrodesulfurized light vacuum |
| 64742–88–7 | Solvent naphtha (petroleum), medium aliph. |
| 64742–89–8 | Solvent naphtha (petroleum), light aliph. |
| 64742–90–1 | Residues (petroleum), steam-cracked |

TABLE 1.—CAS REGISTRY NUMBERS OF PARTIALLY EXEMPT CHEMICAL SUBSTANCES TERMED "PETROLEUM PROCESS STREAMS" FOR PURPOSES OF INVENTORY UPDATE REPORTING—Continued

| CASRN | Product |
|---|---|
| 64742–91–2 | Distillates (petroleum), steam-cracked |
| 64742–92–3 | Petroleum resins, oxidized |
| 64742–93–4 | Asphalt, oxidized |
| 64742–94–5 | Solvent naphtha (petroleum), heavy arom. |
| 64742–95–6 | Solvent naphtha (petroleum), light arom. |
| 64742–96–7 | Solvent naphtha (petroleum), heavy aliph. |
| 64742–97–8 | Distillates (petroleum), oxidized heavy |
| 64742–98–9 | Distillates (petroleum), oxidized light |
| 64742–99–0 | Residual oils (petroleum), oxidized |
| 64743–00–6 | Hydrocarbon waxes (petroleum), oxidized |
| 64743–01–7 | Petrolatum (petroleum), oxidized |
| 64743–02–8 | Alkenes, C>10 .alpha.- |
| 64743–03–9 | Phenols (petroleum) |
| 64743–04–0 | Coke (petroleum), recovery |
| 64743–05–1 | Coke (petroleum), calcined |
| 64743–06–2 | Extracts (petroleum), gas oil solvent |
| 64743–07–3 | Sludges (petroleum), chemically neutralized |
| 64754–89–8 | Naphthenic acids (petroleum), crude |
| 64771–71–7 | Paraffins (petroleum), normal C>10 |
| 64771–72–8 | Paraffins (petroleum), normal C5-20 |
| 67254–74–4 | Naphthenic oils |

TABLE 1.—CAS REGISTRY NUMBERS OF PARTIALLY EXEMPT CHEMICAL SUBSTANCES TERMED "PETROLEUM PROCESS STREAMS" FOR PURPOSES OF INVENTORY UPDATE REPORTING—Continued

| CASRN | Product |
|---|---|
| 67674–12–8 | Residual oils (petroleum), oxidized, compounds with triethanolamine |
| 67674–13–9 | Petrolatum (petroleum), oxidized, partially deacidified |
| 67674–15–1 | Petrolatum (petroleum), oxidized, Me ester |
| 67674–16–2 | Hydrocarbon waxes (petroleum), oxidized, partially deacidified |
| 67674–17–3 | Distillates (petroleum), oxidized light, compounds with triethanolamine |
| 67674–18–4 | Distillates (petroleum), oxidized light, Bu esters |
| 67891–79–6 | Distillates (petroleum), heavy arom. |
| 67891–80–9 | Distillates (petroleum), light arom. |
| 67891–81–0 | Distillates (petroleum), oxidized light, potassium salts |
| 67891–82–1 | Hydrocarbon waxes (petroleum), oxidized, compounds with ethanolamine |
| 67891–83–2 | Hydrocarbon waxes (petroleum), oxidized, compounds with isopropanolamine |
| 67891–85–4 | Hydrocarbon waxes (petroleum), oxidized, compounds with triisopropanolamine |
| 67891–86–5 | Hydrocarbon waxes (petroleum), oxidized, compds. with diisopropanolamine |
| 68131–05–5 | Hydrocarbon oils, process blends |
| 68131–49–7 | Aromatic hydrocarbons, C6-10, acid-treated, neutralized |
| 68131–75–9 | Gases (petroleum), C3-4 |
| 68153–22–0 | Paraffin waxes and Hydrocarbon waxes, oxidized |
| 68187–57–5 | Pitch, coal tar-petroleum |
| 68187–58–6 | Pitch, petroleum, arom. |

TABLE 1.—CAS REGISTRY NUMBERS OF PARTIALLY EXEMPT CHEMICAL SUBSTANCES TERMED "PETROLEUM PROCESS STREAMS" FOR PURPOSES OF INVENTORY UPDATE REPORTING—Continued

| CASRN | Product |
|---|---|
| 68187–60–0 | Hydrocarbons, C4, ethane-propane-cracked |
| 68307–98–2 | Tail gas (petroleum), catalytic cracked distillate and catalytic cracked naphtha fractionation absorber |
| 68307–99–3 | Tail gas (petroleum), catalytic polymn. naphtha fractionation stabilizer |
| 68308–00–9 | Tail gas (petroleum), catalytic reformed naphtha fractionation stabilizer, hydrogen sulfide-free |
| 68308–01–0 | Tail gas (petroleum), cracked distillate hydrotreater stripper |
| 68308–02–1 | Tail gas (petroleum), distn., hydrogen sulfide-free |
| 68308–03–2 | Tail gas (petroleum), gas oil catalytic cracking absorber |
| 68308–04–3 | Tail gas (petroleum), gas recovery plant |
| 68308–05–4 | Tail gas (petroleum), gas recovery plant deethanizer |
| 68308–06–5 | Tail gas (petroleum), hydrodesulfurized distillate and hydrodesulfurized naphtha fractionator, acid-free |
| 68308–07–6 | Tail gas (petroleum), hydrodesulfurized vacuum gas oil stripper, hydrogen sulfide-free |
| 68308–08–7 | Tail gas (petroleum), isomerized naphtha fractionation stabilizer |
| 68308–09–8 | Tail gas (petroleum), light straight-run naphtha stabilizer, hydrogen sulfide-free |
| 68308–10–1 | Tail gas (petroleum), straight-run distillate hydrodesulfurizer, hydrogen sulfide-free |
| 68308–11–2 | Tail gas (petroleum), propane-propylene alkylation feed prep deethanizer |

TABLE 1.—CAS REGISTRY NUMBERS OF PARTIALLY EXEMPT CHEMICAL SUBSTANCES TERMED "PETROLEUM PROCESS STREAMS" FOR PURPOSES OF INVENTORY UPDATE REPORTING—Continued

| CASRN | Product |
|---|---|
| 68308–12–3 | Tail gas (petroleum), vacuum gas oil hydrodesulfurizer, hydrogen sulfide-free |
| 68308–27–0 | Fuel gases, refinery |
| 68333–22–2 | Residues (petroleum), atmospheric |
| 68333–23–3 | Naphtha (petroleum), heavy coker |
| 68333–24–4 | Hydrocarbon waxes (petroleum), oxidized, compds. with triethanolamine |
| 68333–25–5 | Distillates (petroleum), hydrodesulfurized light catalytic cracked |
| 68333–26–6 | Clarified oils (petroleum), hydrodesulfurized catalytic cracked |
| 68333–27–7 | Distillates (petroleum), hydrodesulfurized intermediate catalytic cracked |
| 68333–28–8 | Distillates (petroleum), hydrodesulfurized heavy catalytic cracked |
| 68333–29–9 | Residues (petroleum), light naphtha solvent extracts |
| 68333–30–2 | Distillates (petroleum), oxidized heavy thermal cracked |
| 68333–81–3 | Alkanes, C4-12 |
| 68333–88–0 | Aromatic hydrocarbons, C9-17 |
| 68334–30–5 | Fuels, diesel |
| 68409–99–4 | Gases (petroleum), catalytic cracked overheads |
| 68410–00–4 | Distillates (petroleum), crude oil |
| 68410–05–9 | Distillates (petroleum), straight-run light |

TABLE 1.—CAS REGISTRY NUMBERS OF PARTIALLY EXEMPT CHEMICAL SUBSTANCES TERMED "PETROLEUM PROCESS STREAMS" FOR PURPOSES OF INVENTORY UPDATE REPORTING—Continued

| CASRN | Product |
|---|---|
| 68410–12–8 | Distillates (petroleum), steam-cracked, C5-10 fraction, high-temp. stripping products with light steam-cracked petroleum naphtha C5 fraction polymers |
| 68410–71–9 | Raffinates (petroleum), catalytic reformer ethylene glycol-water countercurrent exts. |
| 68410–96–8 | Distillates (petroleum), hydrotreated middle, intermediate boiling |
| 68410–97–9 | Distillates (petroleum), light distillate hydrotreating process, low-boiling |
| 68410–98–0 | Distillates (petroleum), hydrotreated heavy naphtha, deisohexanizer overheads |
| 68411–00–7 | Alkenes, C>8 |
| 68425–29–6 | Distillates (petroleum), naphtha-raffinate pyrolyzate-derived, gasoline-blending |
| 68425–33–2 | Petrolatum (petroleum), oxidized, barium salt |
| 68425–34–3 | Petrolatum (petroleum), oxidized, calcium salt |
| 68425–35–4 | Raffinates (petroleum), reformer, Lurgi unit-sepd. |
| 68425–39–8 | Alkenes, C>10 .alpha.-, oxidized |
| 68441–09–8 | Hydrocarbon waxes (petroleum), clay-treated microcryst., contg. polyethylene, oxidized |
| 68459–78–9 | Alkenes, C18-24 .alpha.-, dimers |
| 68475–57–0 | Alkanes, C1-2 |
| 68475–58–1 | Alkanes, C2-3 |
| 68475–59–2 | Alkanes, C3-4 |
| 68475–60–5 | Alkanes, C4-5 |
| 68475–61–6 | Alkenes, C5, naphtha-raffinate pyrolyzate-derived |

TABLE 1.—CAS REGISTRY NUMBERS OF PARTIALLY EXEMPT CHEMICAL SUBSTANCES TERMED "PETROLEUM PROCESS STREAMS" FOR PURPOSES OF INVENTORY UPDATE REPORTING—Continued

| CASRN | Product |
|---|---|
| 68475–70–7 | Aromatic hydrocarbons, C6-8, naphtha-raffinate pyrolyzate-derived |
| 68475–79–6 | Distillates (petroleum), catalytic reformed depentanizer |
| 68475–80–9 | Distillates (petroleum), light steam-cracked naphtha |
| 68476–26–6 | Fuel gases |
| 68476–27–7 | Fuel gases, amine system residues |
| 68476–28–8 | Fuel gases, C6-8 catalytic reformer |
| 68476–29–9 | Fuel gases, crude oil distillates |
| 68476–30–2 | Fuel oil, no. 2 |
| 68476–31–3 | Fuel oil, no. 4 |
| 68476–32–4 | Fuel oil, residues-straight-run gas oils, high-sulfur |
| 68476–33–5 | Fuel oil, residual |
| 68476–34–6 | Fuels, diesel, no. 2 |
| 68476–39–1 | Hydrocarbons, aliph.-arom.-C4-5-olefinic |
| 68476–40–4 | Hydrocarbons, C3-4 |
| 68476–42–6 | Hydrocarbons, C4-5 |
| 68476–43–7 | Hydrocarbons, C4-6, C5-rich |
| 68476–44–8 | Hydrocarbons, C>3 |
| 68476–45–9 | Hydrocarbons, C5-10 arom. conc., ethylene-manuf.-by-product |
| 68476–46–0 | Hydrocarbons, C3-11, catalytic cracker distillates |
| 68476–47–1 | Hydrocarbons, C2-6, C6-8 catalytic reformer |
| 68476–49–3 | Hydrocarbons, C2-4, C3-rich |
| 68476–50–6 | Hydrocarbons, C≥5, C5-6-rich |
| 68476–52–8 | Hydrocarbons, C4, ethylene-manuf.-by-product |

TABLE 1.—CAS REGISTRY NUMBERS OF PARTIALLY EXEMPT CHEMICAL SUBSTANCES TERMED "PETROLEUM PROCESS STREAMS" FOR PURPOSES OF INVENTORY UPDATE REPORTING—Continued

| CASRN | Product |
|---|---|
| 68476–53–9 | Hydrocarbons, C≥20, petroleum wastes |
| 68476–54–0 | Hydrocarbons, C3-5, polymn. unit feed |
| 68476–55–1 | Hydrocarbons, C5-rich |
| 68476–56–2 | Hydrocarbons, cyclic C5 and C6 |
| 68476–77–7 | Lubricating oils, refined used |
| 68476–81–3 | Paraffin waxes and Hydrocarbon waxes, oxidized, calcium salts |
| 68476–84–6 | Petroleum products, gases, inorg. |
| 68476–85–7 | Petroleum gases, liquefied |
| 68476–86–8 | Petroleum gases, liquefied, sweetened |
| 68477–25–8 | Waste gases, vent gas, C1-6 |
| 68477–26–9 | Wastes, petroleum |
| 68477–29–2 | Distillates (petroleum), catalytic reformer fractionator residue, high-boiling |
| 68477–30–5 | Distillates (petroleum), catalytic reformer fractionator residue, intermediate-boiling |
| 68477–31–6 | Distillates (petroleum), catalytic reformer fractionator residue, low-boiling |
| 68477–33–8 | Gases (petroleum), C3-4, isobutane-rich |
| 68477–34–9 | Distillates (petroleum), C3-5, 2-methyl-2-butene-rich |
| 68477–35–0 | Distillates (petroleum), C3-6, piperylene-rich |
| 68477–36–1 | Distillates (petroleum), cracked steam-cracked, C5-18 fraction |
| 68477–38–3 | Distillates (petroleum), cracked steam-cracked petroleum distillates |

TABLE 1.—CAS REGISTRY NUMBERS OF PARTIALLY EXEMPT CHEMICAL SUBSTANCES TERMED "PETROLEUM PROCESS STREAMS" FOR PURPOSES OF INVENTORY UPDATE REPORTING—Continued

| CASRN | Product |
|---|---|
| 68477–39–4 | Distillates (petroleum), cracked stripped steam-cracked petroleum distillates, C8-10 fraction |
| 68477–40–7 | Distillates (petroleum), cracked stripped steam-cracked petroleum distillates, C10-12 fraction |
| 68477–41–8 | Gases (petroleum), extractive, C3-5, butadiene-butene-rich |
| 68477–42–9 | Gases (petroleum), extractive, C3-5, butene-isobutylene-rich |
| 68477–44–1 | Distillates (petroleum), heavy naphthenic, mixed with steam-cracked petroleum distillates C5-12 fraction |
| 68477–47–4 | Distillates (petroleum), mixed heavy olefin vacuum, heart-cut |
| 68477–48–5 | Distillates (petroleum), mixed heavy olefin vacuum, low-boiling |
| 68477–53–2 | Distillates (petroleum), steam-cracked, C5-12 fraction |
| 68477–54–3 | Distillates (petroleum), steam-cracked, C8-12 fraction |
| 68477–55–4 | Distillates (petroleum), steam-cracked, C5-10 fraction, mixed with light steam-cracked petroleum naphtha C5 fraction |
| 68477–58–7 | Distillates (petroleum), steam-cracked petroleum distillates, C5-18 fraction |
| 68477–59–8 | Distillates (petroleum), steam-cracked petroleum distillates cyclopentadiene conc. |
| 68477–60–1 | Extracts (petroleum), cold-acid |
| 68477–61–2 | Extracts (petroleum), cold-acid, C4-6 |
| 68477–62–3 | Extracts (petroleum), cold-acid, C3-5, butene-rich |
| 68477–63–4 | Extracts (petroleum), reformer recycle |

TABLE 1.—CAS REGISTRY NUMBERS OF PARTIALLY EXEMPT CHEMICAL SUBSTANCES TERMED "PETROLEUM PROCESS STREAMS" FOR PURPOSES OF INVENTORY UPDATE REPORTING—Continued

| CASRN | Product |
|---|---|
| 68477–64–5 | Gases (petroleum), acetylene manuf. off |
| 68477–65–6 | Gases (petroleum), amine system feed |
| 68477–66–7 | Gases (petroleum), benzene unit hydrodesulfurizer off |
| 68477–67–8 | Gases (petroleum), benzene unit recycle, hydrogen-rich |
| 68477–68–9 | Gases (petroleum), blend oil, hydrogen-nitrogen-rich |
| 68477–69–0 | Gases (petroleum), butane splitter overheads |
| 68477–70–3 | Gases (petroleum), C2-3 |
| 68477–71–4 | Gases (petroleum), catalytic-cracked gas oil depropanizer bottoms, C4-rich acid-free |
| 68477–72–5 | Gases (petroleum), catalytic-cracked naphtha debutanizer bottoms, C3-5-rich |
| 68477–73–6 | Gases (petroleum), catalytic cracked naphtha depropanizer overhead, C3-rich acid-free |
| 68477–74–7 | Gases (petroleum), catalytic cracker |
| 68477–75–8 | Gases (petroleum), catalytic cracker, C1-5-rich |
| 68477–76–9 | Gases (petroleum), catalytic polymd. naphtha stabilizer overhead, C2-4-rich |
| 68477–77–0 | Gases (petroleum), catalytic reformed naphtha stripper overheads |
| 68477–79–2 | Gases (petroleum), catalytic reformer, C1-4-rich |
| 68477–80–5 | Gases (petroleum), C6-8 catalytic reformer recycle |
| 68477–81–6 | Gases (petroleum), C6-8 catalytic reformer |
| 68477–82–7 | Gases (petroleum), C6-8 catalytic reformer recycle, hydrogen-rich |

TABLE 1.—CAS REGISTRY NUMBERS OF PARTIALLY EXEMPT CHEMICAL SUBSTANCES TERMED "PETROLEUM PROCESS STREAMS" FOR PURPOSES OF INVENTORY UPDATE REPORTING—Continued

| CASRN | Product |
|---|---|
| 68477–83–8 | Gases (petroleum), C3-5 olefinic-paraffinic alkylation feed |
| 68477–84–9 | Gases (petroleum), C2-return stream |
| 68477–85–0 | Gases (petroleum), C4-rich |
| 68477–86–1 | Gases (petroleum), deethanizer overheads |
| 68477–87–2 | Gases (petroleum), deisobutanizer tower overheads |
| 68477–88–3 | Gases (petroleum), deethanizer overheads, C3-rich |
| 68477–89–4 | Distillates (petroleum), depentanizer overheads |
| 68477–90–7 | Gases (petroleum), depropanizer dry, propene-rich |
| 68477–91–8 | Gases (petroleum), depropanizer overheads |
| 68477–92–9 | Gases (petroleum), dry sour, gas-concn.-unit-off |
| 68477–93–0 | Gases (petroleum), gas concn. reabsorber distn. |
| 68477–94–1 | Gases (petroleum), gas recovery plant depropanizer overheads |
| 68477–95–2 | Gases (petroleum), Girbatol unit feed |
| 68477–96–3 | Gases (petroleum), hydrogen absorber off |
| 68477–97–4 | Gases (petroleum), hydrogen-rich |
| 68477–98–5 | Gases (petroleum), hydrotreater blend oil recycle, hydrogen-nitrogen rich |
| 68477–99–6 | Gases (petroleum), isomerized naphtha fractionater, C4-rich, hydrogen sulfide- free |

TABLE 1.—CAS REGISTRY NUMBERS OF PARTIALLY EXEMPT CHEMICAL SUBSTANCES TERMED "PETROLEUM PROCESS STREAMS" FOR PURPOSES OF INVENTORY UPDATE REPORTING—Continued

| CASRN | Product |
|---|---|
| 68478–00–2 | Gases (petroleum), recycle, hydrogen-rich |
| 68478–01–3 | Gases (petroleum), reformer make-up, hydrogen-rich |
| 68478–02–4 | Gases (petroleum), reforming hydrotreater |
| 68478–03–5 | Gases (petroleum), reforming hydrotreater, hydrogen-methane-rich |
| 68478–04–6 | Gases (petroleum), reforming hydrotreater make-up, hydrogen-rich |
| 68478–05–7 | Gases (petroleum), thermal cracking distn. |
| 68478–08–0 | Naphtha (petroleum), light steam-cracked, C5-fraction, oligomer conc. |
| 68478–10–4 | Naphtha (petroleum), light steam-cracked, debenzenized, C8-16-cycloalkadiene conc. |
| 68478–12–6 | Residues (petroleum), butane splitter bottoms |
| 68478–13–7 | Residues (petroleum), catalytic reformer fractionator residue distn. |
| 68478–15–9 | Residues (petroleum), C6-8 catalytic reformer |
| 68478–16–0 | Residual oils (petroleum), deisobutanizer tower |
| 68478–17–1 | Residues (petroleum), heavy coker gas oil and vacuum gas oil |
| 68478–18–2 | Residues (petroleum), heavy olefin vacuum |
| 68478–19–3 | Residual oils (petroleum), propene purifn. splitter |
| 68478–20–6 | Residues (petroleum), steam-cracked petroleum distillates cyclopentadiene conc., C4-cyclopentadiene-free |
| 68478–22–8 | Tail gas (petroleum), catalytic cracked naphtha stabilization absorber |

TABLE 1.—CAS REGISTRY NUMBERS OF PARTIALLY EXEMPT CHEMICAL SUBSTANCES TERMED "PETROLEUM PROCESS STREAMS" FOR PURPOSES OF INVENTORY UPDATE REPORTING—Continued

| CASRN | Product |
|---|---|
| 68478–24–0 | Tail gas (petroleum), catalytic cracker, catalytic reformer and hydrodesulfurizer combined fractionater |
| 68478–25–1 | Tail gas (petroleum), catalytic cracker refractionation absorber |
| 68478–26–2 | Tail gas (petroleum), catalytic reformed naphtha fractionation stabilizer |
| 68478–27–3 | Tail gas (petroleum), catalytic reformed naphtha separator |
| 68478–28–4 | Tail gas (petroleum), catalytic reformed naphtha stabilizer |
| 68478–29–5 | Tail gas (petroleum), cracked distillate hydrotreater separator |
| 68478–30–8 | Tail gas (petroleum), hydrodesulfurized straight-run naphtha separator |
| 68478–31–9 | Tail gas (petroleum), isomerized naphtha fractionates, hydrogen sulfide-free |
| 68478–32–0 | Tail gas (petroleum), saturate gas plant mixed stream, C4-rich |
| 68478–33–1 | Tail gas (petroleum), saturate gas recovery plant, C1-2-rich |
| 68478–34–2 | Tail gas (petroleum), vacuum residues thermal cracker |
| 68512–61–8 | Residues (petroleum), heavy coker and light vacuum |
| 68512–62–9 | Residues (petroleum), light vacuum |
| 68512–78–7 | Solvent naphtha (petroleum), light arom., hydrotreated |
| 68512–91–4 | Hydrocarbons, C3-4-rich, petroleum distillates |
| 68513–02–0 | Naphtha (petroleum), full-range coker |
| 68513–03–1 | Naphtha (petroleum), light catalytic reformed, arom.-free |
| 68513–11–1 | Fuel gases, hydrotreater fractionation, scrubbed |
| 68513–12–2 | Fuel gases, saturate gas unit fractionater-absorber overheads |
| 68513–13–3 | Fuel gases, thermal cracked catalytic cracking residue |
| 68513–14–4 | Gases (petroleum), catalytic reformed straight-run naphtha stabilizer overheads |
| 68513–15–5 | Gases (petroleum), full-range straight-run naphtha dehexanizer off |
| 68513–16–6 | Gases (petroleum), hydrocracking depropanizer off, hydrocarbon-rich |
| 68513–17–7 | Gases (petroleum), light straight-run naphtha stabilizer off |
| 68513–18–8 | Gases (petroleum), reformer effluent high-pressure flash drum off |
| 68513–19–9 | Gases (petroleum), reformer effluent low-pressure flash drum off |
| 68513–62–2 | Disulfides, C5-12-alkyl |
| 68513–63–3 | Distillates (petroleum), catalytic reformed straight-run naphtha overheads |
| 68513–65–5 | Butane, branched and linear |
| 68513–66–6 | Residues (petroleum), alkylation splitter, C4-rich |
| 68513–67–7 | Residues (petroleum), cyclooctadiene bottoms |
| 68513–68–8 | Residues (petroleum), deethanizer tower |
| 68513–69–9 | Residues (petroleum), steam-cracked light |
| 68513–74–6 | Waste gases, ethylene oxide absorber-reactor |
| 68514–15–8 | Gasoline, vapor-recovery |
| 68514–29–4 | Hydrocarbons, amylene feed debutanizer overheads non-extractable raffinates |
| 68514–31–8 | Hydrocarbons, C1-4 |
| 68514–32–9 | Hydrocarbons, C10 and C12, olefin-rich |
| 68514–33–0 | Hydrocarbons, C12 and C14, olefin-rich |
| 68514–34–1 | Hydrocarbons, C9-14, ethylene-manuf.-by-product |
| 68514–35–2 | Hydrocarbons, C14-30, olefin-rich |
| 68514–36–3 | Hydrocarbons, C1-4, sweetened |
| 68514–37–4 | Hydrocarbons, C4-5-unsatd. |
| 68514–38–5 | Hydrocarbons, C4-10-unsatd. |
| 68514–39–6 | Naphtha (petroleum), light steam-cracked, isoprene-rich |
| 68514–79–4 | Petroleum products, hydrofiner-powerformer reformates |
| 68515–25–3 | Benzene, C1-9-alkyl derivs. |
| 68515–26–4 | Benzene, di-C12-14-alkyl derivs. |
| 68515–27–5 | Benzene, di-C10-14-alkyl derivs., fractionation overheads, heavy ends |
| 68515–28–6 | Benzene, di-C10-14-alkyl derivs., fractionation overheads, light ends |
| 68515–29–7 | Benzene, di-C10-14-alkyl derivs., fractionation overheads, middle cut |
| 68515–30–0 | Benzene, mono-C20-48-alkyl derivs. |
| 68515–32–2 | Benzene, mono-C12-14-alkyl derivs., fractionation bottoms |
| 68515–33–3 | Benzene, mono-C10-12-alkyl derivs., fractionation bottoms, heavy ends |
| 68515–34–4 | Benzene, mono-C12-14-alkyl derivs., fractionation bottoms, heavy ends |

TABLE 1.—CAS REGISTRY NUMBERS OF PARTIALLY EXEMPT CHEMICAL SUBSTANCES TERMED "PETROLEUM PROCESS STREAMS" FOR PURPOSES OF INVENTORY UPDATE REPORTING—Continued

| CASRN | Product |
|---|---|
| 68515–35–5 | Benzene, mono-C10-12-alkyl derivs., fractionation bottoms, light ends |
| 68515–36–6 | Benzene, mono-C12-14-alkyl derivs., fractionation bottoms, light ends |
| 68516–20–1 | Naphtha (petroleum), steam-cracked middle arom. |
| 68526–52–3 | Alkenes, C6 |
| 68526–53–4 | Alkenes, C6-8, C7-rich |
| 68526–54–5 | Alkenes, C7-9, C8-rich |
| 68526–55–6 | Alkenes, C8-10, C9-rich |
| 68526–56–7 | Alkenes, C9-11, C10-rich |
| 68526–57–8 | Alkenes, C10-12, C11-rich |
| 68526–58–9 | Alkenes, C11-13, C12-rich |
| 68526–77–2 | Aromatic hydrocarbons, ethane cracking scrubber effluent and flare drum |
| 68526–99–8 | Alkenes, C6-9 .alpha.- |
| 68527–00–4 | Alkenes, C8-9 .alpha.- |
| 68527–11–7 | Alkenes, C5 |
| 68527–13–9 | Gases (petroleum), acid, ethanolamine scrubber |
| 68527–14–0 | Gases (petroleum), methane-rich off |
| 68527–15–1 | Gases (petroleum), oil refinery gas distn. off |
| 68527–16–2 | Hydrocarbons, C1-3 |
| 68527–18–4 | Gas oils (petroleum), steam-cracked |
| 68527–19–5 | Hydrocarbons, C1-4, debutanizer fraction |
| 68527–21–9 | Naphtha (petroleum), clay-treated full-range straight-run |
| 68527–22–0 | Naphtha (petroleum), clay-treated light straight-run |
| 68527–23–1 | Naphtha (petroleum), light steam-cracked arom. |
| 68527–26–4 | Naphtha (petroleum), light steam-cracked, debenzenized |
| 68527–27–5 | Naphtha (petroleum), full-range alkylate, butane-contg. |
| 68553–00–4 | Fuel oil, no. 6 |
| 68553–14–0 | Hydrocarbons, C8-11 |
| 68602–79–9 | Distillates (petroleum), benzene unit hydrotreater dipentanizer overheads |
| 68602–81–3 | Distillates, hydrocarbon resin prodn. higher boiling |
| 68602–82–4 | Gases (petroleum), benzene unit hydrotreater depentenizer overheads |
| 68602–83–5 | Gases (petroleum), C1-5, wet |
| 68602–84–6 | Gases (petroleum), secondary absorber off, fluidized catalytic cracker overheads fractionater |
| 68602–96–0 | Distillates (petroleum), oxidized light, strong acid components, compds. with diethanolamine |
| 68602–97–1 | Distillates (petroleum), oxidized light, strong acid components, sodium salts |
| 68602–98–2 | Distillates (petroleum), oxidized light, strong acid components |
| 68602–99–3 | Distillates (petroleum), oxidized light, strong acid-free |
| 68603–00–9 | Distillates (petroleum), thermal cracked naphtha and gas oil |
| 68603–01–0 | Distillates (petroleum), thermal cracked naphtha and gas oil, C5-dimer-contg. |
| 68603–02–1 | Distillates (petroleum), thermal cracked naphtha and gas oil, dimerized |
| 68603–03–2 | Distillates (petroleum), thermal cracked naphtha and gas oil, extractive |
| 68603–08–7 | Naphtha (petroleum), arom.-contg. |
| 68603–09–8 | Hydrocarbon waxes (petroleum), oxidized, calcium salts |
| 68603–10–1 | Hydrocarbon waxes (petroleum), oxidized, Me esters, barium salts |
| 68603–11–2 | Hydrocarbon waxes (petroleum), oxidized, Me esters, calcium salts |
| 68603–12–3 | Hydrocarbon waxes (petroleum), oxidized, Me esters, sodium salts |
| 68603–13–4 | Petrolatum (petroleum), oxidized, ester with sorbitol |
| 68603–14–5 | Residual oils (petroleum), oxidized, calcium salts |
| 68603–31–6 | Alkenes, C10, tert-amylene concentrator by-product |
| 68603–32–7 | Alkenes, C15-20 .alpha.-, isomerized |
| 68606–09–7 | Fuel gases, expander off |
| 68606–10–0 | Gasoline, pyrolysis, debutanizer bottoms |
| 68606–11–1 | Gasoline, straight-run, topping-plant |
| 68606–24–6 | Hydrocarbons, C4, butene concentrator by-product |
| 68606–25–7 | Hydrocarbons, C2-4 |
| 68606–26–8 | Hydrocarbons, C3 |
| 68606–27–9 | Gases (petroleum), alkylation feed |
| 68606–28–0 | Hydrocarbons, C5 and C10-aliph. and C6-8-arom. |
| 68606–31–5 | Hydrocarbons, C3-5, butadiene purifn. by-product |
| 68606–34–8 | Gases (petroleum), depropanizer bottoms fractionation off |
| 68606–36–0 | Hydrocarbons, C5-unsatd. rich, isoprene purifn. by-product |

TABLE 1.—CAS REGISTRY NUMBERS OF PARTIALLY EXEMPT CHEMICAL SUBSTANCES TERMED "PETROLEUM PROCESS STREAMS" FOR PURPOSES OF INVENTORY UPDATE REPORTING—Continued

| CASRN | Product |
|---|---|
| 68607–11–4 | Petroleum products, refinery gases |
| 68607–30–7 | Residues (petroleum), topping plant, low-sulfur |
| 68608–56–0 | Waste gases, from carbon black manuf. |
| 68647–60–9 | Hydrocarbons, C>4 |
| 68647–61–0 | Hydrocarbons, C4-5, tert-amylene concentrator by-product |
| 68647–62–1 | Hydrocarbons, C4-5, butene concentrator by-product, sour |
| 68650–36–2 | Aromatic hydrocarbons, C8, o -xylene-lean |
| 68650–37–3 | Paraffin waxes (petroleum), oxidized, sodium salts |
| 68782–97–8 | Distillates (petroleum), hydrofined lubricating-oil |
| 68782–98–9 | Extracts (petroleum), clarified oil solvent, condensed-ring-arom.-contg. |
| 68782–99–0 | Extracts (petroleum), heavy clarified oil solvent, condensed-ring-arom.-contg. |
| 68783–00–6 | Extracts (petroleum), heavy naphthenic distillate solvent, arom. conc. |
| 68783–01–7 | Extracts (petroleum), heavy naphthenic distillate solvent, paraffinic conc. |
| 68783–02–8 | Extracts (petroleum), intermediate clarified oil solvent, condensed-ring-arom.-contg. |
| 68783–04–0 | Extracts (petroleum), solvent-refined heavy paraffinic distillate solvent |
| 68783–05–1 | Gases (petroleum), ammonia-hydrogen sulfide, water-satd. |
| 68783–06–2 | Gases (petroleum), hydrocracking low-pressure separator |

TABLE 1.—CAS REGISTRY NUMBERS OF PARTIALLY EXEMPT CHEMICAL SUBSTANCES TERMED "PETROLEUM PROCESS STREAMS" FOR PURPOSES OF INVENTORY UPDATE REPORTING—Continued

| CASRN | Product |
|---|---|
| 68783–07–3 | Gases (petroleum), refinery blend |
| 68783–08–4 | Gas oils (petroleum), heavy atmospheric |
| 68783–09–5 | Naphtha (petroleum), catalytic cracked light distd. |
| 68783–12–0 | Naphtha (petroleum), unsweetened |
| 68783–13–1 | Residues (petroleum), coker scrubber, condensed-ring-arom.-contg. |
| 68783–15–3 | Alkenes, C6-7 .alpha.- |
| 68783–61–9 | Fuel gases, refinery, sweetened |
| 68783–62–0 | Fuel gases, refinery, unsweetened |
| 68783–64–2 | Gases (petroleum), catalytic cracking |
| 68783–65–3 | Gases (petroleum), C2-4, sweetened |
| 68783–66–4 | Naphtha (petroleum), light, sweetened |
| 68814–47–1 | Waste gases, refinery vent |
| 68814–67–5 | Gases (petroleum), refinery |
| 68814–87–9 | Distillates (petroleum), full-range straight-run middle |
| 68814–89–1 | Extracts (petroleum), heavy paraffinic distillates, solvent-deasphalted |
| 68814–90–4 | Gases (petroleum), platformer products separator off |
| 68814–91–5 | Alkenes, C5-9 .alpha.- |
| 68855–57–2 | Alkenes, C6-12 .alpha.- |
| 68855–58–3 | Alkenes, C10-16 .alpha.- |
| 68855–59–4 | Alkenes, C14-18 .alpha.- |
| 68855–60–7 | Alkenes, C14-20 .alpha.- |

TABLE 1.—CAS REGISTRY NUMBERS OF PARTIALLY EXEMPT CHEMICAL SUBSTANCES TERMED "PETROLEUM PROCESS STREAMS" FOR PURPOSES OF INVENTORY UPDATE REPORTING—Continued

| CASRN | Product |
|---|---|
| 68911–58–0 | Gases (petroleum), hydrotreated sour kerosine depentanizer stabilizer off |
| 68911–59–1 | Gases (petroleum), hydrotreated sour kerosine flash drum |
| 68915–96–8 | Distillates (petroleum), heavy straight-run |
| 68915–97–9 | Gas oils (petroleum), straight-run, high-boiling |
| 68918–69–4 | Petrolatum (petroleum), oxidized, zinc salt |
| 68918–73–0 | Residues (petroleum), clay-treating filter wash |
| 68918–93–4 | Paraffin waxes and Hydrocarbon waxes, oxidized, alkali metal salts |
| 68918–98–9 | Fuel gases, refinery, hydrogen sulfide-free |
| 68918–99–0 | Gases (petroleum), crude oil fractionation off |
| 68919–00–6 | Gases (petroleum), dehexanizer off |
| 68919–01–7 | Gases (petroleum), distillate unifiner desulfurization stripper off |
| 68919–02–8 | Gases (petroleum), fluidized catalytic cracker fractionation off |
| 68919–03–9 | Gases (petroleum), fluidized catalytic cracker scrubbing secondary absorber off |
| 68919–04–0 | Gases (petroleum), heavy distillate hydrotreater desulfurization stripper off |
| 68919–05–1 | Gases (petroleum), light straight run gasoline fractionation stabilizer off |
| 68919–06–2 | Gases (petroleum), naphtha unifiner desulfurization stripper off |
| 68919–07–3 | Gases (petroleum), platformer stabilizer off, light ends fractionation |
| 68919–08–4 | Gases (petroleum), preflash tower off, crude distn. |

TABLE 1.—CAS REGISTRY NUMBERS OF PARTIALLY EXEMPT CHEMICAL SUBSTANCES TERMED "PETROLEUM PROCESS STREAMS" FOR PURPOSES OF INVENTORY UPDATE REPORTING—Continued

| CASRN | Product |
|---|---|
| 68919–09–5 | Gases (petroleum), straight-run naphtha catalytic reforming off |
| 68919–10–8 | Gases (petroleum), straight-run stabilizer off |
| 68919–11–9 | Gases (petroleum), tar stripper off |
| 68919–12–0 | Gases (petroleum), unifiner stripper off |
| 68919–15–3 | Hydrocarbons, C6-12, benzene-recovery |
| 68919–16–4 | Hydrocarbons, catalytic alkylation, by-products, C3-6 |
| 68919–17–5 | Hydrocarbons, C12-20, catalytic alkylation by-products |
| 68919–19–7 | Gases (petroleum), fluidized catalytic cracker splitter residues |
| 68919–20–0 | Gases (petroleum), fluidized catalytic cracker splitter overheads |
| 68919–37–9 | Naphtha (petroleum), full-range reformed |
| 68920–06–9 | Hydrocarbons, C7-9 |
| 68920–07–0 | Hydrocarbons, C<10-linear |
| 68920–64–9 | Disulfides, di-C1-2-alkyl |
| 68921–07–3 | Distillates (petroleum), hydrotreated light catalytic cracked |
| 68921–08–4 | Distillates (petroleum), light straight-run gasoline fractionation stabilizer overheads |
| 68921–09–5 | Distillates (petroleum), naphtha unifiner stripper |
| 68921–67–5 | Hydrocarbons, ethylene-manuf.-by-product distn. residues |
| 68952–76–1 | Gases (petroleum), catalytic cracked naphtha debutanizer |
| 68952–77–2 | Tail gas (petroleum), catalytic cracked distillate and naphtha stabilizer |

TABLE 1.—CAS REGISTRY NUMBERS OF PARTIALLY EXEMPT CHEMICAL SUBSTANCES TERMED "PETROLEUM PROCESS STREAMS" FOR PURPOSES OF INVENTORY UPDATE REPORTING—Continued

| CASRN | Product |
|---|---|
| 68952–78–3 | Tail gas (petroleum), catalytic hydrodesulfurized distillate fractionation stabilizer, hydrogen sulfide-free |
| 68952–79–4 | Tail gas (petroleum), catalytic hydrodesulfurized naphtha separator |
| 68952–80–7 | Tail gas (petroleum), straight-run naphtha hydrodesulfurizer |
| 68952–81–8 | Tail gas (petroleum), thermal-cracked distillate, gas oil and naphtha absorber |
| 68952–82–9 | Tail gas (petroleum), thermal cracked hydrocarbon fractionation stabilizer, petroleum coking |
| 68953–80–0 | Benzene, mixed with toluene, dealkylation product |
| 68955–27–1 | Distillates (petroleum), petroleum residues vacuum |
| 68955–28–2 | Gases (petroleum), light steam-cracked, butadiene conc. |
| 68955–31–7 | Gases (petroleum), butadiene process, inorg. |
| 68955–32–8 | Natural gas, substitute, steam-reformed desulfurized naphtha |
| 68955–33–9 | Gases (petroleum), sponge absorber off, fluidized catalytic cracker and gas oil desulfurizer overhead fractionation |
| 68955–34–0 | Gases (petroleum), straight-run naphtha catalytic reformer stabilizer overhead |
| 68955–35–1 | Naphtha (petroleum), catalytic reformed |
| 68955–36–2 | Residues (petroleum), steam-cracked, resinous |
| 68955–76–0 | Aromatic hydrocarbons, C9-16, biphenyl deriv.-rich |
| 68955–96–4 | Disulfides, dialkyl and di-Ph, naphtha sweetening |
| 68956–47–8 | Fuel oil, isoprene reject absorption |

TABLE 1.—CAS REGISTRY NUMBERS OF PARTIALLY EXEMPT CHEMICAL SUBSTANCES TERMED "PETROLEUM PROCESS STREAMS" FOR PURPOSES OF INVENTORY UPDATE REPORTING—Continued

| CASRN | Product |
|---|---|
| 68956–48–9 | Fuel oil, residual, wastewater skimmings |
| 68956–52–5 | Hydrocarbons, C4-8 |
| 68956–54–7 | Hydrocarbons, C4-unsatd. |
| 68956–55–8 | Hydrocarbons, C5-unsatd. |
| 68956–70–7 | Petroleum products, C5-12, reclaimed, wastewater treatment |
| 68988–79–4 | Benzene, C10-12-alkyl derivs., distn. residues |
| 68988–99–8 | Phenols, sodium salts, mixed with sulfur compounds, gasoline alk. scrubber residues |
| 68989–88–8 | Gases (petroleum), crude distn. and catalytic cracking |
| 68990–35–2 | Distillates (petroleum), arom., hydrotreated, dicyclopentadiene-rich |
| 68991–49–1 | Alkanes, C10-13, arom.-free desulfurized |
| 68991–50–4 | Alkanes, C14-17, arom.-free desulfurized |
| 68991–51–5 | Alkanes, C10-13, desulfurized |
| 68991–52–6 | Alkenes, C10-16 |
| 69013–21–4 | Fuel oil, pyrolysis |
| 69029–75–0 | Oils, reclaimed |
| 69430–33–7 | Hydrocarbons, C6-30 |
| 70024–88–3 | Ethene, thermal cracking products |
| 70528–71–1 | Distillates (petroleum), heavy distillate solvent ext. heart-cut |
| 70528–72–2 | Distillates (petroleum), heavy distillate solvent ext. vacuum overheads |
| 70528–73–3 | Residues (petroleum), heavy distillate solvent ext. vacuum |

TABLE 1.—CAS REGISTRY NUMBERS OF PARTIALLY EXEMPT CHEMICAL SUBSTANCES TERMED "PETROLEUM PROCESS STREAMS" FOR PURPOSES OF INVENTORY UPDATE REPORTING—Continued

| CASRN | Product |
|---|---|
| 70592–76–6 | Distillates (petroleum), intermediate vacuum |
| 70592–77–7 | Distillates (petroleum), light vacuum |
| 70592–78–8 | Distillates (petroleum), vacuum |
| 70592–79–9 | Residues (petroleum), atm. tower, light |
| 70693–00–4 | Hydrocarbon waxes (petroleum), oxidized, sodium salts |
| 70693–06–0 | Aromatic hydrocarbons, C9-11 |
| 70913–85–8 | Residues (petroleum), solvent-extd. vacuum distilled atm. residuum |
| 70913–86–9 | Alkanes, C18-70 |
| 70955–08–7 | Alkanes, C4-6 |
| 70955–09–8 | Alkenes, C13-14 .alpha.- |
| 70955–10–1 | Alkenes, C15-18 .alpha.- |
| 70955–17–8 | Aromatic hydrocarbons, C12-20 |
| 71243–66–8 | Hydrocarbon waxes (petroleum), clay-treated, microcryst., oxidized, potassium salts |
| 71302–82–4 | Hydrocarbons, C5-8, Houdry butadiene manuf. by-product |
| 71329–37–8 | Residues (petroleum), catalytic cracking depropanizer, C4-rich |
| 71808–30–5 | Tail gas (petroleum), thermal cracking absorber |
| 72230–71–8 | Distillates (petroleum), cracked steam-cracked, C5-17 fraction |
| 72623–83–7 | Lubricating oils (petroleum), C>25, hydrotreated bright stock-based |
| 72623–84–8 | Lubricating oils (petroleum), C15-30, hydrotreated neutral oil-based, contg. solvent deasphalted residual oil |
| 72623–85–9 | Lubricating oils (petroleum), C20-50, hydrotreated neutral oil-based, high-viscosity |
| 72623–86–0 | Lubricating oils (petroleum), C15-30, hydrotreated neutral oil-based |
| 72623–87–1 | Lubricating oils (petroleum), C20-50, hydrotreated neutral oil-based |
| 73138–65–5 | Hydrocarbon waxes (petroleum), oxidized, magnesium salts |
| 92045–43–7 | Lubricating oils (petroleum), hydrocracked non-arom. solvent deparaffined |
| 92045–58–4 | Naphtha (petroleum), isomerization, C6-fraction |
| 92062–09–4 | Slack wax (petroleum), hydrotreated |
| 93762–80–2 | Alkenes, C15-18 |
| 98859–55–3 | Distillates (petroleum), oxidized heavy, compds. with diethanolamine |
| 98859–56–4 | Distillates (petroleum), oxidized heavy, sodium salts |
| 101316–73–8 | Lubricating oils (petroleum), used, non-catalytically refined |
| 164907–78–2 | Extracts (petroleum), asphaltene-low vacuum residue solvent |
| 164907–79–3 | Residues (petroleum), vacuum, asphaltene-low |
| 178603–63–9 | Gas oils (petroleum), vacuum, hydrocracked, hydroisomerized, hydrogenated, C10-25 |
| 178603–64–0 | Gas oils (petroleum), vacuum, hydrocracked, hydroisomerized, hydrogenated, C15-30, branched and cyclic |
| 178603–65–1 | Gas oils (petroleum), vacuum, hydrocracked, hydroisomerized, hydrogenated, C20-40, branched and cyclic |
| 178603–66–2 | Gas oils (petroleum), vacuum, hydrocracked, hydroisomerized, hydrogenated, C25-55, branched and cyclic |
| 212210–93–0 | Solvent naphtha (petroleum), heavy arom., distn. residues |
| 221120–39–4 | Distillates (petroleum), cracked steam-cracked, C5-12 fraction |
| 445411–73–4 | Gas oils (petroleum), vacuum, hydrocracked, hydroisomerized, hydrogenated, C10-25, branched and cyclic |

(2) *Specific exempted chemical substances*—(i) *Exemption.* EPA has determined that, at this time, the information in § 711.15(b)(4) associated with the chemical substances listed in paragraph (b)(2)(iv) of this section is of low current interest.

(ii) *Considerations.* In making its determination of whether this partial exemption should apply to a particular chemical substance, EPA will consider the totality of information available for the chemical substance in question, including but not limited to, one or more of the following considerations:

(A) Whether the chemical substance qualifies or has qualified in past IUR collections for the reporting of the information described in § 711.15(b)(4) (i.e., at least one site manufactures 300,000 pounds (lb.) or more of the chemical substance).

(B) The chemical substance's chemical and physical properties or potential for persistence, bioaccumulation, health effects, or environmental effects (considered independently or together).

(C) The information needs of EPA, other Federal agencies, tribes, States, and local governments, as well as members of the public.

(D) The availability of other complementary risk screening information.

(E) The availability of comparable processing and use information.

(F) Whether the potential risks of the chemical substance are adequately managed.

(iii) *Amendments.* EPA may amend the chemical substance list in paragraph (b)(2)(iv) of this section on its own initiative or in response to a request from the public based on EPA's determination of whether the information in § 711.15(b)(4) is of low interest.

(A) Any person may request that EPA amend the chemical substance list in Table 2 in paragraph (b)(2)(iv) of this section. Your request must be in writing and must be submitted to the following address: OPPT IUR Submission Coordinator (Mail Code 7407M), Attention: Inventory Update Reporting, Office of Pollution Prevention and Toxics, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001. Requests must identify the chemical substance in question, as well as its CASRN or other chemical identification number as identified in § 711.15(b)(3)(i), and must contain a written rationale for the request that provides sufficient specific information, addressing the considerations listed in § 711.6(b)(2)(ii), including cites and relevant documents, to demonstrate to EPA that the collection of the information in § 711.15(b)(4) for the chemical substance in question either is or is not of low current interest. If a request related to a particular chemical substance is resubmitted, any subsequent request must clearly identify new information contained in the request. EPA may request other information that it believes necessary to evaluate the request. EPA will issue a written response to each request within 120 days of receipt of the request, and will maintain copies of these responses in a docket that will be established for each reporting cycle.

(B) As needed, the Agency will initiate rulemaking to make revisions to Table 2 in paragraph (b)(2)(iv) of this section.

(C) To assist EPA in reaching a decision regarding a particular request prior to a given principal reporting year, requests must be submitted to EPA no later than 12 months prior to the start of the next principal reporting year.

(iv) *List of chemical substances.* EPA has designated the chemical substances listed in Table 2 of this paragraph by CASRN, as partially exempt from reporting under the IUR.

TABLE 2.—CASRN OF PARTIALLY EXEMPT CHEMICAL SUBSTANCES

| CASRN | Chemical |
|---|---|
| 50–70–4 | D-Glucitol |
| 50–81–7 | L-Ascorbic acid |
| 50–99–7 | D-Glucose |
| 56–81–5 | 1,2,3-Propanetriol |
| 56–87–1 | L-Lysine |
| 57–50–1 | .alpha.-D-Glucopyranoside, .beta.-D-fructofuranosyl |
| 58–95–7 | 2H-1-Benzopyran-6-ol, 3,4-dihydro-2,5,7,8-tetramethyl-2-[(4R,8R)-4,8,12-trimethyltridecyl]-, acetate, (2R)- |
| 59–02–9 | 2H-1-Benzopyran-6-ol, 3,4-dihydro-2,5,7,8-tetramethyl-2-[(4R,8R)-4,8,12-trimethyltridecyl]-, (2R)- |
| 59–51–8 | Methionine |
| 69–65–8 | D-Mannitol |
| 87–79–6 | L-Sorbose |
| 87–99–0 | Xylitol |
| 96–10–6 | Aluminum, chlorodiethyl- |
| 97–93–8 | Aluminum, triethyl- |
| 100–99–2 | Aluminum, tris(2-methylpropyl)- |
| 123–94–4 | Octadecanoic acid, 2,3-dihydroxypropyl ester |
| 124–38–9 | Carbon dioxide |
| 137–08–6 | .beta.-Alanine, N-[(2R)-2,4-dihydroxy-3,3-dimethyl-1-oxobutyl]-, calcium alt (2:1) |
| 142–47–2 | L-Glutamic acid, monosodium salt |
| 150–30–1 | Phenylalanine |
| 563–43–9 | Aluminum, dichloroethyl- |
| 1070–00–4 | Aluminum, trioctyl- |
| 1116–70–7 | Aluminum, tributyl- |
| 1116–73–0 | Aluminum, trihexyl- |
| 1191–15–7 | Aluminum, hydrobis(2-methylpropyl)- |
| 1317–65–3 | Limestone |
| 1333–74–0 | Hydrogen |

TABLE 2.—CASRN OF PARTIALLY EXEMPT CHEMICAL SUBSTANCES—Continued

| CASRN | Chemical |
|---|---|
| 1592–23–0 | Octadecanoic acid, calcium salt |
| 7440–37–1 | Argon |
| 7440–44–0 | Carbon |
| 7727–37–9 | Nitrogen |
| 7782–42–5 | Graphite |
| 7782–44–7 | Oxygen |
| 8001–21–6 | Sunflower oil |
| 8001–22–7 | Soybean oil |
| 8001–23–8 | Safflower oil |
| 8001–26–1 | Linseed oil |
| 8001–29–4 | Cottonseed oil |
| 8001–30–7 | Corn oil |
| 8001–31–8 | Coconut oil |
| 8001–78–3 | Castor oil, hydrogenated |
| 8001–79–4 | Castor oil |
| 8002–03–7 | Peanut oil |
| 8002–13–9 | Rape oil |
| 8002–43–5 | Lecithins |
| 8002–75–3 | Palm oil |
| 8006–54–0 | Lanolin |
| 8016–28–2 | Lard, oil |
| 8016–70–4 | Soybean oil, hydrogenated |
| 8021–99–6 | Charcoal, bone |
| 8029–43–4 | Syrups, hydrolyzed starch |
| 11103–57–4 | Vitamin A |
| 12075–68–2 | Aluminum, di-.mu.-chlorochlorotriethyldi- |
| 12542–85–7 | Aluminum, trichlorotrimethyldi- |
| 16291–96–6 | Charcoal |
| 26836–47–5 | D-Glucitol, monooctadecanoate |
| 61789–44–4 | Fatty acids, castor-oil |
| 61789–97–7 | Tallow |

TABLE 2.—CASRN OF PARTIALLY EXEMPT CHEMICAL SUBSTANCES—Continued

| CASRN | Chemical |
|---|---|
| 61789–99–9 | Lard |
| 64147–40–6 | Castor oil, dehydrated |
| 64755–01–7 | Fatty acids, tallow, calcium salts |
| 65996–63–6 | Starch, acid-hydrolyzed |
| 65996–64–7 | Starch, enzyme-hydrolyzed |
| 67701–01–3 | Fatty acids, C12-18 |
| 68002–85–7 | Fatty acids, C14-22 and C16-22-unsatd. |
| 68131–37–3 | Syrups, hydrolyzed starch, dehydrated |
| 68188–81–8 | Grease, poultry |
| 68308–36–1 | Soybean meal |
| 68308–54–3 | Glycerides, tallow mono-, di- and tri-, hydrogenated |
| 68334–00–9 | Cottonseed oil, hydrogenated |
| 68334–28–1 | Fats and glyceridic oils, vegetable, hydrogenated |
| 68409–76–7 | Bone meal, steamed |
| 68424–45–3 | Fatty acids, linseed-oil |
| 68424–61–3 | Glycerides, C16-18 and C18-unsatd. mono- and di- |
| 68425–17–2 | Syrups, hydrolyzed starch, hydrogenated |
| 68439–86–1 | Bone, ash |
| 68442–69–3 | Benzene, mono-C10-14-alkyl derivs. |
| 68476–78–8 | Molasses |
| 68514–27–2 | Grease, catch basin |
| 68514–74–9 | Palm oil, hydrogenated |
| 68525–87–1 | Corn oil, hydrogenated |
| 68648–87–3 | Benzene, C10-16-alkyl derivs. |
| 68918–42–3 | Soaps, stocks, soya |
| 68952–94–3 | Soaps, stocks, vegetable-oil |
| 68956–68–3 | Fats and glyceridic oils, vegetable |

TABLE 2.—CASRN OF PARTIALLY EXEMPT CHEMICAL SUBSTANCES—Continued

| CASRN | Chemical |
|---|---|
| 68989–98–0 | Fats and glyceridic oils, vegetable, residues |
| 73138–67–7 | Lard, hydrogenated |
| 120962–03–0 | Canola oil |
| 129813–58–7 | Benzene, mono-C10-13-alkyl derivs. |
| 129813–59–8 | Benzene, mono-C12-14-alkyl derivs. |
| 129813–60–1 | Benzene, mono-C14-16-alkyl derivs. |

**§ 711.8 Persons who must report.**

Except as provided in § 711.9 and § 711.10, the following persons are subject to the requirements of this part. Persons must determine whether they must report under this section for each chemical substance that they manufacture (including import) at an individual site.

(a) *Persons subject to recurring reporting*—(1) For the 2011 submission period, any person who manufactured (including imported) for commercial purposes 25,000 lb. (11,340 kilogram (kg)) or more of a chemical substance described in § 711.5 at any single site owned or controlled by that person at any time during the principal reporting year (i.e., calendar year 2010) is subject to reporting.

(2) For the submission periods subsequent to the 2011 submission period, any person who manufactured (including imported) for commercial purposes 25,000 lb. (11,340 kg) or more of a chemical substance described in § 711.5 at any single site owned or controlled by that person at any time during any calendar year since the last principal reporting year (e.g., for the 2015 submission period, consider calendar years 2011, 2012, 2013, and 2014, given that 2010 was the last principal reporting year).

(b) *Exceptions.* Any person who manufactured (including imported) for commercial purposes any chemical substance that is the subject of a rule promulgated under TSCA section 5(a)(2), 5(b)(4), or 6, or is the subject of an order in effect under TSCA section 5(e), or is the subject of relief that has been granted under a civil action under TSCA section 5 or 7 is subject to reporting for that chemical substance, regardless of the production volume.

**§ 711.9 Persons not subject to this part.**

A person described in § 711.8 is not subject to the requirements of this part if that person qualifies as a small manufacturer as that term is defined in 40 CFR 704.3. Notwithstanding this exclusion, a person who qualifies as a small manufacturer is subject to this part with respect to any chemical substance that is the subject of a rule proposed or promulgated under TSCA section 4, 5(b)(4), or 6, or is the subject of an order in effect under TSCA section 5(e), or is the subject of relief that has been granted under a civil action under TSCA section 5 or 7.

**§ 711.10 Activities for which reporting is not required.**

A person described in § 711.8 is not subject to the requirements of this part with respect to any chemical substance described in § 711.5 that the person solely manufactured or imported under the following circumstances:

(a) The person manufactured or imported the chemical substance described in § 711.5 solely in small quantities for research and development.

(b) The person imported the chemical substance described in § 711.5 as part of an article.

(c) The person manufactured the chemical substance described in § 711.5 in a manner described in 40 CFR 720.30(g) or (h).

**§ 711.15 Reporting information to EPA.**

For the 2011 submission period, any person who must report under this part, as described in § 711.8, must submit the information described in this section for each chemical substance described in § 711.5 that the person manufactured (including imported) for commercial purposes in an amount of 25,000 lb. (11,340 kg) or more (or lower volume for chemical substances subject to the rules, orders, or actions described in § 711.8(b)) during the principal reporting year (i.e., calendar year 2010). For the submission periods subsequent to the 2011 submission period, any person who must report under this part, as described in § 711.8(b), must submit the information described in this section for each chemical substance described in § 711.5 that the person manufactured (including imported) for commercial purposes in an amount of 25,000 lb. (11,340 kg) or more (or lower volume for chemical substances subject to the rules, orders, or actions described in § 711.8(b)) at any one site during any calendar year since the last principal

reporting year (e.g., for the 2015 submission period, consider calendar years 2011, 2012, 2013, and 2014, since 2010 was the last principal reporting year). The principal reporting year for each submission period is the previous calendar year (e.g., the principal reporting year for the 2015 submission period is calendar year 2014). For all submission periods, a separate report must be submitted for each chemical substance at each site for which the submitter is required to report. A submitter of information under this part must report information as described in this section to the extent that such information is known to or reasonably ascertainable by that person.

(a) *Reporting information to EPA.* Any person who reports information to EPA must do so using the e-IURweb reporting software provided by EPA at the address set forth in § 711.35. The submission must include all information described in paragraph (b) of this section. Persons must submit a separate Form U for each site for which the person is required to report. The e-IURweb reporting software is described in the instructions available from EPA at the website set forth in § 711.35.

(b) *Information to be reported.* Manufacturers (including importers) of a reportable chemical substance in an amount of 25,000 lb. (11,340 kg) or more at a site during any calendar year since the last principal reporting year must report the information described in this section. As described in § 711.6(b)(1) and (b)(2), manufacturers of certain chemical substances are not required to report the information described in paragraph (b)(4) of this section.

(1) *A certification statement signed and dated by an authorized official of the submitter company.* Persons reporting must submit this information using e-IURweb as described in § 711.35. The authorized official must certify that the submitted information has been completed in compliance with the requirements of this part and that the confidentiality claims made on the Form U are true and correct. The certification must be signed and dated by the authorized official for the submitter company, and provide that person's name, official title, and e-mail address.

(2) *Company and plant site information.* The following currently correct company and plant site information must be reported for each site at which at least 25,000 lb. (11,340 kg) of a reportable chemical substance is manufactured (including imported) during any calendar year since the last principal reporting year (see § 711.3 for the "site" for importers):

(i) The parent company name, address, and Dun and Bradstreet Number. A submitter under this part must obtain a Dun and Bradstreet Number for the parent company if none exists.

(ii) The name of a person who will serve as technical contact for the submitter company, and who will be able to answer questions about the information submitted by the company to EPA, the contact person's full mailing address, telephone number, and e-mail address.

(iii) The name and full street address of each site. A submitter under this part must include the appropriate Dun and Bradstreet Number for each plant site reported, and the county or parish (or other jurisdictional indicator) in which the plant site is located. A submitter under this part must obtain a Dun and Bradstreet Number for the site reported if none exists.

(3) *Specific information for chemical substances manufactured in amounts of 25,000 lb. or more.* The following chemical-specific information must be reported for each reportable chemical substance manufactured (including imported) at each site in amounts of 25,000 lb. (11,340 kg) or more during any calendar year since the last principal reporting year:

(i) The specific, currently correct CA Index name as used to list the chemical substance on the TSCA Inventory and the correct corresponding CASRN for each reportable chemical substance at each site. A submitter under this part may use an EPA-designated TSCA Accession Number for a confidential chemical substance in lieu of a CASRN when a CASRN is not known to or reasonably ascertainable by the submitter. In addition to reporting the number itself, submitters must specify the type of number they are reporting by selecting from among the codes in Table 3 of this paragraph.

TABLE 3.—CODES TO SPECIFY TYPE OF CHEMICAL IDENTIFYING NUMBER

| Code | Number Type |
|---|---|
| A | Accession Number |
| C | Chemical Abstracts Registry Number (CASRN) |

(A) If an importer submitting a report cannot provide all the information specified in § 711.15(b) of this section because it is claimed as confidential by the supplier of the chemical substance, the importer must have the supplier provide the correct chemical identity information directly to EPA in a joint submission, electronically using e-IURweb and CDX (see § 711.35), and which clearly references the importer's submission.

(B) If a manufacturer submitting a report cannot provide all the information specified in § 711.15(b) of this section because the reportable chemical substance is manufactured using a reactant having a specific chemical identity claimed as confidential by its supplier, the manufacturer must submit a report directly to EPA containing all the information known to or reasonably ascertainable by the manufacturer about the chemical identity of the reported chemical substance. In addition, the manufacturer must ensure that the supplier of the confidential reactant provide the correct chemical identity of the confidential reactant directly to EPA in a joint submission, electronically using e-IURweb and CDX (see § 711.35), and which clearly references the manufacture's submission.

(ii) For the principal reporting year only, a statement indicating, for each reportable chemical substance at each site, whether the chemical substance is manufactured in the United States, imported into the United States, or both manufactured in the United States and imported into the United States.

(iii) For the principal reporting year, the total annual volume (in pounds) of each reportable chemical substance domestically manufactured and imported at each site. The total annual domestically manufactured volume (not including imported volume) and the total annual imported volume must be separately reported. This amount must be reported to two significant figures of accuracy. For each complete calendar year since the last principal reporting year, the total annual volume (domestically manufactured and imported volumes in pounds) of each reportable chemical substance at each site.

(iv) For the principal reporting year only, the volume used on site and the volume exported of each reportable chemical substance domestically manufactured and imported at each site. This amount must be reported to two significant figures of accuracy.

(v) For the principal reporting year only, a designation indicating, for each imported reportable chemical substance at each site, whether the imported chemical substance is physically present at the reporting site.

(vi) For the principal reporting year only, a designation indicating, for each reportable chemical substance at each site, whether the chemical substance is being recycled, remanufactured,

reprocessed, reused, reworked, or otherwise used for a commercial purpose instead of being disposed of as a waste or included in a waste stream.

(vii) For the principal reporting year only, the total number of workers reasonably likely to be exposed to each reportable chemical substance at each site. For each reportable chemical substance at each site, the submitter must select from among the ranges of workers listed in Table 4 of this paragraph and report the corresponding code (i.e., W1 through W8):

TABLE 4.—CODES FOR REPORTING NUMBER OF WORKERS REASONABLY LIKELY TO BE EXPOSED

| Code | Range |
|---|---|
| W1 | Fewer than 10 workers |
| W2 | At least 10 but fewer than 25 workers |
| W3 | At least 25 but fewer than 50 workers |
| W4 | At least 50 but fewer than 100 workers |
| W5 | At least 100 but fewer than 500 workers |
| W6 | At least 500 but fewer than 1,000 workers |
| W7 | At least 1,000 but fewer than 10,000 workers |
| W8 | At least 10,000 workers |

(viii) For the principal reporting year only, the maximum concentration, measured by percentage of weight, of each reportable chemical substance at the time it is sent off-site from each site. If the chemical substance is site-limited, you must report the maximum concentration, measured by percentage of weight, of the reportable chemical substance at the time it is reacted on-site to produce a different chemical substance. This information must be reported regardless of the physical form(s) in which the chemical substance is sent off-site/reacted on-site. For each chemical substance at each site, select the maximum concentration of the chemical substance from among the ranges listed in Table 5 of this paragraph and report the corresponding code (i.e., M1 through M5):

TABLE 5.—CODES FOR REPORTING MAXIMUM CONCENTRATION OF CHEMICAL SUBSTANCE

| Code | Concentration Range (% weight) |
|---|---|
| M1 | Less than 1% by weight |
| M2 | At least 1 but less than 30% by weight |
| M3 | At least 30 but less than 60% by weight |
| M4 | At least 60 but less than 90% by weight |
| M5 | At least 90% by weight |

(ix) For the principal reporting year only, the physical form(s) of the reportable chemical substance as it is sent off-site from each site. If the chemical substance is site-limited, you must report the physical form(s) of the reportable chemical substance at the time it is reacted on-site to produce a different chemical substance. For each chemical substance at each site, the submitter must report as many physical forms as apply from among the physical forms listed in this unit:

(A) Dry powder.
(B) Pellets or large crystals.
(C) Water- or solvent-wet solid.
(D) Other solid.
(E) Gas or vapor.
(F) Liquid.

(x) For the principal reporting year only, submitters must report the percentage, rounded off to the closest 10%, of total production volume of the reportable chemical substance, for the principal reporting year only, reported in response to paragraph (b)(3)(iii) of this section, that is associated with each physical form reported under paragraph (b)(3)(ix) of this section.

(4) *Specific information related to processing and use.* Persons subject to paragraph (b)(3) of this section must report the information described in paragraphs (b)(4)(i) and (b)(4)(ii) of this section for each reportable chemical substance at sites under their control and at sites that receive a reportable chemical substance from the submitter directly or indirectly (including through a broker/distributor, from a customer of the submitter, etc.). Information reported in response to this paragraph must be reported for the principal reporting year only and only to the extent that it is known to or reasonably ascertainable by the submitter. Information required to be reported under this paragraph is limited to domestic (i.e., within the customs territory of the United States) processing and use activities. If information responsive to a given data requirement under this paragraph, including information in the form of an estimate, is not known or reasonably ascertainable, the submitter is not required to respond to the requirement.

(i) *Industrial processing and use information*—(A) A designation indicating the type of industrial processing or use operation(s) at each site that receives a reportable chemical substance from the submitter site directly or indirectly (whether the recipient site(s) are controlled by the submitter site or not). For each chemical substance, report the letters which correspond to the appropriate processing or use operation(s) listed in Table 6 of this paragraph. A particular designation may need to be reported more than once, to the extent that a submitter reports more than one sector (under paragraph (b)(4)(i)(B) of this section) that applies to a given designation under this paragraph.

TABLE 6.—CODES FOR REPORTING TYPE OF INDUSTRIAL PROCESSING OR USE OPERATION

| Designation | Operation |
|---|---|
| PC | Processing as a reactant |
| PF | Processing—incorporation into formulation, mixture or reaction product |
| PA | Processing—incorporation into article |
| PK | Processing—repackaging |
| U | Use—non-incorporative activities |

(B) A code indicating the sector(s) which best describe the industrial activities associated with each industrial processing or use operation reported under paragraph (b)(4)(i)(A) of this section. For each chemical substance, report the code that corresponds to the appropriate sector(s) listed in Table 7 of this paragraph. A particular sector code may need to be reported more than once, to the extent that a submitter reports more than one industrial function code (under paragraph (b)(4)(i)(C) of this section) that applies to a given sector code under this paragraph.

TABLE 7.—CODES FOR REPORTING INDUSTRIAL SECTORS

| Code | Sector Description |
|---|---|
| IS1 | Agriculture, Forestry, Fishing and Hunting |
| IS2 | Oil and Gas Drilling, Extraction, and support activities |
| IS3 | Mining (except Oil and Gas) and support activities |
| IS4 | Utilities |
| IS5 | Construction |
| IS6 | Food, beverage, and tobacco product manufacturing |
| IS7 | Textiles, apparel, and leather manufacturing |
| IS8 | Wood Product Manufacturing |
| IS9 | Paper Manufacturing |
| IS10 | Printing and Related Support Activities |
| IS11 | Petroleum Refineries |
| IS12 | Asphalt Paving, Roofing, and Coating Materials Manufacturing |
| IS13 | Petroleum Lubricating Oil and Grease Manufacturing |
| IS14 | All other Petroleum and Coal Products Manufacturing |
| IS15 | Petrochemical Manufacturing |
| IS16 | Industrial Gas Manufacturing |
| IS17 | Synthetic Dye and Pigment Manufacturing |
| IS18 | Carbon Black Manufacturing |
| IS19 | All Other Basic Inorganic Chemical Manufacturing |
| IS20 | Cyclic Crude and Intermediate Manufacturing |
| IS21 | All Other Basic Organic Chemical Manufacturing |
| IS22 | Plastics Material and Resin Manufacturing |
| IS23 | Synthetic Rubber Manufacturing |
| IS24 | Organic Fiber Manufacturing |
| IS25 | Pesticide, Fertilizer, and Other Agricultural Chemical Manufacturing |
| IS26 | Pharmaceutical and Medicine Manufacturing |

TABLE 7.—CODES FOR REPORTING INDUSTRIAL SECTORS—Continued

| Code | Sector Description |
|---|---|
| IS27 | Paint and Coating Manufacturing |
| IS28 | Adhesive Manufacturing |
| IS29 | Soap, Cleaning Compound, and Toilet Preparation Manufacturing |
| IS30 | Printing Ink Manufacturing |
| IS31 | Explosives Manufacturing |
| IS32 | Custom Compounding of Purchased Resins |
| IS33 | Photographic Film, Paper, Plate, and Chemical Manufacturing |
| IS34 | All Other Chemical Product and Preparation Manufacturing |
| IS35 | Plastics Product Manufacturing |
| IS36 | Rubber Product Manufacturing |
| IS37 | Non-metallic Mineral Product Manufacturing (includes clay, glass, cement, concrete, lime, gypsum, and other non-metallic mineral product manufacturing) |
| IS38 | Primary Metal Manufacturing |
| IS39 | Fabricated Metal Product Manufacturing |
| IS40 | Machinery Manufacturing |
| IS41 | Computer and Electronic Product Manufacturing |
| IS42 | Electrical Equipment, Appliance, and Component Manufacturing |
| IS43 | Transportation Equipment Manufacturing |
| IS44 | Furniture and Related Product Manufacturing |
| IS45 | Miscellaneous Manufacturing |
| IS46 | Wholesale and Retail Trade |
| IS47 | Services |
| IS48 | Other (requires additional information) |

(C) For each sector reported under paragraph (b)(4)(i)(B) of this section, code(s) from Table 8 of this paragrph must be selected to designate the industrial function category(ies) that best represents the specific manner in which the chemical substance is used. A particular industrial function category may need to be reported more than once, to the extent that a submitter reports more than one industrial processing or use operation/sector combination (under paragraphs (b)(4)(i)(A) and (b)(4)(i)(B) of this section) that applies to a given industrial function category under this paragraph. If more than 10 unique combinations of industrial processing or use operations/sector/industrial function categories apply to a chemical substance, submitters need only report the 10 unique combinations for the chemical substance that cumulatively represent the largest percentage of the submitter's production volume for that chemical substance, measured by weight. If none of the listed industrial function categories accurately describes a use of a chemical substance, the category "Other" may be used, and must include a description of the use.

TABLE 8.—CODES FOR REPORTING INDUSTRIAL FUNCTION CATEGORIES

| Code | Category |
|---|---|
| U001 | Abrasives |
| U002 | Adhesives and sealant chemicals |
| U003 | Adsorbents and absorbents |
| U004 | Agricultural chemicals (non-pesticidal) |
| U005 | Anti-adhesive agents |
| U006 | Bleaching agents |
| U007 | Corrosion inhibitors and anti-scaling agents |
| U008 | Dyes |
| U009 | Fillers |
| U010 | Finishing agents |
| U011 | Flame retardants |
| U012 | Fuels and fuel additives |
| U013 | Functional fluids (closed systems) |
| U014 | Functional fluids (open systems) |
| U015 | Intermediates |
| U016 | Ion exchange agents |
| U017 | Lubricants and lubricant additives |
| U018 | Odor agents |
| U019 | Oxidizing/reducing agents |
| U020 | Photosensitive chemicals |
| U021 | Pigments |

TABLE 8.—CODES FOR REPORTING INDUSTRIAL FUNCTION CATEGORIES—Continued

| Code | Category |
|---|---|
| U022 | Plasticizers |
| U023 | Plating agents and surface treating agents |
| U024 | Process regulators |
| U025 | Processing aids, specific to petroleum production |
| U026 | Processing aids, not otherwise listed |
| U027 | Propellants and blowing agents |
| U028 | Solids separation agents |
| U029 | Solvents (for cleaning or degreasing) |
| U030 | Solvents (which become part of product formulation or mixture) |
| U031 | Surface active agents |
| U032 | Viscosity adjustors |
| U033 | Laboratory chemicals |
| U034 | Paint additives and coating additives not described by other categories |
| U999 | Other (specify) |

(D) The estimated percentage, rounded off to the closest 10%, of total production volume of the reportable chemical substance associated with each combination of industrial processing or use operation, sector, and industrial function category. Where a particular combination of industrial processing or use operation, sector, and industrial function category accounts for less than 5% of the submitter's site's total production volume of a reportable chemical substance, the percentage must not be rounded off to 0% if the production volume attributable to that industrial processing or use operation, sector, and industrial function category combination is 25,000 lb. (11,340 kg) or more during the reporting year. Instead, in such a case, submitters must report the percentage, rounded off to the closest 1%, of the submitter's site's total production volume of the reportable chemical substance associated with the particular combination of industrial processing or use operation, sector, and industrial function category.

(E) For each combination of industrial processing or use operation, sector, and industrial function category, the submitter must estimate the number of sites at which each reportable chemical substance is processed or used. For each combination associated with each chemical substance, the submitter must select from among the ranges of sites listed in Table 9 of this paragraph and report the corresponding code (i.e., S1 through S7):

TABLE 9.—CODES FOR REPORTING NUMBERS OF SITES

| Code | Range |
|---|---|
| S1 | Fewer than 10 sites |
| S2 | at least 10 but fewer than 25 sites |
| S3 | at least 25 but fewer than 100 sites |
| S4 | at least 100 but fewer than 250 sites |
| S5 | at least 250 but fewer than 1,000 sites |
| S6 | at least 1,000 but fewer than 10,000 sites |
| S7 | at least 10,000 sites |

(F) For each combination of industrial processing or use operation, sector, and industrial function category, the submitter must estimate the number of workers reasonably likely to be exposed to each reportable chemical substance. For each combination associated with each chemical substance, the submitter must select from among the worker ranges listed in paragraph (b)(3)(v) of this section and report the corresponding code (i.e., W1 though W8).

(ii) *Consumer and commercial use information*—(A) Using the codes listed in Table 10 of this paragraph, submitters must designate the consumer and commercial product category or categories that best describe the consumer and commercial products in which each reportable chemical substance is used (whether the recipient site(s) are controlled by the submitter site or not). If more than 10 codes apply to a chemical substance, submitters need only report the 10 codes for the chemical substance that cumulatively represent the largest percentage of the submitter's production volume for that chemical, measured by weight. If none of the listed consumer and commercial product categories accurately describes the consumer and commercial products in which each reportable chemical substance is used, the category "Other" may be used, and must include a description of the use.

TABLE 10.—CODES FOR REPORTING CONSUMER AND COMMERCIAL PRODUCT CATEGORIES

| Code | Category |
|---|---|
| CHEMICAL SUBSTANCES IN FURNISHING, CLEANING, TREATMENT/CARE PRODUCTS | |
| C101 | Floor Coverings |
| C102 | Foam Seating and Bedding Products |
| C103 | Furniture and Furnishings not covered elsewhere |
| C104 | Fabric, Textile, and Leather Products not covered elsewhere |
| C105 | Cleaning and Furnishing Care Products |
| C106 | Laundry and Dishwashing Products |
| C107 | Water Treatment Products |
| C108 | Personal Care Products |
| C109 | Air Care Products |
| C110 | Apparel and Footwear Care Products |
| CHEMICAL SUBSTANCES IN CONSTRUCTION, PAINT, ELECTRICAL, AND METAL PRODUCTS | |
| C201 | Adhesives and Sealants |
| C202 | Paints and Coatings |
| C203 | Building/Construction Materials - Wood and Engineered Wood Products |
| C204 | Building/Construction Materials not covered elsewhere |
| C205 | Electrical and Electronic Products |
| C206 | Metal Products not covered elsewhere |
| C207 | Batteries |
| CHEMICAL SUBSTANCES IN PACKAGING, PAPER, PLASTIC, HOBBY PRODUCTS | |
| C301 | Food Packaging |
| C302 | Paper Products |
| C303 | Plastic and Rubber Products not covered elsewhere |
| C304 | Toys, Playground, and Sporting Equipment |

TABLE 10.—CODES FOR REPORTING CONSUMER AND COMMERCIAL PRODUCT CATEGORIES—Continued

| Code | Category |
|---|---|
| C305 | Arts, Crafts, and Hobby Materials |
| C306 | Ink, Toner, and Colorant Products |
| C307 | Photographic Supplies, Film, and Photochemicals |
| CHEMICAL SUBSTANCES IN AUTOMOTIVE, FUEL,AGRICULTURE, OUTDOOR USE PRODUCTS | |
| C401 | Automotive Care Products |
| C402 | Lubricants and Greases |
| C403 | Anti-Freeze and De-icing Products |
| C404 | Fuels and Related Products |
| C405 | Explosive Materials |
| C406 | Agricultural Products (non-pesticidal) |
| C407 | Lawn and Garden Care Products |
| CHEMICAL SUBSTANCES IN PRODUCTS NOT DESCRIBED BY OTHER CODES | |
| C980 | Non-TSCA Use |
| C909 | Other (specify) |

(B) An indication, within each consumer and commercial product category reported under paragraph (b)(4)(ii)(A) of this section, whether the use is a consumer or a commercial use.

(C) Submitters must determine, within each consumer and commercial product category reported under paragraph (b)(4)(ii)(A) of this section, whether any amount of each reportable chemical substance manufactured (including imported) by the submitter is present in (for example, a plasticizer chemical substance used to make pacifiers) or on (for example, as a component in the paint on a toy) any consumer products intended for use by children age 14 or younger, regardless of the concentration of the chemical substance remaining in or on the product. Submitters must select from the following options: The chemical substance is used in or on any consumer products intended for use by children, the chemical substance is not used in or on any consumer products intended for use by children, or information as to whether the chemical substance is used in or on any consumer products intended for use by children is not known to or reasonably ascertainable by the submitter.

(D) The estimated percentage, rounded off to the closest 10%, of the submitter's site's total production volume of the reportable chemical substance associated with each consumer and commercial product category. Where a particular consumer and commercial product category accounts for less than 5% of the total production volume of a reportable chemical substance, the percentage must not be rounded off to 0% if the production volume attributable to that commercial and consumer product category is 25,000 lb. (11,340 kg) or more during the reporting year. Instead, in such a case, submitters must report the percentage, rounded off to the closest 1%, of the submitter's site's total production volume of the reportable chemical substance associated with the particular consumer and commercial product category.

(E) Where the reportable chemical substance is used in consumer or commercial products, the estimated typical maximum concentration, measured by weight, of the chemical substance in each consumer and commercial product category reported under paragraph (b)(4)(ii)(A) of this section. For each chemical substance in each commercial and consumer product category reported under paragraph (b)(4)(ii)(A) of this section, submitters must select from among the ranges of concentrations listed in Table 5 in paragraph (b)(3)(viii) of this section and report the corresponding code (i.e., M1 through M5).

(F) Where the reportable chemical substance is used in a commercial product, the submitter must estimate the number of commercial workers reasonably likely to be exposed to each reportable chemical substance. For each combination associated with each substance, the submitter must select from among the worker ranges listed in Table 4 in paragraph (b)(3)(vii) of this section and report the corresponding code (i.e., W1 though W8).

**§ 711.20 When to report.**

All information reported to EPA in response to the requirements of this part must be submitted during an applicable submission period from June 1 to September 30 at 4–year intervals, beginning in 2011. Any person described in § 711.8(a) must report during each submission period for each chemical substance described in § 711.5 that the person manufactured (including imported) during any calendar year since the last principal reporting year (e.g., for the 2011 submission period, consider calendar years 2006, 2007, 2008, 2009, and 2010, since 2005 was the last principal reporting year).

**§ 711.22 Duplicative reporting.**

(a) *With regard to TSCA section 8(a) rules.* Any person subject to the requirements of this part who previously has complied with reporting requirements of a rule under TSCA section 8(a) by submitting the information described in § 711.15 for a chemical substance described in § 711.5 to EPA, and has done so within 1 year of the start of a submission period described in § 711.20, is not required to report again on the manufacture of that chemical substance at that site during that submission period.

(b) *With regard to importers.* This part requires that only one report be submitted on each import transaction involving a chemical substance described in § 711.5. When two or more persons are involved in a particular import transaction and each person meets the Agency's definition of "importer" as set forth in 40 CFR 704.3, they may determine among themselves who should submit the required report; if no report is submitted as required under this part, EPA will hold each such person liable for failure to report.

(c) *Toll manufacturers and persons contracting with a toll manufacturer.* This part requires that only one report be submitted on each chemical substance described in § 711.5. When a company contracts with a toll manufacturer to manufacture a chemical substance, and each party meets the Agency's definition of "manufacturer" as set forth in § 711.3, the contracting company is primarily responsible for the IUR submission. In the event the contracting company does not report, the toll manufacturer must report. Both the contracting company and the toll manufacturer are liable if no report is made.

**§ 711.25 Recordkeeping requirements.**

Each person who is subject to the reporting requirements of this part must retain records that document any information reported to EPA. Records relevant to reporting during a submission period must be retained for a period of 5 years beginning on the last day of the submission period. Submitters are encouraged to retain their records longer than 5 years to ensure that past records are available as a reference when new submissions are being generated.

**§ 711.30 Confidentiality claims.**

(a) *Confidentiality claims.* Any person submitting information under this part

may assert a business confidentiality claim for the information at the time it is submitted. Any such confidentiality claims must be made at the time the information is submitted. Confidentiality claims cannot be made when a response is left blank or an indication of not known to or reasonably ascertainable by is provided. These claims will apply only to the information submitted with the claim. New confidentiality claims, if appropriate, must be asserted with regard to information submitted during a different submission period. Guidance for asserting confidentiality claims is provided in the instructions identified in § 711.35. Information claimed as confidential in accordance with this section will be treated and disclosed in accordance with the procedures in 40 CFR part 2.

(b) *Chemical identity.* A person may assert a claim of confidentiality for the chemical identity of a specific chemical substance only if the identity of that chemical substance is treated as confidential in the Master Inventory File as of the time the report is submitted for that chemical substance under this part. The following steps must be taken to assert a claim of confidentiality for the identity of a reportable chemical substance:

(1) The submitter must submit with the report detailed written answers to the following questions signed and dated by an authorized official.

(i) What harmful effects to your competitive position, if any, do you think would result from the identity of the chemical substance being disclosed in connection with reporting under this part? How could a competitor use such information? Would the effects of disclosure be substantial? What is the causal relationship between the disclosure and the harmful effects?

(ii) How long should confidential treatment be given? Until a specific date, the occurrence of a specific event, or permanently? Why?

(iii) Has the chemical substance been patented? If so, have you granted licenses to others with respect to the patent as it applies to the chemical substance? If the chemical substance has been patented and therefore disclosed through the patent, why should it be treated as confidential?

(iv) Has the identity of the chemical substance been kept confidential to the extent that your competitors do not know it is being manufactured or imported for a commercial purpose by anyone?

(v) Is the fact that the chemical substance is being manufactured (including imported) for a commercial purpose available to the public, for example in technical journals, libraries, or State, local, or Federal agency public files?

(vi) What measures have been taken to prevent undesired disclosure of the fact that the chemical substance is being manufactured (including imported) for a commercial purpose?

(vii) To what extent has the fact that this chemical substance is manufactured (including imported) for commercial purposes been revealed to others? What precautions have been taken regarding these disclosures? Have there been public disclosures or disclosures to competitors?

(viii) Does this particular chemical substance leave the site of manufacture (including import) in any form, e.g., as product, effluent, emission? If so, what measures have been taken to guard against the discovery of its identity?

(ix) If the chemical substance leaves the site in a product that is available to the public or your competitors, can the chemical substance be identified by analysis of the product?

(x) For what purpose do you manufacture (including import) the substance?

(xi) Has EPA, another Federal agency, or any Federal court made any pertinent confidentiality determinations regarding this chemical substance? If so, please attach copies of such determinations.

(2) If any of the information contained in the answers to the questions listed in paragraph (b)(1) of this section is asserted to contain confidential business information (CBI), the submitter must clearly identify the information that is claimed confidential by marking the specific information on each page with a label such as "confidential business information," "proprietary," or "trade secret."

(c) *Site identity.* A submitter may assert a claim of confidentiality for a site only if the linkage of the site with a reportable chemical substance is confidential and not publicly available. The following steps must be taken to assert a claim of confidentiality for a site identity:

(1) The submitter must submit with the report detailed written answers to the following questions signed and dated by an authorized official:

(i) Has site information been linked with a chemical identity in any other Federal, State, or local reporting scheme? For example, is the chemical identity linked to a facility in a filing under the Emergency Planning and Community Right-to-Know Act (EPCRA) section 311, namely through a Material Safety Data Sheet (MSDS)? If so, identify all such schemes. Was the linkage claimed as confidential in any of these instances?

(ii) What harmful effect, if any, to your competitive position do you think would result from the identity of the site and the chemical substance being disclosed in connection with reporting under this part? How could a competitor use such information? Would the effects of disclosure be substantial? What is the causal relationship between the disclosure and the harmful effects?

(2) If any of the information contained in the answers to the questions listed in paragraph (c)(1) of this section is asserted to contain CBI, the submitter must clearly identify the information that is claimed confidential by marking the specific information on each page with a label such as "confidential business information," "proprietary," or "trade secret."

(d) *Processing and use information.* A submitter may assert a claim of confidentiality for each data element required by § 711.15(b)(4) only if the linkage of the information with a reportable chemical substance is confidential and not publicly available. The following steps must be taken to assert a claim of confidentiality for each data element, individually, required by § 711.15(b)(4):

(1) The submitter must submit with the report detailed written answers to the following questions signed and dated by an authorized official:

(i) Is the identified use of this chemical substance publicly known? For example, is information on the use available in advertisements or other marketing materials, professional journals or other similar materials, or in non-confidential mandatory or voluntary government filings or publications? Has your company ever provided use information on the chemical substance that was not claimed as confidential?

(ii) What harmful effect, if any, to your competitive position do you think would result from the information reported as required by § 711.15(b)(4) and the chemical substance being disclosed in connection with reporting under this part? How could a competitor use such information? Would the effects of disclosure be substantial? What is the causal relationship between the disclosure and the substantial harmful effects?

(2) If any of the information contained in the answers to the questions listed in paragraph (d)(1) of this section is asserted to contain CBI, the submitter must clearly identify the information that is claimed confidential by marking the specific information on each page with a label such as "confidential

business information," "proprietary," or "trade secret."

(e) *No claim of confidentiality*. If no claim of confidentiality is indicated on Form U submitted to EPA under this part; if Form U lacks the certification required by § 711.15(b)(1); if confidentiality claim substantiation required under paragraphs (b), (c), and (d) of this section is not submitted with Form U; or if the identity of a chemical substance listed on the non-confidential portion of the Master Inventory File is claimed as confidential, EPA may make the information available to the public without further notice to the submitter.

**§ 711.35 Electronic filing.**

(a) You must use e-IURweb to complete and submit Form U; EPA Form 7740–8. Submissions may only be made as set forth in this section.

(b) Submissions must be sent electronically to EPA via CDX.

(c) Obtain e-IURweb and instructions, as follows:

(1) *By website*. Go to the EPA Inventory Update Reporting Internet homepage at *http://www.epa.gov/iur* and follow the appropriate links.

(2) *By phone or e-mail*. Contact the EPA TSCA Hotline at (202) 554–1404 or *TSCA-Hotline@epa.gov* for a CD-ROM containing the instructions.

[FR Doc. 2010–19830 Filed 8–12–10; 8:45 am]

BILLING CODE 6560–50–S

Federal Register

Friday,
August 13, 2010

# Part V

# Department of Commerce

## National Oceanic and Atmospheric Administration

## Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to Open Water Marine Seismic Survey in the Beaufort and Chukchi Seas, Alaska; Notice

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

**RIN 0648–XV09**

### Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to Open Water Marine Seismic Survey in the Beaufort and Chukchi Seas, Alaska

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

**ACTION:** Notice; issuance of an incidental take authorization.

**SUMMARY:** In accordance with the Marine Mammal Protection Act (MMPA) regulations, notification is hereby given that NMFS has issued an Incidental Harassment Authorization (IHA) to Shell Offshore Inc. (Shell) to take, by harassment, small numbers of 8 species of marine mammals incidental to a marine survey program, which includes site clearance and shallow hazards, ice gouge, and strudel scour surveys, in the Beaufort and Chukchi Seas, Alaska, during the 2010 Arctic open water season.

**DATES:** Effective August 6, 2010, through November 30, 2010.

**ADDRESSES:** Inquiry for information on the incidental take authorization 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. A copy of the application containing a list of the references used in this document, NMFS' Environmental Assessment (EA) and Finding of No Significant Impact (FONSI), and the IHA 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#applications.*

Documents cited in this notice may be viewed, by appointment, during regular business hours, at the aforementioned address.

**FOR FURTHER INFORMATION CONTACT:** Shane Guan, Office of Protected Resources, NMFS, (301) 713–2289 or Brad Smith, NMFS, Alaska Region, (907) 271–3023.

**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. Except with respect to certain activities not pertinent here, the MMPA defines "harassment" as:

> any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild ["Level A harassment"]; or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering ["Level B harassment"].

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

#### Summary of Request

NMFS received an application on December 24, 2009, from Shell for the taking, by harassment, of marine mammals incidental to several marine surveys designed to gather data relative to site clearance and shallow hazards, ice gouge, and strudel scour in selected areas of the Beaufort Sea and ice gouge in the Chukchi Sea, Alaska. These surveys are continuations of those performed by Shell in the Beaufort Sea beginning in 2006, and in the Chukchi Sea in 2008. After addressing comments from NMFS, Shell modified its application and submitted a revised application on April 19, 2010. The April 19, 2010, application is the one available for public comment (*see* **ADDRESSES**) and considered by NMFS for this proposed IHA.

Site clearance and shallow hazards surveys will evaluate the seafloor, and shallow sub seafloor at prospective exploration drilling locations, focusing on the depth to seafloor, topography, the potential for shallow faults or gas zones, and the presence of archaeological features. The types of equipment used to conduct these surveys use low level energy sources focused on limited areas in order to characterize the footprint of the seafloor and shallow sub seafloor at prospective drilling locations. Ice gouge surveys will determine the depth and distribution of ice gouges into the seabed. Ice gouge surveys use low-level energy sources similar to the site clearance and shallow hazards.

Shell intends to conduct these marine surveys during the 2010 Arctic open-water season (July through October). Impacts to marine mammals may occur from noise produced by various active acoustic sources used in the surveys.

#### Description of the Specified Activity

Shell plans to complete the following surveys during the 2010 open-water season:

- Beaufort Sea Site Clearance and Shallow Hazards Surveys
- Beaufort Sea Marine Surveys
  - Ice Gouge Survey
  - Strudel Scour Survey
- Chukchi Sea Marine Surveys
  - Ice Gouge Survey

Each of these individual surveys will require marine vessels to accomplish the work. Shell states that these marine surveys will be conducted between July and October 2010, however, ice and weather conditions will influence the exact dates and locations marine vessel survey operations can be conducted.

*1. Beaufort Sea Site Clearance and Shallow Hazards Surveys*

Shell's proposed site clearance and shallow hazards surveys are to gather data on: (1) Bathymetry, (2) seabed topography and other seabed characteristics (*e.g.,* boulder patches), (3) potential geohazards (*e.g.,* shallow faults and shallow gas zones), and (4) the presence of any archeological features (*e.g.,* shipwrecks). Site clearance and shallow hazards surveys can be accomplished by one vessel with

acoustic sources. No other vessels are necessary to accomplish the proposed work.

The focus of this activity will be on Shell's existing leases in Harrison Bay in the central Beaufort Sea. Actual locations of site clearance and shallow hazards surveys within Harrison Bay have not been definitively set as of this date, although these will occur on the Outer Continental Shelf (OCS) lease blocks in Harrison Bay located in the Beaufort Sea shown on Figure 1 of Shell's IHA application. The site clearance and shallow hazards surveys will be conducted within an area of approximately 216 $mi^2$ (558 $km^2$) north of Thetis Island more than 3 mi (4.8 km) to approximately 20 mi (33 km) offshore. Approximately 63 mi (162.7 km) of the data acquisition is planned within this general area. The survey track line is approximately 351.5 $mi^2$ (565 $km^2$). The average depth of the survey area ranges from 35 to 85 ft (10.7 to 26 m).

Ice and weather permitting, Shell is proposing to conduct site clearance and shallow hazards surveys within the timeframe of July 2010 through October 2010. The actual survey time is expected to take 30 days.

The vessel that will be conducting this activity has not been determined at this point, but will be similar to the R/V *Mt. Mitchell* which is the vessel that was used for surveys in the Chukchi Sea in 2009. The R/V *Mt. Mitchell* is a diesel powered-vessel, 70 m (231 ft) long, 12.7 m (42 ft) wide, with a 4.5 m (15 ft) draft.

It is proposed that the following acoustic instrumentation, or something similar, be used.

• Deep Penetration Profiler, (40 cu-in airgun source with 48-channel streamer) and Medium Penetration Profiler, (40 cu-in airgun source with 24-channel streamer):

The deep and medium penetration profilers are the major active acoustic sources used in the site clearance and shallow hazards surveys. The modeled source level is estimated at 217 dB re 1 µPa rms. The 120, 160, 180, and 190 dB re 1 µPa rms received level isopleths are estimated at 14,900 m, 1,220 m, 125 m, and 35 m from the source, respectively.

• Dual-frequency side scan sonar, (100–400 kHz or 300–600 kHz):

Based on Shell's 2006 90-day report, the source level of this active acoustic source when operated at 190 and 240 kHz is approximately 225 dB re 1 µPa rms. Due to its high frequency range, NMFS does not consider its acoustic energy would be strong enough to cause impacts to marine mammals beyond a couple of hundred meters from the source.

• Single beam Echo Sounder, (high: 100–340 kHz, low: 24–50 kHz):

This echo sounder is a typical "fathometer" or "fish-finder" that is widely used in most recreational or fishing vessels. Source levels for these types of units are typically in the range of 180–200 dB re 1 µPa rms. Using a spherical spreading model, the 160 dB isopleth is estimated at 100 m from the source for the lower range of the acoustic signals. For the higher range of the signal, due to the higher absorption coefficients, the 160 dB isopleth is expected to be under 100 m from the source.

• Multi-Beam Echo Sounder, (240 kHz):

Since the output frequency from this echo sounder is above the upper-limit of marine mammal hearing range, NMFS believes it unlikely that a marine mammal would be taken by this activity.

• Shallow Sub-Bottom Profiler, (2–12 kHz):

Information regarding this active acoustic source on two vessels (*Alpha Helix* and *Henry C.*) was provided in Shell's 2008 90-day open water marine survey monitoring report. For the *Alpha Helix* measurement, at 3.5 kHz, the source level for the shallow sub-bottom profiler was 193.8 dB re 1 µPa rms, and its 120, 160, 180, and 190 dB re 1 µPa rms isopleths were determined to be 310 m, 14 m, 3 m, and 1 m from the source, respectively. For the *Henry C.* measurement, at 3.5 kHz, the source level of the similar profiler was measured at 167.2 dB re 1 µPa rms, and its 120 and 160 dB re 1 µPa rms isopleths were determined to be 980 m and 3 m, respectively.

*2. Beaufort Sea Marine Surveys*

Two marine survey activities are proposed for the Beaufort Sea: (1) Ice gouge survey, and (2) strudel scour survey. Shell continues to conduct these types of marine surveys annually over a few years to enhance baseline and statistical understanding of the formation, longevity, and temporal distribution of sea floor features and baseline environmental and biologic conditions. Marine surveys for ice gouge and strudel scour surveys can be accomplished by one vessel for each. No other vessels are necessary to accomplish the proposed work.

The proposed ice gouge surveys will be conducted in both State of Alaska waters including Camden Bay, and the Federal waters of the OCS in the Beaufort Sea near Pt. Thomson ranging from near shore to approximately 37 mi (59.5 km) offshore. The water depth in the ice gouging survey area ranges between 15 to 120 ft (4.5 to 36.6 m), and the surveys will be conducted within an area of 1,950 $mi^2$ (5,036 $km^2$) with a survey track line of approximately 1,276 mi (2,050 km, *See* Figure 2 of Shell's IHA application).

The proposed strudel scour survey will occur in State of Alaska waters in Pt. Thomson ranging from near shore to 3 mi (4.8 km) offshore. The water depth ranges from 3 to 20 ft (0.9 to 6.1 m). The strudel scour survey will be conducted in an area of approximately 140 $mi^2$ (361.5 $km^2$). The survey track line is approximately 124 mi (200 km).

Ice and weather permitting, Shell is proposing to conduct this work within the timeframe of July 2010 through October 2010. The actual survey time is expected to take 45 days.

**Ice Gouge Survey**

As part of the feasibility study for Shell's Alaskan prospects a survey is required to identify and evaluate seabed conditions. Ice gouging is created by ice keels, which project from the bottom of moving ice and gouge into seafloor sediment. Ice gouge features are mapped, and by surveying each year, new gouges can be identified. The ice gouge information is used to aid in predicting the prospect of, orientation, depth, and frequency of future ice gouges. Ice gouge information is required for the design of potential pipelines and for the design of pipeline trenching and installation equipment.

The 2010 ice gouge surveys will be conducted using the conventional survey method where the acoustic instrumentation will be towed behind the survey vessel, or possibly with the use of an Autonomous Underwater Vehicle (AUV). The same acoustic instrumentation will be used during both AUV and the conventional survey methods. The AUV is a self-propelled autonomous vehicle that will be equipped with acoustic instrumentation and programmed for remote operation over the seafloor where the ice gouge survey is to be conducted, and the vehicle is launched and retrieved from a marine vessel.

For the survey operations, the AUV will be launched from the stern of a vessel and will survey the seafloor close to the vessel. The vessel will transit an area, with the AUV surveying the area behind the vessel. The AUV also has a Collision Avoidance System and operates without a towline that reduces potential impact to marine mammals (such as entanglement). Using bathymetric sonar or multibeam echo sounder the AUV can record the gouges on the seafloor surface caused by ice keels. The sub-bottom profiler can

record layers beneath the surface to about 20 feet (6 m). The AUV is more maneuverable and able to complete surveys more quickly than a conventional survey. This reduces the duration that vessels producing sound must operate. The proposed ice gouge survey in the Beaufort Sea is expected to last for 45 days.

The vessel that will be used for ice gouging surveys has not been selected, but it is anticipated that the vessel would be similar to the R/V *Mt. Mitchell,* which is 70 m (231 ft) long, 12.7 m (42 ft) wide, and 4.5 m (15 ft) draft.

It is proposed that the following acoustic instrumentation, or something similar, be used.

• Dual Frequency sub-bottom profiler; (2 to 7 kHz or 8 to 23 kHz):

Information regarding this active acoustic source on *Henry C.* was provided in Shell's 2006 and 2007 90-day open water marine survey monitoring reports. In the 2006 report, at 2–7 and 8–23 kHz, the source level was estimated at 184.6 dB re 1 μPa rms, and its 120, 160, and 180 dB re 1 μPa rms isopleths were determined to be 456 m, 7 m, and 2 m from the source, respectively. In the 2007 report, at 2–7 kHz, the source level was estimated at 161.1 dB re 1 μPa rms, and its 120 and 160 dB re 1 μPa rms isopleths were determined to be 260 m and 1 m, respectively.

• Multibeam Echo Sounder (240 kHz) and Side-scan sonar system (190 to 210 kHz):

Since the output frequencies from these acoustic instruments are above the upper-limits of marine mammal hearing range, NMFS believes it unlikely that a marine mammal would be taken by this activity.

**Strudel Scour Survey**

During the early melt on the North Slope, the rivers begin to flow and discharge water over the coastal sea ice near the river deltas. That water flows down holes in the ice ("strudels") and scours the seafloor. These areas are called "strudel scours". Information on these features is required for prospective pipeline planning. Two proposed activities are required to gather this information: aerial survey via helicopter overflights during the melt to locate the strudels; and strudel scour marine surveys to gather bathymetric data. The overflights investigate possible sources of overflood water and will survey local streams that discharge in the vicinity of Point Thomson including the Staines River, which discharges to the east into Flaxman Lagoon, and the Canning River, which discharges to the east directly into the Beaufort Sea. These helicopter overflights will occur during late May/early June 2010 and, weather permitting, should take no more than two days. There are no planned landings during these overflights other than at the Deadhorse or Kaktovik airports.

Areas that have strudel scour identified during the aerial survey will be verified and surveyed with a marine vessel after the breakup of nearshore ice. The vessel has not been determined, however, it is anticipated that it will be the diesel-powered R/V *Annika Marie* which has been utilized 2006 through 2008 and measures 13.1 m (43 ft) long, or similar vessel.

This proposed activity is not anticipated to take more than 5 days to conduct. The operation is conducted in the shallow water areas near the coast in the vicinity of Point Thomson. This vessel will use the following equipment:

• Multibeam Echo Sounder (240 kHz) and Side-scan sonar system (190 to 210 kHz):

Since the output frequencies from these acoustic instruments are above the upper-limits of marine mammal hearing range, NMFS believes it unlikely that a marine mammal would be taken by this activity.

• Single Beam Bathymetric Sonar:

Source levels for these types of units are typically in the 180–230 dB range, somewhat lower than multibeam or side scan sonars. A unit used during a previous survey had a source level (at high power) of 215 dB re 1 μPa (0-peak) and a standard operating frequency of 200 kHz. Since the output frequencies from these acoustic instruments are above the upper-limits of marine mammal hearing range, NMFS believes it unlikely that a marine mammal would be taken by this activity.

*3. Chukchi Sea Marine Survey—Ice Gouge Survey*

Shell proposes one marine survey activity for the Chukchi Sea in 2010. Shell intends to conduct ice gouge surveys annually over a few years to enhance baseline and statistical understanding of the formation, longevity, and temporal distribution of sea floor features and baseline environmental and biologic conditions. The ice gouge survey can be accomplished by one vessel. No other vessels are necessary to accomplish the proposed work.

The proposed ice gouge surveys will be conducted in both State of Alaska waters and the Federal waters of the OCS in the Chukchi Sea. Actual locations of the ice gouge surveys have not been definitively set as of this date, although these will occur within the area outlined in Figure 4 of the IHA application. The water depth of the ice gouging survey ranges between 20 to 120 ft (6.1 to 36.6 m), and the surveys will take in an area of 21,954 $mi^2$ (56,965 $km^2$), with a survey track line of approximately 1,539 mi (2,473 km). This activity is proposed to be conducted within the timeframe of July through October 2010. The total program will last a maximum of 60 days, excluding downtime due to ice, weather and other unforeseen delays, and should be complete by the end of October 2010.

The equipment and method used to conduct the ice gouge survey in the Chukchi Sea will be the same as that used in the Beaufort Sea. Because of the low source levels of the sub-bottom profiler and the high-frequency nature of the multi-beam echo sounder used in the proposed ice gouge survey, NMFS believes it unlikely that a marine mammal would be taken by this activity.

**Comments and Responses**

A notice of NMFS' proposal to issue an IHA to Shell published in the **Federal Register** on May 18, 2010 (75 FR 27708). That notice described, in detail, Shell's proposed activity, the marine mammal species that may be affected by the activity, and the anticipated effects on marine mammals. During the 30-day public comment period, NMFS received five comment letters from the following: the Marine Mammal Commission (Commission); the Alaska Eskimo Whaling Commission (AEWC); the Inupiat Community of the Arctic Slope (ICAS); the North Slope Borough Office of the Mayor (NSB); and Alaska Wilderness League (AWL), Audubon Alaska, Center for Biological Diversity, Defenders of Wildlife, Earthjustice, Greenpeace, Natural Resources Defense Council, Northern Alaska Environmental Center, Ocean Conservancy, Oceana, Pacific Environment, Sierra Club, and World Wildlife Fund (collectively "AWL"), along with an attached letter from Dr. David E. Bain, a contract scientist for NMFS.

The AEWC submitted several journal articles as attachments to its comment letters. NMFS acknowledges receipt of these documents but does not intend to address the specific articles themselves in the responses to comments, since these journal articles are merely used as citations in AEWC's comments. AEWC also submitted an unsigned, final version of the 2010 Conflict Avoidance Agreement (CAA), since Shell declined to sign the CAA. Dr. Bain also attached

an in-review journal article he coauthored. Any comments specific to Shell's application that address the statutory and regulatory requirements or findings NMFS must make to issue an IHA are addressed in this section of the **Federal Register** notice.

*General Comments*

*Comment 1:* AEWC and ICAS believe that NMFS should not issue incidental take authorizations for oil and gas-related activities given the current suspension of offshore drilling in Alaska and pending reorganization of the Minerals Management Service (MMS). AEWC and ICAS point out that the harm caused by an oil spill is not the only risk to marine mammals posed by oil and gas activities on the OCS and that there are concerns regarding underwater noise from geophysical activities and the threats posed to marine mammals from noise and chemical pollution, as well as increased vessel traffic. AEWC further claims that many times, NMFS issued IHAs over the objections of the scientific and subsistence communities as well as the agencies' own scientists.

*Response:* The legal requirements and underlying analysis for the issuance of an IHA concerning take associated with seismic activities are unrelated to the moratorium on offshore drilling and reorganization of the MMS. In order to issue an authorization pursuant to Section 101(a)(5)(D) of the MMPA, NMFS must determine that the taking by harassment of small numbers of marine mammal species or stocks will have a negligible impact on affected species or stocks, and will not have an unmitigable adverse impact on the availability of affected species or stocks for taking for subsistence uses. If NMFS is able to make these findings, the Secretary is required to issue an IHA. In the case of Shell's activities for 2010 (as described in the application, the notice of proposed IHA (75 FR 27708; May 18, 2010) and this document), NMFS determined that it was able to make the required MMPA findings. Additionally, as described later in this section and throughout this document, NMFS has determined that Shell's activities will not result in injury or mortality of marine mammals, and no injury or mortality is authorized under the IHA.

As discussed in detail in the proposed IHA (75 FR 27708; May 18, 2010), the EA for the issuance of IHAs to Shell and Statoil for the proposed open water marine and seismic surveys, and this document, NMFS has conducted a thorough analysis of the potential impacts of underwater anthropogenic sound (especially sound from geophysical surveys) on marine mammals. We have cited multiple studies and research that support NMFS' MMPA and National Environmental Policy Act (NEPA) determinations that the localized and short-term disturbance from seismic surveys, with strict mitigation and monitoring measures implemented, is likely to result in negligible impacts to marine mammals and no significant impact to the human environment, respectively. Although issuance of the IHA may be of concern to certain members of the public, the proposed issuance of the IHA was carefully reviewed and analyzed by NMFS scientists both at headquarters, through an Endangered Species Act (ESA) section 7 consultation at NMFS Alaska Regional Office, and by an independent bioacoustics expert and NMFS' National Marine Mammal Laboratory. Based on those reviews, NMFS staff in the Office of Protected Resources made appropriate changes to this document.

*Comment 2:* ICAS points out that Native communities in Alaska have long been ignored in the race to find and develop offshore oil and gas resources and that the U.S. Government has consistently failed to comply with legal requirements that require consultation with local Native communities as proposals are being developed that affect native environments. Instead, both Federal agencies and the entities they permit make only token gestures at consultations with Native groups offering them only the opportunity for involvement after proposals are developed and after local knowledge would serve a useful purpose.

*Response:* Regulations at 50 CFR 216.104(a)(12) require applicants for IHAs in Arctic waters to submit a Plan of Cooperation (POC), which, among other things, requires the applicant to meet with affected subsistence communities to discuss the proposed activities. Additionally, for many years, NMFS has conducted the Arctic Open Water Meeting, which brings together the Federal agencies, the oil and gas industry, and affected Alaska Native organizations to discuss the proposed activities and monitoring plans. Local knowledge is considered at these times, and it is not too late for that knowledge to serve a useful purpose. These communities are also afforded the opportunity to submit comments on the application and proposed IHA notice, which are then considered by NMFS before making a final determination on whether or not to issue an IHA.

*Comment 3:* Executive Order 13175 requires Federal agencies to conduct government-to-government consultation when undertaking to formulate and implement policies that have tribal implications. Despite this explicit requirement, ICAS believes that NMFS has failed to consult with governing bodies of Native people who will be and have been affected by the decisions NMFS is making under the MMPA. NMFS must meet with ICAS and local Native villages on a government-to-government basis to discuss the proposed IHA, as well as appropriate mitigation and monitoring requirements.

*Response:* NMFS recognizes the importance of the government-to-government relationship and has taken steps to ensure that Alaska Natives play an active role in the management of Arctic species. For example, NOAA and the AEWC co-manage bowhead whales pursuant to a cooperative agreement. This agreement has allowed the AEWC to play a significant role in the management of a valuable resource by affording Alaska Natives the opportunity to protect bowhead whales and the Eskimo culture and to promote scientific investigation, among other purposes.

In addition, NMFS works closely with Alaska Natives when considering whether to permit the take of marine mammals incidental to oil and gas operations. NMFS has met repeatedly over the years with Alaska Native representatives to discuss concerns related to NMFS' MMPA program in the Arctic, and has also taken into account recommended mitigation measures to reduce the impact of oil and gas operations on bowhead whales and to ensure the availability of marine mammals for taking for subsistence uses. Finally, NMFS has participated in Alaska Native community meetings in the past and will continue to do so, when feasible. NMFS most recently met with ICAS at its May monthly meeting in Barrow to discuss NMFS' role in minimizing impacts to marine mammals from oil and gas industry activities and asked the ICAS membership for specific recommendations. NMFS will continue to ensure that it meets its government-to-government responsibilities and will work closely with Alaska Natives to address their concerns.

*MMPA Concerns*

*Comment 4:* AEWC notes their disappointment in NMFS for releasing for public comment an incomplete application from Shell that fails to provide the mandatory information required by the MMPA and NMFS' implementing regulations. AEWC requests that NMFS return Shell's application as incomplete, or else the agency risks making arbitrary and

indefensible determinations under the MMPA. The following is the information that AEWC believes to be missing from Shell's application: (1) A description of the "age, sex, and reproductive condition" of the marine mammals that will be impacted, particularly in regard to bowhead whales (50 CFR 216.104(a)(6)); (2) the economic "availability and feasibility * * * of equipment, methods, and manner of conducting such activity or other means of effecting the least practicable adverse impact upon the affected species or stocks, their habitat, and on their availability for subsistence uses, paying particular attention to rookeries, mating grounds, and areas of similar significance" (50 CFR 216.104(a)(11)); and (3) suggested means of learning of, encouraging, and coordinating any research related activities (50 CFR 216.104(a)(14)). NSB also notes its concern about the lack of specificity regarding the timing and location of the proposed surveys, as well as the lack of specificity regarding the surveys themselves.

*Response:* NMFS does not agree that it released an incomplete application for review during the public comment period. After NMFS' initial review of the application, NMFS submitted questions and comments to Shell on its application. After receipt and review of Shell's responses, which were incorporated into the final version of the IHA application that was released to the public for review and comment, NMFS made its determination of completeness and released the application, addenda, and the proposed IHA notice (75 FR 27708; May 18, 2010). Regarding the three specific pieces of information believed to be missing by AEWC, Shell's original application included a description of the pieces of information that are required pursuant to 50 CFR 216.104(a)(12).

Information required pursuant to 50 CFR 216.104(a)(6) requires that an applicant submit information on the "age, sex, and reproductive condition (if possible)" of the number of marine mammals that may be taken. In the application, Shell described the species expected to be taken by harassment and provided estimates of how many of each species were expected to be taken during their activities. In most cases, it is very difficult to estimate how many animals, especially cetaceans, of each age, sex, and reproductive condition will be taken or impacted by seismic or site clearance and shallow hazards surveys.

Shell also provided information on economic "availability and feasibility * * * of equipment, methods, and manner of conducting such activity or other means of effecting the least practicable adverse impact upon the affected species or stocks, their habitat, and on their availability for subsistence uses, paying particular attention to rookeries, mating grounds, and areas of similar significance" (50 CFR 216.104(a)(11)) in its IHA application. In its application, Shell states that four main mitigations regarding site clearance and shallow hazards surveys in the Beaufort Sea are proposed: (1) Timing and locations for active survey acquisition work; (2) to configure airguns in a manner that directs energy primarily down to the seabed thus decreasing the range of horizontal spreading of noise; (3) using a energy source which is as small as possible while still accomplishing the survey objectives; and (4) curtailing active survey work when the marine mammal observers sight visually (from shipboard) the presence of marine mammals within identified ensonified zones. Details of these mitigation measures are discussed further in the 4MP that is included in Shell's IHA application. In addition to these measures, NMFS' Notice of Proposed IHA (75 FR 27708, May 18, 2010) described mitigation measures proposed to be implemented by Shell (outlined in the application), as well as additional measures proposed by NMFS for inclusion in an IHA.

Lastly, information required pursuant to 50 CFR 216.104(a)(14) was also included in Shell's application. Shell provided a list of researchers who could potentially receive results of their research activities who may find the data useful in their own research. Additionally, Shell states that it plans to deploy arrays of acoustic recorders in the Beaufort Sea in 2010, similar to those deployed in 2007 and 2008 using DASARs supplied by Greeneridge. These directional acoustic systems permit localization of bowhead whale and other marine mammal vocalizations, and to further understand, define, and document sound characteristics and propagation resulting from shallow hazards surveys that may have the potential to cause deflections of bowhead whales from their migratory pathway. NMFS also determined that Shell's application provides descriptions of the specified activities and specified geographic region.

In conclusion, NMFS believes that Shell provided all of the necessary information to proceed with publishing a proposed IHA notice in the **Federal Register**.

*Comment 5:* AEWC and NSB state that NMFS failed to issue a draft authorization for public review and comment. The plain language of both the MMPA and NMFS' implementing regulations require that NMFS provide the opportunity for public comment on the "proposed incidental harassment authorization" (50 CFR 216.104(b)(1)(i); 16 U.S.C. 1371 (a)(5)(D)(iii)) and not just on the application itself as NMFS has done here. Given Shell's refusal to sign the CAA and without a complete draft authorization and accompanying findings, AEWC states that it cannot provide meaningful comments on Shell's proposed activities, ways to mitigate the impacts of those activities on marine mammals, and measures that are necessary to protect subsistence uses and sensitive resources.

*Response:* The May 18, 2010 proposed IHA notice (75 FR 27708) contained all of the relevant information needed by the public to provide comments on the proposed authorization itself. The notice contained the permissible methods of taking by harassment, means of effecting the least practicable impact on such species (*i.e.,* mitigation), measures to ensure no unmitigable adverse impact on the availability of the species or stock for taking for subsistence use, requirements pertaining to the monitoring and reporting of such taking, including requirements for the independent peer review of the proposed monitoring plan. The notice provided detail on all of these points and, in NMFS view, allowed the public to comment on the proposed authorization and inform NMFS' final decision. Additionally, the notice contained NMFS' preliminary findings of negligible impact and no unmitigable adverse impact.

The signing of a CAA is not a requirement to obtain an IHA. The CAA is a document that is negotiated between and signed by the industry participant, AEWC, and the Village Whaling Captains' Associations. NMFS has no role in the development or execution of this agreement. Although the contents of a CAA may inform NMFS' no unmitigable adverse impact determination for bowhead and beluga whales and ice seals, the signing of it is not a requirement. While a CAA has not been signed and a final version agreed to by industry participants, AEWC, and the Village Whaling Captains' Associations, NMFS was provided with a copy of the version ready for signature by AEWC. NMFS has reviewed the CAA and included several measures from the document which relate to marine mammals and avoiding conflicts with subsistence hunts in the IHA. Some of

the conditions which have been added to the IHA include: (1) Avoiding concentrations of whales and reducing vessel speed when near whales; (2) flying at altitudes above 457 m (1,500 ft) unless involved in marine mammal monitoring or during take-offs, landings, or in emergencies situations; (3) conducting sound source verification measurements; and (4) participating in the Communication Centers. Despite the lack of a signed CAA for 2010 activities, NMFS is confident that the measures contained in the IHA will ensure no unmitigable adverse impact to subsistence users.

*Comment 6:* AEWC and NSB argue that Shell has not demonstrated that its proposed activities would take only "small numbers of marine mammals of a species or population stock," resulting in no more than a "negligible impact" on a species or stock. In addition, NSB argues that NMFS has not adequately analyzed harassment associated with received levels of noise below 160 dB.

*Response:* NMFS believes that it provided sufficient information in its proposed IHA notice (75 FR 27708; May 18, 2010) to make the small numbers and negligible impact determinations and that the best scientific information available was used to make those determinations. While some published articles indicate that certain marine mammal species may avoid seismic vessels at levels below 160 dB, NMFS does not consider that these responses rise to the level of a take, as defined in the MMPA. While studies, such as Miller *et al.* (1999), have indicated that some bowhead whales may have started to deflect from their migratory path 35 km (21.7 mi) from the seismic vessel, it should be pointed out that these minor course changes are during migration and, as described in MMS' 2006 Final Programmatic Environmental Assessment (PEA), have not been seen at other times of the year and during other activities. To show the contextual nature of this minor behavioral modification, recent monitoring studies of Canadian seismic operations indicate that feeding, non-migratory bowhead whales do not move away from a noise source at an SPL of 160 dB. Therefore, while bowheads may avoid an area of 20 km (12.4 mi) around a noise source, when that determination requires a post-survey computer analysis to find that bowheads have made a 1 or 2 degree course change, NMFS believes that does not rise to a level of a "take," as the change in bearing is due to animals sensing the noise and avoiding passage through the ensonified area during their migration, and should not be considered as being displaced from their habitat. NMFS therefore continues to estimate "takings" under the MMPA from impulse noises, such as seismic, as being at a distance of 160 dB (re 1 μPa). As explained throughout this **Federal Register** notice, it is highly unlikely that marine mammals would be exposed to SPLs that could result in serious injury or mortality. The best scientific information indicates that an auditory injury is unlikely to occur, as apparently sounds need to be significantly greater than 180 dB for injury to occur (Southall *et al.,* 2007). The 180–dB radius for the airgun array to be used by Shell is 125 m (410 ft). Therefore, if injury were possible from Shell's activities, the animal would need to be closer than 125 m (410 ft). However, based on the configuration of the airgun array and streamers, it is highly unlikely that a marine mammal would be that close to the seismic vessel. Mitigation measures described later in this document will be implemented should a marine mammal enter this small zone around the airgun array.

Regarding the "small numbers" issue raised by the AEWC and NSB, NMFS has provided estimates on the number of marine mammals that could be taken as a result of Shell's proposed marine surveys, and the estimated takes from these proposed activities are all under 3 percent for affected marine mammal populations (*see* Potential Number of Takes by Harassment section below).

*Impacts to Marine Mammals*

*Comment 7:* AEWC notes that based on the density estimates, Shell is predicting that an average of 381 and a maximum of 394 Bering-Chukchi-Beaufort (B–C–B) stock of bowhead whales may be exposed to seismic sounds at received levels above 160 dB. AEWC states that these are by no means "small numbers" of marine mammals that will be subjected to impacts as a result of Shell's operations.

*Response:* NMFS determined that the small numbers requirement has been satisfied. Shell has predicted that an average of 381 individuals of the B–C–B stock of bowhead whales would be exposed to noise received levels above 160 dB as the result of Shell's proposed marine surveys, and NMFS assumes that animals exposed to received levels above 160 dB are taken. However, because of the tendency of whales to avoid the source to some degree, and the fact that both the whales and the source are both moving through an area, the majority of the exposures would likely occur at levels closer to 160 dB (not higher levels) and the impacts would be expected to be relatively low-level and not of a long duration. NMFS addresses "small numbers" in terms relative to the stock or population size. The Level B harassment take estimate of 381 bowhead whales is a small number in relative terms, because of the nature of the anticipated responses and in that it represents only 2.67 percent of the regional stock size of that species (14,247), if each "exposure" at 160 dB represents an individual bowhead whale. Additionally, the percentage would be even lower if animals move out of the seismic area in a manner that does not result in a take at all.

*Comment 8:* AWL, NSB, and AEWC noted that NMFS has acknowledged that permanent threshold shift (PTS) qualifies as a serious injury. Therefore, if an acoustic source at its maximum level has the potential to cause PTS and thus lead to serious injury, it would not be appropriate to issue an IHA for the activity (60 FR 28381, May 31, 1995). AEWC states that therefore an LOA is required here. While the airguns proposed by Shell are smaller than those associated with typical 2D/3D deep marine surveys, the noise they produce is still considerable, as evidenced by the estimated 120 dB radius that extends out to 14,000 m.

*Response:* In the proposed rule to implement the process to apply for and obtain an IHA, NMFS stated that authorizations for harassment involving the "potential to injure" would be limited to only those that may involve non-serious injury (60 FR 28379; May 31, 1995). While the **Federal Register** notice cited by the commenters states that NMFS considered PTS to be a serious injury (60 FR 28379; May 31, 1995), our understanding of anthropogenic sound and the way it impacts marine mammals has evolved since then, and NMFS no longer considers PTS to be a serious injury. NMFS has defined "serious injury" in 50 CFR 216.3 as "* * * any injury that will likely result in mortality." There are no data that suggest that PTS would be likely to result in mortality, especially the limited degree of PTS that could hypothetically be incurred through exposure of marine mammals to seismic airguns at the level and for the duration that are likely to occur in this action.

Further, as stated several times in this document and previous **Federal Register** notices for seismic activities, there is no empirical evidence that exposure to pulses of airgun sound can cause PTS in any marine mammal, even with large arrays of airguns (*see* Southall *et al.* 2007). PTS is thought to occur several decibels above that inducing mild temporary threshold shift (TTS), the mildest form of hearing impairment (a non-injurious effect).

NMFS 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 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. As summarized later in this document, data that are now available imply that TTS is unlikely to occur unless bow-riding odontocetes are exposed to airgun pulses much stronger than 180 dB re 1 Pa rms (Southall *et al.* 2007). Additionally, NMFS has required monitoring and mitigation measures to negate the possibility of marine mammals being seriously injured as a result of Shell's activities. In the proposed IHA, NMFS determined that Shell's activities are unlikely to even result in TTS. Based on this determination and the explanation provided here, PTS is also not expected. Therefore, an IHA is appropriate.

*Comment 9:* AWL, Dr. Bain, NSB, and AEWC state that NMFS has not adequately considered whether marine mammals may be harassed at received levels significantly lower than 160 dB and that NMFS did not use the best scientific evidence in setting the sound levels against which take was assessed. They state that NMFS calculated harassment from Shell's proposed surveying based on the exposure to marine mammals to sounds at or above 160 dB and that this uniform approach to harassment does not take into account known reactions of marine mammals in the Arctic to levels of noise far below 160 dB. These comments state that bowhead, gray, killer, and beluga whales and harbor porpoise react to sounds lower than 160 dB.

Citing several papers on killer whales and harbor porpoise, Dr. Bain states that major behavioral changes of these animals appear to be associated with received levels of around 135 dB re 1 µPa, and that minor behavioral changes can occur at received levels from 90–110 dB re 1 µPa or lower. He also states that belugas have been observed to respond to icebreakers by swimming rapidly away at distances up to 80 km, where received levels were between 94 and 105 dB re 1 µPa. Belugas exhibited minor behavioral changes such as changes in vocalization, dive patterns, and group composition at distances up to 50 km (NRC 2003), where received levels were likely around 120 dB.

AEWC also states that in conducting scoping on its national acoustic guidelines for marine mammals, NMFS noted that the existing system for determining take (*i.e.,* the 160 dB mark) "considers only the sound pressure level of an exposure but not its other attributes, such as duration, frequency, or repetition rate, all of which are critical for assessing impacts on marine Mammals" and "also assumes a consistent relationship between rms (root-mean-square) and peak pressure values for impulse sounds, which is known to be inaccurate under certain (many) conditions" (70 FR 1871, 1873; January 11, 2005). Thus, NMFS itself has recognized that 160 dB (rms) is not an adequate measure. AEWC argues that current scientific research establishes that 120 dB (rms) is a more appropriate measure for impacts to marine mammals.

*Response:* The best information available to date for reactions by bowhead whales to noise, such as seismic, is based on the results from the 1998 aerial survey (as supplemented by data from earlier years) as reported in Miller *et al.* (1999). In 1998, bowhead whales below the water surface at a distance of 20 km (12.4 mi) from an airgun array received pulses of about 117–135 dB re 1 µPa rms, depending upon propagation. Corresponding levels at 30 km (18.6 mi) were about 107–126 dB re 1 µPa rms. Miller *et al.* (1999) surmise that deflection may have begun about 35 km (21.7 mi) to the east of the seismic operations, but did not provide SPL measurements to that distance and noted that sound propagation has not been studied as extensively eastward in the alongshore direction, as it has northward, in the offshore direction. Therefore, while this single year of data analysis indicates that bowhead whales may make minor deflections in swimming direction at a distance of 30–35 km (18.6–21.7 mi), there is no indication that the SPL where deflection first begins is at 120 dB; it could be at another SPL lower or higher than 120 dB. Miller *et al.* (1999) also note that the received levels at 20–30 km (12.4–18.6 mi) were considerably lower in 1998 than have previously been shown to elicit avoidance in bowheads exposed to seismic pulses. However, the seismic airgun array used in 1998 was larger than the ones used in 1996 and 1997. Therefore, NMFS believes that it cannot scientifically support adopting any single SPL value below 160 dB and apply it across the board for all species and in all circumstances. Second, these minor course changes occurred during migration and, as indicated in MMS' 2006 PEA, have not been seen at other times of the year and during other activities. Third, as stated in the past, NMFS does not believe that minor course corrections during a migration equate to "take" under the MMPA. This conclusion is based on controlled exposure experiments conducted on migrating gray whales exposed to the U.S. Navy's low frequency sonar (LFA) sources (Tyack 2009). When the source was placed in the middle of the migratory corridor, the whales were observed deflecting around the source during their migration. However, such minor deflection is considered not to be biologically significant. To show the contextual nature of this minor behavioral modification, recent monitoring studies of Canadian seismic operations indicate that when, not migrating, but involved in feeding, bowhead whales do not move away from a noise source at an SPL of 160 dB. Therefore, while bowheads may avoid an area of 20 km (12.4 mi) around a noise source, when that determination requires a post-survey computer analysis to find that bowheads have made a 1 or 2 degree course change, NMFS believes that does not rise to a level of a "take." NMFS therefore continues to estimate "takings" under the MMPA from impulse noises, such as seismic, as being at a distance of 160 dB (re 1 µPa). Although it is possible that marine mammals could react to any sound levels detectable above the ambient noise level within the animals' respective frequency response range, this does not mean that such animals would react in a biologically significant way. According to experts on marine mammal behavior, the degree of reaction which constitutes a "take," *i.e.,* a reaction deemed to be biologically significant that could potentially disrupt the migration, breathing, nursing, breeding, feeding, or sheltering, etc., of a marine mammal is complex and context specific, and it depends on several variables in addition to the received level of the sound by the animals. These additional variables include, but are not limited to, other source characteristics (such as frequency range, duty cycle, continuous vs. impulse vs. intermittent sounds, duration, moving vs. stationary sources, etc.); specific species, populations, and/or stocks; prior experience of the animals (naive vs. previously exposed); habituation or sensitization of the sound by the animals; and behavior context (whether the animal perceives the sound as predatory or simply annoyance), etc. (Southall *et al.* 2007).

The references cited in the comment letters address different source characteristics (continuous sound rather than impulse sound that are planned for the proposed shallow hazard and site clearance surveys) or species (killer whales and harbor proposes) that rarely occur in the proposed Arctic action area. Some information about the responses of bowhead and gray whales to seismic survey noises has been acquired through dedicated research and marine mammal monitoring studies conducted during prior seismic surveys. Detailed descriptions regarding behavioral responses of these marine mammals to seismic sounds are available (*e.g.,* Richardson *et al.* 1995; review by Southall *et al.* 2007), and are also discussed in this document. Additionally, as Shell does not intend to use ice-breakers during its operations, statements regarding beluga reactions to icebreaker noise are not relevant to this activity.

Regarding the last point raised in this comment by AEWC, NMFS recognizes the concern. However, NMFS does not agree with AEWC's statement that current scientific research establishes that 120 dB (rms) is a more appropriate measure for impacts to marine mammals for reasons noted above. Based on the information and data summarized in Southall *et al.* (2007), and on information from various studies, NMFS believes that the onset for behavioral harassment is largely context dependent, and there are many studies showing marine mammals do not show behavioral responses when exposed to multiple pulses at received levels above 160 dB re 1 µPa (*e.g.,* Malme *et al.* 1983; Malme *et al.* 1984; Richardson *et al.* 1986; Akamatsu *et al.* 1993; Madsen and Møhl 2000; Harris *et al.* 2001; Miller *et al.* 2005). Therefore, although using a uniform SPL of 160–dB for the onset of behavioral harassment for impulse noises may not capture all of the nuances of different marine mammal reactions to sound, it is an appropriately conservative way to manage and regulate anthropogenic noise impacts on marine mammals. Therefore, unless and until an improved approach is developed and peer-reviewed, NMFS will continue to use the 160–dB threshold for determining the level of take of marine mammals by Level B harassment for impulse noise (such as from airguns).

*Comment 10:* NSB and AWL note that this IHA, as currently proposed, is based on uncertainties that are not allowed under the MMPA. Citing comments made by NMFS on recent MMS Lease Sale Environmental Impact Statements, NSB notes that NMFS stated that without more current and thorough data on the marine mammals in the Chukchi Sea and their use of these waters, it would be difficult to make the findings required by the MMPA. NSB notes that NMFS noted that the "continued lack of basic audiometric data for key marine mammal species" that occur throughout the Chukchi Sea inhibits the "ability to determine the nature and biological significance of exposure to various levels of both continuous and impulsive oil and gas activity sounds."

*Response:* NMFS agrees that while there may be some uncertainty on the current status of some marine mammal species in the Chukchi Sea and on impacts to marine mammals from seismic surveys, the best available information supports our findings. NMFS is currently proposing to conduct new population assessments for Arctic pinniped species, and current information is available on-line through the Stock Assessment Reports (SARs). Moreover, NMFS has required the industry to implement a monitoring and reporting program to collect additional information concerning effects to marine mammals.

In regard to impacts, there is no indication that seismic survey activities are having a long-term impact on marine mammals. For example, apparently, bowhead whales continued to increase in abundance during periods of intense seismic activity in the Chukchi Sea in the 1980s (Raftery *et al.* 1995; Angliss and Outlaw 2007), even without implementation of current mitigation requirements. As a result, NMFS believes that seismic survey noise in the Arctic will affect only small numbers of and have no more than a negligible impact on marine mammals in the Chukchi Sea. As explained in this document and based on the best available information, NMFS has determined that Shell's activities will affect only small numbers of marine mammals, will have a negligible impact on affected species or stocks, and will not have an unmitigable adverse impact on subsistence uses of the affected species or stocks.

*Comment 11:* AEWC notes that stranded marine mammals or their carcasses are also a sign of injury. NMFS states in its notice that it "does not expect any marine mammal will * * * strand as a result of the proposed survey" (75 FR 27708; May 18, 2010). In reaching this conclusion, NMFS claims that strandings have not been recorded for the Beaufort and Chukchi Seas. AEWC states that the Department of Wildlife Management of NSB has completed a study documenting 25 years worth of stranding data and showing that five dead whales were reported in 2008 alone in comparison with the five dead whales that were reported in the same area over the course of 25 years (Rosa 2009).

In light of the increase in seismic operations in the Arctic since 2006, AEWC says that NSB's study raises serious concerns about the impacts of these operations and their potential to injure marine mammals. AEWC states that while they think this study taken together with the June 2008 stranding of "melon headed whales off Madagascar that appears to be associated with seismic surveys" (75 FR 27708; May 18, 2010) demonstrate that seismic operations have the potential to injure marine mammals beyond beaked whales (and that Shell needs to apply for an LOA for its operations), certainly NSB's study shows that direct injury of whales is on-going. AEWC states that these direct impacts must be analyzed and explanations sought out before additional activities with the potential to injure marine mammals are authorized, and that NMFS must explain how, in light of this new information, Shell's application does not have the potential to injure marine mammals.

*Response:* NMFS has reviewed the information provided by AEWC regarding marine mammal strandings in the Arctic. The Rosa (2009) paper cited by AEWC does not provide any evidence linking the cause of death for the bowhead carcasses reported in 2008 to seismic operations. Additionally, the increased reporting of carcasses in the Arctic since 2006 may also be a result of increased reporting effort and does not necessarily indicate that there were fewer strandings prior to 2008. Marine mammal observers (MMOs) aboard industry vessels in the Beaufort and Chukchi Seas have been required to report sightings of injured and dead marine mammals to NMFS as part of the IHA requirements only since 2006.

Regarding the June 2008 stranding of melon headed whales off Madagascar, information available to NMFS at this time indicates that the seismic airguns were not active around the time of the stranding. While the Rosa (2009) study does present information regarding the injury of whales in the Arctic, it does not link the cause of the injury to seismic survey operations. As NMFS has stated previously, the evidence linking marine mammal strandings and seismic surveys remains tenuous at best. Two papers, Taylor *et al.* (2004) and Engel *et al.* (2004) reference seismic signals as a possible cause for a marine mammal stranding.

Taylor *et al.* (2004) noted two beaked whale stranding incidents related to seismic surveys. The statement in Taylor *et al.* (2004) was that the seismic vessel was firing its airguns at 1300 hrs on September 24, 2004, and that between 1400 and 1600 hrs, local fishermen found live stranded beaked whales 22 km (12 nm) from the ship's location. A review of the vessel's trackline indicated that the closest approach of the seismic vessel and the beaked whales stranding location was 18 nm (33 km) at 1430 hrs. At 1300 hrs, the seismic vessel was located 25 nm (46 km) from the stranding location. What is unknown is the location of the beaked whales prior to the stranding in relation to the seismic vessel, but the close timing of events indicates that the distance was not less than 18 nm (33 km). No physical evidence for a link between the seismic survey and the stranding was obtained. In addition, Taylor *et al.* (2004) indicates that the same seismic vessel was operating 500 km (270 nm) from the site of the Galapagos Island stranding in 2000. Whether the 2004 seismic survey caused the beaked whales to strand is a matter of considerable debate (*see* Cox *et al.* 2006). However, these incidents do point to the need to look for such effects during future seismic surveys. To date, follow up observations on several scientific seismic survey cruises have not indicated any beaked whale stranding incidents.

Engel *et al.* (2004), in a paper presented to the IWC in 2004 (SC/56/E28), mentioned a possible link between oil and gas seismic activities and the stranding of 8 humpback whales (7 off the Bahia or Espirito Santo States and 1 off Rio de Janeiro, Brazil). Concerns about the relationship between this stranding event and seismic activity were raised by the International Association of Geophysical Contractors (IAGC). The IAGC (2004) argues that not enough evidence is presented in Engel *et al.* (2004) to assess whether or not the relatively high proportion of adult strandings in 2002 is anomalous. The IAGC contends that the data do not establish a clear record of what might be a "natural" adult stranding rate, nor is any attempt made to characterize other natural factors that may influence strandings. As stated previously, NMFS remains concerned that the Engel *et al.* (2004) article appears to compare stranding rates made by opportunistic sightings in the past with organized aerial surveys beginning in 2001. If so, then the data are suspect.

Finally, if bowhead and gray whales react to sounds at very low levels by making minor course corrections to avoid seismic noise, and mitigation measures require Shell to ramp-up the seismic array to avoid a startle effect, strandings such as those observed in the Bahamas in 2000 are highly unlikely to occur in the Arctic Ocean as a result of seismic activity. Therefore, NMFS does not expect any marine mammals will incur serious injury or mortality as a result of Shell's 2010 survey operations, so an LOA is not needed.

Lastly, Shell is required to report all sightings of dead and injured marine mammals to NMFS and to notify the Marine Mammal Health and Stranding Response Network. However, Shell is not permitted to conduct necropsies on dead marine mammals. Necropsies can only be performed by people authorized to do so under the Marine Mammal Health and Stranding Response Program MMPA permit. NMFS is currently considering different methods for marking carcasses to reduce the problem of double counting. However, a protocol has not yet been developed, so marking is not required in the IHA.

*Comment 12:* AEWC and NSB state that research is increasingly showing that marine mammals may remain within dangerous distances of seismic operations rather than leave a valued resource such as a feeding ground (*see* Richardson 2004). The International Whaling Commission (IWC) scientific committee has indicated that the lack of deflection by feeding whales in Camden Bay (during Shell seismic activities) likely shows that whales will tolerate and expose themselves to potentially harmful levels of sound when needing to perform a biologically vital activity, such as feeding (mating, giving birth, etc.). Thus, the noise from Shell's proposed operations could injure marine mammals if they are close enough to the source. NSB further states that NMFS has not adequately analyzed the potential for serious injury.

*Response:* If marine mammals, such as bowhead whales, remain near a seismic operation to perform a biologically vital activity, such as feeding, depending on the distance from the vessel and the size of the 160-dB radius, the animals may experience some Level B harassment. A detailed analysis on potential impacts of anthropogenic noise (including noise from seismic airguns and other active acoustic sources used in geophysical surveys) is provided in the proposed IHA (75 FR 27708; May 18, 2010) and in this document. Based on the analysis, NMFS believes that it is unlikely any animals exposed to noise from Shell's proposed marine surveys would be exposed to received levels that could cause TTS (a non-injurious Level B harassment). Therefore, it is even less likely that marine mammals would be exposed to levels of sound from Shell's activity that could cause PTS (a non-lethal Level A harassment).

In addition, depending on the distance of the animals from the vessel and the number of individual whales present, certain mitigation measures are required to be implemented. If an aggregation of 12 or more mysticete whales are detected within the 160-dB radius, then the airguns must be shutdown until the aggregation is no longer within that radius. Additionally, if any whales are sighted within the 180-dB radius or any pinnipeds are sighted within the 190-dB radius of the active airgun array, then either a power-down or shutdown must be implemented immediately. For the reasons stated throughout this document, NMFS has determined that Shell's operations will not injure, seriously injure, or kill marine mammals.

*Comment 13:* AEWC states that NMFS does little to assess whether Level A harassment is occurring as a result of the deflection of marine mammals as a result of Shell's proposed operations. Deflected marine mammals may suffer impacts due to masking of natural sounds including calling to others of their species, physiological damage from stress and other non-auditory effects, harm from pollution of their environment, tolerance, and hearing impacts (*see* Nieukirk *et al.* 2004). Not only do these operations disrupt the animals' behavioral patterns, but they also create the potential for injury by causing marine mammals to miss feeding opportunities, expend more energy, and stray from migratory routes when they are deflected. Dr. Bain also states that there are three main ways that minor behavioral changes, when experienced by numerous individuals for extended periods of time, can affect population growth: Increased energy expenditure, reduced food acquisition, and stress (Trites and Bain 2000).

*Response: See* the response to comment 9 regarding the potential for injury. The paper cited by AEWC (Nieukirk *et al.* 2004) tried to draw linkages between recordings of fin, humpback, and minke whales and airgun signals in the western North Atlantic; however, the authors note the difficulty in assessing impacts based on the data collected. The authors also state that the effects of airgun activity on baleen whales is unknown and then cite to Richardson *et al.* (1995) for some possible effects, which AEWC lists in their comment. There is no statement in the cited study, however, about the

linkage between deflection and these impacts. While deflection may cause animals to expend extra energy, there is no evidence that this deflection is causing a significant behavioral change that will adversely impact population growth. In fact, bowhead whales continued to increase in abundance during periods of intense seismic activity in the Chukchi Sea in the 1980s (Raftery *et al.* 1995; Angliss and Outlaw 2007). Therefore, NMFS does not believe that injury will occur as a result of Shell's activities. Additionally, Shell's total data acquisition activities would only ensonify 7.3 $km^2$ to received levels above 160 dB of the Beaufort Sea (0.0016% of the entire Beaufort Sea). Therefore, based on the smaller radii associated with Shell's site clearance and shallow hazards surveys than the larger 2D or 3D seismic programs and the extremely small area of the Beaufort Sea where Shell will utilize airguns, it is unlikely that marine mammals will need to expend extra energy to locate prey or to have reduced foraging opportunities.

*Comment 14:* Citing Erbe (2002), AEWC notes that any sound at some level can cause physiological damage to the ear and other organs and tissues. Placed in a context of an unknown baseline of sound levels in the Chukchi Sea, it is critically important that NMFS take a precautionary approach to permitting additional noise sources in this poorly studied and understood habitat. Thus, the best available science dictates that NMFS use a more cautious approach in addressing impacts to marine mammals from seismic operations.

*Response:* The statement from Erbe (2002) does not take into account mitigation measures required in the IHA to reduce impacts to marine mammals. As stated throughout this document, based on the fact that Shell will be using a small airgun array (total discharge volume of 40 $in^3$) and will implement mitigation measures (*i.e.,* ramp-up, power-down, shutdown, etc.), NMFS does not believe that there will be any injury or mortality of marine mammals as a result of Shell's operations.

*Comment 15:* AEWC states that in making its negligible impact determination, NMFS failed to consider several impacts: (1) Displacing marine mammals from feeding areas; (2) non-auditory, physiological effects, namely stress; (3) the possibility of vessel strikes needs to be considered in light of scientific evidence of harm from ship traffic to marine mammals; (4) impacts to marine mammal habitat, including pollution of the marine environment and the risk of oil spills, toxic, and nontoxic waste being discharged; (5) impacts to fish and other food sources upon which marine mammals rely; and (6) specific marine mammals that will be taken, including their age, sex, and reproductive condition. The first issue was also raised by Dr. Bain.

*Response:* NMFS does not agree that these impacts were not considered. First, the area that would be ensonified by Shell's proposed open water marine surveys represents a small fraction of the total habitat of marine mammals in the Beaufort and Chukchi Seas. In addition, as the survey vessel is constantly moving, the ensonified zone where the received levels exceed 160 dB re 1 µPa (rms), which is estimated to be approximately 7.3 $km^2$ at any given time, is constantly moving. Therefore, the duration during which marine mammals would potentially avoid the ensonified area would be brief. Therefore, NMFS does not believe marine mammals would be displaced from their customary feeding areas as a result of Shell's proposed marine surveys.

Second, non-auditory, physiological effects, including stress, were analyzed in the Notice of Proposed IHA (75 FR 27708; May 18, 2010). No single marine mammal is expected to be exposed to high levels of sound for extended periods based on the size of the airgun array to be used by Shell and the fact that an animal would need to swim close to, parallel to, and at the same speed as the vessel to incur several high intensity pulses. This also does not take into account the mitigation measures described later in this document.

Third, impacts resulting from vessel strikes and habitat pollution and impacts to fish were fully analyzed in NMFS' 2010 Final EA for Shell and Statoil's open water marine and seismic activities (NMFS 2010). Additionally, the proposed IHA analyzed potential impacts to marine mammal habitat, including prey resources. That analysis noted that while mortality has been observed for certain fish species found in extremely close proximity to the airguns, Sætre and Ona (1996) concluded that mortality rates caused by exposure to sounds are so low compared to natural mortality that issues relating to stock recruitment should be regarded as insignificant.

For the sixth point, please *see* the response to comment 4. The age, sex, and reproductive condition must be provided when possible. However, this is often extremely difficult to predict. Additional mitigation measures for bowhead cow/calf pairs, such as monitoring the 120-dB radius and requiring shutdown when 4 or more cow/calf pairs enter that zone, were considered and required for this survey.

*Comment 16:* AEWC states that in assessing the level of take and whether it is negligible, NMFS relied on flawed density estimates that call into question all of NMFS' preliminary conclusions. AEWC states that density data are lacking or outdated for almost all marine mammals that may be affected by Shell's operations in the Beaufort and Chukchi Seas, especially for the fall. AEWC provided a few species specific examples to show that NMFS failed to utilize the best available scientific studies in assessing Shell's application. AEWC argues that NMFS' guess at the number of beluga and bowhead whales relies on a study from Moore *et al.* that was published in 2000, that the density of bowhead whales was derived from limited aerial surveys conducted by industry operators, and that these estimates are contrary to the best available scientific information. AEWC also points out that NMFS makes no mention of the most recent Alaska Marine Mammal Stock Assessment Report (SAR) which was released this year, and that the Assessment cites to a 2003 study that documented bowheads "in the Chukchi and Bering Seas in the summer" that are "thought to be a part of the expanding Western Arctic stock" (Angliss and Allen 2009). While a study published in 2003 still is not a sufficient basis for a 2009 density analysis, this study does show that additional information is available that indicates that the number of bowhead whales in the Chukchi may be higher than estimated by NMFS.

*Response:* As required by the MMPA implementing regulations at 50 CFR 216.102(a), NMFS has used the best scientific information available in assessing the level of take and whether it is negligible. Although most of the data NMFS depends on were collected over 10 years (1982–1991) from aerial surveys offshore of northern Alaska (Moore *et al.* 2000), these are the best scientific information available for bowhead and beluga whale density and distribution so far. Since approximately 10 days of Shell's proposed shallow hazards and site clearance surveys are likely to occur during the fall period when bowheads are migrating through the Beaufort Sea, more conservative estimates were made to take account for this 10-day moving average presented by Richardson and Thomson (2002). Additionally, the 2003 study noted by AEWC in the bowhead whale Alaska Marine Mammal SAR discusses distribution, not density (Rugh *et al.* 2003). It was not cited because it is not useful for deriving density estimates.

Therefore, density estimates for bowhead and beluga whales using Moore *et al.* (2000) are based on the best available science.

*Comment 17:* AEWC states that NMFS fails to explain how and why it reaches various conclusions in calculating marine mammal densities and what the densities are actually estimated to be once calculated. One example is NMFS' reliance on Moore *et al.* (2000) in making its density determinations. This study documented sightings of marine mammals but did not estimate the total number of animals present. AEWC states that NMFS's practices have resulted in entirely arbitrary calculations of the level of take of marine mammals and whether such takes constitute "small numbers" or a "negligible impact" as a result of Shell's proposal.

*Response:* All densities used in calculating estimated take of marine mammals based on the described operations are shown in Tables 6–1 to 6–3 of Shell's application. Moore *et al.* (2000) provides line transect effort and sightings from aerial surveys for cetaceans in the Chukchi Sea. The kilometers of "on-transect" observer effort and number of sightings were used in the accepted line-transect density estimate equation described in Buckland *et al.* (2001). Species specific correction factors for animals that were not at the surface or that were at the surface but were not sighted [g(0)] and animals not sighted due to distance from the survey trackline [f(0)] used in the equation were taken from reports or publications on the same species or similar species if no values were available for a given species, that used the same survey platform. Additional explanations regarding the calculations of marine mammal densities are provided in the Shell's application and the **Federal Register** notice for the proposed IHA (75 FR 27708; May 18, 2010). Therefore, NMFS believes the methodology used in calculations of the level of take of marine mammals is scientifically well supported.

*Comment 18:* AEWC is opposed to NMFS using "survey data" gathered by industry while engaging in oil and gas related activities and efforts to document their take of marine mammals. AEWC points out that such industry "monitoring" is designed to document the level of take occurring from the operation (*see* 75 FR 27724 and Shell's 4MP). AEWC argues that putting aside whether the methodologies employed are adequate for this purpose, they certainly are not adequate for assessing the density or presence of marine mammals that typically avoid such operations.

*Response:* In making its determinations, NMFS uses the best scientific information available, as required by the MMPA implementing regulations. For some species, density estimates from sightings surveys, as well as from "industry surveys", were provided in the text of Shell's application and the Notice of Proposed IHA for purposes of comparison. However, where information was available from sightings surveys (*e.g.,* Moore *et al.* 2000; Bengtson *et al.* 2005), those estimates were used to calculate take. Data collected on industry vessels were only used when no other information was available. Additionally, while some Arctic marine mammal species have shown fleeing responses to seismic airguns, data is also collected on these vessels during periods when no active seismic data collection is occurring.

*Comment 19:* AEWC states that as a general matter, when it comes to NMFS assessing the various stocks of marine mammals under the MMPA, it cannot use outdated data *i.e.,* "abundance estimates older than 8 years" because of the "decline in confidence in the reliability of an aged abundance estimate" (Angliss and Allen 2009) and the agency is thus unable to reach certain conclusions. Similarly, here, where data are outdated or nonexistent, NMFS should decide it cannot reach the necessary determinations. AEWC argues that these flaws in NMFS' analysis render the agency's preliminary determinations about the level of harassment and negligible impacts completely arbitrary.

*Response:* The statements quoted by AEWC from Angliss and Allen (2009) are contained in species SARs where abundance estimates are older than 8 years. However, the full statement reads as follows: "However, the 2005 revisions to the SAR guidelines (NMFS 2005) state that abundance estimates older than 8 years should not be used to calculate PBR due to a decline in confidence in the reliability of an aged abundance estimate." Shell's activities are not anticipated to remove any individuals from the stock or population. Therefore, a recent estimate of PBR is not needed for NMFS to make the necessary findings under Section 101(a)(5)(D) of the MMPA. Additionally, Shell's application provides information (including data limitations) and references for its estimates of marine mammal abundance. Because AEWC has not provided information contrary to the data provided by Shell, and NMFS does not have information that these estimates are not reliable, NMFS considers these data to be the best available.

*Comment 20:* AWL argues that the effects of ice gouge and strudel scour surveying should be considered. AWL states that NMFS' dismissal of potential effects based on marine mammal hearing is not adequately supported. AWL and Dr. Bain argue that NMFS' approach fails to take into consideration the fact that: (1) Juvenile whales, based on their smaller size, likely hear sounds of higher frequencies than adults of the same species; (2) that sound sources contain frequencies beyond the "normal" frequency in the form of undertones, overtones, distortion, or noise; (3) NMFS failed to consider the beat frequency, that when a source simultaneously emits sound of more than one frequency, it will also emit energy at the difference between the two frequencies; (4) NMFS fails to take into account the fact that information about hearing abilities of bowhead whales is based on estimates since bowheads have not been the subject of direct testing and there is inherent uncertainty in these estimates; and (5) the **Federal Register** notice does not address the fact that toothed whales are sensitive to high-frequency sounds including those over 100 kHz.

*Response:* NMFS considered the potential effects of Shell's proposed ice gouge and strudel scour surveys in the Beaufort and Chukchi Seas (75 FR 27708; May 18, 2010). The reason NMFS does not think take of marine mammal is likely from ice gouge and strudel scour is because the active acoustic devices being used in these surveys are either in the frequency range above 180 kHz, which is beyond marine mammals functional hearing range, or with low source levels. In addition, due to their high-frequency nature, there is much absorption during sound propagation, which weakens much of the acoustic intensity within a relatively short range.

Although NMFS recognizes much scientific information is still needed on marine mammal hearing capability and audiograms, studies over the past sixty years on key common species across several major taxonomy groups have provided overall hearing ranges of marine mammal species (*see* review in Richardson *et al.* 1995; Southall *et al.* 2007). These studies show that marine mammal hearing ranges follow certain patterns and can be divided into five functional hearing groups: low-frequency cetacean (baleen whales), mid-frequency cetacean (mostly large to mid-size toothed whales, and delphinids), high-frequency cetacean (porpoises and river dolphins),

pinniped in water, and pinniped in air (Southall *et al.* 2007). Although it is possible that juvenile animals could have better hearing at high-frequency ranges similar to humans, however, the overall sensitivity that defines hearing is based on species (or hearing groups) instead of age groups. Therefore, it is incorrect to assume that juvenile whales hear sounds of higher frequencies because of their small size, regardless of species and functional hearing groups. In addition, the reason that juvenile animals (including humans) have slightly better high-frequency hearing is related to age rather than size (the principle behind it is a biological phenomenon called presbycusis, or aging ear).

Regarding point (2) concerning "normal" frequency, which was not defined in the comment, NMFS assumes that Dr. Bain refers to the frequenc(ies) outside the manufacturers' specs for their acoustic devices. Although these outlier noises could be a concern for high-frequency acoustic sources, especially if the frequencies are within the sensitive hearing range of marine mammals, NMFS does not believe these noises have high acoustic intensities in most cases. Nevertheless, NMFS requested that Shell provide frequency spectra and source characteristics for all of its acoustic devices. Shell reported back that it was unable to obtain such specifications from manufacturers. However, Shell will be required to conduct measurements of power density spectra (frequency spectra) of its high frequency active acoustic sources (operating frequency >180 kHz) that will be used in its marine surveys against ambient background noise levels. The power density spectra of these high frequency active acoustic sources will be reported in 1/3-octave band and 1-Hz band from 10 Hz to 180 kHz. The purpose for this measurement is to determine whether there is any acoustic energy within marine mammal hearing ranges that would be generated from operating these high frequency acoustic sources.

If significant acoustic energy (broadband source level >160 dB re 1 μPa @ 1 m in frequency band below 180 kHz) from these high frequency active acoustic sources exists within marine mammal hearing ranges, Shell is required to implement mitigation measures (such as establishing disturbance zones). Therefore, NMFS believes it unlikely that a marine mammal would be taken by this activity.

In regard to point (3), in order to produce "beat frequency," not only do the two sources have to be very close to each other, they also have to be perfectly synchronized. In the case of Shell's high-frequency sonar, these two interfering frequencies will need to be produced by one device to use the non-linearity of water to purposefully generate the different frequency between two high frequencies. Even so, it is a very inefficient way to generate the beat frequency, with only a low percentage of the original intensity with very narrow beamwidth. Therefore, NMFS does not consider this to be an issue of concern.

NMFS is aware that no direct measurements of hearing exist for these animals, and theories regarding their sensory capabilities are consequently speculative (for a detailed assessment by species using the limited available information, *see* Erbe 2002). In these species, hearing sensitivity has been estimated from behavioral responses (or lack thereof) to sounds at various frequencies, vocalization frequencies they use most, body size, ambient noise levels at the frequencies they use most, and cochlear morphometry and anatomical modeling (Richardson *et al.* 1995; Wartzok and Ketten 1999; Houser *et al.* 2001; Erbe 2002; Clark and Ellison 2004; Ketten *et al.* 2007). Though detailed information is lacking on the species level, the combined information strongly suggests that mysticetes are likely most sensitive to sound from perhaps tens of Hz to ~10 kHz (Southall *et al.* 2007). Although hearing ranges for toothed whales (mid- and high-frequency cetaceans) fall between 100s Hz to over 100 kHz, their most sensitive frequency lie between 10 to 90 kHz, and sensitivity falls sharply above 100 kHz.

*Comment 21:* Dr. Bain states that changes in behavior resulting from noise exposure could lead to indirect injury in marine mammals in the wild. He presented several examples to suggest that marine mammals repeatedly exposed to Level B harassment could result in Level A takes: (1) Harbor porpoise were observed traveling at high speeds during exposure to mid-frequency sonar in Haro Strait in 2003 and that exhaustion from rapid flight could lead to mortality; (2) citing MMS' (2004) Environmental Assessment on Proposed Oil and Gas Lease Sale 195 in the Beaufort Sea Planning Area (OCS EIS/EA MMS 2004–028) that feeding requires a prey density of 800 mg/m$^3$ and his own observation, Dr. Bain is concerned displacement from highly productive feeding areas would negatively affect individual whales and that small cetaceans such as harbor porpoise would face a risk of death if they are unable to feed for periods as short as 48–72 hours, or they may move into habitat where they face an increased risk of predation; and (3) individual killer whales have been observed splitting from their pod when frightened by sonar and that other killer whales' separation from their social units has resulted in death.

*Response:* NMFS agrees that it is possible that changes in behavior or auditory masking resulting from noise exposure could lead to injury in marine mammals under certain circumstances in the world, such as those examples/hypotheses raised by Dr. Bain. However, the assumption that Dr. Bain made that "exhaustion from rapid flight leading to heart or other muscle damage" could account for mortality merely because of exposure to airgun noise has no scientific basis. Also, it is not likely that received SPLs from the site clearance and shallow hazards surveys would cause drastic changes in behavior or auditory masking in marine mammals in the vicinity of the action area. First, marine mammals in the aforementioned examples and hypotheses were exposed to high levels of non-pulse intermittent sounds, such as military sonar, which has been shown to cause flight activities (*e.g.,* Haro Strait killer whales); and continuous sounds such as the vessel, which could cause auditory masking when animals are closer to the source. The sources produced by the acoustic equipment and airguns for Shell's site clearance and shallow hazards surveys are impulse sounds used in seismic profiling, bathymetry, and seafloor imaging. Unlike military sonar, seismic pulses have an extremely short duration (tens to hundreds of milliseconds) and relatively long intervals (several seconds) between pulses. Therefore, the sound energy levels from these acoustic sources and small airguns are far lower in a given time period. Second, the intervals between each short pulse would allow the animals to detect any biologically significant signals, and thus avoid or prevent auditory masking. Although airgun pulses at long distances (over kilometers) may be "stretched" in duration and become non-pulse due to multipath propagation, the intervals between the non-pulse noises would still allow biologically important signals to be detected by marine mammals. Especially due to the relatively small source being used for the site clearance and shallow hazard surveys, the received levels at such long distances would be even lower (*e.g.,* modeled received levels at 15 km are expected to be under 120 dB re 1 μPa). In addition, NMFS requires mitigation measures to ramp-up acoustic sources at a rate of no more than 6 dB per 5 min.

This ramp-up would prevent marine mammals from being exposed to high level noises without warning, thereby eliminating the possibility that animals would dramatically alter their behavior (*i.e.* from a "startle" reaction). NMFS also believes that long-term displacement of marine mammals from a feeding area is not likely because the seismic vessel is constantly moving, and the maximum 160-dB ensonified radius is about 1.22 km, which would create an area of ensonification of approximately 7.3 $km^2$ at any given moment, which constitutes a very small portion of the Beaufort Sea (0.0016 percent). In reality, NMFS expects the 160-dB ensonified zone to be smaller due to absorption and attenuation of acoustic energy in the water column.

*Comment 22:* Citing research on long term adverse effects to whales and dolphins from whale watching activities (Trites and Bain 2000; Bain 2002; Lusseau *et al.* 2009), Dr. Bain states that Level B behavioral harassment could be the primary threat to cetacean populations.

*Response:* Although NMFS agrees that long-term, persistent, and chronic exposure to Level B harassment could have a profound and significant impact on marine mammal populations, such as described in the references cited by Dr. Bain, those examples do not reflect the impacts of seismic surveys to marine mammals for Shell's project. First, whale watching vessels are intentionally targeting and making close approaches to cetacean species so the tourists onboard can have a better view of the animals. Some of these whale/dolphin watching examples cited by Dr. Bain occurred in the coastal waters of the Northwest Pacific between April and October and for extended periods of time ("[r]ecreational and scientific whale watchers were active by around 6 a.m., and some commercial whale watching continued until around sunset"). Thus multiple vessels have been documented to be in relatively close proximity to whales for about 12 hours a day, six months a year, not counting some "out of season" whale watching activities and after dark commercial filming efforts. In addition, noise exposures to whales and dolphins from whale watching vessels are probably significant due to the vessels' proximity to the animals. To the contrary, Shell's proposed open-water shallow hazard and site clearance surveys, along with existing industrial operations in the Arctic Ocean, do not intentionally approach marine mammals in the project areas. Shell's survey locations are situated in a much larger Arctic Ocean Basin, which is far away from most human impacts. Therefore, the effects from each activity are remote and spread farther apart, as analyzed in NMFS' 2010 EA, as well as the MMS 2006 PEA. Shell's site clearance and shallow hazards activities would only be conducted between July and October for 60 days, weather permitting. In addition, although studies and monitoring reports from previous seismic surveys have detected Level B harassment of marine mammals, such as avoidance of certain areas by bowhead and beluga whales during the airgun firing, no evidence suggests that such behavioral modification is biologically significant or non-negligible (Malme *et al.* 1986; 1988; Richardson *et al.* 1987; 1999; Miller *et al.* 1999; 2005), as compared to marine mammals exposed to chronic sound from whale watching vessels, as cited by Dr. Bain. Therefore, NMFS believes that potential impacts to marine mammals in the Chukchi Sea by site clearance and shallow hazards surveys would be limited to Level B harassment only, and due to the limited scale and remoteness of the project in relation to a large area, such adverse effects would not accumulate to the point where biologically significant effects would be realized.

*Comment 23:* Dr. Bain notes that NMFS uses different thresholds for continuous and pulsed sounds. Dr. Bain thus assumes that the motivation for this was to tie impact to SEL measurements of sound (as opposed to RMS or peak-to-peak measurements), which correlated well with TTS. Dr. Bain states that there is no evidence linking SEL to behavioral changes, and citing his paper (Bain and Williams, in review), Mr. Bain claims he found peak-to-peak level measurements correlated best with behavioral changes.

*Response:* First, Dr. Bain's assumption regarding NMFS' use of different behavioral thresholds for impulse and non-impulse noises are incorrect. The reason for the difference is not to tie impact to SEL measurements of sound to behavioral change, rather, this difference (received level at 160 dB re 1 µPa for pulse and 120 dB re 1 µPa for non-pulse) came from many field observations and analyses (*see* review by Richardson *et al.* 1995; Southall *et al.* 2007) on measured avoidance responses in whales in the wild. Specifically, the 160 dB re 1 µPa (rms) threshold was derived from data for mother-calf pairs of migrating gray whales (Malme *et al.* 1983; 1984) and bowhead whales (Richardson *et al.* 1985; Richardson *et al.* 1986) responding when exposed to seismic airguns (impulsive sound source). The 120 dB re 1µPa (rms) threshold also originates from research on baleen whales, specifically migrating gray whales (Malme *et al.* 1984; predicted 50% probability of avoidance) and bowhead whales reacting when exposed to industrial (*i.e.,* drilling and dredging) activities (non-impulsive sound source) (Richardson *et al.* 1990).

Dr. Bain's attached paper (Bain and Williams, in review) reports the results of an examination of effects of large airgun arrays on behavior of marine mammals in the waters of British Columbia, Canada and Washington State, USA, using a small boat to monitor out to long ranges (1 to > 70 km from the seismic source vessel). The paper concludes that a significant relationship was observed between the magnitude of behavioral response and peak-to-peak received level and the long distances at which behavioral responses were observed (> 60 km for harbor porpoise), along with counter-productive behavior that occasionally brought individuals into higher-intensity acoustic zones. However, there are potential design flaws in the study. First, the paper states a launch carried aboard the seismic receiver vessel was placed in the water to perform received level measurements near marine mammals. When making acoustic measurements, the launch "travelled along a line at approximately 20 km/h until either marine mammals were closely approached, or the launch had travelled 10 km." Therefore, it is highly likely that behavioral reactions from observed marine mammals were caused by the high-speed, close-approach of the launch, rather than from distant seismic airguns. This experiment design may explain the authors' observation of "counter-productive behavioral responses" that animals are moving into higher-intensity acoustic zones, which probably indicates that behavioral changes caused by Bain's launch greatly exceeded any behavioral change resulting from exposure to seismic airgun noise. Second, the authors of the paper also expressed "methodological concerns due to the subjectivity of observers." Nevertheless, this study concludes that harbor seal individuals were generally moving away from the airguns at exposure levels above 170 dB re 1 µPa (p–p) and that gray whales were observed at received levels up to approximately 170 dB re 1 µPa (p–p) exhibiting no obvious behavioral response. These observations contradict Mr. Bain's earlier comments that major behavioral effects result from noise in the 105–125 dB range.

Finally, Bain and Williams (in review) also state that the study "found that while airguns concentrated their sound output at low frequencies, substantial

high frequency energy (to at least 100 kHz) was also present." However, the paper provides no explanation as to how this conclusion was made. The accompanying power density spectrum (Figure 2 in Bain and Williams, in review) of the paper fails to show evidence that the frequencies above 1 kHz were mostly contributed from seismic airguns, and there was no indication at what distance this recording was made.

*Subsistence Issues*

*Comment 24:* AEWC states that the nondiscretionary congressional directive that there will be no more than a negligible impact to marine mammals and no unmitigable adverse impact to the availability of marine mammals for subsistence taking is consistent with the MMPA's overall treatment of both marine mammal and subsistence protections. AEWC further states that Congress has set a "moratorium on the taking * * * of marine mammals," 16 U.S.C. 1371(a), with the sole exemption provided for the central role of subsistence hunting by Alaska Natives. Thus, AEWC concludes that Congress has given priority to subsistence takes of marine mammals over all other exceptions to the moratorium, which may be applied for and obtained only if certain statutory and regulatory requirements are met. However, AEWC states that incidental harassment authorizations are available only for specified activities for which the Secretary makes the mandated findings. Thus, the pursuit of those activities is subordinated, by law, to the critical subsistence uses that sustain Alaska's coastal communities. NSB further states that NMFS has not adequately demonstrated that the proposed activities will not have "an unmitigable adverse impact on the availability of such species or stock for taking for subsistence uses."

*Response:* The MMPA does not prohibit an activity from having an adverse impact on the availability of marine mammals for subsistence uses; rather, the MMPA requires NMFS to ensure the activity does not have an unmitigable adverse impact on the availability of such species or stocks for taking for subsistence uses. NMFS has defined "unmitigable adverse impact" in 50 CFR 216.103 as an impact resulting from the specified activity: (1) That is likely to reduce the availability of the species to a level insufficient for a harvest to meet subsistence needs by: (i) Causing the marine mammals to abandon or avoid hunting areas; (ii) directly displacing subsistence users; or (iii) placing physical barriers between the marine mammals and the subsistence hunters; and (2) that cannot be sufficiently mitigated by other measures to increase the availability of marine mammals to allow subsistence needs to be met.

For the determination of the unmitigable adverse impact analysis, NMFS, other government agencies, and affected stakeholder agencies and communities were provided a copy of the draft POC in March 2010, which outlined measures Shell would implement to ensure no unmitigable adverse impact to subsistence uses. The POC specifies times and areas to avoid in order to minimize possible conflicts with traditional subsistence hunts by North Slope villages for transit and open-water activities. Shell waited to begin activities until the close of the spring beluga hunt in the village of Point Lay. Shell has also developed a Communication Plan and will implement the plan before initiating the 2010 program to coordinate activities with local subsistence users as well as Village Whaling Associations in order to minimize the risk of interfering with subsistence hunting activities, and keep current as to the timing and status of the bowhead whale migration, as well as the timing and status of other subsistence hunts. The Communication Plan includes procedures for coordination with Communication and Call Centers to be located in coastal villages along the Beaufort and Chukchi Seas during Shell's program in 2010.

Based on the measures contained in the IHA (and described later in this document), NMFS has determined that mitigation measures are in place to ensure that Shell's operations do not have an unmitigable adverse impact on the availability of marine mammal species or stocks for subsistence uses.

*Mitigation and Monitoring Concerns*

*Comment 25:* NSB is concerned that MMOs cannot *see* animals at the surface when it is dark or during the day because of fog, glare, rough seas, the small size of animals such as seals, and the large portion of time that animals spend submerged. NSB also notes that Shell has acknowledged that reported sightings are only "minimum" estimates of the number of animals potentially affected by surveying.

*Response:* NMFS recognizes the limitations of visual monitoring in darkness and other inclement weather conditions. Therefore, in the IHA to Shell, NMFS requires that no seismic airgun can be ramped up when the entire safety zones are not visible. However, Shell's operations will occur in an area where periods of darkness do not begin until early September. Beginning in early September, there will be approximately 1–3 hours of darkness each day, with periods of darkness increasing by about 30 min each day. By the end of the survey period, there will be approximately 8 hours of darkness each day. These conditions provide MMOs favorable monitoring conditions for most of the time.

*Comment 26:* AEWC notes that Shell intends to employ marine mammal observers ("MMO") and a "190 and 180 dB safety radii for pinnipeds and cetaceans, respectively, and the 160 dB disturbance radii" to mitigate these effects. However, AEWC states that the safety radii proposed by Shell do not negate these impacts. The safety radii only function as well as the observers on the vessels can *see* and report marine mammals within the radii or the general vicinity of the vessel. AEWC notes that MMOs are human and suffer from human flaws, and that observers are bad at judging distances in the water—*i.e.,* whether a marine mammal is within the radii or not. AEWC further states that at night and during storms MMOs are particularly ineffective. Thus, AEWC concludes that Shell's proposed MMO program is not sufficient mitigation to prevent Shell from engaging in Level A harassment.

*Response:* NMFS does not agree with AEWC's observation and conclusion, although AEWC is right that distance judging in the water is a challenging issue for MMOs. However, as noted in Shell's Marine Mammal Monitoring and Mitigation Plan (4MP), distances to nearby marine mammals will be estimated with binoculars (Fujinon 7 x 50) containing a reticle to measure the vertical angle of the line of sight to the animal relative to the horizon. In addition, MMOs may use a laser rangefinder to test and improve their abilities for visually estimating distances to objects in the water. The device was very useful in improving the distance estimation abilities of the observers at distances up to about 600 m (1,968 ft)—the maximum range at which the device could measure distances to highly reflective objects such as other vessels—while the isopleth to the 180 dB received level is expected to be at 125 m (410 ft) from the source vessel. Therefore, NMFS believes that marine mammal monitoring efforts that would be employed by Shell during its marine surveys are adequate.

In addition, mitigation measures such as ramp-up of airguns would warn any marine mammals that are missed during the pre-survey period to leave the survey vicinity. Lastly, recent studies show that it is unlikely a marine

mammal would experience TTS when exposed to a seismic pulse at a received level of 190 dB (*see* Finneran *et al.* 2002). In order for a marine mammal to experience even a mild TTS, the animal has to be in a zone with intense noise for a certain duration to and be exposed to a sound level much greater than a single seismic impulse, and research on marine mammal behavior during TTS experiments indicates that animals will try to avoid areas where receive levels are high enough to cause TTS (*see* Finneran *et al.* 2002).

*Comment 27:* NSB and AEWC note that Shell asserts that mitigation measures are designed to protect animals from injurious takes, but it is not clear that these mitigation measures are effective in protecting marine mammals or subsistence hunters. AEWC states that data previously presented by Shell and ConocoPhillips from their seismic activities made clear that MMOs failed to detect many marine mammals that encroached within the designated safety zones. AEWC further notes that Shell admits that night vision devices "are not nearly as effective as visual observation during daylight hours."

*Response:* NMFS believes that the required monitoring and mitigation measures are effective and are an adequate means of effecting the least practicable impact to marine mammals and their habitat. Moreover, the safety zones for Shell's 2010 surveys are much smaller than those for the larger 3D seismic surveys in past years. The 180- and 190-dB safety zones are 125 m (410 ft) and 35 m (115 ft), respectively. The monitoring reports from 2006, 2007, 2008, and 2009 do not note any instances of serious injury or mortality (Patterson *et al.* 2007; Funk *et al.* 2008; Ireland *et al.* 2009; Reiser *et al.* 2010). Additionally, the fact that a power-down or shutdown is required does not indicate that marine mammals are not being detected or that they are incurring serious injury. As discussed elsewhere in this document and in the Notice of Proposed IHA (75 FR 27708; May 18, 2010), 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 (a non-injurious, Level B harassment) in odontocetes. 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. For Shell's proposed survey activities, the distance at which the received energy level (per pulse) would be expected to be ≥175–180 dB SEL is the distance to the 190 dB re 1 μPa (rms) isopleth (given that the rms level is approximately 10–15 dB higher than the SEL value for the same pulse). Seismic pulses with received energy levels ≥175–180 dB SEL (190 dB re 1 μPa (rms)) are expected to be restricted to a radius of approximately 35 m (115 ft) around the airgun array.

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. 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). From this, it is suspected that received levels causing TTS onset may also be higher in baleen whales.

In pinnipeds, TTS thresholds associated with exposure to brief pulses (single or multiple) of underwater sound have not been measured. Initial evidence from prolonged exposures suggested that some pinnipeds may incur TTS at somewhat lower received levels than do small odontocetes exposed for similar durations (Kastak *et al.* 1999; 2005). However, more recent indications are that TTS onset in the most sensitive pinniped species studied (harbor seal, which is closely related to the ringed seal) may occur at a similar SEL as in odontocetes (Kastak *et al.* 2004).

NMFS 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. As summarized above, data that are now available imply that TTS is unlikely to occur unless bow-riding odontocetes are exposed to airgun pulses much stronger than 180 dB re 1 μPa rms (Southall *et al.* 2007). No cases of TTS are expected as a result of Shell's proposed activities given the small size of the source, the strong likelihood that baleen whales (especially migrating bowheads) would avoid the approaching airguns (or vessel) before being exposed to levels high enough for there to be any possibility of TTS, and the mitigation measures proposed to be implemented during the survey described later in this document.

There is no empirical evidence that exposure to pulses of airgun sound can cause PTS in any marine mammal, even with large arrays of airguns (*see* Southall *et al.* 2007). PTS might occur at a received sound level at least several decibels above that inducing mild TTS if the animal is exposed to the strong sound pulses with very rapid rise time.

It is highly unlikely that marine mammals could receive sounds strong enough (and over a sufficient duration) to cause permanent hearing impairment during a project employing the airgun sources planned here (*i.e.,* an airgun array with a total discharge volume of 40 $in^3$). In the proposed project, marine mammals are unlikely to be exposed to received levels of seismic pulses strong enough to cause more than slight TTS. Given the higher level of sound necessary to cause PTS, it is even less likely that PTS could occur. In fact, even the levels immediately adjacent to the airgun may not be sufficient to induce PTS, especially because a mammal would not be exposed to more than one strong pulse unless it swam immediately alongside the airgun for a period longer than the inter-pulse interval. Baleen whales, and belugas as well, generally avoid the immediate area around operating seismic vessels. The planned monitoring and mitigation measures, including visual monitoring, power-downs, and shutdowns of the airguns when mammals are seen within the safety radii, will minimize the already-minimal probability of exposure of marine mammals to sounds strong enough to induce PTS.

NMFS acknowledges that night-time monitoring by using night vision devices is not nearly as effective as visual observation during daylight hours. Therefore, the IHA to Shell prohibits start up of seismic airguns when the entire safety zone can not be effectively monitored during the night-time hours. If Shell has a shutdown of its seismic airgun array during low-light hours, it will have to wait till daylight to start ramping up the airguns.

*Comment 28:* The Commission believes that absent an evaluation by the oil and gas industry of its monitoring and mitigation measures, the effects of the industry's activities will remain uncertain. The Commission recommends that NMFS require Shell to collect information necessary to evaluate the effectiveness of the

mitigation measures adopted and to review and modify mitigation measures accordingly. The Commission notes that mitigation measures required for Shell's proposed marine surveys should be useful to a degree, but in some cases they are not sufficiently specific. For example, the Commission raised questions about the "power-down" and asks NMFS to specify what speed of reduction would be required when a marine mammal is observed within 274 m (300 yards) of a vessel. The Commission considers it vital that NMFS and the industry make every reasonable effort to evaluate the mitigation measures whenever possible, and that the evaluation should provide a basis for (1) Distinguishing between measures that do and do not have protective value, (2) improving those that are useful, and (3) finding alternatives for those that are not. Citing a report from the Joint Subcommittee on Ocean Science and Technology, NSB also questions the effectiveness of ramp-up measures.

*Response:* 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). For Shell's proposed open water marine surveys, a series of mitigation and monitoring measures are required under the IHA. These mitigation measures include: (1) Sound source measurements to determine safety zones more accurately, (2) establishment of safety and disturbance zones to be monitored by MMOs on the seismic vessel, (3) a power-down when a marine mammal is detected approaching a safety zone and a shutdown when a marine mammal is observed within a zone, (4) ramp-up of the airgun array, (5) establishing a 120-dB safety zone and prohibition of seismic surveys within that zone whenever it encompasses four or more bowhead whale mother-calf pairs, (6) establishing a 160-dB safety zone that would prohibit firing of the seismic airguns within the zone whenever it encompasses 12 or more bowhead or gray whales involved in non-migratory behavior (*e.g.,* feeding), and (7) a requirement that vessels reduce speed when within 274 m (300 yards) of whales and steer around those whales if possible.

The basic rational for these mitigation measures is (a) To avoid exposing marine mammals to intense seismic airgun noises at received levels that could cause TTS (for mitigation measures listed as (1) through (4)), (b) to avoid exposing large aggregations of bowhead whales and bowhead whale calves to elevated noise received levels (mitigation measures (5) and (6)), and (c) to avoid vessel strike of marine mammals (mitigation measure (7)). Although limited research in recent years shows that noise levels that could induce TTS in odontocetes and pinnipeds are much higher than current NMFS safety thresholds (*i.e.,* 180 dB and 190 dB re 1 μPa (rms) for cetaceans and pinnipeds, respectively), mitigation measures listed in (1) through (3) provide very conservative measures to ensure that no marine mammals are exposed to noise levels that would result in TTS. The power-down measure listed in (3) requires Shell to reduce the firing airguns accordingly so that a marine mammal that is detected approaching the safety zone will be further away from the reduced safety radius (as a result of power-down).

Regarding mitigation measures requiring ramp-ups, while scientific research built around the question on whether ramp-up is effective has not been conducted, several studies on the effects of anthropogenic noise on marine mammals indicate that many marine mammals will move away from a sound source that they find annoying (*e.g.* Malme *et al.* 1984; Miller *et al.* 1999; others reviewed in Richardson *et al.* 1995). In particular, three species of baleen whales have been the subject of tests involving exposure to sounds from a single airgun, which is equivalent to the first stage of ramp-up. All three species were shown to move away at the onset of a single airgun operation (Malme *et al.* 1983; 1984; 1985; 1986; Richardson *et al.* 1986; McCauley *et al.* 1998; 2000). From this research, it can be presumed that if a marine mammal finds a noise source annoying or disturbing, it will move away from the source prior to sustaining an injury, unless some other over-riding biological activity keeps the animal from vacating the area. This is the premise supporting NMFS' and others' belief that ramp-up is effective in preventing injury to marine mammals. However, to what degree ramp-up protects marine mammals from exposure to intense noises is unknown. Thus, NMFS will require industry applicants that will conduct marine or seismic surveys in the 2010 open water season to collect, record, analyze, and report MMO observations during any ramp-up period, as recommended by the independent peer review panel convened in March 2010, to review Shell's monitoring plan (more information is available later in this document).

Mitigation measures (5) and (6) regarding four cow-calf pairs and an aggregation of 12 bowhead and/or gray whales, which were proposed in MMS' 2006 programmatic EA and were required in NMFS IHAs issued between 2006 to 2008, need to be further analyzed for their effectiveness and efficacy. NMFS is currently conducting a review of these mitigation measures through the Environmental Impact Statement process for the Arctic oil and gas activities.

Finally, regarding the speed reduction for vessels in the vicinity of marine mammals, NMFS clarifies that vessel speed must be reduced to less than 10 knots when a marine mammal is detected within 274 m (300 yards) of the vessel. This mitigation measure is to avoid vessel strike of marine mammals and is based on NMFS' ship strike rule for the north Atlantic right whale. NMFS will evaluate the efficacy of this mitigation. Although there has never been a vessel strike of marine mammals by vessels involved in seismic activities in the Arctic, NMFS is still taking this precaution.

*Comment 29:* The Commission recommends that Shell be required to supplement its mitigation measures by using passive acoustic monitoring (PAM) to provide a more reliable estimate of the number of marine mammals taken during the course of the proposed seismic survey.

*Response:* NMFS' 2010 EA for this action contains an analysis of why PAM is not required to be used by Shell to implement mitigation measures. Shell will deploy acoustic recorders to collect data on vocalizing animals. However, this information will not be used in a real-time or near-real-time capacity. Along with the fact that marine mammals may not always vocalize while near the PAM device, another impediment is that flow noise generated by a towed PAM will interfere with low frequency whale calls and make their detection difficult and unreliable. MMS sponsored a workshop on the means of acoustic detection of marine mammals in November 2009 in Boston, MA. The workshop reviewed various available acoustic monitoring technology (passive and active), its feasibility and applicability for use in MMS-authorized activities, and what additional developments need to take place to

improve its effectiveness. The conclusion is that at this stage, using towed passive acoustics to detect marine mammals is not a mature technology. NMFS may consider requirements for PAM in the future depending on information received as the technology develops further. Additionally, NMFS recommended to Shell that the company work to help develop and improve this type of technology for use in the Arctic.

*Comment 30:* AWL states that NMFS should consider time and space limitations on surveying in order to reduce harm, and that there is a general consensus that spatial-temporal avoidance of high value habitat represents one of the best means to diminish potential impacts. In this case, AWL requests NMFS to evaluate the possibility of avoiding activities during the peak of the bowhead migration within the Beaufort migratory corridor before issuing an IHA. In addition, AWL requests NMFS to require Shell to complete its 30 days of shallow hazard surveying in July and August in an effort to avoid—as much as possible—the bulk of the bowhead migration.

*Response:* In making its negligible determination for the issuance of an IHA to Shell for open water marine surveys, NMFS has conducted a thorough review and analysis on how to reduce any adverse effects to marine mammals from the proposed action, including the consideration of time and space limitations that could reduce impacts to the bowhead migration. As Shell indicates in its IHA application, the majority of the site clearance and shallow hazards surveys will be conducted during August and September to avoid the peak of the bowhead whale migration through the Beaufort Sea, which typically occurs in mid-September and October.

In addition, bowhead whales migrating west across the Alaskan Beaufort Sea in autumn, in particular, are unusually responsive to airgun noises, with avoidance occurring out to distances of 20–30 km from a medium-sized airgun source (Miller *et al.* 1999; Richardson *et al.* 1999). However, while bowheads may avoid an area of 20 km (12.4 mi) around a noise source, when that determination requires a post-survey computer analysis to find that bowheads have made a 1 or 2 degree course change, NMFS believes that does not rise to a level of a "take" and that such minor behavioral modification is not likely to be biologically significant.

*Comment 31:* The Commission recommends that NMFS (1) Review the proposed monitoring measures to ensure that Shell is required to gather information on all the potentially important sources of noise and the complex sound field that the seismic survey activities create; (2) work with Shell and its contractors to engage acknowledged survey experts to review the survey design and planned analyses to ensure that Shell will provide relatively unbiased and reliable results; (3) work with Shell to coordinate a comparative analysis of the results of vessel-based, aerial, and passive acoustic monitoring methods to evaluate their relative strengths and weaknesses and determine if and how they could be improved for use with future surveys; (4) develop a plan for collecting meaningful baseline information—that is, information that provides a reliable basis for evaluating long-term effects on the marine mammal species and stocks that may be affected by oil and gas development and production in the Beaufort Sea area; and (5) work with Shell to determine how the data collected during the proposed activities can be made available to other scientific purposes.

*Response:* NMFS largely agrees with the Commission's recommendations and has been working with the seismic survey applicants and their contractors on gathering information on acoustic sources, survey design review, and monitoring analyses. NMFS has contacted Shell and received information on all the active acoustic sources that would be used for its proposed open water marine surveys. The information includes source characteristics such as frequency ranges and source levels, as well as estimated propagation loss. In addition, at NMFS' request, Shell has provided power density spectra for all of its high-frequency sonar equipments.

Regarding the remaining points, NMFS convened an independent peer review panel to review Shell's 4MP for the Open Water Marine Survey Program in the Beaufort and Chukchi Seas, Alaska. The panel met on March 25 and 26, 2010, and provided their final report to NMFS on April 22, 2010. NMFS has reviewed the report and evaluated all recommendations made by the panel. NMFS has determined that there are several measures that Shell can incorporate into its 2010 open water Marine Survey Program 4MP to improve it, and is requiring those measures in the IHA. Additionally, there are other recommendations that NMFS has determined would also result in better data collection, and could potentially be implemented by oil and gas industry applicants, but which likely could not be implemented for the 2010 open-water season due to technical issues (*see* below). A detailed discussion about the panel review is presented later in this document. While it may not be possible to implement those changes this year, NMFS believes that they are worthwhile and appropriate suggestions that may require a bit more time to implement, and Shell should consider incorporating them into future monitoring plans should Shell decide to apply for IHAs in the future. Nevertheless, despite these recommendations, NMFS believes that Shell's 4MP will be sufficient for purposes of data gathering in 2010.

*Comment 32:* The Commission recommends that the IHA require Shell to halt its seismic survey and consult with NMFS regarding any seriously injured or dead marine mammal when the injury or death may have resulted from Shell's activities.

*Response:* NMFS concurs with the Commission's recommendation. NMFS has included a condition in the IHA which requires Shell to immediately shutdown the seismic airguns if a dead or injured marine mammal has been sighted within an area where the seismic airguns were operating within the past 24 hours so that information regarding the animal can be collected and reported to NMFS. In addition, Shell must report the events to the Marine Mammal Stranding Network within 24 hours of the sighting, as well as to the NMFS staff person designated by the Director, Office of Protected Resources, or to the staff person designated by the Alaska Regional Administrator. The lead MMO is required to complete a written certification, which must include the following information: species or description of the animal(s); the condition of the animal(s) (including carcass condition if the animal is dead); location and time of first discovery; observed behaviors (if alive); and photographs or video (if available). In the event that the marine mammal injury or death was determined to have been a direct result of Shell's activities, then operations will cease, NMFS and the Stranding Network will be notified immediately, and operations will not be permitted to resume until NMFS has had an opportunity to review the written certification and any accompanying documentation, make determinations as to whether modifications to the activities are appropriate and necessary, and has notified Shell that activities may be resumed.

If NMFS determines that further investigation is appropriate, once investigations are completed and determinations made, NMFS would use available information to help reduce the

likelihood that a similar event would happen in the future and move forward with necessary steps to ensure environmental compliance for oil and gas related activities under the MMPA.

*Cumulative Impact Concerns*

*Comment 33:* NSB, AEWC, ICAS, and AWL state that NMFS must also consider the effects of disturbances in the context of other activities occurring in the Arctic. NSB states that NMFS should ascertain the significance of multiple exposures to underwater noise, ocean discharge, air pollution, and vessel traffic—all of which could impact bowhead whales and decrease survival rates or reproductive success. NSB notes that the cumulative impacts of all industrial activities must be factored into any negligible impact determination. NSB, AEWC, ICAS, and AWL list a series of reasonably foreseeable activities in the Arctic Ocean as: (1) GX Technology's Beaufort Sea seismic surveys; (2) Statoil's Chukchi Sea seismic surveys; (3) Seismic surveys planned in the Canadian Arctic; (4) U.S. Geological Survey's (USGS') seismic surveys; (5) BP's production operations at Northstar; and (6) Dalmorneftegeophysica (DMNG) Russian Far East offshore seismic surveys.

*Response:* Under section 101(a)(5)(D) of the MMPA, NMFS is required to determine whether the taking by the applicant's specified activity will take only small numbers of marine mammals, will have a negligible impact on the affected marine mammal species or population stocks, and will not have an unmitigable impact on the availability of affected species or stocks for subsistence uses. Cumulative impact assessments are NMFS' responsibility under the National Environmental Policy Act (NEPA), not the MMPA. In that regard, MMS' 2006 Final PEA, NMFS' 2007 and 2008 Supplemental EAs, NMFS' 2009 EA, and NMFS' 2010 EA address cumulative impacts. The most recent NMFS' 2010 EA addresses cumulative activities and the cumulative impact analysis focused on oil and gas related and non-oil and gas related activities in both Federal and State of Alaska waters that were likely and foreseeable. The oil and gas related activities in the U.S. Arctic in 2010 include this activity; Statoil's proposed seismic survey in Chukchi Sea; ION Geophysical's proposed seismic survey in Beaufort Sea; and BP's production operations at Northstar. GX Technology's Beaufort Sea seismic surveys have been cancelled by the company. Seismic survey activities in the Canadian and Russian Arctic occur in different geophysical areas, therefore, they are not analyzed under the NMFS 2010 EA. Other appropriate factors, such as Arctic warming, military activities, and noise contributions from community and commercial activities were also considered in NMFS' 2010 EA. Please refer to that document for further discussion of cumulative impacts.

*Comment 34:* Citing the peer review panel created for this year's open water meeting that Shell's activities "will create a complex sound field with potential effects beyond those that the applicant proposes to monitor," and NRC's advice on assessing cumulative effects to the population from multiple effects to multiple individuals, the AWL recommends NMFS create a sound budget for the Arctic, limiting the total amount of sound introduced into the water. The AWL further states that instead of dismissing the impacts of relatively smaller sources of sound, NMFS should account for and regulate those sources, and a sound budget may be the most appropriate tool for doing so. The AWL states that even without a comprehensive sound budget, NMFS could impose limits on the total number of activities permitted in the Arctic during the open water season. Allowing only one or two noise generating activities each year could reduce the potential for take and would facilitate additional monitoring of the impacts of noise, since multiple noise sources make it very difficult to study the effect of specific sound sources.

*Response:* NMFS agrees that assessing cumulative effects to the population from multiple effects to multiple individual marine mammals is an important approach to understanding overall impacts of industry activities to the species and the environment. NMFS is also considering the peer review panel's recommendation and is addressing sound budget issues in the marine environment through a series of workshops and a working group. In addition, Shell is required to provide sound source verification (SSV) tests before they start marine surveys. These acoustic measurements will be analyzed and provided in the 90-day report for Shell's marine surveys. Additional information on Arctic sound budget data are being collected by many researchers, including underwater recordings made by some of the passive acoustic arrays deployed on the Alaska north slope. These data will hopefully be analyzed to address overall ambient sound levels and a sound budget for the Arctic Ocean.

Further, NMFS also requested that Shell provide source characteristics for all active acoustic sources that are planned to be used in the proposed open water marine surveys. NMFS has reviewed these data and analyzed overall ambient sound levels in the Arctic Ocean based on current knowledge. The review and analysis showed that the short-term ensonification of a small region in the Beaufort and Chukchi Seas during the open water season is not likely to appreciably increase the ambient noise level and alter the local ocean soundscape. A description of the analysis is provided in NMFS' 2010 EA for Shell and Statoil's proposed open water marine and seismic surveys (NMFS 2010).

Finally, as NMFS is working on its Arctic EIS, limits on the total of oil and gas related activities to be allowed in the Arctic are being considered under separate alternatives. Nevertheless, NMFS does not agree with AWL's notion of "[a]llowing only one or two noise generating activities each year" as monitoring reports and studies from prior year industrial activities (*e.g.,* there were five seismic survey activities in the open water season of 2008) indicate that multiple activities can be authorized in the Arctic while still reaching a finding of no significant impact, provided that appropriate mitigation and monitoring measures are prescribed and implemented.

*Comment 35:* In addressing cumulative effects, Dr. Bain points out a number of ways he believes that Statoil's seismic surveys in the Chukchi Sea could interact with Shell's marine surveys: (1) If the same individuals are exposed to both projects, this would increase the duration of exposure beyond those considered in the applications. Further, individuals would potentially be exposed multiple times, and multiple exposures are likely to result in increased stress levels; (2) if both projects operate in the Chukchi at the same time, individuals would be forced to simultaneously respond to both noise sources. Avoidance of one noise source could result in a marine mammal approaching the other noise source, resulting in unexpectedly high noise exposure. This negates the safety assumption that animals will move away prior to receiving harmful exposure; and (3) different individuals may be exposed to the two projects, which would put NMFS' assumption that its policies only allow small takes to occur into question.

*Response:* In assessing the cumulative effects, NMFS has considered that animals could be exposed to multiple activities, multiple times. As described in detail in the proposed IHA (75 FR

27708; May 18, 2010), Shell's ice gouge survey in the Chukchi Sea is not expected to result in takes of marine mammals due to its high frequency and the low energy acoustic sources being used. In addition, even if marine mammals would be affected by the presence of the ice gouge survey activities being conducted concurrently with Statoil's 3D marine seismic survey, the affected areas represent a small fraction of the total habitat of the Chukchi Sea, therefore, it is not likely that marine mammals avoiding one source would run into the other, as suggested by Dr. Bain. The ensonified area with received levels above 160 dB in the Chukchi Sea is 531 $km^2$ (or 0.089 percent of the entire Chukchi Sea). Finally, considering different individuals may be exposed to two projects in both the Beaufort and Chukchi Seas, NMFS has provided the total number of individuals that could be taken by Level B harassment from both activities and concludes that the total take numbers are small, with the most potential takes being: 184 Eastern Chukchi Sea beluga whales (4.95% of the population), 539 B–C–B bowhead whales (3.78% population), and 6,629 Alaska ringed seals (2.87% population). Potential takes of all other species are estimated to be under 1% of the populations. Therefore, NMFS believes Dr. Bain's concerns are not warranted.

*ESA Concerns*

*Comment 36:* AWL states that NMFS section 7 consultation under the ESA must consider the potential impact of potential future oil and gas activities, including (1) Shell's strudel scour and ice gouge surveying to enable pipeline construction for production on its proposed Chukchi and Beaufort drill sites; and (2) a shallow hazard survey in Harrison Bay to allow for later exploration drilling. AWL states that in both instances, NMFS must consider the effects of the entire agency action.

*Response:* Under section 7 of the ESA, NMFS Office of Protected Resources has completed consultation with NMFS Alaska Regional Office on "Authorization of Small Takes under the Marine Mammal Protection Act for Certain Oil and Gas Exploration Activities in the U.S. Beaufort and Chukchi Seas, Alaska for 2010." In a Biological Opinion issued on July 13, 2010, NMFS concluded that the issuance of the incidental take authorizations under the MMPA for seismic surveys are not likely to jeopardize the continued existence of the endangered humpback or bowhead whale. As no critical habitat has been designated for these species, none will be affected. The 2010 Biological Opinion takes into consideration all oil and gas related seismic survey activities that would occur in the 2010 open water season. This Biological Opinion does not include impacts from exploratory drilling and production activities, which are subject to a separate consultation. In addition, potential future impacts from oil and gas activities will be subject to consultation in the future when activities are proposed. NMFS has reviewed Shell's proposed action and has determined that the findings in the 2010 Biological Opinion apply to its 2010 Beaufort Sea site clearance and shallow hazards surveys. In addition, NMFS has issued an Incidental Take Statement (ITS) under this Biological Opinion for Shell's survey activities, which contains reasonable and prudent measures with implementing terms and conditions to minimize the effects of take of bowhead and humpback whales.

*Comment 37:* AWL argues that NMFS' existing regional biological opinion is inadequate. AWL states that NMFS' 2008 Biological Opinion does not adequately consider site-specific information related to Shell's proposed drilling. AWL points out that Shell has proposed exploration drilling in Camden Bay in the Beaufort Sea, and that Camden Bay has been repeatedly identified as a resting and feeding area for migrating bowheads, which has been reaffirmed by the recent monitoring. AWL states that NMFS should re-examine the potential impacts of Shell's proposed drilling in light of its long-standing policy and the cautionary language contained in its 2008 opinion.

*Response:* NMFS initiated a section 7 consultation under the ESA for the potential impacts to ESA-listed marine mammal species that could be adversely affected as a result of several oil and gas related activities in the 2010 open-water season. The 2010 Biological Opinion covered the activities by Shell, Statoil, and ION's proposed open water marine and seismic survey activities. However, as far as Shell's drilling activities are concerned, Shell has withdrawn these actions due to the moratorium on offshore drilling.

*Comment 38:* AWL argues that NMFS' 2008 Biological Opinion does not adequately consider oil spills. AWL states that in the 2008 Biological Opinion, NMFS recognized the potential dangers of a large oil spill, and that whales contacting oil, particularly freshly-spilled oil, "could be harmed and possibly killed." Citing NMFS's finding in its 2008 Biological Opinion that several "coincidental events" would have to take place for such harm to occur: (1) A spill; (2) that coincides with the whales' seasonal presence; (3) that is "transported to the area the whales occupy (*e.g.,* the migrational corridor or spring lead system)"; and (4) is not successfully cleaned up. AWL points out that this combination of events is not as remote as NMFS appears to have assumed because NMFS' analysis of whether a spill may occur relies in part on statistical probabilities based on past incidents. AWL states that there appears to have been a significant breakdown in the system that was intended to both prevent spills from occurring and require adequate oil spill response capabilities to limit the harm. AWL states that NMFS must take into account that there are likely gaps in the current regulatory regime, and that given those flaws, an analysis that relies on the safety record of previous drilling is doubtful as a predictive tool.

*Response:* As discussed in the previous Response to Comment, no drilling is planned for Shell during the 2010 open water season, therefore, these activities will be considered in a separate consultation if and when Shell proposes to conduct exploratory drilling because seismic activities do not raise an oil-spill concern.

*NEPA Concerns*

*Comment 39:* AEWC believes that NMFS, in direct contravention of the law, excluded the public from the NEPA process since NMFS did not release a draft EA for the public to review and provide comments prior to NMFS taking its final action.

*Response:* Neither NEPA nor the Council on Environmental Quality's (CEQ) regulations explicitly require circulation of a draft EA for public comment prior to finalizing the EA. The Federal courts have upheld this conclusion, and in one recent case, the Ninth Circuit squarely addressed the question of public involvement in the development of an EA. In *Bering Strait Citizens for Responsible Resource Development* v. *U.S. Army Corps of Engineers* (524 F.3d 938, 9th Cir. 2008), the court held that the circulation of a draft EA is not required in every case; rather, Federal agencies should strive to involve the public in the decision-making process by providing as much environmental information as is practicable prior to completion of the EA so that the public has a sufficient opportunity to weigh in on issues pertinent to the agency's decision-making process. In the case of Shell's 2010 MMPA IHA request, NMFS involved the public in the decision-making process by distributing Shell's IHA application and addenda for a 30-

day notice and comment period. However, at that time, a draft EA was not available to provide to the public for comment. The IHA application and NMFS' Notice of Proposed IHA (75 FR 27708; May 18, 2010) contained information relating to the project. For example, the application included a project description, its location, environmental matters such as species and habitat to be affected, and measures designed to minimize adverse impacts to the environment and the availability of affected species or stocks for subsistence uses.

*Comment 40:* AEWC notes that Shell's IHA application warrants review in an environmental impact statement (EIS) given the potential for significant impacts.

*Response:* NMFS' 2010 EA was prepared to evaluate whether significant environmental impacts may result from the issuance of an IHA to Shell, which is an appropriate application of NEPA. After completing the EA, NMFS determined that there would not be significant impacts to the human environment and accordingly issued a FONSI. Therefore, an EIS is not needed for this action.

*Comment 41:* AEWC, AWL, and NSB note that NMFS is preparing a Programmatic EIS (PEIS). Although MMS published a draft PEIS (PEIS; MMS 2007) in the summer of 2007, to date, a Final PEIS has not been completed. AWL also notes that NMFS and MMS have reaffirmed their previous determination that a programmatic EIS process is necessary to address the overall, cumulative impacts of increased oil and gas activity in the Arctic Ocean and intend to incorporate into that analysis new scientific information as well as new information about projected seismic and exploratory drilling activity in both seas. However, AWL and AEWC argue that NEPA regulations make clear that NMFS should not proceed with authorizations for individual projects like Shell's surveying until its programmatic EIS is complete. NSB states that it would be regretful for Shell to proceed on a one-year IHA when the impact of those activities could have a catastrophic impact on Arctic resources and foreclose management options to be developed in the forthcoming EIS.

*Response:* While the Final PEIS will analyze the affected environment and environmental consequences from seismic surveys in the Arctic, the analysis contained in the Final PEIS will apply more broadly to Arctic oil and gas operations. NMFS' issuance of an IHA to Shell for the taking of several species of marine mammals incidental to conducting its open-water marine survey program in the Chukchi and Beaufort Seas in 2010, as analyzed in the EA, is not expected to significantly affect the quality of the human environment. Shell's surveys are not expected to significantly affect the quality of the human environment because of the limited duration and scope of Shell's operations. Additionally, the EA contained a full analysis of cumulative impacts.

*Miscellaneous Issues*

*Comment 42:* The AEWC states that Shell was unable to reach an accord on the annual CAA with AEWC. AEWC states that the CAA has historically formed the basis for NMFS' statutorily required determination of no unmitigable adverse impacts to subsistence activities. Specifically, AEWC states that Shell was not able to reach agreement with AEWC on (1) provisions for zero discharge and (2) on the sound threshold for activities that should be subject to sound source verification procedures. AEWC requests NMFS to fulfill its Congressional mandate and ensure that Shell's activities do not have more than a negligible impact on marine mammal stocks or an unmitigable adverse impact on the subsistence activities. The Commission also recommends that NMFS require Shell to engage in consultations with Alaska Native communities that may be affected by the company's activities and, to the extent feasible, seek to resolve any Alaska Native concerns through negotiation of a CAA.

*Response:* AEWC states that the CAA has historically formed the basis for NMFS' statutorily required determination of no unmitigable adverse impacts to subsistence activities, which is incorrect. Under sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*), an IHA or LOA shall be granted to U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if NMFS finds that the taking of marine mammals will have a negligible impact on the species or stock(s) and will not have an unmitigable adverse impact on the availability of the species or stock(s) for certain subsistence uses, and if the permissible methods of taking and requirements pertaining to the mitigation, monitoring and reporting of such takings are set forth. In other words, no marine mammal take authorizations may be issued if NMFS has reason to believe that the proposed exploration or development activities would have an unmitigable adverse impact on the availability of marine mammal species or stock(s) for Alaskan native subsistence uses. Although Federal laws do not require consultation with the native coastal communities until after offshore exploration and development plans have been finalized, permitted, and authorized, pre-permitting consultations between the oil and gas industry and the Alaskan coastal native communities are considered by NMFS when the agency makes a determination whether such activities would have an unmitigable adverse impact on the availability of marine mammal species or stock(s) for subsistence uses. For the proposed marine surveys, Shell has conducted POC meetings for its seismic operations in the Beaufort and Chukchi Seas in the communities and villages of Nuiqsut, Kaktovik, Barrow, Kotzebue, Wainwright, Point Lay, and Point Hope.

Shell has not signed the 2010 CAA with Alaska Natives and has informed NMFS that it does not intend to do so. NMFS has scrutinized all of the documents submitted by Shell (*e.g.,* IHA application, Plan of Cooperation and other correspondence to NMFS and affected stakeholders) and documents submitted by other affected stakeholders and concluded that harassment of marine mammals incidental to Shell's activities will not have more than a negligible impact on marine mammal stocks or an unmitigable adverse impact on the availability of marine mammals for taking for subsistence uses. This finding was based in large part on NMFS' definition of "negligible impact," "unmitigable adverse impact," the proposed mitigation and monitoring measures, the scope of activities proposed to be conducted, including time of year, location and presence of marine mammals in the project area, and Shell's Plan of Cooperation.

As described in Shell's IHA application, the source vessel will transit through the Chukchi Sea along a route that lies offshore of the polynya zone. This entry into the Chukchi Sea will not occur before July 1, 2010. In the event the transit outside of the polynya zone results in Shell having to move away from ice, the source vessel may enter into the polynya zone. If it is necessary to move into the polynya zone, Shell will notify the local communities of the change in the transit route through the Com Centers.

Shell has developed a Communication Plan and will implement the plan before initiating the 2010 program to coordinate activities with local subsistence users as well as Village Whaling Associations in order to minimize the risk of interfering with

subsistence hunting activities, and keep current as to the timing and status of the bowhead whale migration, as well as the timing and status of other subsistence hunts. The Communication Plan includes procedures for coordination with Communication and Call Centers to be located in coastal villages along the Beaufort and Chukchi Seas during Shell's program in 2010.

Shell will employ local Subsistence Advisors from the Beaufort and Chukchi Sea villages to provide consultation and guidance regarding the whale migration and subsistence hunt. There may be up to nine subsistence advisor-liaison positions (one per village), to work approximately 8 hours per day and 40-hour weeks through Shell's 2010 program. The subsistence advisor will use local knowledge to gather data on subsistence lifestyle within the community and advise as to ways to minimize and mitigate potential impacts to subsistence resources during program activities. Responsibilities include reporting any subsistence concerns or conflicts; coordinating with subsistence users; reporting subsistence-related comments, concerns, and information; and advising how to avoid subsistence conflicts. A subsistence advisor handbook will be developed prior to the operational season to specify position work tasks in more detail.

Shell will also implement flight restrictions prohibiting aircraft from flying within 1,000 ft (300 m) of marine mammals or below 1,500 ft (457 m) altitude (except during takeoffs and landings or in emergency situations) while over land or sea.

Besides bowhead whale hunting, beluga whales are hunted for subsistence at Barrow, Wainwright, Point Lay, and Point Hope, with the most taken by Point Lay (Fuller and George 1997). Harvest at all of these villages generally occurs between April and July with most taken in April and May when pack-ice conditions deteriorate and leads open up. Ringed, bearded, and spotted seals are hunted by all of the villages bordering the project area (Fuller and George 1997). Ringed and bearded seals are hunted throughout the year, but most are taken in May, June, and July when ice breaks up and there is open water instead of the more difficult hunting of seals at holes and lairs. Spotted seals are only hunted in spring through summer.

Therefore, the scheduling of the proposed marine surveys is expected to have minimum conflict between the industries and marine mammal harvests.

Finally, the required mitigation and monitoring measures are expected to reduce any adverse impacts on marine mammals for taking for subsistence uses to the extent practicable. These measures include, but are not limited to, the 180 dB and 190 dB safety (shut-down/power-down) zones; a requirement to monitor the 160 dB isopleths for aggregations of 12 or more non-migratory balaenidae whales and when necessary shut down seismic airguns; reducing vessel speed to 10 knots or less when a vessel is within 300 yards of whales to avoid a collision; utilizing communication centers to avoid any conflict with subsistence hunting activities; and the use of marine mammal observers.

Measures related to "zero volume discharge" do not affect NMFS' negligible determination on impacts of the species or stock(s) or the unmitigable adverse impact determination on the availability of the species or stock(s) for certain subsistence uses, as long as Shell's emission discharge is within the guidelines set by the Environmental Protection Agency (EPA). Regarding the sound source verification (SSV), NMFS requires Shell to conduct SSV tests for all its airgun and active acoustic sources and seismic and support vessels that will be involved in the proposed marine surveys.

Over the past several months, NMFS has worked with both Alaska Native communities and the industry, to the extent feasible, to resolve any Alaska Native concerns from the proposed open water marine and seismic surveys. These efforts include convening an open water stakeholders' meeting in Anchorage, AK, in March 2010, and multiple conference meetings with representatives of the Alaska Native communities and the industry. Lastly, as mentioned previously in this document, NMFS has included several measures from the CAA in the IHA issued to Shell.

*Comment 43:* AEWC notes that, in 2009, NMFS did not publish its response to comments on proposed IHAs activities conducted during the open water season until well after the fall subsistence hunt at Cross Island had concluded and geophysical operations had already taken place. AEWC states that NMFS' failure to release its response to comments until after the activities had taken place casts serious doubt on the validity of NMFS' public involvement process and the underlying analysis of impacts to subsistence activities and marine mammals.

*Response:* NMFS does not agree with AEWC's statement that NMFS' failure to release its response to comments until after the activities had taken place casts doubt on the validity of NMFS' public involvement process, or the underlying analysis of impacts to subsistence activities and marine mammals. As stated earlier, the decision to issue an IHA to Shell for its proposed marine surveys in the Beaufort and Chukchi Seas is based in large part on NMFS' definition of "negligible impact," "unmitigable adverse impact," the proposed mitigation and monitoring measures, the scope of activities proposed to be conducted, including time of year, location and presence of marine mammals in the project area, extensive research and studies on potential impacts of anthropogenic sounds to marine mammals, marine mammal behavior, distribution, and movements in the vicinity of Shell's proposed project areas, Shell's Plan of Cooperation, and on public comments received during the commenting period and peer-review recommendations by an independent review panel. The reason that NMFS was not able to publish its response to comments on proposed IHA activities in 2009 for Shell's shallow hazards and site clearance surveys until the end of the survey activities was due to the large amount of comments NMFS received. NMFS was able to review and analyze all comments it received and address their validity for the issuance of the IHA. However, due to the large volume of comments, NMFS was not able to organize them into publishable format to be incorporated into the **Federal Register** notice for publication on a timely basis. NMFS will strive to make sure that all comments are addressed in full and published by the time IHAs or LOAs are issued.

*Comment 44:* AEWC states that Shell failed to provide plans for community engagement. AEWC states that Shell is required to include in its application a "schedule for meeting with affected subsistence communities to discuss proposed activities and to resolve potential conflicts regarding any aspects of either the operation or the plan of cooperation." (50 CFR 216.104(a)(12)(ii)). However, AEWC notes that in its application, Shell only just mentions that it held a few meetings and "anticipates continued engagement." AEWC argues that this vague intention to participate in more meetings with the affected communities is insufficient and does not satisfy the regulatory requirement. AEWC points out that Shell is also required to provide its plans for continuing to meet with communities. AEWC notes that while Shell mentions communicating with communities via its SA and Com and

Call Center program, which allows for the availability of back and forth communication, the company has described no actual, planned communication with the affected communities.

*Response:* The information AEWC contained in the comment is outdated. Since the submission of Shell's IHA application, Shell indicated that it completed its pre-season Plan of Cooperation meetings for the 2010 season in early April 2010. Through the Subsistence Advisor (SA) and Com and Call Center (Com Center) program for 2010, Shell's SA and Shell representatives in the Com Centers will be available daily to the communities throughout the 2010 season. The SA and Com Center programs provide residents of the nearest affected communities a way to communicate where and when subsistence activities occur so that industry may avoid conflicts with planned subsistence activities.

*Comment 45:* NSB states that NMFS should consider and address disproportionate impacts in analyzing the IHA application, that Federal agencies must "make achieving environmental justice part of * * * [their] mission[s]." Compared to many United States residents, NSB states that Alaskan Natives face significant impacts from oil and gas activities in the OCS. NSB requests that NMFS thus specifically address issues of environmental justice in considering this application and that NMFS must also work to ensure effective public participation and access to information, and must "ensure that public documents, notices, and hearings relating to human health or the environment are concise, understandable, and readily accessible to the public."

*Response:* Under section 101(a)(5)(D) of the MMPA, NMFS is required to determine whether the taking by the applicant's specified activity will take only small numbers of marine mammals, will have a negligible impact on the affected marine mammal species or population stocks, and will not have an unmitigable impact on the availability of affected species or stocks for subsistence uses. Environmental justice and other impacts to the human environment are NMFS' responsibility under the NEPA and applicable executive orders, not the MMPA. In that regard, NMFS' 2010 EA addresses the potential cumulative impacts to the socioeconomic environment, including traditional knowledge, community and economy of the Alaskan Arctic, subsistence harvesting, and coastal and marine use issues. Please refer to NMFS' 2010 EA for these assessments.

In addition, NMFS has been working with the public to ensure public participation, which includes the public review and comments on Shell's IHA application and the proposed IHA. All documents related to this action are available through the NMFS Office of Protected Resources Web site at *http://www.nmfs.noaa.gov/pr/permits/incidental.htm#applications*.

**Description of Marine Mammals in the Area of the Specified Activity**

Nine cetacean and four pinniped species under NMFS jurisdiction could occur in the general area of Shell's open water marine survey areas in the Beaufort and Chukchi Seas. The species most likely to occur in the general area near Harrison Bay in the Alaskan Beaufort Sea include two cetacean species: Beluga (*Delphinapterus leucas*) and bowhead whales (*Balaena mysticetus*) and three seal species: Ringed (*Phoca hispida*), spotted (*P. largha*), and bearded seals (*Erignathus barbatus*). Most encounters are likely to occur in nearshore shelf habitats or along the ice edge. The marine mammal species that is likely to be encountered most widely (in space and time) throughout the period of the planned shallow hazards surveys is the ringed seal. Encounters with bowhead and beluga whales are expected to be limited to particular regions and seasons, as discussed below.

Other marine mammal species that have been observed in the Beaufort and Chukchi Seas but are less frequent or uncommon in the Beaufort Sea project area include harbor porpoise (*Phocoena phocoena*), narwhal (*Monodon monoceros*), killer whale (*Orcinus orca*), fin whale (*Balaenoptera physalus*), minke whale (*B. acutorostrata*), humpback whale (*Megaptera novaeangliae*), gray whale (*Eschrichtius robustus*), and ribbon seal (*Histriophoca fasciata*). These species could occur in the project area, but each of these species is uncommon or rare in the area and relatively few encounters with these species are expected during the proposed marine surveys. The narwhal occurs in Canadian waters and occasionally in the Beaufort Sea, but it is rare there and is not expected to be encountered. There are scattered records of narwhal in Alaskan waters, including reports by subsistence hunters, where the species is considered extralimital (Reeves *et al.* 2002). Point Barrow, Alaska, is the approximate northeastern extent of the harbor porpoise's regular range (Suydam and George 1992), though there are extralimital records east to the mouth of the Mackenzie River in the Northwest Territories, Canada, and recent sightings in the Beaufort Sea in the vicinity of Prudhoe Bay during surveys in 2007 and 2008 (Christie *et al.* 2009). Monnett and Treacy (2005) did not report any harbor porpoise sightings during aerial surveys in the Beaufort Sea from 2002 through 2004. Humpback, fin, and minke whales have recently been sighted in the Chukchi Sea but very rarely in the Beaufort Sea. Greene *et al.* (2007) reported and photographed a humpback whale cow/calf pair east of Barrow near Smith Bay in 2007, which is the first known occurrence of humpbacks in the Beaufort Sea. Savarese *et al.* (2009) reported one minke whale sighting in the Beaufort Sea in 2007 and 2008. Ribbon seals do not normally occur in the Beaufort Sea; however, two ribbon seal sightings were reported during vessel-based activities near Prudhoe Bay in 2008 (Savarese *et al.* 2009).

The bowhead and humpback whales are listed as "endangered" under the Endangered Species Act (ESA) and as depleted under the MMPA. Certain stocks or populations of gray, beluga, and killer whales and spotted seals are listed as endangered or proposed for listing under the ESA; however, none of those stocks or populations occur in the proposed activity area. Additionally, the ribbon seal is considered a "species of concern" under the ESA, and the bearded and ringed seals are "candidate species" under the ESA, meaning they are currently being considered for listing.

Shell's application contains information on the status, distribution, seasonal distribution, and abundance of each of the species under NMFS jurisdiction mentioned in this document. Please refer to the application for that information (*see* **ADDRESSES**). Additional information can also be found in the NMFS Stock Assessment Reports (SAR). The Alaska 2009 SAR is available at: *http://www.nmfs.noaa.gov/pr/pdfs/sars/ak2009.pdf*.

**Monitoring Plan Peer Review**

The MMPA requires that monitoring plans be independently peer reviewed "where the proposed activity may affect the availability of a species or stock for taking for subsistence uses" (16 U.S.C. 1371(a)(5)(D)(ii)(III)). Regarding this requirement, NMFS' implementing regulations state, "Upon receipt of a complete monitoring plan, and at its discretion, [NMFS] will either submit the plan to members of a peer review panel for review or within 60 days of receipt of the proposed monitoring plan,

schedule a workshop to review the plan" (50 CFR 216.108(d)).

NMFS convened an independent peer review panel to review Shell's Marine Mammal Monitoring and Mitigation Plan (4MP) for the Open Water Marine Survey Program in the Beaufort and Chukchi Seas, Alaska, during 2010. The panel met on March 25 and 26, 2010, and provided their final report to NMFS on April 22, 2010. The full panel report can be viewed at: *http://www.nmfs.noaa.gov/pr/permits/incidental.htm#applications.*

NMFS provided the panel with Shell's 4MP and asked the panel to address the following questions and issues for Shell's plan:

(1) The monitoring program should document the effects (including acoustic) on marine mammals and document or estimate the actual level of take as a result of the activity. Does the monitoring plan meet this goal?

(2) Ensure that the monitoring activities and methods described in the plan will enable the applicant to meet the requirements listed in (1) above;

(3) Are the applicant's objectives achievable based on the methods described in the plan?

(4) Are the applicant's objectives the most useful for understanding impacts on marine mammals?

(5) Should the applicant consider additional monitoring methods or modifications of proposed monitoring methods for the proposed activity? And

(6) What is the best way for an applicant to report their data and results to NMFS?

Section 3 of the report contains recommendations that the panel members felt were applicable to all of the monitoring plans reviewed this year. Section 4.4 of the report contains recommendations specific to Shell's Open Water Marine Survey Program 4MP. Specifically, for the general recommendations, the panel commented on issues related to: (1) Acoustic effects of oil and gas exploration—assessment and mitigation; (2) aerial surveys; (3) MMOs; (4) visual near-field monitoring; (5) visual far-field monitoring; (6) baseline biological and environmental information; (7) comprehensive ecosystem assessments and cumulative impacts; (8) duplication of seismic survey effort; and (9) whale behavior.

NMFS has reviewed the report and evaluated all recommendations made by the panel. NMFS has determined that there are several measures that Shell can incorporate into its 2010 Open Water Marine Survey Program 4MP to improve it. Additionally, there are other recommendations that NMFS has determined would also result in better data collection, and could potentially be implemented by oil and gas industry applicants, but which likely could not be implemented for the 2010 open water season due to technical issues (*see* below). While it may not be possible to implement those changes this year, NMFS believes that they are worthwhile and appropriate suggestions that may require a bit more time to implement, and Shell should consider incorporating them into future monitoring plans should Shell decide to apply for IHAs in the future.

The following subsections lay out measures that NMFS recommends for implementation as part of the 2010 Open Water Marine Survey Program 4MP and those that are recommended for future programs.

*Recommendations for Inclusion in the 2010 4MP and IHA*

Section 3.3 of the panel report contains several recommendations regarding MMOs, which NMFS agrees that Shell should incorporate:

- Observers should be trained using visual aids (*e.g.,* videos, photos), to help them identify the species that they are likely to encounter in the conditions under which the animals will likely be seen.
- Observers should understand the importance of classifying marine mammals as "unknown" or "unidentified" if they cannot identify the animals to species with confidence. In those cases, they should note any information that might aid in the identification of the marine mammal sighted. For example, for an unidentified mysticete whale, the observers should record whether the animal had a dorsal fin.
- Observers should attempt to maximize the time spent looking at the water and guarding the safety radii. They should avoid the tendency to spend too much time evaluating animal behavior or entering data on forms, both of which detract from their primary purpose of monitoring the safety zone.
- 'Big eye' binoculars ($25 \times 150$) should be used from high perches on large, stable platforms. They are most useful for monitoring impact zones that extend beyond the effective line of sight. With two or three observers on watch, the use of 'big eyes' should be paired with searching by naked eye, the latter allowing visual coverage of nearby areas to detect marine mammals. When a single observer is on duty, the observer should follow a regular schedule of shifting between searching by naked-eye, low-power binoculars, and big-eye binoculars based on the activity, the environmental conditions, and the marine mammals of concern.
- Observers should use the best possible positions for observing (*e.g.,* outside and as high on the vessel as possible), taking into account weather and other working conditions.
- Whenever possible, new observers should be paired with experienced observers to avoid situations where lack of experience impairs the quality of observations. If there are Alaska Native MMOs, the MMO training that is conducted prior to the start of the survey activities should be conducted with both Alaska Native MMOs and biologist MMOs being trained at the same time in the same room. There should not be separate training courses for the different MMOs.

In Section 3.4, panelists recommend collecting some additional data to help verify the utility of the "ramp-up" requirement commonly contained in IHAs. To help evaluate the utility of ramp-up procedures, NMFS will require observers to record and report their observations during any ramp-up period. An analysis of these observations may lead to the conclusion regarding the effectiveness of ramp-up and should be included in the monitoring report.

Among other things, Section 3.5 of the panel report recommends recording visibility data because of the concern that the line-of-sight distance for observing marine mammals is reduced under certain conditions. MMOs should "carefully document visibility during observation periods so that total estimates of take can be corrected accordingly".

Section 4.4 of the report contains recommendations specific to Shell's Open Water Marine Survey Program 4MP. Of the recommendations presented in this section, NMFS has determined that the following should be implemented for the 2010 season:

- Summarize observation effort and conditions, the number of animals seen by species, the location and time of each sighting, position relative to the survey vessel, the company's activity at the time, each animal's response, and any adjustments made to operating procedures. Provide all spatial data on charts (always including vessel location).
- Make all data available in the report or (preferably) electronically for integration with data from other companies.
- Accommodate specific requests for raw data, including tracks of all vessels and aircraft associated with the operation and activity logs documenting when and what types of sounds are

introduced into the environment by the operation.

NMFS spoke with Shell about the inclusion of these recommendations into the 2010 4MP and IHA. Shell indicated to NMFS that they will incorporate these recommendations into the 4MP, and NMFS has made several of these recommendations requirements in the IHA.

*Recommendations for Inclusion in Future Monitoring Plans*

Section 3.5 of the report recommends methods for conducting comprehensive monitoring of a large-scale seismic operation. One method for conducting this monitoring recommended by panel members is the use of passive acoustic devices. Additionally, Section 3.2 of the report encourages the use of such systems if aerial surveys will not be used for real-time mitigation monitoring. NMFS acknowledges that there are challenges involved in using this technology to detect bowhead whale vocalizations in conjunction with seismic airguns in this environment, especially in real time. However, NMFS recommends that Shell work to help develop and improve this type of technology for use in the Arctic (and use it once it is available and effective), as it could be valuable both for real-time mitigation implementation, as well as archival data collection. Shell indicated to NMFS that they have been working for several years to aid in the development of such technology and will continue to do so.

The panelists also recommend adding a tagging component to monitoring plans. "Tagging of animals expected to be in the area where the survey is planned also may provide valuable information on the location of potentially affected animals and their behavioral responses to industrial activities. Although the panel recognized that such comprehensive monitoring might be difficult and expensive, such an effort (or set of efforts) reflects the complex nature of the challenge of conducting reliable, comprehensive monitoring for seismic or other relatively-intense industrial operations that ensonify large areas of ocean." While this particular recommendation is not feasible for implementation in 2010, NMFS recommends that Shell consider adding a tagging component to future seismic survey monitoring plans should Shell decide to conduct such activities in future years. Shell currently helps to fund the U.S. Geological Survey's walrus tagging project in the Arctic and is open to the idea of helping to fund other marine mammal tagging projects in the Arctic.

To the extent possible, NMFS recommends implementing the recommendation contained in Section 4.4.6 for the 2010 season: "Integrate all observer data with information from tagging and acoustic studies to provide a more comprehensive description of the acoustic environment during its survey." However, NMFS recognizes that this integration process may take time to implement. Therefore, Shell should begin considering methods for the integration of the observer data now if Shell intends to apply for IHAs in the future.

In Section 3.4, panelists recommend collecting data to evaluate the efficacy of using forward-looking infrared devices (FLIR) vs. night-vision binoculars. The panelists note that while both of these devices may increase detection capabilities by MMOs of marine mammals, the reliability of these technologies should be tested under appropriate conditions and their efficacy evaluated. NMFS recommends that Shell design a study to explore using both FLIR and night-vision binoculars and collect data on levels of detection of marine mammals using each type of device.

*Other Recommendations in the Report*

The panel also made several recommendations, which are not discussed in the two preceding subsections. NMFS determined that many of the recommendations were made beyond the bounds of what the panel members were tasked to do. For example, the panel recommended that NMFS begin a transition away from using a single metric of acoustic exposure to estimate the potential effects of anthropogenic sound on marine living resources. This is not a recommendation about monitoring but rather addresses a NMFS policy issue. NMFS is currently in the process of revising its acoustic guidelines on a national scale. A recommendation was also made regarding the training and oversight of MMOs. NMFS is currently working on a national policy for this as well Section 3.7 of the report contains several recommendations regarding comprehensive ecosystem assessments and cumulative impacts. These are good, broad recommendations, however, the implementation of these recommendations would not be the responsibility solely of oil and gas industry applicants. The recommendations require the cooperation and input of several groups, including Federal, state, and local government agencies, members of other industries, and members of the scientific research community. NMFS will encourage the industry and others to build the relationships and infrastructure necessary to pursue these goals, and incorporate these recommendations into future MMPA authorizations, as appropriate. Lastly, Section 3.8 of the report makes a recommendation regarding data sharing and reducing the duplication of seismic survey effort. While this is a valid recommendation, it does not relate to monitoring or address any of the six questions with which the panel members were tasked to answer.

For some of the recommendations, NMFS felt that additional clarification was required by the panel members before NMFS could determine whether or not applicants should incorporate them into the monitoring plans. Section 3.2 of the report discusses the use of and methods for conducting aerial surveys. Industry applicants have not conducted aerial surveys in Chukchi Sea lease sale areas for several years because of the increased risk for flying there (as noted by the panel report). To that end, NMFS has asked the panel to provide recommendations on whether or not similar surveys could be conducted from dedicated vessel-based platforms. NMFS also asked for additional clarification on some of the recommendations regarding data collection and take estimate calculations. In addition, NMFS asked the panel members for clarification on the recommendation contained in Section 3.6 regarding baseline studies. Lastly, NMFS asked the panel members for clarification on the recommendation specific to Shell contained in Section 4.4 regarding estimating statistical power for all methods intended to detect adverse impacts. Once NMFS hears back from the panel and is clear with these recommendations, NMFS will follow up with Shell and discuss the implementation of these additional measures in future years.

**Potential Effects of the Specified Activity on Marine Mammals**

Operating a variety of active acoustic sources such as airguns, side-scan sonars, echo-sounders, and sub-bottom profilers for site clearance and shallow hazard surveys, ice gouge, and strudel surveys can impact marine mammals in a variety of ways.

*Potential Effects of Airgun and Sonar Sounds on Marine Mammals*

The effects of sounds from airgun pulses might include one or more of the following: tolerance, masking of natural sounds, behavioral disturbance, and

temporary or permanent hearing impairment or non-auditory effects (Richardson *et al.* 1995). 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) Tolerance

Numerous studies have shown that pulsed sounds from airguns are often readily detectable in the water at distances of many kilometers. Numerous studies have also shown that marine mammals at distances more than a few kilometers from operating seismic vessels often show no apparent response. That is often true even in cases when the pulsed 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 airgun pulses under some conditions, at other times, mammals of all three types have shown no overt reactions. In general, pinnipeds and small odontocetes seem to be more tolerant of exposure to airgun pulses than baleen whales.

(2) Behavioral Disturbance

Marine mammals may behaviorally react to sound when exposed to anthropogenic noise. These behavioral reactions are often shown as: changing durations of surfacing and dives, number of blows per surfacing, or moving direction and/or speed; reduced/increased vocal activities; changing/cessation of certain behavioral activities (such as socializing or feeding); visible startle response or aggressive behavior (such as tail/fluke slapping or jaw clapping); avoidance of areas where noise sources are located; and/or flight responses (*e.g.,* pinnipeds flushing into water from haulouts or rookeries).

The biological significance of many of these behavioral disturbances is difficult to predict, especially if the detected disturbances appear minor. However, the consequences of behavioral modification could be expected to be biologically significant if the change affects growth, survival, and reproduction. Some of these significant behavioral modifications include:

- Drastic change in diving/surfacing patterns (such as those thought to be causing beaked whale stranding due to exposure to military mid-frequency tactical sonar);
- Habitat abandonment due to loss of desirable acoustic environment; and
- Cease feeding or social interaction.

For example, at the Guerreo Negro Lagoon in Baja California, Mexico, which is one of the important breeding grounds for Pacific gray whales, shipping and dredging associated with a salt works may have induced gray whales to abandon the area through most of the 1960s (Bryant *et al.* 1984). After these activities stopped, the lagoon was reoccupied, first by single whales and later by cow-calf pairs.

The onset of behavioral disturbance from anthropogenic noise depends on both external factors (characteristics of noise sources and their paths) and the receiving animals (hearing, motivation, experience, demography) and is also difficult to predict (Southall *et al.* 2007).

Currently NMFS uses 160 dB re 1 µPa at received level for impulse noises (such as airgun pulses) as the onset of marine mammal behavioral harassment.

*Mysticete:* Baleen whales generally tend to avoid operating airguns, but avoidance radii are quite variable. Whales are often reported to show no overt reactions to airgun pulses at distances beyond a few kilometers, even though the airgun pulses remain well above ambient noise levels out to much longer distances (reviewed in Richardson *et al.* 1995; Gordon *et al.* 2004). However, studies done since the late 1990s of migrating humpback and migrating bowhead whales show reactions, including avoidance, that sometimes extend to greater distances than documented earlier. Avoidance distances often exceed the distances at which boat-based observers can *see* whales, so observations from the source vessel can be biased. Observations over broader areas may be needed to determine the range of potential effects of some large-source seismic surveys where effects on cetaceans may extend to considerable distances (Richardson *et al.* 1999; Moore and Angliss 2006). Longer-range observations, when required, can sometimes be obtained via systematic aerial surveys or aircraft-based observations of behavior (*e.g.,* Richardson *et al.* 1986, 1999; Miller *et al.* 1999, 2005; Yazvenko *et al.* 2007a, 2007b) or by use of observers on one or more support vessels operating in coordination with the seismic vessel (*e.g.,* Smultea *et al.* 2004; Johnson *et al.* 2007). However, the presence of other vessels near the source vessel can, at least at times, reduce sightability of cetaceans from the source vessel (Beland *et al.* 2009), thus complicating interpretation of sighting data.

Some baleen whales show considerable tolerance of seismic pulses. However, when the pulses are strong enough, avoidance or other behavioral changes become evident. Because the responses become less obvious with diminishing received sound level, it has been difficult to determine the maximum distance (or minimum received sound level) at which reactions to seismic become evident and, hence, how many whales are affected.

Studies of gray, bowhead, and humpback whales have determined that received levels of pulses in the 160–170 dB re 1 µPa (rms) range seem to cause obvious avoidance behavior in a substantial fraction of the animals exposed (*see* review in Southall *et al.* 2007). In many areas, seismic pulses diminish to these levels at distances ranging from 4–15 km from the source. A substantial proportion of the baleen whales within such distances may show avoidance or other strong disturbance reactions to the operating airgun array. However, in other situations, various mysticetes tolerate exposure to full-scale airgun arrays operating at even closer distances, with only localized avoidance and minor changes in activities. At the other extreme, in migrating bowhead whales, avoidance often extends to considerably larger distances (20–30 km) and lower received sound levels (120–130 dB re 1 µPa (rms)). Also, even in cases where there is no conspicuous avoidance or change in activity upon exposure to sound pulses from distant seismic operations, there are sometimes subtle changes in behavior (*e.g.,* surfacing-respiration-dive cycles) that are only evident through detailed statistical analysis (*e.g.,* Richardson *et al.* 1986; Gailey *et al.* 2007).

Data on short-term reactions by cetaceans to impulsive noises are not necessarily indicative of long-term or biologically significant effects. It is not known whether impulsive sounds affect reproductive rate or distribution and habitat use in subsequent days or years. However, gray whales have continued to migrate annually along the west coast of North America despite intermittent seismic exploration (and much ship traffic) in that area for decades (Appendix A in Malme *et al.* 1984; Richardson *et al.* 1995), and there has been a substantial increase in the population over recent decades (Allen and Angliss 2010). The western Pacific gray whale population did not seem affected by a seismic survey in its feeding ground during a prior year (Johnson *et al.* 2007). Similarly, bowhead whales have continued to travel to the eastern Beaufort Sea each summer despite seismic exploration in their summer and autumn range for many years (Richardson *et al.* 1987), and their numbers have increased

notably (Allen and Angliss 2010). Bowheads also have been observed over periods of days or weeks in areas ensonified repeatedly by seismic pulses (Richardson *et al.* 1987; Harris *et al.* 2007). However, it is generally not known whether the same individual bowheads were involved in these repeated observations (within and between years) in strongly ensonified areas. In any event, in the absence of some unusual circumstances, the history of coexistence between seismic surveys and baleen whales suggests that brief exposures to sound pulses from any single seismic survey are unlikely to result in prolonged effects.

*Odontocete:* Little systematic information is available about reactions of toothed whales to airgun pulses. Few studies similar to the more extensive baleen whale/seismic pulse work summarized above have been reported for toothed whales. However, there are recent systematic data on sperm whales (*e.g.,* Gordon *et al.* 2006; Madsen *et al.* 2006; Winsor and Mate 2006; Jochens *et al.* 2008; Miller *et al.* 2009). There is also an increasing amount of information about responses of various odontocetes to seismic surveys based on monitoring studies (*e.g.,* Stone 2003; Smultea *et al.* 2004; Moulton and Miller 2005; Bain and Williams 2006; Holst *et al.* 2006; Stone and Tasker 2006; Potter *et al.* 2007; Hauser *et al.* 2008; Holst and Smultea 2008; Weir 2008; Barkaszi *et al.* 2009; Richardson *et al.* 2009).

Dolphins and porpoises are often seen by observers on active seismic vessels, occasionally at close distances (*e.g.,* bow riding). However, some studies near the U.K., Newfoundland and Angola, in the Gulf of Mexico, and off Central America have shown localized avoidance. Also, belugas summering in the Canadian Beaufort Sea showed larger-scale avoidance, tending to avoid waters out to 10–20 km from operating seismic vessels. In contrast, recent studies show little evidence of conspicuous reactions by sperm whales to airgun pulses, contrary to earlier indications.

There are almost no specific data on responses of beaked whales to seismic surveys, but it is likely that most if not all species show strong avoidance. There is increasing evidence that some beaked whales may strand after exposure to strong noise from tactical military mid-frequency sonars. Whether they ever do so in response to seismic survey noise is unknown. Northern bottlenose whales seem to continue to call when exposed to pulses from distant seismic vessels.

For delphinids, and possibly the Dall's porpoise, the available data suggest that a ≥170 dB re 1 μPa (rms) disturbance criterion (rather than ≥160 dB) would be appropriate. With a medium-to-large airgun array, received levels typically diminish to 170 dB within 1–4 km, whereas levels typically remain above 160 dB out to 4–15 km (*e.g.,* Tolstoy et al. 2009). Reaction distances for delphinids are more consistent with the typical 170 dB re 1 μParms distances.

Due to their relatively higher frequency hearing ranges when compared to mysticetes, odontocetes may have stronger responses to mid- and high-frequency sources such as sub-bottom profilers, side scan sonar, and echo sounders than mysticetes (Richardson *et al.* 1995; Southall *et al.* 2007). Although the mid- and high-frequency active acoustic sources with operating frequency between 2 and 50 kHz planned to be used by Shell have much lower power outputs (167–200 dB re 1 μPa @ 1 m at source level) than those from the airguns, they could cause mild behavior reactions to odontocete whales because their operating frequencies fall within the sensitive hearing range of these animals. However, scientific information is lacking on specific behavioral responses by odontocetes to mid- and high-frequency sources. Nevertheless, based on our current knowledge on mysticete reaction towards low-frequency airgun pulses, we could induce that more or less similar reactions could be exhibited by odontocete whales towards mid- and high-frequency sources.

*Pinnipeds:* Few studies of the reactions of pinnipeds to noise from open-water seismic exploration have been published (for review of the early literature, *see* Richardson *et al.* 1995). However, pinnipeds have been observed during a number of seismic monitoring studies. Monitoring in the Beaufort Sea during 1996–2002 provided a substantial amount of information on avoidance responses (or lack thereof) and associated behavior. Additional monitoring of that type has been done in the Beaufort and Chukchi Seas in 2006–2009. Pinnipeds exposed to seismic surveys have also been observed during seismic surveys along the U.S. west coast. Some limited data are available on physiological responses of pinnipeds exposed to seismic sound, as studied with the aid of radio telemetry. Also, there are data on the reactions of pinnipeds to various other related types of impulsive sounds.

Early observations provided considerable evidence that pinnipeds are often quite tolerant of strong pulsed sounds. During seismic exploration off Nova Scotia, gray seals exposed to noise from airguns and linear explosive charges reportedly did not react strongly (J. Parsons in Greene *et al.* 1985). An airgun caused an initial startle reaction among South African fur seals but was ineffective in scaring them away from fishing gear. Pinnipeds in both water and air sometimes tolerate strong noise pulses from non-explosive and explosive scaring devices, especially if attracted to the area for feeding or reproduction (Mate and Harvey 1987; Reeves *et al.* 1996). Thus, pinnipeds are expected to be rather tolerant of, or to habituate to, repeated underwater sounds from distant seismic sources, at least when the animals are strongly attracted to the area.

In summary, visual monitoring from seismic vessels has shown only slight (if any) avoidance of airguns by pinnipeds, and only slight (if any) changes in behavior. These studies show that many pinnipeds do not avoid the area within a few hundred meters of an operating airgun array. However, based on the studies with large sample size, or observations from a separate monitoring vessel, or radio telemetry, it is apparent that some phocid seals do show localized avoidance of operating airguns. The limited nature of this tendency for avoidance is a concern. It suggests that one cannot rely on pinnipeds to move away, or to move very far away, before received levels of sound from an approaching seismic survey vessel approach those that may cause hearing impairment.

(3) Masking

Chronic exposure to excessive, though not high-intensity, noise could cause masking at particular frequencies for marine mammals that utilize sound for vital biological functions. Masking can interfere with detection of acoustic signals such as communication calls, echolocation sounds, and environmental sounds important to marine mammals. Since marine mammals depend on acoustic cues for vital biological functions, such as orientation, communication, finding prey, and avoiding predators, marine mammals that experience severe acoustic masking will have reduced fitness in survival and reproduction.

Masking occurs when noise and signals (that animal utilizes) overlap at both spectral and temporal scales. For the airgun noise generated from the proposed marine seismic survey, these are low frequency (under 1 kHz) pulses with extremely short durations (in the scale of milliseconds). Lower frequency man-made noises are more likely to affect detection of communication calls and other potentially important natural sounds such as surf and prey noise.

There is little concern regarding masking due to the brief duration of these pulses and relatively longer silence between airgun shots (9–12 seconds) near the noise source, however, at long distances (over tens of kilometers away) in deep water, due to multipath propagation and reverberation, the durations of airgun pulses can be "stretched" to seconds with long decays (Madsen *et al.* 2006; Clark and Gagnon 2006). Therefore it could affect communication signals used by low frequency mysticetes when they occur near the noise band and thus reduce the communication space of animals (*e.g.,* Clark *et al.* 2009a, 2009b) and cause increased stress levels (*e.g.,* Foote *et al.* 2004; Holt *et al.* 2009). Further, in areas of shallow water, multipath propagation of airgun pulses could be more profound, thus affecting communication signals from marine mammals even at close distances. Nevertheless, the intensity of the noise is also greatly reduced at such long distances.

Although masking effects of pulsed sounds on marine mammal calls and other natural sounds are expected to be limited, there are few specific studies on this. Some whales continue calling in the presence of seismic pulses and whale calls often can be heard between the seismic pulses (*e.g.,* Richardson *et al.* 1986; McDonald *et al.* 1995; Greene *et al.* 1999a, 1999b; Nieukirk *et al.* 2004; Smultea *et al.* 2004; Holst *et al.* 2005a, 2005b, 2006; Dunn and Hernandez 2009). However, there is one recent summary report indicating that calling fin whales distributed in one part of the North Atlantic went silent for an extended period starting soon after the onset of a seismic survey in the area (Clark and Gagnon 2006). It is not clear from that preliminary paper whether the whales ceased calling because of masking, or whether this was a behavioral response not directly involving masking. Also, bowhead whales in the Beaufort Sea may decrease their call rates in response to seismic operations, although movement out of the area might also have contributed to the lower call detection rate (Blackwell *et al.* 2009a; 2009b).

Among the odontocetes, there has been one report that sperm whales ceased calling when exposed to pulses from a very distant seismic ship (Bowles *et al.* 1994). However, more recent studies of sperm whales found that they continued calling in the presence of seismic pulses (Madsen *et al.* 2002; Tyack *et al.* 2003; Smultea *et al.* 2004; Holst *et al.* 2006; Jochens *et al.* 2008). Madsen *et al.* (2006) noted that airgun sounds would not be expected to mask sperm whale calls given the intermittent nature of airgun pulses. Dolphins and porpoises are also commonly heard calling while airguns are operating (Gordon *et al.* 2004; Smultea *et al.* 2004; Holst *et al.* 2005a, 2005b; Potter *et al.* 2007). Masking effects of seismic pulses are expected to be negligible in the case of the smaller odontocetes, given the intermittent nature of seismic pulses plus the fact that sounds important to them are predominantly at much higher frequencies than are the dominant components of airgun sounds.

Pinnipeds have best hearing sensitivity and/or produce most of their sounds at frequencies higher than the dominant components of airgun sound, but there is some overlap in the frequencies of the airgun pulses and the calls. However, the intermittent nature of airgun pulses presumably reduces the potential for masking.

Marine mammals are thought to be able to compensate for masking by adjusting their acoustic behavior such as shifting call frequencies, increasing call volume and vocalization rates. For example, blue whales are found to increase call rates when exposed to seismic survey noise in the St. Lawrence Estuary (Di Iorio and Clark 2009). The North Atlantic right whales (*Eubalaena glacialis*) exposed to high shipping noise increase call frequency (Parks *et al.* 2007), while some humpback whales respond to low-frequency active sonar playbacks by increasing song length (Miller *et al.* 2000).

(4) Hearing Impairment

Marine mammals exposed to high intensity sound repeatedly or for prolonged periods can experience hearing threshold shift (TS), which is the loss of hearing sensitivity at certain frequency ranges (Kastak *et al.* 1999; Schlundt *et al.* 2000; Finneran *et al.* 2002; 2005). TS can be permanent (PTS), in which case the loss of hearing sensitivity is unrecoverable, or temporary (TTS), in which case the animal's hearing threshold will recover over time (Southall *et al.* 2007). Just like masking, marine mammals that suffer from PTS or TTS will have reduced fitness in survival and reproduction, either permanently or temporarily. Repeated noise exposure that leads to TTS could cause PTS. For transient sounds, the sound level necessary to cause TTS is inversely related to the duration of the sound.

*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. It is a temporary phenomenon, and (especially when mild) is not considered to represent physical damage or "injury" (Southall *et al.* 2007). Rather, the onset of TTS is an indicator that, if the animal is exposed to higher levels of that sound, physical damage is ultimately a possibility.

The magnitude of TTS depends on the level and duration of noise exposure, and to some degree on frequency, among other considerations (Kryter 1985; Richardson *et al.* 1995; Southall *et al.* 2007). For sound exposures at or somewhat above the TTS threshold, hearing sensitivity recovers rapidly after exposure to the noise ends. In terrestrial mammals, TTS can last from minutes or hours to (in cases of strong TTS) days. Only a few data have been obtained on sound levels and durations necessary to elicit mild TTS in marine mammals (none in mysticetes), and none of the published data concern TTS elicited by exposure to multiple pulses of sound during operational seismic surveys (Southall *et al.* 2007).

For toothed whales, experiments on a bottlenose dolphin (*Tursiops truncates*) and beluga whale showed that exposure to a single watergun impulse at a received level of 207 kPa (or 30 psi) peak-to-peak (p-p), which is equivalent to 228 dB re 1 µPa (p-p), resulted in a 7 and 6 dB TTS in the beluga whale at 0.4 and 30 kHz, respectively. Thresholds returned to within 2 dB of the pre-exposure level within 4 minutes of the exposure (Finneran *et al.* 2002). No TTS was observed in the bottlenose dolphin.

Finneran *et al.* (2005) further examined the effects of tone duration on TTS in bottlenose dolphins. Bottlenose dolphins were exposed to 3 kHz tones (non-impulsive) for periods of 1, 2, 4 or 8 seconds (s), with hearing tested at 4.5 kHz. For 1-s exposures, TTS occurred with SELs of 197 dB, and for exposures >1 s, SEL >195 dB resulted in TTS (SEL is equivalent to energy flux, in dB re 1 $\mu Pa^2$-s). At an SEL of 195 dB, the mean TTS (4 min after exposure) was 2.8 dB. Finneran *et al.* (2005) suggested that an SEL of 195 dB is the likely threshold for the onset of TTS in dolphins and belugas exposed to tones of durations 1–8 s (*i.e.,* TTS onset occurs at a near-constant SEL, independent of exposure duration). That implies that, at least for non-impulsive tones, a doubling of exposure time results in a 3 dB lower TTS threshold.

However, the assumption that, in marine mammals, the occurrence and magnitude of TTS is a function of cumulative acoustic energy (SEL) is probably an oversimplification. Kastak *et al.* (2005) reported preliminary

evidence from pinnipeds that, for prolonged non-impulse noise, higher SELs were required to elicit a given TTS if exposure duration was short than if it was longer, *i.e.,* the results were not fully consistent with an equal-energy model to predict TTS onset. Mooney *et al.* (2009a) showed this in a bottlenose dolphin exposed to octave-band non-impulse noise ranging from 4 to 8 kHz at SPLs of 130 to 178 dB re 1 μPa for periods of 1.88 to 30 minutes (min). Higher SELs were required to induce a given TTS if exposure duration was short than if it was longer. Exposure of the aforementioned bottlenose dolphin to a sequence of brief sonar signals showed that, with those brief (but non-impulse) sounds, the received energy (SEL) necessary to elicit TTS was higher than was the case with exposure to the more prolonged octave-band noise (Mooney *et al.* 2009b). Those authors concluded that, when using (non-impulse) acoustic signals of duration ~0.5 s, SEL must be at least 210–214 dB re 1 μPa2-s to induce TTS in the bottlenose dolphin. The most recent studies conducted by Finneran *et al.* also support the notion that exposure duration has a more significant influence compared to SPL as the duration increases, and that TTS growth data are better represented as functions of SPL and duration rather than SEL alone (Finneran *et al.* 2010a, 2010b). In addition, Finneran *et al.* (2010b) conclude that when animals are exposed to intermittent noises, there is recovery of hearing during the quiet intervals between exposures through the accumulation of TTS across multiple exposures. Such findings suggest that when exposed to multiple seismic pulses, partial hearing recovery also occurs during the seismic pulse intervals.

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 ambient noise levels at those low frequencies tend to be higher (Urick 1983). 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). From this, it is suspected that received levels causing TTS onset may also be higher in baleen whales. However, no cases of TTS are expected given the small size of the airguns proposed to be used and the strong likelihood that baleen whales (especially migrating bowheads) would avoid the approaching airguns (or vessel) before being exposed to levels high enough for there to be any possibility of TTS.

In pinnipeds, TTS thresholds associated with exposure to brief pulses (single or multiple) of underwater sound have not been measured. Initial evidence from prolonged exposures suggested that some pinnipeds may incur TTS at somewhat lower received levels than do small odontocetes exposed for similar durations (Kastak *et al.* 1999; 2005). However, more recent indications are that TTS onset in the most sensitive pinniped species studied (harbor seal, which is closely related to the ringed seal) may occur at a similar SEL as in odontocetes (Kastak *et al.* 2004).

Most cetaceans show some degree of avoidance of seismic vessels operating an airgun array (*see* above). It is unlikely that these cetaceans would be exposed to airgun pulses at a sufficiently high level for a sufficiently long period to cause more than mild TTS, given the relative movement of the vessel and the marine mammal. TTS would be more likely in any odontocetes that bow- or wake-ride or otherwise linger near the airguns. However, while bow- or wake-riding, odontocetes would be at the surface and thus not exposed to strong sound pulses given the pressure release and Lloyd Mirror effects at the surface. But if bow- or wake-riding animals were to dive intermittently near airguns, they would be exposed to strong sound pulses, possibly repeatedly.

If some cetaceans did incur mild or moderate TTS through exposure to airgun sounds in this manner, this would very likely be a temporary and reversible phenomenon. However, even a temporary reduction in hearing sensitivity could be deleterious in the event that, during that period of reduced sensitivity, a marine mammal needed its full hearing sensitivity to detect approaching predators, or for some other reason.

Some pinnipeds show avoidance reactions to airguns, but their avoidance reactions are generally not as strong or consistent as those of cetaceans. Pinnipeds occasionally seem to be attracted to operating seismic vessels. There are no specific data on TTS thresholds of pinnipeds exposed to single or multiple low-frequency pulses. However, given the indirect indications of a lower TTS threshold for the harbor seal than for odontocetes exposed to impulse sound (*see* above), it is possible that some pinnipeds close to a large airgun array could incur TTS.

Current NMFS' noise exposure standards require 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). These criteria were taken from recommendations by an expert panel of the High Energy Seismic Survey (HESS) Team that performed an assessment on noise impacts by seismic airguns to marine mammals in 1997, although the HESS Team recommended a 180-dB limit for pinnipeds in California (HESS 1999). The 180 and 190 dB re 1 μPa (rms) levels have not been considered to be the levels above which TTS might occur. Rather, they were 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. As summarized above, data that are now available imply that TTS is unlikely to occur in various odontocetes (and probably mysticetes as well) unless they are exposed to a sequence of several airgun pulses stronger than 190 dB re 1 μPa (rms). On the other hand, for the harbor seal, harbor porpoise, and perhaps some other species, TTS may occur upon exposure to one or more airgun pulses whose received level equals the NMFS "do not exceed" value of 190 dB re 1 μPa (rms). That criterion corresponds to a single-pulse SEL of 175–180 dB re 1 $\mu Pa^2$-s in typical conditions, whereas TTS is suspected to be possible in harbor seals and harbor porpoises with a cumulative SEL of ~171 and ~164 dB re 1 $\mu Pa^2$-s, respectively.

It has been shown that most large whales and many smaller odontocetes (especially the harbor porpoise) show at least localized avoidance of ships and/or seismic operations. Even when avoidance is limited to the area within a few hundred meters of an airgun array, that should usually be sufficient to avoid TTS based on what is currently known about thresholds for TTS onset in cetaceans. In addition, ramping up airgun arrays, which is standard operational protocol for many seismic operators, should allow cetaceans near the airguns at the time of startup (if the sounds are aversive) to move away from the seismic source and to avoid being exposed to the full acoustic output of the airgun array. Thus, most baleen whales likely will not be exposed to high levels of airgun sounds provided the ramp-up procedure is applied. Likewise, many odontocetes close to the

trackline are likely to move away before the sounds from an approaching seismic vessel become sufficiently strong for there to be any potential for TTS or other hearing impairment. Hence, there is little potential for baleen whales or odontocetes that show avoidance of ships or airguns to be close enough to an airgun array to experience TTS. Therefore, it is not likely that marine mammals in the vicinity of the proposed open water marine and seismic surveys by Shell and Statoil would experience TTS as a result of these activities.

*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 (Kryter 1985). Physical damage to a mammal's hearing apparatus can occur if it is exposed to sound impulses that have very high peak pressures, especially if they have very short rise times. (Rise time is the interval required for sound pressure to increase from the baseline pressure to peak pressure.)

There is no specific evidence that exposure to pulses of airgun sound can cause PTS in any marine mammal, even with large arrays of airguns. However, given the likelihood that some mammals close to an airgun array might incur at least mild TTS (*see* above), there has been further speculation about the possibility that some individuals occurring very close to airguns might incur PTS (*e.g.,* Richardson *et al.* 1995; Gedamke *et al.* 2008). Single or occasional occurrences of mild TTS are not indicative of permanent auditory damage, but repeated or (in some cases) single exposures to a level well above that causing TTS onset might elicit PTS.

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 (Southall *et al.* 2007). Based on data from terrestrial mammals, a precautionary assumption is that the PTS threshold for impulse sounds (such as airgun pulses as received close to the source) is at least 6 dB higher than the TTS threshold on a peak-pressure basis, and probably >6 dB higher (Southall *et al.* 2007). The low-to-moderate levels of TTS that have been induced in captive odontocetes and pinnipeds during controlled studies of TTS have been confirmed to be temporary, with no measurable residual PTS (Kastak *et al.* 1999; Schlundt *et al.* 2000; Finneran *et al.* 2002; 2005; Nachtigall *et al.* 2003; 2004). However, very prolonged exposure to sound strong enough to elicit TTS, or shorter-term exposure to sound levels well above the TTS threshold, can cause PTS, at least in terrestrial mammals (Kryter 1985). In terrestrial mammals, the received sound level from a single non-impulsive sound exposure must be far above the TTS threshold for any risk of permanent hearing damage (Kryter 1994; Richardson *et al.* 1995; Southall *et al.* 2007). However, there is special concern about strong sounds whose pulses have very rapid rise times. In terrestrial mammals, there are situations when pulses with rapid rise times (*e.g.,* from explosions) can result in PTS even though their peak levels are only a few dB higher than the level causing slight TTS. The rise time of airgun pulses is fast, but not as fast as that of an explosion.

Some factors that contribute to onset of PTS, at least in terrestrial mammals, are as follows:

- Exposure to single very intense sound,
- Fast rise time from baseline to peak pressure,
- Repetitive exposure to intense sounds that individually cause TTS but not PTS, and
- Recurrent ear infections or (in captive animals) exposure to certain drugs.

Cavanagh (2000) reviewed the thresholds used to define TTS and PTS. Based on this review and SACLANT (1998), it is reasonable to assume that PTS might occur at a received sound level 20 dB or more above that inducing mild TTS. However, for PTS to occur at a received level only 20 dB above the TTS threshold, the animal probably would have to be exposed to a strong sound for an extended period, or to a strong sound with rather rapid rise time.

More recently, Southall *et al.* (2007) estimated that received levels would need to exceed the TTS threshold by at least 15 dB, on an SEL basis, for there to be risk of PTS. Thus, for cetaceans exposed to a sequence of sound pulses, they estimate that the PTS threshold might be an M-weighted SEL (for the sequence of received pulses) of ~198 dB re 1 $\mu Pa^2$-s. Additional assumptions had to be made to derive a corresponding estimate for pinnipeds, as the only available data on TTS-thresholds in pinnipeds pertained to nonimpulse sound (*see* above). Southall *et al.* (2007) estimated that the PTS threshold could be a cumulative SEL of ~186 dB re 1 $\mu Pa^2$-s in the case of a harbor seal exposed to impulse sound. The PTS threshold for the California sea lion and northern elephant seal would probably be higher given the higher TTS thresholds in those species. Southall *et al.* (2007) also note that, regardless of the SEL, there is concern about the possibility of PTS if a cetacean or pinniped received one or more pulses with peak pressure exceeding 230 or 218 dB re 1 µPa, respectively. Thus, PTS might be expected upon exposure of cetaceans to either SEL ≥198 dB re 1 µPa2-s or peak pressure ≥230 dB re 1 µPa. Corresponding proposed dual criteria for pinnipeds (at least harbor seals) are ≥186 dB SEL and ≥ 218 dB peak pressure (Southall *et al.* 2007). These estimates are all first approximations, given the limited underlying data, assumptions, species differences, and evidence that the "equal energy" model may not be entirely correct.

Sound impulse duration, peak amplitude, rise time, number of pulses, and inter-pulse interval are the main factors thought to determine the onset and extent of PTS. Ketten (1994) has noted that the criteria for differentiating the sound pressure levels that result in PTS (or TTS) are location and species specific. PTS effects may also be influenced strongly by the health of the receiver's ear.

As described above for TTS, in estimating the amount of sound energy required to elicit the onset of TTS (and PTS), it is assumed that the auditory effect of a given cumulative SEL from a series of pulses is the same as if that amount of sound energy were received as a single strong sound. There are no data from marine mammals concerning the occurrence or magnitude of a potential partial recovery effect between pulses. In deriving the estimates of PTS (and TTS) thresholds quoted here, Southall *et al.* (2007) made the precautionary assumption that no recovery would occur between pulses.

It is unlikely that an odontocete would remain close enough to a large airgun array for sufficiently long to incur PTS. There is some concern about bowriding odontocetes, but for animals at or near the surface, auditory effects are reduced by Lloyd's mirror and surface release effects. The presence of the vessel between the airgun array and bow-riding odontocetes could also, in some but probably not all cases, reduce the levels received by bow-riding animals (*e.g.,* Gabriele and Kipple 2009). The TTS (and thus PTS) thresholds of baleen whales are unknown but, as an interim measure, assumed to be no lower than those of odontocetes. Also, baleen whales generally avoid the immediate area around operating seismic vessels, so it is unlikely that a baleen whale could incur PTS from exposure to airgun pulses. The TTS (and thus PTS) thresholds of some pinnipeds (*e.g.,* harbor seal) as well as the harbor

porpoise may be lower (Kastak *et al.* 2005; Southall *et al.* 2007; Lucke *et al.* 2009). If so, TTS and potentially PTS may extend to a somewhat greater distance for those animals. Again, Lloyd's mirror and surface release effects will ameliorate the effects for animals at or near the surface.

(5) Non-Auditory Physical Effects

Non-auditory physical effects might occur in marine mammals exposed to strong underwater pulsed 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. Some marine mammal species (*i.e.,* beaked whales) may be especially susceptible to injury and/or stranding when exposed to intense sounds. However, there is no definitive evidence that any of these effects occur even for marine mammals in close proximity to large arrays of airguns, and beaked whales do not occur in the proposed project area. In addition, marine mammals that show behavioral avoidance of seismic vessels, including most baleen whales, some odontocetes (including belugas), and some pinnipeds, are especially unlikely to incur non-auditory impairment or other physical effects. The small airgun array proposed to be used by Shell would only have 190 and 180 dB distances of 35 and 125 m (115 and 410 ft), respectively.

Therefore, it is unlikely that such effects would occur during Shell's proposed surveys given the brief duration of exposure and the planned monitoring and mitigation measures described later in this document.

(6) Stranding and Mortality

Marine mammals close to underwater detonations of high explosive can be killed or severely injured, and the auditory organs are especially susceptible to injury (Ketten *et al.* 1993; Ketten 1995). Airgun pulses are less energetic and their peak amplitudes have slower rise times, while stranding and mortality events would include other energy sources (acoustical or shock wave) far beyond just seismic airguns. To date, there is no evidence that serious injury, death, or stranding by marine mammals can occur from exposure to airgun pulses, even in the case of large airgun arrays.

However, in numerous past IHA notices for seismic surveys, commenters have referenced two stranding events allegedly associated with seismic activities, one off Baja California and a second off Brazil. NMFS has addressed this concern several times, and, without new information, does not believe that this issue warrants further discussion. For information relevant to strandings of marine mammals, readers are encouraged to review NMFS' response to comments on this matter found in 69 FR 74906 (December 14, 2004), 71 FR 43112 (July 31, 2006), 71 FR 50027 (August 24, 2006), and 71 FR 49418 (August 23, 2006). In addition, a May-June 2008, stranding of 100–200 melon-headed whales (*Peponocephala electra*) off Madagascar that appears to be associated with seismic surveys is currently under investigation (IWC 2009).

It should be noted that strandings related to sound exposure have not been recorded for marine mammal species in the Beaufort and Chukchi seas. NMFS notes that in the Beaufort Sea, aerial surveys have been conducted by MMS and industry during periods of industrial activity (and by MMS during times with no activity). No strandings or marine mammals in distress have been observed during these surveys and none have been reported by North Slope Borough inhabitants. As a result, NMFS does not expect any marine mammals will incur serious injury or mortality in the Arctic Ocean or strand as a result of proposed seismic survey.

*Potential Effects From Active Sonar Equipment on Marine Mammals*

Several active acoustic sources other than the 40 cu-in airgun have been proposed for Shell's 2010 open water marine surveys in the Beaufort and Chukchi Seas. The specifications of these sonar equipments (source levels and frequency ranges) are provided above. In general, the potential effects of these equipments on marine mammals are similar to those from the airgun, except the magnitude of the impacts is expected to be much less due to the lower intensity and higher frequencies. Estimated source levels and zones of influence from sonar equipment are discussed above. In some cases, due to the fact that the operating frequencies of some of this equipment (*e.g.,* Multi-beam echo sounder: frequency at 240 kHz) are above the hearing ranges of marine mammals, use of the equipment is not expected to cause any take of marine mammals.

*Vessel Sounds*

In addition to the noise generated from seismic airguns and active sonar systems, various types of vessels will be used in the operations, including source vessels and support vessels. Sounds from boats and vessels have been reported extensively (Greene and Moore 1995; Blackwell and Greene 2002; 2005; 2006). Numerous measurements of underwater vessel sound have been performed in support of recent industry activity in the Chukchi and Beaufort Seas. Results of these measurements have been reported in various 90-day and comprehensive reports since 2007 (*e.g.,* Aerts *et al.* 2008; Hauser *et al.* 2008; Brueggeman 2009; Ireland *et al.* 2009). For example, Garner and Hannay (2009) estimated sound pressure levels of 100 dB at distances ranging from approximately 1.5 to 2.3 mi (2.4 to 3.7 km) from various types of barges. MacDonald *et al.* (2008) estimated higher underwater SPLs from the seismic vessel *Gilavar* of 120 dB at approximately 13 mi (21 km) from the source, although the sound level was only 150 dB at 85 ft (26 m) from the vessel. Compared to airgun pulses, underwater sound from vessels is generally at relatively low frequencies.

The primary sources of sounds from all vessel classes are propeller cavitation, propeller singing, and propulsion or other machinery. Propeller cavitation is usually the dominant noise source for vessels (Ross 1976). Propeller cavitation and singing are produced outside the hull, whereas propulsion or other machinery noise originates inside the hull. There are additional sounds produced by vessel activity, such as pumps, generators, flow noise from water passing over the hull, and bubbles breaking in the wake. Icebreakers contribute greater sound levels during ice-breaking activities than ships of similar size during normal operation in open water (Richardson *et al.* 1995). This higher sound production results from the greater amount of power and propeller cavitation required when operating in thick ice. Source levels from various vessels would be empirically measured before the start of marine surveys.

**Anticipated Effects on Habitat**

The primary potential impacts to marine mammals and other marine species are associated with elevated sound levels produced by airguns and other active acoustic sources. However, other potential impacts to the surrounding habitat from physical disturbance are also possible.

*Potential Impacts on Prey Species*

With regard to fish as a prey source for cetaceans and pinnipeds, fish are known to hear and react to sounds and to use sound to communicate (Tavolga *et al.* 1981) and possibly avoid predators (Wilson and Dill 2002). Experiments have shown that fish can sense both the

strength and direction of sound (Hawkins, 1981). Primary factors determining whether a fish can sense a sound signal, and potentially react to it, are the frequency of the signal and the strength of the signal in relation to the natural background noise level.

The level of sound at which a fish will react or alter its behavior is usually well above the detection level. Fish have been found to react to sounds when the sound level increased to about 20 dB above the detection level of 120 dB (Ona 1988); however, the response threshold can depend on the time of year and the fish's physiological condition (Engas *et al.* 1993). In general, fish react more strongly to pulses of sound rather than a continuous signal (Blaxter *et al.* 1981), and a quicker alarm response is elicited when the sound signal intensity rises rapidly compared to sound rising more slowly to the same level.

Investigations of fish behavior in relation to vessel noise (Olsen *et al.* 1983; Ona 1988; Ona and Godo 1990) have shown that fish react when the sound from the engines and propeller exceeds a certain level. Avoidance reactions have been observed in fish such as cod and herring when vessels approached close enough that received sound levels are 110 dB to 130 dB (Nakken 1992; Olsen 1979; Ona and Godo 1990; Ona and Toresen 1988). However, other researchers have found that fish such as polar cod, herring, and capeline are often attracted to vessels (apparently by the noise) and swim toward the vessel (Rostad *et al.* 2006). Typical sound source levels of vessel noise in the audible range for fish are 150 dB to 170 dB (Richardson *et al.* 1995).

Some mysticetes, including bowhead whales, feed on concentrations of zooplankton. Some feeding bowhead whales may occur in the Alaskan Beaufort Sea in July and August, and others feed intermittently during their westward migration in September and October (Richardson and Thomson [eds.] 2002; Lowry *et al.* 2004). Reactions of zooplanktoners to sound are, for the most part, not known. Their abilities to move significant distances are limited or nil, depending on the type of animal. A reaction by zooplankton to sounds produced by the marine survey program would only be relevant to whales if it caused concentrations of zooplankton to scatter. Pressure changes of sufficient magnitude to cause that type of reaction would probably occur only near the airgun source, which is expected to be a very small area. Impacts on zooplankton behavior are predicted to be negligible, and that would translate into negligible impacts on feeding mysticetes.

**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 behavioral harassment is anticipated as a result of the proposed open water marine survey program. Anticipated take of marine mammals is associated with noise propagation from the seismic airgun(s) used in the site clearance and shallow hazards surveys.

The full suite of potential impacts to marine mammals was described in detail in the "Potential Effects of the Specified Activity on Marine Mammals" section found earlier in this document. The potential effects of sound from the proposed open water marine survey programs 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). As discussed earlier in this document, the most common impact will likely be from behavioral disturbance, including avoidance of the ensonified area or changes in speed, direction, and/or diving profile of the animal. For reasons discussed previously in this document, hearing impairment (TTS and PTS) are highly unlikely to occur based on the fact that most of the equipment to be used during Shell's proposed open water marine survey programs do not have received levels high enough to elicit even mild TTS beyond a short distance. For instance, for the airgun sources, the 180- and 190-dB re 1 µPa (rms) isopleths extend to 125 m and 35 m from the source, respectively. None of the other active acoustic sources is expected to have received levels above 180 dB re 1 µPa (rms) within the frequency bands of marine mammal hearing sensitivity (below 180 kHz) beyond a few meters from the source. Finally, based on the proposed mitigation and monitoring measures described earlier in this document, no injury or mortality of marine mammals is anticipated as a result of Shell's proposed open water marine survey programs.

For impulse sounds, such as those produced by airgun(s) used for the site clearance and shallow hazards surveys, NMFS uses the 160 dB re 1 µPa (rms) isopleth to indicate the onset of Level B harassment. Shell provided calculations for the 160-dB isopleths produced by these active acoustic sources and then used those isopleths to estimate takes by harassment. NMFS used these calculations to make the necessary MMPA findings. Shell provides a full description of the methodology used to estimate takes by harassment in its IHA application (*see* **ADDRESSES**), which is also provided in the following sections.

Shell has requested an authorization to take individuals of 11 marine mammal species by Level B harassment. These 11 marine mammal species are: beluga whale (*Delphinapterus leucas*), narwhal (*Monodon monoceros*), harbor porpoise (*Phocoena phocoena*), bowhead whale (*Balaena mysticetus*), gray whale (*Eschrichtius robustus*), humpback whale (*Megaptera novaeangliae*), minke whale (*Balaenoptera acutorostrata*), bearded seal (*Erignathus barbatus*), ringed seal (*Phoca hispida*), spotted seal (*P. largha*), and ribbon seal (*Histriophoca fasciata*). However, NMFS believes that narwhals, minke whales, and ribbon seals are not likely to occur in the proposed survey area during the time of the proposed site clearance and shallow hazards surveys. Therefore, NMFS believes that only the other eight of the 11 marine mammal species would likely be taken by Level B behavioral harassment as a result of the proposed marine surveys.

*Basis for Estimating "Take by Harassment"*

As stated previously, it is current NMFS policy to estimate take by Level B harassment for impulse sounds as occurring when an animal is exposed to a received level of 160 dB re 1 µPa (rms). However, not all animals react to sounds at this low level, and many will not show strong reactions (and in some cases any reaction) until sounds are much stronger. Southall *et al.* (2007) provides a severity scale for ranking observed behavioral responses of both free-ranging marine mammals and laboratory subjects to various types of anthropogenic sound (*see* Table 4 in Southall *et al.* (2007)). Tables 7, 9, and 11 in Southall *et al.* (2007) outline the numbers of low-frequency cetaceans, mid-frequency cetaceans, and pinnipeds in water, respectively, reported as having behavioral responses to multi-pulses in 10-dB received level increments. These tables illustrate that

the more severe reactions did not occur until sounds were much higher than 160 dB re 1 μPa (rms).

The proposed open water marine surveys would use low energy active acoustic sources, including a total volume of 40 cu-in airgun or airgun array. Other active acoustic sources used for ice gouging and strudel scour all have relatively low source levels and/or high frequencies beyond marine mammal hearing range. Table 1 depicts the modeled and/or measured source levels, and radii for the 120, 160, 180, and 190 dB re 1 μPa (rms) from various sources (or equivalent) that are proposed to be used in the marine mammal surveys by Shell.

Table 1. A list of active acoustic sources proposed to be used for the Shell's 2010 open water marine surveys in the Chukchi and Beaufort Seas

TABLE 1—A LIST OF ACTIVE ACOUSTIC SOURCES PROPOSED TO BE USED FOR THE SHELL'S 2010 OPEN WATER MARINE SURVEYS IN THE CHUKCHI AND BEAUFORT SEAS

| Survey types | Active acoustic sources | Frequency | Modeled source level | Radii (m) at modeled received levels (dB re 1 μPa) | | | |
|---|---|---|---|---|---|---|---|
| | | | | 190 | 180 | 160 | 120 |
| Site Clearance & Shallow Hazards. | 40 cu-in airgun ..... | ..... | 217 | 35 | 125 | 1,220 | 14,900 |
| | Dual frequency side scan | 190 & 240 kHz ..... | 225 | Not modeled/measured because frequency outputs beyond marine mammal hearing range. | | | |
| | Single beam echo sound | 100–340 kHz ..... | 180–200 | Not modeled/measured because majority of frequency outputs beyond marine mammal hearing range. | | | |
| | Shallow sub-bottom profiler. | 3.5 kHz (Alpha Helix) | 193.8 | 1 | 3 | 14 | 310 |
| | | 3.5 kHz (*Henry C.*) ... | 167.2 | NA | NA | 3 | 980 |
| | | 400 Hz ..... | 176.8 | NA | NA | 9 | 1,340 |
| Ice Gouging Surveys. | Dual freq sub-bottom profiler. | 2–7 kHz & 8–23 kHz | 184.6 | NA | 2 | 7 | 456 |
| | Multibeam Echo Sounder | 240 kHz ..... | Not modeled/measured because frequency outputs beyond marine mammal hearing range. | | | | |
| Strudel Scour Survey. | Multibeam Echo Sounder | 240 kHz ..... | Not modeled/measured because frequency outputs beyond marine mammal hearing range. | | | | |
| | Single Beam Bathymetric Sonar. | >200 kHz ..... | 215 | Not modeled/measured because frequency outputs beyond marine mammal hearing range. | | | |

"Take by Harassment" is calculated in this section and Shell's application by multiplying the expected densities of marine mammals that may occur in the site clearance and shallow hazards survey area by the area of water body likely to be exposed to airgun impulses with received levels of ≥160 dB re 1 μPa (rms). The single exception to this method is for the estimation of exposures of bowhead whales during the fall migration where more detailed data were available allowing an alternate approach, described below, to be used. This section describes the estimated densities of marine mammals that may occur in the project area. The area of water that may be ensonified to the above sound levels is described further in the "Potential Number of Takes by Harassment" subsection.

Marine mammal densities near the operation are likely to vary by season and habitat. However, sufficient published data allowing the estimation of separate densities during summer (July and August) and fall (September and October) are only available for beluga and bowhead whales. As noted above, exposures of bowhead whales during the fall are not calculated using densities (*see* below). Therefore, summer and fall densities have been estimated for beluga whales, and a summer density has been estimated for bowhead whales. Densities of all other species have been estimated to represent the duration of both seasons. The estimated 30 days of site clearance and shallow hazards survey activity will take place in eastern Harrison Bay at approximately five potential prospective future drill sites. The survey lines form a grid or survey "patch." It is expected that three of these patches will be surveyed during the summer and two during the fall. The areas of water exposed to sounds during surveys at the patches are separated by season in this manner and as described further below.

Marine mammal densities are also likely to vary by habitat type. In the Alaskan Beaufort Sea, where the continental shelf break is relatively close to shore, marine mammal habitat is often defined by water depth. Bowhead and beluga occurrence within nearshore (0–131 ft, 0–40 m), outer continental shelf (131–656 ft, 40–200 m), slope (656–6,562 ft, 200–2,000 m), basin (≤6,562 ft, 2,000 m), or similarly defined habitats have been described previously (Moore *et al.* 2000; Richardson and Thomson 2002). The presence of most other species has generally only been described relative to the entire continental shelf zone (0–656 ft, 0–200 m) or beyond. Sounds produced by the site clearance and shallow hazards surveys are expected to drop below 160 dB within the nearshore zone (0–131 ft, 0–40 m, water depth). Sounds ≥160 dB are not expected to occur in waters >656 ft (200 m). Because airgun sounds at the indicated levels would not be introduced to the outer continental shelf, separate beluga and bowhead densities for the outer continental shelf have not been used in the calculations.

In addition to water depth, densities of marine mammals are likely to vary with the presence or absence of sea ice (*see* later for descriptions by species). At times during either summer or fall, pack-ice may be present in some of the area near Harrison Bay. However, because some of the survey equipment towed behind the vessel may be damaged by ice, site clearance and shallow hazards survey activities will generally avoid sea-ice. Therefore, Shell has assumed that only 10% of the area exposed to sounds ≥160 dB by the survey will be near ice margin habitat. Ice-margin densities of marine mammals in both seasons have therefore been multiplied by 10% of the area exposed to sounds by the airguns, while open-water (nearshore) densities have been multiplied by the remaining 90% of the area (*see* area calculations below).

To provide some allowance for the uncertainties, Shell calculated both "maximum estimates" as well as "average estimates" of the numbers of marine mammals that could potentially be affected. For a few marine mammal species, several density estimates were available, and in those cases the mean and maximum estimates were determined from the survey data. In other cases, no applicable estimate (or perhaps a single estimate) was available, so correction factors were used to arrive at "average" and "maximum" estimates. These are described in detail in the following subsections. NMFS has determined that the average density data of marine mammal populations will be used to calculate estimated take numbers because these numbers are based on surveys and monitoring of marine mammals in the vicinity of the proposed project area. For several species whose average densities are too low to yield a take number due to extra-limital distribution in the vicinity of the proposed Beaufort Sea survey area, but whose chance occurrence has been documented in the past, such as gray and humpback whales and harbor porpoises, NMFS allotted a few numbers of these species to allow unexpected takes of these species.

Detectability bias, quantified in part by f(0), is associated with diminishing sightability with increasing lateral distance from the trackline. Availability bias [g(0)] refers to the fact that there is <100% probability of sighting an animal that is present along the survey trackline. Some sources of densities used below included these correction factors in their reported densities. In other cases the best available correction factors were applied to reported results when they had not been included in the reported data (*e.g.* Moore *et al.* 2000b).

(1) Cetaceans

As noted above, the densities of beluga and bowhead whales present in the Beaufort Sea are expected to vary by season and location. During the early and mid-summer, most belugas and bowheads are found in the Canadian Beaufort Sea and Amundsen Gulf or adjacent areas. Low numbers of bowhead whales, some of which are in feeding aggregations, are found in the eastern Alaskan Beaufort Sea and the northeastern Chukchi Sea. Belugas begin to move across the Alaskan Beaufort Sea in August, and the majority of bowheads do so toward the end of August.

*Beluga Whales*—Beluga density estimates were derived from data in Moore *et al.* (2000). During the summer, beluga whales are most likely to be encountered in offshore waters of the eastern Alaskan Beaufort Sea or areas with pack ice. The summer beluga whale nearshore density was based on 11,985 km (7,749 mi) of on-transect effort and 9 associated sightings that occurred in water ≤50 m (164 ft) in Moore *et al.* (2000; Table 2). A mean group size of 1.63, a f(0) value of 2.841, and a g(0) value of 0.58 from Harwood *et al.* (1996) were also used in the calculation. Moore *et al.* (2000) found that belugas were equally likely to occur in heavy ice conditions as open water or very light ice conditions in summer in the Beaufort Sea, so the same density was used for both nearshore and ice-margin estimates (Table 2). The fall beluga whale nearshore density was based on 72,711 km (45,190 mi) of on-transect effort and 28 associated sightings that occurred in water ≤50 m (164 ft) reported in Moore *et al.* (2000). A mean group size of 2.9 (CV=1.9), calculated from all Beaufort Sea fall beluga sightings in ≤50 m (164 ft) of water present in the MMS Bowhead Whale Aerial Survey Program (BWASP) database, along with the same f(0) and g(0) values from Harwood *et al.* (1996) were also used in the calculation. Moore *et al.* (2000) found that during the fall in the Beaufort Sea belugas occurred in moderate to heavy ice at higher rates than in light ice, so ice-margin densities were estimated to be twice the nearshore densities. Based on the CV of group size maximum estimates in both season and habitats were estimated as four times the average estimates. "Takes by harassment" of beluga whales during the fall in the Beaufort Sea were not calculated in the same manner as described for bowhead whales (below) because of the relatively lower expected densities of beluga whales in nearshore habitat near the site clearance and shallow hazards surveys and the lack of detailed data on the likely timing and rate of migration through the area (Table 3).

TABLE 2—EXPECTED SUMMER (JUL–AUG) DENSITIES OF BELUGA AND BOWHEAD WHALES IN THE ALASKAN BEAUFORT SEA. DENSITIES ARE CORRECTED FOR F(0) AND G(0) BIASES

| | Nearshore | Ice margin |
|---|---|---|
| Species | Average Density (#/km$^2$). | Average Density (#/km$^2$). |
| Beluga whale | 0.0030. | 0.0030. |
| Bowhead whale | 0.0186. | 0.0186. |

TABLE 3—EXPECTED FALL (SEP–NOV) DENSITIES OF BELUGA AND BOWHEAD WHALES IN THE ALASKAN BEAUFORT SEA. DENSITIES ARE CORRECTED FOR F(0) AND G(0) BIASES

| | Nearshore | Ice margin |
|---|---|---|
| Species | Average Density (#/km$^2$). | Average Density (#/km$^2$). |
| Beluga whale | 0.0027. | 0.0054. |
| Bowhead whale* | N/A. | N/A. |

**See* text for description of how bowhead whales estimates were made.

*Bowhead Whales*—Industry aerial surveys of the continental shelf near Camden Bay in 2008 recorded eastward migrating bowhead whales until July 12 (Lyons and Christie 2009). No bowhead sightings were recorded again, despite continued flights, until August 19. Aerial surveys by industry operators did not begin until late August of 2006 and 2007, but in both years bowheads were also recorded in the region before the end of August (Christie *et al.* 2009). The late August sightings were likely of bowheads beginning their fall migration so the densities calculated from those surveys were not used to estimate summer densities in this region. The three surveys in July 2008, resulted in density estimates of 0.0099, 0.0717, and 0.0186 whales/km$^2$, respectively. The estimate of 0.0186 whales/km$^2$ was used as the average nearshore density, and the estimate of 0.0717 whales/km$^2$ was used as the maximum (Table 2). Sea ice was not present during these surveys. Moore *et al.* (2000) reported that bowhead whales in the Alaskan Beaufort Sea were distributed uniformly relative to sea ice, so the same nearshore densities were used for ice-margin habitat.

During the fall most bowhead whales will be migrating west past the site clearance and shallow hazards surveys, so it is less accurate to assume that the number of individuals present in the area from one day to the next will be static. However, feeding, resting, and milling behaviors are not entirely uncommon at this time and location either. In order to incorporate the movement of whales past the planned operations, and because the necessary data are available, Shell has developed an alternate method of calculating the number of individuals exposed to sounds produced by the site clearance and shallow hazards surveys. The method is founded on estimates of the proportion of the population that would pass within the ≥160 dB rms zones on a given day in the fall during survey activities.

Approximately 10 days of site clearance and shallow hazards survey activity are likely to occur during the fall period when bowheads are migrating through the Beaufort Sea. If the bowhead population has continued to grow at an annual rate of 3.4%, the current population size would be approximately 14,247 individuals based on a 2001 population of 10,545 (Zeh and Punt 2005). Based on data in Richardson and Thomson (2002, Appendix 9.1), the number of whales expected to pass each day was estimated as a proportion of the population. Minimum and maximum estimates of the number of whales passing each day were not available, so a single estimate based on the 10-day moving average presented by Richardson and Thomson (2002) was used. Richardson and Thomson (2002) also calculated the proportion of animals within water depth bins (<20 m, 20–40 m, 40–200 m, >200 m; or <65 ft, 65–131 ft, 131–656 ft, >656 ft). Using this information the total number of whales expected to pass the site clearance and shallow hazards surveys each day was multiplied by the proportion of whales that would be in each depth category to estimate how many individuals would be within each depth bin on a given day. The proportion of each depth bin falling within the ≥160 dB rms zone was then multiplied by the number of whales within the respective bins to estimate the total number of individuals that would be exposed on each day. This was repeated for a total of 10 days (September 15–19 and October 1–4) and the results were summed to estimate the total number of bowhead whales that might be exposed to ≥160 dB rms during the migration period in the Beaufort Sea.

*Other Cetaceans*—For other cetacean species that may be encountered in the Beaufort Sea, densities are likely to vary somewhat by season, but differences are not expected to be great enough to require estimation of separate densities for the two seasons. Harbor porpoises and gray whales are not expected to be present in large numbers in the Beaufort Sea during the fall but small numbers may be encountered during the summer. They are most likely to be present in nearshore waters (Table 4). Narwhals are not expected to be encountered during the site clearance and shallow hazards surveys. However, there is a chance that a few individuals may be present if ice is nearby. The first record of humpback whales in the Beaufort Sea was documented in 2007 so their presence cannot be ruled out. Since these species occur so infrequently in the Beaufort Sea, little to no data are available for the calculation of densities. Minimal densities have therefore been assigned for calculation purposes and to allow for chance encounters (Table 4).

TABLE 4. EXPECTED DENSITIES OF CETACEANS (EXCLUDING BELUGA AND BOWHEAD WHALE) AND SEALS IN THE ALASKAN BEAUFORT SEA

| | Nearshore | Ice margin |
|---|---|---|
| Species | Average density (#/km$^2$) | Average density (#/km$^2$) |
| Narwhal | 0.0000 | 0.0000 |
| Harbor porpoise | 0.0001 | 0.0000 |
| Gray whale | 0.0001 | 0.0000 |
| Bearded seal | 0.0181 | 0.0128 |
| Ribbon seal | 0.0001 | 0.0001 |
| Ringed seal | 0.3547 | 0.2510 |
| Spotted seal | 0.0037 | 0.0001 |

(2) Pinnipeds

Extensive surveys of ringed and bearded seals have been conducted in the Beaufort Sea, but most surveys have been conducted over the landfast ice, and few seal surveys have occurred in open-water or in the pack ice. Kingsley (1986) conducted ringed seal surveys of the offshore pack ice in the central and eastern Beaufort Sea during late spring (late June). These surveys provide the most relevant information on densities of ringed seals in the ice margin zone of the Beaufort Sea. The density estimate in Kingsley (1986) was used as the average density of ringed seals that may be encountered in the ice margin (Table 6–3 in Shell's application and Table 4 here). The average ringed seal density in the nearshore zone of the Alaskan Beaufort Sea was estimated from results of ship-based surveys at times without seismic operations reported by Moulton and Lawson (2002; Table 6–3 in Shell's application and Table 4 here).

Densities of bearded seals were estimated by multiplying the ringed seal densities by 0.051 based on the proportion of bearded seals to ringed seals reported in Stirling *et al.* (1982;

Table 6–3 in Shell's application and Table 4 here). Spotted seal densities in the nearshore zone were estimated by summing the ringed seal and bearded seal densities and multiplying the result by 0.015 based on the proportion of spotted seals to ringed plus bearded seals reported in Moulton and Lawson (2002; Table 6–3 in Shell's application and Table 4 here). Minimal values were assigned as densities in the ice-margin zones (Table 6–3 in Shell's application and Table 4 here).

*Potential Number of Takes by Harassment*

Numbers of marine mammals that might be present and potentially disturbed are estimated below based on available data about mammal distribution and densities at different locations and times of the year as described previously. The planned site clearance and shallow hazards survey would take place in the Beaufort Sea over two different seasons. The estimates of marine mammal densities have therefore been separated both spatially and temporarily in an attempt to represent the distribution of animals expected to be encountered over the duration of the site clearance and shallow hazards survey.

The number of individuals of each species potentially exposed to received levels ≥160 dB re 1 μPa (rms) within each season and habitat zone was estimated by multiplying

- the anticipated area to be ensonified to the specified level in each season and habitat zone to which that density applies, by
- the expected species density.

The numbers of potential individuals exposed were then summed for each species across the two seasons and habitat zones. Some of the animals estimated to be exposed, particularly migrating bowhead whales, might show avoidance reactions before being exposed to ≥160 dB re 1 μPa (rms). Thus, these calculations actually estimate the number of individuals potentially exposed to ≥160 dB that would occur if there were no avoidance of the area ensonified to that level.

The area of water potentially exposed to received levels ≥160 dB re 1 μPa (rms) by airgun operations was calculated by buffering a typical site clearance and shallow hazards survey grid of lines by the estimated >160 dB distance from the airgun source, including turns between lines during which a single mitigation airgun will be active. Measurements of a 2 x 10 $in^3$ airgun array used in 2007 were reported by Funk *et al.* (2008). These measurements were used to model both of the potential airgun arrays that may be used in 2010, a 4 x 10 $in^3$ array or a 2 x 10 $in^3$ + 1 x 20 $in^3$ array. The modeling results showed that the 40 cubic inch array is likely to produce sound that propagates further than the alternative array, so those results were used. The modeled 160 dB re 1 μPa (rms) distance from a 40 cubic inch array was 1,220 m (4,003 ft) from the source. Because this is a modeled estimate, but based on similar measurements at the same location, the estimated distance was only increased by a factor of 1.25 instead of a typical 1.5 factor. This results in a 160 dB distance of 1,525 m (5,003 ft) which was added to both sides of the survey lines in a typical site clearance and shallow hazards survey grid. The resulting area that may be exposed to airgun sounds ≥160 dB re 1 μPa (rms) is 81.6 $km^2$. In most cases the use of a single mitigation gun during turns will not appreciably increase the total area exposed to sounds ≥160 dB re 1 μPa (rms), but analysis of a similar survey pattern from the Chukchi Sea (but using the Beaufort sound radii) suggested use of the mitigation gun may increase this area to 82.3 $km^2$. As described above, three patches (246.9 $km^2$) are likely to be surveyed during the summer leaving two (164.6 $km^2$) for the fall. During both seasons, 90% of the area has been multiplied by nearshore (open-water) densities, and the remaining 10% by the ice-margin densities.

For analysis of potential effects on migrating bowhead whales we calculated the maximum distance perpendicular to the migration path ensonified to ≥160 dB re 1 μPa (rms) by a typical survey patch as 11.6 km (7.2 mi). This distance represents approximately 21% of the 56 km (34.8 mi) between the barrier islands and the 40-m (131-ft) bathymetry line so it was assumed that 21% of the bowheads migrating within the nearshore zone (water depth 0–40 m, or 0–131 ft) may be exposed to sounds ≥160 dB re 1 μPa (rms) if they showed no avoidance of the site clearance and shallow hazards survey activities.

*Cetaceans*—Cetacean species potentially exposed to airgun sounds with received levels ≥160 dB re 1 μPa (rms) would involve bowhead, gray, humpback, and beluga whales and harbor porpoises. Shell also included some maximum exposure estimates for narwhal and minke whale. However, as stated previously in this document, NMFS has determined that authorizing take of these two cetacean species is not warranted given the highly unlikely potential of these species to occur in the open water marine survey area. The average estimates of the number of individual bowhead whales exposed to received sound levels ≥160 dB re 1 μPa (rms) is 381 and belugas is 1 individual. However, since beluga whales often form small groups, it is likely that the exposure to the animals would be based on groups instead of individual animals. Therefore, NMFS proposes to make an adjustment to increase the number of beluga whale takes to 5 individuals to reflect the aggregate nature of these animals.

The estimates show that one endangered cetacean species (the bowhead whale) is expected to be exposed to sounds ≥160 dB re 1 μPa (rms) unless bowheads avoid the area around the site clearance and shallow hazards survey areas (Tables 4). Migrating bowheads are likely to do so to some extent, though many of the bowheads engaged in other activities, particularly feeding and socializing, probably will not.

As discussed before, although no take estimates of gray and humpback whales and harbor porpoises can be calculated due to their low density and extralimital distribution in the vicinity of the site clearance and shallow hazards survey area in the Beaufort Sea, their occurrence has been documented in the past. Therefore, to allow for chance encounters of these species, NMFS proposes to include two individuals of each of these three species as having the potential to be exposed to an area with received levels ≥160 dB re 1 μPa (rms).

*Pinnipeds*—The ringed seal is the most widespread and abundant pinniped in ice-covered arctic waters, and there appears to be a great deal of year-to-year variation in abundance and distribution of these marine mammals. Ringed seals account for a large number of marine mammals expected to be encountered during the site clearance and shallow hazard survey activities, and hence exposed to sounds with received levels ≥160 dB re 1 μPa (rms). The average estimate is that 567 ringed seals might be exposed to sounds with received levels ≥160 dB re 1 μPa (rms) from airgun impulses.

Two additional seal species are expected to be encountered. Average estimates for bearded seal exposures to sound levels ≥160 dB re 1μPa (rms) is 7 individuals. For spotted seal the exposure estimates is 1 individual.

Table 5 summarizes the number of potential takes by harassment of all species.

TABLE 5—SUMMARY OF THE NUMBER OF POTENTIAL EXPOSURES OF MARINE MAMMALS TO RECEIVED SOUND LEVELS IN THE WATER OF ≥160 dB DURING SHELL'S PLANNED SITE CLEARANCE AND SHALLOW HAZARDS SURVEYS NEAR HARRISON BAY IN THE BEAUFORT SEA, ALASKA, JULY—OCTOBER, 2010

| Species | Total number of exposure to sound levels >160 dB re 1 μPa (rms) |
|---|---|
| Beluga whale | 5 |
| Harbor porpoise | 2 |
| Bowhead whale | 381 |
| Gray whale | 2 |
| Humpback whale | 2 |
| Bearded seal | 7 |
| Ringed seal | 142 |
| Spotted seal | 1 |

*Estimated Take Conclusions*

Cetaceans—Effects on cetaceans are generally expected to be restricted to avoidance of an area around the site clearance and shallow hazards surveys and short-term changes in behavior, falling within the MMPA definition of "Level B harassment".

Using the 160 dB criterion, the average estimates of the numbers of individual cetaceans exposed to sounds ≥160 dB re 1 μPa (rms) represent varying proportions of the populations of each species in the Beaufort Sea and adjacent waters. For species listed as "Endangered" under the ESA, the estimates include approximately 381 bowheads. This number is approximately 2.7% of the Bering-Chukchi-Beaufort population of >14,247 assuming 3.4% annual population growth from the 2001 estimate of >10,545 animals (Zeh and Punt 2005). The small numbers of other mysticete whales that may occur in the Beaufort Sea are unlikely to occur near the planned site clearance and shallow hazards surveys. The few that might occur would represent a very small proportion of their respective populations. The average estimate of the number of belugas that might be exposed to ≥160 dB re 1 μPa (rms) (1, with adjustment to 5 considering group occurrence) represents <1% of its population.

Seals—A few seal species are likely to be encountered in the study area, but ringed seal is by far the most abundant in this area. The average estimates of the numbers of individuals exposed to sounds at received levels ≥160 dB re 1 μPa (rms) during the site clearance and shallow hazards surveys are as follows: ringed seals (142), bearded seals (7), and spotted seals (1), (representing <1% of their respective Beaufort Sea populations).

**Impact on Availability of Affected Species or Stock for Taking for Subsistence Uses**

*Relevant Subsistence Uses*

The disturbance and potential displacement of marine mammals by sounds from the proposed marine surveys are the principal concerns related to subsistence use of the area. Subsistence remains the basis for Alaska Native culture and community. Marine mammals are legally hunted in Alaskan waters by coastal Alaska Natives. In rural Alaska, subsistence activities are often central to many aspects of human existence, including patterns of family life, artistic expression, and community religious and celebratory activities. Additionally, the animals taken for subsistence provide a significant portion of the food that will last the community throughout the year. The main species that are hunted include bowhead and beluga whales, ringed, spotted, and bearded seals, walruses, and polar bears. (Both the walrus and the polar bear are under the USFWS' jurisdiction.) The importance of each of these species varies among the communities and is largely based on availability.

The subsistence communities in the Beaufort and Chukchi Seas that have the potential to be impacted by Shell's proposed open water marine surveys include Kaktovik, Nuiqsut, Barrow, Wainwright, and Point Lay. Kaktovik is a coastal community near the east boundary of the proposed ice gouging area. Nuiqsut is approximately 30 mi (50 km) inland from the proposed site clearance and shallow hazards survey area. Cross Island, from which Nuiqsut hunters base their bowhead whaling activities, is approximately 44 mi (70 km) east of the proposed site clearance and shallow hazards survey area. Barrow lies approximately 168 mi (270 km) west of Shell's Harrison Bay site clearance and shallow hazards survey areas. Wainwright is a coastal community approximately 12 mi (20 km) to the southeast boundary of the proposed ice gouging survey area in the Chukchi Sea. Point Lay is another coastal community boarding the southwest boundary of the proposed ice gouging survey area in the Chukchi Sea. Point Hope is the western tip of the North Slope and is approximately 124 mi (200 km) southwest of Shell's proposed ice gouge survey area in the Chukchi Sea.

(1) Bowhead Whales

Of the three communities along the Beaufort Sea coast, Barrow is the only one that currently participates in a spring bowhead whale hunt. However, this hunt is not anticipated to be affected by Shell's activities, as the spring hunt occurs in late April to early May, and Shell's marine surveys in Beaufort Sea will not begin until July at the earliest.

All three communities participate in a fall bowhead hunt. In autumn, westward-migrating bowhead whales typically reach the Kaktovik and Cross Island (Nuiqsut hunters) areas by early September, at which point the hunts begin (Kaleak 1996; Long 1996; Galginaitis and Koski 2002; Galginaitis and Funk 2004, 2005; Koski *et al.* 2005). Around late August, the hunters from Nuiqsut establish camps on Cross Island from where they undertake the fall bowhead whale hunt. The hunting period starts normally in early September and may last as late as mid-October, depending mainly on ice and weather conditions and the success of the hunt. Most of the hunt occurs offshore in waters east, north, and northwest of Cross Island where bowheads migrate and not inside the barrier islands (Galginaitis 2007). Hunters prefer to take bowheads close to shore to avoid a long tow, but Braund and Moorehead (1995) report that crews may (rarely) pursue whales as far as 50 mi (80 km) offshore. Whaling crews use Kaktovik as their home base, leaving the village and returning on a daily basis. The core whaling area is within 12 mi (19.3 km) of the village with a periphery ranging about 8 mi (13 km) farther, if necessary. The extreme limits of the Kaktovik whaling hunt would be the middle of Camden Bay to the west. The timing of the Kaktovik bowhead whale hunt roughly parallels the Cross Island whale hunt (Impact Assessment Inc 1990b; SRB&A 2009: Map 64). In recent years, the hunts at Kaktovik and Cross Island have usually ended by mid- to late September.

Westbound bowheads typically reach the Barrow area in mid-September, and are in that area until late October (Brower 1996). However, over the years, local residents report having seen a small number of bowhead whales feeding off Barrow or in the pack ice off Barrow during the summer. Recently, autumn bowhead whaling near Barrow has normally begun in mid-September to early October, but in earlier years it began as early as August if whales were observed and ice conditions were favorable (USDI/BLM 2005). The recent decision to delay harvesting whales

until mid-to-late September has been made to prevent spoilage, which might occur if whales were harvested earlier in the season when the temperatures tend to be warmer. Whaling near Barrow can continue into October, depending on the quota and conditions.

Along the Chukchi Sea, the spring bowhead whale hunt for Wainwright occurs between April and June in leads offshore from the village. Whaling camps can be located up to 16–24 km (10–15 mi) from shore, depending on where the leads open up. Whalers prefer to be closer, however, and will sometimes go overland north of Wainwright to find closer leads (SRBA 1993). Residents of Point Lay have not hunted bowhead whales in the recent past, but were selected by the International Whaling Commission (IWC) to receive a bowhead whale quota in 2009, and began bowhead hunting again in 2009. In the more distant past, Point Lay hunters traveled to Barrow, Wainwright, or Point Hope to participate in the bowhead whale harvest activities. In Point Hope, the bowhead whale hunt occurs between March and June, when the pack-ice lead is usually 10–11 km (6–7 mi) offshore. Camps are set up along the landfast ice edge to the south and southeast of the village. Point Hope whalers took between one and seven bowhead whales per year between 1978 and 2008, with the exception of 1980, 1989, 2002, and 2006, when no whales were taken (Suydam and George 2004; Suydam *et al.* 2008, 2007, 2006, 2005). There is no fall bowhead hunt in Point Hope, as the whales migrate back down on the west side of the Bering Strait, out of range of the Point Hope whalers (Fuller and George 1997).

(2) Beluga Whales

Beluga whales are not a prevailing subsistence resource in the communities of Kaktovik and Nuiqsut. Kaktovik hunters may harvest one beluga whale in conjunction with the bowhead hunt; however, it appears that most households obtain beluga through exchanges with other communities. Although Nuiqsut hunters have not hunted belugas for many years while on Cross Island for the fall hunt, this does not mean that they may not return to this practice in the future. Data presented by Braund and Kruse (2009) indicate that only one percent of Barrow's total harvest between 1962 and 1982 was of beluga whales and that it did not account for any of the harvested animals between 1987 and 1989.

There has been minimal harvest of beluga whales in Beaufort Sea villages in recent years. Additionally, if belugas are harvested, it is usually in conjunction with the fall bowhead harvest. Shell will not be operating during the Kaktovik and Nuiqsut fall bowhead harvests.

In the Chukchi communities, the spring beluga hunt by Wainwright residents is concurrent with the bowhead hunt, but belugas are typically taken only during the spring hunt if bowheads are not present in the area. Belugas are also hunted later in the summer, between July and August, along the coastal lagoon systems. Belugas are usually taken less than 16 km (10 mi) from shore. Beluga whales are harvested in June and July by Point Lay residents. They are taken in the highest numbers in Naokak and Kukpowruk Passes south of Point Lay, but hunters will travel north to Utukok Pass and south to Cape Beaufort in search of belugas. The whales are usually herded by hunters with their boats into the shallow waters of Kasegaluk Lagoon (MMS 2007). In Point Hope, belugas are also hunted in the spring, coincident with the spring bowhead hunt. A second hunt takes place later in the summer, in July and August, and can extend into September, depending on conditions and the IWC quota. The summer hunt is conducted in open water along the coastline on either side of Point Hope, as far north as Cape Dyer (MMS 2007). Belugas are smaller than bowhead whales, but beluga whales often make up a significant portion of the total harvest for Point Hope (Fuller and George 1997; SRBA 1993). Ninety-eight belugas harvested in 1992 made up 40.3% of the total edible harvest for that year. Three bowhead whales represented 6.9% of the total edible harvest for the same year (Fuller and George 1997).

(3) Ice Seals

Ringed seals are available to subsistence users in the Beaufort Sea year-round, but they are primarily hunted in the winter or spring due to the rich availability of other mammals in the summer. Bearded seals are primarily hunted during July in the Beaufort Sea; however, in 2007, bearded seals were harvested in the months of August and September at the mouth of the Colville River Delta. An annual bearded seal harvest occurs in the vicinity of Thetis Island in July through August. Approximately 20 bearded seals are harvested annually through this hunt. Spotted seals are harvested by some of the villages in the summer months. Nuiqsut hunters typically hunt spotted seals in the nearshore waters off the Colville River delta, which drains into Harrison Bay, where Shell's proposed site clearance and shallow hazards surveys are planned.

Although there is the potential for some of the Beaufort villages to hunt ice seals during the summer and fall months while Shell is conducting marine surveys, the primary sealing months occur outside of Shell's operating time frame.

In the Chukchi Sea, seals are most often taken between May and September by Wainwright residents. Wainwright hunters will travel as far south as Kuchaurak Creek (south of Point Lay) and north to Peard Bay. Hunters typically stay within 72 km (45 mi) of the shore. Ringed and bearded seals are harvested all year by Point Lay hunters. Ringed seals are hunted 32 km (20 mi) north of Point Lay, as far as 40 km (25 mi) offshore. Hunters travel up to 48 m (30 mi) north of the community for bearded seals, which are concentrated in the Solivik Island area. Bearded seals are also taken south of the community in Kasegaluk Lagoon, and as far as 40 km (25 mi) from shore. Seals are harvested throughout most of the year by the Point Hope community, although they tend to be taken in the greatest numbers in the winter and spring months. The exception is the bearded seal hunt, which peaks later in the spring and into the summer (Fuller and George 1997; MMS 2007). Species of seals harvested by Point Hope hunters include ringed, spotted, and bearded. Seals are hunted on the ice (Fuller and George 1997). Hunters tend to stay close to the shore but will travel up to 24 km (15 mi) offshore south of the point, weather dependent. Seals are hunted to the north of the community as well, but less often, as the ice is less stable and can be dangerous. Seals are taken between Akoviknak Lagoon to the south and Ayugatak Lagoon to the north (MMS 2007).

*Potential Impacts to Subsistence Uses*

NMFS has defined "unmitigable adverse impact" in 50 CFR 216.103 as:

> * * * an impact resulting from the specified activity: (1) That is likely to reduce the availability of the species to a level insufficient for a harvest to meet subsistence needs by: (i) Causing the marine mammals to abandon or avoid hunting areas; (ii) Directly displacing subsistence users; or (iii) Placing physical barriers between the marine mammals and the subsistence hunters; and (2) That cannot be sufficiently mitigated by other measures to increase the availability of marine mammals to allow subsistence needs to be met.

Noise and general activity during Shell's proposed open water marine surveys have the potential to impact marine mammals hunted by Native

Alaskans. In the case of cetaceans, the most common reaction to anthropogenic sounds (as noted previously in this document) is avoidance of the ensonified area. In the case of bowhead whales, this often means that the animals divert from their normal migratory path by several kilometers. Additionally, general vessel presence in the vicinity of traditional hunting areas could negatively impact a hunt.

In the case of subsistence hunts for bowhead whales in the Beaufort and Chukchi Seas, there could be an adverse impact on the hunt if the whales were deflected seaward (further from shore) in traditional hunting areas. The impact would be that whaling crews would have to travel greater distances to intercept westward migrating whales, thereby creating a safety hazard for whaling crews and/or limiting chances of successfully striking and landing bowheads.

*Plan of Cooperation (POC or Plan)*

Regulations at 50 CFR 216.104(a)(12) require IHA applicants for activities that take place in Arctic waters to provide a POC or information that identifies what measures have been taken and/or will be taken to minimize adverse effects on the availability of marine mammals for subsistence purposes.

Shell's POC is also subject to MMS Lease Sale Stipulation No. 5, which requires that all exploration operations be conducted in a manner that prevents unreasonable conflicts between oil and gas activities and the subsistence activities and resources of residents of the North Slope.

The POC identifies the measures that Shell has developed in consultation with North Slope subsistence communities and will implement during its planned 2010 site clearance and shallow hazards surveys and ice gouge surveys to minimize any adverse effects on the availability of marine mammals for subsistence uses. In addition, the POC details Shell's communications and consultations with local subsistence communities concerning its planned 2010 program, potential conflicts with subsistence activities, and means of resolving any such conflicts. Shell states that through its Subsistence Advisor (SA) and Com and Call Center (Com Center) program for 2010, Shell's SA and Shell representatives in the Com Centers will be available daily to the communities throughout the 2010 season. The SA and Com Center programs provide residents of the nearest affected communities a way to communicate where and when subsistence activities so that industry may avoid conflicts with planned subsistence activities. Shell continues to document its contacts with the North Slope subsistence communities, as well as the substance of its communications with subsistence stakeholder groups.

Shell states that the POC will be, and has been in the past, the result of numerous meetings and consultations between Shell, affected subsistence communities and stakeholders, and federal agencies. The POC identifies and documents potential conflicts and associated measures that will be taken to minimize any adverse effects on the availability of marine mammals for subsistence use. Outcomes of POC meetings are attached to the POC as addenda and were distributed to Federal, State, and local agencies as well as local stakeholder groups that either adjudicate or influence mitigation approaches for Shell's open water programs.

Meetings for Shell's 2010 program in the Beaufort and Chukchi Seas were conducted for Nuiqsut, Kaktovik, Barrow, Point Hope, Point Lay, Wainwright, and Kotzebue in the 1st quarter of 2010. Shell met with the marine mammal commissions and committees including the Alaska Eskimo Whaling Commission, Eskimo Walrus Commission, Alaska Beluga Whale Committee, Alaska Ice Seal Committee, and the Alaska Nanuuq Commission on December 8, 2009 in co-management meeting. Throughout 2010 Shell anticipates continued engagement with the marine mammal commissions and committees active in the subsistence harvests and marine mammal research.

Following the 2010 season, Shell intends to have a post-season co-management meeting with the commissioners and committee heads to discuss results of mitigation measures and outcomes of the preceding season. The goal of the post-season meeting is to build upon the knowledge base, discuss successful or unsuccessful outcomes of mitigation measures, and possibly refine plans or mitigation measures if necessary.

**Mitigation Measures**

In order to issue an incidental take authorization under Section 101(a)(5)(D) of the MMPA, NMFS must set forth the permissible methods of taking pursuant to such activity, and other means of effecting the least practicable adverse 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.

For Shell's proposed open water marine surveys in the Beaufort and Chukchi Sea, Shell worked with NMFS and proposed the following mitigation measures to minimize the potential impacts to marine mammals in the project vicinity as a result of the marine survey activities.

As part of the application, Shell submitted to NMFS a Marine Mammal Monitoring and Mitigation Program (4MP) for its shallow hazards survey activities in the Beaufort Sea during the 2010 open-water season. The objectives of the 4MP are:

- To ensure that disturbance to marine mammals and subsistence hunts is minimized and all permit stipulations are followed,
- To document the effects of the proposed survey activities on marine mammals, and
- To collect baseline data on the occurrence and distribution of marine mammals in the study area.

For the proposed Shell's 2010 open water marine survey program in the Beaufort and Chukchi Seas, the following mitigation measures are required.

*(1) Sound Source Measurements*

As described above, previous measurements of airguns in the Harrison Bay area were used to model the distances at which received levels are likely to fall below 160, 180, and 190 dB re 1 μPa (rms) from the planned airgun sources. These modeled distances will be used as temporary safety radii until measurements of the airgun sound source are conducted. The measurements will be made at the beginning of the field season and the measured radii used for the remainder of the survey period.

The objectives of the sound source verification measurements planned for 2010 in the Beaufort Sea will be to measure the distances in the broadside and endfire directions at which broadband received levels reach 190, 180, 170, 160, and 120 dB re 1 μPa (rms) for the energy source array combinations that may be used during the survey activities. The configurations will include at least the full array and the operation of a single source that will be used during power downs. The measurements of energy source array sounds will be made at the beginning of the survey and the distances to the various radii will be reported as soon as possible after recovery of the equipment. The primary radii of concern will be the 190 and 180 dB safety radii for pinnipeds and cetaceans, respectively, and the 160 dB disturbance radii. In addition to

reporting the radii of specific regulatory concern, nominal distances to other sound isopleths down to 120 dB re 1 μPa (rms) will be reported in increments of 10 dB.

Data will be previewed in the field immediately after download from the ocean bottom hydrophone (OBH) instruments. An initial sound source analysis will be supplied to NMFS and the airgun operators within 120 hours of completion of the measurements, if possible. The report will indicate the distances to sound levels between 190 dB re 1 μPa (rms) and 120 dB re 1 μPa (rms) based on fits of empirical transmission loss formulae to data in the endfire and broadside directions. The 120-hour report findings will be based on analysis of measurements from at least three of the OBH systems. A more detailed report including analysis of data from all OBH systems will be issued to NMFS as part of the 90-day report following completion of the acoustic program.

Airgun pressure waveform data from the OBH systems will be analyzed using JASCO's suite of custom signal processing software that implements the following data processing steps:

- Energy source pulses in the OBH recordings are identified using an automated detection algorithm. The algorithm also chooses the 90% energy time window for rms sound level computations.
- Waveform data is converted to units of μPa using the calibrated acoustic response of the OBH system. Gains for frequency-dependent hydrophone sensitivity, amplifier and digitizer are applied in this step.
- For each pulse, the distance to the airgun array is computed from GPS deployment positions of the OBH systems and the time referenced DGPS navigation logs of the survey vessel.
- The waveform data are processed to determine flat-weighted peak sound pressure level (PSPL), rms SPL and SEL.
- Each energy pulse is Fast Fourier Transformed (FFT) to obtain 1-Hz spectral power levels in 1-second steps.
- The spectral power levels are integrated in standard 1/3-octave bands to obtain band sound pressure levels (BSPL) for bands from 10 Hz to 20 kHz. Both un-weighted and M-weighted (frequency weighting based on hearing sensitivities of four marine mammal functional hearing groups, *see* Southall *et al.* (2007) for a review) SPL's for each airgun pulse may be computed in this step for species of interest.

The output of the above data processing steps includes listings and graphs of airgun array narrow band and broadband sound levels versus range, and spectrograms of shot waveforms at specified ranges. Of particular importance are the graphs of level versus range that are used to compute representative radii to specific sound level thresholds.

Power density spectra (frequency spectra) of high frequency active acoustic sources (operating frequency >180 kHz) that will be used in Shell's marine surveys will also be measured against ambient background noise levels and reported in 1/3-octave band and 1-Hz band from 10 Hz to 180 kHz. The purpose for this measurement is to determine whether there is any acoustic energy within marine mammal hearing ranges that would be generated from operating these high frequency acoustic sources.

*(2) Safety and Disturbance Zones*

Under current NMFS guidelines, "safety radii" for marine mammal exposure to impulse sources are customarily defined as the distances within which received sound levels are ≥180 dB re 1 μPa (rms) for cetaceans and ≥190 dB re 1 μPa (rms) for pinnipeds. These safety criteria are based on an assumption that SPL received at levels lower than these will not injure these animals or impair their hearing abilities, but that SPL received at higher levels might have some such effects. Disturbance or behavioral effects to marine mammals from underwater sound may occur after exposure to sound at distances greater than the safety radii (Richardson *et al.* 1995).

Initial safety and disturbance radii for the sound levels produced by the survey activities have been modeled. These radii will be used for mitigation purposes until results of direct measurements are available early during the exploration activities. The planned survey will use an airgun source composed of either 40 $in^3$ airguns or 1 × 20-$in^3$ plus 2 × 10-$in^3$ airguns. The total source volume will be 4 × 10 $in^3$. Measurements of a 2 × 10-$in^3$ airgun array used in 2007 were reported by Funk *et al.* (2008). These measurements were used as the basis for modeling both of the potential airgun arrays that may be used in 2010. The modeling results showed that the 40 $in^3$ array is likely to produce sounds that propagate further than the alternative array, so those results were used to estimate "takes by harassment" in Shell's IHA application and will also be used during initial survey activities prior to in-field sound source measurements. The modeled 190 and 180 dB distances from a 40 cubic inch array were 35 and 125 m, respectively. Because this is a modeled estimate, but based on similar measurements at the same location, the estimated distances for initial safety radii were only increased by a factor of 1.25 instead of a typical 1.5 factor. This results in a 190-dB distance of 44 m and a 180-dB distance of 156 m.

A single 10-$in^3$ airgun will be used as a mitigation gun during turns or if a power down of the full array is necessary due to the presence of a marine mammal close to the vessel. Underwater sound propagation of a 10-$in^3$ airgun was measured near Harrison Bay in 2007 and results were reported in Funk *et al.* (2008). The 190 dB and 180 dB distances from those measurements, 5 m and 20 m respectively, will be used as the pre-sound source measurement safety zones during use of the single mitigation gun.

An acoustics contractor will perform the direct measurements of the received levels of underwater sound versus distance and direction from the energy source arrays using calibrated hydrophones. The acoustic data will be analyzed as quickly as reasonably practicable in the field and used to verify (and if necessary adjust) the safety distances. The mitigation measures to be implemented at the 190 and 180 dB sound levels will include power downs and shut downs as described below.

*(3) Power Downs and Shut Downs*

A power-down is the immediate reduction in the number of operating energy sources from all firing to some smaller number. A shutdown is the immediate cessation of firing of all energy sources. The arrays will be immediately powered down whenever a marine mammal is sighted approaching close to or within the applicable safety zone of the full arrays but is outside or about to enter the applicable safety zone of the single mitigation source. If a marine mammal is sighted within the applicable safety zone of the single mitigation airgun, the entire array will be shut down (*i.e.,* no sources firing). Although MMOs will be located on the bridge ahead of the center of the airgun array, the shutdown criterion for animals ahead of the vessel will be based on the distance from the bridge (vantage point for MMOs) rather than from the airgun array—a precautionary approach. For marine mammals sighted alongside or behind the airgun array, the distance is measured from the array.

Following a power-down or shutdown, operation of the airgun array will not resume until the marine mammal has cleared the applicable safety zone. The animal will be considered to have cleared the safety zone if it:

• Is visually observed to have left the safety zone;
• Has not been seen within the zone for 15 min in the case of small odontocetes and pinnipeds; or
• Has not been seen within the zone for 30 min in the case of mysticetes.

In the unanticipated event that an injured or dead marine mammal is sighted within an area where Shell deployed and utilized seismic airguns within the past 24 hours, Shell will immediately shutdown the seismic airgun array and notify the Marine Mammal Stranding Network within 24 hours of the sighting.

In the event that the marine mammal has been determined to have been deceased for at least 72 hours, as certified by the lead MMO onboard the source vessel, and no other marine mammals have been reported injured or dead during that same 72 hour period, the airgun array may be restarted (by conducting the necessary ramp-up procedures described elsewhere in this section of the document) upon completion of a written certification by the MMO. The certification must include the following: species or description of the animal(s); the condition of the animal(s) (including carcass condition if the animal is dead); location and time of first discovery; observed behaviors (if alive); and photographs or video (if available). Within 24 hours after the event specified herein, Shell must notify NMFS by telephone or email of the event and ensure that the written certification is provided to NMFS.

In the event that the marine mammal injury resulted from something other than seismic airgun operations (*e.g.,* gunshot wound, polar bear attack), as certified by the lead MMO onboard the seismic vessel, the airgun array may be restarted (by conducting the necessary ramp-up procedures described elsewhere in this section of the document) upon completion of a written certification by the MMO. The certification must include the following: species or description of the animal(s); the condition of the animal(s) (including carcass condition if the animal is dead); location and time of first discovery; observed behaviors (if alive); and photographs or video (if available). Within 24 hours after the event specified herein, Shell must notify NMFS by telephone or email of the event and ensure that the written certification is provided to NMFS.

In the event the animal has not been dead for a period greater than 72 hours or the cause of the injury or death cannot be immediately determined by the lead MMO, Shell shall immediately report the incident to either the NMFS staff person designated by the Director, Office of Protected Resources or to the staff person designated by the Alaska Regional Administrator. The lead MMO must complete written certification and provide it to the NMFS staff person. The certification must include the following: species or description of the animal(s); the condition of the animal(s) (including carcass condition if the animal is dead); location and time of first discovery; observed behaviors (if alive); and photographs or video (if available). The airgun array may be restarted (by conducting the necessary ramp-up procedures described elsewhere in this section of the document) upon completion of the written certification.

In the event that the marine mammal death or injury was directly caused by the seismic airgun operations (*e.g.,* struck by a vessel, entangled in gear), Shell shall immediately report the incident to the designated NMFS staff person by telephone or email and the Marine Mammal Stranding Network of the event and ensure that written certification is provided to the NMFS staff person. The certification must include the following: species or description of the animal(s); the condition of the animal(s) (including carcass condition if the animal is dead); location and time of first discovery; observed behaviors (if alive); and photographs or video (if available). The airguns may not be restarted until NMFS has had an opportunity to review the written certification and any accompanying documentation, make determinations as to whether modifications to the activities are appropriate and necessary, and has notified Shell that activities may be resumed. Approval to resume operations may be provided via letter, e-mail, or telephone.

*(4) Ramp Ups*

A ramp up of an airgun array provides a gradual increase in sound levels, and involves a stepwise increase in the number and total volume of airguns firing until the full volume is achieved.

The purpose of a ramp up (or "soft start") is to "warn" cetaceans and pinnipeds in the vicinity of the airguns and to provide time for them to leave the area and thus avoid any potential injury or impairment of their hearing abilities.

During the proposed shallow hazards survey program, the seismic operator will ramp up the airgun arrays slowly. Full ramp ups (*i.e.,* from a cold start after a shut down, when no airguns have been firing) will begin by firing a single airgun in the array. The minimum duration of a shut-down period, *i.e.,* without air guns firing, which must be followed by a ramp up typically is the amount of time it would take the source vessel to cover the 180-dB safety radius. The actual time period depends on ship speed and the size of the 180-dB safety radius. That period is estimated to be about 1–2 minutes based on the modeling results described above and a survey speed of 4 knots.

A full ramp up, after a shut down, will not begin until there has been a minimum of 30 min of observation of the safety zone by MMOs to assure that no marine mammals are present. The entire safety zone must be visible during the 30-minute lead-in to a full ramp up. If the entire safety zone is not visible, then ramp up from a cold start cannot begin. If a marine mammal(s) is sighted within the safety zone during the 30-minute watch prior to ramp up, ramp up will be delayed until the marine mammal(s) is sighted outside of the safety zone or the animal(s) is not sighted for at least 15–30 minutes: 15 minutes for small odontocetes and pinnipeds, or 30 minutes for baleen whales and large odontocetes.

During turns and transit between seismic transects, at least one airgun will remain operational. The ramp-up procedure still will be followed when increasing the source levels from one airgun to the full arrays. However, keeping one airgun firing will avoid the prohibition of a cold start during darkness or other periods of poor visibility. Through use of this approach, seismic operations can resume upon entry to a new transect without a full ramp up and the associated 30-minute lead-in observations. MMOs will be on duty whenever the airguns are firing during daylight, and during the 30-min periods prior to ramp-ups as well as during ramp-ups. Daylight will occur for 24 h/day until mid-August, so until that date MMOs will automatically be observing during the 30-minute period preceding a ramp up. Later in the season, MMOs will be called out at night to observe prior to and during any ramp up. The seismic operator and MMOs will maintain records of the times when ramp-ups start, and when the airgun arrays reach full power.

To help evaluate the utility and effectiveness of ramp-up procedures, MMOs are required to record and report their observations during any ramp-up period.

*(5) Mitigation Measures Concerning Bowhead Cow/Calf Pairs and Whale Aggregations*

For seismic activities (including shallow hazards and site clearance and

other marine surveys where active acoustic sources will be employed) in the Beaufort Sea after August 25, a 120-dB monitoring (safety) zone for bowhead whales will be established and monitored for the next 24 hours if four or more bowhead whale cow/calf pairs are observed at the surface during an aerial monitoring program within the area where an ensonified 120-dB zone around the vessel's track is projected. To the extent practicable, such monitoring should focus on areas upstream (eastward) of the bowhead migration. No seismic surveying shall occur within the 120-dB safety zone around the area where these whale cow-calf pairs were observed, until two consecutive surveys (aerial or vessel) indicate they are no longer present within the 120-dB safety zone of seismic-surveying operations.

A 160-dB vessel monitoring zone for bowhead and gray whales will be established and monitored in the Chukchi Sea and after August 25 in the Beaufort Sea during all seismic surveys. Whenever an aggregation of bowhead whales or gray whales (12 or more whales of any age/sex class that appear to be engaged in a nonmigratory, significant biological behavior (*e.g.,* feeding, socializing)) are observed during an aerial or vessel monitoring program within the 160-dB safety zone around the seismic activity, the seismic operation will not commence or will shut down, until two consecutive surveys (aerial or vessel) indicate they are no longer present within the 160-dB safety zone of seismic-surveying operations.

Survey information, especially information about bowhead whale cow-calf pairs or feeding bowhead or gray whale aggregations, shall be provided to NMFS as required in MMPA authorizations, and will form the basis for NMFS determining whether additional mitigation measures, if any, will be required over a given time period.

*(6) Mitigation Measures Concerning Vessel Speed and Directions*

Furthermore, the following measures concerning vessel speed and directions are required for Shell's 2010 open water marine survey program in the Beaufort and Chukchi Seas:

- All vessels should reduce speed to below 10 knots when within 300 yards (274 m) of whales, and those vessels capable of steering around such groups should do so. Vessels may not be operated in such a way as to separate members of a group of whales from other members of the group;
- Avoid multiple changes in direction and speed when within 300 yards (274 m) of whales; and
- When weather conditions require, such as when visibility drops, support vessels must adjust speed accordingly to avoid the likelihood of injury to whales.

*(7) Subsistence Mitigation Measures*

The following mitigation measures, plans, and programs shall be implemented to reduce impacts from Shell's marine surveys that could potentially affect subsistence groups and communities. These measures, plans, and programs have been effective in past seasons of work in the Arctic and were developed in past consultations with these communities. These measures, plans, and programs will be implemented by Shell during its 2010 program in both the Beaufort and Chukchi Seas to monitor and mitigate potential impacts to subsistence users and resources.

Shell states that it will implement the following additional measures to ensure coordination of its activities with local subsistence users to minimize further the risk of impacting marine mammals and interfering with any subsistence hunts:

- For the purposes of reducing or eliminating conflicts between subsistence whaling activities and Shell's survey program, Shell will participate with other operators in the Communication and Call Centers (Com-Center) Program. The Com-Centers will be operated 24 hours/day during the 2010 fall subsistence bowhead whale hunt.
- To minimize impacts on marine mammals and subsistence hunting activities, the source vessel will transit through the Chukchi Sea along a route that lies offshore of the polynya zone. This entry into the Chukchi Sea will not occur before July 1, 2010. In the event the transit outside of the polynya zone results in Shell having to move away from ice, the source vessel may enter into the polynya zone. If it is necessary to move into the polynya zone, Shell will notify the local communities of the change in the transit route through the Com-Centers.
- Shell has developed a Communication Plan and will implement the plan before initiating the 2010 program to coordinate activities with local subsistence users as well as Village Whaling Associations in order to minimize the risk of interfering with subsistence hunting activities, and keep current as to the timing and status of the bowhead whale migration, as well as the timing and status of other subsistence hunts. The Communication Plan includes procedures for coordination with Com-Centers to be located in coastal villages along the Beaufort and Chukchi Seas during Shell's program in 2010.
- Shell will employ local Subsistence Advisors from the Beaufort and Chukchi Sea villages to provide consultation and guidance regarding the whale migration and subsistence hunt. There may be up to nine subsistence advisor-liaison positions (one per village), to work approximately 8 hours per day and 40-hour weeks through Shell's 2010 program. The subsistence advisor will use local knowledge (Traditional Knowledge) to gather data on subsistence lifestyle within the community and advise as to ways to minimize and mitigate potential impacts to subsistence resources during program activities. Responsibilities include reporting any subsistence concerns or conflicts; coordinating with subsistence users; reporting subsistence-related comments, concerns, and information; and advising how to avoid subsistence conflicts. A subsistence advisor handbook will be developed prior to the operational season to specify position work tasks in more detail.
- Shell will also implement flight restrictions prohibiting aircraft from flying within 1,000 ft (300 m) of marine mammals or below 1,500 ft (457 m) altitude (except during takeoffs and landings or in emergency situations) while over land or sea.
- Upon notification by a Com-Center operator of an at-sea emergency, Shell will provide such assistance as necessary to prevent the loss of life, if conditions allow the holder of this Authorization to safely do so.
- Upon request for emergency assistance made by a subsistence whale hunting organization, or by a member of such an organization, in order to prevent the loss of a whale, the holder of this Authorization shall assist towing of a whale taken in a traditional subsistence whale hunt, if conditions allow Shell to safely do so.
- *Post-season Review:* Following completion of the 2010 Beaufort and Chukchi Seas open water marine survey program, Shell will conduct a co-management meeting with the commissioners and committee heads to discuss results of mitigation measures and outcomes of the preceding season. The goal of the post-season meeting is to build upon the knowledge base, discuss successful or unsuccessful outcomes of mitigation measures, and possibly refine plans or mitigation measures if necessary.

*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 evaluations and analyses of the aforementioned mitigation measures, NMFS has determined that the 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, and will have no unmitigable impact to subsistence hunt.

**Monitoring and Reporting Measures**

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.

*Monitoring Measures*

The following monitoring measures are required for Shell's 2010 open water marine survey program in the Beaufort and Chukchi Seas.

(1) Vessel-based MMOs

Vessel-based monitoring for marine mammals will be done by trained MMOs throughout the period of marine survey activities. MMOs will monitor the occurrence and behavior of marine mammals near the survey vessel during all daylight periods during operation and during most daylight periods when airgun operations are not occurring. MMO duties will include watching for and identifying marine mammals, recording their numbers, distances, and reactions to the survey operations, and documenting "take by harassment" as defined by NMFS.

A sufficient number of MMOs will be required onboard the survey vessel to meet the following criteria: (1) 100% monitoring coverage during all periods of survey operations in daylight; (2) maximum of 4 consecutive hours on watch per MMO; and (3) maximum of 12 hours of watch time per day per MMO.

MMO teams will consist of Inupiat observers and experienced field biologists. An experienced field crew leader will supervise the MMO team onboard the survey vessel. New observers shall be paired with experienced observers to avoid situations where lack of experience impairs the quality of observations. The total number of MMOs may decrease later in the season as the duration of daylight decreases.

Shell anticipates that there will be provision for crew rotation at least every six to eight weeks to avoid observer fatigue. During crew rotations detailed hand-over notes will be provided to the incoming crew leader by the outgoing leader. Other communications such as email, fax, and/or phone communication between the current and oncoming crew leaders during each rotation will also occur when possible. In the event of an unexpected crew change Shell will facilitate such communications to insure monitoring consistency among shifts.

Crew leaders and most other biologists serving as observers in 2010 will be individuals with experience as observers during one or more of the 1996–2009 seismic or shallow hazards monitoring projects in Alaska, the Canadian Beaufort, or other offshore areas in recent years.

Biologist-observers will have previous marine mammal observation experience, and field crew leaders will be highly experienced with previous vessel-based marine mammal monitoring and mitigation projects. Resumes for those individuals will be provided to NMFS for review and acceptance of their qualifications. Inupiat observers will be experienced in the region, familiar with the marine mammals of the area, and complete a NMFS-approved observer training course designed to familiarize individuals with monitoring and data collection procedures. A marine mammal observers' handbook, adapted for the specifics of the planned survey program, will be prepared and distributed beforehand to all MMOs.

Most observers, including Inupiat observers, will also complete a two-day training and refresher session on marine mammal monitoring, to be conducted shortly before the anticipated start of the 2010 open-water season. Any exceptions will have or receive equivalent experience or training. The training session(s) will be conducted by qualified marine mammalogists with extensive crew-leader experience during previous vessel-based seismic monitoring programs. Observers should be trained using visual aids (*e.g.,* videos, photos), to help them identify the species that they are likely to encounter in the conditions under which the animals will likely be seen.

If there are Alaska Native MMOs, the MMO training that is conducted prior to the start of the survey activities should be conducted with both Alaska Native MMOs and biologist MMOs being trained at the same time in the same room. There should not be separate training courses for the different MMOs.

Primary objectives of the training include:

- Review of the marine mammal monitoring plan for this project, including any amendments specified by NMFS in the IHA (if issued), by USFWS and by MMS, or by other agreements in which Shell may elect to participate;
- Review of marine mammal sighting, identification, and distance estimation methods;
- Review of operation of specialized equipment (reticle binoculars, night vision devices, and GPS system);
- Review of, and classroom practice with, data recording and data entry systems, including procedures for recording data on marine mammal sightings, monitoring operations, environmental conditions, and entry error control. These procedures will be implemented through use of a customized computer database and laptop computers; and
- Review of the specific tasks of the Inupiat Communicator.

Observers should understand the importance of classifying marine mammals as "unknown" or "unidentified" if they cannot identify the animals to species with confidence. In those cases, they should note any information that might aid in the identification of the marine mammal sighted. For example, for an unidentified mysticete whale, the observers should record whether the animal had a dorsal fin.

MMOs will watch for marine mammals from the best available vantage point on the survey vessel, typically the bridge. MMOs will scan systematically with the unaided eye and

7 × 50 reticle binoculars, supplemented with 20 × 60 image-stabilized Zeiss Binoculars or Fujinon 25 × 150 "Big-eye" binoculars and night-vision equipment when needed. With two or three observers on watch, the use of big eyes should be paired with searching by naked eye, the latter allowing visual coverage of nearby areas to detect marine mammals. Personnel on the bridge will assist the MMOs in watching for marine mammals.

Observers should attempt to maximize the time spent looking at the water and guarding the safety radii. They should avoid the tendency to spend too much time evaluating animal behavior or entering data on forms, both of which detract from their primary purpose of monitoring the safety zone.

Observers should use the best possible positions for observing (*e.g.,* outside and as high on the vessel as possible), taking into account weather and other working conditions. MMOs shall carefully document visibility during observation periods so that total estimates of take can be corrected accordingly.

Information to be recorded by marine mammal observers will include the same types of information that were recorded during recent monitoring programs associated with Industry activity in the Arctic (*e.g.,* Ireland *et al.* 2009). When a mammal sighting is made, the following information about the sighting will be recorded:

(A) Species, group size, age/size/sex categories (if determinable), behavior when first sighted and after initial sighting, heading (if consistent), bearing and distance from the MMO, apparent reaction to activities (*e.g.,* none, avoidance, approach, paralleling, etc.), closest point of approach, and behavioral pace;

(B) Time, location, speed, activity of the vessel, sea state, ice cover, visibility, and sun glare;

(C) The positions of other vessel(s) in the vicinity of the MMO location; and

(D) Whether adjustments were made to Shell's activity status.

The ship's position, speed of support vessels, and water temperature, water depth, sea state, ice cover, visibility, and sun glare will also be recorded at the start and end of each observation watch, every 30 minutes during a watch, and whenever there is a change in any of those variables.

Distances to nearby marine mammals will be estimated with binoculars (Fujinon 7 × 50 binoculars) containing a reticle to measure the vertical angle of the line of sight to the animal relative to the horizon. MMOs may use a laser rangefinder to test and improve their abilities for visually estimating distances to objects in the water. However, previous experience showed that a Class 1 eye-safe device was not able to measure distances to seals more than about 230 ft (70 m) away. The device was very useful in improving the distance estimation abilities of the observers at distances up to about 1,968 ft (600 m)—the maximum range at which the device could measure distances to highly reflective objects such as other vessels. Humans observing objects of more-or-less known size via a standard observation protocol, in this case from a standard height above water, quickly become able to estimate distances within about ±20% when given immediate feedback about actual distances during training.

For monitoring related to deployment of the AUV, MMOs will advise the vehicle operators prior to deployment if aggregations of marine mammals have been observed in the survey area which might increase the likelihood of the vehicle encountering an animal or otherwise disturbing a group of animals.

Shell plans to conduct the site clearance and shallow hazards survey 24 hr/day. Regarding nighttime operations, note that there will be no periods of total darkness until mid-August. When operating under conditions of reduced visibility attributable to darkness or to adverse weather conditions, night-vision equipment ("Generation 3" binocular image intensifiers, or equivalent units) will be available for use.

(2) Aerial Survey Program

Shell proposes to conduct an aerial survey program in support of the shallow hazards program in the Beaufort Sea during the fall of 2010. The shallow hazards survey program may start in the Beaufort Sea as early as July 2010, however, aerial surveys would not begin until the start of the bowhead whale migration, around August 20, 2010. The objectives of the aerial survey will be:

- To advise operating vessels as to the presence of marine mammals (primarily cetaceans) in the general area of operation;
- To collect and report data on the distribution, numbers, movement and behavior of marine mammals near the survey operations with special emphasis on migrating bowhead whales;
- To support regulatory reporting related to the estimation of impacts of survey operations on marine mammals;
- To investigate potential deflection of bowhead whales during migration by documenting how far east of survey operations a deflection may occur and where whales return to normal migration patterns west of the operations; and
- To monitor the accessibility of bowhead whales to Inupiat hunters.

Specially-outfitted Twin Otter aircraft have an excellent safety record and are expected to be the survey aircraft. These aircraft will be specially modified for survey work and have been used extensively by NMFS, Alaska Department of Fish and Game, North Slope Borough, and LGL Limited during many marine mammal projects in Alaska, including industry-funded projects as recent as the 2006–2008 seasons. The aircraft will be provided with a comprehensive set of survival equipment appropriate to offshore surveys in the Arctic. For safety reasons, the aircraft will be operated with two pilots.

Aerial survey flights will begin around August 20, 2010. Surveys will then be flown daily during the shallow hazards survey operations, weather and flight conditions permitting, and continued for 5 to 7 days after all activities at the site have ended.

The aerial survey procedures will be generally consistent with those used during earlier industry studies (Davis *et al.* 1985; Johnson *et al.* 1986; Evans *et al.* 1987; Miller *et al.* 1997, 1998, 1999, 2002; Patterson 2007). This will facilitate comparison and pooling of data where appropriate. However, the specific survey grids will be tailored to Shell's operations. During the 2010 open-water season Shell will coordinate and cooperate with the aerial surveys conducted by MMS/NMFS and any other groups conducting surveys in the same region.

It is understood that shallow hazard survey timing and the specific location offshore of Harrison Bay are subject to change as a result of unpredictable weather and ice conditions. The aerial survey design is therefore intended to be flexible and able to adapt at short notice to changes in the operations.

For marine mammal monitoring flights, aircraft will be flown at approximately 120 knots (138 mph) ground speed and usually at an altitude of 1,000 ft (305 m). Flying at a survey speed of 120 knots (138 mph) greatly increases the amount of area that can be surveyed, given aircraft limitations, with minimal effect on the ability to detect bowhead whales. Surveys in the Beaufort Sea are directed at bowhead whales, and an altitude of 900–1,000 ft (274–305 m) is the lowest survey altitude that can normally be flown without concern about potential aircraft disturbance. Aerial surveys at an altitude of 1,000 ft (305 m) do not provide much information about seals

but are suitable for both bowhead and beluga whales. The need for a 900–1,000+ (374–305 m) ft cloud ceiling will limit the dates and times when surveys can be flown.

Two primary observers will be seated at bubble windows on either side of the aircraft and a third observer will observe part time and record data the rest of the time. All observers need bubble windows to facilitate downward viewing. For each marine mammal sighting, the observer will dictate the species, number, size/age/sex class when determinable, activity, heading, swimming speed category (if traveling), sighting cue, ice conditions (type and percentage), and inclinometer reading to the marine mammal into a digital recorder. The inclinometer reading will be taken when the animal's location is 90° to the side of the aircraft track, allowing calculation of lateral distance from the aircraft trackline.

Transect information, sighting data and environmental data will be entered into a GPS-linked computer by the third observer and simultaneously recorded on digital voice recorders for backup and validation. At the start of each transect, the observer recording data will record the transect start time and position, ceiling height (ft), cloud cover (in 10ths), wind speed (knots), wind direction (°T) and outside air temperature (°C). In addition, each observer will record the time, visibility (subjectively classified as excellent, good, moderately impaired, seriously impaired or impossible), sea state (Beaufort wind force), ice cover (in 10ths) and sun glare (none, moderate, severe) at the start and end of each transect, and at 2-min intervals along the transect. This will provide data in units suitable for statistical summaries and analyses of effects of these variables (and position relative to the survey vessel) on the probability of detecting animals (*see* Davis *et al.* 1982; Miller *et al.* 1999; Thomas *et al.* 2002). The data logger will automatically record time and aircraft position (latitude and longitude) for sightings and transect waypoints, and at pre-selected intervals along transects.

Ice observations during aerial surveys will be recorded and satellite imagery may be used, where available, during post-season analysis to determine ice conditions adjacent to the survey area. These are standard practices for surveys of this type and are necessary in order to interpret factors responsible for variations in sighting rates.

Shell will assemble the information needed to relate marine mammal observations to the locations of the survey vessel, and to the estimated received levels of industrial sounds at mammal locations. During the aerial surveys, Shell will record relevant information on other industry vessels, whaling vessels, low-flying aircraft, or any other human activities that are observed in the survey area.

Shell will also consult with MMS/National Marine Mammal Laboratory regarding coordination during the survey activities and real-time sharing of data. The aims will be:

- To ensure aircraft separation when both crews conduct surveys in the same general region;
- To coordinate the 2010 aerial survey projects in order to maximize consistency and minimize duplication;
- To use data from MMS's broad-scale surveys to supplement the results of the more site specific Shell surveys for purposes of assessing the effects of shallow hazard survey activities on whales and estimating "take by harassment";
- To maximize consistency with previous years' efforts insofar as feasible.

It is expected that raw bowhead sighting and flight-line data will be exchanged between MMS and Shell on a daily basis during the survey period, and that each team will also submit its sighting information to NMFS in Anchorage each day. After the Shell and MMS data files have been reviewed and finalized, they will be exchanged in digital form.

Shell is not aware of any other related aerial survey programs presently scheduled to occur in the Alaskan Beaufort Sea in areas where Shell is anticipated to be conducting survey operations during July–October 2010. However, one or more other programs are possible in support of other industry and research operations. If another aerial survey project were planned, Shell would seek to coordinate with that project to ensure aircraft separation, maximize consistency, minimize duplication, and share data.

During the late summer and fall, bowhead whale is the primary species of concern, but belugas and gray whales are also present. To address concerns regarding deflection of bowheads at greater distances, the survey pattern around shallow hazards survey operations has been designed to document whale distribution from about 25 mi (40 km) east of Shell's vessel operations to about 37 mi (60 km) west of operations (*see* Figure 1 of Shell's 4MP).

Bowhead whale movements during the late summer/autumn are generally from east to west, and transects should be designed to intercept rather than parallel whale movements. The transect lines in the grid will be oriented north-south, equally spaced at 5 mi (8 km) and randomly shifted in the east-west direction for each survey by no more than the transect spacing. The survey grid will total about 808 mi (1,300 km) in length, requiring approximately 6 hours to survey at a speed of 120 knots (138 mph), plus ferry time. Exact lengths and durations will vary somewhat depending on the position of the survey operation and thus of the grid, the sequence in which lines are flown (often affected by weather), and the number of refueling/rest stops.

Weather permitting, transects making up the grid in the Beaufort Sea will be flown in sequence from west to east. This decreases difficulties associated with double counting of whales that are (predominantly) migrating westward.

(3) Acoustic Monitoring

As discussed earlier in this document, Shell will conduct SSV tests to establish the isopleths for the applicable safety radii. In addition, Shell proposes to use acoustic recorders to study bowhead deflections.

Shell plans to deploy arrays of acoustic recorders in the Beaufort Sea in 2010, similar to that which was done in 2007 and 2008 using Directional Autonomous Seafloor Acoustic Recorders (DASARs) supplied by Greeneridge. These directional acoustic systems permit localization of bowhead whale and other marine mammal vocalizations. The purpose of the array will be to further understand, define, and document sound characteristics and propagation resulting from shallow hazards surveys that may have the potential to cause deflections of bowhead whales from their migratory pathway. Of particular interest will be the east-west extent of deflection, if any (*i.e.,* how far east of a sound source do bowheads begin to deflect and how far to the west beyond the sound source does deflection persist). Of additional interest will be the extent of offshore (or towards shore) deflection that might occur.

In previous work around seismic operations in the Alaskan Beaufort Sea, the primary method for studying this question has been aerial surveys. Acoustic localization methods will provide supplementary information for addressing the whale deflection question. Compared to aerial surveys, acoustic methods have the advantage of providing a vastly larger number of whale detections, and can operate day or night, independent of visibility, and to some degree independent of ice conditions and sea state—all of which

prevent or impair aerial surveys. However, acoustic methods depend on the animals to call, and to some extent, assume that calling rate is unaffected by exposure to industrial noise. Bowheads call frequently in fall, but there is some evidence that their calling rate may be reduced upon exposure to industrial sounds, complicating interpretation. The combined use of acoustic and aerial survey methods will provide a suite of information that should be useful in assessing the potential effects of survey operations on migrating bowhead whales.

Using passive acoustics with directional autonomous recorders, the locations of calling whales will be observed for a 6- to 10-week continuous monitoring period at five coastal sites (subject to favorable ice and weather conditions).

Shell plans to conduct the whale migration monitoring using the passive acoustics techniques developed and used successfully since 2001 for monitoring the migration past Northstar production island northwest of Prudhoe Bay and from Kaktovik to Harrison Bay during the 2007–2009 migrations. Those techniques involve using DASARs to measure the arrival angles of bowhead calls at known locations, then triangulating to locate the calling whale.

In attempting to assess the responses of bowhead whales to the planned industrial operations, it will be essential to monitor whale locations at sites both near and far from industry activities. Shell plans to monitor at five sites along the Alaskan Beaufort coast as shown in Figure 3 of Shell's 4MP. The eastern-most site (#5 in Figure 3 of the 4MP) will be just east of Kaktovik and the western-most site (#1 in Figure 3 of the 4MP) will be in the vicinity of Harrison Bay. Site 2 will be located west of Prudhoe Bay. Sites 4 and 3 will be west of Camden Bay. These five sites will provide information on possible migration deflection well in advance of whales encountering an industry operation and on "recovery" after passing such operations should a deflection occur.

The proposed geometry of DASARs at each site is comprised of seven DASARs oriented in a north-south pattern resulting in five equilateral triangles with 4.3-mi (7-km) element spacing. DASARs will be installed at planned locations using a GPS. However, each DASAR's orientation once it settles on the bottom is unknown and must be determined to know how to reference the call angles measured to the whales. Also, the internal clocks used to sample the acoustic data typically drift slightly, but linearly, by an amount up to a few seconds after 6 weeks of autonomous operation. Knowing the time differences within a second or two between DASARs is essential for identifying identical whale calls received on two or more DASARs.

Bowhead migration begins in late August with the whales moving westward from their feeding sites in the Canadian Beaufort Sea. It continues through September and well into October. Shell will attempt to install the 21 DASARs at three sites (3, 4 and 5) in early August. The remaining 14 DASARs will be installed at sites 1 and 2 in late August. Thus, Shell proposes monitoring for whale calls from before August 15 until sometime before October 15, 2010.

At the end of the season, the fourth DASAR in each array will be refurbished, recalibrated, and redeployed to collect data through the winter. The other DASARs in the arrays will be recovered. The redeployed DASARs will be programmed to record 35 min every 3 hours with a disk capacity of 10 months at that recording rate. This should be ample space to allow over-wintering from approximately mid-October 2010, through mid-July 2011.

Additional details on methodology and data analysis for the three types of monitoring described here (*i.e.,* vessel-based, aerial, and acoustic) can be found in the 4MP in Shell's application (*see* **ADDRESSES**).

*Reporting Measures*

(1) SSV Report

A report on the preliminary results of the acoustic verification measurements, including as a minimum the measured 190-, 180-, 160-, and 120-dB re 1 μPa (rms) radii of the source vessel(s) and the support vessels, will be submitted within 120 hr after collection and analysis of those measurements at the start of the field season. This report will specify the distances of the safety zones that were adopted for the marine survey activities.

(2) Technical Reports

The results of Shell's 2010 open water marine survey monitoring program (*i.e.,* vessel-based, aerial, and acoustic), including estimates of "take" by harassment, will be presented in the "90-day" and Final Technical reports. The Technical Reports will include: (a) Summaries of monitoring effort (*e.g.,* total hours, total distances, and marine mammal distribution through the study period, accounting for sea state and other factors affecting visibility and detectability of marine mammals); (b) analyses of the effects of various factors influencing detectability of marine mammals (*e.g.,* sea state, number of observers, and fog/glare); (c) species composition, occurrence, and distribution of marine mammal sightings, including date, water depth, numbers, age/size/gender categories (if determinable), group sizes, and ice cover; (d) analyses of the effects of survey operations; (e) sighting rates of marine mammals during periods with and without airgun activities (and other variables that could affect detectability); (f) initial sighting distances versus airgun activity state; (g) closest point of approach versus airgun activity state; (h) observed behaviors and types of movements versus airgun activity state; (i) numbers of sightings/individuals seen versus airgun activity state; (j) distribution around the survey vessel versus airgun activity state; and (k) estimates of take by harassment. This information will be reported for both the vessel-based and aerial monitoring. In addition, Shell shall provide all spatial data on charts (always including vessel location) and make all data available in the report, preferably electronically, for integration with data from other companies. Shell shall also accommodate specific requests for raw data, including tracks of all vessels and aircraft associated with the operation and activity logs documenting when and what types of sounds are introduced into the environment by the operation.

Analysis of all acoustic data will be prioritized to address the primary questions. The primary data analysis questions are to (a) Determine when, where, and what species of animals are acoustically detected on each DASAR, (b) analyze data as a whole to determine offshore bowhead distributions as a function of time, (c) quantify spatial and temporal variability in the ambient noise, and (d) measure received levels of airgun activities. The bowhead detection data will be used to develop spatial and temporal animal distributions. Statistical analyses will be used to test for changes in animal detections and distributions as a function of different variables (*e.g.,* time of day, time of season, environmental conditions, ambient noise, vessel type, operation conditions).

The initial technical report is due to NMFS within 90 days of the completion of Shell's Beaufort and Chukchi Seas open water marine survey programs. The "90-day" report will be subject to review and comment by NMFS. Any recommendations made by NMFS must be addressed in the final report prior to acceptance by NMFS.

(3) Comprehensive Report

In November, 2007, Shell (in coordination and cooperation with other Arctic seismic IHA holders) released a final, peer-reviewed edition of the 2006 Joint Monitoring Program in the Chukchi and Beaufort Seas, July–November 2006 (LGL 2007). This report is available on the NMFS Protected Resources Web site (*see* **ADDRESSES**). In March, 2009, Shell released a final, peer-reviewed edition of the Joint Monitoring Program in the Chukchi and Beaufort Seas, Open Water Seasons, 2006–2007 (Ireland *et al.* 2009). This report is also available on the NMFS Protected Resources Web site (*see* **ADDRESSES**). A draft comprehensive report for 2008 (Funk *et al.* 2009) was provided to NMFS and those attending the Arctic Stakeholder Open-water Workshop in Anchorage, Alaska, on April 6–8, 2009. The 2008 report provides data and analyses from a number of industry monitoring and research studies carried out in the Chukchi and Beaufort Seas during the 2008 open-water season with comparison to data collected in 2006 and 2007. Reviewers plan to provide comments on the 2008 report to Shell shortly. Once Shell is able to incorporate reviewer comments, the final 2008 report will be made available to the public. The 2009 draft comprehensive report is due to NMFS by mid-April 2010. NMFS will make this report available to the public upon receipt.

Following the 2010 shallow hazards surveys a comprehensive report describing the vessel-based, aerial, and acoustic monitoring programs will be prepared. The comprehensive report will describe the methods, results, conclusions and limitations of each of the individual data sets in detail. The report will also integrate (to the extent possible) the studies into a broad based assessment of industry activities, and other activities that occur in the Beaufort and/or Chukchi seas, and their impacts on marine mammals during 2010. The report will help to establish long-term data sets that can assist with the evaluation of changes in the Chukchi and Beaufort Seas ecosystems. The report will attempt to provide a regional synthesis of available data on industry activity in offshore areas of northern Alaska that may influence marine mammal density, distribution and behavior. The comprehensive report will be due to NMFS within 240 days of the date of issuance of the IHA (if issued).

(4) Notification of Injured or Dead Marine Mammals

Shell will notify NMFS' Office of Protected Resources and NMFS' Stranding Network within 48 hours of sighting an injured or dead marine mammal in the vicinity of marine survey operations. Shell will provide NMFS with the species or description of the animal(s), the condition of the animal(s) (including carcass condition if the animal is dead), location, time of first discovery, observed behaviors (if alive), and photo or video (if available).

In the event that an injured or dead marine mammal is found by Shell that is not in the vicinity of the proposed open water marine survey program, Shell will report the same information as listed above as soon as operationally feasible to NMFS.

Negligible Impact and Small Numbers Analysis and 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 Shell's proposed 2010 open water marine surveys in the Beaufort and Chukchi Seas, and none are proposed to be authorized. Additionally, as discussed previously in this document, animals in the area are not expected to incur hearing impairment (*i.e.,* TTS or PTS) or non-auditory physiological effects. Takes will be limited to Level B behavioral harassment. Although it is possible that some individuals of marine mammals may be exposed to sounds from marine survey activities more than once, the expanse of these multi-exposures are expected to be less extensive since both the animals and the survey vessels will be moving constantly in and out the survey areas.

The proposed marine survey areas in the Beaufort and Chukchi Seas are not known habitat for breeding or calving for marine mammals during the time of the proposed marine survey activities.

Although bowhead whales are observed feeding in the Beaufort and Chukchi Seas during the summer, some studies have shown that bowhead whales will continue to feed in areas of seismic operations (*e.g.,* Richardson *et al.* 2004). Therefore, it is reasonable to conclude that the marine surveys using active acoustic sources will not displace bowhead whales from their important feeding areas. Also, it is important to note that the sounds produced by the proposed Shell marine surveys are of much lower intensity than those produced by airgun arrays during a 3D or 2D seismic survey. Should bowheads choose to feed in the ensonified area instead of avoiding the sound, individuals may be exposed to sounds at or above 160 dB re 1 μPa (rms) when the survey vessel passes by. Depending on the direction and speed of the survey vessel, the duration of exposure is not expected to be more than 15 minutes (assuming the survey vessel is traveling at 4 knots (7.5 km/hr) and heading directly towards the whale but without engaging the whale inside the safety zone). While feeding in an area of increased anthropogenic sound even below NMFS current threshold for behavioral harassment for impulse sound, *i.e.* 160 dB re 1 μPa (rms), may potentially result in increased stress, it is not anticipated that the low received levels from marine surveys and the amount of time that an individual whale may remain in the area to feed would result in extreme physiological stress to the animal (*see* review by Southall *et al.* 2007). Additionally, if an animal is excluded from the area (such as Harrison Bay) for feeding because it decides to avoid the ensonified area, this may result in some extra energy expenditure for the animal to find an alternate feeding area. However, there are multiple feeding areas nearby in the Beaufort Sea for bowhead whales to choose from. The disruption to feeding is not anticipated to have more than a negligible impact on the affected species or stock.

Beluga whales are less likely to occur in the proposed marine survey area than bowhead whales in Beaufort Sea. Should any belugas occur in the area of marine surveys, it is not expected that they would be exposed for a prolonged period of time, for the same reason discussed above due to the movement of survey vessel and animals. Gray whales, humpback whales, and harbor porpoises rarely occur in the Beaufort Sea, therefore, the potential effects to these species from the proposed open water marine surveys is expected to be close to none. The exposure of cetaceans to sounds produced by the proposed marine surveys is not expected to result in more than Level B harassment and is

anticipated to have no more than a negligible impact on the affected species or stock.

Some individual pinnipeds may be exposed to sound from the proposed marine surveys more than once during the time frame of the project. However, as discussed previously, due to the constant moving of the survey vessel, the probability of an individual pinniped being exposed to sound multiple times is much lower than if the source is stationary. Therefore, NMFS has determined that the exposure of pinnipeds to sounds produced by the proposed marine surveys in the Beaufort and Chukchi Seas is not expected to result in more than Level B harassment and is anticipated to have no more than a negligible impact on the affected species or stock.

Of the eight marine mammal species likely to occur in the proposed marine survey area, only the bowhead and humpback whales are listed as endangered under the ESA. The species are also designated as "depleted" under the MMPA. Despite these designations, the Bering-Chukchi-Beaufort stock of bowheads has been increasing at a rate of 3.4 percent annually for nearly a decade (Allen and Angliss 2010). Additionally, during the 2001 census, 121 calves were counted, which was the highest yet recorded. The calf count provides corroborating evidence for a healthy and increasing population (Allen and Angliss 2010). The occurrence of humpback whales in the proposed marine survey areas is considered very rare. There is no critical habitat designated in the U.S. Arctic for the bowhead whale and humpback whale. The bearded and ringed seals are "candidate species" under the ESA, meaning they are currently being considered for listing but are not designated as depleted under the MMPA. None of the other three species that may occur in the project area are listed as threatened or endangered under the ESA or designated as depleted under the MMPA.

Potential impacts to marine mammal habitat were discussed previously in this document (*see* the "Anticipated Effects on Habitat" section). Although some disturbance is possible to food sources of marine mammals, the impacts are anticipated to be minor enough as to not affect rates of recruitment or survival of marine mammals in the area. Based on the vast size of the Arctic Ocean where feeding by marine mammals occurs versus the localized area of the marine survey activities, any missed feeding opportunities in the direct project area would be minor based on the fact that other feeding areas exist elsewhere.

The estimated takes proposed to be authorized represent 0.01% of the Beaufort Sea population of approximately 39,258 beluga whales (Allen and Angliss 2010), 0.004% of Bering Sea stock of approximately 48,215 harbor porpoises, 0.01% of the Eastern North Pacific stock of approximately 17,752 gray whales, 2.67% of the Bering-Chukchi-Beaufort population of 14,247 individuals assuming 3.4 percent annual population growth from the 2001 estimate of 10,545 animals (Zeh and Punt, 2005), and 0.21% of the Western North Pacific stock of approximately 938 humpback whales. The take estimates presented for bearded, ringed, and spotted seals represent 0.003, 0.06, and 0.002 percent of U.S. Arctic stocks of each species, respectively. These estimates represent the percentage of each species or stock that could be taken by Level B behavioral harassment if each animal is taken only once. In addition, the mitigation and monitoring measures (described previously in this document) proposed for inclusion in the IHA (if issued) are expected to reduce even further any potential disturbance to marine mammals.

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 finds that Shell's proposed 2010 open water marine surveys in the Beaufort and Chukchi Seas may result in the incidental take of small numbers of marine mammals, by Level B harassment only, and that the total taking from the marine surveys will have a negligible impact on the affected species or stocks.

*Unmitigable Adverse Impact Analysis and Determination*

NMFS has determined that Shell's proposed 2010 open water marine surveys in the Beaufort and Chukchi Seas will not have an unmitigable adverse impact on the availability of species or stocks for taking for subsistence uses. This determination is supported by information contained in this document and Shell's POC. Shell has adopted a spatial and temporal strategy for its Arctic open water marine surveys that should minimize impacts to subsistence hunters, which is discussed in detail below, broken into different subsistence activities.

(1) Bowhead Whales

During the proposed period of activity (July through October) most marine mammals are expected to be dispersed throughout the area, except during the peak of the bowhead whale migration in the Beaufort Sea, which occurs from late August into October. Bowhead whales are expected to be in the Canadian Beaufort Sea during much of the time prior to subsistence whaling and, therefore, are not expected to be affected by the site clearance and shallow hazard surveys prior to then. Further, site clearance and shallow hazards surveys will be conducted over 50–100 mi (80–160 km) west of the furthest west boundary of the traditional bowhead hunting waters used by Kaktovik hunters, 10–50 mi (16–80 km) west of Cross Island from where Nuiqsut hunters base their harvest, and over 35 miles east of the furthest east boundary of the traditional bowhead hunting waters used by Barrow hunters. In light of the small sound source for these surveys and resulting ensonified area > 160 dB (1,525 m) described previously in this document, the sheer distances from where these site clearance and shallow hazard surveys will occur from the areas of Kaktovik and Barrow bowhead hunts serve to mitigate any prospect of impact to the hunts. Site clearance and shallow hazard surveys will be timed to occur beyond the traditional boundary of Nuiqsut hunts, besides occurring 10–50 mi (16–80 km) west of Cross Island and "downstream" of this bowhead whale hunt, thereby mitigating the prospect of impact to Nuiqsut whaling. In addition, Shell will execute a communication plan and use communication and call centers located in coastal villages of the Beaufort Sea (*see* above) to communicate activities and routine vessel traffic with subsistence users throughout the period in which all surveys will be conducted. As a result of the distance and spatial location of site clearance and shallow hazard surveys from traditional bowhead whale subsistence harvest, any effects on the bowhead whale, as a subsistence resource, will be negligible.

Activities associated with Shell's planned ice gouge surveys in Camden Bay would have no or negligible effect on the availability of bowhead whales for the Kaktovik, Nuiqsut, and Barrow subsistence whaling harvests. Mitigation of the impact from ice gouge surveys includes the possible use of either an AUV, or conventional survey method without airguns, and timing and location of surveys. The AUV will be launched from the stern of a vessel and will survey the seafloor close to the

vessel. The vessel will transit an area, with the AUV surveying the area behind the vessel. Marine mammal observers onboard the vessel will help to ensure the AUV has a minimal impact on the environment. The AUV also has a Collision Avoidance System and operates without a towline, thereby reducing potential impact to marine mammals. Using bathymetric sonar or multi-beam echo sounder the AUV can record the gouges on the seafloor surface caused by ice keels. The Sub-bottom profiler can record layers beneath the surface to about 20 ft (6.1 m). The AUV is more maneuverable and able to complete surveys more quickly than a conventional survey. This reduces the duration that vessels producing sound must operate. Also, the ice gouge surveys will be timed to avoid locations east of Mary Sachs Entrance in Camden Bay during the bowhead subsistence harvest of Kaktovik. The ice gouge survey locations through Mary Sachs Entrance and out into Camden Bay are more than 40 mi (64 km) east of Cross Island, and given this distance plus the low-level sound source of the ice gouge surveys, this will mitigate impact to the Nuiqsut bowhead whale subsistence harvest. Timing of activities will be coordinated via the nearest communication and call centers operating in the Beaufort Sea, presumably in Kaktovik and Deadhorse. As a result of the timing, location, and lack of an airgun source for the ice gouge surveys, any effects on the bowhead whale, as a subsistence resource, will be negligible.

Ice gouge survey activities in the Chukchi Sea will be scheduled to avoid impact to bowhead whale subsistence harvests that could be conducted in the Chukchi Sea communities of Wainwright or Point Hope. Scheduling will be coordinated via the nearest communication and call center operating in the Chukchi Sea communities.

(2) Beluga Whales

Beluga are not a prevailing subsistence resource in the communities of Kaktovik, Nuiqsut, or Barrow. Thus, given the location and timing of site clearance and shallow hazards and ice gouge surveys in the Beaufort Sea, any such behavioral response by beluga to these activities would have no significant effect on them as a subsistence resource.

Belugas are a prevailing subsistence resource in the Chukchi Sea community of Pt. Lay. The Point Lay beluga hunt is concentrated in the first two weeks of July (but sometimes continues into August), when belugas are herded by hunters with boats into Kasegaluk Lagoon and harvested in shallow waters. Ice gouge survey activities in the Chukchi Sea will be scheduled to avoid the traditional subsistence beluga hunt in the community of Pt. Lay. Timing of any ice gouge survey activities will be coordinated via the nearest communication and call centers operating in the Chukchi Sea, presumably in Wainwright and Barrow.

(3) Seals

Seals are an important subsistence resource and ringed seals make up the bulk of the seal harvest of both Kaktovik and Nuiqsut. Seals can be hunted year-round, but are taken in highest numbers in the summer months in the Beaufort Sea (MMS 2008). Seal-hunting trips can take Nuiqsut hunters several miles offshore; however, the majority of seal hunting takes place closer to shore. The mouth of the Colville River is considered a productive seal hunting area (AES 2009), as well as the edge of the sea ice. Lease blocks where site clearance and shallow hazards surveys will occur are located over 15 mi (24 km) from the mouth of the Colville River, so there is less chance for impact on subsistence hunting for seals. Ice gouge surveys in Mary Sachs Entrance in Camden Bay will be conducted (AES 2009) over 30 miles from the westernmost extent of seal hunting by Kaktovik hunters (AES 2009). The remainder of ice gouge lines will be much further offshore than where Kaktovik seal hunts typically occur which is inside the barrier islands (AES 2009). It is assumed that effects on subsistence seal harvests would be negligible given the distances between Shell's proposed site clearance and shallow hazards and ice gouge surveys and the subsistence seal hunting areas of Nuiqsut and Kaktovik.

Seals are an important subsistence resource in the Chukchi Sea community of Wainwright. Ringed seals make up the bulk of the seal harvest. Most ringed and bearded seals are harvested in the winter or in the spring (May-July) which is before Shell's ice gouge survey would commence, but some harvest continues into the open water period. Hunting that does occur during the open water season generally occurs within 10 miles of the coastline (AES 2009), while the majority of ice gouge survey activity will be much further offshore. Timing of activities will be coordinated via the nearest communication and call centers operating in the Chukchi Sea, presumably in Wainwright and Barrow. It is assumed that effects on subsistence seal harvests would be negligible given the timing and distances between Shell's proposed ice gouge survey and the subsistence seal hunting area of Wainwright.

All survey activities will be operated in accordance with the procedures of Shell's Marine Mammal Monitoring and Mitigation Plan (4MP) that accompanies this program. This potential impact is mitigated by application of the procedures established in the 4MP and to be detailed in the POC. Adaptive mitigation measures may be employed during times of active scouting, whaling, or other subsistence hunting activities that occur within the traditional subsistence hunting areas of the potentially affected communities.

Shell states that it will continue its adopted spatial and temporal operational strategy that, when combined with its community outreach and engagement program, will provide effective protection to the bowhead migration and subsistence hunt.

Based on the above analysis, measures described in Shell's POC, the proposed mitigation and monitoring measures, and the project design, NMFS has determined that there will not be an unmitigable adverse impact on subsistence uses from Shell's 2010 open water marine survey activities in the Beaufort and Chukchi Seas.

**Endangered Species Act (ESA)**

There are two marine mammal species listed as endangered under the ESA with confirmed or possible occurrence in the proposed project area: the bowhead whale and the humpback whale. NMFS' Permits, Conservation and Education Division consulted with NMFS' Alaska Regional Office Division of Protected Resources under section 7 of the ESA on the issuance of an IHA to Shell under section 101(a)(5)(D) of the MMPA for this activity. A Biological Opinion was issued on July 13, 2010, which concludes that issuance of an IHA is not likely to jeopardize the continued existence of the fin, humpback, or bowhead whale. NMFS has issued an Incidental Take Statement under this Biological Opinion which contains reasonable and prudent measures with implementing terms and conditions to minimize the effects of take of listed species.

**National Environmental Policy Act (NEPA)**

NMFS prepared an EA that includes an analysis of potential environmental effects associated with NMFS' issuance of an IHA to Shell to take marine mammals incidental to conducting its marine survey program in the Beaufort and Chukchi Seas during 2010 open water season. NMFS has finalized the

EA and prepared a FONSI for this action. Therefore, preparation of an EIS is not necessary.

**Authorization**

As a result of these determinations, NMFS has issued an IHA to Shell to take marine mammals incidental to its 2010 open water marine surveys in the Beaufort and Chukchi Seas, Alaska, provided the previously mentioned mitigation, monitoring, and reporting requirements are incorporated.

Dated: August 6, 2010.

**James H. Lecky,**

*Director, Office of Protected Resources, National Marine Fisheries Service.*

[FR Doc. 2010–19950 Filed 8–12–10; 8:45 am]

**BILLING CODE 3510–22–P**

Federal Register

Friday,
August 13, 2010

# Part VI

# Department of Commerce

## National Oceanic and Atmospheric Administration

## Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to Open Water Marine Seismic Survey in the Chukchi Sea, Alaska; Notice

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

**RIN 0648–XW13**

### Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to Open Water Marine Seismic Survey in the Chukchi Sea, Alaska

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

**ACTION:** Notice; issuance of an incidental take authorization.

**SUMMARY:** In accordance with the Marine Mammal Protection Act (MMPA) regulations, notification is hereby given that NMFS has issued an Incidental Harassment Authorization (IHA) to Statoil USA E&P Inc. (Statoil) to take, by harassment, small numbers of 12 species of marine mammals incidental to a marine seismic survey program in the Chukchi Sea, Alaska, during the 2010 Arctic open water season.

**DATES:** Effective August 6, 2010, through November 30, 2010.

**ADDRESSES:** Inquiry for information on the incidental take authorization 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. A copy of the application containing a list of the references used in this document, NMFS' Environmental Assessment (EA) and Finding of No Significant Impact (FONSI), and the IHA 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#applications.*

Documents cited in this notice may be viewed, by appointment, during regular business hours, at the aforementioned address.

**FOR FURTHER INFORMATION CONTACT:** Shane Guan, Office of Protected Resources, NMFS, (301) 713–2289 or Brad Smith, NMFS, Alaska Region, (907) 271–3023.

**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. Except with respect to certain activities not pertinent here, the MMPA defines "harassment" as:

> Any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild ["Level A harassment"]; or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering ["Level B harassment"].

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

#### Summary of Request

NMFS received an application on December 24, 2009, from Statoil for the taking, by harassment, of marine mammals incidental to 3D and 2D marine seismic surveys in the Chukchi Sea, Alaska, during the 2010 open-water season. After addressing comments from NMFS, Statoil modified its application and submitted a revised application on April 12, 2010. The April 12, 2010, application was the one available for public comment (see **ADDRESSES**) and considered by NMFS for the IHA.

The marine seismic survey will use two towed airgun arrays consisting of 26 active (10 spare) airguns with a maximum discharge volume of 3,000 cubic inch ($in^3$). The 3D survey will take place in a 915 $mi^2$ (2,370 $km^2$) survey area approximately 150 mi (241 km) west of Barrow in water depth of approximately 100 to 165 ft (30 to 50 m). The seismic survey is designed to collect 3D data of the deep sub-surface in Statoil's Chukchi leases in support of future oil and gas development within the area of coverage. The data will help identify source rocks, migration pathways, and play types. In addition, a 2D tie line survey has been designed as a second priority program to acquire useful information in the region. The four stand alone 2D lines (with a total length of approximately 420 mi or 675 km) are designed to tie the details of the new high resolution 3D image to the surrounding regional geology to facilitate interpretation of more regional trends. The number of 2D km acquired will to some degree be dependent on the 2010 season's restrictive ice coverage and the 3D data acquisition progress.

Statoil intends to conduct these marine surveys during the 2010 Arctic open-water season (July through November). Impacts to marine mammals may occur from noise produced by airgun sources used in the surveys.

#### Description of the Specified Activity

Statoil plans to conduct geophysical data acquisition activities in the Chukchi Sea in the period late July through the end of November, 2010. Data acquisition is expected to take approximately 60 days (including anticipated downtime), but the total period for this request was from July 25 through November 30 to allow for unexpected downtime (the IHA became effective on August 6, 2010). The project area encompasses approximately 915 $mi^2$ (2,370 $km^2$) in Statoil lease holdings in the Bureau of Ocean Energy Management, Regulation, and Enforcement's (BOEMRE) (formerly the Minerals Management Service) Outer Continental Shelf (OCS) Lease Sale 193 area in the northern Chukchi Sea (Figure 1 of the Statoil IHA application). The activities consist of 3D seismic data acquisition and a 2D tie line survey as a second priority program.

The entire 3D program, if it can be completed, will consist of approximately 3,100 mi (4,990 km) of production line, not including line turns. A total of four 2D well tie lines with a total length of approximately 420 mi (675 km) are included in the survey

plan as a second priority program. The 3D seismic data acquisition will be conducted from the M/V Geo Celtic. The M/V Geo Celtic will tow two identical airgun arrays at approximately 20 ft (6 m) depth and at a distance of about 902 ft (275 m) behind the vessel. Each array is composed of three strings for a total of 26 active G-guns (4×60 $in^3$, 8×70 $in^3$, 6×100 $in^3$, 4×150 $in^3$, and 4×250 $in^3$) with a total discharge volume of 3000 $in^3$. Each array also consists of 5 clusters of 10 inactive airguns that will be used as spares. One of the smallest guns in the array (60 $in^3$) will be used as the mitigation gun. More details of the airgun array and its components are described in Appendix B of Statoil's IHA application. In addition to the airgun array, pinger systems (DigiRANGE II, or similar systems) will be used to position the streamer array relative to the vessel.

The estimated source level for the full 3000 $in^3$ array is 245 dB re 1 μPa (rms) at 1 m. The maximum distances to received levels of 190, 180 160, and 120 dB re 1 μPa (rms) from sound source verification (SSV) measurements of the 3,147 $in^3$ airgun array used in the Chukchi Sea during 2006–2008 were used to model the received levels at these distances, which show that the maximum distances are 700, 2,500, 13,000, and 120,000 m, respectively. The SSV tests will provide received sound measurements in 10–dB increments between 120–190–dB isopleths. NMFS does not consider marine mammals exposed to impulse sounds below the 160 dB received level to be taken. The sole purpose of measuring to the 120 dB distance is to assess how far the sound source attenuates in the Arctic for the proposed seismic survey and the resulting information has not been factored into NMFS' MMPA decision for the Statoil seismic activities.

The estimated source level of the mitigation gun (*i.e.,* the single 60 $in^3$ airgun noted above) is 230 dB re 1 μPa (rms) at 1 m, and the modeled distances to received levels of 190, 180 160, and 120 dB re 1 μPa (rms) are 75, 220, 1,800, and 50,000 m, respectively.

The DigiRANGE II pinger system produces very short pulses, occurring for 10 ms, with source levels of approximately 180 dB re 1 μPa (rms) at 1 m at 55 kHz, 188 dB re 1 μPa (rms) at 1 m at 75 kHz, and 184 dB re 1 μPa (rms) at 1 m at 95 kHz. One pulse is emitted on command from the operator aboard the source vessel, which under normal operating conditions is once every 10 s. Most of the energy in the sound pulses emitted by this pinger is between 50 and 100 kHz. The signal is omnidirectional. Using a simple spherical spreading modeling for sound propagation, the calculated distances to received levels of 180, 160, and 120 dB re 1 μPa (rms) are 2.5 m, 25 m, and 2,512 m, respectively. These distances are well within the radii for airgun arrays and that of a single mitigation gun.

The vessel will travel along pre-determined lines at a speed of about 4–5 knots while one of the airgun arrays discharges every 8–10 seconds (shot interval 61.52 ft [18.75 m]). The streamer hydrophone array will consist of twelve streamers of up to approximately 2.2 mi (4 km) in length, with a total of 20,000–25,000 hydrophones at 6.6 ft (2 m) spacing. This large hydrophone streamer receiver array, designed to maximize efficiency and minimize the number of source points, will receive the reflected signals from the airgun array and transfer the data to an on-board processing system.

A 2D tie line survey has been designed as a second priority program to allow the vessel to acquire useful information in the region. The four stand alone 2D lines have a total length of approximately 420 mi (675 km) and are designed to tie the details of the new high resolution 3D image to known surrounding regional geology.

The approximate boundaries of the total surface area are between 71°30′ N and 72°00′ N and between 165° W and 162°30′ W. The water depth in the survey area varies from 100 to 165 ft (30 to 50 m).

The vessels involved in the seismic survey activities will consist of at least three vessels as listed below. Specifications of these vessels (or equivalent vessels if availability changes) are provided in Appendix A of Statoil's IHA application.

- One (1) seismic source vessel, the M/V Geo Celtic or similar equipped vessel, to tow the two 3,000 $in^3$ airgun arrays and hydrophone streamer for the 3D (and 2D) seismic data acquisition and to serve as a platform for marine mammal monitoring;
- One (1) chase/monitoring vessel, the M/V Gulf Provider or similar equipped vessel, for marine mammal monitoring, crew transfer, support and supply duties.
- One (1) chase/monitoring vessel, the M/V Thor Alpha or similar equipped vessel, for marine mammal monitoring, support and supply duties.

The M/V Geo Celtic, or similar vessel, arrived in Dutch Harbor around mid July 2010. The vessels were resupplied and the crew changed at this port. All three vessels had departed Dutch Harbor at the end of July with an expected transit time of approximately 5 days (weather depending). Directly upon arrival in the 3D survey area, depending on ice conditions, the M/V Geo Celtic will deploy the airgun array and start operating their guns for the purpose of sound source verification measurements (see Statoil IHA application for more details). The startup date of seismic data acquisition is expected to be early/mid August but depends on local ice conditions.

Upon completion of these measurements the seismic data acquisition in the Chukchi Sea will start and, depending on the start date, is expected to be completed in the first half of October. This is based on an estimated duration of 60 days from first to last shot point (including anticipated downtime). The data acquisition is a 24-hour operation.

**Comments and Responses**

A notice of NMFS' proposal to issue an IHA to Statoil published in the **Federal Register** on June 8, 2010 (75 FR 32379). That notice described, in detail, Statoil's proposed activity, the marine mammal species that may be affected by the activity, and the anticipated effects on marine mammals. During the 30-day public comment period, NMFS received five comment letters from the following: The Marine Mammal Commission (Commission); the Alaska Eskimo Whaling Commission (AEWC); the North Slope Borough Office of the Mayor (NSB); and Alaska Wilderness League (AWL), Audubon Alaska, Center for Biological Diversity, Defenders of Wildlife, Earthjustice, Greenpeace, Natural Resources Defense Council, Northern Alaska Environmental Center, Ocean Conservancy, Oceana, Pacific Environment, Sierra Club, and World Wildlife Fund (collectively "AWL"), along with an attached letter from Dr. David E. Bain, a contract scientist for NMFS.

The AEWC submitted several journal articles as attachments to its comment letters. NMFS acknowledges receipt of these documents but does not intend to address the specific articles themselves in the responses to comments, since these articles are merely used as citations in AEWC's comments. AEWC also submitted copies of 2009 and 2010 Conflict Avoidance Agreement (CAA), since Statoil declined to sign the CAA. Dr. Bain also attached an in-review journal article he coauthored. Any comments specific to Statoil's application that address the statutory and regulatory requirements or findings NMFS must make to issue an IHA are addressed in this section of the **Federal Register** notice.

*General Comments*

*Comment 1:* AEWC believes that NMFS should not issue incidental take authorizations for oil and gas-related activities given the current suspension of offshore drilling in Alaska and pending reorganization of the Minerals Management Service (MMS). AEWC points out that the harm caused by an oil spill is not the only risk to marine mammals posed by oil and gas activities on the OCS and that there are concerns regarding underwater noise from geophysical activities and the threats posed to marine mammals from noise and chemical pollution, as well as increased vessel traffic. AEWC further claims that many times, NMFS issued IHAs over the objections of the scientific and subsistence communities as well as the agencies' own scientists.

*Response:* The legal requirements and underlying analysis for the issuance of an IHA concerning take associated with seismic activities are unrelated to the moratorium on offshore drilling and reorganization of the MMS. In order to issue an authorization pursuant to Section 101(a)(5)(D) of the MMPA, NMFS must determine that the taking by harassment of small numbers of marine mammals will have a negligible impact on affected species or stocks, and will not have an unmitigable adverse impact on the availability of affected species or stocks for taking for subsistence uses. If NMFS is able to make these findings, the Secretary is required to issue an IHA. In the case of Statoil's activities for 2010 (as described in the application, the notice of proposed IHA (75 FR 32379; June 8, 2010) and this document), NMFS determined that it was able to make the required MMPA findings. Additionally, as described later in this section and throughout this document, NMFS has determined that Statoil's activities will not result in injury or mortality of marine mammals, and no injury or mortality is authorized under the IHA.

As discussed in detail in the proposed IHA (75 FR 32379; June 18, 2010), the EA for the issuance of IHAs to Shell and Statoil for the proposed open water marine and seismic surveys, and this document, NMFS has conducted a thorough analysis of the potential impacts of underwater anthropogenic sound (especially sound from geophysical surveys) on marine mammals. We have cited multiple studies and research that support NMFS MMPA and National Environmental Policy Act (NEPA) determinations that the localized and short-term disturbance from seismic surveys, with strict mitigation and monitoring measures implemented, are likely to result in negligible impacts to marine mammals and their habitat and no significant impact to the human environment, respectively. Although issuance of the IHA may be of concern to certain members of the public, the proposed issuance of the IHA was carefully reviewed and analyzed by NMFS scientists at headquarters and through Endangered Species Act (ESA) section 7 consultation at NMFS Alaska Regional Office, and by an independent bioacoustics expert. Based on those reviews, NMFS staff in the Office of Protected Resources made appropriate changes to this document.

*Comment 2:* The Commission requests that NMFS clarify whether the 3D and 2D seismic surveys will occur simultaneously or independent of one another and, if they will occur independently, recalculate the total exposed area and subsequent exposures for the 2D surveys.

*Response:* As stated in Statoil's IHA application, the 3D and 2D seismic surveys will occur independently. The total exposed area and subsequent exposures for the 2D surveys are reported in Statoil's IHA application.

*MMPA Concerns*

*Comment 3:* AEWC notes their disappointment in NMFS for releasing for public comment an incomplete application from Statoil that fails to provide the mandatory information required by the MMPA and NMFS' implementing regulations. AEWC requests that NMFS return Statoil's application as incomplete, or else the agency risks making arbitrary and indefensible determinations under the MMPA. The following is the information that AEWC believes to be missing from Statoil's application: (1) For several species, a thorough "description of the status, distribution, and seasonal distribution (when applicable) of the affected species or stocks of marine mammals likely to be affected" (50 CFR 216.104(a)(4)); (2) a description of the "age, sex, and reproductive condition" of the marine mammals that will be impacted, particularly in regard to bowhead whales (50 CFR 216.104(a)(6)); (3) an adequate detailing of "the anticipated impact of the activity upon the species or stock of marine mammals" (50 CFR 216.104(a)(7)); (4) the economic "availability and feasibility * * * of equipment, methods, and manner of conducting such activity or other means of effecting the least practicable adverse impact upon the affected species or stocks, their habitat, and on their availability for subsistence uses, paying particular attention to rookeries, mating grounds, and areas of similar significance" (50 CFR 216.104(a)(11)); and (5) suggested means of learning of, encouraging, and coordinating any research related activities (50 CFR 216.104(a)(14)). NSB also notes its concern about the lack of specificity regarding the timing and location of the proposed surveys, as well as the lack of specificity regarding the surveys themselves.

*Response:* NMFS does not agree that it released an incomplete application for review during the public comment period. After NMFS' initial review of the application, NMFS submitted questions and comments to Statoil on its application. After receipt and review of Statoil's responses, which were incorporated into the final version of the IHA application that was released to the public for review and comment, NMFS made its determination of completeness and released the application, addenda, and the proposed IHA notice (75 FR 32379; June 8, 2010). Regarding the three specific pieces of information believed to be missing by AEWC, Statoil's original application included a description of the pieces of information that are required pursuant to 50 CFR 216.104(a)(12).

Information required pursuant to 50 CFR 216.104(a)(4) and (6) requires that an applicant submit information on the "status, distribution, and seasonal distribution (when applicable) of the affected species or stocks of marine mammals likely to be affected" and "age, sex, and reproductive condition (if possible)" of the number of marine mammals that may be taken, respectively. In the application, Statoil described the species expected to be taken by harassment and provided estimates of how many of each species were expected to be taken during their activities. The status and distribution of these species are included in Section IV of Statoil's IHA application, the proposed IHA (75 FR 32379; June 8, 2010), and in this document. However, in most cases, it is difficult to estimate how many animals, especially cetaceans, of each age, sex, and reproductive condition will be taken or impacted by seismic surveys, because group composition of animals varies greatly by time and space.

In Section VII of Statoil's IHA application, the proposed IHA (75 FR 32379; June 8, 2010), and in this document, detailed discussion on the anticipated impacts from the proposed Statoil open water seismic survey in the Chukchi is provided, as required under 50 CFR 216.104(a)(7). The description of the anticipated impacts includes

discussions on potential effects from airgun noise and pinger signers.

Statoil also provided information on economic "availability and feasibility * * * of equipment, methods, and manner of conducting such activity or other means of effecting the least practicable adverse impact upon the affected species or stocks, their habitat, and on their availability for subsistence uses, paying particular attention to rookeries, mating grounds, and areas of similar significance" (50 CFR 216.104(a)(11)) in its IHA application. In its application, Statoil states that four main mitigations regarding the open water marine seismic survey in the Chukchi Sea are proposed: (1) Timing and locations for active survey acquisition work; (2) to configure airguns in a manner that directs energy primarily down to the seabed thus decreasing the range of horizontal spreading of noise; (3) using an energy source which is as small as possible while still accomplishing the survey objectives; and (4) curtailing active survey work when the marine mammal observers sight visually (from shipboard) the presence of marine mammals within identified ensonified zones. Details of these mitigation measures are discussed further in the 4MP that is included in Statoil's IHA application. In addition to these measures, NMFS' Notice of Proposed IHA (75 FR 32379; June 8, 2010) described mitigation measures proposed to be implemented by Statoil (outlined in the application), as well as additional measures proposed by NMFS for inclusion in an IHA.

Lastly, information required pursuant to 50 CFR 216.104(a)(14) was also included in Statoil's application. Statoil states that it will cooperate with any number of external entities, including other energy companies, agencies, universities, and NGOs, in its efforts to manage, understand, and fully communicate information about environmental impacts related to seismic activities. Statoil is a member of the OGP E&P Sound & Marine Life joint industry programme (JIP), which is an international consortium of oil and gas companies organized under the OGP in London. The objective of the JIP program is to obtain valid data on the effects of sounds produced by the gas exploration and production industry on marine life. Additionally, Statoil, Shell, and ConocoPhillips (CPAI) are jointly funding an extensive science program in the Chukchi Sea, which will be carried out by Olgoonik-Fairweather LLC to continue the acoustic monitoring programs of 2006–2009 with a total of 44 acoustic recorders distributed both broadly across the Chukchi lease area and nearshore environment and intensively on the Statoil, Burger (Shell), and Klondike (CPAI) lease holdings. Please refer to Statoil's IHA application and the proposed IHA (75 FR 32379; June 8, 2010) for a detailed description of the science program.

In conclusion, NMFS believes that Statoil provided all of the necessary information to proceed with publishing a proposed IHA notice in the **Federal Register**.

*Comment 4:* AEWC and NSB state that NMFS failed to issue a draft authorization for public review and comment. The plain language of both the MMPA and NMFS' implementing regulations require that NMFS provide the opportunity for public comment on the "proposed incidental harassment authorization" (50 CFR 216.104(b)(1)(i); 16 U.S.C. 1371(a)(5)(D)(iii)) and not just on the application itself as NMFS has done here. Given Statoil's refusal to sign the CAA and without a complete draft authorization and accompanying findings, AEWC states that it cannot provide meaningful comments on Statoil's proposed activities, ways to mitigate the impacts of those activities on marine mammals, and measures that are necessary to protect subsistence uses and sensitive resources.

*Response:* The June 8, 2010 proposed IHA notice (75 FR 32379) contained all of the relevant information needed by the public to provide comments on the proposed authorization itself. The notice contained the permissible methods of taking by harassment, means of effecting the least practicable impact on such species (*i.e.,* mitigation), measures to ensure no unmitigable adverse impact on the availability of the species or stock for taking for subsistence use, requirements pertaining to the monitoring and reporting of such taking, including requirements for the independent peer review of the proposed monitoring plan. The notice provided detail on all of these points, and, in NMFS' view, allowed the public to comment on the proposed authorization and inform NMFS' final decision. Additionally, the notice contained NMFS' preliminary findings of negligible impact and no unmitigable adverse impact.

The signing of a CAA is not a requirement to obtain an IHA. The CAA is a document that is negotiated between and signed by the industry participant, AEWC, and the Village Whaling Captains' Associations. NMFS has no role in the development or execution of this agreement. Although the contents of a CAA may inform NMFS' no unmitigable adverse impact determination for bowhead and beluga whales and ice seals, the signing of it is not a requirement. While a CAA has not been signed and a final version agreed to by industry participants, AEWC, and the Village Whaling Captains' Associations, NMFS was provided with a copy of the version ready for signature by AEWC. NMFS has reviewed the CAA and included several measures from the document which relate to marine mammals and avoiding conflicts with subsistence hunts in the IHA. Some of the conditions which have been added to the IHA include: (1) Avoiding concentrations of whales and reducing vessel speed when near whales; (2) conducting sound source verification measurements; and (3) participating in the Communication Centers. Despite the lack of a signed CAA for 2010 activities, NMFS is confident that the measures contained in the IHA will ensure no unmitigable adverse impact to subsistence users.

*Comment 5:* AEWC and NSB argue that Statoil has not demonstrated that its proposed activities would take only "small numbers of marine mammals of a species or population stock," resulting in no more than a "negligible impact" on a species or stock. In addition, NSB argues that NMFS has not adequately analyzed harassment associated with received levels of noise below 160 dB.

*Response:* NMFS believes that it provided sufficient information in its proposed IHA notice (75 FR 32379; June 8, 2010) to make the small numbers and negligible impact determinations and that the best scientific information available was used to make those determinations. While some published articles indicate that certain marine mammal species may avoid seismic vessels at levels below 160 dB, NMFS does not consider that these responses rise to the level of a take as defined in the MMPA. While studies, such as Miller *et al.* (1999), have indicated that some bowhead whales may have started to deflect from their migratory path 35 km (21.7 mi) from the seismic vessel, it should be pointed out that these minor course changes are during migration and, as described in MMS' 2006 Final Programmatic Environmental Assessment (PEA), have not been seen at other times of the year and during other activities. To show the contextual nature of this minor behavioral modification, recent monitoring studies of Canadian seismic operations indicate that feeding, non-migratory bowhead whales do not move away from a noise source at an SPL of 160 dB. Therefore, while bowheads may avoid an area of 20 km (12.4 mi) around a noise source, when that determination requires a

post-survey computer analysis to find that bowheads have made a 1 or 2 degree course change, NMFS believes that does not rise to a level of a "take," as the change in bearing is due to animals sensing the noise and avoiding passing through the ensonified area during their migration, and should not be considered as being displaced from their habitat. NMFS therefore continues to estimate "takings" under the MMPA from impulse noises, such as seismic, as being at a distance of 160 dB (re 1 μPa). As explained throughout this **Federal Register** notice, it is highly unlikely that marine mammals would be exposed to SPLs that could result in serious injury or mortality. The best scientific information indicates that an auditory injury is unlikely to occur, as apparently sounds need to be significantly greater than 180 dB for injury to occur (Southall *et al.* 2007).

Regarding the small number issue raised by the AEWC and NSB, NMFS has developed a series of estimates for marine mammals that could be taken as a result of Statoil's proposed marine surveys, and the estimated takes from these proposed activities are all under five percent for any affected marine mammal species or stock (see Potential Number of Takes by Harassment section below).

*Impacts to Marine Mammals*

*Comment 6:* AEWC notes that based on the density estimates, Statoil is predicting that an average of 2,253 and 4,234 individuals of Alaska ringed seals may be exposed to sound levels of 160 dB and above during the proposed 3D and 2D seismic surveys, respectively. AEWC and NSB state that these are by no means "small numbers" of marine mammals that will be subjected to impacts as a result of Statoil's operations.

*Response:* NMFS determined that the small numbers requirement has been satisfied. Statoil has predicted that an average of 2,253 and 4,234 individuals of Alaska ringed seals may be exposed to sound levels of 160 dB and above as the result of Statoil's proposed 3D and 2D marine seismic surveys, respectively, and NMFS assumes that animals exposed to received levels above 160 dB are taken. However, because of the tendency of marine mammals to avoid the source to some degree, and the fact that both the marine mammals and the source are moving through an area, the majority of the exposures would likely occur at levels closer to 160 dB (not higher levels) and the impacts would be expected to be relatively low-level and not of a long duration. NMFS assesses "small numbers" in terms relative to the population/stock size. The Level B harassment take estimate of a total of 6,487 Alaska stock of ringed seals is a small number in relative terms, because of the nature of the anticipated responses and in that it represents only 2.81 percent of the regional stock size of that species (population > 230,000), if each "exposure" at 160 dB represents an individual ringed seal. Furthermore, as discussed below, exposure of marine mammals to received levels at 160 dB do not always constitute a "take." Many animals may not respond to this level in a way that is considered biologically significant. Therefore, even though NMFS uses the 160 dB received level as the onset of Level B harassment for regulatory purposes, this does not mean that all animals exposed to this level or levels above 160 dB are "taken." Additionally, NMFS believes the percentage would be even lower if animals move out of the seismic area. In these circumstances, animals that are outside of the ensonified zone (e.g., the 160 dB isopleth) would not be expected to be taken by Level B harassment.

*Comment 7:* AWL, NSB, and AEWC noted that NMFS has acknowledged that permanent threshold shift (PTS) qualifies as a serious injury. Therefore, if an acoustic source at its maximum level has the potential to cause PTS and thus lead to serious injury, it would not be appropriate to issue an IHA for the activity (60 FR 28381; May 31, 1995). AEWC states that therefore an LOA is required here.

*Response:* In the proposed rule to implement the process to apply for and obtain an IHA, NMFS stated that authorizations for harassment involving the "potential to injure" would be limited to only those that may involve non-serious injury (60 FR 28379; May 31, 1995). While the **Federal Register** notice cited by the commenters states that NMFS considered PTS to be a serious injury (60 FR 28379; May 31, 1995), our understanding of anthropogenic sound and the way it impacts marine mammals has evolved since then, and NMFS no longer considers PTS to be a serious injury. NMFS has defined "serious injury" in 50 CFR 216.3 as "* * * any injury that will likely result in mortality." There are no data that suggest that PTS would be likely to result in mortality, especially the limited degree of PTS that could hypothetically be incurred through exposure of marine mammals to seismic airguns at the level and for the duration that are likely to occur in this action.

Further, as stated several times in this document and previous **Federal Register** notices for seismic activities, there is no empirical evidence that exposure to pulses of airgun sound can cause PTS in any marine mammal, even with large arrays of airguns (see Southall *et al.* 2007). PTS is thought to occur several decibels above that inducing mild temporary threshold shift (TTS), the mildest form of hearing impairment (a non-injurious effect). NMFS 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 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. As summarized later in this document, data that are now available imply that TTS is unlikely to occur unless bow-riding odontocetes are exposed to airgun pulses much stronger than 180 dB re 1 Pa rms (Southall *et al.* 2007). Additionally, NMFS has required monitoring and mitigation measures to negate the possibility of marine mammals being seriously injured as a result of Statoil's activities. In the proposed IHA, NMFS determined that Statoil's activities are unlikely to even result in TTS. Based on this determination and the explanation provided here, PTS is also not expected. Therefore, an IHA is appropriate.

*Comment 8:* AWL, NSB, and AEWC state that NMFS has not adequately considered whether marine mammals may be harassed at received levels significantly lower than 160 dB and that NMFS did not use the best scientific evidence in setting the sound levels against which take was assessed. They state that NMFS calculated harassment from Statoil's proposed surveying based on the exposure of marine mammals to sounds at or above 160 dB and that this uniform approach to harassment does not take into account known reactions of marine mammals in the Arctic to levels of noise far below 160 dB. These comments state that bowhead, gray, killer, and beluga whales and harbor porpoise react to sounds lower than 160 dB.

Citing several papers on killer whales and harbor porpoise, Dr. Bain states that major behavioral changes of these animals appear to be associated with received levels of around 135 dB re 1 μPa, and that minor behavioral changes can occur at received levels from 90–110 dB re 1 μPa or lower. He also states that belugas have been observed to respond to icebreakers by swimming rapidly away at distances up to 80 km,

where received levels were between 94 and 105 dB re 1 μPa. Belugas exhibited minor behavioral changes such as changes in vocalization, dive patterns, and group composition at distances up to 50 km (NRC 2003), where received levels were likely around 120 dB.

The AWL states that harbor porpoises have been shown to be particularly responsive to sound, exhibiting behavioral changes, including exclusion from an area, at received levels of 90–110 dB or lower (with received levels around 70–90 dB), depending on experience with the noise source and environmental context. The AWL listed a number of papers but did not point out the source of its statement. The AWL also states that multiple studies confirm the sensitivity of beluga whales, and that they are known to alter their migration paths in response to icebreaker noise at received levels as low as 80 dB, and that belugas have been observed to respond to icebreakers by swimming rapidly away at distances up to 80 km.

AEWC also states that in conducting scoping on its national acoustic guidelines for marine mammals, NMFS noted that the existing system for determining take (i.e., the 160 dB mark) "considers only the sound pressure level of an exposure but not its other attributes, such as duration, frequency, or repetition rate, all of which are critical for assessing impacts on marine Mammals" and "also assumes a consistent relationship between rms (root-mean-square) and peak pressure values for impulse sounds, which is known to be inaccurate under certain (many) conditions" (70 FR 1871, 1873; January 11, 2005). Thus, NMFS itself has recognized that 160 dB (rms) is not an adequate measure. AEWC argues that current scientific research establishes that 120 dB (rms) is a more appropriate measure for impacts to marine mammals.

*Response:* The best information available to date for reactions by bowhead whales to noise, such as seismic, is based on the results from the 1998 aerial survey (as supplemented by data from earlier years) as reported in Miller *et al.* (1999). In 1998, bowhead whales below the water surface at a distance of 20 km (12.4 mi) from an airgun array received pulses of about 117–135 dB re 1 μPa rms, depending upon propagation. Corresponding levels at 30 km (18.6 mi) were about 107–126 dB re 1 μPa rms. Miller *et al.* (1999) surmise that deflection may have begun about 35 km (21.7 mi) to the east of the seismic operations, but did not provide SPL measurements to that distance and noted that sound propagation has not been studied as extensively eastward in the alongshore direction, as it has northward, in the offshore direction. Therefore, while this single year of data analysis indicates that bowhead whales may make minor deflections in swimming direction at a distance of 30–35 km (18.6–21.7 mi), there is no indication that the SPL where deflection first begins is at 120 dB; it could be at another SPL lower or higher than 120 dB. Miller *et al.* (1999) also note that the received levels at 20–30 km (12.4–18.6 mi) were considerably lower in 1998 than have previously been shown to elicit avoidance in bowheads exposed to seismic pulses. However, the seismic airgun array used in 1998 was larger than the ones used in 1996 and 1997. Therefore, NMFS believes that it cannot scientifically support adopting any single SPL value below 160 dB and apply it across the board for all species and in all circumstances. Second, these minor course changes occurred during migration and, as indicated in MMS' 2006 PEA, have not been seen at other times of the year and during other activities. Third, as stated in the past, NMFS does not believe that minor course corrections during a migration equate to "take" under the MMPA. This conclusion is based on controlled exposure experiments conducted on migrating gray whales exposed to the U.S. Navy's low frequency sonar (LFA) sources (Tyack 2009). When the source was placed in the middle of the migratory corridor, the whales were observed deflecting around the source during their migration. However, such minor deflection is considered not to be biologically significant. To show the contextual nature of this minor behavioral modification, recent monitoring studies of Canadian seismic operations indicate that when, not migrating, but involved in feeding, bowhead whales do not move away from a noise source at an SPL of 160 dB. Therefore, while bowheads may avoid an area of 20 km (12.4 mi) around a noise source, when that determination requires a post-survey computer analysis to find that bowheads have made a 1 or 2 degree course change, NMFS believes that does not rise to a level of a "take." NMFS therefore continues to estimate "takings" under the MMPA from impulse noises, such as seismic, as being at a distance of 160 dB (re 1 μPa). Although it is possible that marine mammals could react to any sound levels detectable above the ambient noise level within the animals' respective frequency response range, this does not mean that such animals would react in a biologically significant way. According to experts on marine mammal behavior, the degree of reaction which constitutes a "take," i.e., a reaction deemed to be biologically significant that could potentially disrupt the migration, breathing, nursing, breeding, feeding, or sheltering, etc., of a marine mammal is complex and context specific, and it depends on several variables in addition to the received level of the sound by the animals. These additional variables include, but are not limited to, other source characteristics (such as frequency range, duty cycle, continuous vs. impulse vs. intermittent sounds, duration, moving vs. stationary sources, etc.); specific species, populations, and/or stocks; prior experience of the animals (naive vs. previously exposed); habituation or sensitization of the sound by the animals; and behavior context (whether the animal perceives the sound as predatory or simply annoyance), etc. (Southall *et al.* 2007). Furthermore, the behavioral responses by harbor porpoises (pinger) and beluga whales (icebreaker) were to non-impulse noises. For non-impulse noise sources, research shows that in general, the threshold that induces behavioral responses among animals tends to be much lower. Therefore, NMFS uses 120 dB as the onset for behavioral harassment for non-impulse noises but 160 dB for impulse noises. The noises from the proposed marine seismic survey from airgun arrays are pulses.

The references cited in the comment letters address different source characteristics (continuous sound rather than impulse sound that are planned for the proposed seismic survey) or species (killer whales and harbor porpoises) that rarely occur in the proposed Arctic action area. Some information about the responses of bowhead and gray whales to seismic survey noises has been acquired through dedicated research and marine mammal monitoring studies conducted during prior seismic surveys. Detailed descriptions regarding behavioral responses of these marine mammals to seismic sounds are available (*e.g.,* Richardson *et al.* 1995; review by Southall *et al.* 2007), and are also discussed in this document. Additionally, as Statoil does not intend to use ice-breakers during its operations, statements regarding beluga reactions to icebreaker noise are not relevant to this activity.

Regarding the last point raised in this comment by AEWC, NMFS recognizes the concern. However, NMFS does not agree with AEWC's statement that current scientific research establishes that 120 dB (rms) is a more appropriate measure for impacts to marine mammals

for reasons noted above. Based on the information and data summarized in Southall *et al.* (2007), and on information from various studies, NMFS believes that the onset for behavioral harassment is largely context dependent, and there are many studies showing marine mammals do not show behavioral responses when exposed to multiple pulses at received levels above 160 dB re 1 µPa (e.g., Malme *et al.* 1983; Malme *et al.* 1984; Richardson *et al.* 1986; Akamatsu *et al.* 1993; Madsen and Møhl 2000; Harris *et al.* 2001; Miller *et al.* 2005). Therefore, although using a uniform SPL of 160–dB for the onset of behavioral harassment for impulse noises may not capture all of the nuances of different marine mammal reactions to sound, it is an appropriately conservative way to manage and regulate anthropogenic noise impacts on marine mammals. Therefore, unless and until an improved approach is developed and peer-reviewed, NMFS will continue to use the 160–dB threshold for determining the level of take of marine mammals by Level B harassment for impulse noise (such as from airguns).

*Comment 9:* NSB and AWL note that this IHA, as currently proposed, is based on uncertainties that are not allowed under the MMPA. Citing comments made by NMFS on recent MMS Lease Sale Environmental Impact Statements, NSB notes that NMFS stated that without more current and thorough data on the marine mammals in the Chukchi Sea and their use of these waters, it would be difficult to make the findings required by the MMPA. AWL points out that NMFS specifically observed that activities "occurring near productive forage areas such as the Hanna Shoal" or "along migratory corridors" are most likely to encounter and impact marine mammals. AWL states that Statoil's proposed surveying will likely take place proximate to the Hanna Shoal, which is a feeding ground for gray whales and is within the pathway for migrating bowheads. AWL furthers states that the lack of information runs up against the precautionary nature of the MMPA, therefore, NMFS cannot claim the lack of available information justifies its decision, and that NMFS has an affirmative obligation to find that impacts are no more than "negligible" and limited to the harassment of only "small numbers of marine mammals." NSB notes that NMFS noted that the "continued lack of basic audiometric data for key marine mammal species" that occur throughout the Chukchi Sea inhibits the "ability to determine the nature and biological significance of exposure to various levels of both continuous and impulsive oil and gas activity sounds."

*Response:* While there may be some uncertainty on the current status of some marine mammal species in the Chukchi Sea and on impacts to marine mammals from seismic surveys, the best available information supports our findings. NMFS is currently proposing to conduct new population assessments for Arctic pinniped species, and current information is available on-line through the Stock Assessment Reports (SARs). Moreover, NMFS has required the industry to implement a monitoring and reporting program to collect additional information concerning effects to marine mammals.

In regard to impacts, there is no indication that seismic survey activities are having a long-term impact on marine mammals. For example, apparently, bowhead whales continued to increase in abundance during periods of intense seismic activity in the Chukchi Sea in the 1980s (Raftery *et al.* 1995; Angliss and Outlaw 2007), even without implementation of current mitigation requirements. As a result, NMFS believes that seismic survey noise in the Arctic will affect only small numbers of and have no more than a negligible impact on affected marine mammal species or stocks in the Chukchi Sea. As explained in this document and based on the best available information, NMFS has determined that Statoil's activities will affect only small numbers of marine mammal species or stocks, will have a negligible impact on affected species or stocks, and will not have an unmitigable adverse impact on subsistence uses of the affected species or stocks.

*Comment 10:* AWL and NSB state that the standard for determining whether an IHA is appropriate is exceptionally protective. If there is even the possibility of serious injury, NMFS must establish that the "potential for serious injury can be negated through mitigation requirements" (60 FR 28380; May 31, 1995). Reports from previous surveys, however, indicate that, despite monitored exclusion zones, marine mammals routinely stray too close to the airguns. AEWC states that the safety radii proposed by Statoil do not negate injury.

*Response:* As has already been stated in the **Federal Register** notice for the proposed IHA (75 FR 32379; June 8, 2010), recent scientific information has indicated that received noise levels need to be significantly higher than 190 dB to cause injury to marine mammals (see Southall *et al.* 2007). Therefore, the 180- and 190-dB safety zones are conservative.

The source vessel will be traveling at speeds of about 1–5 knots (1.9–9.3 km/hr). With a 180-dB safety range of 160 m (525 ft), the vessel will have moved out of the safety zone within a few minutes. As a result, during underway survey operations, MMOs are instructed to concentrate on the area ahead of the vessel, not behind the vessel where marine mammals would need to be voluntarily swimming towards the vessel to enter the 180-dB zone. In fact, in some of NMFS' IHAs issued for scientific seismic operations, shutdown is not required for marine mammals that approach the vessel from the side or stern in order to ride the bow wave or rub on the seismic streamers deployed from the stern (and near the airgun array) as some scientists consider this a voluntary action on the part of an animal that is not being harassed or injured by seismic noise. While NMFS concurs that shutdowns are not likely warranted for these voluntary approaches, in the Arctic Ocean, all seismic surveys are shutdown or powered down for all marine mammal close approaches. Also, in all seismic IHAs, including Statoil's IHA, NMFS requires that the safety zone be monitored for 30 min prior to beginning ramp-up to ensure that no marine mammals are present within the safety zones. Implementation of ramp-up is required because it is presumed it would allow marine mammals to become aware of the approaching vessel and move away from the noise, if they find the noise annoying. Data from 2007 and 2008, when Shell had support boats positioned 1 km (0.62 mi) on each side of the 3D seismic vessel, suggest that marine mammals do in fact move away from an active source vessel. In those instances, more seals were seen from the support vessels than were seen from the source vessels during active seismic operations. Additionally, research has indicated that some species tend to avoid areas of active seismic operations (e.g., bowhead whales, see Richardson *et al.* 1999).

NMFS has determined that an IHA is the proper authorization required to cover Statoil's survey. As described in other responses to comments in this document, NMFS does not believe that there is a risk of serious injury or mortality from these activities. The monitoring reports from 2006, 2007, 2008, and 2009 do not note any instances of serious injury or mortality (Patterson *et al.* 2007; Funk *et al.* 2008; Ireland *et al.* 2009; Reiser *et al.* 2010). Additionally, NMFS is confident it has met all of the requirements of section 101(a)(5)(D) of the MMPA (as described

throughout this document) and therefore can issue an IHA to Statoil for its survey operations in 2010.

*Comment 11:* AEWC notes that stranded marine mammals or their carcasses are also a sign of injury. NMFS states in its notice that it "does not expect any marine mammal will * * * strand as a result of the proposed seismic survey" (75 FR 32379; June 8, 2010). In reaching this conclusion, NMFS claims that strandings have not been recorded for the Beaufort and Chukchi Seas. AEWC states that the Department of Wildlife Management of NSB has completed a study documenting 25 years worth of stranding data and showing that five dead whales were reported in 2008 alone in comparison with the five dead whales that were reported in the same area over the course of 25 years (Rosa 2009).

In light of the increase in seismic operations in the Arctic since 2006, AEWC says that NSB's study raises serious concerns about the impacts of these operations and their potential to injure marine mammals. AEWC states that while they think this study taken together with the June 2008 stranding of "melon headed whales off Madagascar that appears to be associated with seismic surveys" (75 FR 32379; June 8, 2010) demonstrate that seismic operations have the potential to injure marine mammals beyond beaked whales (and that Statoil needs to apply for an LOA for its operations), certainly NSB's study shows that direct injury of whales is on-going. AEWC states that these direct impacts must be analyzed and explanations sought out before additional activities with the potential to injure marine mammals are authorized, and that NMFS must explain how, in light of this new information, Statoil's application does not have the potential to injure marine mammals.

*Response:* NMFS has reviewed the information provided by AEWC regarding marine mammal strandings in the Arctic. The Rosa (2009) paper cited by AEWC does not provide any evidence linking the cause of death for the bowhead carcasses reported in 2008 to seismic operations. Additionally, the increased reporting of carcasses in the Arctic since 2006 may also be a result of increased reporting effort and does not necessarily indicate that there were fewer strandings prior to 2008. Marine mammal observers (MMOs) aboard industry vessels in the Beaufort and Chukchi Seas have been required to report sightings of injured and dead marine mammals to NMFS as part of the IHA requirements only since 2006.

Regarding the June 2008 stranding of melon headed whales off Madagascar, information available to NMFS at this time indicates that the seismic airguns were not active around the time of the stranding. While the Rosa (2009) study does present information regarding the injury of whales in the Arctic, it does not link the cause of the injury to seismic survey operations. As NMFS has stated previously, the evidence linking marine mammal strandings and seismic surveys remains tenuous at best. Two papers, Taylor *et al.* (2004) and Engel *et al.* (2004) reference seismic signals as a possible cause for a marine mammal stranding.

Taylor *et al.* (2004) noted two beaked whale stranding incidents related to seismic surveys. The statement in Taylor *et al.* (2004) was that the seismic vessel was firing its airguns at 1300 hrs on September 24, 2004, and that between 1400 and 1600 hrs, local fishermen found live stranded beaked whales 22 km (12 nm) from the ship's location. A review of the vessel's trackline indicated that the closest approach of the seismic vessel and the beaked whales stranding location was 18 nm (33 km) at 1430 hrs. At 1300 hrs, the seismic vessel was located 25 nm (46 km) from the stranding location. What is unknown is the location of the beaked whales prior to the stranding in relation to the seismic vessel, but the close timing of events indicates that the distance was not less than 18 nm (33 km). No physical evidence for a link between the seismic survey and the stranding was obtained. In addition, Taylor *et al.* (2004) indicates that the same seismic vessel was operating 500 km (270 nm) from the site of the Galapagos Island stranding in 2000. Whether the 2004 seismic survey caused the beaked whales to strand is a matter of considerable debate (see Cox *et al.* 2006). However, these incidents do point to the need to look for such effects during future seismic surveys. To date, follow up observations on several scientific seismic survey cruises have not indicated any beaked whale stranding incidents.

Engel *et al.* (2004), in a paper presented to the IWC in 2004 (SC/56/E28), mentioned a possible link between oil and gas seismic activities and the stranding of 8 humpback whales (7 off the Bahia or Espirito Santo States and 1 off Rio de Janeiro, Brazil). Concerns about the relationship between this stranding event and seismic activity were raised by the International Association of Geophysical Contractors (IAGC). The IAGC (2004) argues that not enough evidence is presented in Engel *et al.* (2004) to assess whether or not the relatively high proportion of adult strandings in 2002 is anomalous. The IAGC contends that the data do not establish a clear record of what might be a "natural" adult stranding rate, nor is any attempt made to characterize other natural factors that may influence strandings. As stated previously, NMFS remains concerned that the Engel *et al.* (2004) article appears to compare stranding rates made by opportunistic sightings in the past with organized aerial surveys beginning in 2001. If so, then the data are suspect.

Additionally, if bowhead and gray whales react to sounds at very low levels by making minor course corrections to avoid seismic noise, and mitigation measures require Statoil to ramp-up the seismic array to avoid a startle effect, strandings such as those observed in the Bahamas in 2000 are highly unlikely to occur in the Arctic Ocean as a result of seismic activity. Therefore, NMFS does not expect any marine mammals will incur serious injury or mortality as a result of Statoil's 2010 survey operations, so an LOA is not needed.

Lastly, Statoil is required to report all sightings of dead and injured marine mammals to NMFS and to notify the Marine Mammal Health and Stranding Response Network. However, Statoil is not permitted to conduct necropsies on dead marine mammals. Necropsies can only be performed by people authorized to do so under the Marine Mammal Health and Stranding Response Program MMPA permit. NMFS is currently considering different methods for marking carcasses to reduce the problem of double counting. However, a protocol has not yet been developed, so marking is not required in the IHA.

*Comment 12:* AEWC, NSB, and Dr. Bain state that research is increasingly showing that marine mammals may remain within dangerous distances of seismic operations rather than leave a valued resource such as a feeding ground (see Richardson 2004). The International Whaling Commission (IWC) scientific committee has indicated that the lack of deflection by feeding whales in Camden Bay (during Shell Offshore Inc. and Shell Gulf of Mexico Inc.'s seismic activities) likely shows that whales will tolerate and expose themselves to potentially harmful levels of sound when needing to perform a biologically vital activity, such as feeding (mating, giving birth, etc.). Thus, the noise from Statoil's proposed operations could injure marine mammals if they are close enough to the source. NSB further states that NMFS has not adequately analyzed the potential for serious injury.

*Response:* If marine mammals, such as bowhead whales, remain near a seismic operation to perform a biologically vital activity, such as feeding, depending on the distance from the vessel and the size of the 160-dB radius, the animals may experience some Level B harassment. A detailed analysis on potential impacts of anthropogenic noise (including noise from seismic airguns and other active acoustic sources used in geophysical surveys) is provided in the proposed IHA (75 FR 32379; June 8, 2010) and in this document. Based on the analysis, NMFS believes that it is unlikely any animals exposed to noise from Statoil's proposed marine surveys would be exposed to received levels that could cause TTS (a non-injurious Level B harassment). Therefore, it is even less likely that marine mammals would be exposed to levels of sound from Statoil's activity that could cause PTS (a non-lethal Level A harassment).

In addition, depending on the distance of the animals from the vessel and the number of individual whales present, certain mitigation measures are required to be implemented. If an aggregation of 12 or more mysticete whales are detected within the 160-dB radius, then the airguns must be shutdown until the aggregation is no longer within that radius. Additionally, if any whales are sighted within the 180-dB radius or any pinnipeds are sighted within the 190-dB radius of the active airgun array, then either a power-down or shutdown must be implemented immediately. For the reasons stated throughout this document, NMFS has determined that Statoil's operations will not injure, seriously injure, or kill marine mammals.

*Comment 13:* AEWC, AWL, and Dr. Bain state that NMFS does little to assess whether Level A harassment is occurring as a result of the deflection of marine mammals as a result of Statoil's proposed operations. Deflected marine mammals may suffer impacts due to masking of natural sounds including calling to others of their species, physiological damage from stress and other non-auditory effects, harm from pollution of their environment, tolerance, and hearing impacts (*see* Nieukirk *et al.* 2004). Not only do these operations disrupt the animals' behavioral patterns, but they also create the potential for injury by causing marine mammals to miss feeding opportunities, expend more energy, and stray from migratory routes when they are deflected.

*Response:* See the response to comment 8 regarding the potential for injury. The paper cited by AEWC (Nieukirk *et al.* 2004) tried to draw linkages between recordings of fin, humpback, and minke whales and airgun signals in the western North Atlantic; however, the authors note the difficulty in assessing impacts based on the data collected. The authors also state that the effects of airgun activity on baleen whales is unknown and then cite to Richardson *et al.* (1995) for some possible effects, which AEWC lists in their comment. There is no statement in the cited study, however, about the linkage between deflection and these impacts. While deflection may cause animals to expend extra energy, there is no evidence that this deflection is causing a significant behavioral change that will adversely impact population growth. In fact, bowhead whales continued to increase in abundance during periods of intense seismic in the Chukchi Sea in the 1980s (Raftery *et al.* 1995; Angliss and Outlaw 2007). Therefore, NMFS does not believe that injury will occur as a result of Statoil's activities. Additionally, Statoil's total data acquisition activities would only ensonify 531 $km^2$ of the Chukchi Sea to received levels above 160 dB (0.089% of the entire Chukchi Sea). Therefore, based on the small area of the Chukchi Sea where Statoil will utilize airguns, it is unlikely that marine mammals will need to expend much extra energy to locate prey, or will have reduced foraging opportunities.

*Comment 14:* Citing Erbe (2002), AEWC notes that any sound at some level can cause physiological damage to the ear and other organs and tissues. Placed in a context of an unknown baseline of sound levels in the Chukchi Sea, it is critically important that NMFS take a precautionary approach to permitting additional noise sources in this poorly studied and understood habitat. Thus, the best available science dictates that NMFS use a more cautious approach in addressing impacts to marine mammals from seismic operations. AWL also states noise exposure is likely to result in stress, and stress can impair an animal's immune system.

*Response:* The statement from Erbe (2002) does not take into account mitigation measures required in the IHA to reduce impacts to marine mammals. As stated throughout this document, based on the fact that Statoil will implement mitigation measures (*i.e.,* ramp-up, power-down, shutdown, etc.), NMFS does not believe that there will be any injury or mortality of marine mammals as a result of Statoil's operations.

*Comment 15:* AEWC states that in making its negligible impact determination, NMFS failed to consider several impacts: (1) Displacing marine mammals from feeding areas; (2) non-auditory, physiological effects, namely stress; (3) the possibility of vessel strikes needs to be considered in light of scientific evidence of harm from ship traffic to marine mammals; (4) impacts to marine mammal habitat, including pollution of the marine environment and the risk of oil spills, toxic, and nontoxic waste being discharged; (5) impacts to fish and other food sources upon which marine mammals rely; and (6) specific marine mammals that will be taken, including their age, sex, and reproductive condition. The first issue was also raised by Dr. Bain.

*Response:* NMFS does not agree that these impacts were not considered. First, the area that would be ensonified by Statoil's proposed open water seismic surveys represents a small fraction of the total habitat of marine mammals in the Chukchi Sea. In addition, as the survey vessel is constantly moving, the ensonified zone where the received levels exceed 160 dB re 1 μPa (rms), which is estimated to be approximately 531 $km^2$ at any given time, is constantly moving. Therefore, the duration during which marine mammals would potentially avoid the ensonified area would be brief. Therefore, NMFS does not believe marine mammals would be displaced from their customary feeding areas as a result of Statoil's proposed seismic surveys.

Second, non-auditory, physiological effects, including stress, were analyzed in the Notice of Proposed IHA (75 FR 32379; June 8, 2010). No single marine mammal is expected to be exposed to high levels of sound for extended periods based on the size of the airgun array to be used by Statoil and the fact that an animal would need to swim close to, parallel to, and at the same speed as the vessel to incur several high intensity pulses. This also does not take into account the mitigation measures described later in this document.

Third, impacts resulting from vessel strikes and habitat pollution and impacts to fish were fully analyzed in NMFS' 2010 Final EA for Shell and Statoil's open water marine and seismic activities (NMFS 2010). Additionally, the proposed IHA analyzed potential impacts to marine mammal habitat, including prey resources. That analysis noted that while mortality has been observed for certain fish species found in extremely close proximity to the airguns, Sætre and Ona (1996) concluded that mortality rates caused by

exposure to sounds are so low compared to natural mortality that issues relating to stock recruitment should be regarded as insignificant. For the sixth point, please see the response to comment 4. The age, sex, and reproductive condition must be provided when possible. However, this is often extremely difficult to predict. Additional mitigation measures for bowhead cow/calf pairs, such as monitoring the 120-dB radius and requiring shutdown when 4 or more cow/calf pairs enter that zone, were considered and required for this survey.

*Comment 16:* Stating that airgun noise can cause direct injury to marine mammals, Dr. Bain points out that (1) "airgun arrays do not project noise equally in all directions," and that "beams formed by the arrays can cause an animal moving from high exposure toward lower exposure to move toward the travel path of the seismic survey vessel, ultimately resulting in higher exposure;" (2) "the flight path of animals moving away is not always optimal. Animals may begin by swimming directly away from the array. However, if the array is moving toward them at faster than their sustained swimming speed, the array will approach them. After a while, animals may change tactics to moving orthogonal to the direction of array movement. While orthogonal movement will ultimately reduce the maximum noise level experienced, it allows the seismic survey vessel to close on their location faster. Shortly before the animals are orthogonal to the survey vessel, they may turn and head in the opposite direction of the survey vessel, briefly approaching it, but then increasing the distance between them at close to the highest possible rate;" (3) if pinnipeds do not move away, "the seismic survey vessel can approach them," that "orienting behavior is interrupted with occasional swimming behavior. While the swims can increase the distance between the pinniped and the vessels track line, submerging exposes the ears to the full intensity of the received pulses"; (4) marine mammals may tolerate injury while feeding, because "[f]ishers and NMFS personnel have shot animals and used seal bombs to inflict pain in unsuccessful efforts to deter depredation," and that "predators sometimes swallow hooks along with their prey."

*Response:* While NMFS recognizes that intense noise exposure can cause direct harm to marine mammals, as discussed in the **Federal Register** for the proposed IHA (75 FR 32379; June 8, 2010) and in this document, the intensities of received levels need to be significantly higher or the exposure duration be significantly longer than those at issue here to cause TTS, let alone injury. Please refer to these documents and the EA for a detailed discussion on the noise impacts to marine mammals. The points Dr. Bain made in his comment do not support his argument. Regarding the first point, Dr. Bain is correct that airgun arrays do not project noise equally in all directions. As an airgun is designed to project its impulse downward, most of its acoustic energy is confined in downward beams. Although there is a significant amount of energy being propagated horizontally, especially close by, the intensity of noise is much less when compared to downward acoustic intensities. As acoustic energy travels from its source outwards, an animal moving from higher received levels to lower received levels is generally moving away from the source (the seismic airgun). At long distances where certain higher received levels form due to multi-path propagation and refraction, movement from higher received levels to lower received levels may not necessarily mean that the animal is moving away from the source. However, at this long distance, the received levels are expected to be much lower (below 160 dB) and the distances are expected to be far beyond the zone of influence. This response also addresses part of Dr. Bain's second point regarding animal movement. In addition, the seismic vessel is prohibited from approaching marine mammals within specific safety zones (180 dB isopleths at 2,500 m for cetaceans and 190 dB isopleths at 700 m for pinnipeds). Therefore, to address Dr. Bain's second and third points, regardless of whether animals are moving or not, the seismic vessel is not allowed to approach marine mammals within the designated safety zones. Finally, Dr. Bain's last point regarding the use of seal bombs to inflict pain and "predators sometimes swallow hooks along with their prey," is irrelevant to our MMPA findings for Statoil's seismic activities. Statoil's activities do not involve the use of seal bombs and there is no connection between predators swallowing hooks along with their prey and the use of seismic airguns.

*Comment 17:* Dr. Bain states that "[b]ubble formation may be caused by moderate levels of noise. Rectified diffusion (Crum and Mao 1996) and decompression sickness (Jepson *et al.* 2003) are two postulated mechanisms for this. In rectified diffusion, acoustic energy causes gas to diffuse from the blood into small bubbles. Since bubbles are smaller when compressed, and larger when rarified, the net diffusion is into the bubble, leading to bubble growth in blood, fat, or other tissues, to injurious size." He also states that behaviorally mediated decompression sickness is considered more likely than rectified diffusion as the cause of bubble formation (Cox *et al.* 2006).

*Response:* Although it has been suggested that bubble formation due to nitrogen gas bubble growth, resulting in effects similar to decompression sickness in humans (Jepson *et al.* 2003; Fernández *et al.* 2004, 2005), may be the cause for at least some of the beaked whale mass strandings that occurred in association with mid-frequency active sonar operations, the hypothesis remains untested and the acoustic causative mechanism remains unknown today. In addition, the pathway concerning nitrogen supersaturation levels for deep-diving species of interest, including beaked whales, are based on theoretical models (Houser *et al.* 2001; Southall *et al.* 2007), and no unequivocal support for any of the pathways presently exists.

Finally, the suspected bubble formation by acoustic sources, and the induced atypical diving pattern that are theorized to cause decompression sickness in deep diving marine mammals (such as beaked whales), were mostly speculated to be caused by tactical mid-frequency sonar associated with military exercises, not by airgun impulses from seismic surveys.

*Comment 18:* While discussing impacts specific to the Chukchi Sea, Dr. Bain states that displacement from feeding areas is an even greater concern for harbor porpoises. Dr. Bain adds his personal observations that due to their small size, going without food for a few days can be fatal to harbor porpoises; and that harbor porpoises in Juan de Fuca Strait and Haro Strait experienced a doubling of mortality rates following exposure to a series of mid-frequency sonar exercise.

*Response:* Dr. Bain did not provide any details to support his observations in the comments, and NMFS is not aware of any studies that support Dr. Bain's claim. Because there is no information showing that the doubling of mortality rate in harbor porpoises in Juan de Fuca Strait and Haro Strait is related to the mid-frequency sonar exercise, a causative relationship between the two cannot be derived.

As discussed previously, due to the limited area (531 $km^2$ for an area ensonified by received levels higher than 160 dB) that would be ensonified by the seismic airguns and the relatively short duration of the surveys (total of 60 days), and the constant movement of the

seismic vessel, it is unlikely that harbor porpoises or any other marine mammals would be displaced for any significant amount of time by the proposed open water seismic surveys. Therefore, even if marine mammals temporarily avoid an area that might be their feeding ground due to the seismic survey, the duration of the displacement is expected to be short, so that animals will not lose feeding opportunities for more than a few hours up to a day. In addition, the majority of sound sources from airgun arrays are in the low-frequency range, which is outside harbor porpoises' sensitive hearing range. Therefore, even though the intensities of seismic impulses are high, these impulses may not be perceived as intense noise by harbor porpoises due to their high-frequency hearing.

*Comment 19:* AEWC states that in assessing the level of take and whether it is negligible, NMFS relied on flawed density estimates that call into question all of NMFS' preliminary conclusions. AEWC states that density data are lacking or outdated for almost all marine mammals that may be affected by Statoil's operations in the Chukchi Sea. AEWC argues that NMFS' guess at the number of beluga and bowhead whales relies on a study from Moore *et al.* (2000), which was ten years old. AEWC says that the estimate is contrary to the best available scientific information on beluga whale presence in the Chukchi Sea. AEWC points out that the most recent Alaska Marine Mammal Stock Assessment dates from 2009 and was issued in February 2010 (Allen and Angliss 2010), but Statoil's IHA application relied on the 2008 Alaska Marine Mammal Stock Assessment (Angliss and Allen 2009). AEWC further states that Allen and Angliss (2010) likely underestimated the size of the eastern Chukchi Sea beluga whale stock.

AEWC also notes that the density of bowhead whales was derived from the same ten-year-old report (Moore *et al.* 2000) as was used to calculate beluga whale densities. AEWC points out that NMFS makes no mention of the most recent Alaska Marine Mammal Stock Assessment which was released this year, and that the Assessment cites to a 2003 study that documented bowheads "in the Chukchi and Bering Seas in the summer" that are "thought to be a part of the expanding Western Arctic stock" (Allen and Angliss 2010). While a study published in 2003 still is not a sufficient basis for a 2009 density analysis, this study does show that additional information is available that indicates that the number of bowhead whales in the Chukchi may be higher than estimated by NMFS. NSB also points out that Statoil references aerial surveys conducted by Shell and ConocoPhilips between 2006 and 2008 occurred exclusively in nearshore areas and not within Statoil's proposed operation area.

*Response:* As required by the MMPA implementing regulations at 50 CFR 216.102(a), NMFS has used the best scientific information available in assessing the level of take and whether the take by harassment will have a negligible impact on affect species or stocks. As far as the best scientific information is concerned, NMFS still considers Moore et al. (2000) to provide the best density estimate for the eastern Chukchi Sea population of beluga whales. The Alaska Marine Mammal Stock Assessment reports (Angliss and Allen 2009; Allen and Angliss 2010) do not report density estimates of the beluga whale population, they provide population estimates of marine mammal species and stocks. Furthermore, for the eastern Chukchi Sea stock of beluga whales, Allen and Angliss (2010) and Angliss and Allen (2009) provide the same average estimates of 3,710 individuals, therefore, even though Statoil used an earlier version of the Alaska Marine Mammal Stock Assessment Report, its number is the same as the 2010 report.

Similarly, the Alaska Marine Mammal Stock Assessment only reports the abundance and population size, it does not provide density estimates of marine mammals in the proposed project area. The 2003 study noted by AEWC in the bowhead whale Alaska Marine Mammal SAR discusses distribution, not density (Rugh *et al.* 2003). It was not cited because it is not useful for deriving density estimates. Therefore, density estimates for bowhead and beluga whales using Moore *et al.* (2000) are based on the best available science.

Although most data used for marine mammal density are from Moore *et al.* (2000), information from other sources, wherever available, such as aerial surveys conducted by Shell and ConocoPhilips between 2006 and 2008 (Haley *et al.* 2009), were also used to fill data gaps.

*Comment 20:* AEWC states that NMFS fails to explain how and why it reaches various conclusions in calculating marine mammal densities and what the densities are actually estimated to be once calculated. One example is NMFS' reliance on Moore *et al.* (2000) in making its density determinations. This study documented sightings of marine mammals but did not estimate the total number of animals present. AEWC states that NMFS's practices have resulted in entirely arbitrary calculations of the level of take of marine mammals and whether such takes constitute "small numbers" or a "negligible impact" as a result of Statoil's proposal.

*Response:* All densities used in calculating estimated take of marine mammals based on the described operations are shown in Tables 2 and 3 of Statoil's application. Moore *et al.* (2000) provides line transect effort and sightings from aerial surveys for cetaceans in the Chukchi Sea. Species specific correction factors for animals that were not at the surface or that were at the surface but were not sighted [g(0)] and animals not sighted due to distance from the survey trackline [f(0)] used in the equation were taken from reports or publications on the same species or similar species (if no values were available for a given species) that used the same survey platform. Additional explanations regarding the calculations of marine mammal densities are provided in Statoil's application and the **Federal Register** notice for the proposed IHA (75 FR 32379; June 8, 2010). Therefore, NMFS believes the methodology used in take calculations of the level of take of marine mammals is scientifically well supported.

*Comment 21:* AEWC is opposed to NMFS using "survey data" gathered by industry while engaging in oil and gas related activities and efforts to document their take of marine mammals. AEWC points out that such industry "monitoring" is designed to document the level of take occurring from the operation (see 75 FR 32379 and Statoil's 4MP). AEWC argues that putting aside whether the methodologies employed are adequate for this purpose, they certainly are not adequate for assessing the density or presence of marine mammals that typically avoid such operations.

*Response:* In making its determinations, NMFS uses the best scientific information available, as required by the MMPA implementing regulations. For some species, density estimates from sightings surveys, as well as from "industry surveys", were provided in the text of Statoil's application and the Notice of Proposed IHA for purposes of comparison. However, where information was available from sightings surveys (e.g., Moore *et al.* 2000; Bengtson *et al.* 2005), those estimates were used to calculate take. Data collected on industry vessels were only used when no other information was available. Additionally, while some Arctic marine mammal species have shown fleeing responses to seismic airguns, data is also collected on

these vessels during periods when no active seismic data collection is occurring.

*Comment 22:* AEWC states that as a general matter, when it comes to NMFS assessing the various stocks of marine mammals under the MMPA, it cannot use outdated data i.e., "abundance estimates older than 8 years" because of the "decline in confidence in the reliability of an aged abundance estimate" (Angliss and Allen 2009) and the agency is thus unable to reach certain conclusions. Similarly, here, where data are outdated or nonexistent, NMFS should decide it cannot reach the necessary determinations. AEWC argues that these flaws in NMFS' analysis render the agency's preliminary determinations about the level of harassment and negligible impacts completely arbitrary.

*Response:* The statements quoted by AEWC from Angliss and Allen (2009) are contained in species SARs where abundance estimates are older than 8 years. However, the full statement reads as follows: "However, the 2005 revisions to the SAR guidelines (NMFS 2005) state that abundance estimates older than 8 years should not be used to calculate PBR due to a decline in confidence in the reliability of an aged abundance estimate." Statoil's activities are not anticipated to remove any individuals from the stock or population. Therefore, a recent estimate of PBR is not needed for NMFS to make the necessary findings under Section 101(a)(5)(D) of the MMPA. Additionally, Statoil's application provides information (including data limitations) and references for its estimates of marine mammal abundance. Because AEWC has not provided information contrary to the data provided by Statoil, and NMFS does not have information that these estimates are not reliable, NMFS considers these data to be the best available.

*Comment 23:* Dr. Bain states that standard terminology in the field of density estimates is not used in density estimates, specifically citing the use of f(0). Dr. Bain recommends that an f(0) should be calculated from the data when there is a reference to 891 "transect" sightings of bowheads and that these sightings should have been used in Distance to calculate an f(0) for bowheads and states that it is reasonable to assume this has already been done. Dr. Bain states that log-normal confidence limits should be used when calculating the densities and that the upper confidence limits should be used as the point estimate in the take calculations. Dr. Bain recommends that double-platform trials should be run in Distance to better estimate g(0).

*Response:* The traditional f(0) parameter and terminology are used throughout the density estimate descriptions in Statoil's application.

However, there is no reference given for the 891 "transect" sightings which would allow an evaluation of whether or not the associated covariates suggested by Dr. Bain are available for the recommended analysis. Also, Dr. Bain did not provide a reference for the results of such an analysis that he suggests are reasonable to assume exist.

The equations for the calculation of log-normal confidence limits are provided and an example using "three point estimates of summertime density of bowhead whales" is shown. However, there is no indication of where the three point estimates of summertime densities came from and values in the application do not combine to replicate the estimate provided. Using the upper confidence limits of an estimate is an extremely conservative approach on top of already conservative assumptions regarding received sound levels. Maximum densities and associate take estimates provided in the application are meant to provide upper estimates similar to those suggested from using the upper confidence limits. Basing decisions on take estimates from the upper confidence limits is, as Dr. Bain points out, extremely precautionary, and NMFS does not believe it represents the best available scientific approach.

Since no reference is given for such double-platform data on bowheads. NMFS is not aware of the existence or availability of sufficient data from double-platform trials while surveying bowheads to do the recommended analysis. Collection of an adequate dataset would likely require multiple years of aerial surveys using two observers on each side of the aircraft that collect data independently of each other, which is impracticable due to the scope and scale of the research. Nevertheless, based on available data and analysis, NMFS believes that existing datasets are adequate to address the degrees and levels of potential impacts to marine mammals as a result of the proposed seismic surveys in the project vicinity.

*Comment 24:* Dr. Bain points out that use of the statistical method for incorporating uncertainties is trivial. He further states that the data were inappropriately split to estimate densities and that the raw data should have been analyzed using multivariate modeling approaches available in Distance.

*Response:* As suggested by Dr. Bain, incorporating uncertainty associated with various parameters in a density estimate is relatively easier when working with actual raw survey data by using the Distance software. However, data or analyses of the type suggested on the relevant species at the location and time of the proposed project are not available. Estimates of uncertainty are not necessarily available for all parameters found in the literature that were used to calculate estimated densities. Although incorporating all parameters and associated uncertainties into a single framework would indeed be a good approach, it would not be practical for an applicant to conduct analyses in such detail and large scale. As stated earlier, NMFS believes that existing datasets are adequate to address the degrees and levels of potential impacts to marine mammals as a result of the proposed seismic surveys in the project vicinity.

As for the final point, data "splits" used in the application were based on a published article and the necessary data to do the analysis as Dr. Bain suggested using Distance are not available.

*Comment 25:* Commenting on Southall *et al.* (2007), Dr. Bain states that Southall *et al.'s* review relied on published reports, and they were selective for datasets reported in a way that fit their categorization scheme. Dr. Bain points out that other workers have access to raw data and can rescore behavioral responses using Southall *et al.'s* system (*e.g.,* Bain and Williams in review). Dr. Bain further states that he found that the approach of generalizing responsiveness based on morphological group, such as pinnipeds, high-frequency hearing specialists (small odontocetes), low-frequency specialists (mysticetes), etc., unlikely to be valid, as sibling species such as Dall's and harbor porpoises differed dramatically in their responses to noise from the same airguns in the same geographic area, and harbor porpoises appeared more responsive to airguns than low-frequency specialists like gray whales.

*Response:* NMFS does not agree with Dr. Bain's assessment on Southall *et al.'s* review. First, the central purpose of the Southall *et al.* (2007) paper is to propose, for various marine mammal groups and sound types, levels above which there is a scientific basis for expecting that exposure would cause auditory injury to occur. Although behavioral or electrophysiological audiograms only exist for approximately 20 marine mammal species (of ~128 species and subspecies; Rice 1998), however, since physiological effects of

the auditory structure, *i.e.,* TTS or PTS, are closely related to the frequency ranges of acoustic signals that are sensitive to a particular audio-physiology mechanism, by combining audiograms of known marine mammal species with comparative anatomy, modeling, and response measured in ear tissues from species that are difficult to study, it is a valid approach to classify marine mammal hearing based on their functional hearing groups. Although the current classification of five functional hearing groups (*i.e.,* low-frequency cetacean, mid-frequency cetacean, high-frequency cetacean, pinnipeds in water, and pinnipeds in air) is still in its initial stage, and further improvements are no doubt needed as more scientific information becomes available, these improvements are likely to be focusing on refining the current groupings (*e.g.,* dividing pinnipeds into otariids and phocids). NMFS considers the use of these functional hearing groups in addressing physiological effects and hearing impairment a valid approach.

Second, as far as behavioral effects are concerned, Southall *et al.* (2007) admits that "the available data on behavioral responses do not converge on specific exposure conditions resulting in particular reactions, nor do they point to a common behavioral mechanism." They further points out that "[i]t is clear that behavioral responses are strongly affected by the context of exposure and by the animal's experience, motivation, and conditioning." Therefore, behavioral responses to external stimuli may not be able to be addressed just based on received levels. For example, in Bain and Williams (in review) it is stated that Dall's porpoises were "observed at received levels up to approximately 180 dB re 1 µPa p-p," while harbor porpoises were "recorded at received levels up to 155 dB re 1 µPa p-p, and all individuals were moving away at this level," it is possible that a major factor causing the harbor porpoises to move away was the researchers' vessel that was closely approaching the animals at approximately 20 km/h. We believe a more rigorously designed controlled exposure experiment or behavioral response study is required to obtain unbiased data to address behavioral responses of marine mammals to anthropogenic sound. For this reason, studies used in the Southall *et al.* (2007) review were carefully selected to include studies where "noise exposure (including source and received levels, frequency, duration, duty cycle, and other factors) was either directly reported or was reasonably estimated using simple sound propagation models deemed appropriate for the sources and operational environment" (Southall *et al.* 2007).

Nevertheless, for regulatory purposes, NMFS has been using 160 dB re 1 µPa (rms) as the onset for behavioral harassment when exposed by impulse sources. The basis for choosing received levels corresponding to the onset of behavioral harassment came from many field observations and analyses (*see* review by Richardson *et al.* 1995; Southall *et al.* 2007) that NMFS considers representative in many situations.

*Comment 26:* Dr. Bain states that changes in behavior resulting from noise exposure could lead to injury or death through a number of mechanisms, and he gave the example that "hearing loss due to PTS or TTS may prevent animals from detecting approaching vessels, leading to collisions between marine mammals and vessels," and that such collisions are often ultimately fatal, and that hearing loss may also lead to entanglement and increased risk of predation. Dr. Bain states that hearing ability can also be impaired during exposure to low levels of noise, causing masking. Dr. Bain also points out that another behavioral response to noise is flight, and that "flight can result in stranding (NOAA and Navy 2001), or extreme exhaustion resulting in muscle damage or heart failure (Williams and Thorne 1996)."

*Response:* NMFS agrees that it is possible that changes in behavior or auditory masking resulting from noise exposure could lead to injury in marine mammals under certain circumstances, such as the hypothesized atypical diving patterns that may be exhibited by beaked whales when exposed to military tactical mid-frequency sonar, as discussed earlier and in NOAA and Navy (2001) cited by Dr. Bain in his comment. However, in most cases, changes in behavior resulting from noise exposure do not lead to PTS or TTS as apparently assumed by Dr. Bain in his comment. Additionally, as discussed in the **Federal Register** notice for the proposed IHA and in this document, marine mammals exposed to the proposed Statoil seismic surveys are not expected to experience TTS or PTS with the implementation of appropriate monitoring and mitigation measures. Furthermore, the assumption that Dr. Bain made that "exhaustion from rapid flight leading to heart or other muscle damage" could account for mortality merely because of exposure to airgun noise has no scientific basis.

For issues regarding behavioral change and masking by the proposed Statoil seismic surveys, NMFS does not believe that received SPLs from the airgun arrays would cause drastic changes in behavior or auditory masking in marine mammals outside the safety zones. Unlike military sonar, seismic pulses have an extremely short duration (tens to hundreds of milliseconds) and relatively long intervals (several seconds) between pulses. Therefore, the sound energy levels from these acoustic sources and small airguns are far lower in a given time period. Second, the intervals between each short pulse would allow the animals to detect any biologically significant signals, and thus avoid or prevent auditory masking. Although airgun pulses at long distances (over kilometers) may be "stretched" in duration and become non-pulse due to multipath propagation, the intervals between the non-pulse noises would still allow biologically important signals to be detected by marine mammals. In addition, NMFS requires mitigation measures to ramp-up acoustic sources at a rate of no more than 6 dB per 5 min. This ramp-up would prevent marine mammals from being exposed to high levels of noise without warning, thereby eliminating the possibility that animals would dramatically alter their behavior (i.e. from a "startle" reaction).

*Comment 27:* Citing research on long term adverse effects to whales and dolphins from whale watching activities (Trites and Bain 2000; Bain 2002; Lusseau *et al.* 2009), Dr. Bain states that Level B behavioral harassment could be the primary threat to cetacean populations.

*Response:* Although NMFS agrees that long-term, persistent, and chronic exposure to Level B harassment could have a profound and significant impact on marine mammal populations, such as described in the references cited by Dr. Bain, those examples do not reflect the impacts of seismic surveys to marine mammals for Statoil's project. First, whale watching vessels are intentionally targeting and making close approaches to cetacean species so the tourists onboard can have a better view of the animals. Some of these whale/dolphin watching examples cited by Dr. Bain occurred in the coastal waters of the Northwest Pacific between April and October and for extended periods of time ("[r]ecreational and scientific whale watchers were active by around 6 a.m., and some commercial whale watching continued until around sunset"). Thus multiple vessels have been documented to be in relatively close proximity to whales for about 12 hours a day, six months a year, not counting some "out of season" whale

watching activities and after dark commercial filming efforts. In addition, noise exposures to whales and dolphins from whale watching vessels are probably significant due to the vessels' proximity to the animals. To the contrary, Statoil's proposed seismic survey, along with existing industrial operations in the Arctic Ocean, does not intentionally approach marine mammals in the project areas. Statoil's survey locations are situated in a much larger Arctic Ocean Basin, which is far away from most human impacts. Therefore, the effects from each activity are remote and spread farther apart, as analyzed in NMFS' 2010 EA, as well as the MMS 2006 PEA. Statoil's seismic activities would only be conducted between late July and October for about 60 days, weather permitting. In addition, although studies and monitoring reports from previous seismic surveys have detected Level B harassment of marine mammals, such as avoidance of certain areas by bowhead and beluga whales during the airgun firing, no evidence suggests that such behavioral modification is biologically significant or non-negligible (Malme *et al.* 1986; 1988; Richardson *et al.* 1987; 1999; Miller *et al.* 1999; 2005), as compared to marine mammals exposed to chronic sound from whale watching vessels, as cited by Dr. Bain. Therefore, NMFS believes that potential impacts to marine mammals in the Chukchi Sea by seismic surveys would be limited to Level B harassment only, and due to the limited scale and remoteness of the project in relation to a large area, such adverse effects would not accumulate to the point where biologically significant effects would be realized.

*Comment 28:* Dr. Bain notes that NMFS uses different thresholds for continuous and pulsed sounds, and that "NMFS based its use of a 120 dB contour for continuous sounds primarily on studies of bowheads and gray whales." Dr. Bain observes that "these studies were conducted based on whales close to noise sources," and the "120 dB contour was commonly the level at which 50% of the animals exposed to noise showed observable changes in behavior, such as deflection of the travel path away from the source." Dr. Bain states that there are two problems with this interpretation of the data: (1) This implies that 50% of the whales observed responded to levels lower than 120 dB. That is, 120 dB is not a threshold for a species but a median value of thresholds of individuals. The likelihood that individuals will be taken by exposure to noise levels below 120 dB declines with received level, but does not approach 0 until the received level approaches the limit of audibility; and (2) individuals that responded to levels much lower than 120 dB were not included in these studies, as they did not approach close enough to be observed. NSB also states that bowhead whales showed almost total avoidance of an area around seismic surveys where received sound levels were greater than 120 dB (LGL Ltd. and Greenridge Sciences 1999), and that since the ensonified area for 120 dB is huge, the entire bowhead population could be affected.

*Response:* Since Dr. Bain did not provide any reference in his comment, the validity of his notes and observation cannot be verified. However, NMFS is not aware of the "use of a 120 dB contour for continuous sounds" on any marine mammal species. The basis for choosing received levels corresponding to the onset of behavioral harassment came from many field observations and analyses (*see* review by Richardson *et al.* 1995; Southall *et al.* 2007) on measured avoidance responses in whales in the wild. It is also important to know that NMFS uses different received levels for behavioral harassment caused by impulse and non-impulse noises (i.e., received level at 160 dB re 1 µPa for impulse and 120 dB re 1 µPa for non-impulse). To be specific, the 160 dB re 1 µPa (rms) threshold was derived from data for mother-calf pairs of migrating gray whales (Malme *et al.* 1983; 1984) and bowhead whales (Richardson *et al.* 1985; Richardson *et al.* 1986) responding when exposed to seismic airguns (impulsive sound source). The 120 dB re 1 µPa (rms) threshold also originates from research on baleen whales, specifically migrating gray whales (Malme *et al.* 1984; predicted 50% probability of avoidance) and bowhead whales reacting when exposed to industrial (i.e., drilling and dredging) activities (non-impulsive sound source) (Richardson *et al.* 1990).

Second, Dr. Bain confused "take" under the MMPA with any observed behavioral response. A "take" by Level B harassment is defined as "any act of pursuit, torment, or annoyance which * * * 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" (emphasis added). A brief startling response without subsequent change of the animal's ongoing behavioral pattern, for example, does not constitute a "take" under the definition of MMPA. Therefore, marine mammals that briefly respond to certain received noise levels may not be "taken," as long as there is no disruption of their behavioral patterns.

Finally, as stated above, received levels at 160 dB re 1 µPa is currently used by NMFS as the onset of behavioral harassment for impulses, and source characteristics from airgun arrays are classified as impulses. Therefore, the 120 dB continuous noise discussion in Dr. Bain's comment is inapplicable.

*Comment 29:* Citing works by Calambokidis *et al.* (1998) and Bain and Williams (in review) on impacts of marine mammal behavioral by seismic surveys, Dr. Bain states that harbor porpoises are more likely to be affected by lower received levels than other cetaceans. Dr. Bain states that he believes "the segregation of population by noise tolerance (and physical ability to avoid the noise source) provides an explanation for why some studies detect marine mammals close to noise sources, and other show responses to received levels in the neighborhood of 90 dB or less at great distance." Dr. Bain further states that future work will be needed to elucidate nuances of how those probabilities are influenced by non-noise factors such as location, activity state, or individual factors like age, sex, reproductive status, health status, group composition, and previous experience with noise exposure. Dr. Bain concludes that "bowhead and gray whales can be expected to respond out to the 120 dB contour, with more sensitive individuals perhaps responding at the 105 dB contour. Killer whales and belugas would be expected to respond at the 105 dB contour, with the need for social cohesion resulting in less variability in response than seen in bowheads and grays. Harbor porpoises are likely to exhibit responses out to the level of detection, as they have been shown to respond to received noise below 90 dB in quiet water."

*Response:* NMFS agrees that behavioral responses by marine mammals to noise sources vary with species, population, behavioral context, age, sex, and source characteristics, etc., and NMFS has been looking into these factors and is supporting research such as behavioral response studies (BRS) at the Atlantic Undersea Test and Evaluation Center (AUTEC) in the Bahamas, the Mediterranean Sea, and off southern California to elucidate factors that could induce behavioral responses on cetaceans by various noise sources, particularly by military sonar. Nevertheless, at the current stage, as stated above, NMFS still uses the 120 dB and 160 dB re 1 µPa as the threshold for the onset of behavioral harassment

for non-impulse and impulse noise sources, respectively. Based on many field studies and observations (*see* review by Richardson *et al.* 1995; Southall *et al.* 2007), NMFS believes that these thresholds are conservative and can provide relatively fair estimates of marine mammals potentially subject to harassment.

Dr. Bain did not provide any reference to support his claim that "bowhead and gray whales can be expected to respond out to the 120 dB contour, with more sensitive individuals perhaps responding at the 105 dB contour. Killer whales and belugas would be expected to respond at the 105 dB contour, with the need for social cohesion resulting in less variability in response than seen in bowheads and grays. Harbor porpoises are likely to exhibit responses out to the level of detection, as they have been shown to respond to received noise below 90 dB in quiet water." Additionally, Dr. Bain did not provide what these responses are and whether they meet the definition of "takes" under the MMPA.

*Comment 30:* Citing his manuscript (Bain and Williams, in review) on effects of large airgun arrays on the behavior of marine mammals at long distances in the waters of British Columbia, Canada and Washington State, USA, Dr. Bain argues that marine mammals can be taken at much lower received levels, and states that NMFS underestimated take numbers of marine mammals.

*Response:* NMFS reviewed Dr. Bain's attached manuscript (Bain and Williams, in review), which was attached with his comments. The paper examines the effects of large airgun arrays on behavior of marine mammals in the waters of British Columbia, Canada and Washington State, USA, using a small boat to monitor out to long ranges (1 to > 70 km from the seismic source vessel), and contains some information concerning marine mammals that were apparently affected by the seismic survey. The paper, which was originally presented at the IWC meeting in 2006, concludes that a significant relationship was observed between the magnitude of behavioral response and peak-to-peak received level and the long distances at which behavioral responses were observed (≤ 60 km for harbor porpoise), along with counter-productive behavior that occasionally brought individuals into higher-intensity acoustic zones. However, there are potential design flaws in this study. First, the paper states a launch carried aboard the seismic receiver vessel was placed in the water to perform received level measurements near marine mammals. When making acoustic measurements, the launch "travelled along a line at approximately 20 km/h until either marine mammals were closely approached, or the launch had travelled 10 km." Therefore, it is highly likely that behavioral reactions from observed marine mammals were caused by the high-speed, close-approach of the launch, rather than from distant seismic airguns. This experiment design may explain the authors' observation of "counter-productive behavioral responses" that animals are moving into higher-intensity acoustic zones, which probably indicates that behavioral changes caused by Bain's launch greatly exceeded any behavioral change resulting from exposure to seismic airgun noise. Second, the authors of the paper also expressed "methodological concerns due to the subjectivity of observers." Nevertheless, this study (Bain and Williams, in review) concludes that harbor seal individuals were generally moving away from the airguns at exposure levels above 170 dB re 1 μPa (p-p) and that gray whales were observed at received levels up to approximately 170 dB re 1 μPa (p-p) exhibiting no obvious behavioral response. These observations contradict Mr. Bain's earlier comments that major behavioral effects result from noise in the 105—125 dB range.

Finally, Bain and Williams (in review) also state that the study "found that while airguns concentrated their sound output at low frequencies, substantial high frequency energy (to at least 100 kHz) was also present." However, the paper provides no explanation as to how this conclusion was made. The accompanying power density spectrum (Figure 2 in Bain and Williams, in review) of the paper fails to show evidence that the frequencies above 1 kHz were mostly contributed from seismic airguns, and there was no indication at what distance this recording was made. Therefore, Bain and Williams (in review) cannot be used to interpret marine mammal behavioral reactions to long distance seismic sources because it fails to provide a valid argument that the behavioral reactions by observed marine mammals are from seismic noises and that the acoustic energy of the recorded broadband received levels (up to 100 kHz) is entirely from seismic airguns.

*Comment 31:* Stating marine mammal takes could occur at received levels at 90 dB, Dr. Bain claims that he used the applicant's equation of RL = 157.2 − 35.3 LOG (R/10000) − 0.0000064 (R − 10000) to estimate the distance to the 135 dB, 120 dB, 105 dB, and 90 dB contours, and showed that the best fit distances of these isopleths to be 42000, 110000, 270000, and 620000 (no units given), respectively, with relative areas at 10, 72, 431, and 2274 (no units given), respectively; the 90th percentile distances of these isopleths to be 45000, 116000, 285000, and 650000 (no units given), respectively, and the relative areas of these isopleths to be 12, 80, 311, and 2500 (no units given), respectively. In comparison, Statoil's estimated received level at 120–dB isopleths is 70–120 km from the source (75 FR 32379; June 8, 2010).

*Response:* First, Statoil did not use the equation in Dr. Bain's comment for the estimates of distances to safety zones (180-dB and 190-dB re 1 μPa for cetaceans and pinnipeds, respectively) and zone of influence (160-dB re 1 μPa isopleths). As stated in Statoil's IHA application and in the **Federal Register** notice for the proposed IHA (75 FR 32379; June 8, 2010), the basis for the estimation of distances to the four received sound levels (190 dB, 180 dB, 160 dB, and 120 dB re 1 μPa) from the proposed 3000 $in^3$ airgun array operating at a depth of 20 ft (6 m) are the 2006, 2007 and 2008 sound source verification (SSV) measurements in the Chukchi Sea of a similar array, towed at a similar depth. The measured airgun array had a total discharge volume of 3,147 $in^3$ and was composed of three identically-tuned Bolt airgun sub-arrays, totaling 24 airguns (6 clusters of 2 airguns and 12 single airguns). The proposed 3,000 $in^3$ array is also composed of three strings with a total of 26 active airguns in 13 clusters (five clusters of 10 airguns are inactive and will be used as spares). The difference in discharge volume would lead to an expected loss of less than 0.2 dB and is neglected in this assessment. The estimated source level for the full 3,000 $in^3$ array is 245 dB re 1 μPa (rms). Before SSV tests could be conducted for the 3,000 $in^3$ array that would be used for the proposed seismic survey, it is reasonable to adopt the maximum distances obtained from a similar array during previous measurements in the Chukchi Sea. Therefore, the distances to received levels of 190, 180 160, and 120 dB re 1 μPa (rms) are conservatively estimated at 700, 2,500, 13,000, and 70,000–120,000 m, respectively. The only propagation equation Statoil used in estimating the zones of different isopleths is the one used to calculate the safety zones and zone of influence for the 60 $in^3$ mitigation gun, which was adjusted by adding 3 dB. The term of the equation is:

RL = 226.6 − 21.2log(R) − 0.00022R,
where R is distance in m.

Second, based on the equation Dr. Bain provided, NMFS calculated the distances to 190 and 180-dB received levels at 1,180 m and 2,260 m, respectively, which are very different from what Dr. Bain reported at 370 and 1,100 (units not given), respectively, for "best fit", and 450 and 1,400 (units not given), respectively, for "90th percentile." Finally, without field measurements, NMFS does not know, and Dr. Bain did not explain, how the "best fit" and "90th percentile" were calculated.

*Comment 32:* Dr. Bain states that recent declines in gray whale populations have resulted in the population dropping below the level at which they were delisted, and that emaciation has been observed in many gray whales that have stranded this year, so exclusion from potential feeding grounds is of extra concern this year. Further, Dr. Bain states that harbor porpoises can be affected at large distances from noise sources, and hence large numbers would be expected to be affected by this and other activities. He points out that although NMFS currently recognizes only a single, large stock whose range includes the project area, genetic and movement studies in other parts of the harbor porpoise range have shown that stocks tend to be much smaller and have limited ranges. Finally, Dr. Bain points out that cumulative effects on belugas and other species are likely to have been underestimated because the "greater range at which they are likely to be affected and the potential for greater overlap between the project activities and migration through the area than considered by NMFS for this and the shallow water survey make this the case."

*Response:* Systematic counts of Eastern Pacific gray whales migrating south along the central California coast have been conducted by shore-based observers at Granite Canyon most years since 1967. The most recent abundance estimates are based on counts made during the 1997–98, 2000–01, and 2001–02 southbound migrations. Analyses of these data resulted in abundance estimates of 29,758 for 1997–98, 19,448 for 2000–01, and 18,178 for 2001–02 (Rugh *et al.* 2005). NMFS is aware of the 2000–01 and 2001–02 population drops in the gray whales, nevertheless, to a certain degree, variations in estimates may be due in part to undocumented sampling variation or to differences in the proportion of the gray whale stock migrating as far as the central California coast each year (Hobbs and Rugh 1999). The decline in the 2000–01 and 2001–02 abundance estimates may be an indication that the abundance was responding to environmental limitations as the population approaches the carrying capacity of its environment (Allen and Angliss 2010). Low encounter rates in 2000–01 and 2001–02 may have been due to an unusually high number of whales that did not migrate as far south as Granite Canyon or the abundance may have actually declined following high mortality rates observed in 1999 and 2000 (Gulland *et al.* 2005). Visibly emaciated whales (LeBoeuf *et al.* 2000; Moore *et al.* 2001) suggest a decline in food resources, perhaps associated with unusually high sea temperatures in 1997 (Minobe 2002). Several factors since this mortality event suggest that the high mortality rate was a short-term, acute event and not a chronic situation or trend: (1) Counts of stranded dead gray whales dropped to levels below those seen prior to this event, (2) in 2001 living whales no longer appeared to be emaciated, and (3) calf counts in 2001–02, a year after the event ended, were similar to averages for previous years (Rugh *et al.* 2005). Though it is impractical to exclude the proposed Statoil seismic survey entirely from the gray whale feeding areas (such as areas near Hanna Shoal), as discussed in the **Federal Register** notice for the proposed IHA (75 FR 32379; June 8, 2010) and in this document, the potential impacts to gray whales (and other marine mammals) is expected to be negligible. In addition, mitigation and monitoring measures described below would further reduce the potential impacts. Lastly, Statoil's surveys are not expected to destroy or result in any permanent impact on habitats used by gray whales or to their prey resources or to jeopardize the continued existence of the species.

Since delisting gray whales in 1994, NMFS has continued to monitor the status of the population consistent with its responsibilities under the ESA and the MMPA. In 1999, a NMFS review of the status of the eastern North Pacific stock of gray whales recommended the continuation of this stock's classification as nonthreatened (Rugh *et al.* 1999). Workshop participants determined the stock was not in danger of extinction, nor was it likely to become so in the foreseeable future. In 2001 several organizations and individuals petitioned NMFS to re-list the eastern North Pacific gray whale population. NMFS concluded that there were several factors that may be affecting the gray whale population but there was no information indicating that the population may be in danger of extinction or likely to become so in the foreseeable future. Wade and Perryman (2002) and Punt *et al.* (2004) (cited in the 2008 SAR, Angliss and Allen 2009) found that the stock is within its optimum sustainable population level and that the population is likely close to or above its unexploited equilibrium level. NMFS continues to monitor the abundance of the stock through the MMPA stock assessment process, especially as it approaches its carrying capacity. If new information suggests a reevaluation of the eastern North Pacific gray whales' listing status is warranted, NMFS will complete the appropriate reviews.

Without scientific support, NMFS does not agree with Dr. Bain's assumption that "harbor porpoises can be affected at large distances from noise sources, and hence large numbers would be expected to be affected by this and other activities." Due to the lack of robust field studies and observations, behavioral responses of harbor porpoises (a species in the "high-frequency cetacean" functional hearing group) to impulse noise sources such as those generated by airguns are poorly known. Given that they are high-frequency cetaceans, harbor porpoises are not considered to be sensitive to low frequency noise sources when compared to bowhead whales (which are "low-frequency cetaceans" species). However, NMFS currently uses 160 dB re 1 μPa (rms) as the threshold for the onset of behavioral harassment for all marine mammals. Therefore, NMFS believes its method for calculating takes of harbor porpoises using 160 dB re 1 μPa (rms) is reasonable.

Whether harbor porpoises occurring in Alaska waters belong to one single, large stock is still under scientific debate. Nevertheless, at this time, no data are available to reflect stock structure for harbor porpoise in Alaska, and for management purposes, NMFS Alaska Marine Mammal Stock Assessment reports consider only one Alaska stock of harbor porpoise (Allen and Angliss 2010). Should new information on harbor porpoise stocks become available, the harbor porpoise Stock Assessment Reports will be updated.

Finally, cumulative effects on beluga whales and other species are analyzed in NMFS 2010 EA for the proposed Shell and Statoil's marine and seismic surveys in the Beaufort and Chukchi Seas. The take calculation, which takes into considerations of seasonal and spatial distributions of marine mammals

in the proposed survey areas, is provided in Statoil's IHA application and in the **Federal Register** notice for the proposed IHA (75 FR 32379; June 8, 2010) and in this document.

*Comment 33:* Dr. Bain states that humpback whales are endangered and the stock inhabiting Northern Alaska has a small PBR. Due to uncertainty over the exact amount of human-caused mortality, it is unknown whether ongoing human-caused mortality exceeds potential biological removal (PBR). Although humpback use of the project area is likely to be minimal, any impact on humpbacks poses threats at both the individual and population level. The story is the same for fin whales, except that ongoing human-caused mortality is believed to be near zero if one does not consider ship strikes. Dr. Bain further states that the PBR for the Eastern Chukchi beluga stock is undetermined, because no recent population data are available. If PBR were estimated from old data, it would be 74; with an average annual subsistence harvest of 59, this leaves 15 individuals for other human-caused mortality, which is smaller than many aggregations of belugas. That is, if seismic surveys had lethal effects on a single group of belugas, it could put human-caused mortality over PBR. Finally, Dr. Bain states that killer whales have been observed in the project area, but the stock(s) present is unknown. They are most likely members of the Gulf of Alaska, Aleutian Islands, and Bering Sea Transient Stock, which has a PBR of 3.1, some of which is caused by fishery interactions. A little less likely to be present are members of the Eastern North Pacific Alaska Resident Stock, which has a PBR of 11.2, with an existing human-caused mortality of 1.5 per year. For members of either stock, lethal effects of noise to a single group would exceed PBR.

*Response:* Regarding humpback, fin, and killer whales, their occurrence in the proposed project area is rare, and NMFS take estimates show that only 2 individuals of each of these species would be taken by Level B behavioral harassment as a result of the proposed Statoil seismic survey in the Chukchi Sea. Although a total of 184 Eastern Chukchi Sea beluga whales are estimated to be taken by Level B behavioral harassment, these numbers represent less than 5 percent of the total Eastern Chukchi Sea beluga whales population. As mentioned in the **Federal Register** notice (75 FR 32379; June 8, 2010) and in this document, no takes by Level A harassment (injury) and death are expected or authorized for the proposed seismic activities. Therefore, the discussion of PBR is inapplicable to this action.

*Comment 34:* AWL notes that Statoil's closely spaced survey lines and large cross-track distances will result in the "repeated exposure of the same area of waters." AWL further states that although the area of overlap for 160-dB does not directly apply to the smaller 180- and 190-dB safety zones, the logic employed does reveal the potential for non-migratory species to encounter Statoil's surveying a number of times over its duration, since NMFS considers repeated exposure to sound levels that potentially cause TTS to potentially risk causing PTS.

*Response:* Repeated exposure may cause a marine mammal to exhibit diminished 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, which will not be the case with Statoil's seismic survey. Additionally, the relatively short crosstrack distance of the 180- and 190-dB radius associated with Statoil's seismic survey result in small areas of overlap of exposed waters during the survey.

Moreover, as explained in detail elsewhere in this document, marine mammals will need to be closer to the seismic source and be exposed to SPLs greater than 190 dB to be exposed to sound levels that could cause TTS. In order for a marine mammal to receive multiple exposures (and thereby incur PTS), the animal would: (1) Need to be close to the vessel and not detected during the period of multiple exposures; (2) be swimming in approximately the same direction and speed as the vessel; and (3) not be deflected away from the vessel as a result of the noise from the seismic array. Preliminary model simulations for seismic surveys in the Gulf of Mexico indicate that marine mammals are unlikely to incur single or multiple exposure levels that could result in PTS, as the seismic vessel would be moving at about 4–5 knots, while the marine mammals would not likely be moving within the zone of potential auditory injury in the same direction and speed as the vessel, especially for those marine mammals that take measures to avoid areas of seismic noise.

*Comment 35:* NSB indicates that Statoil's approach to estimating densities of beluga and bowhead whales is problematic. The best available scientific data show that most marine mammals move considerable distances over the course of the open water period and are not confined to a small area. This movement occurs throughout the open water period and is most intense during the autumn (late August through November) when marine mammals are migrating south through the Chukchi Sea. NSB requests that NMFS use the most appropriate methods for estimating takes.

AWL also questions the use of a "density" measure in determining take in the Chukchi Sea during the bowhead migration. AWL states that NMFS has recognized in the past that using density is inappropriate for determining bowhead take from seismic activities in the Beaufort Sea during the fall. AWL and NSB point out that Statoil used a density approach which assumes animals remain relatively stationary from one day to the next, but this assumption is inapplicable for surveying that will take place within a migratory corridor. AWL points out that the proposed IHA does not indicate the rationale for using an approach that ignores the fact that bowhead whales will pass through the Chukchi Sea in the fall. Dr. Bain notes that properly taking the bowhead migration into account, along with an appropriate sound threshold for harassment, could dramatically increase the estimate of harassed whales.

*Response:* Statoil's density estimates for bowhead and beluga whales are based on the best scientific information available, which is the standard required by the MMPA implementing regulations at 50 CFR 216.102(a). The alternative method referred to by AWL for estimating take of migrating bowhead whales was only used for seismic operations in the Beaufort Sea for Shell's site clearance and seismic surveys (75 FR 22708; May 18, 2010). This method has not been applied to activities in the Chukchi Sea. Because the migration corridor is narrower and better defined in the Beaufort Sea than the Chukchi Sea, this method was deemed appropriate by NMFS for seismic operations in the Beaufort. However, the migratory path taken by bowhead whales once they enter the Chukchi Sea is not as well understood. Moreover, the migratory route is not as narrowly defined in the Chukchi. Additionally, if these species avoid areas of active seismic operations at levels lower than 160 dB re 1 μPa (rms), as noted by several of the commenters, then fewer animals will occur in the area of Statoil's operations. After careful evaluation of the methods used by Statoil to estimate take, NMFS has determined that Statoil used the best

scientific information available in calculating the take estimates.

*Comment 36:* Citing George and Suydam (1998), NSB states that killer whales and ribbon seals occur regularly in the Chukchi Sea and are thus not extralimital, as Statoil described in its IHA application. NSB points out that NMFS should consider ribbon seals, killer whales, and minke whales to occur regularly in the survey area, to be conservative.

*Response:* NMFS based its population assessment on the Alaska Marine Mammal Stock Assessment Reports (Allen and Angliss 2010), peer-reviewed or other technical articles, and prior year monitoring reports of seismic surveys to estimate the likelihood of their occurrence and calculate the take numbers for the species. Although George and Suydam (1998) reported in their paper on killer whale predation in the northeastern Chukchi and western Beaufort Seas, they acknowledged that "[k]iller whales (*Orcinus orca*) are infrequently reported from the northeastern Chukchi and western Beaufort Seas." Based on the available information, NMFS does not expect that these species are likely to be taken in numbers representing more than a chance occurrence, as specified in the **Federal Register** notice for the proposed IHA (75 FR 32379; June 8, 2010).

*Comment 37:* NSB points out that Statoil's application does not provide information about the movements of the Beaufort Sea stock of beluga whales through the Chukchi Sea, and that these beluga whales do migrate through the Chukchi Sea during the fall, when Statoil may be conducting seismic activities. NSB further points out that the minimum population estimate of 3,700 in NMFS' Alaska Marine Mammal Stock Assessment Reports (Angliss and Allen 2009) may be an underestimate of the actual population.

*Response:* Statoil does state in the IHA application that "[i]n the fall, beluga whale densities in the Chukchi Sea are expected to be somewhat higher than in the summer because individuals of the eastern Chukchi Sea stock and the Beaufort Sea stock will be migrating south to their wintering grounds in the Bering Sea." The take estimates of marine mammals are based on the densities of animals in particular areas (*e.g.,* Moore *et al.* 2000), and calculated to yield the number of animals that are likely to be "taken" within modeled zones of influence, as described in details in Statoil's IHA application. Therefore, the calculation of marine mammal take estimation is relevant to its population size. However, stock or population size of a marine mammal species is used in determining whether the number of takes affect a "small number" of marine mammals. For a given level of "take," a species with a small population is expected to experience larger impact than a species with a larger population size. Therefore, contrary to what NSB states, using the minimum population estimate (since the best population estimate is unknown) of eastern Chukchi Sea beluga to calculate the percentage of take is actually a conservative measure to assess takes of marine mammals.

*Subsistence Issues*

*Comment 38:* AEWC states that the nondiscretionary congressional directive that there will be no more than a negligible impact to marine mammals and no unmitigable adverse impact on the availability of marine mammals for subsistence taking is consistent with the MMPA's overall treatment of both marine mammal and subsistence protections. AEWC further states that Congress has set a "moratorium on the taking * * * of marine mammals," 16 U.S.C. 1371(a), with the sole exemption provided for the central role of subsistence hunting by Alaska Natives. Thus, AEWC concludes that Congress has given priority to subsistence takes of marine mammals over all other exceptions to the moratorium, which may be applied for and obtained only if certain statutory and regulatory requirements are met. However, AEWC states that incidental harassment authorizations are available only for specified activities for which the Secretary makes the mandated findings. Thus, the pursuit of those activities is subordinated, by law, to the critical subsistence uses that sustain Alaska's coastal communities. AWL and NSB further states that NMFS has not adequately demonstrated that the proposed activities will not have "an unmitigable adverse impact on the availability of such species or stock for taking for subsistence uses."

*Response:* The MMPA does not prohibit an activity from having an adverse impact on the availability of marine mammals for subsistence uses; rather, the MMPA requires NMFS to ensure the activity does not have an unmitigable adverse impact on the availability of such species or stocks for taking for subsistence uses. NMFS has defined "unmitigable adverse impact" in 50 CFR 216.103 as an impact resulting from the specified activity: (1) That is likely to reduce the availability of the species to a level insufficient for a harvest to meet subsistence needs by: (i) Causing the marine mammals to abandon or avoid hunting areas; (ii) directly displacing subsistence users; or (iii) placing physical barriers between the marine mammals and the subsistence hunters; and (2) that cannot be sufficiently mitigated by other measures to increase the availability of marine mammals to allow subsistence needs to be met.

For the determination of the unmitigable adverse impact analysis, NMFS, other government agencies, and affected stakeholder agencies and communities were provided a copy of the POC in May 2010, which outlined measures Statoil would implement to ensure no unmitigable adverse impact to subsistence uses. The POC specifies times and areas to avoid in order to minimize possible conflicts with traditional subsistence hunts by North Slope villages for transit and open-water activities. Statoil waited to begin activities until the close of the spring beluga hunt in the village of Point Lay. Statoil has also developed a Communication Plan and will implement the plan before initiating the 2010 program to coordinate activities with local subsistence users as well as Village Whaling Associations in order to minimize the risk of interfering with subsistence hunting activities, and keep current as to the timing and status of the bowhead whale migration, as well as the timing and status of other subsistence hunts. The Communication Plan includes procedures for coordination with Communication and Call Centers to be located in coastal villages along the Chukchi Sea during Statoil's program in 2010.

Based on the measures contained in the IHA (and described later in this document), NMFS has determined that mitigation measures are in place to ensure that Statoil's operations do not have an unmitigable adverse impact on the availability of marine mammal species or stocks for subsistence uses.

*Comment 39:* AWL points out that the importance of bowhead and beluga whales to coastal communities and their acknowledged sensitivity to noise impacts strongly favor a precautionary approach, and that to implement such an approach, NMFS should first undertake a comprehensive assessment of traditional ecological knowledge.

*Response:* NMFS recognizes the importance of bowhead whales and other marine mammals to coastal communities and thus is taking a precautionary approach in evaluating the potential impacts that may rise from Statoil's seismic surveys. NMFS has prepared an Environmental Assessment (EA) and Finding of No Significant Impact for the issuance of IHAs to Statoil and Shell to take marine

mammals incidental to the proposed seismic and marine surveys in the 2010 open water season in the Beaufort and Chukchi Seas (NMFS 2010). The EA provides a comprehensive review of the traditional ecological knowledge and assessed the potential impacts to the subsistence life in the Arctic from the proposed survey activities.

*Mitigation and Monitoring Concerns*

*Comment 40:* NSB and Dr. Bain are concerned that MMOs cannot see animals at the surface when it is dark or during the day because of fog, glare, rough seas, the small size of animals such as seals, and the large portion of time that animals spend submerged. NSB also notes that Statoil has acknowledged that reported sightings are only "minimum" estimates of the number of animals potentially affected by surveying.

*Response:* NMFS recognizes the limitations of visual monitoring in darkness and other inclement weather conditions. Therefore, in the IHA to Statoil, NMFS requires that no seismic airgun can be ramped up when the entire safety zones are not visible. However, Statoil's operations will occur in an area where periods of darkness do not begin until early September. Beginning in early September, there will be approximately 1–3 hours of darkness each day, with periods of darkness increasing by about 30 min each day. By the end of the survey period, there will be approximately 8 hours of darkness each day. These conditions provide MMOs favorable monitoring conditions for most of the time.

*Comment 41:* NSB and AEWC note that Statoil asserts that mitigation measures are designed to protect animals from injurious takes, but it is not clear that these mitigation measures are effective in protecting marine mammals or subsistence hunters. AEWC states that data previously presented by Shell and ConocoPhillips from their seismic activities made clear that MMOs failed to detect many marine mammals that encroached within the designated safety zones. AEWC also states that laser rangefinding binoculars are not useful in measuring distances to animals directly.

*Response:* NMFS believes that the required monitoring and mitigation measures are effective and are an adequate means of effecting the least practicable impact to marine mammals and their habitats. The monitoring reports from 2006, 2007, 2008, and 2009 do not note any instances of serious injury or mortality (Patterson *et al.* 2007; Funk *et al.* 2008; Ireland *et al.* 2009; Reiser *et al.* 2010). Additionally, the fact that a power-down or shutdown is required does not indicate that marine mammals are not being detected or that they are incurring serious injury. As discussed elsewhere in this document and in the Notice of Proposed IHA (75 FR 32379; June 8, 2010), the received level of a single seismic pulse (with no frequency weighting) might need to be approximately 186 dB re 1 μPa²-s (*i.e.,* 186 dB sound exposure level [SEL]) in order to produce brief, mild TTS (a non-injurious, Level B harassment) in odontocetes. 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. For Statoil's proposed survey activities, the distance at which the received energy level (per pulse) would be expected to be ≥175–180 dB SEL is the distance to the 190 dB re 1 μPa (rms) isopleth (given that the rms level is approximately 10–15 dB higher than the SEL value for the same pulse). Seismic pulses with received energy levels ≥175–180 dB SEL (190 dB re 1 μPa (rms)) are modeled to be restricted to a radius of approximately 700 m around the airgun array, but are likely to be smaller due to the larger airgun array used in modeling.

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. 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). From this, it is suspected that received levels causing TTS onset may also be higher in baleen whales.

In pinnipeds, TTS thresholds associated with exposure to brief pulses (single or multiple) of underwater sound have not been measured. Initial evidence from prolonged exposures suggested that some pinnipeds may incur TTS at somewhat lower received levels than do small odontocetes exposed for similar durations (Kastak *et al.* 1999; 2005). However, more recent indications are that TTS onset in the most sensitive pinniped species studied (harbor seal, which is closely related to the ringed seal) may occur at a similar SEL as in odontocetes (Kastak *et al.* 2004).

NMFS 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. As summarized above, data that are now available imply that TTS is unlikely to occur unless bow-riding odontocetes are exposed to airgun pulses much stronger than 180 dB re 1 μPa rms (Southall *et al.* 2007). No cases of TTS are expected as a result of Statoil's proposed activities given the small size of the source, the strong likelihood that baleen whales (especially migrating bowheads) would avoid the approaching airguns (or vessel) before being exposed to levels high enough for there to be any possibility of TTS, and the mitigation measures proposed to be implemented during the survey described later in this document.

There is no empirical evidence that exposure to pulses of airgun sound can cause PTS in any marine mammal, even with large arrays of airguns (*see* Southall *et al.* 2007). PTS might occur at a received sound level at least several decibels above that inducing mild TTS if the animal is exposed to the strong sound pulses with very rapid rise time. Given the higher level of sound necessary to cause PTS, it is even less likely that PTS could occur. In fact, even the sound levels immediately adjacent to the airgun may not be sufficient to induce PTS, especially because a mammal would not be exposed to more than one strong pulse unless it swam immediately alongside the airgun for a period longer than the inter-pulse interval. Baleen whales, and belugas as well, generally avoid the immediate area around operating seismic vessels. The planned monitoring and mitigation measures, including visual monitoring, power-downs, and shutdowns of the airguns when mammals are seen within the safety radii, will minimize the already-minimal probability of exposure of marine mammals to sounds strong enough to induce PTS.

NMFS does not believe that MMOs failed to detect many marine mammals that encroached within the designated safety zones. As indicated in the monitoring reports for prior years' open water seismic surveys, marine mammals were routinely detected before and

during seismic surveys using airgun arrays. Although the reports reveal that a few marine mammals entered the designated safety zone without being detected immediately, these events occurred very infrequently and shutdowns were called for immediately when a marine mammal was found within the safety zone. Despite these rare occurrences, NMFS does not believe animals would have experienced TTS or injury because, as noted throughout this document, the 180 dB and 190 dB thresholds for injury are conservative and the best available science indicates animals need to be exposed to significantly higher received levels or for much longer duration to experience TTS, let alone injury, which was very unlikely in the cases documented in prior years' surveys.

NMFS acknowledges that night-time monitoring by using night vision devices is not nearly as effective as visual observation during daylight hours. Therefore, the IHA issued to Statoil prohibits start up of seismic airguns when the entire safety zone cannot be effectively monitored during the night-time hours. Therefore, if Statoil has a shutdown of its seismic airgun array during low-light hours, it will have to wait till daylight to start ramping up the airguns.

*Comment 42:* Citing the report from the peer review panel created for the 2010 Open Water meeting, AWL points out that the report stated that Statoil's "proposed methods would not be sufficient for adequate monitoring of the area within the safety radii when the radii are far from the vessel." NSB also questions the ability of MMOs to detect marine mammals within the 2,500 m safety radii of 180-dB isopleths. AWL further points out that the proposed IHA needs to clarify how marine mammal observers on the support vessels will assist in monitoring safety zones, because the peer review comments noted that even with the addition of two support vessels, Statoil "will be able to monitor only a limited area."

*Response:* First, the comment by the peer review panel in March 2010 during the Open Water meeting in Anchorage, Alaska, was based on a draft version of the Statoil's IHA application, which did not include monitoring measures such as the use of "Big Eye" binoculars (25 x 50). In working with Statoil, NMFS has required the applicant to include the use of "Big Eye" binoculars as a standard device for marine mammal monitoring. In addition, NMFS has also included a number of recommendations from the peer review panel as requirements in the IHA to improve marine mammal monitoring during Statoil's seismic survey. These recommendations, which are discussed in more detail below, include: (1) The use of "big eyes" paired with searching with the naked eye; (2) use of the best possible positions for observing (e.g., outside and as high on the vessel as possible); and (3) pairing experienced MMOs with MMOs who are lacking experience. Further, the estimated safety radii for 180-dB and 190-dB isopleths are at 2,500 m and 700 m from the seismic airgun source, respectively, based on modeling of a large airgun array (3,147 $in^3$) and adjusted upward. The empirically measured distances from this bigger airgun array from 2006–2009 were 460 m, 550 m, and 610 m for the 190-dB isopleths, and 1,400 m, 2,470 m, and 2,000 m for the 180-dB isopleths. All these safety radii are smaller than the estimated ones for the smaller airgun array. Therefore, NMFS expects that the empirically measured safety radii for the airgun array used in Statoil's proposed seismic survey would be much smaller than currently modeled, which would reduce the distance to be monitored.

Regarding the use of support vessels to assist in monitoring safety zones and zones of influence, the lead MMO on the seismic source vessel (or his/her designee) will work with the seismic contractor and/or the Captain to identify areas that will be ensonified to levels ≥160 dB during the next 24- to 48-hour time period. Based on this information MMOs on the source vessel will communicate that information to MMOs and the Captains of support vessels. Statoil will have two support vessels (*Tanux I* and *Norseman I*) assisting the seismic source vessel with this monitoring and other project-related activities. Monitoring routes within the ≥160 dB are often a series of zig-zags, or a racetrack pattern. The goal is to maximize monitoring coverage within the ≥160 dB zone as dictated by support vessel availability, daylight, and survey conditions to ensure that aggregates of non-migratory baleen whales are not present within the zone. Support vessels will transit to and begin monitoring of these locations while maintaining routine communications with the source vessel MMOs to report monitoring status and any relevant sightings.

*Comment 43:* AWL and Dr. Bain note that NMFS appears to simply presume that marine mammals will naturally avoid airguns when they are operating (even when limited to the single mitigation gun), removing the need for monitoring when conditions prevent observers from effectively watching for intrusions into the exclusion zones. AWL and NSB point out that the requirement for ramp ups rests on the same foundation—that marine mammals will leave an affected area as a result of increasing noise. Citing a report by the Joint Subcommittee on Ocean Science and Technology (JSOST 2009), AWL questions the efficacy of ramp up. NSB also questions the ability of power down and shutdown to protect marine mammals.

*Response:* NMFS recognizes that uncertainties regarding marine mammal responses to seismic airgun noise still exist, including avoidance, behavioral reactions, temporary displacement, etc. However, there are many field studies and observations indicating that animals are not likely to occur within an area where sound levels could cause impairment to their auditory apparatus (*see* review by Richardson *et al.* 1995; Southall *et al.* 2007). In addition, monitoring reports during prior years' seismic surveys all record more marine mammal sightings in the vicinity of the seismic vessel when airguns are off than when airguns are on (Patterson *et al.* 2007; Funk *et al.* 2008; Ireland *et al.* 2009; Reiser *et al.* 2010).

For the time period of Statoil's seismic surveys, daylight will occur for 24 h/day until mid-August. Until that date MMOs will automatically be observing during the 30-minute period preceding a ramp up. Later in the season when visibility becomes low, MMOs will be called out at night to observe prior to and during any ramp up using night vision devices (Generation 3 binocular image intensifiers, or equivalent units). Nevertheless, in the IHA NMFS requires that no airgun can be started for ramp up if the entire safety zones cannot be visually observed for at least 30 minutes.

NMFS recognizes that the efficacy of ramp-up has not been well studied. However, before additional scientific information becomes available to show its lack of effectiveness in warning away marine mammals, the employment of ramp up will be required. To help evaluate the utility of ramp-up procedures, NMFS will require observers to record and report their observations during any ramp-up period. An analysis of these observations may lead to new information regarding the effectiveness of ramp-up and should be included in the monitoring report for the 2010 Statoil seismic survey.

Nevertheless, NMFS is confident about the efficacy of power down and especially shutdown in protecting marine mammals from Level A and B harassment from seismic noise sources. By shutting down the airgun array, there will be no seismic noise produced, therefore, marine mammals are unlikely

be taken by Level A and B harassment from noise exposure. Similarly, by powering down the acoustic source, the safety zones will be reduced, and marine mammals that were in these zones will now be placed outside the zones ensonified by a smaller airgun source.

*Comment 44:* The Commission recommends NMFS require the applicant to collect data on the behavior and movements of any marine mammals present during all ramp-up and power-down procedures to help evaluate the effectiveness of these procedures as mitigation measures; and (2) undertake or prompt others to undertake studies needed to resolve questions regarding the effectiveness of ramp-up and power-down as mitigation measures. NSB also questions the effectiveness of ramp-up measures.

*Response:* 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). For Statoil's proposed open water seismic surveys, a series of mitigation and monitoring measures are required under the IHA. These mitigation measures include: (1) Sound source measurements to determine safety zones more accurately, (2) establishment of safety and disturbance zones to be monitored by MMOs on the seismic vessel, (3) a power-down when a marine mammal is detected approaching a safety zone and a shutdown when a marine mammal is observed within a zone, (4) ramp-up of the airgun array, and (5) a requirement that vessels reduce speed when within 274 m (300 yards) of whales and steer around those whales if possible.

The basic rationale for these mitigation measures is (a) to avoid exposing marine mammals to intense seismic airgun noises at received levels that could cause TTS (for mitigation measures listed as (1) through (4)); and (b) to avoid vessel strike of marine mammals (mitigation measure (5)). Although limited research in recent years shows that noise levels that could induce TTS in odontocetes and pinnipeds are much higher than current NMFS safety thresholds (i.e., 180 dB and 190 dB re 1 μPa (rms) for cetaceans and pinnipeds, respectively), mitigation measures listed in (1) through (3) provide very conservative measures to ensure that no marine mammals are exposed to noise levels that would result in TTS. The power-down measure listed in (3) requires Statoil to reduce the firing airguns accordingly so that a marine mammal that is detected approaching the safety zone will be further away from the reduced safety radius (as a result of power-down).

Regarding mitigation measures requiring ramp-ups and power-down, while scientific research built around the question on whether ramp-up is effective has not been conducted, several studies on the effects of anthropogenic noise on marine mammals indicate that many marine mammals will move away from a sound source that they find annoying (*e.g.* Malme *et al.* 1984; Miller *et al.* 1999; others reviewed in Richardson *et al.* 1995). In particular, three species of baleen whales have been the subject of tests involving exposure to sounds from a single airgun, which is equivalent to the first stage of ramp-up. All three species were shown to move away at the onset of a single airgun operation (Malme *et al.* 1983; 1984; 1985; 1986; Richardson *et al.* 1986; McCauley *et al.* 1998; 2000). From this research, it can be presumed that if a marine mammal finds a noise source annoying or disturbing, it will move away from the source prior to sustaining an injury, unless some other over-riding biological activity keeps the animal from vacating the area. This is the premise supporting NMFS' and others' belief that ramp-up is effective in preventing injury to marine mammals. However, to what degree ramp-up protects marine mammals from exposure to intense noises is unknown. For power-down, the rationale is that by powering down airgun arrays, marine mammals that are exposed to received noise levels that could induce TTS will be exposed to lower levels of sound due to the reduction in the output of the airgun source. Nevertheless, NMFS will require industry applicants that will conduct marine or seismic surveys in the 2010 open water season to collect, record, analyze, and report MMO observations during any ramp-up and power-down periods.

*Comment 45:* Citing Thomas *et al.* (2002), Dr. Bain states that the effective strip half-width (μ, the point at which the number of animals sighted beyond that distance equals the number missed inside) is the maximum distance at which the species of interest can be sighted (w), then the number of animals missed closer to the vessel than μ equals the number of animals sighted between μ and w. Dr. Bain further assumes that μ is the distance to the 180 dB contour (isopleths, the approximate value of μ in Figure 15.3 of Richardson and Thomas (2002) for Beaufort 0–3) and w is the distance to the 160 dB contour (isopleths), and points out that if one whale is seen in the outer zone (radius of 13 km for the 160-dB isopleths) "where the sighting probability is say 9% or less," that would suggest that one whale was missed in the inner zone (radius of 2.5 km for the 180-dB isopleths), and 10 were missed in the outer zone. Dr. Bain concludes that "the sighting of a single whale outside the strip half-width would be strong evidence that 12 are present." Dr. Bain thus summarizes that "if a whale is sighted in the inner zone, the airguns would shut down per the 180 dB rule. If a whale is sighted in the outer zone, that would imply that 12 are present within the 160 dB contour, and hence the airguns should shut down per the 160 dB rule. That is, sighting a single bowhead or gray whale, regardless of distance, is evidence the shutdown criteria have been met." Dr. Bain further states that even if no whales are seen, the shutdown criteria may have been meet, as he states that from high observation platforms (11–27 m in eye height), a pair of observers has about a 60% chance of detecting a mysticete whale at the 180-dB isopleths (2.5 km), and that for the paired observation team plots, where sample size is larger, the observers are estimated to have about a 50% chance of seeing a whale at 2.5 km. That is, Dr. Bain concludes, "a whale can be in the zone where there is a risk of immediate injury or death and have only a 50% chance of triggering a shutdown under ideal conditions." Dr. Bain then applies the same logic for seals and states that "a high proportion of seals within the 190 dB contour will fail to trigger a shutdown."

*Response:* While NMFS agrees with Dr. Bain's assessment in principle, NMFS disagrees with a number of assumptions being made in his comments. First, the reference Dr. Bain used to extrapolate the effective strip half-width (μ = 2.5 km) and sighting probability (9%) addresses correction factors that were used for aerial surveys. Although aerial surveys are conducted at higher platforms than vessel surveys, the speed of an aircraft (approximately 100 knots) does not allow adequate time for scanning a particular area, and thus may miss marine mammals if they happen to be underwater. Therefore, using an aerial sighting probability of 9% to address vessel surveys may not be appropriate. Second, Dr. Bain's

hypothetical 9% sighting probability is based on the assumption of using one survey platform only. For Statoil's proposed seismic survey, multiple vessels besides the source vessel will be employed for marine mammal monitoring, and these chase/monitoring vessels are able to fill the sighting gaps that MMOs from the source vessel may miss. Third, using sighting probability for the entire survey tracklines may not be a realistic way to predict the number of animals in the vicinity of the survey area, which tends to be moving constantly. Unless the animals congregate in a large group, sighting probability at an instantaneous location should be interpreted as the percentage of probability of detecting a single animal, instead of the percentage of a group of animals in the area. Therefore, it does not seem reasonable to call for a shutdown of seismic airguns when a whale is detected in the 160-dB zone of influence.

Regarding Dr. Bain's second comment that a whale has a 50% chance of facing the risk of immediate injury or death when occurring at a distance of 2.5 km is scientifically baseless. First, even if the whale or seals were not spotted by the MMOs at 2.5 km or 700 m, respectively, from the seismic vessel, the modeled received levels at these distances are expected to be approximately 180 dB and 190 re 1 μPa (rms), respectively, which are the borderline of the safety zone within which repeated exposure to noise received levels above 180 dB or 190 dB re 1 μPa (rms) could induce TTS. TTS is not considered an injury in cetaceans or pinnipeds. As discussed in detail in the proposed IHA (75 FR 32379; June 8, 2010) and in this document below, new scientific information shows that the onset of TTS is likely at much higher received levels. Second, as the whales are closing in, the sighting probability increases exponentially with reduced distance, reaching to over 80% at a distance of 600 m based on Figure 5.3 of Richardson and Thomas (2002). At this distance, the received levels are expected to be under 200 dB re 1 μPa (rms), which is still lower than the levels that are thought to induce TTS (Finneran *et al.* 2002; Southall *et al.* 2007). Third, as the seismic survey is ongoing, NMFS considers it's unlikely that a marine mammal would be approaching a noise received level that could be uncomfortable to the animal or cause TTS. Therefore, Dr. Bain's conclusion that a whale will face 50% chance of immediate injury or death at 2,500 m away from the seismic survey vessel is scientifically not supported.

*Comment 46:* Dr. Bain states that since animals over the horizon would be affected, visual detection from the seismic vessel alone would be inadequate to prevent exposure. It would be advisable to deploy trained observers on all vessels, not only the one operating airguns, which would allow sighting of some marine mammals that are close enough to be affected by noise, but too far away to be seen from source-based observers.

*Response:* As stated in Statoil's IHA application, five observers will be based aboard the seismic source vessel and at least three MMOs on the chase/monitoring vessels. The IHA issued to Statoil requires that MMOs be stationed onboard both source vessels and chase/monitoring vessels (see Monitoring Measures section below).

*Comment 47:* Dr. Bain states that short ramp-up periods do not allow individuals to move out to the contour at which behavioral effects no longer pose risks of immediate injury prior to onset of full power operation. He concludes that many marine mammals would at least need to reach the 135 dB contour to be safe from behaviorally mediated injury, and that for the airgun array used in this survey, that is likely to be over 40 km away. Dr. Bain further concludes that at normal sustained swimming speeds of 3–4 knots, that is likely to be at least 5–6 hours away.

*Response:* First, claiming that marine mammals exposed to received levels at 135 dB are not safe from immediate injury is not scientifically supported, and many studies have shown that on many occasions animals being exposed to this level of noise have not exhibited any behavioral reactions, much less a reaction that would equate to "take" under the MMPA (see reviews by Richardson *et al.* 1995; Southall *et al.* 2007).

Second, it is important to understand that no airgun will be ramped up when a marine mammal is detected within the safety zones (180 dB for cetaceans and 190 dB for pinnipeds) by MMOs on source vessel and chase/monitoring vessels, as stated in the IHA. This means, theoretically, Statoil's seismic vessel cannot even start up the 60 in $^3$ mitigation airgun when cetaceans or pinnipeds are detected within the 2,500 m or 700 m radii, respectively. As the operators start ramping up with the mitigation gun, as stated in the **Federal Register** notice for the proposed IHA (75 FR 32379; June 8, 2010) and in the Statoil's IHA application, the initial safety zones incurred by the mitigation gun are 220 m and 75 m for 180 dB and 190 dB, respectively.

Third, even if there are marine mammals being missed during the initial 30 minutes pre-survey monitoring, the ramping up of the mitigation gun to full-power airgun array would make the safety radii from 220 m to 2,500 m for the 180-dB isopleths and from 75 m to 700 m for the 190-dB isopleths reachable within approximately 15–20 minutes. Using simple math, if a marine mammal is swimming at normal sustained speed of 4 knots (7.41 km/h), the animal would reach the border of the 180-dB isopleths in 20 minutes (it would take pinnipeds 11 minutes to reach the 190-dB isopleths from the dead center of the airgun source, assuming a swimming speed of 3 knots (5.56 km/h)).

Finally, anytime during the ramp up period when a marine mammal is detected within its respective safety zone, the airguns must be immediately stopped, and ramp up will be delayed until the animal is sighted outside of the safety zone or the animal is not sighted for at least 15–30 minutes (15 minutes for small odontocetes and pinnipeds, or 30 minutes for baleen whales and large odontocetes).

*Comment 48:* The Commission, NSB, and Dr. Bain recommend that Statoil be required to supplement its mitigation measures by using passive acoustic monitoring (PAM) to provide a more reliable estimate of the number of marine mammals taken during the course of the proposed seismic survey.

*Response:* NMFS' 2010 EA for this action contains an analysis of why PAM is not required to be used by Statoil to implement mitigation measures. Statoil, Shell, and ConocoPhillips (CPAI) are jointly funding an extensive science program to continue the acoustic monitoring of the Chukchi Sea environment. However, this information will not be used in a real-time or near-real-time capacity. Along with the fact that marine mammals may not always vocalize while near the PAM device, another impediment is that flow noise generated by a towed PAM will interfere with low frequency whale calls and make their detection difficult and unreliable. MMS sponsored a workshop on the means of acoustic detection of marine mammals in November 2009 in Boston, MA. The workshop reviewed various available acoustic monitoring technology (passive and active), its feasibility and applicability for use in MMS-authorized activities, and what additional developments need to take place to improve its effectiveness. The conclusion is that at this stage, using towed passive acoustics to detect marine mammals is not a mature technology. NMFS may consider

requirements for PAM in the future depending on information received as the technology develops further.

*Comment 49:* AWL states that additional mitigation measures are needed to address vulnerable cow/calf pairs. AWL recommends that NMFS require a safety zone that is triggered by the presence of cow/calf pairs because females with calves are considered to be more susceptible to noise disturbances, and NMFS must at least evaluate the necessity of additional mitigation to protect this vulnerable segment of the population, citing MMS' Lease Sale 193 EIS that female baleen whales with calves "show a heightened response to noise and disturbance."

*Response:* Although it has been suggested that female baleen whales with calves "show a heightened response to noise and disturbance," there is no evidence that such "heightened response" is biologically significant and constitutes a "take" under the MMPA. Nevertheless, NMFS requires a 120–dB safety zone for migrating bowhead cow/calf pairs to be implemented to reduce impacts to the animals as they migrate through the narrow corridor in the Beaufort Sea (*see* **Federal Register** notice for proposed IHA to Shell; 75 FR 22708; May 18, 2010). However, in the Chukchi Sea, the migratory corridor for bowhead whales is wider and more open, thus the 120–dB ensonified zone would not impede bowhead whale migration. The animals would be able to swim around the ensonified area. Additionally, NMFS has not imposed a requirement to conduct aerial monitoring of the 120–dB safety zone for the occurrence of four or more cow-calf pairs in the Chukchi Sea because it is not practicable. First, NMFS determined that monitoring the 120–dB safety zone was not necessary in the Chukchi Sea because there would not be the level of effort by 3D seismic survey operations present in 2006. This provides cow/calf pairs with sufficient ability to move around the seismic source without significant effort. Second, aerial surveys are not required in the Chukchi Sea because they have currently been determined to be impracticable due to lack of adequate landing facilities, and the prevalence of fog and other inclement weather in that area. This could potentially result in an inability to return to the airport of origin, thereby resulting in safety concerns.

*Comment 50:* AWL states that NMFS should consider time and space limitations on surveying in order to reduce harm, and to restrict surveys to times in which the safety zones are visible to marine monitors. AWL requests that Statoil not operate in conditions—such as darkness, fog, or rough seas—in which the observers are unable to ensure that the safety zones are free of marine mammals. In addition, AWL requests NMFS to evaluate the benefits that would come from halting the surveying during the peak of the bowhead migration through the Chukchi Sea.

*Response:* In making its negligible determination for the issuance of an IHA to Statoil for open water marine surveys, NMFS has conducted a thorough review and analysis on how to reduce any adverse effects to marine mammals from the proposed action, including the consideration of time and space limitations that could reduce impacts to the bowhead migration. As indicated in its IHA application, Statoil will complete its seismic survey in the first half of October to avoid the peak of the bowhead whale migration through the Chukchi Sea, which typically occurs after October. By restricting survey activities to only daylight hours, Statoil will not be able to complete its seismic surveys before its preferred date, and therefore, there could be more adverse impacts to migrating bowhead whales.

Bowhead whales migrating west across the Alaskan Beaufort Sea in autumn, in particular are unusually responsive to airgun noises, with avoidance occurring out to distances of 20—30 km from a medium-sized airgun source (Miller *et al.* 1999; Richardson *et al.* 1999). However, while bowheads may avoid an area of 20 km (12.4 mi) around a noise source, when that determination requires a post-survey computer analysis to find that bowheads have made a 1 or 2 degree course change, NMFS believes that does not equate to "take" under the MMPA, and that such minor behavioral modification is not likely to be biologically significant.

*Comment 51:* NSB requests NMFS to require Statoil to fly aerial surveys in support of its proposed activities.

*Response:* Aerial monitoring is not required in IHAs for surveys that occur in the offshore environment of the Chukchi Sea because they have currently been determined to be impracticable due to lack of adequate landing facilities, and the prevalence of fog and other inclement weather in that area. This could potentially result in an inability to return to the airport of origin, thereby resulting in safety concerns.

*Comment 52:* The Commission recommends that NMFS (1) revise its study design to include expanded pre- and post-seismic survey assessments sufficient to obtain reliable sighting data for comparing marine mammal abundance, distribution, and behavior under various conditions; (2) review the proposed monitoring measures and require the applicant (or its contractors) to collect and analyze information regarding all of the potentially important sources of sound and the complex sound field created by all of the activities associated with conducting the seismic survey; (3) require the applicant to collect information to evaluate the assumption that 160 dB is the appropriate threshold at which harassment occurs for all marine mammals that occur in the survey area; and (4) determine, in consultation with Statoil, whether aerial surveys are safe to conduct and should be required and, if not, identify alternative monitoring strategies capable of providing reliable information on the presence of marine mammals and the impact of survey activities to the affected species and stocks.

*Response:* NMFS largely agrees with the Commission's recommendations and has been working with the seismic survey applicants and their contractors on gathering information on acoustic sources, survey design review, and monitoring analyses. NMFS has contacted Statoil and received information on all the active acoustic sources that would be used for its proposed open water marine surveys. The information includes source characteristics such as frequency ranges and source levels, as well as estimated propagation loss.

However, due to the strict time limits for the entire seismic program (60 days of seismic surveys), NMFS does not consider it appropriate to revise its study design to include expanded pre- and post-seismic survey assessments to obtain sighting data for comparing marine mammal abundance, distribution, and behavior under various conditions. Such studies would require scientists with expertise in marine mammal distribution, population ecology, and behavioral ecology onboard the research vessel for extended period of time. NMFS thinks that such a requirement is outside the scope of the proposed action. Nevertheless, marine mammal sighting data and behavioral reactions prior to and immediately after seismic operations will be collected, as described in the proposed IHA (75 FR 32379; June 8, 2010) and in Statoil's IHA application. This information will be used to interpret marine mammal behavioral reactions when exposed to various received noise levels (except levels about 180 dB and 190 dB re 1 μPa for cetaceans and pinnipeds,

respectively) and abundance in relation to seismic surveys, which can be used to evaluate whether 160 dB received level is the appropriate threshold at which harassment occurs for all marine mammals that occur in the survey area.

As far as aerial surveys are concerned, they are not required in the Chukchi Sea because they have currently been determined to be impracticable due to lack of adequate landing facilities, and the prevalence of fog and other inclement weather in that area. This could potentially result in an inability to return to the airport of origin, thereby resulting in safety concerns. However, Statoil is required to use two support vessels to monitor marine mammals in the zones of influence. Nevertheless, NMFS will continue working with the oil and gas industry in discussing the possibility of aerial surveys in the future.

*Comment 53:* The Commission recommends that the IHA require Statoil to halt its seismic survey and consult with NMFS regarding any seriously injured or dead marine mammal when the injury or death may have resulted from Statoil's activities. NSB recommends Statoil be required to facilitate the recovery and necropsy of any marine mammals found dead in their survey area.

*Response:* NMFS concurs with the Commission's recommendation. NMFS has included a condition in the IHA which requires Statoil to immediately shutdown the seismic airguns if a dead or injured marine mammal has been sighted within an area where the seismic airguns were operating within the past 24 hours so that information regarding the animal can be collected and reported to NMFS, and there is clear evidence that the injury or death resulted from Statoil's activities. In addition, Statoil must immediately report the events to the Marine Mammal Stranding Network within 24 hours of the sighting (*telephone:* 1–800–853–1964), as well as to the NMFS staff person designated by the Director, Office of Protected Resources, or to the staff person designated by the Alaska Regional Administrator. The lead MMO is required to complete a written certification, which must include the following information: species or description of the animal(s); the condition of the animal(s) (including carcass condition if the animal is dead); location and time of first discovery; observed behaviors (if alive); and photographs or video (if available). In the event that the marine mammal injury or death was determined to have been a direct result of Statoil's activities, then operations will cease, NMFS and the Stranding Network will be notified immediately, and operations will not be permitted to resume until NMFS has had an opportunity to review the written certification and any accompanying documentation, make determinations as to whether modifications to the activities are appropriate and necessary, and has notified Statoil that activities may be resumed.

For any other sighting of injured or dead marine mammals in the vicinity of any marine survey activities utilizing underwater active acoustic sources for which the cause of injury or mortality cannot be immediately determined, Statoil will ensure that NMFS (regional stranding coordinator) is notified immediately. Statoil will provide NMFS with species or description of the animal(s), the condition of the animal(s) (including carcass condition if the animal is dead), location, time of first discovery, observed behaviors (if alive), and photo or video.

If NMFS determines that further investigation is appropriate, once investigations are completed and determinations made, NMFS would use available information to help reduce the likelihood that a similar event would happen in the future and move forward with necessary steps to ensure environmental compliance for oil and gas related activities under the MMPA.

Since the cause of marine mammal deaths often cannot be determined immediately, and in many cases the deaths are results of gunshots or other trauma unrelated to Statoil's seismic surveys, NMFS does not believe it reasonable and practicable to require Statoil to facilitate the recovery and necropsy of any marine mammals found dead in their survey area.

*Cumulative Impact Concerns*

*Comment 54:* NSB, AEWC, and AWL state that NMFS must also consider the effects of disturbances in the context of other activities occurring in the Arctic. NSB states that NMFS should ascertain the significance of multiple exposures to underwater noise, ocean discharge, air pollution, and vessel traffic—all of which could impact bowhead whales and decrease survival rates or reproductive success. NSB notes that the cumulative impacts of all industrial activities must be factored into any negligible impact determination. NSB, AEWC, and AWL list a series of reasonably foreseeable activities in the Arctic Ocean as: (1) GX Technology's Beaufort Sea seismic surveys; (2) Shell's Beaufort and Chukchi Seas marine surveys; (3) Seismic surveys planned in the Canadian Arctic; (4) U.S. Geological Survey's (USGS') seismic surveys; (5) BP's production operations at Northstar; and (6) Dalmorneftegeophysica (DMNG) Russian Far East offshore seismic surveys.

*Response:* Under section 101(a)(5)(D) of the MMPA, NMFS is required to determine whether the taking by the applicant's specified activity will take only small numbers of marine mammals, will have a negligible impact on the affected marine mammal species or population stocks, and will not have an unmitigable impact on the availability of affected species or stocks for subsistence uses. Cumulative impact assessments are NMFS' responsibility under the National Environmental Policy Act (NEPA), not the MMPA. In that regard, MMS' 2006 Final PEA, NMFS' 2007 and 2008 Supplemental EAs, NMFS' 2009 EA, and NMFS' 2010 EA address cumulative impacts. The most recent NMFS' 2010 EA addresses cumulative activities and the cumulative impact analysis focused on oil and gas related and non-oil and gas related activities in both Federal and State of Alaska waters that were likely and foreseeable. The oil and gas related activities in the U.S. Arctic in 2010 include this activity; Shell's proposed marine surveys in the Beaufort and Chukchi Seas; ION Geophysical's proposed seismic survey in Beaufort Sea; and BP's production operations at Northstar. GX Technology's Beaufort Sea seismic surveys have been cancelled by the company. Seismic survey activities in the Canadian and Russian Arctic occur in different geophysical areas, therefore, they are not analyzed under the NMFS 2010 EA. Other appropriate factors, such as Arctic warming, military activities, and noise contributions from community and commercial activities were also considered in NMFS' 2010 EA. Please refer to that document for further discussion of cumulative impacts.

*Comment 55:* Dr. Bain notes that in Southall *et al.* (2007), a severity scale was developed to allow a graded description of behavioral changes rather than forcing a binary decision about whether a particular change constitutes a take. Dr. Bain states that changes low on the scale would only have population-scale effects if the changes were long lasting due to long-term exposure, or were widespread due to sources affecting a large percentage of populations. That is, the population consequences of a single vessel passing by a dolphin would be expected to be less than a fleet of vessels spending many hours per day for months every year dolphin watching, even if behavioral responses were the same to

each vessel approach (Lusseau *et al.* 2006). Changes high on the scale could result in immediate injury or death through mechanisms such as stranding, gas bubble formation, separation of mothers from calves, stampedes, etc., if they occurred in the relevant setting (Southall *et al.* 2007)

*Response:* Comment noted. As Dr. Bain has noted, long-term exposure to low level noise could have chronic, population level impacts to marine mammals in their environment greater than similar exposures that are short-term and infrequent, even though the instantaneous behavioral reactions are scored the same. NMFS agrees with the example that whales and dolphins being approached by whale watching vessels operating on a daily basis for many hours over a period of years are likely to suffer far more population consequences than, for example, marine mammals exposed to infrequent and short term sounds from seismic and supporting vessels that only operate in an area for two months. In addition to the received noise levels being considered, seismic vessels are required to implement mitigation and monitoring conditions to ensure a certain distance from marine mammals, while whale watching vessels usually do not. This is an important difference, as vessels associated with Statoil's seismic survey will not actually approach marine mammals. As analyzed in detail in the **Federal Register** notice (75 FR 32379; June 8, 2010) and in this document, the proposed Statoil seismic survey in the Chukchi Sea would only affect a limited area over approximately 60 days.

*ESA Concerns*

*Comment 56:* AWL states that NMFS section 7 consultation under the ESA must consider the potential impact of potential future oil and gas activities. AWL further states that a biological opinion must detail how the agency action under review affects the species or its critical habitat. The effects of the action are then added to the "environmental baseline," which consists of the past and present impacts of activities in the action area as well as "the anticipated impacts of all proposed Federal projects of activities in the action area" as well as "the anticipated impacts of all proposed Federal projects in the action area that have already undergone formal or early section 7 consultation." AWL states that NMFS must consider the effects of the entire agency action.

*Response:* Under section 7 of the ESA, NMFS Office of Protected Resources has completed consultation with NMFS Alaska Regional Office on "Authorization of Small Takes under the Marine Mammal Protection Act for Certain Oil and Gas Exploration Activities in the U.S. Beaufort and Chukchi Seas, Alaska for 2010." In a Biological Opinion issued on July 13, 2010, NMFS concluded that the issuance of the incidental take authorizations under the MMPA for seismic surveys are not likely to jeopardize the continued existence of the endangered humpback or bowhead whale. As no critical habitat has been designated for these species, none will be affected. The 2010 Biological Opinion takes into consideration all oil and gas related seismic survey activities that would occur in the 2010 open water season. This Biological Opinion does not include impacts from exploratory drilling and production activities, which are subject to a separate consultation. In addition, potential future impacts from oil and gas activities will be subject to consultation in the future when activities are proposed. NMFS has reviewed Statoil's proposed action and has determined that the findings in the 2010 Biological Opinion apply to its 2010 Chukchi Sea seismic survey. In addition, NMFS has issued an Incidental Take Statement (ITS) under this Biological Opinion for Statoil's survey activities, which contains reasonable and prudent measures with implementing terms and conditions to minimize the effects of take of bowhead and humpback whales.

*Comment 57:* AWL argues that NMFS' existing regional biological opinion is inadequate. AWL states that NMFS' 2008 Biological Opinion does not adequately consider site-specific information related to Shell's proposed drilling. AWL points out that Shell has proposed exploration drilling in Camden Bay in the Beaufort Sea, and that Camden Bay has been repeatedly identified as a resting and feeding area for migrating bowheads, which has been reaffirmed by the recent monitoring. AWL states that NMFS should re-examine the potential impacts of Shell's proposed drilling in light of its long-standing policy and the cautionary language contained in its 2008 opinion.

*Response:* NMFS initiated a section 7 consultation under the ESA for the potential impacts to ESA-listed marine mammal species that could be adversely affected as a result of several oil and gas related activities in the 2010 open-water season. The 2010 Biological Opinion covered the activities by Shell and Statoil's proposed open water marine and seismic survey activities. However, as far as Shell's drilling activities are concerned, Shell has withdrawn these actions due to the moratorium on offshore drilling.

*Comment 58:* Dr. Bain states that bowheads are endangered, and many threats unrelated to oil have limited recovery of other bowhead population, so need to be considered.

*Response:* In issuing the IHA to Statoil for the proposed marine seismic survey, NMFS has thoroughly considered all potential impacts to marine mammals, including bowhead, gray, and beluga whales and harbor porpoises in the project vicinity. A detailed discussion of the cumulative effects on these species and the Arctic environment as a whole is provided in NMFS 2010 EA for the issuance of IHAs to Shell and Statoil.

Specific to the ESA-listed bowhead whales, as well as humpback and fin whales, NMFS Office of Protected Resources has conducted a consultation with NMFS Alaska Regional Office (AKRO) under section 7 of the ESA. After reviewing the current status of the fin, humpback, and bowhead whale, the environmental baseline for the action area, the biological and physical impacts of these actions, and cumulative effects, and considering that the described actions are expected to impact only a single stock of each of these endangered whales, and not the species as a whole, NMFS AKRO issued a Biological Opinion on July 13, 2010. The Biological Opinion concludes that the proposed marine and seismic surveys by Shell and Statoil in the Beaufort and Chukchi Seas during the 2010 open water season are not likely to jeopardize the continued existence of the endangered fin, humpback, or bowhead whale. No critical habitat has been designated for these species, therefore none will be affected. In addition, the population of the Bering-Chukchi-Beaufort Sea stock of bowhead whales is increasing at a rate of 3.5% (Brandon and Wade 2004) or 3.4% (George *et al.* 2004), despite whales being harvested by the Alaska natives (Angliss and Allen 2009). The count of 121 calves during the 2001 census was the highest yet recorded and was likely caused by a combination of variable recruitment and the large population size (George *et al.* 2004). The calf count provides corroborating evidence for a healthy and increasing population (Angliss and Allen 2009).

*Comment 59:* AWL argues that NMFS' 2008 Biological Opinion does not adequately consider oil spills. AWL states that in the 2008 Biological Opinion, NMFS recognized the potential dangers of a large oil spill, and that whales contacting oil, particularly freshly-spilled oil, "could be harmed

and possibly killed." Citing NMFS's finding in its 2008 Biological Opinion that several "coincidental events" would have to take place for such harm to occur: (1) A spill; (2) that coincides with the whales' seasonal presence; (3) that is "transported to the area the whales occupy (*e.g.,* the migrational corridor or spring lead system)"; and (4) is not successfully cleaned up, AWL points out that this combination of events is not as remote as NMFS appears to have assumed because NMFS' analysis of whether a spill may occur relies in part on statistical probabilities based on past incidents. AWL states that there appears to have been a significant breakdown in the system that was intended to both prevent spills from occurring and require adequate oil spill response capabilities to limit the harm. AWL states that NMFS must take into account that there are likely gaps in the current regulatory regime, and that given those flaws, an analysis that relies on the safety record of previous drilling is doubtful as a predictive tool.

*Response:* As discussed in the previous Response to Comment, no drilling is planned for Shell during the 2010 open water season, therefore, these activities will be considered in a separate consultation if and when Statoil proposes to conduct exploratory drilling.

*NEPA Concerns*

*Comment 60:* AEWC believes that NMFS excluded the public from the NEPA process since NMFS did not release a draft EA for the public to review and provide comments prior to NMFS taking its final action.

*Response:* Neither NEPA nor the Council on Environmental Quality's (CEQ) regulations explicitly require circulation of a draft EA for public comment prior to finalizing the EA. The Federal courts have upheld this conclusion, and in one recent case, the Ninth Circuit squarely addressed the question of public involvement in the development of an EA. In *Bering Strait Citizens for Responsible Resource Development* v. *U.S. Army Corps of Engineers* (524 F.3d 938, 9th Cir. 2008), the court held that the circulation of a draft EA is not required in every case; rather, Federal agencies should strive to involve the public in the decision-making process by providing as much environmental information as is practicable prior to completion of the EA so that the public has a sufficient opportunity to weigh in on issues pertinent to the agency's decision-making process. In the case of Statoil's 2010 MMPA IHA request, NMFS involved the public in the decision-making process by distributing Statoil's IHA application and addenda for a 30-day notice and comment period. However, at that time, a draft EA was not available to provide to the public for comment. The IHA application and NMFS' Notice of Proposed IHA (75 FR 32379; June 8, 2010) contained information relating to the project. For example, the application included a project description, its location, environmental matters such as species and habitat to be affected, and measures designed to minimize adverse impacts to the environment and the availability of affected species or stocks for subsistence uses.

*Comment 61:* AEWC notes that Statoil's IHA application warrants review in an environmental impact statement (EIS) given the potential for significant impacts.

*Response:* NMFS' 2010 EA was prepared to evaluate whether significant environmental impacts may result from the issuance of an IHA to Statoil, which is an appropriate application of NEPA. After completing the EA, NMFS determined that there would not be significant impacts to the human environment and accordingly issued a FONSI. Therefore, an EIS is not needed for this action.

*Comment 62:* AEWC, AWL, and NSB note that NMFS is preparing a Programmatic EIS (PEIS). Although MMS published a draft PEIS (PEIS; MMS 2007) in the summer of 2007, to date, a Final PEIS has not been completed. AWL also notes that NMFS and MMS have reaffirmed their previous determination that a programmatic EIS process is necessary to address the overall, cumulative impacts of increased oil and gas activity in the Arctic Ocean and intend to incorporate into that analysis new scientific information as well as new information about projected seismic and exploratory drilling activity in both seas. However, AWL and AEWC argue that NEPA regulations make clear that NMFS should not proceed with authorizations for individual projects like Statoil's surveying until its programmatic EIS is complete.

*Response:* While the Final PEIS will analyze the affected environment and environmental consequences from seismic surveys in the Arctic, the analysis contained in the Final PEIS will apply more broadly to Arctic oil and gas operations. NMFS' issuance of an IHA to Staoil for the taking of several species of marine mammals incidental to conducting its open-water seismic survey program in the Chukchi Sea in 2010, as analyzed in the EA, is not expected to significantly affect the quality of the human environment. Statoil's surveys are not expected to significantly affect the quality of the human environment because of the limited duration and scope of Statoil's operations. Additionally, the EA contained a full analysis of cumulative impacts.

*Miscellaneous Issues*

*Comment 63:* The AEWC states that Statoil has refused to sign the 2010 Open Water Season Conflict Avoidance Agreement (CAA), despite very significant concessions by the AEWC. AEWC believes the greatest concern here is the fact that NMFS must find, on behalf of the Secretary, that Statoil's proposed operations will not have an unmitigable adverse impact on the availability of marine mammals for subsistence uses. AEWC claims that in the absence of a CAA, NMFS has no independent basis on which to make this finding.

*Response:* Under sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*), an IHA or LOA shall be granted to U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if NMFS finds that the taking of marine mammals will have a negligible impact on the species or stock(s) and will not have an unmitigable adverse impact on the availability of the species or stock(s) for certain subsistence uses, and if the permissible methods of taking and requirements pertaining to the mitigation, monitoring and reporting of such takings are set forth. In other words, no marine mammal take authorizations may be issued if NMFS has reason to believe that the proposed exploration or development activities would have an unmitigable adverse impact on the availability of marine mammal species or stock(s) for Alaskan native subsistence uses. For the proposed marine surveys, Statoil has conducted Plan of Cooperation (POC) meetings for its seismic operations in the Chukchi Sea in the communities and villages of Barrow, Wainwright, Point Lay, and Point Hope, and met with representatives of the Marine Mammal Co-Management groups, including the AEWC, Ice Seal Commission, Alaska Beluga Whale Committee, Alaska Eskimo Walrus Commission, and the Nanuq Commission, on March 22, 2010. At each of these meetings, Statoil described the proposed survey program and measures it plans to take, or has taken, to minimize adverse effects its proposed seismic survey may have on the

availability of marine mammals for subsistence use. Statoil requested comments and feedback from subsistence users, and incorporated those comments and concerns in the final version of the POC, which was released on May 28, 2010. The final POC document contains the following information: (1) A description of the proposed marine seismic survey; (2) documentation of consultation with local communities and tribal governments; (3) a description of mitigation measures to reduce the impact of Statoil's planned activity on subsistence; (4) ongoing Chukchi Sea scientific research which Statoil is conducting to gather information on the marine environment; and (5) the future plans for meetings and communication with the affected subsistence Chukchi Sea communities.

In addition, Statoil has entered into a Communication Protocol through a Participation Agreement with Shell to fund and staff a communications station out of Wainwright. The communications center will be staffed by Inupiat operators and on a 24/7 basis during the 2010 subsistence bowhead whale hunt. Call center staff will receive notifications from vessels at least once every six hours and will plot the probable location of vessels on a map at the communications center. Communications center staff will apprise vessel operators of potential operations that may conflict with subsistence whaling activities.

The measures that Statoil has taken, and will take, under the POC, Marine Mammal Monitoring and Mitigation Plan (4MP), and the Participation Agreement are similar to the measures identified in the draft Conflict Avoidance Agreement provided by AEWC. Below, Statoil and NMFS identify the key conflict-avoidance provisions of the CAA, and identify the corresponding provisions of the POC, 4MP, and the Participation Agreement focused on minimizing impacts to the environment and subsistence resources in the Chukchi Sea.

(1) Post-Seasons Review/Preseason Introduction

Under section 108 of the CAA, following the completion of the 2010 Chukchi Sea Open Water Season, and prior to the start of the 2011 season, the AEWC or Whaling Captain's Association of each village may request meetings with Industry Participants to review the results of the 2010 operations and discuss village concerns. Immediately following the above meetings, the CAA provides that Industry Participants will provide a brief introduction of their planned activities for the 2011 Season.

Section 3 of the POC contains a commitment to community engagement and cooperation activities that is in keeping with the spirit of the CAA, including meetings before and after the Open Water Season. In particular, the POC provides that consultation, "both formally and informally, will continue before, during, and after the 2010 seismic survey activities. Feedback from the marine mammal co-management group representatives and subsistence users is valued by Statoil and will be useful for our planned seismic survey and potential future activities."

(2) Marine Mammal Observers and Communications

Under Title II of the CAA, Industry Participants agree to employ MMOs/Inupiat Communicators (IC) on board each Primary Sound Source Vessel that they own or operate. The CAA provides detail about the general duties of the MMO/IC, including the duty to keep a lookout for bowhead whales and marine mammals in the vessels' vicinity, provide direct contact with subsistence whaling boats in the area to avoid conflict, and remain subject to the regular code of employee conduct on board the vessels. Title II of the CAA also covers responsibilities by Industry Participant vessels and subsistence hunting vessels to report in to appropriate Communications System Coordination Centers (Com-Centers) at regular intervals, communicate between vessels, and use communication capabilities to further avoid conflict to aid Industry Participants to avoid areas of active whale hunts. The sections also cover the general operation scheme and protocol for Com-Centers, duties of Com-Center operators, and types of communications equipment to use.

The POC, in section 4.2, contains detailed language about the use of MMOs and Inupiaq MMOs with Traditional Knowledge.

Under the POC, at least five observers will be based aboard the seismic source vessel and at least three MMOs on the chase/monitoring vessels when there are 24 hours of daylight, decreasing as the hours of daylight decrease. Primary roles for MMOs are defined as monitoring for the presence of marine mammals during all daylight airgun operations and during any nighttime ramp-up of the airguns. The MP provides additional detail on the number of MMOs, crew rotations, and observer qualification and training requirements, as well as monitoring methodology, including protocols for poor visibility and night monitoring, use of specialized field equipment, field data-recording, verification, handling, and security, and field reporting. Lastly, the Participation Agreement provides that Statoil (and Shell) will fund a 24/7 communications center staffed by Inupiat personnel. The center will have contact with all vessels at least once every hour.

(3) Vessel Operations

Title III of the CAA covers vessel operations, including the duty of vessel operators to report to appropriate Com-Centers and notify them of operation plan changes. The section also provides measures for avoiding potential interaction with bowhead whales, as well as appropriate sound signature data for each vessel.

Section 4.3 of the POC contains a discussion of mitigation measures that includes: using the best known technology and seismic equipment to minimize impacts; airgun array power down, shut down, and ramp-up procedures to be implemented; cost-sharing participation for Com-Centers; the implementation of Awareness and Interaction Plans to lower the impact of seismic surveys on polar bear and walrus; monitoring ice conditions and movement; and supporting a search and rescue helicopter base as a part of the project plan. The MP contains significant detail on Statoil's agreement to mitigate impacts by adopting stringent safety and disturbance zones, and power down, shut down, and ramp-up protocols. The Participation Agreement discusses logistical support and shore services, including Statoil's pledge to share in the cost burden of maintaining the Wainwright ComCenter and protocols for operations of the Com-Center.

(4) Vessels, Testing, and Monitoring

Title IV of the CAA covers equipment standards and requirements protocols for the sound signature tests, monitoring plans, the use of existing information, procedures for handling raw data gathered during tests, and cumulative noise impact studies.

In the POC, section 2.2 provides detailed descriptions of the vessels to be used during the seismic survey. Section 4.1 provides additional detail regarding vessel and seismic equipment protocols to reduce impacts. Specifically, the POC pledges that Statoil will use the "best known technology and seismic equipment to minimize impacts to the environment," including: equipping vessels with the latest technology and waste management systems; using 12 streamers in the seismic receiver array to reduce the number of times the vessel

must traverse and the amount of shot points needed to cover the entire survey area; using solid streamers which do not contain contaminants that could leak.

(5) Avoiding Conflicts

Title V of the CAA specifically centers on conflict avoidance, and contains guidelines for routing vessels and aircraft and limiting vessel speeds for the avoidance of bowhead whales and subsistence hunts, limitations for geophysical activity, and specific provisions for drilling and production.

Section 3 of the POC, as discussed above, contains a significant commitment to cooperation activities and community engagement. In addition to the continuation of formal and informal consultation, the POC also contains measures outlining Statoil's commitment to continued engagement with marine mammal co-management groups and other community cooperation engagements far outside the scope of the CAA. For example, Statoil has participated in a JIP on Oil Spills in Ice, where Norwegian authorities allowed oil spills in broken ice, with the ultimate goal of developing more effective prevention and mitigation measures.

In summary, the POC, 4MP, and Participation Agreement contain provisions that either directly match or match the spirit of those provisions of the CAA focused on avoiding conflicts between the industry and subsistence users; ensuring short and long-term cooperation and consultation with subsistence users; and commitments to ongoing scientific research of topics such as species distribution, seabed studies, and acoustic monitoring programs.

NMFS has scrutinized all of the documents submitted by Statoil (*e.g.,* IHA application, 4MP, Plan of Cooperation and other correspondence to NMFS and affected stakeholders) and documents submitted by other affected stakeholders and concluded that harassment of marine mammals incidental to Statoil's activities will not have more than a negligible impact on marine mammal stocks or an unmitigable adverse impact on the availability of marine mammals for taking for subsistence uses. This finding was based in large part on NMFS' definition of "negligible impact," "unmitigable adverse impact," the proposed mitigation and monitoring measures, the scope of activities proposed to be conducted, including time of year, location and presence of marine mammals in the project area, and Statoil's Plan of Cooperation.

Besides bowhead whale hunting, beluga whales are hunted for subsistence at Barrow, Wainwright, Point Lay, and Point Hope, with the most taken by Point Lay (Fuller and George 1997). Harvest at all of these villages generally occurs between April and July with most taken in April and May when pack-ice conditions deteriorate and leads open-up. Ringed, bearded, and spotted seals are hunted by all of the villages bordering the project area (Fuller and George 1997). Ringed and bearded seals are hunted throughout the year, but most are taken in May, June, and July when ice breaks up and there is open water instead of the more difficult hunting of seals at holes and lairs. Spotted seals are only hunted in spring through summer.

In addition, the proposed seismic surveys by Statoil would only occur for a brief period of 60 days. It would also occur far offshore, approximately 70 miles, outside the area in which harvest traditionally occurs. NMFS does not expect subsistence users to be directly displaced by the seismic surveys because subsistence users typically do not travel this far offshore to harvest marine mammals. Moreover, because of the significant distance offshore and the lack of hunting in these areas, there is no expectation that any physical barriers would exist between marine mammals and subsistence users.

Finally, the required mitigation and monitoring measures are expected to reduce any adverse impacts on marine mammals for taking for subsistence uses to the extent practicable. These measures include, but are not limited to, the 180 dB and 190 dB safety (shut-down/power-down) zones; a requirement to monitor the 160 dB isopleths for aggregations of 12 or more non-migratory balaenidae whales and when necessary shut-down seismic airguns; reducing vessel speed to 10 knots or less when a vessel is within 300 yards of whales to avoid a collision; utilizing communication centers to avoid any conflict with subsistence hunting activities; and the use of marine mammal observers.

Over the past several months, NMFS has worked with both Alaska Native communities and the industry, to the extent feasible, to resolve any Alaska Native concerns from the proposed open water marine and seismic surveys. These efforts include convening an open water stakeholders' meeting in Anchorage, AK, in March 2010, and multiple conference meetings with representatives of the Alaska Native communities and the industry.

*Comment 64:* AEWC notes that, in 2009, NMFS did not publish its response to comments on proposed IHAs activities conducted during the open water season until well after the fall subsistence hunt at Cross Island had concluded and geophysical operations had already taken place. AEWC states that NMFS' failure to release its response to comments until after the activities had taken place casts serious doubt on the validity of NMFS' public involvement process and the underlying analysis of impacts to subsistence activities and marine mammals.

*Response:* NMFS does not agree with AEWC's statement that NMFS' failure to release its response to comments until after the activities had taken place casts doubt on the validity of NMFS' public involvement process, or the underlying analysis of impacts to subsistence activities and marine mammals. As stated earlier, the decision to issue an IHA to Statoil for its proposed seismic surveys in the Chukchi Sea is based in large part on NMFS' definition of "negligible impact," "unmitigable adverse impact," the proposed mitigation and monitoring measures, the scope of activities proposed to be conducted, including time of year, location and presence of marine mammals in the project area, extensive research and studies on potential impacts of anthropogenic sounds to marine mammals, marine mammal behavior, distribution, and movements in the vicinity of Statoil's proposed project areas, Statoil's Plan of Cooperation, and on public comments received during the commenting period and peer-review recommendations by an independent review panel. The reason that NMFS was not able to publish its response to comments on proposed IHA activities in 2009 for Shell's shallow hazards and site clearance surveys until the end of the survey activities was due to the large amount of comments NMFS received. NMFS was able to review and analyze all comments it received and address their validity for the issuance of the IHA. However, due to the large volume of comments, NMFS was not able to organize them into publishable format to be incorporated into the **Federal Register** notice for publication on a timely basis. NMFS will strive to make sure that in the future all comments are addressed in full and published by the time IHAs are issued, as NMFS has done for the 2010 open-water seismic IHAs.

**Description of Marine Mammals in the Area of the Specified Activity**

Eight cetacean and four pinniped species under NMFS jurisdiction could occur in the general area of Statoil's open water marine seismic survey area

in the Chukchi Sea. The species most likely to occur in the project vicinity include two cetacean species: Beluga (*Delphinapterus leucas*) and bowhead whales (*Balaena mysticetus*), and three seal species: Ringed (*Phoca hispida*), spotted (*P. largha*), and bearded seals (*Erignathus barbatus*). Most encounters are likely to occur in nearshore shelf habitats or along the ice edge. The marine mammal species that is likely to be encountered most widely (in space and time) throughout the period of the open water seismic survey is the ringed seal. Encounters with bowhead and beluga whales are expected to be limited to particular regions and seasons, as discussed below.

Other marine mammal species that have been observed in the Chukchi Sea but are less frequent or uncommon in the project area include harbor porpoise (*Phocoena phocoena*), narwhal (*Monodon monoceros*), killer whale (*Orcinus orca*), fin whale (*Balaenoptera physalus*), minke whale (*B. acutorostrata*), humpback whale (*Megaptera novaeangliae*), gray whale (*Eschrichtius robustus*), and ribbon seal (*Histriophoca fasciata*). These species could occur in the project area, but each of these species is uncommon or rare in the area and relatively few encounters with these species are expected during the proposed marine seismic survey. The narwhal occurs in Canadian waters and occasionally in the Beaufort Sea, but it is rare there and is not expected to be encountered. There are scattered records of narwhal in Alaskan waters, including reports by subsistence hunters, where the species is considered extralimital (Reeves *et al.* 2002). Point Barrow, Alaska, is the approximate northeastern extent of the harbor porpoise's regular range (Suydam and George 1992). Humpback, fin, and minke whales have recently been sighted in the Chukchi Sea but very rarely in the Beaufort Sea. Greene *et al.* (2007) reported and photographed a humpback whale cow/calf pair east of Barrow near Smith Bay in 2007, which is the first known occurrence of humpbacks in the Beaufort Sea. Savarese *et al.* (2009) reported one minke whale sighting in the Beaufort Sea in 2007 and 2008. Ribbon seals do not normally occur in the Beaufort Sea; however, two ribbon seal sightings were reported during vessel-based activities near Prudhoe Bay in 2008 (Savarese *et al.* 2009).

The bowhead, fin, and humpback whales are listed as "endangered" under the Endangered Species Act (ESA) and as depleted under the MMPA. Certain stocks or populations of gray, beluga, and killer whales and spotted seals are listed as endangered or proposed for listing under the ESA; however, none of those stocks or populations occur in the proposed activity area. Additionally, the ribbon seal is considered a "species of concern" under the ESA, and the bearded and ringed seals are "candidate species" under the ESA, meaning they are currently being considered for listing.

Statoil's application contains information on the status, distribution, seasonal distribution, and abundance of each of the species under NMFS jurisdiction mentioned in this document. Please refer to the application for that information (see **ADDRESSES**). Additional information can also be found in the NMFS Stock Assessment Reports (SAR). The Alaska 2009 SAR is available at: *http://www.nmfs.noaa.gov/pr/pdfs/sars/ak2009.pdf.*

**Monitoring Plan Peer Review**

The MMPA requires that monitoring plans be independently peer reviewed "where the proposed activity may affect the availability of a species or stock for taking for subsistence uses" (16 U.S.C. 1371(a)(5)(D)(ii)(III)). Regarding this requirement, NMFS' implementing regulations state, "Upon receipt of a complete monitoring plan, and at its discretion, [NMFS] will either submit the plan to members of a peer review panel for review or within 60 days of receipt of the proposed monitoring plan, schedule a workshop to review the plan" (50 CFR 216.108(d)).

NMFS convened an independent peer review panel to review Statoil's Marine Mammal Monitoring and Mitigation Plan (4MP) for the Marine Seismic Surveys of Selected Lease Areas in the Alaskan Chukchi Sea in 2010. The panel met on March 25 and 26, 2010, and provided their final report to NMFS on April 22, 2010. The full panel report can be viewed at: *http://www.nmfs.noaa.gov/pr/permits/incidental.htm#applications.*

NMFS provided the panel with Statoil's 4MP and asked the panel to address the following questions and issues for Statoil's plan:

(1) The monitoring program should document the effects (including acoustic) on marine mammals and document or estimate the actual level of take as a result of the activity. Does the monitoring plan meet this goal?

(2) Ensure that the monitoring activities and methods described in the plan will enable the applicant to meet the requirements listed in (1) above;

(3) Are the applicant's objectives achievable based on the methods described in the plan?

(4) Are the applicant's objectives the most useful for understanding impacts on marine mammals?

(5) Should the applicant consider additional monitoring methods or modifications of proposed monitoring methods for the proposed activity? And

(6) What is the best way for an applicant to report their data and results to NMFS?

Section 3 of the report contains recommendations that the panel members felt were applicable to all of the monitoring plans reviewed this year. Section 4.6 of the report contains recommendations specific to Statoil's Open Water Marine Seismic Survey Program 4MP. Specifically, for the general recommendations, the panel commented on issues related to: (1) Acoustic effects of oil and gas exploration—assessment and mitigation; (2) aerial surveys; (3) MMOs; (4) visual near-field monitoring; (5) visual far-field monitoring; (6) baseline biological and environmental information; (7) comprehensive ecosystem assessments and cumulative impacts; (8) duplication of seismic survey effort; and (9) whale behavior.

NMFS has reviewed the report and evaluated all recommendations made by the panel. NMFS has determined that there are several measures that Statoil can incorporate into its 2010 Open Water Marine Survey Program 4MP to improve it. Additionally, there are other recommendations that NMFS has determined would also result in better data collection, and could potentially be implemented by oil and gas industry applicants, but which likely could not be implemented for the 2010 open water season due to technical issues (see below). While it may not be possible to implement those changes this year, NMFS believes that they are worthwhile and appropriate suggestions that may require a bit more time to implement, and Statoil should consider incorporating them into future monitoring plans should Statoil decide to apply for IHAs in the future.

The following subsections lay out measures that NMFS recommends for implementation as part of the 2010 Open Water Marine Survey Program 4MP and those that are recommended for future programs.

*Recommendations for Inclusion in the 2010 4MP and IHA*

Section 3.3 of the panel report contains several recommendations regarding MMOs, which NMFS agrees that Statoil should incorporate:

- Observers should be trained using visual aids (e.g., videos, photos), to help them identify the species that they are

likely to encounter in the conditions under which the animals will likely be seen.

• Observers should understand the importance of classifying marine mammals as "unknown" or "unidentified" if they cannot identify the animals to species with confidence. In those cases, they should note any information that might aid in the identification of the marine mammal sighted. For example, for an unidentified mysticete whale, the observers should record whether the animal had a dorsal fin.

• Observers should attempt to maximize the time spent looking at the water and guarding the safety radii. They should avoid the tendency to spend too much time evaluating animal behavior or entering data on forms, both of which detract from their primary purpose of monitoring the safety zone.

• "Big eye" binoculars (25 x 150) should be used from high perches on large, stable platforms. They are most useful for monitoring impact zones that extend beyond the effective line of sight. With two or three observers on watch, the use of "big eyes" should be paired with searching by naked eye, the latter allowing visual coverage of nearby areas to detect marine mammals. When a single observer is on duty, the observer should follow a regular schedule of shifting between searching by naked-eye, low-power binoculars, and "big-eye" binoculars based on the activity, the environmental conditions, and the marine mammals of concern.

• Observers should use the best possible positions for observing (e.g., outside and as high on the vessel as possible), taking into account weather and other working conditions.

• Whenever possible, new observers should be paired with experienced observers to avoid situations where lack of experience impairs the quality of observations. If there are Alaska Native MMOs, the MMO training that is conducted prior to the start of the survey activities should be conducted with both Alaska Native MMOs and biologist MMOs being trained at the same time in the same room. There should not be separate training courses for the different MMOs.

In Section 3.4, panelists recommend collecting some additional data to help verify the utility of the "ramp-up" requirement commonly contained in IHAs. To help evaluate the utility of ramp-up procedures, NMFS will require observers to record and report their observations during any ramp-up period. An analysis of these observations may lead to additional information regarding the effectiveness of ramp-up and should be included in the monitoring report.

Among other things, Section 3.5 of the panel report recommends recording visibility data because of the concern that the line-of-sight distance for observing marine mammals is reduced under certain conditions. MMOs should "carefully document visibility during observation periods so that total estimates of take can be corrected accordingly".

Section 4.6 of the report contains recommendations specific to Statoil's Open Water Marine Seismic Survey Program 4MP. Of the recommendations presented in this section, NMFS has determined that the following should be implemented for the 2010 season:

• Summarize observation effort and conditions, the number of animals seen by species, the location and time of each sighting, position relative to the survey vessel, the company's activity at the time, each animal's response, and any adjustments made to operating procedures. Provide all spatial data on charts (always including vessel location).

• Make all data available in the report or (preferably) electronically for integration with data from other companies.

• Accommodate specific requests for raw data, including tracks of all vessels and aircraft associated with the operation and activity logs documenting when and what types of sounds are introduced into the environment by the operation.

NMFS spoke with Statoil about the inclusion of these recommendations into the 2010 4MP and IHA. Statoil indicated to NMFS that they will incorporate these recommendations into the 4MP, and NMFS has made several of these recommendations requirements in the IHA.

*Recommendations for Inclusion in Future Monitoring Plans*

Section 3.5 of the report recommends methods for conducting comprehensive monitoring of a large-scale seismic operation. One method for conducting this monitoring recommended by panel members is the use of passive acoustic devices. Additionally, Section 3.2 of the report encourages the use of such systems if aerial surveys will not be used for real-time mitigation monitoring. NMFS acknowledges that there are challenges involved in using this technology to detect bowhead whale vocalizations in conjunction with seismic airguns in this environment, especially in real time. However, NMFS recommends that Statoil work to help develop and improve this type of technology for use in the Arctic (and use it once it is available and effective), as it could be valuable both for real-time mitigation implementation, as well as archival data collection. Statoil indicated to NMFS that they have been working for several years to aid in the development of such technology and will continue to do so.

The panelists also recommend adding a tagging component to monitoring plans. "Tagging of animals expected to be in the area where the survey is planned also may provide valuable information on the location of potentially affected animals and their behavioral responses to industrial activities. Although the panel recognized that such comprehensive monitoring might be difficult and expensive, such an effort (or set of efforts) reflects the complex nature of the challenge of conducting reliable, comprehensive monitoring for seismic or other relatively-intense industrial operations that ensonify large areas of ocean." While this particular recommendation is not feasible for implementation in 2010, NMFS recommends that Statoil consider adding a tagging component to future seismic survey monitoring plans should Statoil decide to conduct such activities in future years.

To the extent possible, NMFS recommends implementing the recommendation contained in Section 4.6.6 for the 2010 season: "Integrate all observer data with information from tagging and acoustic studies to provide a more comprehensive description of the acoustic environment during its survey." However, NMFS recognizes that this integration process may take time to implement. Therefore, Statoil should begin considering methods for the integration of the observer data now if Statoil intends to apply for IHAs in the future.

In Section 3.4, panelists recommend collecting data to evaluate the efficacy of using forward-looking infrared devices (FLIR) vs. night-vision binoculars. The panelists note that while both of these devices may increase detection capabilities by MMOs of marine mammals, the reliability of these technologies should be tested under appropriate conditions and their efficacy evaluated. NMFS recommends that Statoil design a study to explore using both FLIR and night-vision binoculars and collect data on levels of detection of marine mammals using each type of device.

*Other Recommendations in the Report*

The panel also made several recommendations, which are not

discussed in the two preceding subsections. NMFS determined that many of the recommendations were made beyond the bounds of what the panel members were tasked to do. For example, the panel recommended that NMFS begin a transition away from using a single metric of acoustic exposure to estimate the potential effects of anthropogenic sound on marine living resources. This is not a recommendation about monitoring but rather addresses a NMFS policy issue. NMFS is currently in the process of revising its acoustic guidelines on a national scale. A recommendation was also made regarding the training and oversight of MMOs. NMFS is currently working on a national policy for this as well. Section 3.7 of the report contains several recommendations regarding comprehensive ecosystem assessments and cumulative impacts. These are good, broad recommendations; however, the implementation of these recommendations would not be the responsibility solely of oil and gas industry applicants. The recommendations require the cooperation and input of several groups, including Federal, state, and local government agencies, members of other industries, and members of the scientific research community. NMFS will encourage the industry and others to build the relationships and infrastructure necessary to pursue these goals, and incorporate these recommendations into future MMPA authorizations, as appropriate. Lastly, Section 3.8 of the report makes a recommendation regarding data sharing and reducing the duplication of seismic survey effort. While this is a valid recommendation, it does not relate to monitoring or address any of the six questions which the panel members were tasked to answer.

For some of the recommendations, NMFS felt that additional clarification was required by the panel members before NMFS could determine whether or not applicants should incorporate them into the monitoring plans. Section 3.2 of the report discusses the use of and methods for conducting aerial surveys. Industry applicants have not conducted aerial surveys in Chukchi Sea lease sale areas for several years because of the increased risk for flying there (as noted by the panel report). To that end, NMFS has asked the panel to provide recommendations on whether or not similar surveys could be conducted from dedicated vessel-based platforms. NMFS also asked for additional clarification on some of the recommendations regarding data collection and take estimate calculations. In addition, NMFS asked the panel members for clarification on the recommendation contained in Section 3.6 regarding baseline studies. Lastly, NMFS asked the panel members for clarification on the recommendation specific to Statoil contained in Section 4.6 regarding estimating statistical power for all methods intended to detect adverse impacts. Once NMFS hears back from the panel and is clear with these recommendations, NMFS will follow up with Statoil and discuss the implementation of these additional measures in future years.

**Potential Effects of the Specified Activity on Marine Mammals**

Operating a variety of active acoustic sources such as airguns and echo sounders can impact marine mammals in a variety of ways.

*Potential Effects of Airgun and Sonar Sounds on Marine Mammals*

The effects of sounds from airgun pulses might include one or more of the following: Tolerance, masking of natural sounds, behavioral disturbance, and temporary or permanent hearing impairment or non-auditory effects (Richardson *et al.* 1995). 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) Tolerance

Numerous studies have shown that pulsed sounds from airguns are often readily detectable in the water at distances of many kilometers. Numerous studies have also shown that marine mammals at distances more than a few kilometers from operating seismic vessels often show no apparent response. That is often true even in cases when the pulsed 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 airgun pulses under some conditions, at other times, mammals of all three types have shown no overt reactions. In general, pinnipeds and small odontocetes seem to be more tolerant of exposure to airgun pulses than baleen whales.

(2) Behavioral Disturbance

Marine mammals may behaviorally react to sound when exposed to anthropogenic noise. These behavioral reactions are often shown as: Changing durations of surfacing and dives, number of blows per surfacing, or moving direction and/or speed; reduced/increased vocal activities; changing/cessation of certain behavioral activities (such as socializing or feeding); visible startle response or aggressive behavior (such as tail/fluke slapping or jaw clapping); avoidance of areas where noise sources are located; and/or flight responses (*e.g.,* pinnipeds flushing into water from haulouts or rookeries).

The biological significance of many of these behavioral disturbances is difficult to predict, especially if the detected disturbances appear minor. However, the consequences of behavioral modification could be expected to be biologically significant if the change affects growth, survival, and reproduction. Some of these significant behavioral modifications include:

- Drastic change in diving/surfacing patterns (such as those thought to be causing beaked whale stranding due to exposure to military mid-frequency tactical sonar);
- Habitat abandonment due to loss of desirable acoustic environment; and
- Cease feeding or social interaction.

For example, at the Guerreo Negro Lagoon in Baja California, Mexico, which is one of the important breeding grounds for Pacific gray whales, shipping and dredging associated with a salt works may have induced gray whales to abandon the area through most of the 1960s (Bryant *et al.* 1984). After these activities stopped, the lagoon was reoccupied, first by single whales and later by cow-calf pairs.

The onset of behavioral disturbance from anthropogenic noise depends on both external factors (characteristics of noise sources and their paths) and the receiving animals (hearing, motivation, experience, demography) and is also difficult to predict (Southall *et al.* 2007).

Currently NMFS uses 160 dB re 1 µPa at received level for impulse noises (such as airgun pulses) as the onset of marine mammal behavioral harassment.

*Mysticete:* Baleen whales generally tend to avoid operating airguns, but avoidance radii are quite variable. Whales are often reported to show no overt reactions to airgun pulses at distances beyond a few kilometers, even though the airgun pulses remain well above ambient noise levels out to much longer distances (reviewed in Richardson *et al.* 1995; Gordon *et al.* 2004). However, studies done since the late 1990s of migrating humpback and migrating bowhead whales show reactions, including avoidance, that sometimes extend to greater distances than documented earlier. Therefore, it

appears that behavioral disturbance can vary greatly depending on context, and not just on received levels alone. Avoidance distances often exceed the distances at which boat-based observers can see whales, so observations from the source vessel can be biased. Observations over broader areas may be needed to determine the range of potential effects of some large-source seismic surveys where effects on cetaceans may extend to considerable distances (Richardson *et al.* 1999; Moore and Angliss 2006). Longer-range observations, when required, can sometimes be obtained via systematic aerial surveys or aircraft-based observations of behavior (*e.g.,* Richardson *et al.* 1986, 1999; Miller *et al.* 1999, 2005; Yazvenko *et al.* 2007a, 2007b) or by use of observers on one or more support vessels operating in coordination with the seismic vessel (*e.g.,* Smultea *et al.* 2004; Johnson *et al.* 2007). However, the presence of other vessels near the source vessel can, at least at times, reduce sightability of cetaceans from the source vessel (Beland *et al.* 2009), thus complicating interpretation of sighting data.

Some baleen whales show considerable tolerance of seismic pulses. However, when the pulses are strong enough, avoidance or other behavioral changes become evident. Because the responses become less obvious with diminishing received sound level, it has been difficult to determine the maximum distance (or minimum received sound level) at which reactions to seismic pulses become evident and, hence, how many whales are affected.

Studies of gray, bowhead, and humpback whales have determined that received levels of pulses in the 160–170 dB re 1 μPa (rms) range seem to cause obvious avoidance behavior in a substantial fraction of the animals exposed (see review in Southall *et al.* 2007). In many areas, seismic pulses diminish to these levels at distances ranging from 4–15 km from the source. A substantial proportion of the baleen whales within such distances may show avoidance or other strong disturbance reactions to the operating airgun array. However, in other situations, various mysticetes tolerate exposure to full-scale airgun arrays operating at even closer distances, with only localized avoidance and minor changes in activities. At the other extreme, in migrating bowhead whales, avoidance often extends to considerably larger distances (20–30 km) and lower received sound levels (120–130 dB re 1 μPa (rms)). Also, even in cases where there is no conspicuous avoidance or change in activity upon exposure to sound pulses from distant seismic operations, there are sometimes subtle changes in behavior (*e.g.,* surfacing-respiration-dive cycles) that are only evident through detailed statistical analysis (*e.g.,* Richardson *et al.* 1986; Gailey *et al.* 2007).

Data on short-term reactions by cetaceans to impulsive noises are not necessarily indicative of long-term or biologically significant effects. It is not known whether impulsive sounds affect reproductive rate or distribution and habitat use in subsequent days or years. However, gray whales have continued to migrate annually along the west coast of North America despite intermittent seismic exploration (and much ship traffic) in that area for decades (Appendix A in Malme *et al.* 1984; Richardson *et al.* 1995), and there has been a substantial increase in the population over recent decades (Allen and Angliss 2010). The western Pacific gray whale population did not seem affected by a seismic survey in its feeding ground during a prior year (Johnson *et al.* 2007). Similarly, bowhead whales have continued to travel to the eastern Beaufort Sea each summer despite seismic exploration in their summer and autumn range for many years (Richardson *et al.* 1987), and their numbers have increased notably (Allen and Angliss 2010). Bowheads also have been observed over periods of days or weeks in areas ensonified repeatedly by seismic pulses (Richardson *et al.* 1987; Harris *et al.* 2007). However, it is generally not known whether the same individual bowheads were involved in these repeated observations (within and between years) in strongly ensonified areas. In any event, in the absence of some unusual circumstances, the history of coexistence between seismic surveys and baleen whales suggests that brief exposures to sound pulses from any single seismic survey are unlikely to result in prolonged effects.

*Odontocete:* Little systematic information is available about reactions of toothed whales to airgun pulses. Few studies similar to the more extensive baleen whale/seismic pulse work summarized above have been reported for toothed whales. However, there are recent systematic data on sperm whales (*e.g.,* Gordon *et al.* 2006; Madsen *et al.* 2006; Winsor and Mate 2006; Jochens *et al.* 2008; Miller *et al.* 2009). There is also an increasing amount of information about responses of various odontocetes to seismic surveys based on monitoring studies (*e.g.,* Stone 2003; Smultea *et al.* 2004; Moulton and Miller 2005; Bain and Williams 2006; Holst *et al.* 2006; Stone and Tasker 2006; Potter *et al.* 2007; Hauser *et al.* 2008; Holst and Smultea 2008; Weir 2008; Barkaszi *et al.* 2009; Richardson *et al.* 2009).

Dolphins and porpoises are often seen by observers on active seismic vessels, occasionally at close distances (*e.g.,* bow riding). However, some studies near the U.K., Newfoundland and Angola, in the Gulf of Mexico, and off Central America have shown localized avoidance. Also, belugas summering in the Canadian Beaufort Sea showed larger-scale avoidance, tending to avoid waters out to 10–20 km from operating seismic vessels. In contrast, recent studies show little evidence of conspicuous reactions by sperm whales to airgun pulses, contrary to earlier indications.

There are almost no specific data on responses of beaked whales to seismic surveys, but it is likely that most if not all species show strong avoidance. There is increasing evidence that some beaked whales may strand after exposure to strong noise from tactical military mid-frequency sonars. Whether they ever do so in response to seismic survey noise is unknown. Northern bottlenose whales seem to continue to call when exposed to pulses from distant seismic vessels.

For delphinids, and possibly the Dall's porpoise, the available data suggest that a ≥170 dB re 1 μPa (rms) disturbance criterion (rather than ≥160 dB) would be appropriate. With a medium-to-large airgun array, received levels typically diminish to 170 dB within 1–4 km, whereas levels typically remain above 160 dB out to 4–15 km (*e.g.,* Tolstoy *et al.* 2009). Reaction distances for delphinids are more consistent with the typical 170 dB re 1 μPa rms distances.

Due to their relatively higher frequency hearing ranges when compared to mysticetes, odontocetes may have stronger responses to mid- and high-frequency sources such as sub-bottom profilers, side scan sonar, and echo sounders than mysticetes (Richardson *et al.* 1995; Southall *et al.* 2007).

*Pinnipeds:* Few studies of the reactions of pinnipeds to noise from open-water seismic exploration have been published (for review of the early literature, see Richardson *et al.* 1995). However, pinnipeds have been observed during a number of seismic monitoring studies. Monitoring in the Beaufort Sea during 1996–2002 provided a substantial amount of information on avoidance responses (or lack thereof) and associated behavior. Additional monitoring of that type has been done in the Beaufort and Chukchi Seas in 2006–2009. Pinnipeds exposed to seismic surveys have also been observed

during seismic surveys along the U.S. west coast. Some limited data are available on physiological responses of pinnipeds exposed to seismic sound, as studied with the aid of radio telemetry. Also, there are data on the reactions of pinnipeds to various other related types of impulsive sounds.

Early observations provided considerable evidence that pinnipeds are often quite tolerant of strong pulsed sounds. During seismic exploration off Nova Scotia, gray seals exposed to noise from airguns and linear explosive charges reportedly did not react strongly (J. Parsons in Greene *et al.* 1985). An airgun caused an initial startle reaction among South African fur seals but was ineffective in scaring them away from fishing gear. Pinnipeds in both water and air sometimes tolerate strong noise pulses from non-explosive and explosive scaring devices, especially if attracted to the area for feeding or reproduction (Mate and Harvey 1987; Reeves *et al.* 1996). Thus, pinnipeds are expected to be rather tolerant of, or to habituate to, repeated underwater sounds from distant seismic sources, at least when the animals are strongly attracted to the area.

In summary, visual monitoring from seismic vessels has shown only slight (if any) avoidance of airguns by pinnipeds, and only slight (if any) changes in behavior. These studies show that many pinnipeds do not avoid the area within a few hundred meters of an operating airgun array. However, based on the studies with large sample size, or observations from a separate monitoring vessel, or radio telemetry, it is apparent that some phocid seals do show localized avoidance of operating airguns. The limited nature of this tendency for avoidance is a concern. It suggests that one cannot rely on pinnipeds to move away, or to move very far away, before received levels of sound from an approaching seismic survey vessel approach those that may cause hearing impairment.

(3) Masking

Chronic exposure to excessive, though not high-intensity, noise could cause masking at particular frequencies for marine mammals that utilize sound for vital biological functions. Masking can interfere with detection of acoustic signals such as communication calls, echolocation sounds, and environmental sounds important to marine mammals. Since marine mammals depend on acoustic cues for vital biological functions, such as orientation, communication, finding prey, and avoiding predators, marine mammals that experience severe acoustic masking will have reduced fitness in survival and reproduction.

Masking occurs when noise and signals (that animal utilizes) overlap at both spectral and temporal scales. For the airgun noise generated from the proposed marine seismic survey, these are low frequency (under 1 kHz) pulses with extremely short durations (in the scale of milliseconds). Lower frequency man-made noises are more likely to affect detection of communication calls and other potentially important natural sounds such as surf and prey noise. There is little concern regarding masking due to the brief duration of these pulses and relatively longer silence between airgun shots (9–12 seconds) near the noise source, however, at long distances (over tens of kilometers away) in deep water, due to multipath propagation and reverberation, the durations of airgun pulses can be "stretched" to seconds with long decays (Madsen *et al.* 2006; Clark and Gagnon 2006). Therefore it could affect communication signals used by low frequency mysticetes when they occur near the noise band and thus reduce the communication space of animals (*e.g.,* Clark *et al.* 2009a, 2009b) and cause increased stress levels (*e.g.,* Foote *et al.* 2004; Holt *et al.* 2009). Further, in areas of shallow water, multipath propagation of airgun pulses could be more profound, thus affecting communication signals from marine mammals even at close distances. Although average ambient noise in areas where received seismic noises are heard can be elevated at long distances, the intensity of the noise is also greatly reduced at such long distances. Nevertheless, partial informational and energetic masking of different degrees could affect signal receiving in some marine mammals within the ensonified areas. Additional research is needed to further address these effects.

Although masking effects of pulsed sounds on marine mammal calls and other natural sounds are expected to be limited, there are few specific studies on this. Some whales continue calling in the presence of seismic pulses and whale calls often can be heard between the seismic pulses (*e.g.,* Richardson *et al.* 1986; McDonald *et al.* 1995; Greene *et al.* 1999a, 1999b; Nieukirk *et al.* 2004; Smultea *et al.* 2004; Holst *et al.* 2005a, 2005b, 2006; Dunn and Hernandez 2009). However, there is one recent summary report indicating that calling fin whales distributed in one part of the North Atlantic went silent for an extended period starting soon after the onset of a seismic survey in the area (Clark and Gagnon 2006). It is not clear from that preliminary paper whether the whales ceased calling because of masking, or whether this was a behavioral response not directly involving masking. Also, bowhead whales in the Beaufort Sea may decrease their call rates in response to seismic operations, although movement out of the area might also have contributed to the lower call detection rate (Blackwell *et al.* 2009a; 2009b).

Among the odontocetes, there has been one report that sperm whales ceased calling when exposed to pulses from a very distant seismic ship (Bowles *et al.* 1994). However, more recent studies of sperm whales found that they continued calling in the presence of seismic pulses (Madsen *et al.* 2002; Tyack *et al.* 2003; Smultea *et al.* 2004; Holst *et al.* 2006; Jochens *et al.* 2008). Madsen *et al.* (2006) noted that airgun sounds would not be expected to mask sperm whale calls given the intermittent nature of airgun pulses. Dolphins and porpoises are also commonly heard calling while airguns are operating (Gordon *et al.* 2004; Smultea *et al.* 2004; Holst *et al.* 2005a, 2005b; Potter *et al.* 2007). Masking effects of seismic pulses are expected to be negligible in the case of the smaller odontocetes, given the intermittent nature of seismic pulses plus the fact that sounds important to them are predominantly at much higher frequencies than are the dominant components of airgun sounds.

Pinnipeds have best hearing sensitivity and/or produce most of their sounds at frequencies higher than the dominant components of airgun sound, but there is some overlap in the frequencies of the airgun pulses and the calls. However, the intermittent nature of airgun pulses presumably reduces the potential for masking.

Marine mammals are thought to be able to compensate for masking by adjusting their acoustic behavior such as shifting call frequencies, increasing call volume and vocalization rates. For example, blue whales are found to increase call rates when exposed to seismic survey noise in the St. Lawrence Estuary (Di Iorio and Clark 2009). The North Atlantic right whales (*Eubalaena glacialis*) exposed to high shipping noise increase call frequency (Parks *et al.* 2007), while some humpback whales respond to low-frequency active sonar playbacks by increasing song length (Miller *el al.* 2000).

(4) Hearing Impairment

Marine mammals exposed to high intensity sound repeatedly or for prolonged periods can experience hearing threshold shift (TS), which is the loss of hearing sensitivity at certain frequency ranges (Kastak *et al.* 1999;

Schlundt *et al.* 2000; Finneran *et al.* 2002; 2005). TS can be permanent (PTS), in which case the loss of hearing sensitivity is unrecoverable, or temporary (TTS), in which case the animal's hearing threshold will recover over time (Southall *et al.* 2007). Just like masking, marine mammals that suffer from PTS or TTS will have reduced fitness in survival and reproduction, either permanently or temporarily. Repeated noise exposure that leads to TTS could cause PTS. For transient sounds, the sound level necessary to cause TTS is inversely related to the duration of the sound.

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. It is a temporary phenomenon, and (especially when mild) is not considered to represent physical damage or "injury" (Southall *et al.* 2007). Rather, the onset of TTS is an indicator that, if the animal is exposed to higher levels of that sound, physical damage is ultimately a possibility.

The magnitude of TTS depends on the level and duration of noise exposure, and to some degree on frequency, among other considerations (Kryter 1985; Richardson *et al.* 1995; Southall *et al.* 2007). For sound exposures at or somewhat above the TTS threshold, hearing sensitivity recovers rapidly after exposure to the noise ends. In terrestrial mammals, TTS can last from minutes or hours to (in cases of strong TTS) days. Only a few data have been obtained on sound levels and durations necessary to elicit mild TTS in marine mammals (none in mysticetes), and none of the published data concern TTS elicited by exposure to multiple pulses of sound during operational seismic surveys (Southall *et al.* 2007).

For toothed whales, experiments on a bottlenose dolphin (*Tursiops truncates*) and beluga whale showed that exposure to a single watergun impulse at a received level of 207 kPa (or 30 psi) peak-to-peak (p-p), which is equivalent to 228 dB re 1 μPa (p-p), resulted in a 7 and 6 dB TTS in the beluga whale at 0.4 and 30 kHz, respectively. Thresholds returned to within 2 dB of the pre-exposure level within 4 minutes of the exposure (Finneran *et al.* 2002). No TTS was observed in the bottlenose dolphin.

Finneran *et al.* (2005) further examined the effects of tone duration on TTS in bottlenose dolphins. Bottlenose dolphins were exposed to 3 kHz tones (non-impulsive) for periods of 1, 2, 4 or 8 seconds (s), with hearing tested at 4.5 kHz. For 1-s exposures, TTS occurred with SELs of 197 dB, and for exposures >1 s, SEL >195 dB resulted in TTS (SEL is equivalent to energy flux, in dB re 1 $\mu Pa^2$-s). At an SEL of 195 dB, the mean TTS (4 min after exposure) was 2.8 dB. Finneran *et al.* (2005) suggested that an SEL of 195 dB is the likely threshold for the onset of TTS in dolphins and belugas exposed to tones of durations 1–8 s (*i.e.,* TTS onset occurs at a near-constant SEL, independent of exposure duration). That implies that, at least for non-impulsive tones, a doubling of exposure time results in a 3 dB lower TTS threshold.

However, the assumption that, in marine mammals, the occurrence and magnitude of TTS is a function of cumulative acoustic energy (SEL) is probably an oversimplification. Kastak *et al.* (2005) reported preliminary evidence from pinnipeds that, for prolonged non-impulse noise, higher SELs were required to elicit a given TTS if exposure duration was short than if it was longer, i.e., the results were not fully consistent with an equal-energy model to predict TTS onset. Mooney *et al.* (2009a) showed this in a bottlenose dolphin exposed to octave-band non-impulse noise ranging from 4 to 8 kHz at SPLs of 130 to 178 dB re 1 μPa for periods of 1.88 to 30 minutes (min). Higher SELs were required to induce a given TTS if exposure duration was short than if it was longer. Exposure of the aforementioned bottlenose dolphin to a sequence of brief sonar signals showed that, with those brief (but non-impulse) sounds, the received energy (SEL) necessary to elicit TTS was higher than was the case with exposure to the more prolonged octave-band noise (Mooney et al. 2009b). Those authors concluded that, when using (non-impulse) acoustic signals of duration 0.5 s, SEL must be at least 210–214 dB re 1 μPa2-s to induce TTS in the bottlenose dolphin. The most recent studies conducted by Finneran *et al.* also support the notion that exposure duration has a more significant influence compared to SPL as the duration increases, and that TTS growth data are better represented as functions of SPL and duration rather than SEL alone (Finneran *et al.* 2010a, 2010b). In addition, Finneran *et al.* (2010b) conclude that when animals are exposed to intermittent noises, there is recovery of hearing during the quiet intervals between exposures through the accumulation of TTS across multiple exposures. Such findings suggest that when exposed to multiple seismic pulses, partial hearing recovery also occurs during the seismic pulse intervals.

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 ambient noise levels at those low frequencies tend to be higher (Urick 1983). 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). From this, it is suspected that received levels causing TTS onset may also be higher in baleen whales. However, no cases of TTS are expected given the small size of the airguns proposed to be used and the strong likelihood that baleen whales (especially migrating bowheads) would avoid the approaching airguns (or vessel) before being exposed to levels high enough for there to be any possibility of TTS.

In pinnipeds, TTS thresholds associated with exposure to brief pulses (single or multiple) of underwater sound have not been measured. Initial evidence from prolonged exposures suggested that some pinnipeds may incur TTS at somewhat lower received levels than do small odontocetes exposed for similar durations (Kastak *et al.* 1999; 2005). However, more recent indications are that TTS onset in the most sensitive pinniped species studied (harbor seal, which is closely related to the ringed seal) may occur at a similar SEL as in odontocetes (Kastak *et al.* 2004).

Most cetaceans show some degree of avoidance of seismic vessels operating an airgun array (see above). It is unlikely that these cetaceans would be exposed to airgun pulses at a sufficiently high level for a sufficiently long period to cause more than mild TTS, given the relative movement of the vessel and the marine mammal. TTS would be more likely in any odontocetes that bow- or wake-ride or otherwise linger near the airguns. However, while bow- or wake-riding, odontocetes would be at the surface and thus not exposed to strong sound pulses given the pressure release and Lloyd Mirror effects at the surface. But if bow- or wake-riding animals were to dive intermittently near airguns, they would be exposed to strong sound pulses, possibly repeatedly.

If some cetaceans did incur mild or moderate TTS through exposure to airgun sounds in this manner, this would very likely be a temporary and

reversible phenomenon. However, even a temporary reduction in hearing sensitivity could be deleterious in the event that, during that period of reduced sensitivity, a marine mammal needed its full hearing sensitivity to detect approaching predators, or for some other reason.

Some pinnipeds show avoidance reactions to airguns, but their avoidance reactions are generally not as strong or consistent as those of cetaceans. Pinnipeds occasionally seem to be attracted to operating seismic vessels. There are no specific data on TTS thresholds of pinnipeds exposed to single or multiple low-frequency pulses. However, given the indirect indications of a lower TTS threshold for the harbor seal than for odontocetes exposed to impulse sound (see above), it is possible that some pinnipeds close to a large airgun array could incur TTS.

Current NMFS' noise exposure standards require 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). These criteria were taken from recommendations by an expert panel of the High Energy Seismic Survey (HESS) Team that performed an assessment on noise impacts by seismic airguns to marine mammals in 1997, although the HESS Team recommended a 180-dB limit for pinnipeds in California (HESS 1999). The 180 and 190 dB re 1 µPa (rms) levels have not been considered to be the levels above which TTS might occur. Rather, they were 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. As summarized above, data that are now available imply that TTS is unlikely to occur in various odontocetes (and probably mysticetes as well) unless they are exposed to a sequence of several airgun pulses stronger than 190 dB re 1 µPa (rms). On the other hand, for the harbor seal, harbor porpoise, and perhaps some other species, TTS may occur upon exposure to one or more airgun pulses whose received level equals the NMFS "do not exceed" value of 190 dB re 1 µPa (rms). That criterion corresponds to a single-pulse SEL of 175–180 dB re 1 $\mu Pa^2$-s in typical conditions, whereas TTS is suspected to be possible in harbor seals and harbor porpoises with a cumulative SEL of ~171 and ~164 dB re 1 $\mu Pa^2$-s, respectively.

It has been shown that most large whales and many smaller odontocetes (especially the harbor porpoise) show at least localized avoidance of ships and/or seismic operations. Even when avoidance is limited to the area within a few hundred meters of an airgun array, that should usually be sufficient to avoid TTS based on what is currently known about thresholds for TTS onset in cetaceans. In addition, ramping up airgun arrays, which is standard operational protocol for many seismic operators, should allow cetaceans near the airguns at the time of startup (if the sounds are aversive) to move away from the seismic source and to avoid being exposed to the full acoustic output of the airgun array. Thus, most baleen whales likely will not be exposed to high levels of airgun sounds provided the ramp-up procedure is applied. Likewise, many odontocetes close to the trackline are likely to move away before the sounds from an approaching seismic vessel become sufficiently strong for there to be any potential for TTS or other hearing impairment. Hence, there is little potential for baleen whales or odontocetes that show avoidance of ships or airguns to be close enough to an airgun array to experience TTS. Therefore, it is not likely that marine mammals in the vicinity of the proposed open water marine and seismic surveys by Shell and Statoil would experience TTS as a result of these activities.

*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 (Kryter 1985). Physical damage to a mammal's hearing apparatus can occur if it is exposed to sound impulses that have very high peak pressures, especially if they have very short rise times. (Rise time is the interval required for sound pressure to increase from the baseline pressure to peak pressure.)

There is no specific evidence that exposure to pulses of airgun sound can cause PTS in any marine mammal, even with large arrays of airguns. However, given the likelihood that some mammals close to an airgun array might incur at least mild TTS (see above), there has been further speculation about the possibility that some individuals occurring very close to airguns might incur PTS (*e.g.,* Richardson *et al.* 1995; Gedamke *et al.* 2008). Single or occasional occurrences of mild TTS are not indicative of permanent auditory damage, but repeated or (in some cases) single exposures to a level well above that causing TTS onset might elicit PTS.

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 (Southall *et al.* 2007). Based on data from terrestrial mammals, a precautionary assumption is that the PTS threshold for impulse sounds (such as airgun pulses as received close to the source) is at least 6 dB higher than the TTS threshold on a peak-pressure basis, and probably > 6 dB higher (Southall *et al.* 2007). The low-to-moderate levels of TTS that have been induced in captive odontocetes and pinnipeds during controlled studies of TTS have been confirmed to be temporary, with no measurable residual PTS (Kastak *et al.* 1999; Schlundt *et al.* 2000; Finneran *et al.* 2002; 2005; Nachtigall *et al.* 2003; 2004). However, very prolonged exposure to sound strong enough to elicit TTS, or shorter-term exposure to sound levels well above the TTS threshold, can cause PTS, at least in terrestrial mammals (Kryter 1985). In terrestrial mammals, the received sound level from a single non-impulsive sound exposure must be far above the TTS threshold for any risk of permanent hearing damage (Kryter 1994; Richardson *et al.* 1995; Southall *et al.* 2007). However, there is special concern about strong sounds whose pulses have very rapid rise times. In terrestrial mammals, there are situations when pulses with rapid rise times (*e.g.,* from explosions) can result in PTS even though their peak levels are only a few dB higher than the level causing slight TTS. The rise time of airgun pulses is fast, but not as fast as that of an explosion.

Some factors that contribute to onset of PTS, at least in terrestrial mammals, are as follows:

- Exposure to single very intense sound,
- Fast rise time from baseline to peak pressure,
- Repetitive exposure to intense sounds that individually cause TTS but not PTS, and
- Recurrent ear infections or (in captive animals) exposure to certain drugs.

Cavanagh (2000) reviewed the thresholds used to define TTS and PTS. Based on this review and SACLANT (1998), it is reasonable to assume that PTS might occur at a received sound level 20 dB or more above that inducing mild TTS. However, for PTS to occur at a received level only 20 dB above the TTS threshold, the animal probably would have to be exposed to a strong

sound for an extended period, or to a strong sound with rather rapid rise time.

More recently, Southall *et al.* (2007) estimated that received levels would need to exceed the TTS threshold by at least 15 dB, on an SEL basis, for there to be risk of PTS. Thus, for cetaceans exposed to a sequence of sound pulses, they estimate that the PTS threshold might be an M-weighted SEL (for the sequence of received pulses) of ~198 dB re 1 μPa²-s. Additional assumptions had to be made to derive a corresponding estimate for pinnipeds, as the only available data on TTS thresholds in pinnipeds pertained to nonimpulse sound (see above). Southall *et al.* (2007) estimated that the PTS threshold could be a cumulative SEL of ~186 dB re 1 μPa²-s in the case of a harbor seal exposed to impulse sound. The PTS threshold for the California sea lion and northern elephant seal would probably be higher given the higher TTS thresholds in those species. Southall *et al.* (2007) also note that, regardless of the SEL, there is concern about the possibility of PTS if a cetacean or pinniped received one or more pulses with peak pressure exceeding 230 or 218 dB re 1 μPa, respectively. Thus, PTS might be expected upon exposure of cetaceans to either SEL ≥ 198 dB re 1 μPa2-s or peak pressure ≥ 230 dB re 1 μPa. Corresponding proposed dual criteria for pinnipeds (at least harbor seals) are ≥ 186 dB SEL and ≥ 218 dB peak pressure (Southall *et al.* 2007). These estimates are all first approximations, given the limited underlying data, assumptions, species differences, and evidence that the "equal energy" model may not be entirely correct.

Sound impulse duration, peak amplitude, rise time, number of pulses, and inter-pulse interval are the main factors thought to determine the onset and extent of PTS. Ketten (1994) has noted that the criteria for differentiating the sound pressure levels that result in PTS (or TTS) are location and species specific. PTS effects may also be influenced strongly by the health of the receiver's ear.

As described above for TTS, in estimating the amount of sound energy required to elicit the onset of TTS (and PTS), it is assumed that the auditory effect of a given cumulative SEL from a series of pulses is the same as if that amount of sound energy were received as a single strong sound. There are no data from marine mammals concerning the occurrence or magnitude of a potential partial recovery effect between pulses. In deriving the estimates of PTS (and TTS) thresholds quoted here, Southall *et al.* (2007) made the precautionary assumption that no recovery would occur between pulses.

It is unlikely that an odontocete would remain close enough to a large airgun array for sufficiently long to incur PTS. There is some concern about bowriding odontocetes, but for animals at or near the surface, auditory effects are reduced by Lloyd's mirror and surface release effects. The presence of the vessel between the airgun array and bow-riding odontocetes could also, in some but probably not all cases, reduce the levels received by bow-riding animals (*e.g.,* Gabriele and Kipple 2009). The TTS (and thus PTS) thresholds of baleen whales are unknown but, as an interim measure, assumed to be no lower than those of odontocetes. Also, baleen whales generally avoid the immediate area around operating seismic vessels, so it is unlikely that a baleen whale could incur PTS from exposure to airgun pulses. The TTS (and thus PTS) thresholds of some pinnipeds (*e.g.,* harbor seal) as well as the harbor porpoise may be lower (Kastak *et al.* 2005; Southall *et al.* 2007; Lucke *et al.* 2009). If so, TTS and potentially PTS may extend to a somewhat greater distance for those animals. Again, Lloyd's mirror and surface release effects will ameliorate the effects for animals at or near the surface.

(5) Non-Auditory Physical Effects

Non-auditory physical effects might occur in marine mammals exposed to strong underwater pulsed 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. Some marine mammal species (*i.e.,* beaked whales) may be especially susceptible to injury and/or stranding when exposed to intense sounds. However, there is no definitive evidence that any of these effects occur even for marine mammals in close proximity to large arrays of airguns, and beaked whales do not occur in the proposed project area. In addition, marine mammals that show behavioral avoidance of seismic vessels, including most baleen whales, some odontocetes (including belugas), and some pinnipeds, are especially unlikely to incur non-auditory impairment or other physical effects.

Therefore, it is unlikely that such effects would occur during Statoil's proposed surveys given the brief duration of exposure and the planned monitoring and mitigation measures described later in this document.

Additional non-auditory effects, while not direct physical impacts, include elevated levels of stress response (Wright *et al.* 2007; Wright and Highfill 2007). Although not many studies have been done on noise-induced stress in marine mammals, extrapolation of information regarding stress responses in other species seems appropriate because the responses are highly consistent among all species in which they have been examined to date (Wright *et al.* 2007). Therefore, it is reasonable to conclude that noise acts as a stressor to marine mammals. Furthermore, given that marine mammals will likely respond in a manner consistent with other species studied, repeated and prolonged exposures to stressors (including or induced by noise) will be problematic for marine mammals of all ages. Wright *et al.* (2007) state that a range of issues may arise from the extended stress response including, but not limited to, suppression of reproduction (physiologically and behaviorally), accelerated aging and sickness-like symptoms.

(6) Stranding and Mortality

Marine mammals close to underwater detonations of high explosive can be killed or severely injured, and the auditory organs are especially susceptible to injury (Ketten *et al.* 1993; Ketten 1995). Airgun pulses are less energetic and their peak amplitudes have slower rise times, while stranding and mortality events would include other energy sources (acoustical or shock wave) far beyond just seismic airguns. To date, there is no evidence that serious injury, death, or stranding by marine mammals can occur from exposure to airgun pulses, even in the case of large airgun arrays.

However, in numerous past IHA notices for seismic surveys, commenters have referenced two stranding events allegedly associated with seismic activities, one off Baja California and a second off Brazil. NMFS has addressed this concern several times, and, without new information, does not believe that this issue warrants further discussion. For information relevant to strandings of marine mammals, readers are encouraged to review NMFS' response to comments on this matter found in 69 FR 74906 (December 14, 2004), 71 FR 43112 (July 31, 2006), 71 FR 50027 (August 24, 2006), and 71 FR 49418 (August 23, 2006). In addition, a May-June 2008, stranding of 100–200 melon-headed whales (*Peponocephala electra*) off Madagascar that appears to be associated with seismic surveys is

currently under investigation (IWC 2009).

It should be noted that strandings related to sound exposure have not been recorded for marine mammal species in the Beaufort and Chukchi seas. NMFS notes that in the Beaufort Sea, aerial surveys have been conducted by MMS and industry during periods of industrial activity (and by MMS during times with no activity). No strandings or marine mammals in distress have been observed during these surveys and none have been reported by North Slope Borough inhabitants. In addition, there are very few instances demonstrating that seismic surveys in general have been linked to marine mammal strandings, other than those mentioned above. As a result, NMFS does not expect any marine mammals will incur serious injury or mortality in the Arctic Ocean or strand as a result of proposed seismic survey.

*Vessel Sounds*

In addition to the noise generated from seismic airguns and active sonar systems, various types of vessels will be used in the operations, including source vessels and support vessels. Sounds from boats and vessels have been reported extensively (Greene and Moore 1995; Blackwell and Greene 2002; 2005; 2006). Numerous measurements of underwater vessel sound have been performed in support of recent industry activity in the Chukchi and Beaufort Seas. Results of these measurements have been reported in various 90-day and comprehensive reports since 2007 (*e.g.,* Aerts *et al.* 2008; Hauser *et al.* 2008; Brueggeman 2009; Ireland *et al.* 2009). For example, Garner and Hannay (2009) estimated sound pressure levels of 100 dB at distances ranging from approximately 1.5 to 2.3 mi (2.4 to 3.7 km) from various types of barges. MacDonald *et al.* (2008) estimated higher underwater SPLs from the seismic vessel *Gilavar* of 120 dB at approximately 13 mi (21 km) from the source, although the sound level was only 150 dB at 85 ft (26 m) from the vessel. Compared to airgun pulses, underwater sound from vessels is generally at relatively low frequencies.

The primary sources of sounds from all vessel classes are propeller cavitation, propeller singing, and propulsion or other machinery. Propeller cavitation is usually the dominant noise source for vessels (Ross 1976). Propeller cavitation and singing are produced outside the hull, whereas propulsion or other machinery noise originates inside the hull. There are additional sounds produced by vessel activity, such as pumps, generators, flow noise from water passing over the hull, and bubbles breaking in the wake. Icebreakers contribute greater sound levels during ice-breaking activities than ships of similar size during normal operation in open water (Richardson *et al.* 1995). This higher sound production results from the greater amount of power and propeller cavitation required when operating in thick ice. Source levels from various vessels would be empirically measured before the start of marine surveys.

**Anticipated Effects on Habitat**

The primary potential impacts to marine mammals and other marine species are associated with elevated sound levels produced by airguns and other active acoustic sources. However, other potential impacts to the surrounding habitat from physical disturbance are also possible.

*Potential Impacts on Prey Species*

With regard to fish as a prey source for cetaceans and pinnipeds, fish are known to hear and react to sounds and to use sound to communicate (Tavolga *et al.* 1981) and possibly avoid predators (Wilson and Dill 2002). Experiments have shown that fish can sense both the strength and direction of sound (Hawkins, 1981). Primary factors determining whether a fish can sense a sound signal, and potentially react to it, are the frequency of the signal and the strength of the signal in relation to the natural background noise level.

The level of sound at which a fish will react or alter its behavior is usually well above the detection level. Fish have been found to react to sounds when the sound level increased to about 20 dB above the detection level of 120 dB (Ona 1988); however, the response threshold can depend on the time of year and the fish's physiological condition (Engas *et al.* 1993). In general, fish react more strongly to pulses of sound rather than a continuous signal (Blaxter *et al.* 1981), and a quicker alarm response is elicited when the sound signal intensity rises rapidly compared to sound rising more slowly to the same level.

Investigations of fish behavior in relation to vessel noise (Olsen *et al.* 1983; Ona 1988; Ona and Godo 1990) have shown that fish react when the sound from the engines and propeller exceeds a certain level. Avoidance reactions have been observed in fish such as cod and herring when vessels approached close enough that received sound levels are 110 dB to 130 dB (Nakken 1992; Olsen 1979; Ona and Godo 1990; Ona and Toresen 1988). However, other researchers have found that fish such as polar cod, herring, and capeline are often attracted to vessels (apparently by the noise) and swim toward the vessel (Rostad *et al.* 2006). Typical sound source levels of vessel noise in the audible range for fish are 150 dB to 170 dB (Richardson *et al.* 1995).

Some mysticetes, including bowhead whales, feed on concentrations of zooplankton. Some feeding bowhead whales may occur in the Alaskan Beaufort Sea in July and August, and others feed intermittently during their westward migration in September and October (Richardson and Thomson [eds.] 2002; Lowry *et al.* 2004). Reactions of zooplanktoners to sound are, for the most part, not known. Their abilities to move significant distances are limited or nil, depending on the type of animal. A reaction by zooplankton to sounds produced by the marine survey program would only be relevant to whales if it caused concentrations of zooplankton to scatter. Pressure changes of sufficient magnitude to cause that type of reaction would probably occur only near the airgun source, which is expected to be a very small area. Impacts on zooplankton behavior are predicted to be negligible, and that would translate into negligible impacts on feeding mysticetes.

**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 behavioral harassment is anticipated as a result of the proposed open water seismic survey program. Anticipated impacts to marine mammals are associated with noise propagation from the seismic airgun(s) used in the seismic survey.

The full suite of potential impacts to marine mammals was described in detail in the "Potential Effects of the Specified Activity on Marine Mammals" section found earlier in this document. The potential effects of sound from the proposed open water marine survey programs 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). As discussed earlier in this document, the most common impact will likely be from behavioral disturbance, including avoidance of the ensonified area or changes in speed, direction, and/or diving profile of the animal. For reasons discussed previously in this document, hearing impairment (TTS and PTS) are highly unlikely to occur based on the proposed mitigation and monitoring measures that would preclude marine mammals being exposed to noise levels high enough to cause hearing impairment.

For impulse sounds, such as those produced by airgun(s) used in the seismic survey, NMFS uses the 160 dB re 1 μPa (rms) isopleth to indicate the onset of Level B harassment. Statoil provided calculations for the 160-dB isopleths produced by these active acoustic sources and then used those isopleths to estimate takes by harassment. NMFS used the calculations to make the necessary MMPA preliminary findings. Statoil provided a full description of the methodology used to estimate takes by harassment in its IHA application (*see* **ADDRESSES**), which is also provided in the following sections.

Statoil has requested an authorization to take 13 marine mammal species by Level B harassment. These 13 marine mammal species are: Beluga whale (*Delphinapterus leucas*), narwhal (*Monodon monoceros*), killer whale (*Orcinus orca*), harbor porpoise (*Phocoena phocoena*), bowhead whale (*Balaena mysticetus*), gray whale (*Eschrichtius robustus*), humpback whale (*Megaptera novaeangliae*), minke whale (*Balaenoptera acutorostrata*), fin whale (*B. physalus*), bearded seal (*Erignathus barbatus*), ringed seal (*Phoca hispida*), spotted seal (*P. largha*), and ribbon seal (*Histriophoca fasciata*). However, NMFS believes that narwhals are not likely to occur in the proposed survey area during the time of the proposed marine seismic survey. Therefore, NMFS believes that only the other 12 marine mammal species could potentially be taken by Level B behavioral harassment as a result of the proposed marine surveys.

*Basis for Estimating "Take by Harassment"*

As stated previously, it is current NMFS policy to estimate take by Level B harassment for impulse sounds at a received level of 160 dB re 1μPa (rms). However, not all animals react to sounds at this low level, and many will not show strong reactions (and in some cases any reaction) until sounds are much stronger. Southall *et al.* (2007) provide a severity scale for ranking observed behavioral responses of both free-ranging marine mammals and laboratory subjects to various types of anthropogenic sound (see Table 4 in Southall *et al.* (2007)). Tables 7, 9, and 11 in Southall *et al.* (2007) outline the numbers of low-frequency cetaceans, mid-frequency cetaceans, and pinnipeds in water, respectively, reported as having behavioral responses to multi-pulses in 10-dB received level increments. These tables illustrate that the more severe reactions did not occur until sounds were much higher than 160 dB re 1μPa (rms).

As described earlier in the document, the proposed open water marine seismic survey would use two airgun arrays with a total discharge volume of 3,000 $in^3$. The modeled 160 dB zone of influence reaches to 13 km from the airgun source. The estimated number of animals potentially harassed was calculated by multiplying the expected densities (in number/$km^2$) by the anticipated area ensonified by levels of ≥160 dB re 1μPa. Estimates of the number of animals potentially impacted were conducted separately for the 3D survey area and the 2D survey lines. For the 3D survey area, the anticipated area ensonified by sound levels of ≥160 dB was calculated as an area encompassing a 8.1 mi (13 km) radius extending from each point of the survey area perimeter (hereafter called the 160 dB exposed survey area). This approach was taken because closely spaced survey lines and large cross-track distances of the ≥160 dB radii result in repeated exposure of the same area of water. Excessive amounts of repeated exposure leads to an overestimation of the number of animals potentially exposed. For the 2D survey lines the area ensonified by sound levels of ≥160 dB was calculated as the total line kilometers multiplied by 2 times the 8.1 mi (13 km) ≥160 dB safety radius. The following subsections describe in more detail the data and methods used in deriving the estimated number of animals potentially "taken by harassment" during the proposed survey. It provides information on the expected marine mammal densities, estimated distances to received levels of 190, 180, 160, and 120 dB re 1μPa and the calculation of anticipated areas ensonified by levels of ≥160 dB.

It is important to understand that not all published results from visual observations have applied correction factors that account for detectability and availability bias. Detectability bias, quantified in part by f(0), is associated with diminishing sightability with increasing lateral distance from the survey trackline. Availability bias [g(0)] refers to the fact that not all animals are at the surface and that there is therefore <100% probability of sighting an animal that is present along the survey trackline. Some sources below included correction factors in the reported densities (e.g., ringed seals in Bengtson *et al.* 2005) and the best available correction factors were applied to reported results when they had not already been included (*e.g.,* Moore *et al.* 2000b).

(1) Cetaceans

Eight species of cetaceans are known to occur in the Chukchi Sea area of the proposed Statoil project. Only four of these (bowhead, beluga, and gray whales, and harbor porpoise) are likely to be encountered during the proposed survey activities. Three of the eight species (bowhead, fin, and humpback whales) are listed as endangered under the ESA. Of these, only the bowhead is likely to be found within the survey area.

*Beluga Whales*—Summer densities of beluga in offshore waters are expected to be low. Aerial surveys have recorded few belugas in the offshore Chukchi Sea during the summer months (Moore *et al.* 2000b). Aerial surveys of the Chukchi Sea in 2008–2009 flown by the NMML as part of the Chukchi Offshore Monitoring in Drilling Area project (COMIDA) have only reported 5 beluga sightings during > 8,700 mi (> 14,000 km) of on-transect effort, only 2 of which were offshore (COMIDA 2009). Additionally, only one beluga sighting was recorded during > 37,904 mi (> 61,000 km) of visual effort during good visibility conditions from industry vessels operating in the Chukchi Sea in July–August of 2006–2008 (Haley *et al.* 2009b). If belugas are present during the summer, they are more likely to occur in or near the ice edge or close to shore during their northward migration. Expected densities were calculated from data in Moore *et al.* (2000b). Data from Moore *et al.* (2000b: Figure 6 and Table 6) used as the average open-water density estimate included two on-transect beluga sightings during 6,639 mi (10,684 km) of on-transect effort in the Chukchi Sea during summer. A mean group size of 7.1 (CV = 1.7) was calculated from 10 Chukchi Sea summer sightings present in the BWASP database. A f(0) value of 2.841 and g(0) value of 0.58 from Harwood *et al.* (1996) were also used in the calculation. The CV associated with group size was used to select an inflation factor of 2 to estimate the maximum density that may occur in both open-water and ice-margin habitats. Specific data on the

relative abundance of beluga in open-water versus ice-margin habitat during the summer in the Chukchi Sea is not available. However, Moore *et al.* (2000b) reported higher than expected beluga sighting rates in open-water during fall surveys in the Beaufort and Chukchi Seas. This would suggest that densities near ice may actually be lower than open water, but belugas are commonly associated with ice, so an inflation factor of only 2 (instead of 4) was used to estimate the average ice-margin density from the open-water density. Based on the very low densities observed from vessels operating in the Chukchi Sea during non-seismic periods and locations in July–August of 2006–2008 (0.0001/km$^2$; Haley *et al.* 2009b), the densities shown in Table 1 are likely biased high.

In the fall, beluga whale densities in the Chukchi Sea are expected to be somewhat higher than in the summer because individuals of the eastern Chukchi Sea stock and the Beaufort Sea stock will be migrating south to their wintering grounds in the Bering Sea (Angliss and Allen 2009). Consistent with this, the number of on-effort beluga sightings reported during COMIDA flights in September–October of 2008–2009 was over 3 times more than during July–August with a very similar amount of on-transect effort (COMIDA 2009). However, there were no beluga sightings reported during >11,185 mi (>18,000 km) of vessel based effort in good visibility conditions during 2006–2008 industry operations in the Chukchi Sea. Densities derived from survey results in the northern Chukchi Sea in Moore *et al.* (2000b) were used as the average density for open-water and ice-margin fall season estimates (see Table 2). Data from Moore *et al.* (2000b: Table 8) used in the average open-water density estimate included 123 beluga sightings and 27,559 mi (44,352 km) of on-transect effort in water depths 118–164 ft (36–50 m). A mean group size of 2.39 (CV = 0.92) came from the average group size of 82 Chukchi Sea fall sightings in waters 115–164 ft (35–50 m) deep present in the BWASP database. A f(0) value of 2.841 and g(0) value of 0.58 from Harwood *et al.* (1996) were used in the calculation. The CV associated with group size was used to select an inflation factor of 2 to estimate the maximum density that may occur in both open-water and ice-margin habitats. Moore *et al.* (2000b) reported higher than expected beluga sighting rates in open-water during fall surveys in the Beaufort and Chukchi seas, so an inflation value of only 2 was used to estimate the average ice-margin density from the open-water density. There were no beluga sightings from vessels operating in the Chukchi Sea during non-seismic periods in September–October of 2006–2008 (Haley *et al.* 2009b).

TABLE 1—EXPECTED DENSITIES OF CETACEANS AND SEALS IN AREAS OF THE CHUKCHI SEA, ALASKA, DURING THE PLANNED SUMMER (JULY–AUGUST) PERIOD OF THE SEISMIC SURVEY PROGRAM

| Species | Nearshore | Ice margin |
|---|---|---|
| | Average density (#/km$^2$) | Average density (#/km$^2$) |
| Beluga whale .... | 0.0033 | 0.0162 |
| Killer whale ..... | 0.0001 | 0.0001 |
| Harbor porpoise | 0.0011 | 0.0011 |
| Bowhead whale | 0.0018 | 0.0018 |
| Fin whale ..... | 0.0001 | 0.0001 |
| Gray whale ..... | 0.0081 | 0.0081 |
| Humpback whale ..... | 0.0001 | 0.0001 |
| Minke whale ..... | 0.0001 | 0.0001 |
| Bearded seal .... | 0.0107 | 0.0142 |
| Ribbon seal ..... | 0.0003 | 0.0003 |
| Ringed seal ..... | 0.3668 | 0.4891 |
| Spotted seal ..... | 0.0073 | 0.0098 |

TABLE 2—EXPECTED DENSITIES OF CETACEANS AND SEALS IN AREAS OF THE CHUKCHI SEA, ALASKA, DURING THE PLANNED FALL (SEPTEMBER–OCTOBER) PERIOD OF THE SEISMIC SURVEY PROGRAM

| Species | Nearshore | Ice margin |
|---|---|---|
| | Average density (#/km$^2$) | Average density (#/km$^2$) |
| Beluga whale .... | 0.0162 | 0.0324 |
| Killer whale ..... | 0.0001 | 0.0001 |
| Harbor porpoise | 0.0010 | 0.0010 |
| Bowhead whale | 0.0174 | 0.0348 |
| Fin whale ..... | 0.0001 | 0.0001 |
| Gray whale ..... | 0.0062 | 0.0062 |
| Humpback whale ..... | 0.0001 | 0.0001 |
| Minke whale ..... | 0.0001 | 0.0001 |
| Bearded seal .... | 0.0107 | 0.0142 |
| Ribbon seal ..... | 0.0003 | 0.0003 |
| Ringed seal ..... | 0.2458 | 0.3277 |
| Spotted seal ..... | 0.0049 | 0.0065 |

*Bowhead Whales*—By July, most bowhead whales are northeast of the Chukchi Sea, within or migrating toward their summer feeding grounds in the eastern Beaufort Sea. No bowheads were reported during 6,639 mi (10,684 km) of on-transect effort in the Chukchi Sea by Moore *et al.* (2000b). Aerial surveys in 2008–2009 by the NMML as part of the COMIDA project reported four sightings during > 8,699 mi (≤14,000 km) of on-transect effort. Two of the four sightings were offshore, both of which occurred near the end of August. Bowhead whales were also rarely reported in July–August of 2006–2008 during aerial surveys of the Chukchi Sea coast (Thomas *et al.* 2009). This is consistent with movements of tagged whales (see ADFG 2009; Quakenbush 2009), all of which moved through the Chukchi Sea by early May 2009, and tended to travel relatively close to shore, especially in the northern Chukchi Sea.

The estimate of bowhead whale density in the Chukchi Sea was calculated by assuming that there was one bowhead sighting during the 6,639 mi (10,684 km) survey effort in the Chukchi Sea during the summer, although no bowheads were actually observed (Moore *et al.* 2000b). The more recent COMIDA data were not used because the NMML has not released a final report summarizing the data. Only two sightings are present in the BWASP database during July and August in the Chukchi Sea, both of which were of individual whales. The mean group size from combined July–August sightings in the BWASP, COMIDA, and 2006–2008 industry database is 1.33 (CV= 0.58). This value, along with a f(0) value of 2 and a g(0) value of 0.07, both from Thomas *et al.* (2002) were used to estimate a summer density of bowhead whales. The CV of group size and standard errors reported in Thomas *et al.* (2002) for f(0) and g(0) correction factors suggest that an inflation factor of 2 is appropriate for deriving a maximum density from the average density. Bowheads are not expected to be encountered in higher densities near ice in the summer (Moore *et al.* 2000b), so the same density estimates are used for open-water and ice-margin habitats. Densities from vessel based surveys in the Chukchi Sea during non-seismic periods and locations in July–August of 2006–2008 (Haley *et al.* 2009b) ranged from 0.0001/km$^2$ to 0.0005/km$^2$ with a maximum 95 percent confidence interval (CI) of 0.0019 km$^2$. This suggests that the densities used in the calculations and shown in Table 1 might be somewhat higher than expected to be observed from vessels near the area of planned operations.

During the fall, bowhead whales migrate west and south from their summer feeding grounds in the Beaufort Sea and Amundsen Gulf to their wintering grounds in the Bering Sea. During this fall migration bowheads are more likely to be encountered in the Chukchi Sea. Moore *et al.* (2000b: Table 8) reported 34 bowhead sightings during 27,560 mi (44,354 km) of on-transect

survey effort in the Chukchi Sea during September–October. Thomas *et al.* (2009) also reported increased sightings on coastal surveys of the Chukchi Sea during September and October of 2006–2008. Aerial surveys in 2008–2009 (COMIDA 2009) reported 20 bowhead sightings during 8,803 mi (14,167 km) of on-transect effort, eight of which were offshore. GPS tagging of bowheads show that migration routes through the Chukchi Sea are more variable than through the Beaufort Sea (ADFG 2009; Quakenbush 2009). Some of the routes taken by bowheads remain well north or south of the planned survey activities while others have passed near to or through the area. Kernel densities estimated from GPS locations of whales suggest that bowheads do not spend much time (e.g., feeding or resting) in the north-central Chukchi Sea near the area of planned activities (ADFG 2009). The mean group size from September–October Chukchi Sea bowhead sightings in the BWASP database is 1.59 (CV=1.08). This is slightly below the mean group size of 1.85 from all the preliminary COMIDA sightings during the same months, but above the value of 1.13 from only on-effort COMIDA sightings (COMIDA 2009). The same f(0) and g(0) values that were used for the summer estimates above were used for the fall estimates. As with the summer estimates, an inflation factor of 2 was used to estimate the maximum density from the average density in both habitat types. Moore *et al.* (2000b) found that bowheads were detected more often than expected in association with ice in the Chukchi Sea in September–October, so a density of twice the average open-water density was used as the average ice-margin density. Densities from vessel based surveys in the Chukchi Sea during non-seismic periods and locations in September–October of 2006–2008 (Haley *et al.* 2009b) ranged from 0.0001/km$^2$ to 0.0050/km$^2$ with a maximum 95 percent CI of 0.0480 km$^2$. This suggests the densities used in the calculations and shown in Table 2 are somewhat higher than are likely to be observed from vessels near the area of planned operations.

*Gray Whales*—The average open-water summer density was calculated from effort and sightings in Moore *et al.* (2000b: Table 6) for water depths 118–164 ft (36–50 m) including 4 sightings during 3,901 mi (6,278 km) of on-transect effort. An average group size of 3.11 (CV=0.97) was calculated from all July–August Chukchi Sea gray whale sightings in the BWASP database and used in the summer density estimate. This value was higher than the average group size in the preliminary COMIDA data (1.71; COMIDA 2009) and from coastal aerial surveys in 2006–2008 (1.27; Thomas *et al.* 2009). Correction factors f(0) = 2.49 (Forney and Barlow 1998) and g(0) = 0.30 (Forney and Barlow 1998; Mallonee 1991) were also used in the density calculation. Since the group size used in the average density estimate was relatively high compared to other data sources and the CV was near to one, an inflation factor of 2 was used to estimate the maximum densities from average densities in both habitat types. Gray whales are not commonly associated with sea ice, but may occur close to sea ice, so the densities for open-water habitat were also used for ice-margin habitat. Densities from vessel based surveys in the Chukchi Sea during non-seismic periods and locations in July–August of 2006–2008 (Haley *et al.* 2009b) ranged from 0.0009/km$^2$ to 0.0034/km$^2$ with a maximum 95 percent CI of 0.0146 km$^2$. This suggests that the densities used in the calculations and shown in Table 1 are somewhat higher than are expected to be observed from vessels near the area of planned operations.

Gray whale densities are expected to be much higher in the summer months than during the fall when most whales start their southbound migration. Moore *et al.* (2000b) found that the distribution of gray whales was more widely dispersed through the northern Chukchi Sea and limited to nearshore areas where most whales were observed in water less than 115 ft (35 m) deep. With similar amounts of on-transect effort between summer and fall aerial surveys in 2008–2009, gray whale sightings were three times higher in July–August than in September–October, and five times higher taking into account all effort and sightings (COMIDA 2009). Thomas *et al.* (2009) also reported decreased sighting rates of gray whales in the fall.

The on-transect effort and associated gray whale sightings (27 sightings during 44,352 km of on-transect effort) in water depth of 118–164 ft (36–50 m) during autumn (Moore *et al.* 2000b; 12) was used as the average density estimate for the Chukchi Sea during the fall period. A group size value of 2.49 (CV=1.37) calculated from the BWASP database was used in the density calculation, along with the same f(0) and g(0) values described above. The group size value of 2.49 was again higher than the average group size calculated from preliminary COMIDA data (1.24; COMIDA 2009) and as reported from coastal aerial surveys in 2006–2008 (1.12; Thomas *et al.* 2009). Densities from vessel based surveys in the Chukchi Sea during non-seismic periods and locations in September–October of 2006–2008 (Haley *et al.* 2009b) ranged from 0.0011/km$^2$ to 0.0024/km$^2$ with a maximum 95 percent CI of 0.0183 km$^2$. This suggests the densities used in the calculations and shown in Table 2 are somewhat higher than are likely to be observed from vessels near the area of planned operations.

*Harbor Porpoise*—Harbor Porpoise densities were estimated from industry data collected during 2006–2008 activities in the Chukchi Sea. Prior to 2006, no reliable estimates were available for the Chukchi Sea and harbor porpoise presence was expected to be very low and limited to nearshore regions. For this reason, the data collected from industry vessels was considered to be the best available data. Observers on industry vessels in 2006–2008, however, recorded sightings throughout the Chukchi Sea during the summer and early fall months. Density estimates from 2006–2008 observations during non-seismic periods and locations in July–August ranged from 0.0009/km$^2$ to 0.0016/km$^2$ with a maximum 95 percent CI of 0.0016/km$^2$ (Haley *et al.* 2009b). The median value from the summer season of those three years (0.0011/km$^2$) was used as the average open-water density estimate while the high value (0.0016/km$^2$) was used as the maximum estimate (Table 1). Harbor porpoise are not expected to be present in higher numbers near ice, so the open-water densities were used for ice-margin habitat in both seasons. Harbor porpoise densities recorded during industry operations in the fall months of 2006–2008 were slightly lower and ranged from 0.0002/km$^2$ to 0.0013/km$^2$ with a maximum 95 percent CI of 0.0044/km$^2$. The median value (0.0010/km$^2$) was again used as the average density estimate and the high value (0.0013/km$^2$) was used as the maximum estimate (Table 2).

*Other Cetaceans*—The remaining four cetacean species that could be encountered in the Chukchi Sea during Statoil's planned seismic survey include the humpback whale, killer whale, minke whale, and fin whale. Although there is evidence of the occasional occurrence of these animals in the Chukchi Sea, it is unlikely that more than a few individuals will be encountered during the proposed activities. George and Suydam (1998) reported killer whales, Brueggeman *et al.* (1990) and Haley *et al.* (2009b) reported minke whale, and COMIDA (2009) and Haley *et al.* (2009b) reported fin whales off of Ledyard Bay in the Chukchi Sea.

(2) Pinnipeds

Four species of pinnipeds may be encountered in the Chukchi Sea: Ringed seal, bearded seal, spotted seal, and ribbon seal. Each of these species, except the spotted seal, is associated with both the ice margin and the nearshore area. The ice margin is considered preferred habitat (as compared to the nearshore areas) during most seasons.

*Ringed and Bearded Seals*—Ringed seal and bearded seal average summer ice-margin densities (Table 1) were available in Bengtson *et al.* (2005) from spring surveys in the offshore pack ice zone (zone 12P) of the northern Chukchi Sea. However, corrections for bearded seal availability, g(0), based on haulout and diving patterns were not available. Densities of ringed and bearded seals in open water are expected to be somewhat lower in the summer when preferred pack ice habitat may still be present in the Chukchi Sea. Average and maximum open-water densities have been estimated as ¾ of the ice margin densities during the summer for both species. The fall density of ringed seals in the offshore Chukchi Sea has been estimated as ⅔ the summer densities because ringed seals begin to reoccupy nearshore fast ice areas as it forms in the fall. Bearded seals may begin to leave the Chukchi Sea in the fall, but less is known about their movement patterns so fall densities were left unchanged from summer densities. For comparison, the ringed seal density estimates calculated from data collected during summer 2006–2008 industry operations ranged from 0.0082/km$^2$ to 0.0221/km$^2$ with a maximum 95 percent CI of 0.0577/km$^2$ (Haley *et al.* 2009b). These estimates are lower than those made by Bengtson *et al.* (2005) which is not surprising given the different survey methods and timing.

*Spotted Seal*—Little information on spotted seal densities in offshore areas of the Chukchi Sea is available. Spotted seals are often considered to be predominantly a coastal species except in the spring when they may be found in the southern margin of the retreating sea ice, before they move to shore. However, satellite tagging has shown that they sometimes undertake long excursions into offshore waters during summer (Lowry *et al.* 1994, 1998). Spotted seal densities in the summer were estimated by multiplying the ringed seal densities by 0.02. This was based on the ratio of the estimated Chukchi populations of the two species. Chukchi Sea spotted seal abundance was estimated by assuming that 8% of the Alaskan population of spotted seals is present in the Chukchi Sea during the summer and fall (Rugh *et al.* 1997), the Alaskan population of spotted seals is 59,214 (Angliss and Allen 2009), and that the population of ringed seals in the Alaskan Chukchi Sea is >208,000 animals (Bengtson *et al.* 2005). In the fall, spotted seals show increased use of coastal haulouts so densities were estimated to be ⅔ of the summer densities.

*Ribbon Seal*—Ribbon seals have been reported in very small numbers within the Chukchi Sea by observers on industry vessels (two sightings; Haley *et al.* 2009b). The resulting density estimate of 0.0003/km$^2$ was used as the average density and a multiplier of 4 was used as the estimated maximum density for both seasons and habitat zones.

*Potential Number of Takes by Harassment*

This subsection provides estimates of the number of individuals potentially exposed to sound levels ≥160 dB re 1 μPa (rms). The estimates are based on a consideration of the number of marine mammals that might be disturbed (through Level B harassment) by operations in the Chukchi Sea and the anticipated area exposed to sound levels of 160 dB re 1 μPa (rms).

As described above, marine mammal density estimates for the Chukchi Sea have been derived for two time periods, the summer period (July–August), and the fall period (September–October). Animal densities encountered in the Chukchi Sea during both of these time periods will further depend on the habitat zone within which the source vessel is operating, *i.e.,* open water or ice margin. The seismic source vessel is not an icebreaker and cannot tow survey equipment through pack ice. Under this assumption, densities of marine mammals expected to be observed near ice margin areas have been applied to 10% of the proposed 3D survey area and 2D tracklines in both seasons. Densities of marine mammals expected to occur in open water areas have been applied to the remaining 90% of the 3D survey and 2D tracklines area in both seasons.

The number of individuals of each species potentially exposed to received levels ≥160 dB re 1 μPa (rms) within each season and habitat zone was estimated by multiplying

- The anticipated area to be ensonified to the specified level in each season and habitat zone to which that density applies, by
- The expected species density.

The numbers of individuals potentially exposed were then summed for each species across the two seasons and habitat zones. Some of the animals estimated to be exposed, particularly migrating bowhead whales, might show avoidance reactions before being exposed to ≥160 dB re 1 μPa (rms). Thus, these calculations actually estimate the number of individuals potentially exposed to ≥160 dB that would occur if there were no avoidance of the area ensonified to that level.

(1) 3D Seismic Survey Area

The size of the proposed 3D seismic survey area is 915 mi$^2$ (2,370 km$^2$) and located >100 mi (160 km) offshore. Approximately ¼ of the area (~234 mi$^2$, or ~606 km$^2$) is expected to be surveyed in August (weather depending). This area, with a 160 dB radius of 8 mi (13 km) along each point of its perimeter equals a total area of ~1,081 mi$^2$ (~2,799 km$^2$). Summer marine mammal densities from Table 1 have been applied to this area. The other ¾ of the survey area (~687 mi$^2$, or ~1,779 km$^2$) is expected to be covered in September–October. This area, also with a 160 dB radius of 8 mi (13 km) along each point of its perimeter results in a total area of ~1,813 mi$^2$ (~4,695 km$^2$). Fall marine mammal densities from Table 2 have been applied to this area. Based on these assumptions and those described above, the estimates of marine mammals potentially exposed to sounds ≥160 dB in the Chukchi Sea from seismic data acquisition in the 3D survey area were calculated in Table 3.

For the common species, the requested numbers were calculated as described above and based on the average and maximum densities reported. For less common species, for which minimum density estimates were assumed, the numbers were set to a minimum to allow for chance encounters. The mitigation gun (60 in$^3$) will be active during turns extending about 1.6 mi (2.5 km) outside the 3D survey area. The estimated 160 dB radius for the 60 in$^3$ mitigation gun is 5,906 ft (1,800 m) and therefore falls well within the area expected to be exposed to received sound levels of ≥160 dB of the 3D survey area.

TABLE 3—SUMMARY OF THE NUMBER OF POTENTIAL EXPOSURES OF MARINE MAMMALS TO RECEIVED SOUND LEVELS IN THE WATER OF ≥160 DB DURING STATOIL'S PLANNED MARINE SEISMIC SURVEY IN THE CHUKCHI SEA, ALASKA, 2010

| Species | Number of exposure to sound levels >160 dB re 1 μPa (rms) by 3D seismic survey | Number of exposure to sound levels >160 dB re 1 μPa (rms) by 2D seismic survey | Total number of exposure to sound levels >160 dB re 1 μPa (rms) |
|---|---|---|---|
| Beluga whale | 97 | 87 | 184 |
| Killer whale | 1 | 1 | 2 |
| Harbor porpoise | 8 | 13 | 21 |
| Bowhead whale | 95 | 63 | 158 |
| Gray whale | 52 | 92 | 144 |
| Humpback whale | 1 | 1 | 2 |
| Fin whale | 1 | 1 | 2 |
| Minke whale | 1 | 1 | 2 |
| Bearded seal | 82 | 132 | 214 |
| Ribbon seal | 2 | 4 | 6 |
| Ringed seal | 2,253 | 4,234 | 6,487 |
| Spotted seal | 45 | 85 | 130 |

(2) 2D Seismic Survey Lines

Seismic data along the ~420 mi (675 km) of four 2D survey tracklines might be acquired with the full airgun array if access to the 3D survey area is restricted (*e.g.,* ice conditions), or 3D acquisition progress is better than anticipated. Under the assumption that these restrictive weather conditions will mainly be an issue in the early summer season, 80% of the 2D tracklines are assumed to be acquired during August and 20% during the fall. The total area potentially exposed to ≥160 dB from these tracklines was calculated with the trackline sections outside the 3D survey area. Excluding these sections results in a total trackline length of ~285 mi (460 km). With a 160 dB radius of ~8 mi (13 km) this results in a total exposed area of ~7,432 $mi^2$ (11,960 $km^2$). Such summer densities were used for 80% of the total area (5,945 $mi^2$, or 9,568 $km^2$) and fall densities for the remaining 20% (1,486 $mi^2$, or 2,392 $km^2$). Following a similar approach as for the 3D survey area, numbers of more common marine mammal species were calculated based on the average and maximum densities and for less common species the numbers were set to a minimum to allow for chance encounters. The results of estimates of marine mammals potentially exposed to sounds ≥160 dB in the Chukchi Sea from seismic data acquisition along the 2D tracklines are presented in Table 3.

*Estimated Take Conclusions*

Cetaceans—Effects on cetaceans are generally expected to be restricted to avoidance of an area around the seismic survey and short-term changes in behavior, falling within the MMPA definition of "Level B harassment".

Using the 160 dB criterion, the average estimates of the numbers of individual cetaceans exposed to sounds ≥160 dB re 1 μPa (rms) represent varying proportions of the populations of each species in the Beaufort Sea and adjacent waters. For species listed as "Endangered" under the ESA, the estimates include approximately 158 bowheads. This number is approximately 1.11% of the Bering-Chukchi-Beaufort population of >14,247 assuming 3.4% annual population growth from the 2001 estimate of >10,545 animals (Zeh and Punt 2005). For other cetaceans that might occur in the vicinity of the marine seismic survey in the Chukchi Sea, they also represent a very small proportion of their respective populations. The average estimates of the number of belugas, killer whales, harbor porpoises, gray whales, fin whales, humpback whales, and minke whales that might be exposed to ≥160 dB re 1 μPa (rms) are 183, 2, 21, 144, 2, 2, and 2. These numbers represent 4.95%, 0.62%, 0.04%, 0.81%, 0.03%, 0.21%, and 0.19% of these species respective populations in the proposed action area.

Seals—A few seal species are likely to be encountered in the study area, but ringed seal is by far the most abundant in this area. The average estimates of the numbers of individuals exposed to sounds at received levels ≥160 dB re 1 μPa (rms) during the proposed seismic survey are as follows: Ringed seals (6,487), bearded seals (215), spotted seals (129), and ribbon seals (6). These numbers represent 2.81%, 0.09%, 0.22%, and 0.01% of Alaska stocks of ringed, bearded, spotted, and ribbon seals.

**Impact on Availability of Affected Species or Stock for Taking for Subsistence Uses**

*Relevant Subsistence Uses*

The disturbance and potential displacement of marine mammals by sounds from the proposed marine surveys are the principal concerns related to subsistence use of the area. Subsistence remains the basis for Alaska Native culture and community. Marine mammals are legally hunted in Alaskan waters by coastal Alaska Natives. In rural Alaska, subsistence activities are often central to many aspects of human existence, including patterns of family life, artistic expression, and community religious and celebratory activities. Additionally, the animals taken for subsistence provide a significant portion of the food that will last the community throughout the year. The main species that are hunted include bowhead and beluga whales, ringed, spotted, and bearded seals, walruses, and polar bears. (Both the walrus and the polar bear are under the USFWS' jurisdiction.) The importance of each of these species varies among the communities and is largely based on availability.

Subsistence hunting and fishing continue to be prominent in the household economies and social welfare of some Alaskan residents, particularly among those living in small, rural villages (Wolfe and Walker 1987). Subsistence remains the basis for Alaska Native culture and community. In rural Alaska, subsistence activities are often central to many aspects of human existence, including patterns of family life, artistic expression, and community religious and celebratory activities.

Marine mammals are legally hunted in Alaskan waters by coastal Alaska Natives; species hunted include

bowhead and beluga whales; ringed, spotted, and bearded seals; walruses, and polar bears. The importance of each of the various species varies among the communities based largely on availability. Bowhead whales, belugas, and walruses are the marine mammal species primarily harvested during the time of the proposed seismic survey. There is little or no bowhead hunting by the community of Point Lay, so beluga and walrus hunting are of more importance there. Members of the Wainwright community hunt bowhead whales in the spring, although bowhead whale hunting conditions there are often more difficult than elsewhere, and they do not hunt bowheads during seasons when Statoil's seismic operation would occur. Depending on the level of success during the spring bowhead hunt, Wainwright residents may be very dependent on the presence of belugas in a nearby lagoon system during July and August. Barrow residents focus hunting efforts on bowhead whales during the spring and generally do not hunt beluga then. However, Barrow residents also hunt in the fall, when Statoil expects to be conducting seismic surveys (though not near Barrow).

(1) Bowhead Whales

Bowhead whale hunting is a key activity in the subsistence economies of northwest Arctic communities. The whale harvests have a great influence on social relations by strengthening the sense of Inupiat culture and heritage in addition to reinforcing family and community ties.

An overall quota system for the hunting of bowhead whales was established by the International Whaling Commission (IWC) in 1977. The quota is now regulated through an agreement between NMFS and the Alaska Eskimo Whaling Commission (AEWC). The AEWC allots the number of bowhead whales that each whaling community may harvest annually (USDI/BLM 2005). The annual take of bowhead whales has varied due to (a) changes in the allowable quota level and (b) year-to-year variability in ice and weather conditions, which strongly influence the success of the hunt.

Bowhead whales migrate around northern Alaska twice each year, during the spring and autumn, and are hunted in both seasons. Bowhead whales are hunted from Barrow during the spring and the fall migration and animals are not successfully harvested every year. The spring hunt along Chukchi villages and at Barrow occurs after leads open due to the deterioration of pack ice; the spring hunt typically occurs from early April until the first week of June. The fall migration of bowhead whales that summer in the eastern Beaufort Sea typically begins in late August or September. Fall migration into Alaskan waters is primarily during September and October.

In the fall, subsistence hunters use aluminum or fiberglass boats with outboards. Hunters prefer to take bowheads close to shore to avoid a long tow during which the meat can spoil, but Braund and Moorehead (1995) report that crews may (rarely) pursue whales as far as 50 mi (80 km). The autumn bowhead hunt usually begins in Barrow in mid-September, and mainly occurs in the waters east and northeast of Point Barrow.

The scheduling of this seismic survey has been discussed with representatives of those concerned with the subsistence bowhead hunt, most notably the AEWC, the Barrow Whaling Captains' Association, and the North Slope Borough (NSB) Department of Wildlife Management.

The planned mobilization and start date for seismic surveys in the Chukchi Sea (~20 July and ~1 August) is well after the end of the spring bowhead migration and hunt at Wainwright and Barrow. Seismic operations will be conducted far offshore from Barrow and are not expected to conflict with subsistence hunting activities. Specific concerns of the Barrow whaling captains are addressed as part of the Plan of Cooperation with the AEWC (*see* below).

(2) Beluga Whales

Beluga whales are available to subsistence hunters along the coast of Alaska in the spring when pack-ice conditions deteriorate and leads open up. Belugas may remain in coastal areas or lagoons through June and sometimes into July and August. The community of Point Lay is heavily dependent on the hunting of belugas in Kasegaluk Lagoon for subsistence meat. From 1983–1992 the average annual harvest was ~40 whales (Fuller and George 1997). In Wainwright and Barrow, hunters usually wait until after the spring bowhead whale hunt is finished before turning their attention to hunting belugas. The average annual harvest of beluga whales taken by Barrow for 1962–1982 was five (MMS 1996). The Alaska Beluga Whale Committee recorded that 23 beluga whales had been harvested by Barrow hunters from 1987 to 2002, ranging from 0 in 1987, 1988 and 1995 to the high of 8 in 1997 (Fuller and George 1997; Alaska Beluga Whale Committee 2002 in USDI/BLM 2005). The seismic survey activities take place well offshore, far away from areas that are used for beluga hunting by the Chukchi Sea communities. It is possible, but unlikely, that accessibility to belugas during the subsistence hunt could be impaired during the survey.

(3) Ringed Seals

Ringed seals are hunted mainly from October through June. Hunting for these smaller mammals is concentrated during winter because bowhead whales, bearded seals and caribou are available through other seasons. In winter, leads and cracks in the ice off points of land and along the barrier islands are used for hunting ringed seals. The average annual ringed seal harvest was 49 seals in Point Lay, 86 in Wainwright, and 394 in Barrow (Braund *et al.* 1993; USDI/BLM 2003, 2005). Although ringed seals are available year-round, the seismic survey will not occur during the primary period when these seals are typically harvested. Also, the seismic survey will be largely in offshore waters where the activities will not influence ringed seals in the nearshore areas where they are hunted.

(4) Spotted Seals

The spotted seal subsistence hunt peaks in July and August along the shore where the seals haul out, but usually involves relatively few animals. Spotted seals typically migrate south by October to overwinter in the Bering Sea. During the fall migration spotted seals are hunted by the Wainright and Point Lay communities as the seals move south along the coast (USDI/BLM 2003). Spotted seals are also occasionally hunted in the area off Point Barrow and along the barrier islands of Elson Lagoon to the east (USDI/BLM 2005). The seismic survey will remain offshore of the coastal harvest area of these seals and should not conflict with harvest activities.

(5) Bearded Seals

Bearded seals, although generally not favored for their meat, are important to subsistence activities in Barrow and Wainright, because of their skins. Six to nine bearded seal hides are used by whalers to cover each of the skin-covered boats traditionally used for spring whaling. Because of their valuable hides and large size, bearded seals are specifically sought. Bearded seals are harvested during the spring and summer months in the Chukchi Sea (USDI/BLM 2003, 2005). The animals inhabit the environment around the ice floes in the drifting nearshore ice pack, so hunting usually occurs from boats in the drift ice. Most bearded seals are harvested in coastal areas inshore of the

proposed survey so no conflicts with the harvest of bearded seals are expected.

In the event that both marine mammals and hunters are near the 3D survey area when seismic surveys are in progress, the proposed project potentially could impact the availability of marine mammals for harvest in a small area immediately around the vessel, in the case of pinnipeds, and possibly in a large area in the case of migrating bowheads. However, the majority of marine mammals are taken by hunters within ~21 mi (~33 km) from shore (Figure 2 in Statoil's IHA application), and the seismic source vessel M/V Geo Celtic will remain far offshore, well outside the hunting areas. Considering the timing and location of the proposed seismic survey activities, as described earlier in the document, the proposed project is not expected to have any significant impacts to the availability of marine mammals for subsistence harvest. Specific concerns of the respective communities are addressed as part of the Plan of Cooperation between Statoil and the AEWC.

*Potential Impacts to Subsistence Uses*

NMFS has defined "unmitigable adverse impact" in 50 CFR 216.103 as:

> * * * an impact resulting from the specified activity: (1) That is likely to reduce the availability of the species to a level insufficient for a harvest to meet subsistence needs by: (i) Causing the marine mammals to abandon or avoid hunting areas; (ii) Directly displacing subsistence users; or (iii) Placing physical barriers between the marine mammals and the subsistence hunters; and (2) That cannot be sufficiently mitigated by other measures to increase the availability of marine mammals to allow subsistence needs to be met.

Noise and general activity during Statoil's proposed open water marine seismic survey have the potential to impact marine mammals hunted by Native Alaskans. In the case of cetaceans, the most common reaction to anthropogenic sounds (as noted previously in this document) is avoidance of the ensonified area. In the case of bowhead whales, this often means that the animals divert from their normal migratory path by several kilometers. Additionally, general vessel presence in the vicinity of traditional hunting areas could negatively impact a hunt.

In the case of subsistence hunts for bowhead whales in the Chukchi Sea, there could be an adverse impact on the hunt if the whales were deflected seaward (further from shore) in traditional hunting areas. The impact would be that whaling crews would have to travel greater distances to intercept westward migrating whales, thereby creating a safety hazard for whaling crews and/or limiting chances of successfully striking and landing bowheads.

*Plan of Cooperation (POC or Plan)*

Regulations at 50 CFR 216.104(a)(12) require IHA applicants for activities that take place in Arctic waters to provide a POC or information that identifies what measures have been taken and/or will be taken to minimize adverse effects on the availability of marine mammals for subsistence purposes.

Statoil states that it intends to maintain an open and transparent process with all stakeholders throughout the life-cycle of activities in the Chukchi Sea. Statoil began the stakeholder engagement process in 2009 with meeting Chukchi Sea community leaders at the tribal, city, and corporate level. Statoil will continue to engage with leaders, community members, and subsistence groups, as well as local, state, and federal regulatory agencies throughout the exploration and development process.

As part of stakeholder engagement, Statoil has conducted Plan of Cooperation (POC) meetings for its seismic operations in the Chukchi Sea in the communities and villages of Barrow, Wainwright, Point Lay, and Point Hope, and met with representatives of the Marine Mammal Co-Management groups, including the AEWC, Ice Seal Commission, Alaska Beluga Whale Committee, Alaska Eskimo Walrus Commission, and the Nanuq Commission, on March 22, 2010. At each of these meetings, Statoil described the proposed survey program and measures it plans to take, or has taken, to minimize adverse effects its seismic survey may have on the availability of marine mammals for subsistence use. Statoil requested comments and feedback from subsistence users, and incorporated those comments and concerns in the final version of the POC, which was released on May 28, 2010. The final POC document contains the following information: (1) A description of the proposed marine seismic survey; (2) documentation of consultation with local communities and tribal governments; (3) a description of mitigation measures to reduce the impact of Statoil's planned activity on subsistence; (4) ongoing Chukchi Sea scientific research which Statoil is conducting to gather information on the marine environment; and (5) the future plans for meetings and communication with the affected subsistence Chukchi Sea communities.

In addition, Statoil has entered into a Communication Protocol through a Participation Agreement with Shell to fund and staff a communications station out of Wainwright. The communications center will be staffed by Inupiat operators and on a 24/7 basis during the 2010 subsistence bowhead whale hunt. Call center staff will receive notifications from vessels at least once every six hours and will plot the probable location of vessels on a map at the communications center. Communications center staff will apprise vessel operators of potential operations that may conflict with subsistence whaling activities.

In addition, under the POC, at least five observers will be based aboard the seismic source vessel and at least three MMOs on the chase/monitoring vessels when there are 24 hours of daylight, decreasing as the hours of daylight decrease. Primary roles for MMOs are defined as monitoring for the presence of marine mammals during all daylight airgun operations and during any nighttime ramp-up of the airguns. The MP provides additional detail on the number of MMOs, crew rotations, and observer qualification and training requirements, as well as monitoring methodology, including protocols for poor visibility and night monitoring, use of specialized field equipment, field data-recording, verification, handling, and security, and field reporting. Lastly, the Participation Agreement provides that Statoil (and Shell) will fund a 24/7 communications center staffed by Inupiat personnel. The center will have contact with all vessels at least once every hour.

Following the 2010 season, Statoil intends to have a post-season co-management meeting with the commissioners and committee heads to discuss results of mitigation measures and outcomes of the preceding season. The goal of the post-season meeting is to build upon the knowledge base, discuss successful or unsuccessful outcomes of mitigation measures, and possibly refine plans or mitigation measures if necessary.

**Mitigation Measures**

In order to issue an incidental take authorization under Section 101(a)(5)(D) of the MMPA, NMFS must set forth the permissible methods of taking pursuant to such activity, and other means of effecting the least practicable adverse 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.

For the Statoil open water marine seismic survey in the Chukchi Sea, Statoil worked with NMFS and proposed the following mitigation measures to minimize the potential impacts to marine mammals in the project vicinity as a result of the marine seismic survey activities.

As part of the application, Statoil submitted to NMFS a Marine Mammal Monitoring and Mitigation Program (4MP) for its open water seismic survey in the Chukchi Sea during the 2010 open-water season. The objectives of the 4MP are:

- To ensure that disturbance to marine mammals and subsistence hunts is minimized and all permit stipulations are followed,
- To document the effects of the proposed survey activities on marine mammals, and
- To collect baseline data on the occurrence and distribution of marine mammals in the study area.

For Statoil's 2010 open water marine seismic surveys in the Chukchi Sea, the following mitigation measures are required.

(1) Sound Source Measurements

As described above, previous measurements of similar airgun arrays in the Chukchi Sea were used to model the distances at which received levels are likely to fall below 120, 160, 180, and 190 dB re 1 μPa (rms) from the planned airgun sources. These modeled distances will be used as temporary safety radii until measurements of the airgun sound source are conducted. The measurements will be made at the beginning of the field season and the measured radii used for the remainder of the survey period.

The objectives of the sound source verification measurements planned for 2010 in the Chukchi Sea will be to measure the distances in the broadside and endfire directions at which broadband received levels reach 190, 180, 170, 160, and 120 dB re 1 μPa (rms) for the energy source array combinations that may be used during the survey activities. The configurations will include at least the full array and the operation of a single mitigation source that will be used during power downs. The measurements of energy source array sounds will be made by an acoustics contractor at the beginning of the survey and the distances to the various radii will be reported as soon as possible after recovery of the equipment. The primary radii of concern will be the 190 and 180 dB safety radii for pinnipeds and cetaceans, respectively, and the 160 dB radii for zone of influence (ZOI). In addition to reporting the radii of specific regulatory concern, nominal distances to other sound isopleths down to 120 dB (rms) will be reported in increments of 10 dB.

Data will be previewed in the field immediately after download from the ocean bottom hydrophone (OBH) instruments. An initial sound source analysis will be supplied to NMFS and the airgun operators within 120 hours of completion of the measurements, if possible. The report will indicate the distances to sound levels between 190 dB re 1 μPa (rms) and 120 dB re 1 μPa (rms) based on fits of empirical transmission loss formulae to data in the endfire and broadside directions. The 120-hour report findings will be based on analysis of measurements from at least three of the OBH systems. A more detailed report including analysis of data from all OBH systems will be issued to NMFS as part of the 90-day report following completion of the acoustic program.

(2) Safety and Disturbance Zones

Under current NMFS guidelines, "safety radii" for marine mammal exposure to impulse sources are customarily defined as the distances within which received sound levels are ≥180 dB re 1 μPa (rms) for cetaceans and ≥190 dB re 1 μPa (rms) for pinnipeds. These safety criteria are based on an assumption that SPL received at levels lower than these will not injure these animals or impair their hearing abilities, but that SPL received at higher levels might have some such effects. Disturbance or behavioral effects to marine mammals from underwater sound may occur after exposure to sound at distances greater than the safety radii (Richardson *et al.* 1995).

Initial safety and disturbance radii for the sound levels produced by the survey activities have been estimated from measurements of similar seismic arrays used in the Chukchi Sea in previous years. These radii will be used for mitigation purposes until results of direct measurements are available early during the exploration activities.

The basis for the estimation of distances to the four received sound levels from the proposed 3000 in$^3$ airgun array operating at a depth of 20 ft (6 m) are the 2006, 2007 and 2008 sound source verification (SSV) measurements in the Chukchi Sea of a similar array, towed at a similar depth. The measured airgun array had a total discharge volume of 3,147 in$^3$ and was composed of three identically-tuned Bolt airgun sub-arrays, totaling 24 airguns (6 clusters of 2 airguns and 12 single airguns). The proposed 3,000 in$^3$ array is also composed of three strings with a total of 26 active airguns in 13 clusters. The difference in discharge volume would lead to an expected loss of less than 0.2 dB and is neglected in this assessment. The estimated source level for the full 3,000 in$^3$ array is 245 dB re 1 μPA (rms). Without measurement data for the specific site to be surveyed, it is reasonable to adopt the maximum distances obtained from a similar array during previous measurements in the Chukchi Sea. Table 1 summarizes the distances to received levels of 190, 180 160, and 120 dB re 1 μPa (rms) that are adopted for the analysis for the proposed survey. Distances for received levels of 120 dB are highly variable, in part because the bottom geoacoustic properties will have a major effect on received levels at such distances.

To estimate the distances to various received levels from the 60 in$^3$ mitigation gun the data from previous measurements of a 30 in$^3$ gun were used. In general the pressure increase relative to a 30 in$^3$ gun can be derived by calculating the square root of (60/30), which is 1.41. This means that the dB levels for the sound pressure levels of a 60 in$^3$ will increase by approximately 3 dB (20Log[1.41]) compared to the 30 in$^3$ gun. The distances as summarized in Table 1 were derived by adding 3 dB to the constant term of the equation RL = 226.6–21.2log(R)–0.00022R. The estimated source level of this single 60 in$^3$ airgun is 230 dB re 1 μPa (rms).

TABLE 1—ESTIMATED DISTANCES TO RECEIVED SOUND LEVELS ≥190, 180, 170, 160, AND 120 dB re 1 μPA (rms) FROM THE 3,000 IN$^3$ AIRGUN ARRAY AND THE 60 IN$^3$ MITIGATION GUN OF THE PROPOSED SEISMIC SURVEY. THESE DISTANCES ARE BASED ON MEASUREMENTS IN THE CHUKCHI SEA FROM A SIMILAR AIRGUN ARRAY.

| Received Levels (dB re 1 μPa rms) | Distance (m) | |
|---|---|---|
| | 3,000 in$^3$ | 60 in$^3$ |
| | (full airgun array) | (mitigation airgun) |
| 190 | 700 | 70 |
| 180 | 2,500 | 220 |
| 160 | 13,000 | 1,800 |
| 120 | 70,000–120,000 | 50,000 |

An acoustics contractor will perform the direct measurements of the received levels of underwater sound versus distance and direction from the energy source arrays using calibrated hydrophones. The acoustic data will be analyzed as quickly as reasonably practicable in the field and used to verify (and if necessary adjust) the safety distances. The field report will be made available to NMFS and the MMOs within 120 hrs of completing the measurements. The mitigation measures to be implemented at the 190 and 180 dB sound levels will include power downs and shut downs as described below.

(3) Power Downs and Shut Downs

A power-down is the immediate reduction in the number of operating energy sources from all firing to some smaller number. A shutdown is the immediate cessation of firing of all energy sources. The arrays will be immediately powered down whenever a marine mammal is sighted approaching close to or within the applicable safety zone of the full arrays but is outside or about to enter the applicable safety zone of the single mitigation source. If a marine mammal is sighted within the applicable safety zone of the single mitigation airgun, the entire array will be shut down (*i.e.,* no sources firing).

Following a power-down or shutdown, operation of the airgun array will not resume until the marine mammal has cleared the applicable safety zone. The animal will be considered to have cleared the safety zone if it:

- Is visually observed to have left the safety zone;
- Has not been seen within the zone for 15 min in the case of small odontocetes and pinnipeds; or
- Has not been seen within the zone for 30 min in the case of mysticetes.

In the unanticipated event that an injured or dead marine mammal is sighted within an area where the holder of this Authorization deployed and utilized seismic airguns within the past 24 hours, immediately shutdown the seismic airgun array and notify the Marine Mammal Stranding Network within 24 hours of the sighting (telephone: 1–800–853–1964).

In the event that the marine mammal has been determined to have been deceased for at least 72 hours, as certified by the lead MMO onboard the source vessel, and no other marine mammals have been reported injured or dead during that same 72 hour period, the airgun array may be restarted by conducting the necessary ramp-up procedures described below upon completion of a written certification by the MMO. The certification must include the following: Species or description of the animal(s); the condition of the animal(s) (including carcass condition if the animal is dead); location and time of first discovery; observed behaviors (if alive); and photographs or video (if available). Within 24 hours after the event, Statoil must notify the designated staff person by telephone or email of the event and ensure that the written certification is provided to the NMFS staff person.

In the event that the marine mammal injury resulted from something other than seismic airgun operations (*e.g.,* gunshot wound, polar bear attack), as certified by the lead MMO onboard the seismic vessel, the airgun array may be restarted by conducting the necessary ramp-up procedures described below upon completion of a written certification by the MMO. The certification must include the following: Species or description of the animal(s); the condition of the animal(s) (including carcass condition if the animal is dead); location and time of first discovery; observed behaviors (if alive); and photographs or video (if available). Within 24 hours after the event, Statoil must notify the designated staff person by telephone or email of the event and ensure that the written certification is provided to the NMFS staff person.

(4) Ramp Ups

A ramp up of an airgun array provides a gradual increase in sound levels, and involves a stepwise increase in the number and total volume of airguns firing until the full volume is achieved.

The purpose of a ramp up (or "soft start") is to "warn" cetaceans and pinnipeds in the vicinity of the airguns and to provide time for them to leave the area and thus avoid any potential injury or impairment of their hearing abilities.

During the proposed seismic survey, the seismic operator will ramp up the airgun arrays slowly. Full ramp ups (*i.e.,* from a cold start after a shut down, when no airguns have been firing) will begin by firing a single airgun in the array. The minimum duration of a shut-down period, *i.e.,* without air guns firing, which must be followed by a ramp up, is typically the amount of time it would take the source vessel to cover the 180-dB safety radius. The actual time period depends on ship speed and the size of the 180-dB safety radius. That period is estimated to be about 15–20 minutes based on the modeling results described above and a survey speed of 4 knots.

A full ramp up, after a shut down, will not begin until there has been a minimum of 30 min of observation of the safety zone by MMOs to assure that no marine mammals are present. The entire safety zone must be visible during the 30-minute lead-in to a full ramp up. If the entire safety zone is not visible, then ramp up from a cold start cannot begin. If a marine mammal(s) is sighted within the safety zone during the 30-minute watch prior to ramp up, ramp up will be delayed until the marine mammal(s) is sighted outside of the safety zone or the animal(s) is not sighted for at least 15–30 minutes: 15 minutes for small odontocetes and pinnipeds, or 30 minutes for baleen whales and large odontocetes.

During turns and transit between seismic transects, at least one airgun will remain operational. The ramp-up procedure still will be followed when

increasing the source levels from one airgun to the full arrays. However, keeping one airgun firing will avoid the prohibition of a cold start during darkness or other periods of poor visibility. Through use of this approach, seismic operations can resume upon entry to a new transect without a full ramp up and the associated 30-minute lead-in observations. MMOs will be on duty whenever the airguns are firing during daylight, and during the 30-min periods prior to ramp-ups as well as during ramp-ups. Daylight will occur for 24 h/day until mid-August, so until that date MMOs will automatically be observing during the 30-minute period preceding a ramp up. Later in the season, MMOs will be called out at night to observe prior to and during any ramp up. The seismic operator and MMOs will maintain records of the times when ramp-ups start, and when the airgun arrays reach full power.

(5) Mitigation Measures Concerning Baleen Whale Aggregations

A 160-dB vessel monitoring zone for large whales will be established and monitored in the Chukchi Sea during all seismic surveys. Whenever an aggregation of bowhead whales or gray whales (12 or more whales of any age/sex class that appear to be engaged in a nonmigratory, significant biological behavior (*e.g.,* feeding, socializing)) are observed during an aerial or vessel monitoring program within the 160-dB safety zone around the seismic activity, the seismic operation will not commence or will shut down, until two consecutive surveys (aerial or vessel) indicate they are no longer present within the 160-dB safety zone of seismic-surveying operations.

Survey information, especially information about bowhead whale cow/calf pairs or feeding bowhead or gray whales, shall be provided to NMFS as required in MMPA authorizations, and will form the basis for NMFS determining whether additional mitigation measures, if any, will be required over a given time period.

(6) Mitigation Measures Concerning Vessel Speed and Directions

Furthermore, the following measures concerning vessel speed and directions are required for Statoil's 2010 open water marine seismic surveys in the Chukchi Sea:

(1) All vessels should reduce speed when within 300 yards (274 m) of whales, and those vessels capable of steering around such groups should do so. Vessels may not be operated in such a way as to separate members of a group of whales from other members of the group;

(2) Avoid multiple changes in direction and speed when within 300 yards (274 m) of whales; and

(3) When weather conditions require, such as when visibility drops, support vessels must adjust speed accordingly to avoid the likelihood of injury to whales.

(7) Subsistence Mitigation Measures

The following measures, plans, and programs will be implemented by Statoil during its 2010 open water marine seismic survey in the Chukchi Sea to monitor and mitigate potential impacts to subsistence users and resources. These measures, plans, and programs have been effective in past seasons of work in the Arctic and were developed in past consultations with potentially affected communities.

Statoil will not be entering the Chukchi Sea until early August, so there will be no potential conflict with spring bowhead whale or beluga subsistence whaling in the polynya zone. Statoil's seismic survey area is ~100 mi (~161 km) northwest of Wainwright which reduces the potential impact to subsistence hunting activities occurring along the Chukchi Sea coast. The communication center in Wainwright will be jointly funded by Statoil and other operators, and Statoil will routinely call the communication center according to the established protocol while in the Chukchi Sea. Statoil plans to have one major crew change which will take place in Nome, AK, and will not involve the use of helicopters. Statoil does have a contingency plan for a potential transfer of a small number of crew via ship-to-shore vessel at Wainwright. If this should become necessary, the Wainwright communications center will be contacted to determine the appropriate vessel route and timing to avoid potential conflict with subsistence users.

Following completion of the 2010 Chukchi Sea open water marine seismic surveys, Statoil will conduct a co-management meeting with the commissioners and committee heads to discuss results of mitigation measures and outcomes of the preceding season. The goal of the post-season meeting is to build upon the knowledge base, discuss successful or unsuccessful outcomes of mitigation measures, and possibly refine plans or mitigation measures if necessary.

*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 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.

**Monitoring and Reporting Measures**

In order to issue an ITA for an activity, Section 101(a)(5)(D) of the MMPA states that NMFS must 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.

*Monitoring Measures*

The following monitoring measures are required for Statoil's 2010 open water marine seismic surveys in the Chukchi Sea.

(1) Vessel-Based MMOs

Vessel-based monitoring for marine mammals will be done by trained MMOs throughout the period of marine survey activities. MMOs will monitor the occurrence and behavior of marine mammals near the survey vessel during all daylight periods during operation and during most daylight periods when airgun operations are not occurring. MMO duties will include watching for and identifying marine mammals, recording their numbers, distances, and reactions to the survey operations, and documenting "take by harassment" as defined by NMFS.

A sufficient number of MMOs will be required onboard the survey vessel to meet the following criteria: (1) 100% monitoring coverage during all periods of survey operations in daylight; (2) maximum of 4 consecutive hours on watch per MMO; and (3) maximum of 12 hours of watch time per day per MMO.

During seismic operations when there is 24 hrs of daylight, five MMOs will be based aboard the seismic source vessel and at least three MMOs on the chase/monitoring vessels.

MMO teams will consist of Inupiat observers and experienced field biologists. An experienced field crew leader will supervise the MMO team onboard the survey vessel. New observers shall be paired with experienced observers to avoid situations where lack of experience impairs the quality of observations. The total number of MMOs may decrease later in the season as the duration of daylight decreases.

Statoil anticipates one crew change to occur approximately half-way through the season. During crew rotations detailed hand-over notes will be provided to the incoming crew leader by the outgoing leader. Other communications such as email, fax, and/or phone communication between the current and oncoming crew leaders during each rotation will also occur when possible. In the event of an unexpected crew change Statoil will facilitate such communications to insure monitoring consistency among shifts.

Crew leaders and most other biologists serving as observers in 2010 will be individuals with experience as observers during one or more of the 1996–2009 seismic or shallow hazards monitoring projects in Alaska, the Canadian Beaufort, or other offshore areas in recent years.

Biologist-observers will have previous marine mammal observation experience, and field crew leaders will be highly experienced with previous vessel-based marine mammal monitoring and mitigation projects. Resumes for those individuals will be provided to NMFS for review and acceptance of their qualifications. Inupiat observers will be experienced in the region, familiar with the marine mammals of the area, and complete a NMFS-approved observer training course designed to familiarize individuals with monitoring and data collection procedures. A marine mammal observers' handbook, adapted for the specifics of the planned survey program, will be prepared and distributed beforehand to all MMOs.

Most observers, including Inupiat observers, will also complete a two-day training and refresher session on marine mammal monitoring, to be conducted shortly before the anticipated start of the 2010 open-water season. Any exceptions will have or receive equivalent experience or training. The training session(s) will be conducted by qualified marine mammalogists with extensive crew-leader experience during previous vessel-based seismic monitoring programs. Observers should be trained using visual aids (*e.g.,* videos, photos), to help them identify the species that they are likely to encounter in the conditions under which the animals will likely be seen.

If there are Alaska Native MMOs, the MMO training that is conducted prior to the start of the survey activities should be conducted with both Alaska Native MMOs and biologist MMOs being trained at the same time in the same room. There should not be separate training courses for the different MMOs.

Primary objectives of the training include:

- Review of the marine mammal monitoring plan for this project, including any amendments specified by NMFS in the IHA, by USFWS and by MMS, or by other agreements in which Statoil may elect to participate;
- Review of marine mammal sighting, identification, and distance estimation methods;
- Review of operation of specialized equipment (reticle binoculars, night vision devices, and GPS system);
- Review of, and classroom practice with, data recording and data entry systems, including procedures for recording data on marine mammal sightings, monitoring operations, environmental conditions, and entry error control. These procedures will be implemented through use of a customized computer database and laptop computers; and
- Review of the specific tasks of the Inupiat Communicator.

Observers should understand the importance of classifying marine mammals as "unknown" or "unidentified" if they cannot identify the animals to species with confidence. In those cases, they should note any information that might aid in the identification of the marine mammal sighted. For example, for an unidentified mysticete whale, the observers should record whether the animal had a dorsal fin.

MMOs will watch for marine mammals from the best available vantage point on the survey vessel, typically the bridge. MMOs will scan systematically with the unaided eye and 7 x 50 reticle binoculars, supplemented with 20 x 60 image-stabilized Zeiss Binoculars or Fujinon 25 x 150 "Big-eye" binoculars and night-vision equipment when needed. With two or three observers on watch, the use of big eyes should be paired with searching by naked eye, the latter allowing visual coverage of nearby areas to detect marine mammals. Personnel on the bridge will assist the MMOs in watching for marine mammals.

Observers should attempt to maximize the time spent looking at the water and guarding the safety radii. They should avoid the tendency to spend too much time evaluating animal behavior or entering data on forms, both of which detract from their primary purpose of monitoring the safety zone.

Observers should use the best possible positions for observing (*e.g.,* outside and as high on the vessel as possible), taking into account weather and other working conditions. MMOs shall carefully document visibility during observation periods so that total estimates of take can be corrected accordingly.

Information to be recorded by marine mammal observers will include the same types of information that were recorded during recent monitoring programs associated with Industry activity in the Arctic (*e.g.,* Ireland *et al.,* 2009). When a mammal sighting is made, the following information about the sighting will be recorded:

(A) Species, group size, age/size/sex categories (if determinable), behavior when first sighted and after initial sighting, heading (if consistent), bearing and distance from the MMO, apparent reaction to activities (*e.g.,* none, avoidance, approach, paralleling, etc.), closest point of approach, and behavioral pace;

(B) Time, location, speed, activity of the vessel, sea state, ice cover, visibility, and sun glare;

(C) The positions of other vessel(s) in the vicinity of the MMO location; and

(D) Whether adjustments were made to Statoil's activity status.

The ship's position, speed of support vessels, and water temperature, water depth, sea state, ice cover, visibility, and sun glare will also be recorded at the start and end of each observation watch, every 30 minutes during a watch, and whenever there is a change in any of those variables.

Distances to nearby marine mammals will be estimated with binoculars (Fujinon 7 x 50 binoculars) containing a reticle to measure the vertical angle of the line of sight to the animal relative to the horizon. MMOs may use a laser rangefinder to test and improve their

abilities for visually estimating distances to objects in the water. However, previous experience showed that a Class 1 eye-safe device was not able to measure distances to seals more than about 230 ft (70 m) away. The device was very useful in improving the distance estimation abilities of the observers at distances up to about 1,968 ft (600 m)—the maximum range at which the device could measure distances to highly reflective objects such as other vessels. Humans observing objects of more-or-less known size via a standard observation protocol, in this case from a standard height above water, quickly become able to estimate distances within about ± 20% when given immediate feedback about actual distances during training.

Statoil plans to conduct the marine seismic survey 24 hr/day. Regarding nighttime operations, note that there will be no periods of total darkness until mid-August. When operating under conditions of reduced visibility attributable to darkness or to adverse weather conditions, night-vision equipment ("Generation 3" binocular image intensifiers, or equivalent units) will be available for use.

(2) Acoustic Monitoring

*Sound Source Measurements*

As described above, previous measurements of airguns in the Chukchi Sea were used to estimate the distances at which received levels are likely to fall below 120, 160, 180, and 190 dB re 1 μPa (rms) from the planned airgun sources. These modeled distances will be used as temporary safety radii until measurements of the airgun sound source are conducted. The measurements will be made at the beginning of the field season and the measured radii used for the remainder of the survey period. An acoustics contractor with experience in the Arctic conducting similar measurements in recent years will use their equipment to record and analyze the underwater sounds and write the summary reports as described below.

The objectives of the sound source verification measurements planned for 2010 in the Chukchi Sea will be (1) to measure the distances in the broadside and endfire directions at which broadband received levels reach 190, 180, 170, 160, and 120 dB re 1 μPa (rms) for the energy source array combinations that may be used during the survey activities. The configurations will include at least the full array and the operation of a single mitigation source that will be used during power downs. The measurements of energy source array sounds will be made by an acoustics contractor at the beginning of the survey and the distances to the various radii will be reported as soon as possible after recovery of the equipment. The primary radii of concern will be the 190 and 180 dB safety radii for pinnipeds and cetaceans, respectively, and the 160 dB disturbance radii. In addition to reporting the radii of specific regulatory concern, nominal distances to other sound isopleths down to 120 dB re 1 μPa (rms) will be reported in increments of 10 dB.

Data will be previewed in the field immediately after download from the hydrophone instruments. An initial sound source analysis will be supplied to NMFS and the airgun operators within 120 hours of completion of the measurements, if possible. The report will indicate the distances to sound levels based on fits of empirical transmission loss formulae to data in the endfire and broadside directions. A more detailed report will be issued to NMFS as part of the 90-day report following completion of the acoustic program.

*2010 Shared Science Program*

Statoil, Shell, and ConocoPhillips (CPAI) are jointly funding an extensive science program in the Chukchi Sea. This program will be carried out by Olgoonik-Fairweather LLC (OFJV) with the vessels Norseman II and Westward Wind during the 2010 open water season. The science program is not part of the Statoil seismic program, but worth mentioning in this context due to the acoustic monitoring array deployed within the seismic survey area as shown in Figures 1 and 2 of Statoil's IHA application. The science program components include:

- Acoustics Monitoring
- Fisheries Ecology
- Benthic Ecology
- Plankton Ecology
- Mammals
- Seabirds
- Physical Oceanography

The 2010 program continues the acoustic monitoring programs of 2006–2009 with a total of 44 acoustic recorders distributed both broadly across the Chukchi lease area and nearshore environment and intensively on the Statoil, Burger (Shell), and Klondike (CPAI) lease holdings. The recorders will be deployed in late July or early August and will be retrieved in early to mid-October, depending on ice conditions. The recorders will be the Advanced Multi-Channel Acoustic Recorder (AMAR) and the Autonomous Underwater Recorder for Acoustic Listening (AURAL) model acoustic buoys set to record at 16 kHz sample rate. These are the same recorder models and same sample rates that have been used for this program from 2006–2009. The broad area arrays are designed to capture both general background soundscape data, seismic survey sounds and marine mammal call data across the lease area. From these recordings we have been able to gain insight into large-scale distributions of marine mammals, identification of marine mammal species present, movement and migration patterns, and general abundance data. The site specific focused arrays are designed to also support localization of marine mammal calls on and around the leaseholdings. In the case of the Statoil prospect, where Statoil intends to conduct seismic data acquisition in 2010, localized calls will enable investigators to understand responses of marine mammals to survey operations both in terms of distribution around the operation and behavior (*i.e.,* calling behavior). The site specific array will consist of 7 AMAR recorders deployed in a hexagonal configuration as shown in Figure 2 of Statoil's 4MP, with inter-recorder spacing of 8 km (12.9 mi). These recorders are the same types that were used successfully in the 2009 site-specific acoustic monitoring program on Shell and CPAI prospects. The recorded sample resolution is 24-bits and sample frequency is 16 kHz, which is sufficient to capture part or all of the sounds produced by the marine mammal species known to be present, with the exception of harbor porpoise. The recorders will be synchronized to support localization of calling bowhead whales. Other species' calls are typically detected from distances less than the 8 km recorder separation. Consequently the multi-sensor triangulation method, that is used for bowheads calls, will not be used to determine calling locations of other species; however, detection of other species' calls indicates the animal's position within a circular region of radius equal to the maximum detection distances of a few kilometers.

*Reporting Measures*

(1) SSV Report

A report on the preliminary results of the acoustic verification measurements, including as a minimum the measured 190-, 180-, 160-, and 120-dB re 1 μPa (rms) radii of the source vessel(s) and the support vessels, will be submitted within 120 hr after collection and analysis of those measurements at the start of the field season. This report will specify the distances of the safety zones

that were adopted for the marine survey activities.

(2) Technical Reports

The results of Statoil's 2010 open water marine seismic survey monitoring program (*i.e.,* vessel-based and acoustic), including estimates of "take" by harassment, will be presented in the "90-day" and Final Technical reports. The Technical Reports will include: (a) Summaries of monitoring effort (*e.g.,* total hours, total distances, and marine mammal distribution through the study period, accounting for sea state and other factors affecting visibility and detectability of marine mammals); (b) analyses of the effects of various factors influencing detectability of marine mammals (*e.g.,* sea state, number of observers, and fog/glare); (c) species composition, occurrence, and distribution of marine mammal sightings, including date, water depth, numbers, age/size/gender categories (if determinable), group sizes, and ice cover; (d) analyses of the effects of survey operations; (e) sighting rates of marine mammals during periods with and without airgun activities (and other variables that could affect detectability); (f) initial sighting distances versus airgun activity state; (g) closest point of approach versus airgun activity state; (h) observed behaviors and types of movements versus airgun activity state; (i) numbers of sightings/individuals seen versus airgun activity state; (j) distribution around the survey vessel versus airgun activity state; and (k) estimates of take by harassment. In addition, Statoil shall provide all spatial data on charts (always including vessel location) and make all data available in the report, preferably electronically, for integration with data from other companies. Statoil shall also accommodate specific requests for raw data, including tracks of all vessels and aircraft (if available) associated with the operation and activity logs documenting when and what types of sounds are introduced into the environment by the operation.

The initial technical report is due to NMFS within 90 days of the completion of Statoil's Chukchi Sea open water marine seismic surveys. The "90-day" report will be subject to review and comment by NMFS. Any recommendations made by NMFS must be addressed in the final report prior to acceptance by NMFS.

(3) Comprehensive Report

Following the 2010 open-water season a comprehensive report describing the vessel-based monitoring and acoustic monitoring programs will be prepared. The comprehensive report will describe the methods, results, conclusions and limitations of each of the individual data sets in detail. The report will also integrate (to the extent possible) the studies into a broad-based assessment of industry activities, and other activities that occur in the Chukchi Sea, and their impacts on marine mammals during 2010. The report will help to establish long-term data sets that can assist with the evaluation of changes in the Chukchi Sea ecosystem. The report will attempt to provide a regional synthesis of available data on industry activity in offshore areas of northern Alaska that may influence marine mammal density, distribution and behavior.

(4) Notification of Injured or Dead Marine Mammals

Statoil will notify NMFS' Office of Protected Resources and NMFS' Stranding Network within 48 hours of sighting an injured or dead marine mammal in the vicinity of marine survey operations. Statoil will provide NMFS with the species or description of the animal(s), the condition of the animal(s) (including carcass condition if the animal is dead), location, time of first discovery, observed behaviors (if alive), and photo or video (if available).

In the event that an injured or dead marine mammal is found by Statoil that is not in the vicinity of the proposed open water marine survey program, Statoil will report the same information as listed above as soon as operationally feasible to NMFS.

Negligible Impact and Small Numbers Analysis and 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 Statoil's proposed 2010 open water marine seismic surveys in the Chukchi Seas, and none are proposed to be authorized. Additionally, animals in the area are not expected to incur hearing impairment (*i.e.,* TTS or PTS) or non-auditory physiological effects. Takes will be limited to Level B behavioral harassment. Although it is possible that some individuals of marine mammals may be exposed to sounds from marine survey activities more than once, the expanse of these multi-exposures are expected to be less extensive since both the animals and the survey vessels will be moving constantly in and out of the survey areas.

Most of the bowhead whales encountered during the summer will likely show overt disturbance (avoidance) only if they receive airgun sounds with levels ≥160 dB re 1 μPa (rms). Odontocete reactions to seismic energy pulses are usually assumed to be limited to shorter distances from the airgun(s) than are those of mysticetes, probably in part because odontocete low-frequency hearing is assumed to be less sensitive than that of mysticetes. However, at least when in the Canadian Beaufort Sea in summer, belugas appear to be fairly responsive to seismic energy, with few being sighted within 6–12 mi (10–20 km) of seismic vessels during aerial surveys (Miller *et al.,* 2005). Belugas will likely occur in small numbers in the Chukchi Sea during the survey period and few will likely be affected by the survey activity. In addition, due to the constant moving of the seismic survey vessel, the duration of the noise exposure by cetaceans to seismic impulse would be brief. For the same reason, it is unlikely that any individual animal would be exposed to high received levels multiple times.

Taking into account the mitigation measures that are planned, effects on cetaceans are generally expected to be restricted to avoidance of a limited area around the survey operation and short-term changes in behavior, falling within the MMPA definition of "Level B harassment". Furthermore, the estimated numbers of animals potentially exposed to sound levels sufficient to cause appreciable disturbance are very low percentages of the population sizes in the Bering-Chukchi-Beaufort seas, as described above.

The many reported cases of apparent tolerance by cetaceans of seismic exploration, vessel traffic, and some other human activities show that co-existence is possible. Mitigation measures such as controlled vessel speed, dedicated marine mammal observers, non-pursuit, and shut downs or power downs when marine mammals are seen within defined ranges will further reduce short-term reactions and minimize any effects on hearing sensitivity. In all cases, the effects are expected to be short-term, with no lasting biological consequence.

Some individual pinnipeds may be exposed to sound from the proposed

marine surveys more than once during the time frame of the project. However, as discussed previously, due to the constant moving of the survey vessel, the probability of an individual pinniped being exposed multiple times is much lower than if the source is stationary. Therefore, NMFS has preliminarily determined that the exposure of pinnipeds to sounds produced by the proposed marine seismic survey in the Chukchi Sea is not expected to result in more than Level B harassment and is anticipated to have no more than a negligible impact on the animals.

Of the twelve marine mammal species likely to occur in the proposed marine survey area, only the bowhead, fin, and humpback whales are listed as endangered under the ESA. These species are also designated as "depleted" under the MMPA. Despite these designations, the Bering-Chukchi-Beaufort stock of bowheads has been increasing at a rate of 3.4 percent annually for nearly a decade (Allen and Angliss, 2010). Additionally, during the 2001 census, 121 calves were counted, which was the highest yet recorded. The calf count provides corroborating evidence for a healthy and increasing population (Allen and Angliss, 2010). The occurrence of fin and humpback whales in the proposed marine survey areas is considered very rare. There is no critical habitat designated in the U.S. Arctic for the bowhead, fin, and humpback whale. The bearded and ringed seals are "candidate species" under the ESA, meaning they are currently being considered for listing but are not designated as depleted under the MMPA. None of the other three species that may occur in the project area are listed as threatened or endangered under the ESA or designated as depleted under the MMPA.

Potential impacts to marine mammal habitat were discussed previously in this document (see the "Anticipated Effects on Habitat" section). Although some disturbance is possible to food sources of marine mammals, the impacts are anticipated to be minor enough as to not affect rates of recruitment or survival of marine mammals in the area. Based on the vast size of the Arctic Ocean where feeding by marine mammals occurs versus the localized area of the marine survey activities, any missed feeding opportunities in the direct project area would be minor based on the fact that other feeding areas exist elsewhere.

The estimated takes proposed to be authorized represent 4.95% of the Eastern Chukchi Sea population of approximately 3,700 beluga whales (Angliss and Allen, 2009), 0.62% of Aleutian Island and Bering Sea stock of approximately 340 killer whales, 0.04% of Bering Sea stock of approximately 48,215 harbor porpoises, 0.81% of the Eastern North Pacific stock of approximately 17,752 gray whales, 1.11% of the Bering-Chukchi-Beaufort population of 14,247 individuals assuming 3.4 percent annual population growth from the 2001 estimate of 10,545 animals (Zeh and Punt, 2005), 0.21% of the Western North Pacific stock of approximately 938 humpback whales, 0.03% of the North Pacific stock of approximately 5,700 fin whales, and 0.19% of the Alaska stock of approximately 1,003 minke whales. The take estimates presented for bearded, ringed, spotted, and ribbon seals represent 0.09, 2.81, 0.22, and 0.01 percent of U.S. Arctic stocks of each species, respectively. These estimates represent the percentage of each species or stock that could be taken by Level B behavioral harassment if each animal is taken only once. In addition, the mitigation and monitoring measures (described previously in this document) proposed for inclusion in the IHA (if issued) are expected to reduce even further any potential disturbance to marine mammals.

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 finds that Statoil's proposed 2010 open water marine seismic survey in the Chukchi Sea may result in the incidental take of small numbers of marine mammals, by Level B harassment only, and that the total taking from the marine surveys will have a negligible impact on the affected species or stocks.

*Unmitigable Adverse Impact Analysis and Determination*

NMFS has determined that Statoil's proposed 2010 open water marine seismic survey in the Chukchi Sea will not have an unmitigable adverse impact on the availability of species or stocks for taking for subsistence uses. This determination is supported by information contained in this document and Statoil's POC. Statoil has adopted a spatial and temporal strategy for its Chukchi Sea operations that should minimize impacts to subsistence hunters. Statoil will enter the Chukchi Sea far offshore, so as to not interfere with July hunts in the Chukchi Sea villages. After the close of the July beluga whale hunts in the Chukchi Sea villages, very little whaling occurs in Wainwright, Point Hope, and Point Lay. Although the fall bowhead whale hunt in Barrow will occur while Statoil is still operating (mid- to late-September to October), Barrow is approximately 150 mi (241 km) east of the eastern boundary of the proposed marine seismic survey site. Based on these factors, Statoil's Chukchi Sea seismic survey is not expected to interfere with the fall bowhead harvest in Barrow. In recent years, bowhead whales have occasionally been taken in the fall by coastal villages along the Chukchi coast, but the total number of these animals has been small.

Adverse impacts are not anticipated on sealing activities since the majority of hunts for seals occur in the winter and spring, when Statoil will not be operating. Additionally, most sealing activities occur much closer to shore than Statoil's proposed marine seismic survey area.

Based on the measures described in Statoil's POC, the required mitigation and monitoring measures (described earlier in this document), and the project design itself, NMFS has determined that there will not be an unmitigable adverse impact on subsistence uses from Statoil's open water marine seismic survey in the Chukchi Sea.

**Endangered Species Act (ESA)**

There are three marine mammal species listed as endangered under the ESA with confirmed or possible occurrence in the proposed project area: Bowhead whale, fin whale, and humpback whale. NMFS' Permits, Conservation and Education Division consulted with NMFS' Alaska Regional Office Division of Protected Resources under section 7 of the ESA on the issuance of an IHA to Statoil under section 101(a)(5)(D) of the MMPA for this activity. A Biological Opinion was issued on July 13, 2010, which concludes that issuance of an IHA is not likely to jeopardize the continued existence of the fin, humpback, or bowhead whale. NMFS has issued an Incidental Take Statement under this Biological Opinion which contains reasonable and prudent measures with implementing terms and conditions to minimize the effects of take of listed species.

**National Environmental Policy Act (NEPA)**

NMFS prepared an EA that includes an analysis of potential environmental effects associated with NMFS' issuance of an IHA to Statoil to take marine mammals incidental to conducting its

marine survey program in the Beaufort and Chukchi Seas during the 2010 open water season. NMFS has finalized the EA and prepared a FONSI for this action. Therefore, preparation of an EIS is not necessary.

**Authorization**

As a result of these determinations, NMFS has issued an IHA to Statoil to take marine mammals incidental to its 2010 open water marine seismic surveys in the Chukchi Sea, Alaska, provided the previously mentioned mitigation, monitoring, and reporting requirements are incorporated.

Dated: August 6, 2010.

**James H. Lecky,**

*Director, Office of Protected Resources, National Marine Fisheries Service.*

[FR Doc. 2010–19962 Filed 8–12–10; 8:45 am]

**BILLING CODE 3510–22–P**

# Reader Aids

**Federal Register**

Vol. 75, No. 156

Friday, August 13, 2010

## CUSTOMER SERVICE AND INFORMATION

| | |
|---|---|
| **Federal Register/Code of Federal Regulations** | |
| General Information, indexes and other finding aids | **202–741–6000** |
| **Laws** | **741–6000** |
| **Presidential Documents** | |
| Executive orders and proclamations | **741–6000** |
| **The United States Government Manual** | **741–6000** |
| **Other Services** | |
| Electronic and on-line services (voice) | **741–6020** |
| Privacy Act Compilation | **741–6064** |
| Public Laws Update Service (numbers, dates, etc.) | **741–6043** |
| TTY for the deaf-and-hard-of-hearing | **741–6086** |

### ELECTRONIC RESEARCH

**World Wide Web**

Full text of the daily Federal Register, CFR and other publications is located at: **http://www.gpoaccess.gov/nara/index.html**

Federal Register information and research tools, including Public Inspection List, indexes, and links to GPO Access are located at: **http://www.archives.gov/federal_register**

**E-mail**

**FEDREGTOC-L** (Federal Register Table of Contents LISTSERV) is an open e-mail service that provides subscribers with a digital form of the Federal Register Table of Contents. The digital form of the Federal Register Table of Contents includes HTML and PDF links to the full text of each document.

To join or leave, go to **http://listserv.access.gpo.gov** and select *Online mailing list archives, FEDREGTOC-L, Join or leave the list (or change settings);* then follow the instructions.

**PENS** (Public Law Electronic Notification Service) is an e-mail service that notifies subscribers of recently enacted laws.

To subscribe, go to **http://listserv.gsa.gov/archives/publaws-l.html** and select *Join or leave the list (or change settings);* then follow the instructions.

**FEDREGTOC-L** and **PENS** are mailing lists only. We cannot respond to specific inquiries.

**Reference questions.** Send questions and comments about the Federal Register system to: **fedreg.info@nara.gov**

The Federal Register staff cannot interpret specific documents or regulations.

**Reminders.** Effective January 1, 2009, the Reminders, including Rules Going Into Effect and Comments Due Next Week, no longer appear in the Reader Aids section of the Federal Register. This information can be found online at **http://www.regulations.gov.**

**CFR Checklist.** Effective January 1, 2009, the CFR Checklist no longer appears in the Federal Register. This information can be found online at **http://bookstore.gpo.gov/.**

## FEDERAL REGISTER PAGES AND DATE, AUGUST

45047–45474 ..... 2
45475–46836 ..... 3
46837–47170 ..... 4
47171–47432 ..... 5
47433–47698 ..... 6
47699–48272 ..... 9
48273–48548 ..... 10
48549–48856 ..... 11
48857–49350 ..... 12
49351–49812 ..... 13

## CFR PARTS AFFECTED DURING AUGUST

At the end of each month, the Office of the Federal Register publishes separately a List of CFR Sections Affected (LSA), which lists parts and sections affected by documents published since the revision date of each title.

**3 CFR**

**Proclamations:**
8544 ..... 46835
8545 ..... 48855

**Administrative Orders:**
Memorandums:
Memo. of August 3, 2010 ..... 47433

**5 CFR**

532 ..... 49351
2416 ..... 48273

**Proposed Rules:**
532 ..... 45557

**7 CFR**

652 ..... 48273
3022 ..... 49357

**Proposed Rules:**
357 ..... 46859
989 ..... 47490

**8 CFR**

214 ..... 47699
217 ..... 47701
274a ..... 47699

**9 CFR**

**Proposed Rules:**
307 ..... 47726
381 ..... 47726
590 ..... 47726

**10 CFR**

**Proposed Rules:**
37 ..... 47494

**11 CFR**

**Proposed Rules:**
9428 ..... 47729

**12 CFR**

226 ..... 46837
328 ..... 49363
330 ..... 49363
347 ..... 49363
701 ..... 47171
707 ..... 47173

**Proposed Rules:**
1 ..... 49423
16 ..... 49423
28 ..... 49423
741 ..... 47236
750 ..... 47236
908 ..... 49314
1209 ..... 49314
1213 ..... 47495
1780 ..... 49314

**13 CFR**

121 ..... 48549
134 ..... 47435

**14 CFR**

25 ..... 46838, 46840, 47176
39 ..... 47180, 47182, 47184, 47190, 47194, 47197, 47199, 47201, 47203, 47207, 47208, 49365, 49368, 49370, 49375, 49377
71 ..... 47709, 48550, 48551
91 ..... 48552, 48857
97 ..... 45047, 45049

**Proposed Rules:**
39 ..... 45075, 45558, 45560, 46861, 46864, 46868, 46873, 47242, 47245, 47247, 47249, 47734, 48281, 48615, 48617, 48618, 48620, 48623
71 ..... 47252, 47736, 47737
234 ..... 45562
244 ..... 45562
250 ..... 45562
259 ..... 45562
399 ..... 45562

**15 CFR**

734 ..... 45052
748 ..... 45052

**16 CFR**

310 ..... 48458
1500 ..... 49379

**17 CFR**

200 ..... 47444
201 ..... 47444
202 ..... 47444
275 ..... 49234
279 ..... 49234

**Proposed Rules:**
1 ..... 47738
30 ..... 47738
140 ..... 47738
210 ..... 47064
239 ..... 47064
240 ..... 47064
249 ..... 47064
270 ..... 47064
274 ..... 47064

**18 CFR**

11 ..... 48553
376 ..... 48553

**Proposed Rules:**
35 ..... 47499

**20 CFR**

**Proposed Rules:**
1 ..... 49596
10 ..... 49596
25 ..... 49596

**21 CFR**

1308 ..... 47451

**Proposed Rules:**
1308.....47503

**22 CFR**

40.....45475
42.....45475
62.....48555
120.....46843
**Proposed Rules:**
124.....48625
126.....48625

**26 CFR**

1.....49380, 49394
53.....46844
54.....46844
602.....49380, 49394
**Proposed Rules:**
1.....49427, 49428
300.....48880

**27 CFR**

**Proposed Rules:**
478.....47254

**28 CFR**

79.....48274

**29 CFR**

1926.....47906
4022.....49407
**Proposed Rules:**
404.....48416
4062.....48283
4063.....48283

**30 CFR**

938.....48526
**Proposed Rules:**
56.....49429
57.....49429
938.....46877

**31 CFR**

560.....48562
**Proposed Rules:**
50.....45563

**32 CFR**

199 .....47452, 47458, 47460, 47710, 47712
706.....47210
**Proposed Rules:**
68.....47504
161.....47515
199.....47519

**33 CFR**

1.....49408
3.....47211, 48564
100.....47212, 47215
114.....49408
115.....49408
116.....49408
117 .....45477, 47217, 47461, 48276, 49408
118.....49408
138.....49411
165 .....45055, 45478, 47211, 47713, 47715, 48564, 49412

**34 CFR**

**Proposed Rules:**
222.....49432

**36 CFR**

242.....48857

**37 CFR**

201.....47464

**39 CFR**

111.....47717

**40 CFR**

Ch. I.....49556
35.....49414
52 .....45057, 45480, 45483, 46845, 47218, 48566, 48579, 48582, 48860, 48864
70.....48582
81.....45485, 47218
180 .....46847, 47465, 47475
271.....47223
272.....45489, 47223
300.....47482, 48867
1515.....48585
**Proposed Rules:**
49.....48880
51.....45075, 45210
52 .....45075, 45076, 45080, 45082, 45210, 45568, 46880, 48627, 48628, 48894, 48895
60.....47520
70.....48628
72.....45075, 45210
78.....45075, 45210
81 .....45571, 46881, 47746
93.....49435
97.....45075, 45210
98.....48744
112.....45572
131.....45579
271.....47256
272.....45583, 47256
300.....47521, 48895
704.....49656
710.....49656
711.....49656
1039.....47520
1042.....47520
1065.....47520
1068.....47520

**42 CFR**

410.....45700, 49030
413.....49030
414.....49030
416.....45700
419.....45700
431.....48816
447.....48816
457.....48816
**Proposed Rules:**
410.....46169
411.....46169
412.....46169
413.....46169, 49215
416.....46169
419.....46169
482.....46169
489.....46169

**44 CFR**

64.....49417
**Proposed Rules:**
67.....47751

**45 CFR**

1611.....47487
**Proposed Rules:**
170.....45584

**47 CFR**

1.....45494
2.....45058
25.....45058
27.....45058
73.....47488
97.....46854
101.....45496
**Proposed Rules:**
1.....45590, 47142
27.....47142
54.....48236
61.....48629
64.....48629
73.....46885
95.....47142

**48 CFR**

205.....45072
207.....45072
208.....45072
209.....45072
211.....45072
215 .....45072, 48276, 48278
216.....45072
217.....45072, 48276
219.....45072
225.....45072, 48279
228.....45072
231.....48278
232.....45072
237.....45072
243.....48276
246.....45072
250.....45072
252 .....45072, 48278, 48279
541.....48872
552.....48872
Ch. 14.....48873

**49 CFR**

192.....48593
193.....48593
195.....48593
541.....47720
594.....48608
595.....47489
**Proposed Rules:**
27.....47753
37.....47753
38.....47753
192.....45591

**50 CFR**

17.....45497
100.....48857
218.....45527
648 .....48613, 48874, 49420
679.....49422
**Proposed Rules:**
17 .....45592, 46844, 48294, 48896, 48914
20.....47682
622.....49447
648.....48920
665.....45085
680.....48298

## LIST OF PUBLIC LAWS

This is a continuing list of public bills from the current session of Congress which have become Federal laws. It may be used in conjunction with ''P L U S'' (Public Laws Update Service) on 202–741–6043. This list is also available online at *http://www.archives.gov/federal-register/laws.html*.

The text of laws is not published in the **Federal Register** but may be ordered in ''slip law'' (individual pamphlet) form from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402 (phone, 202–512–1808). The text will also be made available on the Internet from GPO Access at *http://www.gpoaccess.gov/plaws/index.html*. Some laws may not yet be available.

**H.R. 4380/P.L. 111–227**

United States Manufacturing Enhancement Act of 2010 (Aug. 11, 2010; 124 Stat. 2409)

**H.R. 5872/P.L. 111–228**

General and Special Risk Insurance Funds Availability Act of 2010 (Aug. 11, 2010; 124 Stat. 2482)

**H.R. 5981/P.L. 111–229**

To increase the flexibility of the Secretary of Housing and Urban Development with respect to the amount of premiums charged for FHA single family housing mortgage insurance, and for other purposes. (Aug. 11, 2010; 124 Stat. 2483)

**Last List August 12, 2010**

## Public Laws Electronic Notification Service (PENS)

**PENS** is a free electronic mail notification service of newly enacted public laws. To subscribe, go to *http://listserv.gsa.gov/archives/publaws-l.html*

**Note:** This service is strictly for E-mail notification of new laws. The text of laws is not available through this service. **PENS** cannot respond to specific inquiries sent to this address.