IN THE UNITED STATES DISTRICT COURT
DISTRICT OF NORTH DAKOTA
SOUTHWESTERN DIVISION

CASEY VOIGT and JULIE VOIGT, Plaintiffs, v. COYOTE CREEK MINING COMPANY, LLC, a North Dakota Corporation, Defendant.	Civil Action No. 1:15-CV-00109

SUPPLEMENTAL BRIEF IN SUPPORT OF MOTION TO DISMISS

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I. INTRODUCTION

On February 23, 2016, this Court requested supplemental briefing on two issues related to the calculation of the Potential to Emit at Defendant Coyote Creek's Coal Preparation and Processing Plant ("Coal Processing Plant"):

(1) The extent to which fugitive Particulate Matter ("PM") emissions from activities at the Open Storage Pile ("Storage Pile") adjacent to the Coal Processing Plant's apron feeder "count" towards the calculation of the Coal Processing Plant's Potential to Emit; and

(2) The impact on the Potential to Emit of the Passive Enclosure Containment System ("PECS") which surrounds the crushers and conveyers in the Coal Processing Plant.

This brief undertakes to answer these questions. In short, the Storage Pile does not "count," and the PECS must be taken into account in calculating Potential to Emit. Coyote Creek's minor source permit is the correct one, under applicable state and federal laws, for Coyote Creek's state-of-the-art Coal Processing Plant.

First, fugitive emissions from activities at the Storage Pile adjacent to the Coal Processing Plant's apron feeder do not count towards the calculation of the Coal Processing Plant's Potential to Emit. Indeed, fugitive emissions generally do not count for purposes of a major source/minor source determination. They only count when they come from *within* specific source categories, one of which is a "coal preparation and processing plant." Because the Storage Pile in this case is not a regulated part of the Coal Processing Plant, it does not count.

Second, the impact of the PECS must be taken into account when determining the Coal Processing Plant's Potential to Emit. Potential to Emit calculations consider both physical design and federally enforceable limitations. A limitation is "federally enforceable" if the limitation or its effect on emissions is enforceable by the federal government *or* legally and

practicably enforceable by a state or local government. *See Nat'l Mining Ass'n v. EPA*, 59 F.3d 1351 (D.C. Cir. 1995), and *Chemical Mfrs. Ass'n v. EPA*, 1995 U.S. App. LEXIS 31475 (D.C. Cir. Sept. 15, 1995) (invalidating a strict enforceability requirement and ordering the EPA to consider state and local enforcement, as well). The PECS is both. The PECS is required to ensure compliance with federal New Source Performance Standards ("NSPS"), and the NSPS standards are enforceable by the United States Environmental Protection Agency ("EPA"). Aside from that, the North Dakota Department of Health ("NDDH") has both the legal and practical ability to enforce the conditions of Coyote Creek's minor source construction permit, which requires the installation and the continued operation and maintenance of the PECS sufficient to ensure that PM emissions comply with the applicable standards. There is no requirement that a limitation be expressed in numerical terms in order for it to qualify as "federally enforceable."

II. DISCUSSION

A. Fugitive Emissions from the Storage Pile Do Not Count in the Coal Processing Plant's Potential to Emit Because The EPA Does Not Regulate the Storage Pile as Part of the Coal Processing Plant.

This lawsuit hinges on whether Coyote Creek is constructing a "major source," which federal regulations define to mean, in relevant part, "any stationary source which emits, or has the potential to emit, 250 tons per year or more of a regulated NSR pollutant." 40 C.F.R. § 52.21(b)(1)(i)(b); *see also* N.D.C.C. Chapter 33-15-15 (adopting by reference the rules contained in 40 C.F.R. § 52.21). The first issue on which this Court requested supplemental briefing is whether fugitive emissions from activities at the Storage Pile adjacent to the Coal Processing Plant's apron feeder "count" towards the calculation of the Coal Processing Plant's Potential to Emit for the purpose of determining whether it is a major source. They do not. The Storage Pile is not regulated as part of the Coal Processing Plant source. That is the correct reading of the

rules, and, just as important, that is the reading adopted by the NDDH. The EPA has provided a framework for determining whether a Storage Pile is a part of a "coal preparation and processing plant," and the Coal Processing Plant and Storage Pile in this case fall on different sides of the line. (Exhibit F).

(a) The Scope of the Rule is Clear.

NSPS Subpart Y has regulated the source category of "coal preparation and processing plants that process more than 181 megagrams (Mg) (200 tons) of coal per day" since the 1970s. *See* 40 C.F.R. §§ 60.250, 60.254. For purposes of the applicable regulations, "[c]oal preparation and processing plant" means "any facility (excluding underground mining operations) which prepares coal by one or more of the following processes: breaking, crushing, screening, wet or dry cleaning, and thermal drying." 40 C.F.R. § 60.251(e). The Coyote Creek Coal Processing Plant—which will prepare coal by crushing in an amount that exceeds the daily threshold—meets the definition.

Under NSPS Subpart Y, the EPA regulates sources, such as the Coal Processing Plant, by establishing performance standards and emissions control requirements for certain types of operations that are often found within a stationary source from that source category. From 1974 to 2009, "affected facilities in coal preparation and processing plants" included "[t]hermal dryers, pneumatic coal-cleaning equipment (air tables), coal processing and conveying equipment (including breakers and crushers), and coal storage systems, transfer and loading systems." *See* 40 C.F.R. § 60.250(a), (b), (c); § 60.251(e). In October 2009, the EPA published amendments to the NSPS standards for coal processing plants. Among other things, "the amendments establish[ed] work practice standards to control fugitive coal dust emissions from

open storage piles located at coal preparation and processing plants."[1] 74 Fed. Reg. 51,950 (attached as Exhibit A). However, the amended rule only regulates coal piles that are "in coal preparation and processing plants," 40 C.F.R. § 60.250(a), leaving other coal piles outside its scope.

So, only open storage piles "located at [a] coal preparation and processing plant[,]" 74 Fed. Reg. 51,950, "associated with [a] coal preparation plant[,]" 74 Fed. Reg. 51,954, or "in [a] coal preparation and processing plant[,]" 40 C.F.R. § 60.250(a), are subject to regulation as an affected facility within that coal processing plant. And the EPA has made clear where the Coal Processing Plant begins. "EPA interprets coal unloading into the first hopper 'downstream' from any form of transportation to be the beginning of the 'coal preparation plant.'" EPA, Standards of Performance for Coal Preparation and Processing Plants (40 C.F.R. 60 Subpart Y), Response to Comments Received on Proposed Amendments and Supplemental Proposal, at 78 (September 2009) (attached as Exhibit E).[2] The EPA's interpretation is consistent with the common sense view that a "coal preparation and processing plant" begins where coal is loaded into a plant that processes coal—thus, coal piles after that point "count," but coal piles before that point do not. EPA's repeated statements on this point leave Plaintiffs with little room to maneuver. "[C]oal unloading that involves conveying coal to coal plant machinery is subject to the NSPS." 63 Fed. Reg. 53,288. That is, "[c]oal must be directly unloaded into receiving equipment, such as a hopper, to be subject to the provisions of NSPS Subpart Y." 63 Fed. Reg. 53,289. "The coal must be directly unloaded into receiving equipment, such as a hopper, to be subject to the

[1] In particular, the EPA "require[d] owners or operators of open storage piles . . . associated with coal preparation plants to develop and comply with a fugitive coal dust emissions control plan to control fugitive PM emissions." 74 Fed. Reg. 51,954.

[2] Even the language employed by the EPA in the preamble to the 2009 amendments confirms that the Coal Processing Plant begins where coal is loaded into plant machinery: "EPA believes that coal moving operations, once the coal enters the 'coal preparation plant,' will be by conveyor rather than by truck." 74 Fed. Reg. 51,954, 51,969.

provisions of NSPS Subpart Y." *See* Plaintiffs' Reply, Doc. 27 at 3, (quoting the EPA's 1998 Guidance interpreting NSPS Subpart Y).

(b) The Complaint is Contrary to the Clear Scope of the Rule.

The Storage Pile in this case comes *before* coal is loaded into the Coal Processing Plant, *before* the coal enters the stationary source in question. Plaintiffs' contrary position is a conclusion, not an analysis. They simply point to the same sort of statements from the EPA—the ones expressing that coal unloading "*at a coal preparation plant* is part of the source belonging to the source category for coal preparation plants," *see* Plaintiffs' Reply, Doc. 27 at 4 (emphasis added)—and assert that "[t]he coal pile counts." They are mistaken. If coal unloading directly into the machinery at the Coal Processing Plant is where the line is drawn, then the Storage Pile, which comes *before* coal unloading into the machinery at the Coal Processing Plant, does *not* "count." Again, the EPA made clear in its Response to Comments on the same 2009 amendments at issue in this case that the "EPA interprets coal unloading into the first hopper 'downstream' from any form of transportation to be the beginning of the 'coal preparation plant." EPA, Standards of Performance for Coal Preparation and Processing Plants (40 C.F.R. 60 Subpart Y), Response to Comments Received on Proposed Amendments and Supplemental Proposal, at 78.

Beyond that, Plaintiffs seem to think a case can be made by drawing distinctions between temporary and permanent coal piles. Doc. 27 at 4. Regardless of whether a factual showing that a coal pile is "temporary" would be relevant to proving it is regulated as an affected facility within the Coal Processing Plant, Plaintiffs have included no such allegation in their Complaint. Nor could they do so, because, as their own allegations show, the Storage Pile is a permanent fixture. It spans eight acres, *see* Doc. 11-1 ¶ 38, weighs 180,000 tons, *see* Doc. 1-1 at 5, and will exist for the duration of the Coyote Creek Mine's contract with nearby Coyote Station.

(c) Coyote Creek's Position is Consistent with the Scope of the Rule.

Moreover, as indicated in the January 21, 2016, letter from the NDDH to the EPA which Coyote Creek submitted as supplemental authority, the State takes the position that the Storage Pile is not part of the regulated NSPS facility. Every other mine in the State that has an associated coal processing facility was constructed with a minor source permit, consistent with the NDDH's interpretation. *See* Doc. 21 at 24. In fact, corporate affiliates of Coyote Creek operate two other coal mines with associated coal processing facilities within the State. Both of them operate with minor source permits,[3] in part because coal piles such as the Storage Pile at issue here are not considered part of the regulated NSPS facility. Indeed, North Dakota coal processing plants in general tend not to have internal coal piles, especially when they support nearby electric generating units by conveying coal directly to the generating unit rather than storing it in open piles in the coal processing facility. Plaintiffs have encouraged this Court to gloss over the fact that Coyote Creek's position is plainly more consistent with the NDDH interpretation, but this is a significant point. The EPA has delegated authority to the NDDH for NSPS implementation and enforcement.[4] That delegation gives considerable discretion to the NDDH, and the NDDH does not need to ask for EPA's permission when applying the NSPS to Coyote Creek. It is within their purview to interpret and apply the regulations.

In any event, the EPA itself does not consider the Storage Pile to be part of the Coal Processing Plant under circumstances like those present in this case. In promulgating the new rules, the EPA recognized that some entities, like the Coal Processing Plant, would not have coal

[3] *See* Falkirk Mining Company Minor Source Permit to Operate, Permit No. O79002; Coteau Properties Company—Freedom Mine Minor Source Permit to Operate, Permit No. O85004 (both accessible *via* search function at http://www.ndhealth.gov/EHS/FOIA/AQPermits/AQPermitOperating.aspx).

[4] *See* US EPA Region 8 Delegation Summary and New Source Performance Standards: Colorado, Montana, North Dakota, South Dakota, Utah and Wyoming Automatic Delegation of Authority to Implement and Enforce.

piles within their processing facilities. In particular, as part of the 2009 amendments to Subpart Y, the EPA "developed six model coal preparation plants" to evaluate the cost-effectiveness of emissions control options. 73 Fed. Reg. 22,901, 22,904 (Apr. 28, 2008). An EPA memorandum analyzing the control costs of the model plants is included in the supporting documentation for the 2009 rule. *See* EPA, Cost of Control Memorandum (attached as Exhibit D). The model plants vary by capacity and location, and are intended to represent a range of different sources subject to Subpart Y. For each type of plant, the memorandum first describes the trajectory of the coal from the time it enters the coal processing facility to the time it departs for delivery. The memorandum then uses those assumptions to evaluate emissions control strategies.

The EPA assumed that some of the model plants had open coal piles and that some did not. For example, Model Plants A, B, and E are each described as having at least one short-term coal storage pile that will be part of the regulated source. *See* EPA, Cost of Control Memorandum, at 4, 6 and 12. Model Plant D is assumed to have both a short- and a long-term coal pile. *Id.* at 10. By contrast, the EPA explained that Model Plant C has "no open-air short-term coal storage pile" and "no long-term storage pile." *Id.* at 8. Similarly, Model Plant F is assumed to have "no short or long-term storage pile." *Id.* at 14.

Tellingly, Model Plant F was modeled after operations at a Western sub-bituminous surface coal mine. By contrast, the models that had storage piles that would be covered by the NSPS (and thus counted in Potential to Emit to the extent quantifiable) were for an Eastern bituminous underground mine (Plant A), a plant located at an industrial facility (Plant B), a plant located at an electric utility power plant (Plant D), and a plant located at a coke-making facility (Plant E). The EPA therefore anticipated that, once coal was within a coal processing facility, some plants would convey coal directly from a crusher or other process equipment to a receiving

facility without the need for open storage piles. *Compare* Ex. F *with* EPA, Cost of Control Memorandum, at 14.

Even before the 2009 amendments to Subpart Y, the EPA has long recognized that some coal preparation and processing plants store coal in open piles as part of their processes and some do not. For example, when the EPA first considered regulating emissions from coal storage piles the agency explained that the "*final* step in the plant feed preparation process entails the storage of raw coal" which "can be stored either in open areas or in closed bins." EPA, A Review of Standards of Performance for New Stationary Sources – Coal Preparation Plants (December 1980) at 2-5 (emphasis added). The EPA similarly noted that cleaned coal, meaning coal that has already been processed, "may be stored in open, uncontrolled storage piles or in enclosed silos or bins." *Id.* at p. 2-12. In both instances, as in the current rule, the EPA was concerned with how coal is stored *after* it is delivered to the plant site. *Id.* at 2-3.

Consistent with the foregoing, NDDH has properly interpreted Subpart Y to conclude that there are no open storage piles in the Coal Processing Plant. If Plaintiffs hope to compel the NDDH to change its interpretation, they cannot do so in federal court. Challenges to the State Implementing Agency's interpretation of the Clean Air Act's requirements do not fall within the jurisdiction conferred by the Clean Air Act's citizen suit provision. *See Sierra Club v. Korleski*, 681 F.3d 342 (6th Cir. 2012) (holding that Section 7604 of the Clean Air Act does not authorize suits against state regulators to compel a certain interpretation of the Act's requirements, or a certain enforcement approach). Plaintiffs' suit belongs in State court, with a different defendant, and pursuant to a different statute: the North Dakota Environmental Legal Enforcement Act ("ELEA").[5]

[5] As an aside, during argument, the Court asked some questions about the size of the Coyote Creek Storage Pile and operations at the generating unit it supplies. The generating unit can consume up to 7,000 tons per day. At

B. The PECS Has to Be Included in the Coal Processing Plant's Potential to Emit.

The second issue raised by the Court is whether and when the calculation of a facility's Potential to Emit takes into account the emissions-limiting effect of any pollution control equipment that is a part of the facility's design. Applied to this case, the question is whether the Coal Processing Plant's Potential to Emit is calculated at the particular point in space where the Coal Processing Plant's crushers and conveyors operate (and assuming that the PECS either is not constructed or is not operational), or at a point outside of the physical containment structure that houses them. The answer is clear: The PECS must be taken into account.

1. Potential to Emit Takes Required Air Pollution Control Equipment into Account.

To fully parse this issue requires a fair bit of history. After the passage of the Clean Air Act Amendments of 1977, the EPA took the position that the phrase "Potential to Emit," for the purpose of determining major source status, excluded the impact of emissions-reducing equipment and controls. *Nat'l Mining Ass'n v. EPA*, 59 F.3d 1351 (D.C. Cir. 1995) (citing 40 C.F.R. §§ 51.24(b)(3), 52.21(b)(3) (1978)). But in *Alabama Power Co. v. Costle*, 636 F.2d 323 (D.C. Cir. 1979), the D.C. Circuit told the EPA that its interpretation was wrong:

> EPA has interpreted the phrase "potential to emit" as referring to the measure of a source's "uncontrolled emissions[,]" *i.e.*, the projected emissions of a source when operating at full capacity, with the projection increased by hypothesizing the absence of air pollution control equipment designed into the source. Yet, the language and comprehensive scheme of the statute reveal that an emitting facility is "major[,]" within the meaning of section 169(1), only if it either (1) actually emits the specified annual tonnage of any air pollutant, or (2) has the potential, when operating at full design capacity, to emit the statutory amount. The purpose of Congress was to require preconstruction review and a permit before major amounts of emissions were released into the air. When determining a facility's potential to emit air pollutants, EPA must look to the facility's "design

(continued...)

maximum rates, the unit has 3.5 days of storage in a coal barn located at the generating unit, and additional storage in an adjacent pile. The Coyote Creek Storage Pile is expected to hold about 21 to 25 days of supply.

> capacity[,]" a concept which not only includes a facility's maximum productive capacity (a criterion employed by EPA) *but also takes into account the anticipated functioning of the air pollution control equipment designed into the facility.*

636 F.2d at 353 (emphasis added).

After the D.C. Circuit's decision in *Alabama Power*, the EPA proposed a new definition of "Potential to Emit" that would have taken into account air pollution control equipment, but not operational restraints. *Nat'l Mining Ass'n*, 59 F.3d at 1362 (citing 44 Fed. Reg. 51,924 (1979)). Commenters lobbied for similar treatment for operational controls, and the EPA acquiesced. The final regulations issued in 1980 took the position that Potential to Emit calculations could factor in physical controls and/or operational restraints so long as they were "federally enforceable." *Id.* (citing 45 Fed. Reg. 52,676, 52,746 (1980)). The 1980 regulations defined as "federally enforceable" those emissions restrictions that were "enforceable by the Administrator"—but made no provision for enforcement by the States or local authorities. *Id.* (citing 45 Fed. Reg. 52,737).

Various entities challenged that aspect of the rule, and the EPA settled with the challengers in February 1982, agreeing to amend the provision once again, this time to take into account emission limits "enforceable under federal, state or local law and discoverable by the Administrator and any other person." *Nat'l Mining Ass'n*, 59 F.3d at 1362 (citing 48 Fed. Reg. 38,742, 38,748, 38,755 (1983)). Subsequent proposed rules reflected the new definition, but, somewhere along the way, the EPA unilaterally abandoned the agreement, and the final regulations issued in 1989 retreated to a middle ground. *Id.* "'Federal enforceability' was still defined to reach only those limitations 'enforceable by the Administrator,' but this term now included state constraints imposed under federally approved plans." *Id.* at 1363 (citing 54 Fed. Reg. 27,274, 27,285-86 (1989)).

That was the framework in place in 1989, the year the Guidance on which Plaintiffs base their argument was created. *See* DE 27 at 4-7. But that was not the end of the story. In 1995, the D.C. Circuit struck down the EPA's federal enforceability requirement:

> What EPA has not explained is how its refusal to consider limitations other than those that are "federally enforceable" serves the statute's directive to "consider[] controls" when it results in a refusal to credit controls imposed by a state or locality even if they are unquestionably effective. Under EPA's regime, even a state program of unassailable effectiveness would not qualify in computing a source's capacity to emit unless it had been submitted not only for EPA approval, but also for inclusion in the SIP. In doing so, EPA would sacrifice a statutory objective in pursuit of ends that, at least as presented in argument to us, have not been justified, either in terms of § 112 or other provisions of the Act. EPA has not explained why it is essential that a control be included within a SIP. It is not apparent why a state's or locality's controls, when demonstrably effective, should not be credited in determining whether a source subject to those controls should be classified as a major or area source.

Nat'l Mining Ass'n, 59 F.3d at 1364.

Although *National Mining Association* dealt with Section 112 of the Clean Air Act, the Court's subsequent decision in *Chemical Manufacturers Association v. EPA*, No. 89-1514, 1995 U.S. App. LEXIS 31475 (D.C. Cir. Sept. 15, 1995), was more directly on point. There, the Court considered the same legal question in the context of the 40 C.F.R. § 52.21 rules applicable to this case, and affirmatively vacated the federal enforceability requirement. *Id.*

A series of Federal Register entries show how the EPA reacted to these D.C. Circuit decisions. The EPA's first post-*Chemical Manufacturers* statement on the subject, in 1996, simply affirmed that the D.C. Circuit's decisions would have some effect, even though the term "federally enforceable" was still nominally included in the rules:

> The "PTE" is currently defined as the "maximum capacity of a stationary source to emit a pollutant under its physical and operational design." Any physical or operational limitation on the capacity of the source to emit a pollutant, including a permit limitation, is treated as part of its design provided the limitation or its effect on emissions is federally enforceable (e.g., see existing §§ 51.165(a)(1)(iii) and 51.166(b)(4)).

> In recent decisions, *National Mining Ass'n v. EPA*, 59 F.3d 1351 (D.C. Cir. 1995) and *Chemical Manufacturers Ass'n v. EPA*, No. 89-1514, slip op. (D.C. Cir. Sept. 15, 1995), the District of Columbia Circuit court addressed challenges related to EPA's requirement that a source which wishes to limit its PTE must obtain a federally enforceable limit. The EPA is currently reviewing its [f]ederal enforceability requirements in light of these court decisions, and has not yet decided how it will address this issue. Once EPA has completed its review of the [f]ederal enforceability requirements in all relevant programs including NSR, the Agency will make available in a Federal Register notice its response to the court decisions.

61 Fed. Reg. 38,249, 38,253 (July 23, 1996). In its next Federal Register statement on the subject, issued in 2002, the EPA more clearly confirmed that the federal enforceability requirement was no longer in effect:

> In our existing regulations that are unamended by today's action, the term "federal enforceability" still appears. In 1995, the court in *Chemical Manufacturers Ass'n v. EPA* remanded the definition of PTE in the major NSR program to EPA. No. 89-1514 (D.C. Cir. Sept. 15, 1995). Because the court vacated the requirements in the nationwide rules, the term federal enforceability as it relates to PTE is not in effect (pending final rule making by the Agency) in the [f]ederal rules. The decision, however, did not address the term "federally enforceable" as used in SIPs, because that issue was not before the court.

67 Fed. Reg. 80,186, 80,191 (December 31, 2002). Finally, in 2012, the EPA made clear that it had officially adopted the position urged by the challengers to the federal enforceability requirement back in 1995—that equal weight should be given to enforceability under federal, state and local laws:

> Because the definition of major stationary source relies, in large part on, a source's "potential to emit," the definition of "potential to emit" is extremely important in determining the applicability of PSD and title V for a particular source. The PSD regulations define PTE as:
>
> > The maximum capacity of a stationary source to emit a pollutant under its physical and operational design. Any physical or operational limitation on the capacity of the source to emit a pollutant, including air pollution control equipment and restrictions on hours of operation or on the type or amount of fuel combusted, stored or processed, shall be treated as part of

> its design if the limitation or the effect it would have on emissions is federally enforceable.
>
> 40 CFR 52.21(b)(4). Following two court decisions, *National Mining Association v. EPA*, 59 F.3d 1351 (D.C. Cir. 1995) and *Chemical Manufacturers Ass'n v. EPA*, No. 89-1514 (D.C. Cir. 1995), we clarified that the term "federally enforceable" should be read to mean "federally enforceable or legally and practicably enforceable by a state or local air pollution control agency." Release of Interim Policy on Federal Enforceability of Limitations on Potential to Emit, at 3 (Jan. 22, 1996).

77 Fed. Reg. 14,226, 14,245 n.44 (March 8, 2012) (discussing 40 C.F.R. §§ 52.21(b)(4), 51.165(a)(1)(iii), 51.166(b)(4)).

The 1996 Interim Policy referenced in the 2012 Federal Register statement is attached to this supplemental brief as Exhibit B. In it, the EPA confirms, again, that the D.C. Circuit had "vacated the federal enforceability requirement of the PTE definitions in the PSD and NSR regulations." Ex. B at 2. The EPA went on to explain, however, that "the immediate practical impacts [on] the PSD/NSR programs are not substantial for newly constructed major sources." *Id.* That is because "[e]very SIP [already] contain[ed] a minor NSR program that applies generally to new or modified sources of air pollutants, without regard to whether those sources are 'major[,]'" and "[p]ermits under such programs are, like all other SIP measures, federally enforceable." *Id.* at 5 (citing 42 U.S.C. § 7413(b)(1); 40 C.F.R. § 52.23).

In sum, the EPA has recognized for more than twenty years that a physical limitation on a facility's emissions potential simply needs to be "federally enforceable or legally and practicably enforceable by a state or local air pollution control agency" in order for that limitation to be taken into account in the Potential to Emit determination. 77 Fed. Reg. 14,245 n.44.

2. The PECS Is Required Air Pollution Control Equipment.

The PECS clearly is a "physical . . . limitation on the capacity of the source to emit a pollutant[.]" 40 C.F.R. § 52.21(b)(4). In fact, it is Best Demonstrated Technology ("BDT") for

the control of dust formation.[6] *See* 74 Fed. Reg. 51,950, 51,954 ("BDT for coal-handling equipment used on sub-bituminous and lignite coals consists of four technologies—fabric filters, passive enclosure containment systems (PECS), fogging systems, and wet extraction scrubbers."). By using a PECS instead of a traditional mechanical vent and baghouse, Coyote Creek effectively prevents pollution from forming. *See* EPA, Memorandum to Coal Preparation NSPS Docket (May 2009) (attached as Exhibit G). The only disputed question is whether "the [PECS] or the effect [the PECS] would have on emissions is [federally enforceable or legally and practicably enforceable by a state or local air pollution control agency.]" *Id.* (with language from 77 Fed. Reg. 14,245 n.44 in brackets). It is. First, the PECS is a classic federally enforceable control measure installed to ensure compliance with NSPS emission limitations. *See* 40 C.F.R. 60.255(c) ("If any affected coal processing and conveying equipment . . . are enclosed in a building, and emissions from the building do not exceed any of the standards in § 60.254 that apply to the affected facility, then the facility shall be deemed to be in compliance with such standards."). Anything required in order to ensure compliance with federal NSPS regulations is *de facto* "federally enforceable," in the most straightforward sense. Second, the conditions of Coyote Creek's state-issued minor source permit, which require the installation and maintenance of the PECS and which limit Coyote Creek to operating under emissions limits set by state law, also satisfy the requirement, because those conditions are legally and practically enforceable by the NDDH. And, contrary to Plaintiffs' arguments, these points are dispositive. There is no

[6] BDT is the best system of continuous emissions reduction that has been demonstrated to work in a given industry, considering economic costs and other factors, such as energy use, while Best Available Control Technology ("BACT") is the maximum degree of reduction in the discharge of air pollutants (emissions) achievable through the currently available methods, systems, and techniques while taking economic, energy, environmental and other costs into consideration. *See, e.g.*, EPA, Standards of Performance for Portland Cement Plants (40 CFR 60 Subpart F), Response to Public Comments (August 2010) (acknowledging the EPA position that "the main difference between BACT and BDT determinations for purposes of NSPS is that a BACT determination is made on a site-specific basis."). In other words, BDT is the best control technology available, *period*, while BACT is the best control technology available at a given *site*. Coyote Creek has the best control technology, period.

requirement that a numerical emissions limitation be present in order for a design element like the PECS to be federally enforceable.

(a) The PECS Is Required for Compliance with NSPS Limitations.

The text of the Clean Air Act provides that the EPA can directly enforce the NSPS requirements applicable to the Coal Processing Plant. *See* 42 U.S.C. §§ 7411(c)(2), 7413. Throughout the governing NSPS regulations, the EPA repeatedly reaffirms that NSPS limits and conditions are "federally enforceable." *See, e.g.*, 40 C.F.R. §§ 60.41b ("Federally enforceable means all limitations and conditions that are enforceable by [the EPA], including the requirements of 40 CFR parts 60 and 61, requirements within any applicable State Implementation Plan, and any permit requirements established under 40 CFR 52.21 or under 40 CFR 51.18 and 51.24."); 60.41Da (same); 60.41c (same); 60.51b (same); 60.1465 (same); 60.1940 (same). In promulgating some of the particular regulations at issue in this case, the EPA stated explicitly that its requirements were federally enforceable. *See* 74 Fed. Reg. 51,950, 51,970 (Oct. 8, 2009) (explaining that the fugitive dust control plan requirements in 40 C.F.R. § 60.254(c) are federally enforceable). That alone answers the question.

(b) The PECS Is a Federally Enforceable Requirement of the Construction Permit.

But there is more. For even if the NSPS standards applicable to the Coal Processing Plant were not directly federally enforceable, the 1989 Guidance invoked by Plaintiffs begins by affirming that State minor source construction permits are *themselves* federally enforceable for purposes of determining Potential to Emit:

> Permit limitations are very significant in determining whether a source is subject to major new source review. This is because they are the easiest and most common way for a source to obtain restrictions on its potential to emit. A permit does not have to be a major source permit to legally restrict potential emissions. A minor source construction permit issued pursuant to a state program approved by

> EPA as meeting the requirements of 40 C.F.R. Section 51.160 is federally enforceable.

EPA, Limiting Potential to Emit in New Source Permitting, at 1-2 (June 13, 1989) (the 1989 Guidance, attached as Exhibit C). Coyote Creek's State-issued minor source construction permit contains numerous provisions guaranteeing the legal and practical enforceability of both "the [PECS] [and] the effect [the PECS] would have on emissions," 40 C.F.R. § 52.21(b)(4), and the following list is not exhaustive.

First, Paragraph II.D of the Permit provides that "[c]onstruction of the above described facility shall be in accordance with information provided in the permit application as well as any plans, specifications and supporting data submitted to the Department." Doc. 1-2 at 4. It sets forth notice obligations for any significant deviations from the specifications furnished to the NDDH, and adds that the "issuance of this Permit to Construct may be suspended or revoked if the Department determines that a significant deviation from the plans and specifications furnished has been or is to be made." *Id.* To remove all doubt about the State's ability to enforce, the Permit adds that "[a]ny violation of a condition issued as part of this permit to construct[,] as well as any construction which proceeds in variance with any information submitted in the application, is regarded as a violation of construction authority and is subject to enforcement action." *Id.* Coyote Creek's Permit Application makes the PECS an explicit part of its construction plan, Doc. 1-1 at 5, 13, so Coyote Creek *cannot* simply fail to construct the PECS in the way it said that it would, or it will be subject to enforcement action by the NDDH. Therefore, "the [PECS] . . . is [legally and practicably enforceable by a state . . . air pollution control agency.]" 40 C.F.R. § 52.21(b)(4) (incorporating 77 Fed. Reg. 14,245 n.44).

Second, Paragraph II.J of the Permit further provides that "[a]ny alteration, repairing, expansion, or change in the method of operation of the source which results in the emission of an

additional type or greater amount of air contaminants or which results in an increase in the ambient concentration of any air contaminant, must be reviewed and approved by the Department prior to the start of such alteration, repairing, expansion or change in the method of operation." Doc. 1-2 at 5. According to Plaintiffs' own allegations, the removal of the PECS would result in increased emission of pollutants sufficient to trigger this provision. Doc. 11-1[7] ¶ 47 (claiming that, without the PECS, "the mine's Potential to Emit uncontrolled PM from the primary crusher and secondary crusher will be between 700.8 tons per year and 1,927.2 tons per year"). Thus, "the effect [the PECS] would have on emissions is [legally and practicably enforceable by a state . . . air pollution control agency.]" 40 C.F.R. § 52.21(b)(4) (incorporating 77 Fed. Reg. 14,245 n.44).

Third, Paragraph II.O of the Permit provides that "[t]he owner/operator shall maintain and operate all air pollution control equipment in a manner consistent with good air pollution control practice for minimizing emissions." Doc. 1-2 at 5. The table at Doc. 1-2, Page 2, makes explicit that the "Passive Enclosure Containment System" is "Air Pollution Control Equipment," so Paragraph II.O clearly covers the PECS. And Paragraph II.S stresses that "the conditions of this permit herein become, upon the effective date of this permit, enforceable by the Department pursuant to any remedies it now has, or may in the future have, under the North Dakota Air Pollution Control Law, NDCC Chapter 23-25." Doc. 1-2 at 6. Again, "the [PECS] [and] the effect [the PECS] would have on emissions is [legally and practicably enforceable by a state … pollution control agency.]" 40 C.F.R. § 52.21(b)(4) (and 77 Fed. Reg. 14,245 n.44).

The foregoing are not illusory threats—the NDDH actually *does* have the legal and practical ability to enforce the conditions of the permits it issues. Section 23-25-03 of the North

[7] Coyote Creek cites to the Amended Complaint, which has not yet been accepted by this Court, because it shows that amendment is futile.

Dakota Century Code, the NDDH's enabling statute, gives the agency the power to "[i]ssue such orders as may be necessary to effectuate the purposes of this chapter and enforce the same by all appropriate administrative and judicial procedures." N.D.C.C. § 23-25-03(5). It also grants the NDDH authority to "[p]rovide by rules any procedures necessary and appropriate to develop, implement, and enforce any air pollution prevention and control program established by the Federal Clean Air Act." N.D.C.C. § 23-25-03(12). The NDDH also possesses a right of on-site inspection, *see* N.D.C.C. Chapter 23-25-05, and it has the power to impose substantial penalties for violations of permit conditions, *see* N.D.C.C. Chapter 23-25-10. For example, "[a]ny person who willfully violates . . . any permit condition . . . is subject to a fine of not more than ten thousand dollars per day per violation, or [to] imprisonment for not more than one year, or both." N.D.C.C. § 23-25-10(1).[8]

Finally, the permit conditions above are not just "legally and practically enforceable" by the State, thereby qualifying under the newer, expanded definition of "federally enforceable." In the eyes of the law, enforceability by the NDDH *is the same thing* as enforceability by the EPA. The North Dakota SIP incorporates wholesale the NSPS Subpart Y provisions as a federally enforceable program. *See* N.D.A.C. Chapter 33-15-12 (updated through July 1, 2013, and taking the 2009 amendments into account). It also incorporates the SIP-approved minor NSR and Title V programs, which mirror the Potential to Emit definition espoused by the EPA and discussed above. *See* N.D.A.C. Chatper 33-15-15. And, again, the EPA has said that "[p]ermits under [state law minor source] programs are, like all other SIP measures, federally enforceable." Ex. B

[8] The law provides the procedural details of the enforcement mechanism, as well. It incorporates by reference the provisions of North Dakota's Administrative Agencies Procedures Act ("AAPA"), which set forth the framework for administrative and judicial review of enforcement actions by the NDDH. N.D.C.C. Chapter 23-25-08 ("Any proceeding under this chapter for . . . [d]etermining compliance with rules and regulations of the department[] must be conducted in accordance with the provisions of chapter 28-32 [the AAPA], and appeals may be taken as therein provided.").

at 5 (citing 42 U.S.C. § 7413(b)(1); 40 C.F.R. §52.23)). That is because EPA has approved the SIP provisions in question, *see* 40 C.F.R. 52 Subpart JJ, and because it has formally delegated enforcement authority to the NDDH. *Supra*, FN.4. In short, there simply is no legal difference between the current situation and the one the Plaintiffs seem to desire, especially because the control technology already slated to be put in place is as good as it gets in this industry. *See* 74 Fed. Reg. 51,950, 51,954.

(c) A Numerical Emissions Limitation Is Not Required for the PECS to be Federally Enforceable.

Plaintiffs do not dispute either of these points, really. But they argue that because there is no specific, numerical limitation attached to the PECS, it cannot be used to lower the Potential to Emit. Plaintiffs are wrong. There is no such requirement, and the Coal Processing Plant is a minor source.

First, since the initial promulgation of the NSPS for Coal Preparation and Processing Plants, the EPA has recognized that numerical limits may not always be feasible. In outlining its process for the development of the standards, the EPA explained that "[w]here appropriate, standards for visible emissions are established in conjunction with mass emission standards" but also recognized that, "[i]n some cases, such as fugitive dust, there is no mass standard." *See* EPA, Background Information for Standards of Performance: Coal Preparation Plants, Volume 1: Proposed Standards (Oct. 1974) at xiii.[9] This remains true in the current iteration of the regulations. For example, 40 C.F.R. § 60.254(c) requires the owner or operator of an open storage pile to prepare and operate in accordance with a fugitive coal dust emissions control plan. The standard itself does not contain any numerical limits; rather, compliance is demonstrated by implementing a plan that identifies and describes "the control measures the owner or operator

[9] http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OAR-2008-0260-0134

will use to minimize fugitive coal dust emissions from each open storage pile." 40. C.F.R. § 60.254(c)(1). *See also* EPA, Standards of Performance for Coal Preparation and Processing Plants (40 C.F.R. Part 60, Subpart Y), Response to Comments Received on Proposed Amendments and Supplemental Proposal, at 90 (September 2009) ("With respect to monitoring the effectiveness of fugitive dust control measures used on open storage piles . . . EPA has concluded that it is not feasible to prescribe or enforce a standard of performance and that work practice standards are appropriate."). But even in the absence of any numerical standards, the EPA has confirmed that the requirement in Section 60.254(c) is federally enforceable. *See* 74 Fed. Reg. 51,950, 51,970 (October 8, 2009) ("The requirement to control fugitive coal dust emissions by operating according to a written fugitive dust emissions control plan is a Federal requirement and is Federally enforceable.").

In citing the 1989 Guidance, Plaintiffs acknowledge that there are two types of limitations on Potential to Emit—permit limits and non-permit limits. As Plaintiffs correctly note, the 1989 Guidance clarifies that "[n]on-permit limitations can also legally restrict potential to emit. These limitations include New Source Performance Standards codified at 40 C.F.R. Part 60." *See* Doc. 14 at 2. What Plaintiffs fail to recognize is that the 1989 Guidance is only concerned with the "appropriate means of restricting potential to emit through permit conditions." *Id.* It does not address other limitations on a source's physical capacity to emit, or permit requirements to install and operate pollution control equipment. As a result, the "five important concepts" Plaintiffs identify within the 1989 Guidance are irrelevant to the question of whether the non-permit limits in Subpart Y are federally enforceable.

Numerical emissions caps, production limits, or operational constraints all may be properly incorporated into a permit, but they are not part of NSPS. Nevertheless, NSPS "can

also legally restrict potential to emit." Doc. 14 at 2. As noted above, sometimes "there is no mass standard" in a NSPS, but that does not render the standard unenforceable. Facilities must comply with the opacity standards in Section 60.254 and must demonstrate compliance through the methods and procedures outlined in Sections 60.255—60.257. *See* EPA, Standards of Performance for Coal Preparation and Processing Plants (40 C.F.R. Part 60, Subpart Y), Response to Comments Received on Proposed Amendments and Supplemental Proposal, at 107 ("The facility owner must be able to certify compliance with all applicable limits . . . testing for both PM and opacity is necessary to determine an affected source's compliance with those standards. Direct measurement of compliance, including compliance with opacity limits, is critical to a valid certification.").

In short, even if the 1989 Guidance were applicable here, the EPA has determined that the opacity limits in Section 60.254 are sufficiently definite to be enforceable as a practical matter. EPA, Standards of Performance for Coal Preparation and Processing Plants (40 C.F.R. Part 60, Subpart Y), Response to Comments Received on Proposed Amendments and Supplemental Proposal, at 93 (September 2009) ("EPA believes that rules should be written to include clearly defined limits that are sufficiently enforceable . . . A clear limit such as an opacity limit provides an incentive for the source to take corrective action to avoid the violation prior to, as opposed to after, its occurrence. Further, the opacity limit provides a readily identifiable limit to allow for enforcement where necessary, and results in quantification of the emissions levels so that the source and the Agency can assure the public of the environmental performance of regulated facilities."). In addition to being contrary to the EPA's guidance, Plaintiffs' suggestion that a numerical emissions limit is necessary for a federally enforceable restriction on a source's

Potential to Emit is contrary to *National Mining Association*, 59 F.3d at 1364, and *Chemical Manufacturers*, No. 89-1514, 1995 U.S. App. LEXIS 31475.

In any event, emissions from the use of the federally enforceable PECS were quantified as being well below the major source threshold. Coyote Creek's Permit Application provided that the operation of the PECS would result in "negligible" emissions from the coal conveyors and crushers at the Coal Processing Plant. Doc. 1-1 at 13 (explaining that "no emissions are calculated for the coal processing equipment as it will be controlled by enclosures and PECS. Any emissions from the coal processing equipment are expected to be negligible and unquantifiable as the control equipment is known to be very effective in reducing particulate emissions from coal processing facilities."). And the Permit issued to Coyote Creek by NDDH makes clear that "[a]ny alteration, repairing, expansion, or change in the method of operation of the source which results in the emission of an additional type or greater amount of air contaminants" than the amount represented in the Permit Application "must be reviewed and approved by the Department prior to the start of such alteration, repairing, expansion or change in the method of operation." Doc. 1-2 at 5. Plaintiffs cannot meaningfully argue that the conditions of the Permit are not "federally enforceable," given the developments in the law discussed above. Coyote Creek's permit therefore does include a federally enforceable limitation on total emissions from the crushers and conveyors at the Coal Processing Plant—they must be negligible, which makes the Coal Processing Plant a minor source.

C. The Coal Processing Plant is a Minor Source.

In sum, fugitive emissions from the Storage Pile do not "count" because it is not an affected facility within the Coal Processing Plant. And both the PECS and the effect the PECS would have on emissions are enforceable by the Administrator *and* legally and practicably enforceable by a state pollution control agency. 40 C.F.R. § 52.21(b)(4); 77 Fed. Reg. 14,245

n.44. Plaintiffs' argument that there has to be a numeric emission limitation on the PECS to make it federally enforceable is not consistent with the legal authority set forth above. Measures taken to comply with federal emissions standards such as NSPS are federally enforceable whether or not there is an associated numeric limit, and the state permit provides a legally and practically enforceable requirement for Coyote Creek to install and operate the PECS such that it results in "negligible" particulate matter emissions, and in compliance with emissions limitations for Particulate Matter established by state law. The PECS therefore must be taken into account. *See* 40 C.F.R. § 52.21(b)(4) (a "physical . . . limitation on the capacity of the source to emit a pollutant . . . shall be treated as part of its design if the limitation . . . is [federally enforceable or legally and practicably enforceable by a state or local air pollution control agency.]"). The Coal Processing Plant is a minor source.

III. CONCLUSION

Coyote Creek is constructing a minor source, as the NDDH properly concluded in its capacity as the primary regulator of the Coal Processing Plant. This lawsuit must be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 8, 2016, the foregoing was served electronically upon all parties who have appeared in the docket via CM/ECF.

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Presidential Documents

Title 3—

The President

Proclamation 8430 of October 2, 2009

National Arts and Humanities Month, 2009

By the President of the United States of America

A Proclamation

Throughout our Nation's history, the power of the arts and humanities to move people has built bridges and enriched lives, bringing individuals and communities together through the resonance of creative expression. It is the painter, the author, the musician, and the historian whose work inspires us to action, drives us to contemplation, stirs joy in our hearts, and calls upon us to consider our world anew. The arts and humanities contribute to the vibrancy of our society and the strength of our democracy, and during National Arts and Humanities Month, we recommit ourselves to ensuring all Americans can access and enjoy them.

Our Nation's cultural assets tell the story of America's diversity and reveal our common humanity. Countless American artists develop unique styles by infusing their work with cultural elements from across the country and the world, and in turn, have an impact on the global arts community. Through history and philosophy, we learn the heritage of fellow Americans and appreciate the arc of their narrative as an integral part of our own. Cultural exchanges, collaborative projects, and continuing education programs help us to share and preserve a mosaic of rich traditions and provide future generations with opportunities for artistic expression.

The arts and humanities also bring our economy untold benefits. Millions of Americans take part in the non-profit and for-profit arts industries. Cultural and arts activities not only contribute tens of billions of dollars to our economy, but also inspire innovation. In neighborhoods and communities across the Nation, the arts and humanities lie at the center of revitalization, inspiring creativity, ideas, and new hope in areas that have gone too long without it.

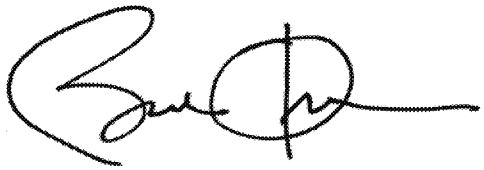
Every American deserves an opportunity to study, understand, and contribute to the arts and humanities. This must begin in our schools, where children may have their first and most important exposure to these disciplines. Working on their own masterpieces and finding inspiration in the work of others, young people are opened to new means of expression that sharpen their creative faculties. An education in music, dance, drama, design, and fine art reinforces skills in fields like math and science, and it can help students reach their full potential. In an ever-changing world, we must prepare our students with the knowledge, creative skills, and an ability to innovate so they can compete and succeed on a global stage.

As a people, we have an unlimited capacity for self-expression and personal interpretation. While we may not always agree with what we see or hear, it is our open-mindedness that commends the artistic struggle behind the creation and our curiosity that pursues its vision. This month, we honor this artistic spirit that lives and breathes within every American. Creativity and a thirst for understanding are the fuel that has fed our Nation's success for centuries, and they will continue to be well into our future.

NOW, THEREFORE, I, BARACK OBAMA, President of the United States of America, by virtue of the authority vested in me by the Constitution and the laws of the United States, do hereby proclaim October 2009 as

National Arts and Humanities Month. I call upon the people of the United States to join together in observing this month with appropriate ceremonies, activities, and programs to celebrate the arts and humanities in America.

IN WITNESS WHEREOF, I have hereunto set my hand this second day of October, in the year of our Lord two thousand nine, and of the Independence of the United States of America the two hundred and thirty-fourth.



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Presidential Documents

Proclamation 8431 of October 2, 2009

National Energy Awareness Month, 2009

By the President of the United States of America

A Proclamation

A more prosperous future for our Nation's economy means making investments in energy efficiency and clean energy today. Well-funded energy research and development will not only help protect our environment and support our communities, but it will also address concerns of global competitiveness and national security. Innovation in energy technology will decrease our oil use, strengthen our economy, and reduce the dangerous pollution that causes climate change.

As American scientists, engineers, and entrepreneurs bring new and improved energy technologies to homes and businesses in this country and around the world, they will be showing American leadership and vision while also making clean energy the profitable kind of energy. During National Energy Awareness Month, we recognize the contributions of individuals, organizations, and companies that are committed to advancing energy innovation and efficiency, and we promote the importance of a clean energy economy to our Nation.

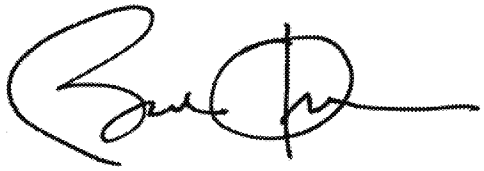
The Federal Government is the largest consumer of energy in the United States, and my Administration is committed to leading by example in the use of clean energy and increased energy efficiency. Not only will we lead through our performance, we will also leverage our ability to be the kind of customer that can help turn an idea into a great American enterprise. Through State and local grants, increased funding for weatherization programs, job training programs, and policies to support clean energy businesses, we are ushering in a new era of green energy that will benefit our economic recovery, our security, and our long-term prosperity.

We face a turning point in our Nation's energy policy. We can either remain the world's leading importer of oil, or we can become the world's leading exporter of clean energy technology. We can allow climate change to wreak unnatural havoc, or we can create jobs deploying low-carbon technologies to prevent its worst effects.

Throughout our history, Americans have successfully confronted challenges that have tested our determination and our capacity to change. If we are to advance energy and climate security, we must focus on energy efficiency, promote sustainable industries, accelerate job training and job creation in these areas, and set effective and achievable standards for the generation and use of clean energy. As a Nation, we will lead by innovating, adapting to the global marketplace, and investing in the kind of sustainable future we want for the generations to come.

NOW, THEREFORE, I, BARACK OBAMA, President of the United States of America, by virtue of the authority vested in me by the Constitution and the laws of the United States, do hereby proclaim October 2009 as National Energy Awareness Month. I call upon the people of the United States to mark this month by making clean energy choices that can both rebuild our economy and make it more sustainable.

IN WITNESS WHEREOF, I have hereunto set my hand this second day of October, in the year of our Lord two thousand nine, and of the Independence of the United States of America the two hundred and thirty-fourth.



[FR Doc. E9–24410
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Presidential Documents

Proclamation 8432 of October 2, 2009

Fire Prevention Week, 2009

By the President of the United States of America

A Proclamation

As powerful as any force in the natural world, fire deserves our utmost attention. Unchecked, fire can destroy homes, devastate our environment, and, at its worst, injure or fatally harm individuals. Fire Prevention Week is a time to learn about important fire safety issues and empower our communities to stay "Fire Smart." It is also a time to honor our Nation's brave firefighters and volunteers who risk their lives to protect their fellow Americans.

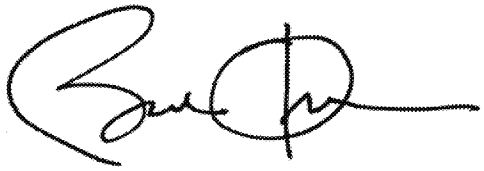
Every year, thousands of Americans experience fires in their homes and workplaces. We can greatly reduce these tragedies by taking a few, very simple steps. For example, if each of us strives to remain attentive while cooking, to properly dispose of all smoking materials, and to regularly check and replace smoke alarm batteries, we can help keep our families safe from harm and protect personal property. Additional precautionary measures should also include the formation of an emergency plan and the education of our children about the proper ways to handle potentially dangerous situations with fire.

This week's theme, "Stay Fire Smart! Don't Get Burned," focuses on increasing burn awareness and prevention. We can each do more to avoid severe burns by testing water temperature, remaining aware of open flames, and ensuring that heating elements—such as those in electric stoves, toasters, hair appliances, and space heaters—are secure and operated properly. These easy, common sense practices can help Americans avoid suffering painful burns.

Fire can have a devastating impact on the life of an individual or family, and it can have far-reaching financial and human consequences. Wildfires can burn hundreds of acres and affect numerous communities, while household fires can spread to neighboring buildings. These and other emergency situations can endanger the lives of not only the public, but also our rescue workers and firefighters. During Fire Prevention Week, we are reminded of the dangers of fire, we honor the brave men and women who protect us from it, and we recommit ourselves to its responsible use.

NOW, THEREFORE, I, BARACK OBAMA, President of the United States of America, by virtue of the authority vested in me by the Constitution and the laws of the United States, do hereby proclaim October 4 through October 10, 2009, as Fire Prevention Week. On Sunday, October 4, 2009, in accordance with Public Law 107–51, the flag of the United States will be flown at half staff on all Federal office buildings in honor of the National Fallen Firefighters Memorial Service. I call on all Americans to participate in this observance with appropriate programs and activities and by renewing their efforts to prevent fires and their tragic consequences.

IN WITNESS WHEREOF, I have hereunto set my hand this second day of October, in the year of our Lord two thousand nine, and of the Independence of the United States of America the two hundred and thirty-fourth.



[FR Doc. E9–24444
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Presidential Documents

Proclamation 8433 of October 2, 2009

Child Health Day, 2009

By the President of the United States of America

A Proclamation

Our Nation has an obligation to provide access to affordable, high-quality health care for all our children. No child should be forced to go without medical attention because the cost of a doctor visit is too high. Healthy children are better equipped to combat illness and to perform well in school, impacting their development well into adulthood. On Child Health Day, we recognize the fundamental importance of health care for our Nation's children, and dedicate our collective energies to support their needs and those of their families.

The responsibility for our children's health rests with every American. Parents and guardians should lead by example. We must teach our children the importance of healthy eating and a physically active lifestyle. We can support community programs across America that provide our young people with healthy choices, and ensure that families have the resources necessary to champion the health of their children. From outdoor activities to community athletic teams, we can seize opportunities to increase physical activity in the lives of our children, and promote healthy habits at an early age.

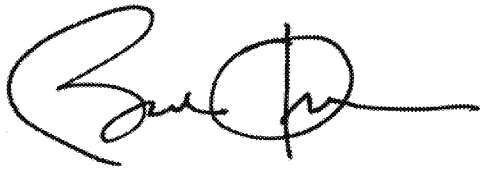
When our children make smart, healthy decisions, they are set on the path towards success. A balanced diet, coupled with proper exercise, has proven effective in combating childhood obesity and other chronic illnesses among our Nation's young people. More recently, the lure of indoor distractions has drawn our children away from the athletic fields and outdoor activities that can be part of a healthy lifestyle. We must engage our Nation's children in behaviors that support their physical fitness, ensure they have access to healthy, affordable food, and empower their families with the information essential for healthy living.

As a Nation, we cannot allow our children to fail in reaching their full potential because we fail to meet their basic needs. My Administration has made children's health a priority, and I was proud to sign the reauthorization of the Children's Health Insurance Program (CHIP), extending health care to millions of young Americans who were previously uninsured. Today, we celebrate the health of our children and rededicate ourselves to providing a bright, healthy future for our Nation's youth.

NOW, THEREFORE, I, BARACK OBAMA, President of the United States of America, by virtue of the authority vested in me by the Constitution and the laws of the United States, do hereby proclaim Monday, October 5, 2009, as Child Health Day.

I call upon families, child health professionals, faith-based and community organizations, and governments to help ensure that America's children stay safe and healthy.

IN WITNESS WHEREOF, I have hereunto set my hand this second day of October, in the year of our Lord two thousand nine, and of the Independence of the United States of America the two hundred and thirty-fourth.



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Rules and Regulations

Federal Register
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Thursday October 8, 2009

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

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

FEDERAL LABOR RELATIONS AUTHORITY

5 CFR Parts 2415, 2416, 2424, and 2429

Employee Responsibilities and Conduct; Enforcement of Nondiscrimination in Programs or Activities; Filing Procedures

AGENCY: Federal Labor Relations Authority.

ACTION: Final rule; technical amendments.

SUMMARY: The Federal Labor Relations Authority (Authority) is making technical amendments to its regulations. The amendments update rules and regulations that prescribe uniform ethical conduct standards and disclosure requirements applicable to all executive branch personnel and update regulations to reconcile with the Rehabilitation Act of 1973 and update or delete several outdated provisions and citations The amendments also make technical revisions to the requirements for documents filed in negotiability disputes and make technical revisions regarding when filings made by commercial delivery are considered served.

DATES: *Effective Date:* November 9, 2009.

FOR FURTHER INFORMATION CONTACT:

Parts 2415 and 2416: Rosa M. Koppel, Solicitor, (202) 218–7999.

Parts 2424 and 2429: Donald S. Harris, Chief, Office of Case Intake and Publication, (202) 218–7740.

SUPPLEMENTARY INFORMATION: The Federal Labor Relations Authority (Authority) is making technical amendments to parts 2415, 2416, 2424, and 2429 of the Authority's regulations in Title 5 of the Code of Federal Regulations.

I. Technical Amendments to Part 2415

In part 2415, the Authority, the General Counsel of the Authority, and the Federal Service Impasses Panel adopt rules and regulations in Title 5 of the Code of Federal Regulations prescribing standards of ethical conduct and governing statements reporting employment and financial interests. First, the citation to 5 CFR part 737 is being revised to reflect its redesignation as 5 CFR part 2637. Part 2637 contains the regulations of the Office of Government Ethics concerning post employment conflict of interest. Second, a citation to 5 CFR part 2635, regulations prescribing standards of ethical conduct for all executive branch personnel, is being added. These regulations supplement 5 CFR part 735, which already is cited in part 2415. Third, a citation to 5 CFR part 2634, regulations concerning executive branch financial disclosure, is being added.

II. Technical Amendments to Part 2416

The Authority is making several technical amendments to part 2416, which was initially promulgated in 1988 and, except for a revision in 2003 to reflect a change in the address of the Authority's offices, has not been amended previously. The technical amendments are as follows:

1. Terminology is updated to reflect that Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. 794(a), was amended to replace the term "handicap" with the term "disability". Specifically, terminology is updated in the heading and text as follows:

a. By removing the term "handicap" wherever it appears and adding, in its place, the term "disability".

b. By removing the term "handicaps" wherever it appears and adding, in its place, the term "disabilities".

c. By removing the term "handicapped person(s)" wherever it appears and adding, in its place, the term "individual(s) with a disability".

d. By removing the term "nonhandicapped person(s)" wherever it appears and adding, in its place, the term "individual(s) without a disability".

2. In section 2416.103, the reference to the definition of "qualified handicapped person" in 29 CFR 1613.702(f) is replaced by a reference to the definition of "qualified individual with a disability" in 29 CFR 1615.103.

3. The requirement to conduct a self-evaluation by September 6, 1989, previously located in section 2416.110, is deleted as outdated, and 2416.111—Notice—is renumbered as section 2416.110.

4. The references, in section 2416.140 and paragraph (b) of section 2416.170 to 29 CFR part 1613 are revised to reflect that it was superseded by 29 CFR part 1614.

5. Paragraphs (c) and (d) of section 2416.150 are being deleted. The deadlines for compliance with program accessibility requirements and for a transition plan in these paragraphs have passed.

III. Technical Amendments to Part 2424

The Authority is making several technical amendments to part 2424. Four subparagraphs, which require that certain papers filed in negotiability cases contain a table of contents and a table of legal authorities cited, if the papers exceed 25 double-spaced pages in length, are being removed. These subparagraphs are:

a. Subparagraph (b)(5) of section 2424.22, pertaining to an exclusive representative's petition for review;

b. Subparagraph (c)(5) of section 2424.24, pertaining to an agency's statement of position;

c. Subparagraph (c)(3) of section 2424.25, pertaining to an exclusive representative's response to an agency's statement of position; and

d. Subparagraph (c)(3) of 2424.26, pertaining to an agency's reply to an exclusive representative's response.

These subparagraphs will be replaced by a new section 2429.29 added to part 2429. This new section requires that papers filed in negotiability cases and in other proceedings that are before the Authority or the Office of Administrative Law Judges include a table of contents if they exceed 10 double-spaced pages in length.

IV. Technical Amendments to Part 2429

The Authority is making several technical amendments to part 2429. Paragraph (b) of section 2429.21 and paragraph (d) of section 2429.27 are revised to change the date on which filings served by commercial delivery are considered served. The current rule is that filings served by commercial delivery are deemed served when received by the Authority. Under the new rule, such filings will be deemed

served on the day they are deposited with a commercial delivery service that will provide a record showing the date the document was tendered to the delivery service. The intended effect of this new rule is to avoid the inequities that would result from rejecting certain documents that arrive late through no fault of the party filing them. Section 2429.22 is revised to provide a party five additional days after service to respond to a notice or paper served by commercial delivery. Section 2429.25 is revised to require four legible copies to be provided with the filing of the original, rather than the current requirement of five legible copies. Finally, a new section 2429.29 is added to require that a document filed in proceedings before the Authority or the Office of Administrative Law Judges include a table of contents if the document exceeds 10 double-spaced pages in length.

Publication of this document constitutes final agency action on these changes under the Administrative Procedure Act (5 U.S.C. 553). Notice and public procedures are unnecessary because the Authority is making only non-substantive technical amendments to its regulations.

Waiver of Proposed Rulemaking

The Authority for good cause finds that prior notice and opportunity for comment on these amendments are unnecessary pursuant to 5 U.S.C. 553(b)(3)(B) because the revisions to the affected sections are merely technical in nature and propose no substantive changes regarding which public comment could be solicited.

Regulatory Flexibility Act Certification

Pursuant to section 605(b) of the Regulatory Flexibility Act, 5 U.S.C. 605(b), the regulations, as amended, will not have a significant impact on a substantial number of small entities, because they apply only to Federal employees, Federal agencies, and labor organizations representing federal employees.

Unfunded Mandates Reform Act of 1995

This rule change will not result in the expenditure by state, local, and tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Small Business Regulatory Enforcement Fairness Act of 1996

This action is not a major rule as defined by section 804 of the Small Business Regulatory Enforcement Fairness Act of 1996. This rule will not result in an annual effect on the economy of $100,000,000 or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

Paperwork Reduction Act of 1995

The amended regulations contain no additional information collection or record keeping requirements under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501, *et seq.*

List of Subjects

5 CFR Part 2415

Conflict of interests, Government employees.

5 CFR Part 2416

Government employees, Enforcement of nondiscrimination on the basis of disability in programs or activities conducted by the Federal Labor Relations Authority.

5 CFR Part 2424

Administrative practice and procedure, Government employees, Labor-management relations.

5 CFR Part 2429

Administrative practice and procedure, Government employees, Labor-management relations.

■ For the reasons set forth in the preamble, the Federal Labor Relations Authority amends parts 2415, 2416, 2624, and 2629 of title 5 of the Code of Federal Regulations as follows:

PART 2415—EMPLOYEE RESPONSIBILITIES AND CONDUCT

■ 1. The authority cited for part 2415 is revised to read as follows:

Authority: E.O. 12674, 54 FR 15159 (April 12, 1989), as modified by E.O. 12731, 55 FR 42547 (October 17, 1990); 5 CFR 735.101, *et seq.*, 2634.101, *et seq.*, 2635.101, *et seq.*, and 2637.101, *et seq.*

■ 2. Section 2415.1 is revised to read as follows:

§ 2415.1 Employee responsibilities and conduct.

The Federal Labor Relations Authority, the General Counsel of the Federal Labor Relations Authority and the Federal Service Impasses Panel, respectively, hereby adopt the rules and regulations contained in parts 735, 2634, 2635, and 2637 of title 5 of the Code of Federal Regulations, prescribing standards of conduct and responsibilities, and governing statements reporting employment and financial interests for officers and employees, including special Government employees, for application, as appropriate, to the officers and employees, including special Government employees, of the Authority, the General Counsel and the Panel.

PART 2416—ENFORCEMENT OF NONDISCRIMINATION ON THE BASIS OF DISABILITY IN PROGRAMS OR ACTIVITIES CONDUCTED BY THE FEDERAL LABOR RELATIONS AUTHORITY

■ 3. The authority cited for part 2416 continues to read as follows:

Authority: 29 U.S.C. 794.

■ 4. Section 2416.101 is revised to read as follows:

§ 2416.101 Purpose.

The purpose of this regulation is to effectuate section 119 of the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, which amended section 504 of the Rehabilitation Act of 1973 to prohibit discrimination on the basis of disability in programs or activities conducted by Executive agencies or the United States Postal Service.

■ 5. Section 2416.102 is revised to read as follows:

§ 2416.102 Application.

This part applies to all programs or activities conducted by the agency, except for programs or activities conducted outside the United States that do not involve individuals with disabilities in the United States.

■ 6. Section 2416.103 is amended by removing the definitions for "individual with handicaps", "qualified individual with handicaps", and "qualified handicapped person" and adding, in alphabetical order, definitions for "individual with disabilities", "qualified disabled person", and "qualified individual with disabilities".

§ 2416.103 Definitions.

* * * * *

Individual with disabilities means any person who has a physical or mental impairment that substantially limits one

or more major life activities, has a record of such an impairment, or is regarded as having such an impairment.

* * * * *

Qualified individual with disabilities means—

(1) With respect to preschool, elementary, or secondary education services provided by the agency, an individual with disabilities who is a member of a class of persons otherwise entitled by statute, regulation, or agency policy to receive education services from the agency;

(2) With respect to any other agency program or activity under which a person is required to perform services or to achieve a level of accomplishment, an individual with disabilities who meets the essential eligibility requirements and who can achieve the purpose of the program or activity without modifications in the program or activity that the agency can demonstrate would result in a fundamental alteration in its nature;

(3) With respect to any other program or activity, an individual with disabilities who meets the essential eligibility requirements for participation in, or receipt of benefits from, that program or activity; and

(4) *Qualified disabled person* as that term is defined for purposes of employment in 29 CFR 1615.103, which is made applicable to this regulation by § 2416.140.

* * * * *

■ 7. Section 2416.130 is revised to read as follows:

§ 2416.130 General prohibitions against discrimination.

(a) No qualified individual with disabilities shall, on the basis of disability, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity conducted by the agency.

(b)(1) The agency, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of disability—

(i) Deny a qualified individual with disabilities the opportunity to participate in or benefit from the aid, benefit, or service;

(ii) Afford a qualified individual with disabilities an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others;

(iii) Provide a qualified individual with disabilities with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others;

(iv) Provide different or separate aid, benefits, or services to individuals with disabilities or to any class of individuals with disabilities than is provided to others unless such action is necessary to provide qualified individuals with disabilities with aid, benefits, or services that are as effective as those provided to others;

(v) Deny a qualified individual with disabilities the opportunity to participate as a member of planning or advisory boards;

(vi) Otherwise limit a qualified individual with disabilities in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving the aid, benefit, or service.

(2) The agency may not deny a qualified individual with disabilities the opportunity to participate in programs or activities that are not separate or different, despite the existence of permissibly separate or different programs or activities.

(3) The agency may not, directly or through contractual or other arrangements, utilize criteria or methods of administration the purpose or effect of which would—

(i) Subject qualified individuals with disabilities to discrimination on the basis of disability; or

(ii) Defeat or substantially impair accomplishment of the objectives of a program or activity with respect to individuals with disabilities.

(4) The agency may not, in determining the site or location of a facility, make selections the purpose or effect of which would—

(i) Exclude individuals with disabilities from, deny them the benefits of, or otherwise subject them to discrimination under any program or activity conducted by the agency; or

(ii) Defeat or substantially impair the accomplishment of the objectives of a program or activity with respect to individuals with disabilities.

(5) The agency, in the selection of procurement contractors, may not use criteria that subject qualified individuals with disabilities to discrimination on the basis of disability.

(6) The agency may not administer a licensing or certification program in a manner that subjects qualified individuals with disabilities to discrimination on the basis of disability, nor may the agency establish requirements for the programs or activities of licensees or certified entities that subject qualified individuals with disabilities to discrimination on the basis of disability. However, the programs or activities of entities that are licensed or certified by the agency are not, themselves, covered by this regulation.

(c) The exclusion of individuals without a disability from the benefits of a program limited by Federal statute or Executive order to individuals with disabilities or the exclusion of a specific class of individuals with disabilities from a program limited by Federal statute or Executive order to a different class of individuals with disabilities is not prohibited by this regulation.

(d) The agency shall administer programs and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.

■ 8. Section 2416.140 is revised to read as follows:

§ 2416.140 Employment.

No qualified individual with disabilities shall, on the basis of disability, be subject to discrimination in employment under any program or activity conducted by the agency. The definitions, requirements, and procedures of section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791), as established by the Equal Employment Opportunity Commission in 29 CFR part 1614, shall apply to employment in federally conducted programs or activities.

■ 9. Section 2416.149 is revised to read as follows:

§ 2416.149 Program accessibility: Discrimination prohibited.

Except as otherwise provided in § 2416.150, no qualified individual with disabilities shall, because the agency's facilities are inaccessible to or unusable by individuals with disabilities, be denied the benefits of, be excluded from participation in, or otherwise be subjected to discrimination under any program or activity conducted by the agency.

■ 10. Section 2416.150 is revised to read as follows:

§ 2416.150 Program accessibility: Existing facilities.

(a) *General.* The agency shall operate each program or activity so that the program or activity, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities. This paragraph does not—

(1) Necessarily require the agency to make each of its existing facilities accessible to and usable by individuals with disabilities;

(2) In the case of historic preservation programs, require the agency to take any

action that would result in a substantial impairment of significant historic features of an historic property; or

(3) Require the agency to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative burdens. In those circumstances where agency personnel believe that the proposed action would fundamentally alter the program or activity or would result in undue financial and administrative burdens, the agency has the burden of proving that compliance with § 2416.150(a) would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the agency head or his or her designee after considering all agency resources available for use in the funding and operation of the conducted program or activity, and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action would result in such an alteration or such burdens, the agency shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that individuals with disabilities receive the benefits and services of the program or activity.

(b) *Methods*—(1) *General.* The agency may comply with the requirements of this section through such means as redesign of equipment, reassignment of services to accessible buildings, assignment of aides to beneficiaries, home visits, delivery of services at alternate accessible sites, alteration of existing facilities and construction of new facilities, use of accessible rolling stock, or any other methods that result in making its programs or activities readily accessible to and usable by individuals with disabilities. The agency is not required to make structural changes in existing facilities where other methods are effective in achieving compliance with this section. The agency, in making alterations to existing buildings, shall meet accessibility requirements to the extent compelled by the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151–4157), and any regulations implementing it. In choosing among available methods for meeting the requirements of this section, the agency shall give priority to those methods that offer programs and activities to qualified individuals with disabilities in the most integrated setting appropriate.

(2) *Historic preservation programs.* In meeting the requirements of § 2416.150(a) in historic preservation programs, the agency shall give priority to methods that provide physical access to individuals with disabilities. In cases where a physical alteration to an historic property is not required because of § 2416.150(a) (2) or (3), alternative methods of achieving program accessibility include—

(i) Using audio-visual materials and devices to depict those portions of an historic property that cannot otherwise be made accessible;

(ii) Assigning persons to guide individuals with disabilities into or through portions of historic properties that cannot otherwise be made accessible; or

(iii) Adopting other innovative methods.

■ 11. Section 2416.151 is revised to read as follows:

§ 2416.151 Program accessibility: New construction and alterations.

Each building or part of a building that is constructed or altered by, on behalf of, or for the use of the agency shall be designed, constructed, or altered so as to be readily accessible to and usable by individuals with disabilities. The definitions, requirements, and standards of the Architectural Barriers Act (42 U.S.C. 4151–4157), as established in 41 CFR 101–19.600 to 101–19.607, apply to buildings covered by this section.

■ 12. Section 2416.160 is amended by revising paragraphs (a) and (d) to read as follows:

§ 2416.160 Communications.

(a) The agency shall take appropriate steps to ensure effective communication with applicants, participants, personnel of other Federal entities, and members of the public.

(1) The agency shall furnish appropriate auxiliary aids where necessary to afford an individual with disabilities an equal opportunity to participate in, and enjoy the benefits of, a program or activity conducted by the agency.

(i) In determining what type of auxiliary aid is necessary, the agency shall give primary consideration to the requests of the individual with disabilities.

(ii) The agency need not provide individually prescribed devices, readers for personal use or study, or other devices of a personal nature.

(2) Where the agency communicates with applicants and beneficiaries by telephone, telecommunication devices for deaf persons (TDD's) or equally effective telecommunication systems shall be used to communicate with persons with impaired hearing.

* * * * *

(d) This section does not require the agency to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative burdens. In those circumstances where agency personnel believe that the proposed action would fundamentally alter the program or activity or would result in undue financial and administrative burdens, the agency has the burden of proving that compliance with § 2416.160 would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the agency head or his or her designee after considering all agency resources available for use in the funding and operation of the conducted program or activity and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action required to comply with this section would result in such an alteration or such burdens, the agency shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that, to the maximum extent possible, individuals with disabilities receive the benefits and services of the program or activity.

■ 13. Section 2416.170 is amended by revising paragraphs (a), (b), and (f) to read as follows:

§ 2416.170 Compliance procedures.

(a) Except as provided in paragraph (b) of this section, this section applies to all allegations of discrimination on the basis of disability in programs and activities conducted by the agency.

(b) The agency shall process complaints alleging violations of section 504 with respect to employment according to the procedures established by the Equal Employment Opportunity Commission in 29 CFR part 1614 pursuant to section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791).

* * * * *

(f) The agency shall notify the Architectural and Transportation Barriers Compliance Board upon receipt of any complaint alleging that a building or facility that is subject to the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151–4157) is not readily accessible to and useable by individuals with disabilities.

PART 2424—NEGOTIABILITY PROCEEDINGS

■ 14. The authority cited for Part 2424 continues to read as follows:

Authority: 5 U.S.C. 7134.

§ 2424.22 [Amended]

■ 15. Amend section 2424.22 as follows:
■ a. In paragraph (b)(3), add "and" after the semi-colon;
■ b. In paragraph (b)(4), remove the semi-colon and the word "and" from the end of the paragraph and add a period in their place; and
■ c. Remove paragraph (b)(5).

§ 2424.24 [Amended]

■ 16. Amend section 2424.24 as follows:
■ a. In paragraph (c)(3), add the word "and" after the semi-colon;
■ b. In paragraph (c)(4), remove the semi-colon and the word "and" from the end of the paragraph and add a period in their place; and
■ c. Remove paragraph (c)(5).

§ 2424.25 [Amended]

■ 17. Amend section 2424.25 by removing paragraph (c)(3).

§ 2424.26 [Amended]

■ 18. Amend section 2424.26 as follows:
■ a. Add the word "and" after the semi-colon at the end of paragraph (c)(1)(iv);
■ b. In paragraph (c)(2), remove the semi-colon and the word "and" from the end of the paragraph and add a period in their place; and
■ c. Remove paragraph (c)(3).

PART 2429—MISCELLANEOUS AND GENERAL REQUIREMENTS

■ 19. The authority cited for part 2429 continues to read as follows:

Authority: 5 U.S.C. 7134; § 2429.18 also issued under 28 U.S.C. 2112(a).

■ 20. Section 2429.21 is amended by revising paragraph (b) to read as follows:

§ 2429.21 Computation of time for filing papers.

* * * * *

(b) Except when filing an unfair labor practice charge pursuant to part 2423 of this subchapter, a representation petition pursuant to part 2422 of this subchapter, and a request for an extension of time pursuant to § 2429.23(a) of this part, when this subchapter requires the filing of any paper with the Authority, the General Counsel, a Regional Director, or an Administrative Law Judge, the date of filing shall be determined by the date of mailing indicated by the postmark date or the date a facsimile is transmitted. If no postmark date is evident on the mailing, it shall be presumed to have been mailed 5 days prior to receipt. If the date of facsimile transmission is unclear, the date of transmission shall be the date the facsimile transmission is received. If the filing is by personal delivery, it shall be considered filed on the date it is received by the Authority or the officer or agent designated to receive such materials. If the filing is deposited with a commercial delivery service that will provide a record showing the date the document was tendered to the delivery service, it shall be considered filed on the date when the matter served is deposited with the commercial delivery service.

* * * * *

■ 21. Section 2429.22 is revised to read as follows:

§ 2429.22 Additional time after service by mail or commercial delivery.

Except as to the filing of an application for review of a Regional Director's Decision and Order under § 2422.31 of this subchapter, whenever a party has the right or is required to do some act pursuant to this subchapter within a prescribed period after service of a notice or other paper upon such party, and the notice or paper is served on such party by mail or commercial delivery, 5 days shall be added to the proscribed period: Provided, however, that 5 days shall not be added in any instance where an extension of time has been granted.

■ 22. Section 2429.25 is revised to read as follows:

§ 2429.25 Number of copies and paper size.

Unless otherwise provided by the Authority or the General Counsel, or their designated representatives, as appropriate, or under this subchapter, and with the exception of any prescribed forms, any document or paper filed with the Authority, General Counsel, Administrative Law Judge, Regional Director, or Hearing Officer, as appropriate, under this subchapter, together with any enclosure filed therewith, shall be submitted on 8½ by 11 inch size paper, using normal margins and font sizes. The original and four (4) legible copies of each document or paper must be submitted. Where facsimile filing is permitted pursuant to § 2429.24(e), one (1) legible copy, capable of reproduction, shall be sufficient. A clean copy capable of being used as an original for purposes such as further reproduction may be substituted for the original.

■ 23. Section 2429.27 is amended by revising paragraph (d) to read as follows:

§ 2429.27 Service; statement of service.

* * * * *

(d) The date of service or date served shall be the day when the matter served is deposited in the U.S. mail, delivered in person, deposited with a commercial delivery service that will provide a record showing the date the document was tendered to the delivery service or, in the case of facsimile transmissions, the date transmitted.

■ 24. Add § 2429.29 to subpart B to read as follows:

§ 2429.29 Content of filings.

Any document that a party files in a proceeding covered by this subchapter that is before the Authority or the Office of Administrative Law Judges must include a table of contents if the document exceeds 10 double-spaced pages in length.

Dated: September 25, 2009.

Carol Waller Pope,

Chairman.

[FR Doc. E9–23552 Filed 10–7–09; 8:45 am]
BILLING CODE 6727–01–P

DEPARTMENT OF AGRICULTURE

Food and Nutrition Service

7 CFR Part 246

[FNS–2009–0001]

RIN 0584–AD71

Special Supplemental Nutrition Program for Women, Infants and Children (WIC): Vendor Cost Containment

AGENCY: Food and Nutrition Service, USDA.

ACTION: Final rule.

SUMMARY: This final rule adopts, with changes, an interim rule published on November 29, 2005 amending the WIC regulations. The final rule incorporates into program regulations new legislative requirements for vendor cost containment that affect the selection, authorization, and reimbursement of retail vendors. These requirements are contained in the Child Nutrition and WIC Reauthorization Act of 2004, enacted on June 30, 2004. The final rule reflects the statutory provisions that require State agencies to implement a vendor peer group system, competitive price criteria, and allowable reimbursement levels in a manner that ensures the WIC Program pays authorized vendors competitive prices for supplemental foods. It also requires State agencies to ensure vendors that derive more than 50 percent of their annual food sales revenue from WIC food instruments ("above-50-percent vendors") do not cause higher food costs for the program than do other vendors ("regular vendors"). The intent

of these provisions is to maximize the number of eligible women, infants, and children served with available Federal funding.

DATES: *Effective Date:* This rule is effective November 9, 2009.

FOR FURTHER INFORMATION CONTACT: Debra Whitford, Chief, Policy and Program Development Branch, Supplemental Food Programs Division, Food and Nutrition Service, 3101 Park Center Drive, Room 522, Alexandria, Virginia 22302, (703) 305–2746.

SUPPLEMENTARY INFORMATION:

Executive Order 12866

This rule has been determined to be Significant and was reviewed by the Office of Management and Budget in conformance with Executive Order 12866.

Regulatory Impact Analysis Summary

As required for all rules designated as Significant by the Office of Management and Budget, a Regulatory Impact Analysis was developed for the WIC Vendor Cost Containment Final Rule. A complete copy of the Impact Analysis is available by contacting the person indicated in the **FOR FURTHER INFORMATION CONTACT** section of this Preamble.

Need for Action

This action is needed to implement the vendor cost containment provisions of the Child Nutrition and WIC Reauthorization Act of 2004, Public Law 108–265, which amended the Child Nutrition Act (CNA). The rule requires WIC State agencies to operate vendor management systems that effectively contain food costs by ensuring that prices paid for supplemental foods are competitive. The rule also responds to data which indicate that WIC food expenditures increasingly include payments to above-50-percent vendors whose prices are not governed by the market forces that affect most retail grocers. As a result, the prices charged by these vendors tend to be higher than those of other retail grocery stores participating in the program. To ensure the program pays competitive prices, this rule confirms the codification of the new statutory requirements in the interim rule for State agencies to use in evaluating vendor applicants' prices during the vendor selection process and when paying vendors for supplemental foods following authorization, with a few exceptions. However, in response to comments, the interim rule's requirement for weighting food instruments in quarterly cost neutrality assessments has been made optional in § 246.12(g)(4)(i)(D) of this final rule. Also, the requirement for recouping excess payments or terminating vendor agreements based on food instruments which had exceeded cost neutrality levels calculated during quarterly cost neutrality assessments, but were submitted for redemption within the maximum allowable reimbursement levels in effect at the time of redemption, has been removed from § 246.12(g)(4)(i)(D). Further, the final rule includes one new requirement based on the comments received; a sentence has been added to § 246.12(g)(4) stating the State agency must inform all vendors of the criteria for peer groups, and must inform each individual vendor of its peer group assignment. This one new requirement is not expected to increase the administrative burden of State agencies since State agencies are already doing this, as indicated during the processing of the certification and exemption requests.

While the Child Nutrition and WIC Reauthorization Act mandates that State agencies establish peer groups, competitive price criteria and allowable reimbursement levels, and states that these requirements must result in the outcome of paying above-50-percent vendors no more than regular vendors, the Act does not specify particular criteria for peer groups or acceptable methods of setting competitive price criteria and allowable reimbursement levels. The Food and Nutrition Service (FNS) considered using the interim rule to mandate specific means of developing peer groups, competitive price criteria and allowable reimbursement levels in order to ensure the outcome of this legislation was achieved. However, given the responsibility of the State agencies to manage WIC as a discretionary grant program, the varying retail food market conditions in each State, and the wide variations in current vendor cost containment systems operated by State agencies, the interim rule provided State agencies with flexibility to develop their own peer groups, competitive price criteria and allowable reimbursement levels.

The State agency vendor cost containment plans and exemption requests approved by FNS following the implementation of the interim rule reflected considerable diversity in peer group criteria, competitive price criteria, and allowable reimbursement levels. Paragraph 246.12(g)(4)(vi) of the interim rule required State agencies which authorized above-50-percent vendors to obtain certification for their vendor cost containment systems from FNS. Also, State agencies could seek an exemption from the requirement to establish peer groups under § 246.12(g)(4)(v), from the requirements for a geographic peer group criterion, or for the use of more than one peer group criterion under § 246.12(g)(4)(ii)(A). The peer group requirements applied to all State agencies, regardless of whether above-50-percent vendors were authorized. These vendor cost containment certification submissions and requests for exemption provided the data needed to determine whether State agency vendor cost containment systems actually reflected the flexibility intended by the interim rule. The following chart summarizes this data from the vendor cost containment plans submitted by the 32 State agencies which sought certification from FNS:

Peer group criteria/reimbursement policy	Number of State agencies using the peer group criteria/ reimbursement policy
Geography/Population Density	26
Number of Cash Registers	11
Type of Ownership (*e.g.*, Sole Proprietorship, Corporate)	3
Size (*e.g.*, Square Footage)	6
Type of Store (*e.g.*, Small Neighborhood Store, Chain)	11
WIC Sales Volume	10
Separate Peer Groups for Supercenter Stores or Commissaries	9
Separate Peer Groups for Above-50-Percent Vendors; Paid Statewide Average	13
Above-50-Percent Vendors in Same Peer Groups with Regular Vendors; Paid Statewide Average	16
Above-50-Percent Vendors in Same Peer Groups with Regular Vendors; Paid Peer Group Average	3

Further, FNS granted exemptions from the peer group requirements in entirety to 28 State agencies which did not authorize above-50-percent vendors. In addition, FNS granted exemptions from the requirement for a geographic peer group criterion to all 10 State agencies which had requested such exemptions. Finally, FNS granted exemptions from the requirement to use more than one peer group criterion to both State agencies which had requested such exemptions; for both of these State agencies, the geographic peer group criterion is the only peer group criterion.

Thus, the interim rule gave State agencies flexibility to design cost containment practices that would be effective in their own markets and would ensure adequate participant access. The final rule maintains this flexibility, while continuing to ensure that above-50-percent vendors do not result in higher costs to the program than regular vendors as required by the CNA.

Benefits

The WIC Program will benefit from the provisions of this rule by reducing unnecessary food expenditures, thereby increasing the potential to serve more eligible women, infants, and children for the same cost. The rule should ensure that payments to vendors reflect competitive prices for WIC foods, particularly regarding above-50-percent vendors. Previously, the WIC Program paid above-50-percent vendors more for supplemental foods than it paid other authorized vendors. Under the interim rule, State agencies that chose to authorize these vendors needed to demonstrate in their certification requests that payments to such vendors would not be higher on average per food instrument than payments to comparable vendors.

FNS conservatively estimated that implementation of the interim rule would result in a cost savings of approximately $75 million annually, as discussed in the Regulatory Impact Analysis for the interim rule. As previously noted, one State agency has already reported that it has been able to serve more than 40,000 additional participants because of the savings resulting from implementation of the interim rule. However, due to other factors which impact on food costs, such as inflation in commodity prices, it is not possible to confirm with absolute certainty that food costs for the Program have declined because of the interim rule. Even so, FNS stands by its estimate of savings since it was based on a comparison of regular vendor prices and above-50-percent vendor prices before the interim rule, when the prices of above-50-percent vendors were usually higher than the prices of regular vendors.

Costs

In order to comply with the interim rule, State agencies needed to make one-time changes in their vendor cost containment systems. Some State agencies were already in full or partial compliance with the rule, while others needed to demonstrate that they met the conditions for an exemption from all or some of the vendor peer group system requirements. As indicated by the State agency comments on the interim rule, many State agencies, particularly those that chose to authorize above-50-percent vendors, incurred additional costs and administrative burdens to achieve compliance with its provisions.

Of the eleven WIC State agencies which submitted comments on the interim rule, nine addressed the administrative burden resulting from implementation of the interim rule. All nine of these State agencies stated that implementation of the interim rule had required a substantial increase in the administrative burden, citing particular requirements of the interim rule, including the requirements to weight food instrument redemption amounts in cost neutrality assessments; collect food prices from vendors at least every six months following authorization; document the above-50-percent vendor status for all vendors; document the above-50-percent vendor status for pharmacies; and to conduct quarterly cost neutrality assessments for State agencies which do not have automated systems for performing statistical analyses. The requirement in the interim rule for weighting food instrument redemption amounts for cost neutrality assessments has been made optional in this final rule, and requirement for collecting food prices from vendors at least every six months following authorization have been modified in this final rule to provide for exemptions.

Also, FNS has provided State agencies with methodologies for reducing the administrative burden of identifying above-50-percent vendors and of the quarterly cost neutrality assessments. Over ninety percent of WIC vendors are also authorized by the Supplemental Nutrition Assistance Program (SNAP, formerly the Food Stamp Program). To assist the State agencies, FNS established a process for comparing WIC redemptions to SNAP redemptions; this process established that about 88 percent of authorized WIC vendors had greater SNAP redemptions than WIC redemptions. As a result, there was no need to obtain further documentation from these vendors, such as tax returns or other verifiable documentation, to establish whether more than 50 percent of a vendor's food sales were derived from WIC purchases. Further, the State agency workload for this redemption comparison process is negligible because FNS maintains the fully automated reporting process which matches the redemption data maintained by the WIC The Integrity Profile (TIP) and the SNAP Store Tracking and Redemption System (STARS) systems.

One State agency commented that this process should not use annualized WIC redemption data for a new WIC vendor because this may erroneously indicate that this vendor is an above-50-percent vendor, resulting in the restriction of payments to this vendor at the maximum allowable redemption levels permitted for above-50-percent vendors. However, the WIC–SNAP redemption match cannot result in a determination that a vendor is an above-50-percent vendor because this match does not include eligible food sales made with cash, credit cards, personal checks, etc. Instead, this process has one of two results: Either the vendor is not an above-50-percent vendor, or the vendor is potentially an above-50-percent vendor. If a vendor is designated as a potential above-50-percent vendor, the State agency needs to obtain further documentation before determining whether the vendor is in fact an above-50-percent vendor. Also, as discussed more fully below in the Background section of this preamble, the State agency must ask all vendor applicants whether they expect to become above-50-percent vendors, and, if not, the vendor must provide supporting documentation to the State agency.

Regulatory Flexibility Act

This rule has been reviewed with regard to the requirements of the Regulatory Flexibility Act (5 U.S.C. 601–612). Although not required by the Act, the Food, Nutrition, and Consumer Services hereby certifies that this rule will not have a significant economic impact on a substantial number of small entities. The provisions implemented through this rulemaking apply to all State agencies administering the WIC Program, regardless of size. Further, as pointed out above, several provisions of this rule provide considerable flexibility to WIC State agencies regarding the manner of implementing its requirements, rather than new prescriptive requirements for the

operation and administration of the Program.

Public Law 104–4

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local and tribal governments and the private sector. Under section 202 of the UMRA, FNS generally must prepare a written statement, including a cost benefit analysis, for proposed and final rules with ''Federal mandates'' that may result in expenditures by State, local or tribal governments, in the aggregate, or the private sector, of $100 million or more in any one year. When such a statement is needed for a rule, section 205 of the UMRA generally requires FNS to identify and consider a reasonable number of regulatory alternatives and adopt the most cost-effective or least burdensome alternative that achieves the objectives of the rule.

This final rule contains no Federal mandates (under the provisions of Title II of the UMRA) for State, local and tribal governments or the private sector of $100 million or more in any one year. Thus, the rule is not subject to the requirements of sections 202 and 205 of the UMRA.

Executive Order 12372

WIC is listed in the Catalog of Federal Domestic Assistance under 10.557. For the reasons set forth in 7 CFR 3015, Subpart V and related Notice (48 FR 29115), this program is included in the scope of Executive Order 12372, which requires intergovernmental consultation with State and local officials.

Federalism Summary Impact Statement

Executive Order 13132 requires Federal agencies to consider the impact of their regulatory actions on State and local governments. Where such actions have federalism implications, agencies are directed to provide a statement for inclusion in the preamble to the regulations describing the agency's considerations in terms of the following three categories called for under section (6)(b)(2)(B) of Executive Order 13132.

Prior Consultation With State Officials

State agencies have expressed concerns and shared information regarding implementation of the interim rule. Because the WIC Program is a State-administered, federally funded program, FNS regional offices have formal and informal discussions with State agencies on an ongoing basis regarding program implementation and policy issues. This arrangement allows State agencies to raise questions and provide comments that form the basis for many of the implementation detail decisions in this and other WIC Program rules. Prior to the implementation of the interim rule, several regional offices convened meetings with State WIC staff that included discussion of the vendor cost containment provisions of this law. In addition, in October 2004, FNS' Supplemental Food Programs Division convened a meeting of WIC State agency representatives, USDA headquarters and regional office staff, and an outside expert on competitive pricing systems, to obtain more information on State agencies' current vendor cost containment systems. During the implementation of the interim rule, FNS further clarified the meaning of the cost containment provisions in response to numerous issues raised by the certification and exemption requests submitted by State agencies. These questions and informal comments received on the interim rule have assisted FNS in making the final rule responsive to State agency concerns.

Nature of Concerns and the Need To Issue This Rule

The comments of most of the State agencies on the interim rule reflected concerns about FNS interpretations of Public Law 108–265, the extent of the flexibility provided to the State agencies by the interim rule, and the administrative burden of implementing the interim rule. These concerns focused on several of the interim rule's requirements, including: above-50-percent vendors may not be paid more on average per food instrument type than regular vendors; food instrument redemption amounts must be weighted in cost neutrality assessments; food prices must be collected from vendors at least every six months following authorization; and verifiable documentation must be used to identify above-50-percent vendors.

Extent to Which Those Concerns Have Been Met

As discussed more fully below in the Background section of this preamble, most of the provisions of the interim rule reflected the explicit requirements of Public Law 108–265 and thus cannot be eliminated or altered. However, as also discussed below, some provisions of the interim rule which were not based on the explicit requirements of Public Law 108–265 have been modified in this final rule. Also, several of these modified provisions had been viewed as administratively burdensome in the comments of State agencies, including the weighting of food redemption amounts in cost neutrality calculations, which has been made optional in the final rule, and the collection of food prices from vendors every six months following authorization, from which a State agency may be exempted under the final rule but not under the interim rule. Additionally, as discussed more fully in the Regulatory Impact Analysis section of this preamble, FNS has also reduced the administrative burden by developing a methodology which has eliminated the need to obtain documentation from approximately 88 percent of authorized vendors regarding whether they are above-50-percent vendors. Finally, this final rule continues the considerable flexibility provided by the interim rule for the manner of State agency implementation, in particular the broad range of peer group criteria available to State agencies as noted above in the Regulatory Impact Analysis section of this preamble. Indeed, the peer group exemption process of the interim rule is continued in the final rule so State agencies may request exemptions from some or all of the peer group requirements; 40 State agencies were granted such exemptions under the interim rule.

Executive Order 12988

This final rule has been reviewed under Executive Order 12988, Civil Justice Reform, and is intended to have preemptive effect with respect to any State or local laws, regulations or policies which conflict with its provisions, or otherwise impede its full implementation. This final rule is not intended to have retroactive effect unless so specified in the DATES paragraph of this preamble. Prior to any judicial challenge to the provisions of this rule or the application of its provisions, all applicable administrative procedures must be exhausted.

Civil Rights Impact Analysis

FNS has reviewed this final rule in accordance with Departmental Regulation 4300–4, ''Civil Rights Impact Analysis,'' to identify and address any major civil rights impacts the final rule might have on minorities, women, and persons with disabilities. FNS has determined that this final rule's intent and provisions will not adversely affect access to WIC services by eligible persons. All data available to FNS indicate that protected individuals have the same opportunity to participate in the WIC Program as non-protected individuals. FNS specifically prohibits State and local government agencies that administer the WIC Program from engaging in actions that discriminate based on race, color, national origin,

sex, age or disability. Section 246.8 of the WIC regulations (7 CFR part 246) indicates that Department of Agriculture regulations on non-discrimination (7 CFR parts 15, 15a and 15b) and FNS instructions ensure that no person shall on the grounds of race, color, national origin, age, sex, or disability, be excluded from participation in, be denied benefits of, or be otherwise subjected to discrimination under the Program.

Discrimination in any aspect of program administration is prohibited by Department of Agriculture regulations on non-discrimination (7 CFR parts 15, 15a, and 15b), the Age Discrimination Act of 1975 (Pub. L. 94–135), the Rehabilitation Act of 1973 (Pub. L. 93–112, section 504), and title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d). Enforcement action may be brought under any applicable Federal law. Title VI complaints shall be processed in accordance with 7 CFR part 15. Where State agencies have options, and they choose to implement a particular provision, they must implement it in such a way that it complies with § 246.8 of the WIC regulations.

Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. Chap. 35; see 5 CFR 1320) requires the Office of Management and Budget (OMB) approve all collections of information by a Federal agency before they can be implemented. Respondents are not required to respond to any collection of information unless it displays a current valid OMB control number. Some of the information collections in this final rule have been previously approved under OMB No. 0584–0043, based on the information reporting requirements outlined in the interim rule WIC Vendor Cost Containment Interim Rule, published on November 29, 2005 at 70 FR 71708. The information collection for this final rule has been submitted to OMB with revisions based on comments and new information, as discussed below.

The preamble of the interim rule separated the reporting burden of that rule into three parts. The first part, listed under § 246.4(a)(14)(xv), included: The description of the vendor cost containment system (peer groups, maximum allowable reimbursement levels, average redemption amounts for selected food instruments) in the State Plan, which is an annual requirement; State agency notification to FNS concerning non-profit above-50-percent vendors exempted by the State agency from cost containment requirements, which could occur at any time; request for exemption from vendor peer group requirements, which must be re-approved triennially; information required for FNS for certification of the State agency's vendor cost containment system, which must be re-approved triennially; and, detailed assurances concerning the implementation of the commitments made under existing certifications, which must be provided annually in the State Plan. The second part, listed under § 246.12(g)(4)(i), concerns the identification of above-50-percent vendors. The third part, listed under § 246.12(g)(4)(ii)(B), concerns the collecting of vendor food prices every six months following authorization of the vendor.

Comments

As noted in the Regulatory Impact Analysis Summary of this preamble, nine commenters, all of them State agencies, addressed the administrative burden of the interim rule. However, only two of these State agencies suggested different burden hours than set forth in the interim rule. One of these State agencies stated that at least one-half of a staff position would be needed to manage ongoing reporting activities, without indicating how this staff time would be distributed between the different reporting burdens set forth in the preamble of the interim rule, including the burdens which have been modified in this final rule. Similarly, the other State agency stated that eight new staff had been requested to address the new administrative needs resulting from the interim rule, including all of the reporting burdens, but also to address the administrative needs unrelated to vendor cost containment—the State agency's emerging Electronic Benefits Transfer (EBT) system. Although lacking in specificity, these comments indicate that FNS may have underestimated the reporting burden hours.

The Regulatory Impact Analysis Summary of this preamble also discusses the other comments on the administrative burden and how the final rule reflects accommodations intended to reduce those burdens. All nine of these State agencies stated that implementation of the interim rule had required a substantial increase in the administrative burden, citing particular requirements of the interim rule, including the requirements to weight food instrument redemption amounts in cost neutrality assessments; collect food prices from vendors at least every six months following authorization; document the above-50-percent vendor status for all vendors; document the above-50-percent vendor status for pharmacies; and to conduct quarterly cost neutrality assessments for State agencies which do not have automated systems for performing statistical analyses. The information collection burden hours have also been adjusted due to these comments, as discussed below.

Collections Added by the Final Rule

Unlike the interim rule, this final rule includes a provision which permits State agencies to seek approval of their methodologies for excluding partially-redeemed food instruments from the required quarterly cost-neutrality assessments. The commenters who stated that such food instruments should be excluded from the cost neutrality assessments included two State agencies. Paragraph 246.4(a)(14)(xv) requires State agencies include information in their State Plan submissions to FNS demonstrating compliance with the cost containment provisions of § 246.12(g)(4), which includes the quarterly cost neutrality assessment requirement of § 246.12(g)(4)(i)(D). Thus a State agency would need FNS approval of a State Plan amendment setting forth a methodology for excluding partially-redeemed food instruments. This is one of the reasons why the information burden hourly rate for the State Plan submissions under the interim rule has been doubled under this final rule.

Burden hours have been added in the final rule to account for an exemption process which, unlike the interim rule, would permit State agencies to seek exemptions from the requirement set forth in § 246.12(g)(4)(ii)(B) for biannual collection of vendor shelf prices. FNS estimates that 15 State agencies will seek such exemptions at the same rate of 16 hours per response used in connection with the request for exemption from the peer group requirement under § 246.4(a)(14)(xv), resulting in 240 burden hours ($15 \times 16 = 240$). This change in the burden hours based on the addition of an exemption process under § 246.12(g)(4)(ii)(B) is the only change of burden hours due to program changes. All of the other changes in burden hours are considered to be adjustments.

The burden hours per response set forth in connection with § 246.12(g)(4)(ii)(B) of the interim rule for the collection of vendor food prices every six months following authorization has been increased in this final rule from one to two hours for both State agencies and vendors in recognition of the aforementioned comments. Although this provision has been modified in the final rule to

provide for exemptions, the overall result is a net increase of 223,154 burden hours for the biannual shelf price collection process. (The final rule allots 313,332 burden hours for the collection of shelf prices by the State agencies and vendors combined, while the interim rule allotted 90,178 hours for this.) Such exemptions could be based on numerous different reasons. As indicated in the Regulatory Impact Analysis, 67 percent of the State agencies are in compliance with the price collection requirement. Thus the exemptions would involve some proportion of the other 33 percent of the 90 State agencies (30 State agencies). FNS estimates that as many as one half of these State agencies may be granted exemptions, i.e., 15 State agencies. (See section 4 of the Background part of this preamble for more information on this exemption process.) Thus the chart below shows that 75 State agencies will need to collect vendor shelf prices biannually under § 246.12(g)(4)(ii)(B), about 83.3 percent of the State agencies, and that about 83.3 percent of the vendors—39,167 vendors—will need to cooperate with this price collection process. As a result, the chart also shows that each of the 75 State agencies will need to collect prices from 1,044 vendors on average twice per year, *i.e.*, $(39{,}167 \div 75 = 546.5) \times 2 = 1{,}044$.

Unlike the interim rule, § 246.12(g)(4) of this final rule states that the State agency must inform all vendors of the criteria for peer groups and each individual vendor of its peer group assignment. State agencies have been advising vendors of their peer group assignments and the peer group criteria, but, for added assurance, a sentence has been added to § 246.12(g)(4) in this final rule to state that the State agency must inform all vendors of the criteria for peer groups and each individual vendor of its peer group assignment. Thus this new requirement set forth in § 246.12(g)(4) would not result in any new information collection burden hours.

Reducing the Collections

As noted in the Regulatory Impact Analysis section of this preamble, four State agencies commented that the interim rule's requirement for weighting food instrument redemption amounts made the cost neutrality assessment process more burdensome. In response, FNS has eliminated the requirement for weighting food instrument redemption amounts in the cost neutrality assessment process. Also, FNS expects certification requests, exemption requests, and State Plan submissions in the future will only involve amendments and/or updating information for most State agencies.

Numbers of Certifications and Exemptions

The previous estimates of 65 State agencies seeking certification and 30 State agencies seeking exemptions need to be replaced with numbers based on actual experience. The certifications concern the cost neutrality of above-50-percent vendors with regards to comparable regular vendors. The exemptions concern the peer group requirements for all vendors. All State agencies are subject to the peer group requirements unless granted an exemption by FNS, but only those State agencies which authorize above-50-percent vendors need to be certified by FNS regarding their processes for maintaining the cost neutrality of above-50-percent vendors in comparison to comparable regular vendors. In Fiscal Years 2005 and 2006, 32 State agencies requested certification and 42 requested exemptions.

Conclusions

Balancing the State agency comments and new requirements against the factors reducing the paperwork burden expected for future certification requests, exemption requests, and State Plan submissions, the burden hours per response estimated for the final rule will be doubled for three of the four information burden categories related to these requests and submissions, as detailed in the chart below. This includes increasing the hourly information burden rate for the State Plan description of the vendor cost containment system from 4 to 8 hours, for exemptions from the peer group requirements from 8 to 16 hours, and for information related to the certification and monitoring of the vendor cost containment system from 8 to 16 hours.

FNS has not been notified by any State agency that it has authorized a non-profit above-50-percent vendor, as required by § 246.12(g)(4)(iv); such notification would be provided as a State Plan submission under § 246.4(a)(14)(xv). FNS does not know if any State agencies will elect to authorize such vendors in the future. Thus the current estimate of the number of State agencies and annual burden hours related to this notification requirement will remain unchanged: five State agencies with one annual burden hour for each, resulting in a total of annual five burden hours. This is the only information burden category related to certification requests, exemption requests, and State Plan submissions for which the burden hours will not be doubled.

The paperwork burden for the annual identification of above-50-percent vendors, per § 246.12(g)(4)(i), was previously set at 2 hours per response. As previously noted, the comparison of WIC and SNAP redemptions has made it possible to eliminate about 88 percent of authorized vendors from any need for further documentation since this comparison has confirmed that about 88 percent of authorized vendors have more SNAP redemptions than WIC redemptions. FNS has established an automated process which matches the redemption data maintained by the WIC TIP and the SNAP STARS systems. The State agency workload for use of this process is negligible.

FNS recognizes that obtaining additional documentation of above-50-percent status for the remaining 12 percent of vendors is more burdensome than the WIC–SNAP redemption match, for both State agencies and vendors. Accordingly, in consideration of the comments on the reporting burden, the burden hours per response for the State agencies has been increased from 2 to 4 hours, and for the vendors from 1 to 2 hours for the data collection related to identifying above-50-percent vendors. However, this higher number of burden hours for vendors will only be applied to the 12 percent of vendors which have been designated as potential above-50-percent vendors based on the WIC–SNAP redemption match (5,640 vendors), since those vendors which have been designated as not being above-50-percent vendors as a result of the WIC–SNAP redemption match will not need to provide any documentation to the State agency at all.

The chart below sets forth the estimated annual reporting burden for the final rule to reflect the above-noted revisions based on State agency comments and information not available when the interim rule was published. Decimals are not included in the chart.

FINAL RULE ESTIMATED ANNUAL REPORTING BURDEN

Section of the regulations	Estimated Number of respondents	Data collections or reports required annually	Estimated average burden hours per response	Estimated annual burden hours
§ 246.4(a)(14)(xv):				
• Description of vendor peer group system and allowable reimbursement levels; average redemption amounts for selected food instruments.	90	1	8	720
• Notification of exemption of non-profit vendors	5	1	1	5
• Request for exemption from vendor peer group requirement	42	1—(triennial)	16	224
• Information required for certification of vendor cost containment system and to monitor ongoing compliance with certification requirements.	32	1—(triennial)	16	171
	32	1	8	256
§ 246.4(a)(14)(xv) Total	90	3.66		1,376
§ 246.12(g)(4)(i)	90	63	4	22,560
Above-50-Percent Determination	5,640	1	2	11,280
§ 246.12(g)(4)(ii)(B)	75	1,044	2	156,666
Biannual Price Collection	39,167	2	2	156,666
§ 246.12(g)(4)(ii)(B) Biannual Price Collection Exemption	15	1	16	240
Total Burden Hours Due to Program Changes				240
Total Burden Hours Due to Adjustments				143,629
Total Burden Hours for the Final Rule				143,869
Currently Approved WIC Reporting and Recordkeeping Burden Hours				3,451,206
Total Proposed WIC Reporting and Recordkeeping Burden Hours				3,595,075

E-Government Act Compliance

FNS is committed to complying with the E-Government Act, to promote the use of the Internet and other information technologies to provide increased opportunities for citizen access to Government information and services, and for other purposes.

Background

Ninety-two letters and electronic mail messages of comment were submitted on the interim rule during the comment period, from 37 WIC-authorized vendors; 22 WIC local agencies; 13 WIC State agencies; 8 members of Congress (in one joint letter); 5 retailer advocacy organizations; 5 social service advocacy organizations; 4 law firms representing WIC-authorized vendors; 3 general public individuals; and 2 non-WIC State agencies. Many of these comment letters and electronic mail messages addressed multiple issues.

1. Definitions of "Above-50-Percent Vendor" and "Food Sales" (§ 246.2)

Definition of "Above-50-Percent Vendor"

Section 246.2 of the interim rule defined "Above-50-percent vendors" as referring to vendors that derive more than 50 percent of their annual food sales revenue from WIC food instruments, and new vendor applicants expected to meet this criterion under guidelines approved by FNS. Two commenters opposed this definition. One of these commenters stated that this group of vendors should be defined based on 70 percent of food sales derived from WIC, so small stores and convenience stores will not go out of business due to the requirement that the redemption amounts of above-50-percent vendors must be comparable to the redemption amounts of chain stores, potentially leading to inadequate participant access. The other commenter stated that the final rule should focus on vendors with WIC redemptions close to 100 percent of their food sales since these are the vendors which have proven to be so costly, not small vendors with a regular retail vendor business model who serve a high percentage of WIC participants in low-income areas.

The definition of "above-50-percent vendor" is based on a legislative requirement in section 17(h)(11)(D)(ii)(I) of the CNA, i.e., vendors with more than 50 percent of annual food sales revenue derived from WIC sales. Therefore, this definition remains as set forth in the interim rule.

Definition of "Food Sales"

Three commenters opposed the definition of "food sales" in § 246.2 of the interim rule as referring to all SNAP-eligible foods. One of these commenters stated that "food sales" as defined in the interim rule cannot be easily verified by many stores because their scanners cannot identify SNAP-eligible food or, if they do, they cannot tally the amounts and that federal tax forms and other documentation maintained by the vendors do not show the sales based on SNAP-eligible foods. Another commenter asserted that State tax forms in one State were not helpful for determining above-50-percent status because these forms do not require a total sales amount from which taxable non-food sales could be subtracted to result in an estimate of food sales, and some foods are taxable; therefore this commenter stated that a vendor should be defined as an above-50-percent vendor based on total sales, not total food sales. One other commenter stated that there is no universal definition of "food sales," resulting in WIC State agencies using a variety of conflicting approaches with disparate results. This commenter argued that State agencies should be allowed to accept self-declaration of vendors with legal penalties for inaccuracy, instead of imposing burdensome data collection processes on vendors.

However, section 17(h)(11)(D)(ii)(I) of the CNA identifies above-50-percent vendors based on more than 50 percent of annual revenue from the sale of food items for WIC food instruments, not food and all other items. Thus the final rule cannot permit total sales instead of total food sales as the basis for identifying above-50-percent vendors. Also, self-declaration would generally not serve as a proper basis for compliance with this provision of the CNA, since self-declaration would be an opinion, not objective data. Therefore,

the definition of "food sales" remains as set forth in the interim rule.

2. Assessment of Above-50-Percent Vendor Status (§ 246.12(g)(4)(i))

Methodologies for Determining the Above-50-Percent Status of Vendor Applicants

Three commenters objected to the statement at 70 FR 71715 of the preamble of the interim rule that State agencies must review invoices as one of the steps needed to determine the above-50-percent status of vendor applicants. These commenters view this requirement as unduly burdensome, recommending instead that State agencies be permitted to review stock for this purpose during the pre-authorization visit or at some other time, and to consider the history of the vendor. One of these commenters also stated that a review of invoices might be misleading because the State agency has no way of knowing if it has received all of a vendor's invoices. FNS agrees with the commenters that a review of invoices should not be required. Instead, the State agency should have the option to rely only on a review of stock at the preauthorization visit, as recommended by the commenters, or even to use both methodologies. Accordingly, new paragraphs 246.12(g)(4)(i)(E) and (g)(4)(i)(F) have been established in the final rule to set forth the required methodologies, previously discussed in the preamble to the interim rule and in FNS guidance, for determining the above-50-percent status of vendor applicants and current vendors, including the other methodologies set forth at 70 FR 71715 of the preamble of the interim rule, but including the review of invoices only as one option. Also, a reference to these two new paragraphs has been added to the second sentence of paragraph 246.12(g)(4)(i).

Timing of Determinations of Above-50-Percent Status

One commenter would prefer to conduct the annual review of the above-50-percent status of its vendors at their individual annual agreement renewal dates rather than reviewing all of them at the same time once a year. Like many State agencies, this State agency processes vendor applications for authorization on an ongoing basis. Paragraph 246.12(g)(4)(i) of the interim rule stated that each State agency must annually implement procedures approved by FNS to identify authorized vendors and vendor applicants as either above-50-percent vendors or regular vendors. The definition of the term "above-50-percent vendor" in § 246.2 of the interim rule refers to vendors that derive more than 50 percent of their annual food sales revenue from WIC food instruments, and new vendor applicants expected to meet this criterion. These provisions did not specify that a State agency must make this determination for all vendors at the same time. Thus, under these provisions, FNS may approve procedures which permit a State agency to conduct the annual review of the above-50-percent status of its vendors at their individual annual agreement renewal dates. These provisions remain unchanged in the final rule.

Assessment of Above-50-Percent Status of Pharmacies

Three commenters recommended greater discretion for State agencies to exclude pharmacies from above-50-percent status. One of these commenters stated that pharmacies generally do not meet the above-50-percent vendor definition and thus the expenditure of administrative resources is not justified to determine their above-50-percent status. Another commenter contended that it is inconsistent to permit exemption of pharmacies which only provide exempt infant formula and WIC-eligible medical foods, but not if these pharmacies also provide contract infant formula. One other commenter stated that State agencies should be able to exempt pharmacies that are authorized to provide exempt infant formula, even if they also provide contract infant formula.

Paragraph 246.12(g)(4)(iv) states that the State agency may except from the competitive price criteria and allowable reimbursement levels pharmacy vendors that supply only exempt infant formula and/or WIC-eligible medical foods, and non-profit vendors for which more than 50 percent of their annual revenue from food sales consists of revenue derived from WIC food instruments. This provision is based on section 17(h)(11)(D) of the CNA, which permits an exemption from competitive price criteria and allowable reimbursement levels for pharmacies that supply only exempt infant formula and WIC-eligible medical foods, but not for pharmacies which also transact food instruments for contract infant formula. Therefore, this final rule must reflect the requirement in the CNA.

State Agency Choice To Authorize Above-50-Percent Vendors

One commenter recommended a statement be added to § 246.12(g)(4)(i) to the effect that a State agency may choose to not authorize above-50-percent vendors. The interim rule included the equivalent statement in the last sentence of § 246.12(g)(4)(i) and in the first sentence of § 246.12(g)(4)(v)(A), by referring to State agencies choosing or not choosing to authorize above-50-percent vendors. This language mirrors the language of section 17(h)(11) of the CNA, which refers to State agencies electing to authorize or not authorize above-50-percent vendors. Therefore, this final rule adopts the language of the interim rule on this subject.

3. Cost Neutrality Standards and Assessment—(§ 246.12(g)(4)(i)(D))

Under § 246.12(g)(4)(i)(D) of the interim rule, the State agency is required to ensure that the prices of above-50-percent vendors do not result in higher total food costs if program participants transact their food instruments at above-50-percent vendors rather than at other vendors that do not meet the above-50-percent criterion. (These other vendors were referred to as "regular vendors.") The State agency must not permit the average cost of each type of food instrument redeemed by above-50-percent vendors to exceed the average cost of the same type of food instrument redeemed by regular vendors; the State agency must compute statewide average costs per food instrument at least quarterly to monitor compliance with this requirement. In addition, § 246.12(g)(4)(i)(D) also requires that the average cost per food instrument must be weighted to reflect the relative proportion of food instruments redeemed by each category of vendors in the peer group system.

Under § 246.12(g)(4)(vi) of the interim rule, which concerned FNS certification of State agency vendor cost containment systems, a State agency is required to demonstrate to FNS that its competitive price criteria and allowable reimbursement levels did not result in average payments per food instrument to above-50-percent vendors that are higher than average payments per food instrument to comparable vendors that are not above-50-percent vendors. The commenters who opposed the statewide average requirement of § 246.12(g)(4)(i)(D) supported the comparable vendor average requirement of § 246.12(g)(4)(vi). The term "comparable vendor" refers to the regular vendors which share common characteristics or criteria with above-50-percent vendors that affect food prices, as determined by the State agency, for the purpose of applying appropriate competitive price criteria to vendors at authorization and limiting payments for food to competitive levels.

Twenty-four commenters supported the requirement that the average redemption amount per food instrument for all above-50-percent vendors must not exceed the average redemption amount per food instrument of all regular vendors statewide. Thirty-six commenters opposed it. The opponents stated that this provision exceeded the intent of section 17(h)(11)(A)(i)(III)(bb) of the CNA, which requires State agencies to establish competitive price criteria and allowable reimbursement levels which do not result in higher food costs if participants transact food instruments with above-50-percent vendors rather than regular vendors. These commenters stated that cost neutrality for above-50-percent vendors should be based on the peer group average per food instrument, not the statewide average of all regular vendors per food instrument, since the statewide average does not take into account pricing differences based on location (*e.g.,* rural/urban) or type of vendor (*e.g.,* large/small/military commissaries/supercenter stores).

One of these commenters pointed out that section 17(h)(11)(A)(i)(III)(bb) of the CNA requires that food costs not be higher if participants use their food instruments with above-50-percent vendors than with regular vendors, unlike section 17(h)(11)(E) of the CNA, which requires that above-50-percent vendors not be paid more on average per food instrument than comparable regular vendors. According to this commenter, the absence of the average payment per food instrument language in section 17(h)(11)(A)(i)(III)(bb) shows that Congress intended to permit State agencies the discretion to consider participant preferences for above-50-percent vendors or other factors that may affect the different redemption levels of above-50-percent vendors in comparison to regular vendors. This commenter also stated that the final rule should include the statement in section 17(h)(11) of the CNA to the effect that the cost containment requirements may not be construed to compel a State agency to achieve lower food costs if participants transact WIC food instruments with above-50-percent vendors rather than regular vendors.

FNS does not agree with these comments. Section 17(h)(11)(A)(i)(III)(bb) of the CNA does not distinguish between vendors based on size or location, and does not provide discretion based on participant preferences or other factors. Such interpretations would undermine the point of this provision—that above-50-percent vendors must be cost neutral in comparison to all other retail vendors. Indeed, such interpretations would make this provision little different from section 17(h)(11)(E), which allows for distinctions based on comparability. Instead, the CNA requires above-50-percent vendors to be cost-neutral with respect to both comparable vendors and all other retail vendors. Moreover, the interim rule did not compel State agencies to achieve lower food costs if participants transact WIC food instruments with above-50-percent vendors rather than regular vendors, and thus a statement to this effect is not needed in the final rule.

Twelve commenters stated that Congress did not intend to put above-50-percent vendors out of business. However, the purpose of the interim rule was not to put above-50-percent vendors out of business. Instead, the interim rule intended to make above-50-percent vendors cost-neutral in comparison to regular vendors, both with respect to peer groups and all regular vendors statewide, as required by the CNA. Ensuring the availability of funds to serve program participants is the paramount consideration. Therefore, the cost neutrality standard remains as set forth in the interim rule.

Weighting

Paragraph 246.12(g)(4)(i)(D) of the interim rule required the average cost per food instrument to be weighted to reflect the relative proportion of food instruments redeemed by each category of vendors in the peer group system. As discussed in the preamble of the interim rule, a weighted average enables the State agency to take into account the frequency with which vendors redeem food instruments of varying redemption amounts. If a State agency makes more payments to vendors that offer the lowest prices for WIC foods, a weighted average will reflect this fact more than a simple average. The weighted average correlates with WIC participants' shopping patterns by giving the most weight to redemption prices of stores with the largest number of WIC transactions. However, following issuance of the interim rule, FNS issued guidance making this requirement optional, pending the final rule, to prevent any administrative difficulties in determining the weighted average from interfering with the certification of State agency vendor cost containment systems as required by the statute. Only one State agency has chosen to use weighting.

Seven comments were submitted on weighting; three of these comments supported the weighting requirement, while four opposed it. Two of the supporting comments stated that the rationale for the weighting requirement, as set forth in the preamble of the interim rule, was sound. The third supporting comment stated that the weighting requirement and the adding of standard deviations to redemption averages would help to avoid price adjustments unfairly based only on exceeding a simple average. Three of the opponents, all State agencies, stated that the weighting requirement would greatly complicate cost neutrality calculations which had already required a significant expenditure of administrative funds to modify their Management Information Systems. These three State agencies and one other, also an opponent of this requirement, stated that weighting should be an option, not a mandate.

FNS agrees with these commenters; the use of weighting in cost neutrality calculations should be optional, not mandatory. This requirement is not necessary to implement the cost neutrality requirements of the CNA, and some State agencies feel it is administratively burdensome. However, as noted above, one State agency has chosen to use weighting. Accordingly, weighting has been made optional in § 246.12(g)(4)(i)(D) of the final rule.

Recoupment and Termination Based on Cost Neutrality Assessments

Paragraph 246.12(g)(4)(i)(D) of the interim rule required the State agency to conduct quarterly cost neutrality assessments to ensure that above-50-percent vendors are not paid on average per food instrument more than all regular vendors statewide. In the event that the above-50-percent vendors are paid more on average than the regular vendors, the State agency had to take action to ensure compliance, such as adjusting payment levels. This provision also states that such action may have included recouping excess payments and terminating the vendor agreements of vendors whose prices are least competitive and which are not needed to ensure participant access. FNS has reconsidered this issue and decided that State agencies must not recoup monies that were paid to a vendor for food instruments redeemed within the established maximum allowable reimbursement level for that vendor, in order to achieve cost neutrality. Likewise, since a State agency cannot recoup monies paid to a vendor for food instruments redeemed within the established maximum allowable reimbursement level for that vendor in order to achieve cost neutrality, it follows that a State agency may not terminate the vendor agreement of a vendor that redeemed food

instruments within the established maximum allowable reimbursement level for that vendor in order to achieve cost neutrality. Accordingly, the above-noted language in § 246.12(g)(4)(i)(D) of the interim rule which referred to the recoupment of monies and the termination of vendor agreements has been deleted in this final rule.

This does not preclude a State agency from making price adjustments to food instruments in accordance with § 246.12(h)(3)(viii) of this final rule and recouping amounts paid to the vendor above the established maximum allowable reimbursement level applicable to the vendor. This also does not preclude a State agency from terminating the vendor agreement of a vendor for failure to remain price-competitive in accordance with § 246.12(h)(3)(viii) of this final rule, *i.e.*, for failure to maintain shelf prices at levels acceptable for authorization, or for failure to submit food instruments for redemption within the established maximum allowable reimbursement level applicable to that vendor.

Partially-Redeemed Food Instruments

Fifteen commenters stated that partially-redeemed food instruments should not be included in cost neutrality determinations because above-50-percent vendors typically redeem all of the supplemental foods authorized for a food instrument while many regular vendors do not; a vendor providing all of the supplemental food authorized for a food instrument should not be held to a redemption level based on food instruments redeemed by other vendors for less than all of the supplemental food authorized for a food instrument. One of these commenters stated that State agencies should have the discretion to compensate for relative rates of partial redemption. FNS agrees that State agencies should be able to exclude partially-redeemed food instruments from the quarterly cost neutrality assessments.

However, the identification of partially-redeemed food instruments to be excluded must be based on an empirical methodology. For example, a State agency could exclude a food instrument because its purchase price is less than the total of the vendor's least expensive food items authorized for that food instrument. A sentence has been added to § 246.12(g)(4)(i)(D) in the final rule to allow a State agency to exclude partially-redeemed food instruments from a quarterly cost neutrality assessment if FNS approves the State agency's empirical methodology for identifying the partially-redeemed food instruments to be excluded.

Another sentence has been added to § 246.12(g)(4)(i)(D) in the final rule to clarify that a State agency may not exclude food instruments from the quarterly cost neutrality assessment based on a rate of partially-redeemed food instruments. A rate of partially-redeemed food instruments, such as a percentage of food instruments with the lowest purchase prices, might include food instruments which reflect a vendor's lower prices instead of partial redemptions. Also, a definition of "partially-redeemed food instrument" has been added to the definitions in § 246.2 to ensure there is a clear understanding of the meaning of this term.

Other Cost Neutrality

One commenter recommended that State agencies be permitted to review no more than 80 percent of the most commonly used food instruments to determine cost neutrality, excluding food instruments which are not redeemed very often. However, the CNA does not provide that a food instrument may be excluded from cost neutrality requirements based on how often food instruments for the same authorized supplemental foods are redeemed.

Another commenter stated that a State agency should be able to assess overall cost neutrality without the redemptions of competitively priced as well as noncompetitively priced above-50-percent vendors needed for participant access. FNS does not agree. The exclusion of the redemptions of noncompetitively priced above-50-percent vendors needed for participant access is intended to prevent the high prices of these above-50-percent vendors from jeopardizing the State agency's efforts to achieve overall cost neutrality, given these State agencies have little choice but to authorize these vendors. Since the prices of competitively priced above-50-percent vendors would not jeopardize the State agency's efforts to achieve overall cost neutrality, there is no reason for the exclusion of their prices, even though these vendors were needed for participant access.

Finally, two commenters recommended that quarterly cost neutrality assessments should not be required for State agencies which establish maximum allowable reimbursement levels for above-50-percent vendors based on the statewide average redemption amount of regular vendors per food instrument type. FNS does not agree, since the quarterly review mechanism would be needed to ensure this process is working effectively.

Exemption From Cost Neutrality Requirements

One commenter stated that a State agency should be granted an exemption from the cost neutrality requirements if the redemptions of above-50-percent vendors comprise less than five percent of total WIC redemptions, as long as the State agency has implemented measurable competitive pricing criteria and allowable reimbursement levels. Paragraph 246.12(g)(4)(v) states that a State agency may use a vendor cost containment approach other than a peer group system if the State agency determines that food instruments redeemed by above-50-percent vendors comprise less than five percent of the total WIC redemptions in the State in the fiscal year prior to a fiscal year in which the exemption is effective, and the State agency's alternative vendor cost containment system would be as effective as a peer group system and would not result in higher costs if program participants redeem food instruments at above-50-percent vendors rather than at regular vendors. (This provision also permits an exemption from peer group requirements for a State agency which chooses not to authorize above-50-percent vendors and meets certain other conditions.)

This provision is based on section 17(h)(11)(A)(ii) of the CNA, which permits an exemption from the peer group requirements if less than five percent of total WIC redemptions consist of above-50-percent vendor redemptions, and for other reasons. The CNA does not provide for exemptions from the cost neutrality requirements for above-50-percent vendors. This rule cannot establish an exemption from the cost neutrality requirements which is not permitted by the CNA.

4. Shelf Price Collection—(§ 246.12(g)(4)(ii)(B))

Paragraph 246.12(g)(4)(ii)(B) of the interim rule required the State agency to collect and monitor each vendor's shelf prices at least once every six months following authorization. FNS established this requirement to help State agencies to ensure the shelf prices of above-50-percent vendors do not exceed those of regular vendors at authorization, and to establish reimbursement levels for above-50-percent vendors, as required by § 246.12(g)(4)(i)(C); to ensure the State agency has sufficient data to assess the effectiveness of peer groups and competitive price criteria every three years, and to change a vendor's peer group placement when warranted, as

required by § 246.12(g)(4)(ii)(C); and to ensure vendors have not, subsequent to authorization, raised their shelf prices to a level that would exceed the competitive price selection criteria under which they were authorized, contrary to § 246.12(g)(4)(iii). Otherwise, State agencies would need to rely on redemption data alone to fulfill these requirements.

Two commenters supported the semiannual price collection requirement, but on the condition that this would not involve an administrative burden for vendors. Four commenters opposed this requirement. The opponents stated that comparing prices to redemptions semiannually is not useful and is burdensome. They stated that State agencies should be permitted to use other methodologies, such as comparing the redemption amounts of vendors in the same peer group, to ensure vendor shelf prices are appropriate. One of these commenters, a State agency, bases its competitive price criteria and maximum allowable reimbursement levels for above-50-percent vendors on the statewide redemption averages per food instrument type of the regular vendors, and thus states that § 246.12(g)(4)(i)(C) should be revised to provide State agencies with flexibility regarding the evaluation of the shelf prices of above-50-percent vendors as long as cost neutrality is achieved.

Another commenter stated that FNS should grant an exemption from the semiannual price collection requirement to a State agency using an efficient and effective alternative methodology for monitoring compliance with §§ 246.12(g)(4)(i)(C), (g)(4)(ii)(C), and (g)(4)(iii), and that collection of shelf prices should be required annually instead of every six months. FNS agrees that an exemption process should be available and has added this to § 246.12(g)(4)(ii)(B).

However, although a State agency may be able to demonstrate that an alternative monitoring process provides an efficient and effective means to ensure such compliance with §§ 246.12(g)(4)(i)(C), (g)(4)(ii)(C), and (g)(4)(iii), frequent collection of shelf prices may be needed for other reasons. Shelf price data collected at least semiannually may provide the only empirical basis for detecting and excluding partial redemptions from cost neutrality calculations. Further, some State agencies establish maximum allowable reimbursement levels based on shelf prices; such State agencies would also need frequent shelf price data. Thus such State agencies would probably not be eligible for an exemption on the basis that the frequent collection of price data is not needed.

Accordingly, the requirement in § 246.12(g)(4)(ii)(B) for State agencies to collect vendor shelf prices at least once every six months has been modified in the final rule to provide that FNS may grant an exemption from this requirement if a State agency demonstrates that its alternative methodology for monitoring vendor compliance with §§ 246.12(g)(4)(i)(C), (g)(4)(ii)(C), and (g)(4)(iii) is efficient and effective and if other State agency policies and procedures are not dependent on frequent collection of shelf price data. This exemption will remain in effect until the State agency no longer meets the conditions on which the exemption was based, until FNS revokes the exemption, or for three years, whichever occurs first.

5. Miscellaneous Issues Regarding Competitive Price Criteria and Maximum Allowable Reimbursement Levels—(§ 246.12(g)(4), (g)(4)(i)(D), (g)(4)(iii), and § 246.12(h)(3)(viii))

Six comments addressed a variety of issues and provisions of the interim rule concerning competitive price criteria and maximum allowable reimbursement levels.

Undercharges

One commenter stated that undercharges on the redemption amounts of food instruments should be subtracted from the vendor's redemption amounts on other food instruments which exceed maximum allowable amounts. However, this would be inconsistent with the definition of "price adjustment" in § 246.2, which refers to an adjustment to the purchase price on a food instrument, not on a group of food instruments. Moreover, an undercharge on a food instrument may indicate only that the prices charged for the food items covered by that food instrument resulted in a combined price which was within the maximum allowable reimbursement level for that food instrument. This is not truly an undercharge, since a maximum allowable reimbursement level is not the expected purchase price; rather, it is expected that the purchase price should be lower since the maximum allowable reimbursement level is the maximum amount which the State agency will pay for that food instrument. Thus, the submission of a food instrument with a purchase price below the maximum allowed amount does not offset the submission of another food instrument with a purchase price exceeding the maximum allowed amount.

Category Pricing

Two commenters objected to "category pricing," *i.e.*, a State agency establishing a price limit or maximum allowable reimbursement level for an entire food category, such as cereal, instead of allowing for the different prices of the various products within that category. One of these commenters stated that the State agency must be able to inform vendors of the price limit for each food product of a food category. The other commenter contended that it is unfair to require vendors to base their prices on a category of food product instead of individual food products, because this forces the vendors to adjust the prices on all of the food products in that food category for all customers. These commenters want such category pricing to be prohibited or limited.

However, this would infringe on the flexibility which FNS wants the State agencies to retain. The State agency needs the flexibility to balance vendor cost containment and fairness to the vendor. Some State agencies determine the per product price limit by averaging the high and low prices for the different products of a food product category; other State agencies base the per product price limit on the highest price of the different products of a food category.

Exclusion of Above-50-Percent Vendor Prices From Determinations of Maximum Allowable Reimbursement Levels

One commenter contended that it is unfair to exclude the food prices of above-50-percent vendors from the determination of peer group maximum allowable reimbursement levels. However, section 17(h)(11)(A)(i)(III) of the CNA clearly requires the State agency to distinguish between above-50-percent vendors and regular vendors by either establishing separate peer groups for above-50-percent vendors, or distinct competitive price criteria and maximum allowable reimbursement levels for above-50-percent vendors within a peer group which also contains regular vendors. Likewise, section 17(h)(11)(E) of the CNA states that a State agency must demonstrate, in order to obtain certification for its vendor cost containment system, that the competitive price criteria and maximum allowable reimbursement levels do not result in higher payments per food instrument for above-50-percent vendors than for regular vendors. To comply with these provisions, the food prices of above-50-percent vendors must not be included in the determination of peer group maximum allowable

reimbursement levels. Accordingly, unchanged from the interim rule, § 246.12(g)(4)(i)(D) of this final rule requires State agencies to ensure the prices of above-50-percent vendors do not inflate the competitive price criteria and allowable reimbursement levels of peer groups consisting of both above-50-percent and regular vendors.

Necessity for Maximum Allowable Reimbursement Levels When Competitive Price Criteria Have Been Met

One commenter stated that the redemption amounts of a vendor which meets competitive price criteria should logically not exceed maximum allowable reimbursement levels, and thus should not be subject to price adjustments. This commenter also suggested the use of weighting or standard deviations may be more likely to result in fair maximum allowable reimbursement levels. This commenter and one other commenter both viewed the price adjustments applied to the food instruments of regular vendors as excessive. The coordination of competitive price criteria and maximum allowed amounts is an ongoing process. Paragraph 246.12(g)(4)(iii) of the interim rule, adopted by this final rule, states that the State agency must establish procedures to ensure a vendor selected for participation in the program does not, subsequent to selection, increase prices to levels that would make the vendor ineligible for authorization. Also, § 246.12(h)(3)(viii) states that as part of the redemption procedures, the State agency must establish and apply limits on the amount of reimbursement allowed for food instruments based on a vendor's peer group and competitive price criteria, and that in setting allowable reimbursement levels, the State agency may include a factor to reflect fluctuations in wholesale prices.

It does not follow that meeting competitive price criteria should guarantee that price adjustments need not occur. Vendor prices change over time, so that maximum allowable reimbursement levels will also change over time. Per § 246.12(h)(1)(i), vendor agreement periods may not exceed three years; meeting competitive price criteria at the beginning of an agreement period does not ensure a vendor will continue to do so throughout the agreement period. State agencies typically use standard deviations or a percentage inflator to account for a reasonable variation in the prices charged by the vendors in the same peer group. FNS agrees with the commenter that such methods will help to ensure price adjustments are fair.

Maximum Allowable Reimbursement Levels That Allow Participants To Purchase All of the Prescribed Foods

One commenter recommended that the statement in the preamble of the interim rule that a State agency must set maximum allowable reimbursement levels that allow WIC participants to purchase all of the foods prescribed on the food instrument from any authorized vendor be included in § 246.12(g)(4) and (h)(3)(viii). While FNS continues to support this statement, there is no need to include it in the Federal WIC Regulations. FNS believes this statement is self-evident. The WIC Program is a nutrition program. If the participant cannot purchase all of the food authorized by a food instrument, then the program's goal of enhancing the nutrition of the participant is undermined.

6. Participant Access Criteria (§ 246.12(g)(4))

Paragraph 246.12(g)(4) of the interim rule stated that in establishing competitive price criteria and allowable reimbursement levels, the State agency must consider participant access by geographic area. One commenter recommended that FNS revise § 246.12(g)(4) by adding a sentence stating that geographic determinations regarding participant access must be narrowly tailored to ensure that participants have reasonable access to authorized vendors, including vendors offering exempt formula. The commenter noted that this added statement would better assure participant access currently jeopardized by redemption difficulties, the stigma resulting from redemption difficulties, lack of transportation, and difficulties encountered by participants attempting to obtain exempt formula. The commenter suggests above-50-percent vendors should be authorized without competitive price criteria and maximum allowable reimbursement levels since these vendors are needed to address these forms of inadequate participant access.

FNS does not agree with this comment. FNS recognizes that such barriers to participation exist. It does not follow, however, that authorization of above-50-percent vendors is the only answer. A State agency may, for example, intensify its training and monitoring of vendors to reemphasize stock requirements and the proper handling of food instruments at the cash register. Indeed, vendors may be terminated per § 246.12(g)(3) or sanctioned per § 246.12(l)(2) based on such deficiencies. In one innovative effort, a State agency contracted with a faith-based health and human service agency to provide direct distribution of supplemental foods to participants through eighteen sites in a large city. Moreover, the high prices frequently charged by above-50-percent vendors authorized to ensure participant access would reduce the program's ability to provide benefits to participants. Thus State agencies should explore all alternatives for addressing such participant access issues.

FNS is not aware of a participant access problem regarding exempt infant formula. Moreover, State agencies need not rely on retail food vendors for providing exempt infant formula to participants; State agencies may authorize pharmacies for this purpose, and many State agencies do so. Further, State agencies may order exempt formula from the manufacturer or from wholesalers such as, for example, a non-profit organization which currently provides exempt infant formula to participants in six States. Therefore, the participant access criteria in the final rule remains as set forth in the interim rule.

7. The Geographic Requirement for Peer Groups (§ 246.12(g)(4)(ii)(A))

Paragraph 246.12(g)(4)(ii)(A) of the interim rule required State agencies include at least two criteria for establishing peer groups, one of which must be a measure of geography, such as metropolitan or other statistical areas that form distinct labor and products markets, unless the State agency receives FNS approval to use a single criterion. Four comments addressed this requirement; one of these comments supported this requirement, two opposed it, and one supported it conditionally.

One of the opposing comments expressed doubt that geography is a reliable indicator of pricing, particularly for small vendors, and that the use of geographic criteria results in peer groups with small numbers of vendors; this commenter stated that further study is needed. The other opposing commenter noted that several studies conducted by WIC State agencies have shown that geographic location is not a key ingredient in pricing.

The comment conditionally supporting the requirement stated that the geographic component of peer groups should conform to vendor pricing zones or commonly accepted geographic regions. The comment supporting the geographic requirement stated that geographic zones alone were sufficient for vendor cost containment in one State.

FNS is not persuaded that the geographic requirement should be removed. Further study and experience may result in reconsideration of this requirement. In the meantime, § 246.12(g)(4)(ii)(A) of the final rule provides a mechanism for obtaining an exemption from this requirement. Thus far, only 10 State agencies have requested an exemption from this requirement, suggesting most State agencies are also not persuaded that the geographic requirement should be removed. The exemption alternative is available for State agencies which learn through study or experience that the geographic component is not conducive for vendor cost containment in their circumstances. All 10 of the requests which have thus far been made for this exemption have been granted. Thus the existing exemption mechanism is sufficient for ensuring the geographic peer group requirement is not imposed in inappropriate circumstances. Therefore, the geographic requirement for peer groups is adopted as final without change.

8. Peer Group Transparency (§ 246.12(g)(4))

Two commenters stated that the peer group process needs to be transparent. They stated that State agencies should ensure key information is available to vendors, including peer group criteria and the resulting peer groups, to ensure that vendors understand their peer groups and can advise the State agency if the peer group is inappropriate. One of these commenters cited an example of a State agency which allegedly had not provided this information. According to this comment, the State agency provided the vendors with a description of the peer groups, including a listing of the vendor types, geographic locations, and number of cash registers for each peer group. As part of this description, the State agency published a chart listing the counties included in each geographic area. The commenter then contacted the State agency for clarification about how the geographic areas had been created, which had not been published. The State agency then explained the basis for the geographic areas to the commenter. The comment stated that this explanation should have been published.

Thus the State agency had published the peer group criteria, but had not, in the commenter's opinion, published an adequate explanation for the basis of one of its criteria. FNS believes this State agency's publication of its peer group criteria was adequate, and that the State agency should not be required to publish explanations for its criteria. The State agency is responsible for establishing the peer group criteria, subject only to FNS approval. The State agency needs to inform the vendor of the peer group criteria which will determine how the State agency calculates the maximum allowable reimbursement amounts applicable to the vendor. FNS encourages State agencies to consider the views of vendors during the development of such criteria, such as in vendor advisory councils, but this does not necessarily involve publication. State agencies have been advising vendors of their peer group assignments and the peer group criteria, but, for added assurance, a sentence has been added to § 246.12(g)(4) in this final rule to state that the State agency must inform all vendors of the criteria for peer groups, and must inform each individual vendor of its peer group assignment.

Providing vendors with a description of the peer groups resulting from use of the criteria does not include a listing of the individual vendor peer group assignments. State agencies must not share the peer group assignment of a vendor with other vendors or their representatives or the public, since this would violate vendor confidentiality per § 246.26(e).

9. Administrative Review of Peer Group Designation and Above-50-Percent Status (§ 246.18(a)(1)(iii)(B))

One commenter stated that a vendor should be able to appeal peer group assignments because a vendor may be eligible for different peer groups in a State using multiple criteria, *e.g.*, a vendor might qualify for one peer group based on the number of cash registers, and also qualify for another peer group based on sales volume; an opportunity to appeal would provide the vendor with an opportunity to provide information ensuring the peer group assignment is equitable. FNS agrees. Paragraph 246.18(a)(1)(iii)(B) of the interim rule stated that the validity or appropriateness of the State agency's vendor peer group criteria and the criteria used to identify vendors that are above-50-percent vendors or comparable to above-50-percent vendors are not subject to administrative review.

This provision does not preclude administrative review regarding the application of the State agency's peer group and above-50-percent vendor status criteria to an individual vendor when this application of criteria is the basis for adverse actions (denial of authorization and termination of a vendor agreement for cause). For example, administrative review of such adverse actions could cover whether the State agency had considered all of the SNAP-eligible food sales documentation for the 12-month period used by the State agency to determine a vendor's above-50-percent status, or whether the State agency had used the correct square footage of the store if such criteria is used by the State agency to determine peer group designations for vendors, although such issues would only be subject to administrative review under the current regulations if the State agency had initiated an adverse action as a result of the application of this criteria.

A vendor should be able to seek administrative review regarding the State agency's peer group assignment or above-50-percent vendor status determination for that vendor even though a vendor has not been denied authorization or terminated. The peer group assignment and above-50-percent vendor status determination play crucial roles in the calculation of the maximum allowable reimbursement levels applied to a vendor, i.e., the level of compensation which a vendor will receive upon redemption of food instruments. Thus the peer group assignment and above-50-percent vendor status determination have a major and immediate economic impact on the vendor. Previously, the adverse actions subject to administrative review included only denials of authorization, terminations of vendor agreements for cause, disqualifications, and civil money penalties and fines. Given the economic impact of peer group assignments and above-50-percent vendor status determinations, these actions are included under § 246.18(a)(1)(ii)(C) of this final rule as adverse actions by themselves. However, given the narrow factual focus of such issues, full administrative reviews per § 246.18(a)(1)(i) would not be necessary; abbreviated administrative reviews per § 246.18(a)(1)(ii) would be sufficient.

The peer group assignment and above-50-percent vendor status determination also play crucial roles in the calculation of the competitive price levels which will determine whether an applicant vendor is eligible for authorization under the competitive price criteria. Paragraph 246.18(a)(1)(iii)(A) of the WIC regulations states that the validity or appropriateness of the State agency's vendor limiting or selection criteria are not subject to administrative review. Thus administrative review for competitive price criteria other than peer group assignments and above-50-percent vendor status determinations

are also limited to the application of such criteria and also have a narrow factual focus, such as the percentage or number of standard deviations above a peer group's average prices permitted for an applicant vendor's prices in order for the vendor to be authorized. Therefore, this final rule includes a new § 246.18(a)(1)(ii)(B) which will provide abbreviated administrative review for appeals concerning the application of any competitive price criteria which results in the denial of authorization. Paragraph 246.12(g)(4)(vii) of the interim rule indicated that the competitive pricing provisions of § 246.12(g)(4) do not create a private right of action based on facts that arise from the impact or enforcement of these provisions. Paragraph 246.12(g)(4)(vii) was not intended to prevent a vendor from obtaining administrative review concerning the application of a competitive price criterion. However, the reference to facts that arise from the impact or enforcement of the competitive price provisions might be misinterpreted to prevent such administrative review. Thus the reference to facts that arise from the impact or enforcement of the competitive price provisions has been removed from § 246.12(g)(4)(vii) of this final rule.

As pointed out above in connection with the transparency of peer group criteria, State agencies must not share the peer group assignment of a vendor with other vendors, their representatives or the public, since this would violate vendor confidentiality per § 246.26(e) of the WIC regulations. Thus vendors would not be entitled to such information as part of the administrative review process.

This final rule also includes conforming revisions of § 246.18(a)(1). The final rule deletes the application of competitive price criteria from § 246.18(a)(1)(i)(A), which previously included the application of competitive price criteria as subject to full administrative review. Additionally, the final rule revises the references in § 246.18(a)(1) to paragraphs of § 246.12(g) to correspond with the revisions of § 246.12(g) introduced by the interim rule and retained in this final rule.

List of Subjects in 7 CFR Part 246

Food assistance programs, Food donations, Grant programs—Social programs, Infants and children, Maternal and child health, Nutrition education, Public assistance programs, WIC, Women.

■ Accordingly, the interim rule amending 7 CFR part 246 which was published on November 29, 2005 at 70 FR 71708 is adopted as final with the following changes:

PART 246—SPECIAL SUPPLEMENTAL NUTRITION PROGRAM FOR WOMEN, INFANTS AND CHILDREN

■ 1. The authority citation for part 246 continues to read as follows:

Authority: 42 U.S.C. 1786.

■ 2. In § 246.2, add in alphabetical order the definition of *partially-redeemed food instrument*, to read as follows:

§ 246.2 Definitions.

* * * * *

Partially-redeemed food instrument means a paper food instrument which is redeemed for less than all of the supplemental foods authorized for that food instrument.

* * * * *

■ 3. In § 246.12:

■ a. Paragraph (g)(4) is amended by adding a new sentence to the end of the introductory text;

■ b. Paragraph (g)(4)(i), end of the second sentence is amended by adding the words ", in accordance with paragraphs (g)(4)(i)(E) and (g)(4)(i)(F) of this section.";

■ c. Paragraph (g)(4)(i)(D), third sentence is amended by revising the word "must" to read "may"; the fifth sentence by removing the words ", recouping excess payments, or terminating vendor agreements with above-50-percent vendors whose prices are least competitive and that are not needed to ensure participant access"; and by adding two sentences at the end of the paragraph.

■ d. Add new paragraphs (g)(4)(i)(E) and (F);

■ e. Revise paragraph (g)(4)(ii)(B); and

■ f. Paragraph (g)(4)(vii) is amended by removing the words "based on facts that arise from the impact or enforcement of these provisions".

The additions and revision read as follows:

§ 246.12 Food delivery systems.

* * * * *

(g) * * *

(4) * * * The State agency must inform all vendors of the criteria for peer groups, and must inform each individual vendor of its peer group assignment.

(i) * * *

(E) Must determine whether vendor applicants are expected to be above-50-percent vendors. The State agency must ask vendor applicants whether they expect to derive more than 50 percent of their annual revenue from the sale of food items from transactions involving WIC food instruments. This question applies whether or not the State agency chooses to authorize above-50-percent vendors. A vendor who answers in the affirmative must be treated as an above-50-percent vendor. The State agency must further assess a vendor who answers in the negative, by first calculating WIC redemptions as a percent of total food sales in existing WIC-authorized stores owned by the vendor applicant. Second, the State agency must calculate or request from the vendor applicant the percentage of anticipated food sales by type of payment, *i.e.*, cash, Supplemental Nutrition Assistance Program, WIC, and credit/debit card. Third, the State agency must review either the inventory invoices for food items, or the actual food items present at the preauthorization visit required by paragraph (g)(5) of this section, or both. Fourth, the State agency must determine whether WIC authorization is required in order for the store to open for business. If the vendor would be expected to be an above-50-percent vendor under any of these criteria, then the vendor must be treated as an above-50-percent vendor. State agencies may use additional data sources and methodologies, if approved by FNS.

(F) Must determine whether a currently authorized vendor meets the above-50-percent criterion, based on the State agency's calculation of WIC redemptions as a percent of the vendor's total foods sales for the same period. If WIC redemptions are more than 50 percent of the total food sales, the vendor must be deemed to be an above-50-percent vendor. As an initial step in identifying above-50-percent vendors, the State agency may compare each vendor's WIC redemptions to Supplemental Nutrition Assistance Program redemptions for the same period. If more than one WIC State agency authorizes a particular vendor, then each State agency must obtain and add the WIC redemptions for each State agency that authorizes the vendor to derive the total WIC redemptions. If Supplemental Nutrition Assistance Program redemptions exceed WIC redemptions, no further assessment is required since the vendor would not be an above-50-percent vendor. For vendors whose WIC redemptions exceed their Supplemental Nutrition Assistance Program redemptions, or if this comparison of redemptions was not made, the State agency must obtain from these vendors a statement of the total amount of revenue derived from the sale of foods that could be purchased using

Supplemental Nutrition Assistance Program benefits. The State agency must also obtain from these vendors documentation (such as tax documents or other verifiable documentation) to support the amount of food sales claimed by the vendor. After evaluating the documentation received from the vendor, the State agency must calculate WIC redemptions as a percent of total food sales and classify the vendor as meeting or not meeting the above-50-percent criterion. State agencies may use additional methods, if approved by FNS.

(ii) * * *

(B) Routine collection of vendor shelf prices at least every six months following authorization to monitor vendor compliance with paragraphs (g)(4)(i)(C), (g)(4)(ii)(C), and (g)(4)(iii) of this section and to ensure State agency policies and procedures dependent on shelf price data are efficient and effective. FNS may grant an exemption from this shelf price collection requirement if the State agency demonstrates to FNSs' satisfaction that an alternative methodology for monitoring vendor compliance with paragraphs (g)(4)(i)(C), (g)(4)(ii)(C), and (g)(4)(iii) of this section is efficient and effective and other State agency policies and procedures are not dependent on frequent collection of shelf price data. Such exemption would remain in effect until the State agency no longer meets the conditions on which the exemption was based, until FNS revokes the exemption, or for three years, whichever occurs first;

* * * * *

■ 4. In § 246.18:

■ a. Revise paragraph (a)(1)(i)(A);

■ b. Paragraph (a)(1)(ii)(A) is amended by revising "(§ 246.12(g)(3)(iii) and (g)(3)(iv))" to read "(§ 246.12(g)(3)(ii) and (g)(3)(iii))";

■ c. Redesignate paragraphs (a)(1)(ii)(B) through (a)(1)(ii)(J) as paragraphs (a)(1)(ii)(D) through (a)(1)(ii)(L), and add new paragraphs (a)(1)(ii)(B) and (a)(1)(ii)(C).

■ d. In newly redesignated paragraph (a)(1)(ii)(F), revise "§ 246.12(g)(7)" to read "§ 246.12(g)(8)";

■ e. Revise paragraphs (a)(1)(iii)(A) and (a)(1)(iii)(B).

The revisions and additions read as follows:

§ 246.18 Administrative review of State agency actions.

(a) * * *

(1) * * *

(i) * * *

(A) Denial of authorization based on the application of the vendor selection criteria for minimum variety and quantity of authorized supplemental foods (§ 246.12(g)(3)(i)), or on a determination that the vendor is attempting to circumvent a sanction (§ 246.12(g)(6));

* * * * *

(ii) * * *

(B) Denial of authorization based on the application of the vendor selection criteria for competitive price (§ 246.12(g)(4));

(C) The application of the State agency's vendor peer group criteria and the criteria used to identify vendors that are above-50-percent vendors or comparable to above-50-percent vendors;

* * * * *

(iii) * * *

(A) The validity or appropriateness of the State agency's vendor limiting criteria (§ 246.12(g)(2)) or vendor selection criteria for minimum variety and quantity of supplemental foods, business integrity, and current Supplemental Nutrition Assistance Program disqualification or civil money penalty for hardship (§ 246.12(g)(3));

(B) The validity or appropriateness of the State agency's selection criteria for competitive price (§ 246.12(g)(4)), including, but not limited to, vendor peer group criteria and the criteria used to identify vendors that are above-50-percent vendors or comparable to above-50-percent vendors;

* * * * *

Dated: September 30, 2009.

Kevin W. Concannon,

Under Secretary for Food, Nutrition, and Consumer Services.

[FR Doc. E9–24143 Filed 10–7–09; 8:45 am]

BILLING CODE 3410–30–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 25

[Docket No. NM403; Special Conditions No. 25–385–SC]

Special Conditions: Boeing Model 747–8/–8F Airplanes, Structural Design Requirements for Four-Post Main Landing Gear System

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final special conditions.

SUMMARY: These special conditions are issued for the Boeing Model 747–8/–8F airplane. This airplane will have novel or unusual design features associated with a four-post main landing gear system. The applicable airworthiness regulations do not contain adequate or appropriate safety standards for this design feature. These special conditions contain the additional safety standards that the Administrator considers necessary to establish a level of safety equivalent to that established by the existing airworthiness standards.

DATES: *Effective Date:* November 9, 2009.

FOR FURTHER INFORMATION CONTACT: Mark Freisthler, FAA, Airframe & Cabin Safety Branch, ANM–115, Transport Airplane Directorate, Aircraft Certification Service, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 227–1119; facsimile (425) 227–1149.

SUPPLEMENTARY INFORMATION:

Background

On November 4, 2005, The Boeing Company, P.O. Box 3707, Seattle, WA 98124, applied for an amendment to Type Certificate Number A20WE to include the new Model 747–8 passenger airplane and the new Model 747–8F freighter airplane. The Model 747–8 and the Model 747–8F are derivatives of the 747–400 and the 747–400F, respectively. Both the Model 747–8 and the Model 747–8F are four-engine jet transport airplanes that will have a maximum takeoff weight of 970,000 pounds and new General Electric GEnx–2B67 engines. The Model 747–8 will have two flight crew and the capacity to carry 660 passengers. The Model 747–8F will have two flight crew and a zero passenger capacity, although Boeing has submitted a petition for exemption to allow the carriage of supernumeraries.

Type Certification Basis

Under the provisions of 14 CFR 21.101, Boeing must show that the Model 747–8 and 747–8F (hereafter referred as 747–8/–8F) meet the applicable provisions of part 25, as amended by Amendments 25–1 through 25–117, except for earlier amendments as agreed upon by the FAA. These regulations will be incorporated into Type Certificate No. A20WE after type certification approval of the 747–8/–8F.

In addition, the certification basis includes other regulations, special conditions and exemptions that are not relevant to these special conditions. Type Certificate No. A20WE will be updated to include a complete description of the certification basis for these model airplanes.

If the Administrator finds that the applicable airworthiness regulations (*i.e.,* 14 CFR part 25) do not contain adequate or appropriate safety standards for the 747–8/–8F because of a novel or

unusual design feature, special conditions are prescribed under the provisions of § 21.16.

In addition to the applicable airworthiness regulations and special conditions, the 747–8/–8F must comply with the fuel vent and exhaust emission requirements of 14 CFR part 34 and the noise certification requirements of 14 CFR part 36.

Special conditions, as defined in 14 CFR 11.19, are issued under § 11.38, and become part of the type certification basis under § 21.101.

Special conditions are initially applicable to the model for which they are issued. Should the type certificate for that model be amended later to include any other model that incorporates the same or similar novel or unusual design feature, or should any other model already included on the same type certificate be modified to incorporate the same or similar novel or unusual design feature, the special conditions would also apply to the other model under § 21.101.

Novel or Unusual Design Features

The Boeing Model 747–8/–8F airplane will incorporate the following novel or unusual design features: A four-post main landing gear system with two wing main landing gears and two body main landing gears.

Discussion

The Boeing Model 747–8/–8F airplane will retain the landing gear arrangement which is unique to the 747 family of airplanes. The conventional arrangement for the main landing gear of transport category airplanes is two-underwing posts. The 747 was the first to introduce a four-post main landing gear arrangement, two underwing posts supplemented by two body posts. This arrangement was adopted to accommodate the then unprecedented increased weight and size of the Model 747 airplane.

Existing regulations are written to address the conventional landing gear configuration commonly found on transport category airplanes. This being the case, they are not appropriate to address the unique features of the Boeing 747 design. The increased number of posts alters the load distribution between the gear units during landing and ground handling conditions addressed by the regulations. This arrangement also loads the airframe differently than conventional landing gear designs. The FAA determined that, while the general conditions addressed by §§ 25.473 and 25.479 through 25.485 were still applicable, specific details contained in these regulations may not be directly relatable to the four-post arrangement.

In 1968 the FAA issued Special Condition A–4 to address the ground load requirements for the main landing gear system for Boeing Model 747–100 series airplanes. That special condition provided clarification on the applicability of §§ 25.473 and 25.479 through 25.485 to the Model 747 airplane. In 1971 Special Condition A–4 was amended to address Boeing Model 747 airplanes with the landing gear load evener system deleted or made inoperable.

The FAA has determined that Special Condition A–4 is applicable to the 747–8/–8F series airplanes, provided that all the applicable part 25 regulations cited in Special Condition A–4 (recorded as an enclosure to FAA Letter WE–120/8110 (CT3488WE–D) to the Boeing Company, dated May 12, 1971) are upgraded to the latest amendment level (*i.e.,* 25–117). Furthermore, as several of these regulations have been updated or consolidated, and acceptable methods of compliance have been described for some of these regulations via advisory circular (AC), new special conditions are needed to clarify the applicable requirements. By updating these special conditions, we are ensuring that the Boeing design provides an equivalent level of safety to conventional landing gear meeting these regulations.

Discussion of Comments

Notice of proposed special conditions No. 25–09–05–SC for the Boeing Model 747–8/–8F airplanes was published in the **Federal Register** on April 27, 2009 (74 FR 19023). Airbus, an original equipment manufacturer, provided several specific comments.

Airbus suggested that certain special conditions be revised to follow the intent of rule changes and guidance recommended by the Aviation Rulemaking Advisory Committee (ARAC). This committee, comprised of representatives from industry and the regulatory authorities, developed recommendations that would revise many of the ground load requirements in 14 CFR 25.

While the FAA agrees with the ARAC recommendations, those recommendations have not yet been adopted into 14 CFR 25. Therefore, evaluation of the ARAC recommendations is not required per § 21.101, *Designation of applicable regulations* (the Changed Product Rule). Furthermore, the FAA does not believe that there is any safety concern that requires application of the ARAC recommendations. On past programs, the FAA has only applied parts of the ARAC recommendations, either by equivalent safety findings or by special conditions, and only when requested by an applicant. Even in those cases, the updated requirements have not been used in their entirety.

As previously indicated, the proposed special condition was derived from the original 747 special condition and was updated to the latest amendment level. The service history of the 747 landing gear design indicates that the original special condition provides adequate design requirements. Furthermore, the landing gear design has not been significantly changed for the 747–8/–8F. Finally, the proposed special condition is an improvement on the original as it takes into account numerous updates to the rules and guidance material it references.

Airbus proposed the following specific changes:

1. The special conditions require consideration of the effects of runway crown for *ground handling conditions,* as defined in § 25.511(b)(4). Airbus suggested that these effects should also be considered for *landing conditions* as specified in the ARAC recommendations.

FAA Response: While the ARAC recommendations represent an improvement in design standards, we do not believe consideration of runway crown is necessary. Furthermore, the FAA has not mandated this requirement on any other program.

2. The special conditions include the following: "The level landing criteria of § 25.479 are directly applicable. The four main landing gear units must be assumed to contact the ground with the airplane longitudinal axis in a horizontal attitude." Airbus suggested that the second sentence is in conflict with the first, and that the conditions specified in the ARAC recommendations should be used.

FAA Response: The second sentence is intended to clarify how § 25.479 is applied to the 747 design, which is not envisaged by the current requirement. The FAA has not mandated the level landing requirement from the ARAC recommendations on any other program.

3. The special conditions include: "The criteria of § 25.495 (ground turning loads) are directly applicable." Airbus suggests it is not correct to state that these criteria are directly applicable and that it would be more appropriate to apply the rational analysis described in the ARAC recommendations.

FAA Response: We believe that application of this requirement can be directly applied, as has been done on previous 747 designs, and that such application is sufficiently conservative.

4. With regard to the shock absorption test requirements of § 25.723, Airbus suggested that the test conditions be expanded as specified in the ARAC recommendations.

FAA Response: We do not believe that using the latest ARAC recommendations is necessary, nor has this requirement been mandated on any other program to date.

Applicability

As discussed above, these special conditions are applicable to the Boeing Model 747–8/–8F airplanes. Should Boeing apply at a later date for a change to the type certificate to include another model incorporating the same novel or unusual design features, these special conditions would apply to that model as well under the provisions of § 21.101.

Conclusion

This action affects only certain novel or unusual design features of the Boeing Model 747–8/–8F airplanes. It is not a rule of general applicability.

List of Subjects in 14 CFR Part 25

Aircraft, Aviation safety, Reporting and recordkeeping requirements.

■ The authority citation for these special conditions is as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701, 44702, 44704.

The Special Conditions

■ Accordingly, pursuant to the authority delegated to me by the Administrator, the following special conditions are issued as part of the type certification basis for the Boeing Model 747–8/–8F airplanes.

The requirements of §§ 25.471, 25.473, and 25.479 through 25.485 apply as follows:

1. *General.* The general design criteria of § 25.471 are directly applicable. The basic landing gear dimensional data must be expanded to include the additional main landing gear units.

2. *Ground Load Conditions and Assumptions.* The criteria specified in § 25.473 are applicable for the design landing conditions except as noted in paragraph 6 of these special conditions.

3. *Landing Gear Arrangement.* The multiple oleo main landing gear configuration does not meet the "conventional arrangement" criterion of § 25.477, with respect to the application of paragraphs 4 through 7 of this special condition. Nevertheless, the landing impact design conditions must meet the intent of §§ 25.473 through 25.485.

4. *Level Landing Conditions.* The level landing criteria of § 25.479 are directly applicable. The four main landing gear units must be assumed to contact the ground with the airplane longitudinal axis in a horizontal attitude.

5. *Tail-Down Landing Conditions.* The airplane must be assumed to contact the ground in any tail down attitude between level and the maximum tail down attitude allowing clearance with the ground of each part of the airplane other than the main landing gear wheels. The airplane forward velocity component must be the most critical value from V_{L1} to 1.25 V_{L2} where V_{L1} and V_{L2} are defined in § 25.481. Each main landing gear unit must be designed for its most critical combination of vertical load and drag load. All other criteria in § 25.481, not superseded by the above criteria shall be directly applicable. The distribution of loads between the gear units for the effects of critical combinations of spin-up and spring-back loadings on the main landing gear units must be considered for the gear units and their supporting structure.

6. *One-Wheel Landing Conditions.* Unless the airplane and landing gears are designed for equivalent or more critical conditions, the airplane will be assumed to land in a level pitch attitude at design landing weight with a descent velocity of 7 fps at the maximum roll angle attainable within the geometric limitations of the airplane with the contact velocities and gear landing conditions of §§ 25.479(a), (c) and (d).

Note: This condition need not be coupled with either a 6 fps landing at maximum take off weight or a 12 fps reserve energy drop test.

7. *Side Load Conditions.* On the main landing gear units, side loads of 80% of the vertical reaction (on one side) acting inward and 60% of the vertical reaction (on the other side) acting outward must be combined with one-half of the maximum vertical ground reactions obtained in the level landing, tail-down landing, or rolled attitude landing conditions. These loads shall be assumed applied at the ground contact point and to be resisted by the inertia of the airplane. Drag loads may be assumed to be zero.

8. *Rebound Landing Condition.* The criteria of § 25.487 are directly applicable.

9. *Ground Handling Conditions.* The criteria of § 25.489 are directly applicable. The effects of runway crown as defined in § 25.511(b)(4) shall be considered in distributing the loads to the individual main landing gear units. The ground reactions must be distributed to the individual landing gear units in a rational or conservative manner, accounting for airframe flexibility and shock strut and tire stiffness.

10. *Take-Off Run.* The criteria of § 25.491 are directly applicable. Compliance may be shown in accordance with Advisory Circular (AC) 25.491–1.

11. *Braked Roll Conditions.* The criteria of §§ 25.493(b), (c), and (d) shall be directly applicable. The formula in § 25.493(e) is not applicable to the B747 due to the 4-post gear arrangement.

12. *Turning.* The criteria of § 25.495 are directly applicable.

13. *Nose-Wheel Yaw.* The criteria of § 25.499 are directly applicable. The criteria are interpreted to apply braking to all main landing gear wheels on one side of the airplane centerline.

14. *Pivoting.* The criteria of § 25.503 are applied individually to each wing main landing gear unit. In addition, all main landing gear units must be designed for the scrubbing and/or torsion loads induced by pivoting about the most critical point consistent with the available main gear braking on one side of the airplane and the available thrust and torque on the airplane. Maximum static engine thrust must be considered only on the engines on the opposite side of the airplane centerline from the pivot point.

15. *Reversed Braking.* The criteria of § 25.507 are directly applicable, except that the phrase "three point" is expanded to include "five point."

16. *Towing Loads.* The criteria of § 25.509 are directly applicable.

17. *Fatigue Evaluation of Landing Gear.* The criteria of § 25.573 at Amendment 25–0 are directly applicable to main landing gear units.

18. *Shock Absorption Tests.* The criteria of § 25.723 are directly applicable. Compliance may be shown in accordance with AC 25.723–1.

19. Substantiation of the design criteria must include a dynamic taxi and landing analysis.

Issued in Renton, Washington, on September 29, 2009.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. E9–24339 Filed 10–7–09; 8:45 am]

BILLING CODE 4910–13–P

AGENCY FOR INTERNATIONAL DEVELOPMENT

22 CFR Part 226

RIN 0412–AA65

Administration of Assistance Awards to U.S. Non-Governmental Organizations; Correction to Financial Reporting for Grants and Cooperative Agreements

AGENCY: Agency for International Development.

ACTION: Technical amendment.

SUMMARY: This document contains an amendment to the regulations published as an interim final rule in the **Federal Register** of Thursday, January 19, 1995, (60 FR 3743). The rule relates to the administration of assistance awards to U.S. Non-Governmental Organizations.

DATES: Effective on October 8, 2009.

FOR FURTHER INFORMATION CONTACT: Michael Gushue, Telephone: 202–712–5831, E-mail: *mgushue@usaid.gov.*

SUPPLEMENTARY INFORMATION:

Background

On January 19, 1995, USAID issued an interim final rule at 22 CFR part 226 which implemented Office of Management and Budget (OMB) Circular A–110.

Need for Amendment

As published, the regulation unduly limits the use of financial reporting forms to Standard Form 269 and Standard Form 270. The purpose of the amendment is to relieve this restriction and allow any such forms as OMB approves. OMB now requires Federal Agencies to use the Federal Financial Report (Standard Form 425 or 425a) to give recipients of grants and cooperative agreements a standard format for reporting the financial status of their grants and cooperative agreements (68 FR 17097, 73 FR 47246).

List of Subjects in 22 CFR Part 226

Grants administration.

■ Accordingly, 22 CFR part 226 is amended by making the following technical amendment:

PART 226—ADMINISTRATION OF ASSISTANCE AWARDS TO U.S. NON-GOVERNMENTAL ORGANIZATIONS

■ 1. The authority citation for part 226 continues to read as follows:

Authority: 22 U.S.C. 2381(a) and 2401.

■ 2. Revise § 226.52 to read as follows:

§ 226.52 Financial reporting.

USAID requires recipients to use the Standard Form 425 or Standard Form 425a, Federal Financial Report, or such other forms authorized for obtaining financial information as may be approved by OMB.

Drew Luten,

Acting Assistant Administrator, Bureau for Management, USAID.

[FR Doc. E9–23680 Filed 10–7–09; 8:45 am]

BILLING CODE 6116–01–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

23 CFR Part 950

[FHWA Docket No. FHWA–06–23597]

RIN 2125–AF07

Interoperability Requirements, Standards, or Performance Specifications for Automated Toll Collection Systems

AGENCY: Federal Highway Administration (FHWA); DOT.

ACTION: Final rule.

SUMMARY: The FHWA is adding a new part to the Code of Federal Regulations, to add regulations specifying the interoperability requirements for automated toll collection systems for the facilities that are tolled under any of the tolling programs contained in section 1604 of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA–LU). Specifically, this rulemaking requires facilities operating with authority under section 1604 of SAFETEA–LU to use electronic toll collection (ETC) systems and to maximize their system's interoperability with other toll facilities. Although a nationwide interoperability standard has not yet been established, this rule seeks to accelerate progress toward achieving nationwide interoperability by requiring these facilities to upgrade their ETC systems to the national standards whenever adopted.

DATES: This rule becomes effective November 9, 2009.

FOR FURTHER INFORMATION CONTACT: Mr. Robert Rupert, FHWA Office of Operations, (202) 366–2194 or Mr. Michael Harkins, Attorney Advisor, FHWA Office of the Chief Counsel, (202) 366– 4928, Federal Highway Administration, 1200 New Jersey Avenue, SE., Washington, DC 20590. Office hours for the FHWA are from 7:45 a.m. to 4:15 p.m., *e.t.*, Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Electronic Access

This document, the notice of proposed rulemaking (NPRM), and all comments received may be viewed on line through the Federal eRulemaking portal at: *http://www.regulations.gov.* The Web site is available 24 hours each day, 365 days each year. Please follow the instructions.

An electronic copy of this document may also be downloaded by accessing the Federal Register's home page at: *http://www.archives.gov* and the Government Printing Office's Web page at *http://www.gpoaccess.gov/nara.*

Background

History

Section 1604 of SAFETEA–LU (Pub. L. 109–59, 119 Stat. 1144) includes provisions related to tolling of highways and facilities. Specifically, section 1604 establishes or amends three tolling programs: (1) The Value Pricing Pilot Program; (2) the Express Lanes Demonstration Program; and (3) the Interstate System Construction Toll Pilot Program. For each toll program under this section, section 1604(b)(6) requires the Secretary of Transportation to promulgate a final rule specifying requirements, standards, or performance specifications for automated toll collection systems.

Section 1604(b)(6) also requires that in developing the final rule to maximize the interoperability of electronic collection systems, the Secretary shall, to the maximum extent practicable:

(1) Accelerate progress toward the national goal of achieving a nationwide interoperable ETC system;

(2) Take into account the use of noncash electronic technology currently deployed within an appropriate geographical area of travel and the noncash electronic technology likely to be in use within the next 5 years; and

(3) Minimize additional costs and maximize convenience to users of toll facility and to the toll facility owner or operator.

An NPRM proposing the creation of a new Part 950 of 23 CFR was published on September 20, 2007, at 72 FR 53736. The purpose was to comply with the mandate of section 1604(b)(6) of SAFETEA–LU to promulgate a final rule specifying the requirements, standards, or performance specifications for automated toll collection systems implemented under section 1604. As stated in the NPRM, FHWA does not believe that it can effectively establish a

national standard at this time. However, FHWA believes that requiring toll agencies to take interoperability issues into consideration in developing their toll collections systems addresses the objective of the statute to accelerate progress toward the goal of nationwide interoperability.

FHWA held two public meetings and received 40 responses to the NPRM. A major focus of the comments was that the current IntelliDrive SM Program (formerly referenced as the Vehicle Infrastructure Integration or VII Program) is expected to result in establishing interoperable ETC standards using the 5.9 Gigahertz (GHz) band of the communications spectrum allocated for IntelliDrive SM by the Federal Communications Commission. Commenters stated that efforts at this time to develop an interoperability standard prior to realization of the standards from the IntelliDrive SM program were seen as being counterproductive and imposed unnecessary costs without apparent benefits to toll operators.

Summary Discussion of Comments Received in Response to the NPRM

The following presents an overview of the comments received in response to the NPRM.

Profile of Respondents

Comments were submitted by a representative cross-section of roadway tolling organizations and an individual. The respondents included tolling agencies or commissions; State departments of transportation; an automobile manufacturer; an international organization representing the interests of tolling authorities and supporting services; automobile trade associations; a government coalition; an association of tolling authorities; and individual firms providing tolling equipment and supporting services. The international organization representing the interests of tolling authorities that provided comments was the International Bridge, Tunnel, and Turnpike Association (IBTTA) which is comprised of 280 members in 25 countries. The government coalition comments were provided by the I–95 Corridor Coalition which is comprised of 17 transportation authorities located along Interstate 95. The association of tolling authorities' comments were provided by E–ZPass Interagency Group (IAG) which is comprised of 23 agencies in 12 States. The automobile trade association comments were provided by the VII Consortium which is comprised of 6 automobile manufacturers and the DOT through a cooperative agreement, and the Association of International Automobile Manufacturers (AIAM) which is comprised of 14 international automobile manufacturers.

There were 40 entries into the docket for comments on the proposed rule. Of these entries, 10 were letters of transmittal. Three were posted by FHWA (the proposed rule, a copy of the presentation material used by the FHWA during the public meetings, and the minutes of the proceedings of the public meeting). Two entries were requests to reschedule the public meeting or to hold an additional meeting (a second public meeting was held). And one entry was a duplicate of a previous entry. Of the remaining 23 entries into the docket, the comment of 8 entries was to endorse the E-ZPass IAG's comments.

Half of the respondents expressed support of FHWA's basic goal of improving mobility through national tolling interoperability. However, most emphasized the importance of considering existing regional interoperability standards and the financial investments that have been made in them throughout the United States during the establishment of national standards, and that the national standard should be backward compatible to them.

The respondents directed their comments within four categories. These categories are general comments, comments directed to the NPRM preamble, comments directed to specific sections of the proposed rule, and comments directed to the questions contained in the NPRM. The following summarizes the comments within each category.

General Comments

Most of the general comments received are reflected in the following excerpts taken from the comments of IBTTA:

○ Some members are concerned that an effort by the Federal Government to establish a technical standard for ETC is premature without having a better understanding and recognition of the financial needs and methods of the toll agencies in assuring financial interoperability. More research is needed on the transition and coordination of "back rooms."

○ Even though the NPRM clearly establishes a narrow scope for the application of interoperability standards, some members are concerned that codification of a "standard to be determined" will give Congress the impression that ETC interoperability is a function subject to their control. In reality, interoperability is more accurately a function of the agencies running the toll facilities and their relationships with other toll operators.

○ The NPRM language suggests a potential for creating conflict with existing State laws, as in the case of California which requires all toll operators to use Title 21 compliant systems.

○ Though the current proposal makes no effort to set an ETC standard, it alludes to a future period when FHWA concurrence would be required on technology selection and could potentially require the use of an ETC system incompatible with the State's requirements. Many IBTTA members are concerned about this possibility.

○ The NPRM is vague in establishing a time frame for compliance at such time as a Federal standard might be established. Electronic toll collection represents an enormous investment of capital in the transponders and associated data and communications systems. Toll agencies require adequate time to amortize prior investments and facilitate the very complex logistics needed to replace millions of transponders among their customers.

○ Is there a business case to be made for national interoperability? More analysis is needed to determine if sufficient value exists, for example, for the occasional traveler from California to pay their toll in New Hampshire with their California-based account. The tens of millions of dollars it would cost the toll industry to establish national account reciprocity may not be worth the limited benefit to a few consumers.

○ Barring a significant infusion of Federal funding into a tolling system that has historically been denied Federal support raises the issue of a potential unfunded Federal mandate that would be borne by the customers of current and future toll facilities.

The FHWA appreciates IBTTA's candor and has carefully considered their recommendations. The FHWA believes that this rule accommodates the concerns expressed.

This rule requires toll agencies to consider regional interoperability, which should mitigate potential conflicts with State laws and FHWA's review, and concurrence will ensure the selection of the toll collection technique addresses regional interoperability concerns.

Also, FHWA concurs that the complexity associated with "back office" billing and financial issues requires caution in addressing interoperability. We will cooperate with the industry in identifying, studying, and addressing accountability issues in nationwide interoperable ETC.

Additionally, this rule does not create Federal standards for automated toll collection. If and when FHWA creates such standards, a separate rulemaking action will be required. Any future rulemaking action would address business concerns with nationwide standardization, including the economic analysis of the cost and benefit distribution. Also, any interested party would be permitted to submit comments to FHWA to consider in developing the final rule as part of the rulemaking process.

The North Carolina Turnpike Authority (NCTA) requested clarification from FHWA on whether NCTA is considered "eligible" by FHWA's proposed rulemaking and whether they fall under section 1604(b)(6) of the SAFETEA–LU provisions. It is unclear from NCTA's comment exactly what NCTA is asking FHWA to clarify with respect to its eligibility. With respect to funding, the Value Pricing Pilot Program is the only 1604 toll program with funding. Under the Value Pricing Pilot Program, State and local governments and other public authorities are eligible grant recipients. Since NCTA appears to be a public authority, NCTA is eligible to receive a grant under the Value Pricing Pilot Program. Also, NCTA may apply directly for toll authority under the Value Pricing Pilot Program and Express Lanes Demonstration Program, and jointly with North Carolina DOT for toll authority under the Interstate System Construction Toll Pilot Program. If NCTA receives toll authority under any of these toll programs, NCTA would be subject to the requirements of this rule.

Comments directed at the **SUPPLEMENTARY INFORMATION:**

Background

The following comments were received in response to the background information provided in the NPRM.

[72 FR 53738, first paragraph]

The AIAM pointed out that, in addition to the Institute of Electrical and Electronic Engineers (IEEE), other standards development organizations are involved in developing standards for 5.9 GHz Dedicated Short-Range Communication (DSRC), particularly the Society of Automotive Engineers (SAE) (see SAE standard J2735).

The omission of the contribution of SAE in the development of standards related to DSRC in the background discussion was not intentional, and FHWA acknowledges the efforts of SAE.

[72 FR 53738, second paragraph]

The AIAM also commented that if the requirements document referenced in the NPRM is the document OmniAir recently circulated entitled "*Vehicle Infrastructure Integration (VII), Tolling and Payment Applications Concept of Operations,*" there are some fundamental assumptions in that document that need to be revised based on a consensus of the major IntelliDrive SM stakeholders. This document has not yet been sufficiently vetted with the affected IntelliDrive SM stakeholders.

The OmniAir document referenced in the NPRM is its Electronic Payment Services National Interoperability Specification, which predates the VII document noted by the AIAM.

[72 FR 53738, paragraph under heading "DOT Outreach Efforts"]

With reference to the NPRM's statement about IBTTA sharing information on their activities, AIAM commented that although ETC represents an important subset of the intended uses of 5.9 GHz DSRC, there are other major stakeholders planning higher-priority safety uses of 5.9 GHz DSRC with whose requirements the ETC requirements must be harmonized. The toll collection interoperability requirements and specifications should therefore be framed within the constraints of the overall IntelliDrive SM system and a National IntelliDrive SM Program, which take into account both technical and policy requirements of the major stakeholders anticipated to use this IntelliDrive SM system.

The FHWA concurs with the potential of IntelliDrive SM to address a range of applications beyond toll collection; however, this rulemaking does not specifically address the requirements of IntelliDrive SM.

Comments Directed at Specific Sections of the Proposed New Part 950 to 23 CFR

Section 950.1 Purpose

Raytheon commented that this section states that the proposed regulations establish interoperability requirements, standards, and performance specifications, but does not present or establish performance specifications in the proposed regulations. The FHWA concurs and herein revises section 950.1 to reflect that the purpose of the rule is to establish interoperability requirements.

Section 950.3 Definitions

Washington DOT and Raytheon commented that the ETC definition is too restrictive. They suggested that the language be strengthened to indicate a preference for the use of ETC where tolls are collected at highway speed and vehicles are not required to slow down. They recommended that the definition of ETC be changed to read:

"*Electronic toll collection (ETC)* is defined as the ability for vehicle operators to automatically pay tolls without altering their driving speed or course."

They noted that if this change were made, then there would be no need for a definition of DSRC, because the term DSRC is never used in the proposed rule. Similar comments were made by others in response to the questions in the NPRM. The FHWA concurs and substantially adopts the alternate definition of ETC in section 950.3.

Section 950.5 Requirements to use electronic toll collection technology

Washington and Texas DOT, the Port Authority of New York and New Jersey, and several toll support firms indicated support of section 950.5(a), if the definition of ETC in section 950.3 is generalized. As noted previously, FHWA concurs and the definitions in section 950.3 have been modified to remove reference to radio communication and to clarify the collection of tolls without altering speed or course.

Rummel, Klepper and Kahl, LLP commented that this section appears to contain ambiguous language when stating cash payments are allowed when the use of such methods do not create an unsafe condition. The commenter proposed that all cash tolling facilities are unsafe due to the stopping of traffic. The commenter based this on a National Transportation Safety Board (NTSB) report following a fatal accident at a cash tolling facility where the toll plaza was in the main stream of traffic. As demonstrated in the NTSB report, toll plazas in main lanes of travel may present some risks, which is one of the reasons these regulations prohibit toll booths from being located in the main lanes of travel. While FHWA believes that ETC systems are essential to facilitating efficient and safe operating conditions, FHWA wants toll collection agencies to provide a means for travelers that may not be enrolled in an ETC system to use the facility without incurring a legal infraction. The FHWA believes that toll agencies are capable of designing and implementing the necessary specifications that ensure the safe and efficient operation of a toll facility in accordance with the standards in this rule. Therefore, FHWA has not made any changes as a result of this comment.

Section 950.7 Interoperability requirements

The Washington DOT requested a description and more information about the design documents that will be required or needed by FHWA to provide concurrence on system design and a definition of non-cash electronic technology. They also requested clarification of the sentence, "* * * only applies if tolls are imposed on a facility after the effective date of this rule." They noted that Washington State's Route 167 high occupancy toll (HOT) lane facility toll system is in design, but tolls are not yet being collected and inquired if FHWA would consider a system that is in design to meet this rule.

The FHWA will require the same design documentation that is routinely required for a Federal-aid project as specified in 23 CFR part 940. This documentation must show compliance with 23 CFR 950.7 of this rule.

If a facility is granted toll authority under a section 1604 toll program and tolls are not imposed at the time this rule becomes effective, the requirements of this rule apply. Section 1604 toll programs include only the Value Pricing Pilot Program, Express Lanes Demonstration Program, and Interstate System Construction Toll Pilot Program. However, this rule does not apply, for example, to facilities granted toll authority under section 166 of Title 23 of the United States Code, *i.e.,* conversion of high occupancy vehicle to HOT facilities.

Raytheon expressed concern that some of the proposed requirements in sections 950.7(b) and 950.7(c) could actually inhibit progress toward the deployment of a next generation national system based on open standards. They expressed concerns that if FHWA approval is required, and if such approval demands that proposed toll system designs maximize compatibility with the most widely deployed DSRC devices, then agencies seeking approval will have no incentive to specify tolling systems with advanced capabilities or open standards. This could extend and expand the use of some proprietary or stagnant technologies beyond their natural lifetime, and could diminish innovation, competition, and user convenience. They suggested that any FHWA approval process would need to carefully balance the benefits of technological innovation with those of legacy system compatibility. In some cases it may be financially or technically impractical to support multiple technologies concurrently, and the benefits of a new or more capable technology may outweigh the benefits of supporting "legacy" users.

The FHWA appreciates the concern expressed by Raytheon. The intent of the rule is to advance interoperability and is not technology specific. It is incumbent on the tolling authority to demonstrate how it is addressing interoperability, including the incorporation of any emerging technologies. The review and concurrence by FHWA will evaluate the information provided by the tolling authority toward achieving interoperability. Accordingly, FHWA has made two changes to this rule. First, FHWA has modified subsection 950.7(b) to clarify that FHWA's concurrence is not intended to force the use of any particular type of technology, and subsection 950.7(c) to clarify that FHWA's concurrence will give appropriate weight to current and future interoperability with toll facilities. Second, FHWA has added a new subsection 950.7(f) to expressly provide that the rule is technology neutral.

TransCore commented that the NPRM states that ETC systems already in operation will not be subject to the present rulemaking. However, the NPRM further states in subsection 950.7(e) that "* * * any change to the facility's toll collection system after the effective date of the final rule would be subject to the regulations proposed in this rule." TransCore believes that this proposed language was unclear as to whether the rule would apply to facilities that change in technology or change in facility size. TransCore believes that because adoption of a national standard is not urgent, regions that use existing technologies to meet their current and future needs should not be hampered from expanding their networks or unduly forced to change anything in their systems unless they have compelling internal reasons to do so.

The FHWA believes that the intent and wording of this section provides the flexibility needed to permit an assessment based on regional needs and requirements. The FHWA concurs with the need to clarify section 950.7(e) and modified it to clarify that changes to the method or technology for collecting tolls would cause the facility to be subject to this rule.

Summary of Responses to NPRM's Request for Comment Questions

The NPRM requested comments on six questions to provide additional information for this or potential future rulemaking actions. Twelve of the respondents submitted specific comments to these questions. Comments on the questions were received from two tolling authorities (NCTA and the Port Authority of New York and New Jersey), two State departments of transportation (California and Texas), one automobile manufacturer (General Motors), two automobile trade associations (AIAM, Inc. and VII Consortium), one international tolling and supporting services association (IBTTA), one tolling authority association (E–ZPass IAG), and three tolling systems firms (Mark IV IVHS, Raytheon Highway Transportation Management Systems, and TransCore). Their responses are summarized below.

1. How should a national electronic toll collection standard be pursued?

In the NPRM, the background discussion states that to ensure national interoperability, an ETC standard would need to include interoperability consideration for both the "front-end" toll collection communications technology and the "back-office" operations of properly identifying and accounting for ETC activities. None of the respondents disagreed with this premise and several suggested that the pursuit of a national standard should address both.

Back-office activities identified for standardization included the data exchanges that govern transaction details, financial reciprocity and settlement, and customer service and accounting. This includes the sharing of customer information regarding account status and includes confidential information such as name, address, credit card information, and vehicle owner information. Several commenters suggested that the financial aspect can be addressed by business agreements that include standards that identify and validate the transponders and standards for reporting toll activities and settling payments.

The IAG proposed that the business agreements and processing standards developed by the IAG be accepted by FHWA as a basis for developing the financial and administrative aspects of national interoperability. Others suggested that the regional solutions to interoperability such as the IAG should be studied to extract the lessons learned, but TransCore felt that most of these consolidations were done in a "brute-force" way that is not readily extrapolated to a full national system. The tolling Concept of Operations document generated by OmniAir was also suggested as a good resource document for the back-office standards.

It was pointed out that back-office standardization is further complicated

by the many and varied restrictions and requirements bound into the local authority's existing bonding agreements and other binding documents. Many of these requirements and restrictions must be handled legally before any further consolidation actions can be taken.

The FHWA appreciates the comments and information provided by the respondents concerning the back-office and financial perspectives to be considered when developing a national interoperable tolling standard.

For the front-end standardization activities, several commented that any effort to develop interoperability standards at the lane-level should support existing technologies. A common front-end technology was identified as desirable in the long run, but it is not necessarily the only solution. Several commented that an interoperable lane-level solution is relatively easy to achieve today using multiprotocol readers, but cannot be implemented because of intellectual property and patent restrictions. It was suggested that FHWA should focus its efforts on making existing regional systems interoperable through negotiation to mitigate these restrictions that prevent existing proprietary systems' interoperability on an interim basis while working toward an open national standard.

The FHWA concurs that lane-level interoperability is potentially easier to accomplish than back-office interoperability because of advances in communication technology, but there may be issues related to intellectual property rights. All of these responses are valuable inputs in consideration of future development of Federal standards either for vehicle-to-roadside communications or back-office transactions.

As part of the interoperability effort, several respondents encouraged FHWA to improve the accuracy, timeliness, and accessibility of Department of Motor Vehicle or Motor Vehicle Commission records across the United States. The commenters indicated that tolling agencies need cost-effective access to accurate license plate information. The FHWA was also encouraged to work with the States to establish a more consistent look and coding structure of license plates. The FHWA will use these recommendations in considering future rulemaking for toll collection interoperability standards and in developing any guidance related to automated toll collection systems.

Several commented that interoperability standards should be open to new technologies and governed by data exchange standards. TransCore commented that there should be no attempt to specify or dictate specific technologies to be used for toll collection, noting that radio frequency identification, global positioning system, and video technologies all play a role in modern toll collection systems. TransCore recommended that any technology standards imposed should, at a minimum, allow these proven approaches to continue to develop, while simultaneously encouraging new technologies that can further improve toll collection efficiencies. The FHWA concurs and believes the modifications to the rule related to technology neutrality clarify the use of technology independent solutions.

Over one-half of those responding to the NPRM's questions indicated that a national toll collection standard should be pursued as an integrated part of the overall National IntelliDrive^{SM} Program. They indicated that toll collection systems should use standard interfaces that are being defined for the IntelliDrive^{SM} system and should function within the operational rules of a National IntelliDrive^{SM} Program to provide an integrated technical and policy framework that supports nationwide interoperability beyond the confines of the tolling applications. General Motors indicated that safety applications should have the highest priority.

It was pointed out that government and industry are working cooperatively in IEEE technical committees to define 5.9 GHz DSRC standards and with OmniAir to define 5.9 GHz interoperability testing and e-payment transaction standards enabling back-office interoperability. These efforts should be continued. The IAG also noted that pilot projects should be initiated to validate the resulting standards.

Several respondents observed that the NPRM suggests that some sort of interim standard is necessary. They contended that implementation of an interim standard to be followed by a federally developed 5.9 GHz DSRC standard will place undue financial, operational, and logistical burdens on those entities covered by the rule without any real prospect of attaining the goal of national interoperability. One respondent stated, "The proposed rule should be set aside in favor of the inevitable adoption of 5.9 GHz DSRC standards."

With the exception of the comment that the rule suggests imposing interim standards, the responses and comments above reinforce statements presented in the proposed rule. Specifically, the General Discussion of the Proposal section of the NPRM stated that, "the Department does not believe that it can effectively establish a national standard at this time." The General Discussion also states that standards published as a result of the DSRC program may form the basis for future rulemaking to establish standards for a nationwide interoperable toll collection system. The FHWA agrees that any 5.9 GHz toll standards should be developed in concert with the IntelliDrive^{SM} Program. The Department continues to support the IntelliDrive^{SM} program and related activities including the IEEE, SAE and OmniAir efforts described previously.

One commented that the national standard should be developed with the FHWA supplying funds to multiple vendors to develop prototype equipment which is then tested for interoperability and specification compliance by an independent contractor.

Several commented that when a national interoperability standard is adopted, there will need to be a significant window of time for toll agencies to migrate to this standard to allow toll agencies to fully amortize their existing system costs and facilitate the complex logistics needed to replace millions of transponders among their customers.

These comments are appropriate considerations if future rulemaking actions are undertaken to identify and adopt a national standard for automated toll collection interoperability. These responses and comments do not necessitate any changes to this rule.

2. What aspects of electronic toll collection should be standardized?

Many of the responses to this question were variations of the responses provided to question 1 that the front-end, lane-level solution, and the back-office data processing solution should be considered for standardization. The communications protocols, message sets, and all data flows for all transactions should be an open specification. Advancing standards that are independent of any specific technology allows toll operators the ability to fully amortize existing investments in roadside infrastructure and on-board units, while allowing for technological evolution and innovation to create new functionality, accuracy, and efficiency.

Several respondents emphasized standardization for the data structures, and the format and rules for exchanging ETC that support the full spectrum of ETC functions to clear the transactions and successfully transfer funds between account holders and facility operators. It

was suggested that the FHWA should develop technology-neutral unified standards for data exchange that address transaction details, financial reciprocity and settlement, customer service and accounting, and revenue collection enforcement. One respondent noted that the most important aspects to be standardized are the data structures, formats, and exchange protocols that support the full spectrum of ETC functions.

The NCTA commented that, "Until a true standard file specification for all on-board unit transactions exists, FHWA should either select the most suitable file specification in operation or facilitate creation of a bridge file specification that includes minimum information as to the issuer of the account, the class of the vehicle, the vehicle weight, and the entry and exit point for transactions occurring on a closed system roadway."

Several suggested a standardized vehicle classification system such that agencies have common framework for metrics, such as vehicle size, axles and configurations to appropriately determine the toll charge.

The IAG repeated its recommendation that the E–ZPass standards provide a basis until such time as a uniform, low cost, easily verifiable point of service payment system is established and accepted.

Several commented that a national clearinghouse should be used for financial transactions with the suggestion that the credit card transaction system may be a good model to study. The Port Authority of New York and New Jersey observed that "Existing ETC systems in the U.S. have largely been developed by having some combination of toll operators, systems integrators and back office contractors providing the financial clearing functions for toll reciprocity and settlement. This has resulted in inherent inefficiencies, redundant investments and systems, and delays from extended financial settlement processes. As the U.S. considers electronic tolling interoperability, the focus should be on more fully integrating established financial institutions in the financial clearing functions."

At the lane level, it was suggested that it is important to avoid specifying a single technical approach to allow the industry to take maximum advantage of new technologies as they emerge. As a general statement, the eventual standards should not be overly prescriptive and should allow as much latitude as possible to the local toll authorities.

General Motors suggested that regulatory requirements for ETC devices must help ensure that operation does not interfere with other vehicle signal transmissions, operations, and functionality. The standard should specify testing to specific performance criteria stipulated in the regulations for vehicle-based ETC and for automated tolling booths to allow developers of on-board vehicle devices to develop and validate independent of the manufacturers of the automated tolling booth technology. Testable performance criteria were mentioned by several other responders as well.

Both of the automobile associations indicated that the Human Machine Interface in the vehicle, or other internal vehicle system components or operations, should not be standardized and are not part of the IntelliDrive^{SM} system. Further, the applications themselves should not be standardized; rather message sets should be standardized to support interoperability allowing for proprietary application differentiation and innovation.

Mark IV IVHS, Inc. indicated that, in the short-term, none of the aspects should be standardized pending the outcome of the 5.9 GHz program. In the long-term, both technical and financial compatibility aspects should be standardized, although the latter is not an absolute requirement, as the same device can be registered for use in multiple systems with different accounts.

The FHWA appreciates the comments and contributions of the respondents. The information provided will serve as valuable input if a national interoperability tolling standard is developed. Since this rule does not address development of a specific standard, no changes are needed based on these comments.

3. How critical is the timing for establishing a national electronic toll collection standard?

One-third of the respondents considered the timing to be non-critical, with one referring to it as a "back-burner" issue. Another respondent felt the timing of the proposed rule is ill-conceived and counter to the federally sponsored 5.9 GHz DSRC effort. The California DOT commented that the timing of a national standard is critical. They suggested that it should have a rapid development time with an aggressive implementation plan.

Almost one-half of the respondents felt it was important to harmonize the timing for establishment of a national ETC standard with the overall National IntelliDrive^{SM} Program development and potential deployment. This is considered important so that consensus on common issues can be maintained. Such harmonization would help to foster coordinated deployment of the necessary vehicle, infrastructure communications equipment, and complementary applications. Several commenters indicated that the tolling community should take advantage of the capabilities afforded by the national IntelliDrive^{SM} initiative, but it is not practical to mandate its use in the near future.

General Motors suggested that regulatory requirements for ETC systems should be paced to, and coordinated with, the standards for vehicle safety and mobility applications. The IAG observed that a critical concern with the 5.9 GHz system is the rollout of the fleet and the timing for massive capital investments in roadside equipment to support a small portion of the users. A program, providing for an initial in-vehicle device that is provided as an after market transponder, could make the establishment of a national standard more realistic.

The IAG stated that establishment of a national standard must be done in a manner that takes into consideration existing standards and the financial investments made in deployed systems. They emphasized that it is important that any call for implementation recognize that the E–ZPass network alone has over 3,000 toll lanes, which would have to be equipped or renovated to make the overall system work. The time to replace or supplement existing systems would be critical since most lanes must operate with daily traffic. They believe that at least a 4-year window would be necessary between the date on which the standards are established and the day the ETC systems are expected to be fully operational. Another respondent suggested it should be fully deployed within 5 years of adoption.

Several respondents stated that hardware interoperability is available to any who need it through use of multimode, multiprotocol devices that are available today. It was suggested that FHWA should explore facilitating a negotiation process to mitigate current patent restrictions to allow agencies to utilize multiprotocol readers. This should be accompanied by the timely implementation of the data interchanges, financial, and procedural requirements to allow current and future interoperable systems.

As noted previously, FHWA concurs that any national interoperable tolling standard developed for the 5.9 GHz DSRC effort must be coordinated with

the overall IntelliDrive[SM] Program. Implementation and adoption of any future standard must address the transition to the new standard and consider current and future investments by the tolling authorities.

4. How should the national standard incorporate current technologies and functions?

The Port Authority of New York and New Jersey recommended that a plan for national interoperability should begin with an evaluation of the applicability of the E–ZPass standards for data exchange, file formats and financial reciprocity, and settlement practices to a national approach. The Texas DOT suggested that the first step was to emphasize video aspects that enhance ETC and establish uniform standards for the collection of data between the camera, the classification system, and the data network. The second step was to establish standards to create a national data repository to facilitate the exchange of information between agencies, similar to that used by the credit card industry. The IBTTA suggested that any national standard should incorporate the functions articulated by IBTTA's ETC performance specification document.

A majority of the respondents stated that compatibility with existing standards should be incorporated in a national interoperability standard to lessen the impact of transitioning from regional standards to the national standards. Any movement toward a national standard must recognize that there is a large investment in place in roadside equipment, transponders, and multiyear back-office contracts that support regional interoperability today. Several noted that the migration period must include a transitional period for the current technologies to operate in parallel with the national standard until tolling agencies are assured it mirrors and captures all of the transactions that the legacy system capture. One respondent commented, "It would be unconscionable to develop a national standard that does not recognize the investment made in ETC systems and accommodate the existing technologies and functions."

Several respondents recommended integrating the ETC standard into the overall IntelliDrive[SM] technology approach so that compatibility with planned technologies under development will be ensured, including the collective agreement of the major IntelliDrive[SM] stakeholders. General Motors suggested that national interoperability standards should focus on performance-based standards that include requirements to ensure ETC devices do not impact vehicle operation and safety communications.

Raytheon suggested that a national 5.9 GHz DSRC standard should not incorporate legacy technologies; rather, it should focus on the next generation. They also suggested that current tolling functions will apply to future systems. However, Raytheon does not believe that it is necessary or efficient for FHWA to standardize all tolling functions and performance parameters.

The comments above will provide valuable input should a national interoperable tolling standard be developed and adopted in the future. As noted previously, this rule does not impose the creation of standard; hence, there are no changes needed to the rule.

5. How should the national standard allow for changes in technologies over time?

A number of the responses reiterated points made in response to previous questions. The point reiterated that the standard should provide a way for any system to evolve over time, but remain backward compatible for a reasonable time. Electronic identification appears to remain the most cost-effective means going forward, but other forms of electronic identification will also be important and should be anticipated and provided for in the standards. The standard should emphasize approach rather than a technology, device, or vendor. It was again noted that the national standard should be harmonized with the IntelliDrive[SM] program.

The Texas DOT recommended that technology should be viewed as a tool to support the interoperable network, by focusing on not only ETC, but also the supporting agreements, networks, and procedures, plus video tolling so that changes in technology can be more easily integrated into the manner in which revenue is collected. Several others responded that if there are to be changes in any of the standardized fundamental technologies, these changes should always be accomplished in a way that allows backward compatibility to support existing vehicles and infrastructure equipment. General Motors suggested focusing on performance-based requirements with open-standards developed through industry voluntary consensus process consistent with the National Technology Transfer and Advancement Act of 1995.

It was suggested that the national standard must provide for flexibility to handle future methods for charging a toll to customers by providing expandability within the financial standards to associate potential multiple devices and business rules to an account. The standards should extend beyond today's norms for ETC by considering electronic payment systems that would employ more ubiquitous data collection, account management, and payment methods than are available in today's transponder-based electronic tolling business models.

Several suggested that a national ETC standard should focus on the data protocol, how the data is stored in a device, and how it is presented to the toll agency, not the means by which the data is transmitted. Similarly, the automobile manufacturers' associations suggested that by focusing on standards for message sets, rather than applications, innovation in applications development may proceed unabated. Similarly, by not standardizing the vehicle human machine interface, automobile manufacturers may proceed rapidly with innovation and product differentiation in this area to best meet the needs of their customers.

Mark IV noted that toll operators must be allowed to realize the safety, efficiency, and environmental benefits of the investments they have made and commitments to amortization schedules. They must be allowed to make their own decisions on conversion based upon the financial, operational, political, and practical considerations unique to their organization.

The FHWA generally agrees with the comments. They will provide valuable input should a national interoperable tolling standard be developed and adopted in the future. As noted previously, this rule does not impose the creation of standards; hence, there are no changes needed to the rule.

6. What are the personal privacy aspects of a national electronic toll collection standard and the technologies that may be used to achieve it?

All of the respondents expressed the importance of preservation of personal privacy. However, Mark IV IVHS commented that there are no personal privacy aspects related to the technology. They indicated that privacy issues should be legislated rather than regulated and, in that context are beyond the scope of this proposed rule.

The NCTA recommended that privacy principles be developed under the national ETC standard to ensure that individuals using the national standard equipped vehicles may be able to do so anonymously. They recommended that personal information used within a national standards program should be limited to information necessary to carry out an articulated and valid national standard purpose.

More than one-half responded that transaction information, spending patterns, and all information related to the personal and financial sources backing an account should be adequately protected. Personal information including account status, credit card information, address information, and travel must be kept private and used solely for the collection of tolls and fines. If the standards accommodate devices that exchange information for multiple purposes, there should be safeguards to ensure that the data flow involving payment transactions is unique and not able to be replicated by legitimate equipment designed for other purposes.

The NCTA noted that, for the collection of tolls for non-toll applications, it recommends the practice of utilizing fair information practices, such as notice and consent by patrons that will establish their agreement that certain private information will be used in the conduct of the business function in which they have agreed to participate. The national standard must contain the tools necessary for the careful protection of personal information and set limits that can be audited on how long personal information will be retained by users and administrators in a national program. The national standard must also provide the opportunity for a customer to terminate their participation (*i.e.,* opt-out) in a non-ETC function.

The automobile manufacturers' associations noted that the VII Coalition has devoted considerable effort and consensus-building into the development and adoption of the "VII Privacy Policies Framework." This document forms the basis for privacy rules expected to govern a National IntelliDrive^{SM} Program. As a potential IntelliDrive^{SM} application, it is important that ETC systems intending to use the IntelliDrive^{SM} system are designed in ways that meet the principles and limits expressed in the "VII Privacy Policies Framework."

Raytheon suggested that FHWA should consider requiring that the subject privacy policies be developed in accordance with specific recognized guidelines such as the Organization for Economic Cooperation and Development Privacy Guidelines on the Protection of Privacy or the more recently developed Asia Pacific Economic Cooperation Privacy Framework.

The previous comments provide valuable input toward potential development of national interoperable tolling standards, or guidance for implementing toll collection interoperability. The comments reiterate the need for privacy policies as required in section 950.5(c) of this rule. No changes to the rule are needed based on these comments.

Rulemaking Analysis and Notices

Executive Order 12866 (Regulatory Planning and Review) and DOT Regulatory Policies and Procedures

The FHWA has determined that this rule is a significant regulatory action within the meaning of Executive Order 12866 and is significant within the meaning of Department of Transportation regulatory policies and procedures. This action is considered significant because of the substantial State and local government and public interest in the requirements for automated toll collection systems. This rule provides interoperability requirements, standards, or performance specifications for toll projects initiated under section 1604 of SAFETEA–LU that use ETC. Section 1604 of SAFETEA–LU establishes or amends three tolling programs: (1) The Value Pricing Pilot Program, which has a maximum of 15 cooperative agreements; (2) the Express Lanes Demonstration Program, which has a maximum of 15 tolling projects; and (3) the Interstate System Construction Toll Pilot Program, which has a maximum of three tolling projects. This rule only establishes conditions on a Federal grant of authority for toll programs under section 1604 and does not require a State to impose tolls on any particular facility nor mandate how a State or toll authority operates, maintains or enforces its tolling program.

It is expected that the economic costs of this rule will be minimal while the benefits could be significant. These changes are not anticipated to adversely affect, in a material way, any sector of the economy. Since this rule only applies to new projects initiated under section 1604 of SAFETEA–LU, no significant encumbrances are added to the project's design or implementation.

Interoperability will afford potential reductions in implementation and operating costs in several ways for the implementing agencies and the public. First, it will allow the leveraging of existing resources, specifically the toll transponders that are being used by vehicle operators. By designing for interoperability, a new ETC project will not need to distribute as many toll transponders as it would if it designed a unique toll collection system. The public users will not need to purchase or fund additional devices and accounts. According to the proceedings of a seminar conducted by the World Bank Group in March 1999, agencies implementing a toll facility may realize additional cost savings of installed equipment of $5,000 per toll collecting lane for ETC versus traditional manual methods.[1] Studies indicate that the costs for adding ETC to existing or already constructed roadways varies from $1.7 million (in 2005 dollars) for seven collection sites along 26 miles of Interstate route 5 in San Diego[2] to $35.7 million for 31 miles of roadway in Dade County, Florida.[3] Different levels of communication and technology infrastructure help account for the variation in implementation costs.

Second, the operating cost for an electronic toll lane is less than one-tenth that of a standard lane. A 1997 report indicated that the Oklahoma Turnpike Authority spent approximately $16,000 per year on the operational cost of an ETC lane. In contrast, the Authority spent approximately $176,000 per year to operate a manual toll collection lane. While this report represents a rural implementation, and may not be fully representative of a more metropolitan implementation with a great number of transactions, the increased number of tolled lanes and the cost savings of automating toll collection lanes versus staffed lanes provides for similar cost savings for operations.

Third, there are also environmental savings associated with congestion reduction. Increasing access to electronic toll lanes will decrease time spent waiting to pay tolls. As an example of reduced delays, attended toll collection facilities can process approximately 300 vehicles per hour, or 12 seconds per vehicle. Dedicated ETC facilities can process approximately 1,200 vehicles per hour, or 3 seconds per vehicle.[4] Using a conservative

[1] Seminar proceedings on "Tolling Options" from "Asian Toll Road Development in an Era of Financial Crisis," March 1999, World Bank Group and the Japanese Ministry of Construction. Link: *http://www.worldbank.org/transport/roads/toll_rds.htm#options.*

[2] I–5 North Coast Managed Lanes Value Pricing Study: Concept Plan Volume 1, prepared by PBConsult for the San Diego Association of Governments (SANDAG), California; April 2006. Link to Portable document format (PDF) file: *http://www.sandag.org/uploads/publicationid/publicationid_1227_5523.pdf.*

[3] Miami-Dade Expressway Authority: Open Road Tolling Master Plan 2007–2011, prepared by Dade Transportation Consultants for Miami-Dade Expressway Authority, Florida; March 2006. Link ITS Costs database: *http://www.itscosts.its.dot.gov/its/benecost.nsf/ID/9A6D1C1362BD54C3852573EC0049CD49.*

[4] Tollways Volume 2, Number 3, by IBTTA, 2005; The Path to Open Road Tolling, by Timothy O. Gallagher and Harold W. Worrall, pgs. 11–21.

estimate for a queue of four vehicles for processing per lane, the delay for not using ETC equals 36 seconds. During peak periods, queues would be longer and delays increased. When multiplied by the number of transactions, these time savings can be considerable based on the value of $15+ per hour that an average person in the United States earns. While the total savings are dependant on how many new systems are built, they could be considerable. Costs would be dependent on the methods that are instituted to collect payments. For example, it may take longer to pay using a lane that allows for multiple types of payment as opposed to lanes dedicated to ETC or barrier-free collection techniques. However, the Department believes that these differences would be minimal or more than offset by the delays caused by current systems.

Toll plazas and barriers reduce a facility's throughput of vehicles, resulting in traffic congestion and its associated hazards as the demand and volume of vehicles increase. Electronic tolling helps to mitigate congestion by eliminating the bottlenecks caused by toll plazas and barriers. For example, in 1995, researchers compared vehicle throughput on lanes with manual toll collections versus ETC on the Tappan Zee Bridge in New York. The manual collection lane accommodated up to 400 to 450 vehicles per hour while an electronic lane peaked at 1,000 vehicles per hour.[5] Also, in another example, the E–ZPass ETC system saved commuters approximately 2.1 million hours of delay on the New Jersey Turnpike in 2000.[6] An evaluation from Florida indicated that enhancing ETC with open road tolling decreased delay by 50 percent for manual cash customers and by 55 percent for automatic coin machine customers, and increased speed by 57 percent in the open road tolling lanes. The addition of open road tolling also decreased crashes by an estimated 22 to 26 percent.[7]

Therefore, this rule will result in only minimal costs to those affected. In addition, these changes will not interfere with any action taken or planned by another agency and will not materially alter the budgetary impact of any entitlements, grants, user fees, or loan programs. Consequently, a full regulatory evaluation is not required.

Regulatory Flexibility Act

In compliance with the Regulatory Flexibility Act (Pub. L. 96–354, 5 U.S.C. 601–612) the FHWA has evaluated the effects of this rule on small entities and has determined that the rule will not have a significant economic impact on a substantial number of small entities.

This rule does not change the roles or responsibilities of small entities in ETC projects. The rule neither improves nor worsens small entities' opportunities to participate in ETC projects, so it results in no economic effect on the small entities. For these reasons, FHWA certifies that this action will not have a significant economic impact on a substantial number of small entities.

Unfunded Mandates Reform Act of 1995

This rule will not impose unfunded mandates as defined by the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4, 109 Stat. 48). This rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $128.1 million or more in any one year (2 U.S.C. 1532). This rule only establishes conditions on a Federal grant of authority for toll programs under section 1604 and does not require a State, public authority, or private entity designated by a State, to impose tolls on any particular facility nor mandates how a State or toll authority operates, maintains or enforces its tolling program.

Executive Order 13132 (Federalism Assessment)

This action has been analyzed in accordance with the principles and criteria contained in Executive Order 13132, and FHWA has determined that this action will not have sufficient federalism implications to warrant the preparation of a federalism assessment. The FHWA has also determined that this action will not preempt any State law or State regulation or affect the States' ability to discharge traditional State governmental functions.

Executive Order 12372 (Intergovernmental Review)

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 do not apply to this program.

Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501, *et seq.*), Federal agencies must obtain approval from the Office of Management and Budget for each collection of information they conduct, sponsor, or require through regulations. The FHWA has determined that this action does not contain collection of information requirements for the purposes of the PRA.

National Environmental Policy Act

The FHWA has analyzed this action for the purpose of the National Environmental Policy Act of 1969 (42 U.S.C. 4321) and has determined that this action will not have any effect on the quality of the environment.

Executive Order 12630 (Taking of Private Property)

The FHWA has analyzed this rule under Executive Order 12630, Governmental Actions and Interface with Constitutionally Protected Property Rights. The FHWA does not anticipate that this action would affect a taking of private property or otherwise have taking implications under Executive Order 12630.

Executive Order 12988 (Civil Justice Reform)

This action 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.

Executive Order 13045 (Protection of Children)

The FHWA has analyzed this rule under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. The FHWA certifies that this action will not cause any environmental risk to health or safety that might disproportionately affect children.

Executive Order 13175 (Tribal Consultation)

The FHWA has analyzed this action under Executive Order 13175, dated November 6, 2000, and believes that this

[5] Lennon, L. "Tappan Zee Bridge E–ZPass System Traffic and Environmental Studies," Paper presented at the 64th ITE Annual Meeting: 1995. ITS Benefits Database Link: *http://www.itsbenefits.its.dot.gov/its/benecost.nsf/0/BFFD6D277991A8C385269610051E2BE.*

[6] Operational and Traffic Benefits of E–ZPass to the New Jersey Turnpike, Prepared by the Wilbur Smith Associates for the New Jersey Turnpike Authority, New Jersey: August 2001. ITS Benefits Database Link: *http://www.itsbenefits.its.dot.gov/its/benecost.nsf/0/78B2ACEBB79ED67785256AC0006E29ED.*

[7] Klodzinski, J. and Gordin, E. and Al-Deek, H. M. "Evaluation of Impacts from Deployment of an Open Road Tolling Concept for a Mainline Toll Plaza." Paper presented at the 86th Annual Meeting of the Transportation Research Board, January 2007. ITS Benefits Database Link: *http://www.itsbenefits.its.dot.gov/its/benecost.nsf/ID/0786EF6A8384D176852573E5006D0C33.*

action would not have substantial direct effects on one or more Indian tribes; would not impose substantial direct compliance costs on Indian tribal governments; and would not preempt tribal laws. The rule addresses interoperability requirements, standards, or performance specifications for toll projects initiated under section 1604 of SAFETEA–LU that use ETC and would not impose any direct compliance requirements on Indian tribal governments.

Executive Order 13211 (Energy Effects)

The FHWA has analyzed this action under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use dated May 18, 2001. We have determined that this is not a significant energy action under that order since it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. Therefore, a Statement of Energy Effects is not required.

Regulation Identification Number

A regulation identification number (RIN) is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. The RIN contained in the heading of this document can be used to cross reference this action with the Unified Agenda.

List of Subjects in 23 CFR Part 950

Communications equipment, Electronic products, Highways and roads, Motor vehicles, Radio, Telecommunication, Transportation.

Issued on: September 29, 2009.

Victor Mendez,

Administrator.

■ In consideration of the foregoing, the FHWA adds a new part 950 to subchapter K, chapter I, title 23, Code of Federal Regulations, to read as follows:

PART 950—ELECTRONIC TOLL COLLECTION

Sec.
950.1 Purpose.
950.3 Definitions.
950.5 Requirement to use electronic toll collection technology.
950.7 Interoperability requirements.
950.9 Enforcement.

Authority: 23 U.S.C. 109, 315; sec. 1604(b)(5) and (b)(6), Pub. L. 109–59, 119 Stat. 1144; 49 CFR 1.48.

§950.1 Purpose.

The purpose of this part is to establish interoperability requirements for toll facilities that are tolled under section 1604 of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA–LU) (Pub. L. 109–59; 119 Stat. 1144) that use electronic toll collection.

§950.3 Definitions.

As used in this part:

1604 toll program refers to any of the tolling programs authorized under section 1604 of SAFETEA–LU. These programs include the Value Pricing Pilot Program, the Express Lanes Demonstration Program, and the Interstate System Construction Toll Pilot Program.

Electronic toll collection means the ability for vehicle operators to pay tolls automatically without slowing down from normal highway speeds.

Toll agency means the relevant public or private entity or entities to which toll authority has been granted for a facility under a 1604 toll program.

§950.5 Requirement to use electronic toll collection technology.

(a) Any toll agency operating a toll facility pursuant to authority under a 1604 toll program shall use an electronic toll collection system as the method for collecting tolls from vehicle operators for the use of the facility unless the toll agency can demonstrate to the FHWA that some other method is either more economically efficient or will make the facility operate more safely. If a facility is collecting tolls pursuant to section 1604(b) of SAFETEA–LU, the toll agency shall only use electronic toll collection systems. Nothing in this subsection shall prevent a toll agency from using cash payment methods, such as toll booths, in areas that are not located in the toll facility's lanes of travel if the location and use of such methods do not create unsafe operating conditions on the toll facility.

(b) A toll agency using electronic toll collection technology must develop and implement reasonable methods to enable vehicle operators that are not enrolled in a toll collection program that is interoperable with the toll collection system of the relevant toll facility to use the facility.

(c) A toll agency using electronic toll collection technology must develop, implement, and make publicly available privacy policies to safeguard the disclosure of any data that may be collected through such technology concerning any user of a toll facility operating pursuant to authority under a 1604 toll program, but is not required to submit such policies to FHWA for approval.

§950.7 Interoperability requirements.

(a) For any toll facility operating pursuant to authority under a 1604 toll program, the toll agency shall—

(1) Identify the projected users of the facility;

(2) Identify the predominant toll collection systems likely utilized by the users of the facility; and

(3) Identify the noncash electronic technology likely to be in use within the next five years in that area.

(b) Based on the identification conducted under subsection (a), the toll agency shall receive the FHWA's concurrence that the facility's toll collection system's standards and design meet the requirements of this part.

(c) In requesting the FHWA's concurrence, the toll agency shall demonstrate to the FHWA that the selected toll collection system and technology achieves the highest reasonable degree of interoperability both with technology currently in use at other existing toll facilities and with technology likely to be in use at toll facilities within the next five years in that area. The toll agency shall explain to the FHWA how the toll collection system takes into account both the use of noncash electronic technology currently deployed within an appropriate geographic area of travel (as defined by the toll agency) and the noncash electronic technology likely to be in use within the next five years in that area. FHWA, in determining whether to concur in the toll agency's proposal, will give appropriate weight to current and future interoperability with toll facilities in that area. The facility's toll collection system design shall include the communications requirements between roadside equipment and toll transponders, as well as accounting compatibility requirements in order to ensure that users of the toll facilities are properly identified and tolls are charged to the appropriate account of the user.

(d) A toll agency that operates any toll facility pursuant to authority under a 1604 toll program must upgrade its toll collection system to meet any applicable standards and interoperability tests that have been officially adopted through rulemaking by the FHWA.

(e) With respect to facilities that are tolled pursuant to the Value Pricing Pilot Program, this part only applies if tolls are imposed on a facility after the effective date of this rule. However, such facility is subject to this part if the facility's toll collection system's method or technology used to collect tolls from vehicle operators is changed or

upgraded after the effective date of the regulations in this part.

(f) Nothing in this part shall be construed as requiring the use of any particular type of electronic toll collection technology. However, any such toll collection technology must meet the interoperability requirement of this section.

§ 950.9 Enforcement.

(a) The tolling authority of any facility operating pursuant to authority under a 1604 toll program shall be suspended in the event the relevant toll agency is not in compliance with this part within six (6) months of receiving a written notice of non-compliance from FHWA. If the toll agency demonstrates that it is taking the necessary steps to come into compliance within a reasonable period of time, FHWA shall extend such tolling authority.

(b) The FHWA may take other action as may be appropriate, including action pursuant to § 1.36 of this title.

[FR Doc. E9–24296 Filed 10–7–09; 8:45 am]

BILLING CODE 4910–22–P

DEPARTMENT OF THE TREASURY

Alcohol and Tobacco Tax and Trade Bureau

27 CFR Part 9

[Docket No. TTB–2008–0008; T.D. TTB–82; Re: Notice No. 89]

RIN 1513–AB52

Establishment of the Happy Canyon of Santa Barbara Viticultural Area (2007R–311P)

AGENCY: Alcohol and Tobacco Tax and Trade Bureau, Treasury.

ACTION: Final rule; Treasury decision.

SUMMARY: This Treasury decision establishes the 23,941-acre "Happy Canyon of Santa Barbara" American viticultural area in Santa Barbara County, California. This viticultural area lies within the larger Santa Ynez Valley viticultural area and the multicounty Central Coast viticultural area. We designate viticultural areas to allow vintners to better describe the origin of their wines and to allow consumers to better identify wines they may purchase.

DATES: *Effective Date:* November 9, 2009.

FOR FURTHER INFORMATION CONTACT: Brady Groscost, Regulations and Rulings Division, Alcohol and Tobacco Tax and Trade Bureau, 1310 G St. NW., Room 200E, Washington, DC 20220; phone 202–927–8210.

SUPPLEMENTARY INFORMATION:

Background on Viticultural Areas

TTB Authority

Section 105(e) of the Federal Alcohol Administration Act (FAA Act), 27 U.S.C. 205(e), authorizes the Secretary of the Treasury to prescribe regulations for the labeling of wine, distilled spirits, and malt beverages. The FAA Act requires that these regulations, among other things, prohibit consumer deception and the use of misleading statements on labels, and ensure that labels provide the consumer with adequate information as to the identity and quality of the product. The Alcohol and Tobacco Tax and Trade Bureau (TTB) administers the regulations promulgated under the FAA Act.

Part 4 of the TTB regulations (27 CFR part 4) allows the establishment of definitive viticultural areas and the use of their names as appellations of origin on wine labels and in wine advertisements. Part 9 of the TTB regulations (27 CFR part 9) contains the list of approved viticultural areas.

Definition

Section 4.25(e)(1)(i) of the TTB regulations (27 CFR 4.25(e)(1)(i)) defines a viticultural area for American wine as a delimited grape-growing region distinguishable by geographical features, the boundaries of which have been recognized and defined in part 9 of the regulations. These designations allow vintners and consumers to attribute a given quality, reputation, or other characteristic of a wine made from grapes grown in an area to its geographical origin. The establishment of viticultural areas allows vintners to describe more accurately the origin of their wines to consumers and helps consumers to identify wines they may purchase. Establishment of a viticultural area is neither an approval nor an endorsement by TTB of the wine produced in that area.

Requirements

Section 4.25(e)(2) of the TTB regulations outlines the procedure for proposing an American viticultural area and provides that any interested party may petition TTB to establish a grape-growing region as a viticultural area. Section 9.3(b) of the TTB regulations requires the petition to include—

- Evidence that the proposed viticultural area is locally and/or nationally known by the name specified in the petition;
- Historical or current evidence that supports setting the boundary of the proposed viticultural area as the petition specifies;
- Evidence relating to the geographical features, such as climate, soils, elevation, and physical features, that distinguish the proposed viticultural area from surrounding areas;
- A description of the specific boundary of the proposed viticultural area, based on features, found on United States Geological Survey (USGS) maps; and
- A copy of the appropriate USGS map(s) with the proposed viticultural area's boundary prominently marked.

Petition for Happy Canyon of Santa Barbara

TTB received a petition from Wes Hagen, Vineyard Manager and Winemaker at Clos Pepe Vineyards, Lompoc, California, on behalf of Happy Canyon vintners and grape growers, proposing the establishment of the Happy Canyon of Santa Barbara American viticultural area. According to the petitioner, the proposed viticultural area encompasses 23,941 acres, 492 acres of which are in commercial viticulture in 6 vineyards. The proposed viticultural area is entirely within the Santa Ynez Valley viticultural area (27 CFR 9.54), which in turn is completely within the multicounty Central Coast viticultural area (27 CFR 9.75).

The petitioner stated that the viticulture of the proposed Happy Canyon of Santa Barbara viticultural area, in eastern Santa Ynez Valley, is distinguishable from that of the rest of the valley, including the Sta. Rita Hills viticultural area (27 CFR 9.162), in western Santa Ynez Valley. We summarize below the supporting evidence submitted with the petition.

Name Evidence

According to the petitioner and USGS maps, the "Happy Canyon of Santa Barbara" name applies to a canyon located in Santa Barbara County. TTB notes that a search of the USGS Geographical Names Information System (GNIS) includes 10 hits for "Happy Canyon," 3 of which are in California. The petitioner originally proposed "Happy Canyon" as the name of the viticultural area. However, based on results of the GNIS search, TTB determined that the Happy Canyon name would require a geographical modifier to pinpoint its physical location and avoid potential consumer confusion with other identical or similar names. After careful consideration, the petitioner modified the name of the petitioned-for viticultural area to

"Happy Canyon of Santa Barbara." The petitioner believes that the proposed Happy Canyon of Santa Barbara viticultural area name will identify the area as a unique grape-growing region for both consumers and industry members.

According to the USGS Lake Cachuma, Santa Ynez, and Figueroa Mountain maps that the petitioner provided, Happy Canyon is a region that descends in elevation northeast-to-southwest, north and west of Lake Cachuma in Santa Barbara County. Happy Canyon Road, a light-duty road, meanders through the proposed viticultural area.

A road map of Santa Barbara County shows that the Happy Canyon area and Happy Canyon Road are to the east of the town of Santa Ynez (Automobile Club of Southern California, California State Automobile Association, January 2003 edition). The map also shows that the Happy Canyon area is within Santa Barbara County.

Boundary Evidence

The petitioner documents that the proposed Happy Canyon of Santa Barbara viticultural area lies in the eastern part of the 40-mile-wide Santa Ynez Valley and the northern part of Santa Barbara County, California. As shown on USGS maps, Happy Canyon comprises canyon terrain, hills, and river and creek basins to the east and south of the San Rafael Mountains, west of Lake Cachuma, and north of the Santa Ynez River.

The petitioner explains that the proposed boundary line of the Happy Canyon of Santa Barbara viticultural area was drawn by a local committee of viticulturists, consultants, and vintners, all of whom had formal training in geology, geography, and agriculture. The proposed boundary line encompasses a unique geological and climatic grape-growing region on the east side of the Santa Ynez Valley viticultural area. The proposed boundary line skirts the San Rafael Mountains to the north, the Los Padres National Forest to the east, and the Lake Cachuma Recreation Area on portions of the south side, according to the written boundary description. The proposed boundary line, continuing in a clockwise direction, incorporates a portion of the Santa Ynez River as the south boundary line, and uses a series of straight lines between elevation points to skirt the steep foothills west of Santa Agueda and Figueroa Creeks.

According to the petitioner, the northern and northeastern portions of the boundary line of the proposed Happy Canyon of Santa Barbara viticultural area are based on the location of the best grape-growing areas, viable agricultural soils, sparse and rocky pine forests, and high elevations. Photographs and descriptions of the landscape in the proposed viticultural area tell of the change from green pastures to stony, infertile soils at the Los Padres National Forest to the northeast. The U.S. Department of Agriculture, Soil Conservation Service, did not map the soils in the national forest. However, as shown on the USGS maps submitted with the petition, elevations north of Happy Canyon rise from 1,200 to 3,200 feet, far exceeding the average 1,200-foot elevation within the proposed viticultural area.

The USGS maps show that the eastern boundary line of the proposed Happy Canyon of Santa Barbara viticultural area runs, north to south, along the border of the Los Padres National Forest, and continues south along the dividing line of several land grants. The proposed boundary line cuts through steep, mountainous terrain where elevations are between approximately 800 and 3,400 feet. The petitioner explains that the proposed eastern boundary line uses the same line established in 1983 for the eastern border of the Santa Ynez Valley viticultural area. Local winegrowers in Happy Canyon assert that the eastern boundary line applies equally well to the Santa Ynez Valley and the proposed Happy Canyon of Santa Barbara viticultural areas.

According to the written boundary description in the petition and the USGS maps, the southern boundary line of the proposed Happy Canyon of Santa Barbara viticultural area coincides with the southern boundary line of the Santa Ynez Valley viticultural area along the boundary line of the Lake Cachuma Recreation Area to its intersection with the Santa Ynez River. The proposed boundary line then follows the Santa Ynez River west to its intersection with a road, where the boundary line turns north.

The petitioner explains that the committee, in determining the southwestern portion of the boundary of the proposed viticultural area, considered only areas that were traditionally known as Happy Canyon and that had similar potential for viticulture.

The petitioner explains that the central and northerly portions of the western boundary line of the proposed Happy Canyon of Santa Barbara viticultural area define the boundaries of grazed, rolling hills and deep canyons with ridge lines 1,200 to 1,800 feet in elevation. According to the written boundary description and USGS maps, the rolling foothills of the Santa Agueda Creek Valley, where cattle graze both sides of the creek, lie immediately inside the proposed western boundary line. As the Santa Agueda Creek Valley rises to the west, rolling foothills meet steep canyons at the western boundary line of the proposed Happy Canyon of Santa Barbara viticultural area. The petitioner notes that the steepness of the terrain to the west and outside of the proposed boundary line contrasts with the topography and geology of the preserved oak scrubland, open rolling grazing land, and vineyards to the east, inside the proposed boundary line.

Distinguishing Features

The petitioner states that the distinguishing features of the proposed Happy Canyon of Santa Barbara viticultural area are climate, topography, drainage, soils, and geology. Happy Canyon, in the eastern portion of the Santa Ynez Valley, and the western portion of the Santa Ynez Valley have overt differences in climate, geological parent material, and soil drainage patterns.

Climate

According to the petitioner, of all the grape-growing areas in the Santa Ynez Valley, Happy Canyon is the furthest inland and has the warmest climate. It is located in the easternmost part of the Santa Ynez Valley, and the daytime highs and nighttime lows in that part of the county vary more in a 24-hour period than those in other parts of the valley. At about 12 miles west of the proposed viticultural area, the inland mountain ranges change direction from west-east to north-south. The north-south mountain ridge blocks the Pacific coastal breezes, preventing them from cooling the canyon. As a result, the ridge traps in heat in Happy Canyon during the warmer growing months.

The petition for the Happy Canyon of Santa Barbara viticultural area includes climatic data for the period 2004–6 provided by Kerry Martin of Coastal Vineyard Care Associates. Some of the data for the Happy Canyon area and the areas to the west and north of Happy Canyon were obtained from data stations located in vineyards and maintained by Coastal Vineyard Care Associates. The data for the areas to the east and south of Happy Canyon were retrieved from the Western Regional Climate Center (at *http://www.wrcc.dri.edu/*) and the California Irrigation Management Information System (at *http://wwwcimis.water.ca.gov/cimis/welcome.jsp*), respectively. The petitioner used those data in creating

the table below, which compares growing degree days, based on the Winkler climate classification system, for Happy Canyon and the surrounding areas; see "General Viticulture," by Albert J. Winkler, University of California Press, 1974.

In the Winkler system, as a measurement of heat accumulation during the growing season, 1 degree day accumulates for each degree Fahrenheit that a day's mean temperature is above 50 degrees, which is the minimum temperature required for grapevine growth. The data, in degree days, show that, compared to the Happy Canyon area, areas to the north, south, and west of Happy Canyon average between 5 and 20 percent cooler and the area to the east averages 15 percent warmer.

GROWING DEGREE DAYS WITHIN AND OUTSIDE OF HAPPY CANYON, 2004–2006

Location relative to Happy Canyon	2004	2005	2006	Overall average	Percent cooler or warmer than Happy Canyon
In Happy Canyon	3,414	3,187	3,419	3,340	Same.
North—Los Alamos	3,250	2,700	3,200	3,050	9% cooler.
East—Figueroa Mountain	3,872	3,721	3,965	3,853	15% warmer.
South—Santa Barbara	2,795	2,537	2,721	2,684	20% cooler.
West—Ballard Canyon	3,300	2,950	3,250	3,167	5% cooler.

Topography

The petitioner explains that the topography of the proposed Happy Canyon of Santa Barbara viticultural area includes varying elevations, rolling foothills, and a distinctive southwest drainage. According to the USGS maps, the proposed viticultural area lies on the east side and in the higher elevations of the Santa Ynez Valley region. Elevations within the proposed boundary line range from 500 feet in the southwest corner to 3,430 feet in the northeast corner, in the foothills of the San Rafael Range.

The petitioner explains that between the Pacific Ocean and the Santa Ynez Valley, hills and mountains trend west-to-east. As the elevation of the Santa Ynez Valley rises from west to east, the hills and mountains turn from a west-east direction to a generally north-south direction. The proposed viticultural area, located inland, lies along mountains and hills with a north-south orientation.

Drainage

According to the petitioner, the southwest drainage pattern of the proposed viticultural area is comparatively unique. To the west of the proposed boundary line, between Santa Agueda Creek and Figueroa Mountain Road, the drainage pattern trends south-southeast.

Soils and Geology

According to the current soil survey, the two major soil types in the proposed Happy Canyon of Santa Barbara viticultural area are related to topography ("Soil Survey of Northern Santa Barbara Area, California," issued by the United States Department of Agriculture, Soil Conservation Service, 1972). Alluvial soils are at lower elevations and on bottoms of canyons; upland soils are at higher elevations of canyons and on surrounding peaks and hilltops.

The petitioner explains that the current soil survey shows that the soil characteristics of the proposed Happy Canyon of Santa Barbara viticultural area include green serpentine (magnesium silicate hydroxide) parent material, elevated levels of exchangeable magnesium, lower levels of exchangeable sodium, and a high cation exchange capacity (CEC). High CEC levels, because of the amount of positively charged ions in the soils, increase the uptake of nutrients by plant roots.

The proposed viticultural area comprises the Shedd-Santa Lucia-Diablo and Toomes-Climara associations on uplands. The Shedd-Santa Lucia-Diablo association consists of strongly sloping to very steep, well drained shaly clay loams and silty clays. The Toomes-Climara association consists of moderately steep to very steep, somewhat excessively drained and well drained clay loams and clays.

The Chamise-Arnold-Crow Hills association is of greater extent in the western portion of the Santa Ynez Valley viticultural area, west of the proposed Happy Canyon of Santa Barbara viticultural area. This association consists of gently sloping to very steep, well drained and somewhat excessively drained sands to clay loams on high terraces and uplands.

The petitioner explains that the soils in the western portion of the Santa Ynez Valley viticultural area, compared to the soils in the proposed Happy Canyon of Santa Barbara viticultural area, have less magnesium, a significantly lower CEC level, and higher amounts of exchangeable sodium. Although drainage patterns change along the proposed western boundary line, the soils on both sides of the boundary line are similar.

The Positas-Ballard-Santa Ynez soil association is scattered throughout much of the southern part of the proposed Happy Canyon of Santa Barbara viticultural area. Sedimentary rock, unfavorable for viticulture, is predominant along the south side of the Santa Ynez River, outside the proposed boundary line.

The petitioner provides the results of two soil studies conducted in connection with the proposed Happy Canyon of Santa Barbara viticultural area. The first study details the differences in CEC among soils tested at sites in the proposed viticultural area and in areas immediately southwest and further west of the proposed boundary line, in the western end of the Santa Ynez Valley. The study shows that the soils in the proposed viticultural area have significantly more magnesium and an elevated CEC level as compared to the soils in areas beyond the proposed boundary line to the southwest and west (see table below). The petitioner also notes that the levels of calcium and sodium in the soils in the Happy Canyon are less than half those in the soils to the southwest and west.

CATION EXCHANGE CAPACITY (CEC) IN SOILS WITHIN AND OUTSIDE OF HAPPY CANYON

[meq/100g = milliequivalents of cations absorbed per 100 grams of soil]

Location	Magnesium	Calcium	Sodium	Total CEC in meq/100g
	Percent of total CEC			
Westerly Vineyard (in Happy Canyon)	74.1	23.1	0.72	32.0
Armour Ranch Road and Hwy 154 (1 mile southwest of Happy Canyon)	34.4	60.0	2.0	12.5
Clos Pepe (in the Sta. Rita Hills viticultural area, in the west end of Santa Ynez Valley)	26.0	61.0	5.0	11.6

The second study that the petitioner provided examines the differences in soils in the proposed Happy Canyon of Santa Barbara viticultural area and in canyons outside the boundary line, as far west as Figueroa Mountain Road, which is located approximately 4 miles away. The study is based on an acreage table of the soils on approximately 35,000 acres within the proposed viticultural area and on an equal number of acres to the west (see "Soil Survey of Northern Santa Barbara Area, California"). The results of that study confirm the differences in total acreage and slope of soils in areas on either side of the proposed western boundary line of the Happy Canyon of Santa Barbara viticultural area (see table below).

DOMINANT SOIL MAP UNITS WITHIN AND OUTSIDE OF HAPPY CANYON

Soil symbol and soil name	Number of map units/percentage of survey area	Percentage slope
Happy Canyon of Santa Barbara (East of Foothills Adjacent to Santa Agueda Creek)		
DaF—Diablo silty clay	28/14	30 to 45 percent.
SrG3—Shedd silty clay loam	23/12	9 to 30 percent.
SdC—Salinas silty clay loam	11/6	2 to 9 percent.
ChF—Chamise shaly loam	11/6	15 to 45 percent.
SrG—Shedd silty clay loam	11/6	9 to 30 percent.
Figueroa Area (West of Foothills and Santa Agueda Creek to Figueroa Mountain Road)		
PtC—Positas fine sandy loam	25/17	2 to 9 percent.
ChF—Chamise shaly loam	22/15	15 to 45 percent.
PtD—Positas fine sandy loam	13/9	9 to 15 percent.
CkF—Chamise clay loam	11/8	30 to 45 percent.
SnC—Santa Ynez gravelly fine sandy loam	11/8	9 to 15 percent.

According to the petitioner, the results of the soil study above show a unique geological pattern that justifies placing the western portion of the proposed boundary line in the vicinity of the Santa Agueda and Figueroa Creeks. The results also show that the Happy Canyon area comprises a group of soils different from those found to the west.

Notice of Proposed Rulemaking and Comments Received

TTB published Notice No. 89 regarding the proposed Happy Canyon of Santa Barbara viticultural area in the **Federal Register** (73 FR 46830) on August 12, 2008. In that notice, TTB invited comments by October 14, 2008, from all interested persons. We expressed particular interest in receiving comments on whether the evidence regarding name and distinguishing features is sufficient to warrant the establishment of this new viticultural area within the existing Santa Ynez Valley and the larger Central Coast viticultural areas. We also solicited comments on the sufficiency and accuracy of the name, boundary, climatic, and other required information submitted in support of the petition. We received seven comments from individuals in response to that notice, and all supported the establishment of the Happy Canyon of Santa Barbara viticultural area as originally proposed.

TTB Finding

As stated above, the proposed viticultural area is entirely within the Santa Ynez Valley viticultural area (27 CFR 9.54), which in turn is completely within the multicounty Central Coast viticultural area (27 CFR 9.75). The Central Coast viticultural area, established by T.D. ATF–216 published in the **Federal Register** on October 24, 1985 (50 FR 43128), identified an area between the Pacific Ocean and the California Coastal Ranges as being under marine influence on climate. T.D. ATF–216 stated that the marine influence caused precipitation, heat summation, maximum high temperatures, minimum low temperatures, length of frost free season, wind, marine fog incursion, and relative humidity to be significantly different from those on the opposite side of the Coastal Ranges, which is typically arid or semiarid. It also recognized the existence of microclimates within this relatively large AVA. The Santa Ynez Valley viticultural area, established by T.D. ATF–132 published in the **Federal Register** on April 15, 1983 (48 FR 16250), was recognized as having a cool Region II climate on the Winkler system, citing the average degree days in Solvang in the center of the valley, and also that summertime temperatures increase going west to east. T.D. ATF–

132 also identifies rainfall average of 16 inches, fog, and three major soils associations (Positas-Ballard-Santa Ynez, Chamise-Arnold-Crow Hill, and Shedd Santa Lucia-Diablo) as being distinguishing geographical features. Although the proposed Happy Canyon of Santa Barbara viticultural area shares some of the characteristics of the Central Coast and Santa Ynez Valley viticultural areas, its location furthest inland and near a north-south mountain ridge blocking some of the marine influence and its unique soil characteristic of high CEC justify recognition of Happy Canyon of Santa Barbara as a distinct viticultural area within the two existing AVAs.

Accordingly, after careful review of the petition and the comments received, TTB finds that the evidence submitted supports the establishment of the proposed viticultural area. Therefore, under the authority of the Federal Alcohol Administration Act and part 4 of our regulations, we establish the "Happy Canyon of Santa Barbara" viticultural area in Santa Barbara County, California, effective 30 days from the publication date of this document.

Boundary Description

See the narrative boundary description of the viticultural area in the regulatory text published at the end of this document.

Maps

The maps for determining the boundary of the viticultural area are listed below in the regulatory text.

Impact on Current Wine Labels

Part 4 of the TTB regulations prohibits any label reference on a wine that indicates or implies an origin other than the wine's true place of origin. With the establishment of this viticultural area and its inclusion in part 9 of the TTB regulations, its name, "Happy Canyon of Santa Barbara," is recognized under 27 CFR 4.39(i)(3) as a name of viticultural significance. The text of the new regulation clarifies this point.

Once this final rule becomes effective, wine bottlers using "Happy Canyon of Santa Barbara" in a brand name, including a trademark, or in another label reference as to the origin of the wine, will have to ensure that the product is eligible to use the viticultural area's full name as an appellation of origin.

For a wine to be labeled with a viticultural area name or with a brand name that includes a viticultural area name or other term identified as being viticulturally significant in part 9 of the TTB regulations, at least 85 percent of the wine must be derived from grapes grown within the area represented by that name or other term, and the wine must meet the other conditions listed in 27 CFR 4.25(e)(3). If the wine is not eligible for labeling with the viticultural area name or other viticulturally significant term and that name or term appears in the brand name, then the label is not in compliance and the bottler must change the brand name and obtain approval of a new label. Similarly, if the viticultural area name or other viticulturally significant term appears in another reference on the label in a misleading manner, the bottler would have to obtain approval of a new label. Accordingly, if a previously approved label uses the name "Happy Canyon of Santa Barbara" for a wine that does not meet the 85 percent standard, the previously approved label will be subject to revocation, upon the effective date of the establishment of the Happy Canyon of Santa Barbara viticultural area.

Different rules apply if a wine has a brand name containing a viticultural area name or other term of viticultural significance that was used as a brand name on a label approved before July 7, 1986. See 27 CFR 4.39(i)(2) for details.

Regulatory Flexibility Act

We certify that this regulation will not have a significant economic impact on a substantial number of small entities. This regulation imposes no new reporting, recordkeeping, or other administrative requirement. Any benefit derived from the use of a viticultural area name is the result of a proprietor's efforts and consumer acceptance of wines from that area. Therefore, no regulatory flexibility analysis is required.

Executive Order 12866

This rule is not a significant regulatory action as defined by Executive Order 12866. Therefore, it requires no regulatory assessment.

Drafting Information

Brady Groscost of the Regulations and Rulings Division drafted this notice.

List of Subjects in 27 CFR Part 9

Wine.

The Regulatory Amendment

■ For the reasons discussed in the preamble, we amend title 27 CFR, chapter I, part 9, as follows:

PART 9—AMERICAN VITICULTURAL AREAS

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

Authority: 27 U.S.C. 205.

Subpart C—Approved American Viticultural Areas

■ 2. Subpart C is amended by adding § 9.217 to read as follows:

§ 9.217 Happy Canyon of Santa Barbara.

(a) *Name.* The name of the viticultural area described in this section is "Happy Canyon of Santa Barbara". For purposes of part 4 of this chapter, "Happy Canyon of Santa Barbara" is a term of viticultural significance.

(b) *Approved maps.* The four United States Geological Survey 1:24,000 scale topographic maps used to determine the boundary of the Happy Canyon of Santa Barbara viticultural area are titled:

(1) Los Olivos, CA, 1995;
(2) Figueroa Mountain, CA, 1995;
(3) Lake Cachuma, CA, 1995; and
(4) Santa Ynez, CA, 1995.

(c) *Boundary.* The Happy Canyon of Santa Barbara viticultural area is located in Santa Barbara County, California. The boundary of the Happy Canyon of Santa Barbara viticultural area is as described below:

(1) The beginning point is on the Los Olivos map at the intersection of the Santa Lucia Ranger District diagonal line and Figueroa Mountain Road, a light-duty road, section 27, T8N, R30W. From the beginning point, proceed southeast along the Santa Lucia Ranger District diagonal line, crossing onto the Figueroa Mountain map, and continuing east to its intersection with the northwest corner of section 6, T7N, R29W; then

(2) Proceed straight south along the R29W and R30W line, which is a boundary line of the Los Padres National Forest, to its intersection with the southwest corner of section 18 that coincides with one of the two 90-degree, southwest corners of the Los Padres National Forest, T7N, R29W; then

(3) Proceed east, south, and then east, along the boundary line of the Los Padres National Forest, to its intersection with the boundary line of the Cañada de Los Pinos, or College Rancho Grant, at the northwest corner of section 28, T7N, R29W; then

(4) Proceed straight south along the boundary line of the Cañada de Los Pinos, or College Rancho Grant, crossing onto the Lake Cachuma map, to its intersection with the 1,074-foot Bitt elevation point and the Lake Cachuma Recreation Area boundary line, section 17 east boundary line, T6N, R29W; then

(5) Proceed generally southwest along the Lake Cachuma Recreation Area boundary line to its intersection with the Santa Ynez River to the west of Lake Cachuma and Bradbury Dam, T6N, R30W; then

(6) Proceed generally west along the Santa Ynez River, crossing onto the Santa Ynez map, and continuing to its intersection with California State Road 154, northwest of BM 533, T6N, R30W; then

(7) Proceed north-northwest in a straight line 1.2 miles to the marked 924-foot elevation point, T6N, R30W; then

(8) Proceed north-northwest in a straight line 1.2 miles to the "Y" in an unimproved road 0.1 mile south of the 800-foot elevation line, west of Happy Canyon Road, T6N, R30W; then

(9) Proceed north-northwest in a straight line for 0.5 mile, crossing onto the Los Olivos map, and continuing to the marked 1,324-foot elevation point, 0.5 mile southwest of Bar G O Ranch, T7N, R30W; then

(10) Proceed north-northwest in a straight line for 2.5 miles crossing over the marked 1,432-foot elevation point in section 9, then continue in a straight line northerly 1.4 miles to the marked 1,721-foot elevation point in section 4, T7N, R30W; then

(11) Proceed north in a straight line 1.4 miles to the marked 2,334-foot elevation point, west of a meandering unimproved road and south of Figueroa Mountain Road, T8N, R30W; then

(12) Proceed east-northeast in a straight line, returning to the beginning point.

Signed: April 27, 2009.

John J. Manfreda,

Administrator.

Approved: June 11, 2009.

Timothy E. Skud,

Deputy Assistant Secretary, (Tax, Trade, and Tariff Policy).

Editorial Note: This document was received in the Office of the Federal Register on October 5, 2009.

[FR Doc. E9–24329 Filed 10–7–09; 8:45 am]

BILLING CODE 4810–31–P

DEPARTMENT OF THE TREASURY

Office of the Secretary

31 CFR Part 1

Privacy Act; Implementation

AGENCY: Office of the Secretary, Treasury.

ACTION: Final rule.

SUMMARY: In accordance with the requirements of the Privacy Act of 1974, as amended, the Department of the Treasury exempts a new Internal Revenue Service (IRS) system of records entitled "Treasury/IRS 50.222—Tax Exempt/Government Entities (TE/GE) Case Management Records" from certain provisions of the Privacy Act.

DATES: *Effective Date:* October 8, 2009.

FOR FURTHER INFORMATION CONTACT: Telephonic inquiries should be directed to Marianne Davis, Program Analyst, Internal Revenue Service, TE/GE Division, at telephone number (949) 389–4304. Written inquiries should be directed to Robert Brenneman, TE/GE Reporting and Electronic Examination System (TREES) Project Manager, at Internal Revenue Service, TE/GE Business Systems Planning (SE:T:BSP), 1111 Constitution Avenue, NW., Attn: PE–6M4, Washington, DC 20224.

SUPPLEMENTARY INFORMATION: The Department of the Treasury published a notice of proposed rule on December 7, 2005 (Volume 70, No. 234), pages 72739–72740, exempting the new system of records from certain provisions of the Privacy Act of 1974, as amended. The IRS published the proposed system notice in its entirety on December 7, 2005 (Volume 70, Number 234), pages 72876–72878.

Under 5 U.S.C. 552a(k)(2), the head of an agency may promulgate rules to exempt any system of records within the agency from certain provisions of the Privacy Act if the system contains investigatory material compiled for law enforcement purposes. Treasury/IRS 52.222—Tax Exempt/Government Entities (TE/GE) Case Management Records contains investigatory material compiled for law enforcement purposes.

The proposed rule requested that public comments be sent the Office of Governmental Liaison and Disclosure, 1111 Constitution Avenue, NW., Washington, DC 20224, no later than January 6, 2006.

The IRS received one comment on the proposed rule and the system of records notice urging the IRS: (1) not to exempt the system of records from requirements that its information be relevant and necessary for its purpose; and, (2) to limit the scope of its exemptions from the Privacy act requirements to provide access and correction rights to individuals.

After consideration, the IRS determined that the public comment did not present any new information that would be a basis for changes being made to the proposed rule or system of records notice because: (1) Relevance and necessity can only be established with certainty after the information is evaluated; and, (2) the access provisions, as written, are consistent with the language and intent of the Privacy Act, comport with the Treasury regulation language for (k)(2), and explain that the release of information to the individual covered by the system would provide the individual or entity subject to investigation with significant information concerning the nature of the investigation and could result in altering or destruction of documentary evidence, the improper influencing of witnesses, and other activities that could impede or compromise the investigation. Accordingly, the Department of the Treasury is hereby giving notice that the system of records entitled "Treasury/IRS 50.222—Tax Exempt/Government Entities (TE/GE) Case Management Records" is exempt from certain provisions of the Privacy Act.

The provisions of the Privacy Act from which the system of records is exempt pursuant to 5 U.S.C. 552a(k)(2) are as follows: 552a(c)(3), (d)(1), (2), (3) and (4), (e)(1), (e)(4)(G), (e)(4)(H), (e)(4)(I), and (f) because the system contains investigatory material compiled for law enforcement purposes.

The following are the reasons why this system of records maintained by the IRS is exempt pursuant to 5 U.S.C. 552a(k)(2) of the Privacy Act of 1974.

(1) 5 U.S.C. 552a(c)(3). This provision of the Privacy Act provides for the release of the disclosure accounting required by 5 U.S.C. 552a(c)(1) and (2) to the individual named in the record at his/her request. The reasons for exempting this system of records from the foregoing provision are:

(i) The release of disclosure accounting would put the tax exempt or government entity subject to investigation or individuals connected with those entities on notice that an investigation exists and that such person is the subject of that investigation.

(ii) Such release would provide the subject of an investigation with an accurate accounting of the date, nature, and purpose of each disclosure and the name and address of the person or agency to which disclosure was made. The release of such information to the individual covered by the system would provide the individual or entity subject to investigation with significant information concerning the nature of the investigation and could result in the altering or destruction of documentary evidence, the improper influencing of witnesses, and other activities that could impede or compromise the investigation.

(iii) Release to the individual of the disclosure accounting would alert the individual as to which agencies were investigating the tax exempt government entity subject to investigation, would provide information concerning the scope of the investigation, and could aid the individual in impeding or compromising investigations by those agencies.

(2) 5 U.S.C. 552a(d)(1), (2), (3) and (4), (e)(4)(G), (e)(4)(H), and (f). These provisions of the Privacy Act relate to an individual's right to be notified of: The existence of records pertaining to such individual; Requirements for identifying an individual who requested access to records; the agency procedures relating to access to records; the content of the information contained in such records; and; the civil remedies available to the individual in the event of adverse determinations by an agency concerning access to or amendment of information contained in record systems.

The reasons for exempting this system of records from the foregoing provisions are as follows:

Notifying an individual (at the individual's request) of the existence of an investigative file pertaining to such individual or granting access to an investigative file pertaining to such individual could: Interfere with investigative and enforcement proceedings; deprive co-defendants of a right to a fair trial or an impartial adjudication; constitute an unwarranted invasion of the personal privacy of others; disclose the identity of confidential sources and reveal confidential information supplied by such sources; or, disclose investigative techniques and procedures.

(3) 5 U.S.C. 552a(e)(1). This provision of the Privacy Act requires each agency to maintain in its records only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute or executive order. The reasons for exempting this system of records from the foregoing are as follows:

(i) The IRS will limit the system to those records relevant and necessary for identifying, monitoring, and responding to complaints, allegations and other information received concerning violations or potential violations of Title 26. However, an exemption from the foregoing is needed because, particularly in the early stages of an investigation, it is not always possible to determine the relevance or necessity of specific information.

(ii) Relevance and necessity are questions of judgment and timing. What appears relevant and necessary when first received may subsequently be determined to be irrelevant or unnecessary. It is only after the information is evaluated that the relevance and necessity of such information can be established with certainty.

(4) 5 U.S.C. 552a(e)(4)(I). This provision of the Privacy Act requires the publication of the categories of sources of records in each system of records. The reasons for exempting this system of records from the foregoing provision are as follows:

(i) Revealing categories of sources of information could disclose investigative techniques and procedures;

(ii) Revealing categories of sources of information could cause sources that supply information to investigators to refrain from giving such information because of fear of reprisal, or fear of breach of promises of anonymity and confidentiality.

As required by Executive Order 12866, it has been determined that this rule is not a significant regulatory action, and therefore, does not require a regulatory impact analysis.

The regulation will not have a substantial direct effect on the States, on the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, it is determined that this rule does not have federalism implications under Executive Order 13132.

Pursuant to the requirements of the Regulatory Flexibility Act, 5 U.S.C. 601–612, it is hereby certified that these regulations will not significantly affect a substantial number of small entities. The rule imposes no duties or obligations on small entities.

In accordance with the provisions of the Paperwork Reduction Act of 1995, the Department of the Treasury has determined that this rule would not impose new recordkeeping, application, reporting, or other types of information collection requirements.

List of Subjects in 31 CFR Part 1

Privacy.

■ Part 1, subpart C of title 31 of the Code of Federal Regulations is amended as follows:

PART 1—[AMENDED]

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

Authority: 5 U.S.C. 301 and 31 U.S.C. 321. Subpart A also issued under 5 U.S.C. 552 as amended. Subpart C also issued under 5 U.S.C. 552a.

■ 2. Section 1.36 paragraph (g)(1)(viii) is amended by adding the following text to the table in numerical order.

§ 1.36 Systems exempt in whole or in part from provisions of 5 U.S.C. 522a and this subpart.

* * * * *

(g) * * *

(1) * * *

(viii) * * *

Number	Name of system
* * * * *	
Treasury/IRS 50.222	Tax Exempt Government Entities Case Management Records.
* * * * *	

Dated: August 25, 2009.

Elizabeth Cuffe,

Deputy Assistant Secretary for Privacy and Treasury Records.

[FR Doc. E9–24302 Filed 10–7–09; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 100

[USCG–2009–0816]

Notice of Enforcement of Regulation

AGENCY: Coast Guard, DHS.

ACTION: Notice of enforcement of regulation.

SUMMARY: The Coast Guard will enforce the special local regulations in the navigable waters of San Francisco Bay for the annual U.S. Navy and City of San Francisco sponsored Fleet Week Parade of Navy Ships, Blue Angels Flight Demonstrations, and Ship Tours to be held from October 8, 2009 through October 12, 2009. This action is necessary to ensure the safety of event participants and spectators. During the enforcement period, no persons or vessels may enter the regulated area without permission of the Captain of the Port (COTP) or his designated representative.

DATES: The regulations in 33 CFR 100.1105(b)(2), regulated area "Bravo" for the U.S. Navy Blue Angels Activities, will be enforced from 12:30 p.m. to 5 p.m. on October 8, 2009 through October 11, 2009. If the U.S. Navy Blue Angels Activities are delayed by inclement weather, the regulation

will also be enforced on October 12, 2009, from 12:30 p.m. to 5 p.m. The regulations in 33 CFR 100.1105(b)(1), regulated area "Alpha" for Navy Parade of Ships, will be enforced from 10:30 a.m. to 1 p.m. on October 10, 2009.

FOR FURTHER INFORMATION CONTACT: Lieutenant Junior Grade Simone Mausz, Waterways Safety Branch, U.S. Coast Guard Sector San Francisco, at (415) 399–7443; e-mail *simone.mausz@uscg.mil*, or the Sector San Francisco Command Center, at (415) 399–3547.

SUPPLEMENTARY INFORMATION: The Coast Guard will enforce the special local regulation for the annual San Francisco Bay Navy Fleet Week Parade of Ships and Blue Angels Demonstration in 33 CFR 100.1105; the Navy Parade of Ships will be enforced from 10:30 a.m. to 1 p.m. on October 10, 2009; and the U.S. Navy Blue Angels Activities will be enforced from 12:30 p.m. to 5 p.m. on October 8, 2009 through October 12, 2009. If the U.S. Navy Blue Angels Activities are delayed by inclement weather, the regulation will also be enforced on October 12, 2009, from 12:30 p.m. to 5 p.m. These regulations can also be found in the October 1, 1993, issue of the **Federal Register** 58 FR 51242. Under the provisions of 33 CFR 100.1105 a vessel may not enter the regulated area, unless it receives permission from the COTP. Additionally, no person or vessel may enter or remain within 500 yards ahead of the lead Navy parade vessel, within 200 yards astern of the last parade vessel, and within 200 yards on either side of all parade vessels. No person or vessel shall anchor, block, loiter in, or impede the transit of ship parade participants or official patrol vessels. When hailed by U.S. Coast Guard patrol personnel by siren, radio, flashing light, or other means, a person or vessel shall come to an immediate stop. Persons or vessels shall comply with all directions given. The Coast Guard may be assisted by other Federal, State, or local law enforcement agencies in enforcing this regulation.

This notice is issued under authority of 33 CFR 100.1105 and 5 U.S.C. 552(a). In addition to this notice in the **Federal Register**, the Coast Guard will provide the maritime community with extensive advance notification of this enforcement period via the Local Notice to Mariners, and Broadcast Notice to Mariners.

Dated: September 11, 2009.

P.M. Gugg,

Captain, U.S. Coast Guard, Captain of the Port, San Francisco.

[FR Doc. E9–24319 Filed 10–7–09; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 110

[Docket No. USCG–2009–0045]

RIN 1625–AA01

Anchorage Regulations; Port of New York

AGENCY: Coast Guard, DHS.

ACTION: Direct final rule; confirmation of effective date.

SUMMARY: This document confirms that the direct final rule entitled "Anchorage Regulations; Port of New York," published July 1, 2009, in the **Federal Register** (74 FR 31354), became effective September 29, 2009.

DATES: The effective date of the direct final rule published July 1, 2009 (74 FR 31354), is confirmed as September 29, 2009.

ADDRESSES: The docket for this rulemaking, USCG–2009–0045, is 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–2009–0045 in the "Keyword" box, and then clicking "Search."

FOR FURTHER INFORMATION CONTACT: If you have questions on this rulemaking, call or e-mail Mr. Jeff Yunker, Waterways Management Division, Coast Guard, telephone 718–354–4195, e-mail *Jeff.M.Yunker@uscg.mil.* If you have questions on viewing the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION:

On July 1, 2009, we published a direct final rule entitled "Anchorage Regulations; Port of New York" in the **Federal Register** (74 FR 31354). That direct final rule revised the southern boundary of Anchorage Ground No. 20–F such that it no longer interferes with the expanded Port Jersey Federal Channel, removing authorization for vessels to mistakenly anchor within a Federal Channel, and therefore removing this hazardous condition for vessels navigating in this area. Additionally, the direct final rule updated two geographic coordinates that make up the northern boundary. The physical location of these points is unchanged; however slight changes in the coordinates reflect the update to datum NAD 83.

In the direct final rule we notified the public of our intent to make the rule effective on September 29, 2009, unless an adverse comment, or notice of intent to submit an adverse comment, was received on or before August 31, 2009. We did not receive any comments or notices of intent to submit an adverse comment on that rule. Therefore, under 33 CFR 1.05–55(d), we now confirm that the "Anchorage Regulations; Port of New York" rule became effective, as scheduled, on September 29, 2009.

Dated: September 29, 2009.

Joseph L. Nimmich,

Rear Admiral, U.S. Coast Guard, Commander, First Coast Guard District.

[FR Doc. E9–24318 Filed 10–7–09; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 110

[Docket No. USCG–2008–1232]

RIN 1625–AA01

Anchorages; New and Revised Anchorages in the Captain of the Port Portland, OR, Area of Responsibility

AGENCY: Coast Guard, DHS.

ACTION: Final rule.

SUMMARY: The Coast Guard is establishing a new anchorage, modifying existing anchorages, and revising the regulations governing anchorages in the Captain of the Port Portland, Oregon, area of responsibility. These changes are necessary to ensure that there are sufficient anchorage opportunities in that area, and to clarify the locations of those anchorage opportunities. In addition, the changes will help prevent conflicts with navigable channels and other uses of anchorage waters.

DATES: This rule is effective November 9, 2009.

ADDRESSES: Comments and material received from the public, as well as documents mentioned in this preamble as being available in the docket, are part of docket USCG–2008–1232 and are available online by going to *http://www.regulations.gov*, inserting USCG–2008–1232 in the "Keyword" box, and clicking "Search." This material is 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 rule, call or e-mail MST1 Jaime Sayers, Waterways Management Division, Coast Guard Sector Portland, telephone 503–240–9319, e-mail *Jaime.A.Sayers@uscg.mil.* If you have questions on viewing the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION:

Regulatory Information

On May 26, 2009, we published a notice of proposed rulemaking (NPRM) entitled "Anchorages; New and Revised Anchorages in the Captain of the Port Portland, OR, Area of Responsibility" in the **Federal Register** (74 FR 24718). We received one comment on the proposed rule. There were no requests made for a public hearing regarding this rule and none was held. No other documents have been published for this rulemaking.

Background and Purpose

The establishment of a new anchorage, modification of existing anchorages, and revision of the regulations governing anchorages contained in this rule are necessary to ensure that there are sufficient anchorage opportunities in the Captain of the Port Portland, Oregon, area of responsibility, and ensure that the locations of those opportunities are clear. In addition, the changes will help prevent conflicts with navigable channels and other uses of anchorage waters. Currently, there are insufficient anchorage opportunities in the Captain of the Port Portland, Oregon, area of responsibility, and many of them conflict with navigable channels and other uses of the anchorage waters.

Discussion of Comments and Changes

The one comment made about this proposed rule explained that the changes being made are the result of a collaborative effort of the members of the Lower Columbia Region Harbor Safety Committee and that the Columbia River Bar Pilots fully support the rule as written. No changes were made as a result of this comment.

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 establishment of a new anchorage, modification of existing anchorages, and revision of the regulations governing anchorages do not have any significant costs associated with them.

Small Entities

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

The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities. This rule would affect the following entities, some of which might be small entities: The owners or operators of vessels intending to transit or anchor in the Captain of the Port Portland, Oregon, area of responsibility. However, the establishment of a new anchorage, modification of existing anchorages, and revision of the regulations governing anchorages that result from this rule will have no economic impact on small entities because anchorages can still be transited and used for other maritime activities besides anchoring.

Assistance for Small Entities

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

Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to the Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency's responsiveness to small business. If you wish to comment on actions by employees of the Coast Guard, call 1–888–REG–FAIR (1–888–734–3247). The Coast Guard will not retaliate against small entities that question or complain about this rule or any policy or action of the Coast Guard.

Collection of Information

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

Federalism

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on State or local governments and would either preempt State law or impose a substantial direct cost of compliance on them. We have analyzed this rule under that Order and have determined that it does not have implications for federalism.

Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or Tribal government, in the aggregate, or by the private sector of $100,000,000 or more in any one year. Though this rule will not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

Taking of Private Property

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

Civil Justice Reform

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

Protection of Children

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

Indian Tribal Governments

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

Energy Effects

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

Technical Standards

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

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

Environment

We have analyzed this rule under Department of Homeland Security Management Directive 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 which do not individually or cumulatively have a significant effect on the human environment. This rule is categorically excluded, under figure 2–1, paragraph (34)(f), of the Instruction. This rule involves the establishment of a new anchorage, modification of existing anchorages, and revision of regulations governing anchorages in the Captain of the Port Portland, Oregon, area of responsibility, which are categorically excluded under section 2.B.2 Figure 2–1, paragraph 34(f), of the Instruction. An environmental analysis checklist and categorical exclusion determination are available in the docket where indicated under **ADDRESSES**.

List of Subjects in 33 CFR Part 110

Anchorage grounds.

■ For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 110 as follows:

PART 110—ANCHORAGE REGULATIONS

■ 1. The authority citation for part 110 continues to read as follows:

Authority: 33 U.S.C. 471, 1221 through 1236, 2030, 2035, 2071; 33 CFR 1.05–1; Department of Homeland Security Delegation No. 0170.1.

■ 2. Revise § 110.228 to read as follows:

§ 110.228 Columbia River, Oregon and Washington.

(a) *Anchorage grounds.*—(1) *Astoria North Anchorage.* An area enclosed by a line beginning northeast of Astoria, Oregon, at latitude 46°12′00.79″ N, longitude 123°49′55.40″ W; thence continuing easterly to latitude 46°12′02.00″ N, longitude 123°49′40.09″ W; thence continuing east-northeasterly to latitude 46°13′14.85″ N, longitude 123°46′27.89″ W; thence continuing south-southeasterly to latitude 46°13′00.56″ N, longitude 123°46′16.65″ W; thence continuing southwesterly to latitude 46°11′51.79″ N, longitude 123°49′18.08″ W; thence continuing west-southwesterly to latitude 46°11′46.27″ N, longitude 123°49′43.48″ W; thence continuing west-southwesterly to latitude 46°11′44.98″ N, longitude 123°49′49.44″ W; thence continuing westerly to latitude 46°11′44.32″ N, longitude 123°49′58.88″ W; thence continuing northeasterly to the point of the beginning.

(2) *Astoria South Anchorage.* An area enclosed by a point beginning east-northeast of Astoria, Oregon, at latitude 46°11′46.95″ N, longitude 123°49′13.04″ W; thence continuing northeasterly to latitude 46°13′02.18″ N, longitude 123°45′54.55″ W; thence continuing easterly to latitude 46°13′05.90″ N, longitude 123°45′41.55″ W; thence continuing southeasterly to latitude 46°12′55.16″ N, longitude 123°45′34.31″ W; thence continuing southwesterly to latitude 46°12′24.32″ N, longitude 123°46′34.70″ W; thence continuing west-southwesterly to latitude 46°11′37.32″ N, longitude 123°49′03.46″ W; thence continuing north-northwesterly to the point of the beginning.

(3) *Longview Anchorage.* An area enclosed by a line beginning southeast of Longview, Washington, at latitude 46°06′28.69″ N, longitude 122°57′38.33″ W; thence continuing northwesterly to latitude 46°06′41.71″ N, longitude 122°58′01.25″ W; thence continuing westerly to latitude 46°07′22.55″ N, longitude 122°59′00.81″ W; thence continuing westerly to latitude 46°07′36.21″ N, longitude 122°59′19.29″ W; thence continuing southwesterly to latitude 46°07″28.44′ N, longitude 122°59′31.18″ W; thence continuing easterly to latitude 46°07′14.77″ N, longitude 122°59′12.70″ W; thence continuing easterly to latitude 46°06′42.01″ N, longitude 122°58′28.41″ W; thence continuing northeasterly to latitude 46°06′34.27″ N, longitude 122°58′14.21″ W; thence continuing northeasterly to latitude 46°06′32.19″ N, longitude 122°58′08.77″ W; thence continuing northeasterly to latitude 46°06′22.44″ N, longitude 122°57′43.27″ W; thence continuing northeasterly to the point of the beginning.

(4) *Kalama Anchorage.* An area to be enclosed by a line beginning north-northwesterly of Sandy Island at latitude 46°01′20.48″ N, longitude 122°52′04.32″ W; thence continuing east-southeasterly to latitude 46°00′57.73″ N, longitude 122°51′35.14″ W; thence continuing east-southeasterly to latitude 46°00′53.95″ N, longitude 122°51′30.29″ W; thence continuing southeasterly to latitude 46°00′35.10″ N, longitude 122°51′15.37″ W; thence continuing south-southeasterly to latitude 45°59′41.48″ N, longitude 122°50′52.40″ W; thence continuing southwesterly to latitude 45°59′38.65″ N, longitude 122°51′05.97″ W; thence continuing north-northwesterly to latitude 46°00′36.82″ N, longitude 122°51′45.44″ W; thence continuing west-northwesterly to latitude 46°01′24.38″ N, longitude 122°52′21.20″ W; thence continuing northeasterly to the beginning.

(5) *Woodland Anchorage.* An area enclosed by a line beginning northeast of Columbia City, Oregon, at latitude 45°53′55.31″ N, longitude 122°48′17.35″ W; thence continuing easterly to latitude 45°53′57.11″ N, longitude 122°48′02.16″ W; thence continuing south-southeasterly to latitude 45°53′21.16″ N, longitude 122°47′44.28″

W; thence continuing westerly to latitude 45°53′20.16″ N, longitude 122°48′02.37″ W; thence continuing northwesterly to latitude 45°53′41.50″ N, longitude 12°48′13.53″ W; thence continuing northerly to the point of beginning.

(6) *Henrici Bar Anchorage.* An area enclosed by a line beginning west-southwesterly of Bachelor Slough, Washington, at latitude 45°47′24.68″ N, longitude 122°46′49.14″ W; thence continuing east-southeasterly to latitude 45°46′44.95″ N, longitude 122°46′13.23″ W, thence continuing southeasterly to latitude 45°46′25.67″ N, longitude 122°46′00.54″ W; thence continuing south-southeasterly to latitude 45°46′02.69″ N, longitude 122°45′50.32″ W; thence continuing southerly to latitude 45°45′43.66″ N, longitude 122°45′45.33″ W; thence continuing southerly to latitude 45°45′37.52″ N, longitude 122°45′44.99″ W; thence continuing westerly to latitude 45°45′37.29″ N, longitude 122°45′53.06 W; thence continuing north-northwesterly to latitude 45°46′15.94″ N, longitude 122°46′10.25″ W; thence continuing west-northwesterly to latitude 45°47′20.20″ N, longitude 122°46′59.28″ W; thence continuing easterly to the point of beginning.

(7) *Lower Vancouver Anchorage.* An area enclosed by a line beginning north-northeast of Reeder Point at latitude 45°43′39.18″ N, longitude 122°45′27.54″ W; thence continuing south-southwesterly to latitude 45°41′26.95″ N, longitude 122°46′13.83″ W; thence continuing southerly to latitude 45°40′35.72″ N, longitude 122°46′09.98″ W; thence continuing south-southeasterly to latitude 45°40′23.95″ N, longitude 122°46′04.26″ W; thence continuing west-southwesterly to latitude 45°40′20.68″ N, longitude 122°46′16.07″ W; thence continuing northwesterly to latitude 45°40′32.85″ N, longitude 122°46′21.98″ W; thence continuing north-northwesterly to latitude 45°41′01.03″ N, longitude 122°46′26.85″ W; thence continuing northerly to latitude 45°41′29.07″ N, longitude 12°46′26.15″ W; thence continuing north-northeasterly to latitude 45°43′41.27″ N, longitude 122°45′39.87″ W; thence continuing easterly to the point of the beginning. The Vancouver lower anchorage will then resume slightly further upstream at an area north of Kelly point and will be enclosed by a line starting at latitude 45°40′10.09″ N, longitude 122°45′57.53′ W; thence continuing southeasterly to latitude 45°39′42.94″ N, longitude 122°45′44.34″ W; thence continuing west-southwesterly to latitude 45°39′40.07″ N, longitude 122°45′56.34″ W; thence continuing northwesterly to latitude 45°40′06.75″ N, longitude 122°46′09.30″ W; thence continuing east-northeasterly to the point of the beginning.

(8) *Kelly Point Anchorage.* An area enclosed by a line beginning northeast of Kelly Point, Oregon, at latitude 45°39′10.32″ N, longitude 122°45′36.45″ W; thence continuing east-southeasterly to latitude 45°39′02.10″ N, longitude 122°45′21.67″ W; thence continuing east-southeasterly to latitude 45°38′59.15″ N, longitude 122°45′16.38″ W; thence continuing southwesterly to latitude 45°38′51.03″ N, longitude 122°45′25.57″ W; thence continuing westerly to latitude 45°38′51.54″ N, longitude 122°45′26.35″ W; thence continuing northwesterly to latitude 45°39′06.27″ N, longitude 122°45′40.50″ W; thence continuing north-northeasterly to the beginning point.

(9) *Upper Vancouver Anchorage.* An area enclosed by a line beginning north-northeast of Hayden Island at latitude 45°38′43.44″ N, longitude 122°44′39.50″ W; thence continuing northeasterly to 45°38′26.98″ N, longitude 122°43′25.87″ W; thence continuing east-northeasterly to latitude 45°38′17.31″ N, longitude 122°42′54.69″ W; thence continuing easterly to latitude 45°38′12.40″ N, longitude 122°42′43.93″ W; thence continuing east-southeasterly to latitude 45°37′40.53″ N, longitude 122°41′44.08″ W; thence south-southeasterly to latitude 45°37′36.11″ N, longitude 122°41′48.86″ W; thence continuing west-southwesterly to latitude 45°37′52.20″ N, longitude 122°42′19.50″ W; thence continuing west-southwesterly to latitude 45°38′10.75″ N, longitude 122°43′08.89″ W; thence continuing southwesterly to latitude 45°38′18.79″ N, longitude 122°43′44.83″ W; thence continuing westerly to latitude 45°38′41.37″ N, longitude 122°44′40.44″ W; thence continuing northeasterly to the point of beginning.

(10) *Cottonwood Island Anchorage.* An area enclosed by a line beginning west-southwest of Longview, WA at latitude 46°05′56.88″ N, longitude 122°56′53.19″ W; thence continuing easterly to latitude 46°05′14.06″ N, longitude 122°54′45.71″ W; thence continuing east-southeasterly to latitude 46°04′57.12″ N, longitude 122°54′12.41″ W; thence continuing southeasterly to latitude 46°04′37.55″ N, longitude 122°53′45.80″ W; thence continuing southeasterly to latitude 46°04′13.72″ N, longitude 122°53′23.66″ W; thence continuing southeasterly to latitude 46°03′54.94″ N, longitude 122°53′11.81″ W; thence continuing southerly to latitude 46°03′34.96″ N, longitude 122°53′03.17″ W; thence continuing westerly to latitude 46°03′32.06″ N, longitude 122°53′19.68″ W; thence continuing north-northwesterly to latitude 46°03′50.84″ N, longitude 122°53′27.81″ W; thence continuing northwesterly to latitude 46°04′08.10″ N, longitude 122°53′38.70″ W; thence continuing northwesterly to latitude 46°04′29.41″ N, longitude 122°53′58.17″ W; thence continuing north-northwesterly to latitude 46°04′49.89″ N, longitude 122°54′21.57″ W; thence continuing northwesterly to latitude 46°05′06.95″ N, longitude 122°54′50.65″ W; thence continuing northwesterly to latitude 46°05′49.77″ N, longitude 122°56′ 58.12″ W; thence continuing east-northeasterly to the point of the beginning.

(b) *Regulations.*

(1) All designated anchorages are intended for the primary use of deep-draft vessels over 200 feet in length.

(2) If a vessel under 200 feet in length is anchored in a designated anchorage, the master or person in charge of the vessel shall:

(i) Ensure that the vessel is anchored so as to minimize conflict with large, deep-draft vessels utilizing or seeking to utilize the anchorage; and

(ii) Move the vessel out of the area if requested by the master of a large, deep-draft vessel seeking to enter or depart the area or if directed by the Captain of the Port.

(3) Vessels desiring to anchor in designated anchorages shall contact the pilot office that manages that anchorage to request an appropriate position to anchor. Columbia River Bar Pilots manage Astoria North Anchorage and Astoria South Anchorage. Columbia River Pilots manage all designated anchorages upriver from Astoria.

(4) No vessel may occupy a designated anchorage for more than 30 consecutive days without permission from the Captain of the Port.

(5) No vessel being laid-up or dismantled or undergoing major alterations or repairs may occupy a designated anchorage without permission from the Captain of the Port.

(6) No vessel carrying a Cargo of Particular Hazard listed in § 126.10 of this chapter may occupy a designated anchorage without permission from the Captain of the Port.

(7) No vessel in a condition such that it is likely to sink or otherwise become a hazard to the operation of other vessels shall occupy a designated anchorage except in an emergency and then only for such periods as may be authorized by the Captain of the Port.

(8) Vessels anchoring in Astoria North Anchorage should avoid placing their anchor in the charted cable area.

Dated: September 9, 2009.

G.T. Blore,

Rear Admiral, U.S. Coast Guard, Commander, Thirteenth Coast Guard District.

[FR Doc. E9–24317 Filed 10–7–09; 8:45 am]

BILLING CODE 4910–15–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[FRL–8952–8]

Approval and Promulgation of Air Quality Implementation Plans; Missouri; Update to Materials Incorporated by Reference

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule; notice of administrative change.

SUMMARY: EPA is updating the materials submitted by Missouri that are incorporated by reference (IBR) into the State implementation plan (SIP). The regulations affected by this update have been previously submitted by the State agency and approved by EPA. This update affects the SIP materials that are available for public inspection at the National Archives and Records Administration (NARA), the Air and Radiation Docket and Information Center located at EPA Headquarters in Washington, DC, and the Regional Office.

DATES: *Effective Date:* This action is effective October 8, 2009.

ADDRESSES: SIP materials which are incorporated by reference into 40 CFR part 52 are available for inspection at the following locations: Environmental Protection Agency, Region 7, 901 North 5th Street, Kansas City, Kansas 66101; or at *http://www.epa.gov/region07/programs/artd/air/rules/fedapprv.htm;* the Air and Radiation Docket and Information Center, EPA Headquarters Library, Room Number 3334, EPA West Building, 1301 Constitution Avenue, NW., Washington, DC 20460, and the National Archives and Records Administration. If you wish to obtain materials from a docket in the EPA Headquarters Library, please call the Office of Air and Radiation Docket at (202) 566–1742. For information on the availability of this material at NARA, call (202) 741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

FOR FURTHER INFORMATION CONTACT: Evelyn VanGoethem at (913) 551–7659, or by e-mail at *vangoethem.evelyn@epa.gov.*

SUPPLEMENTARY INFORMATION: The SIP is a living document which the State revises as necessary to address the unique air pollution problems in the State. Therefore, EPA from time to time must take action on SIP revisions containing new and/or revised regulations to make them part of the SIP. On May 22, 1997 (62 FR 27968), EPA revised the procedures for incorporating by reference Federally approved SIPs, as a result of consultations between EPA and the Office of Federal Register. The description of the revised SIP document, IBR procedures and "Identification of plan" format are discussed in further detail in the May 22, 1997, **Federal Register** document.

On June 29, 1999, EPA published a document in the **Federal Register** (64 FR 34717) beginning the new IBR procedure for Missouri. On May 24, 2004 (69 FR 29435), EPA published an update to the IBR material for Missouri.

In this document, EPA is doing the following:

1. Announcing the update to the IBR material as of August 1, 2009.
2. Correcting the date format in the "State effective date" or "State Submittal date" and "EPA approval date" columns in § 52.820 paragraphs (c), (d) and (e). Dates are numerical month/day/year without additional zeros.
3. Modifying the **Federal Register** citation in § 52.1320 paragraphs (c), (d) and (e) to reflect the beginning page of the preamble as opposed to the page number of the regulatory text.
4. Removing the first entry for 10–5.220 in § 52.1320 paragraph (c) under Chapter 5.

EPA has determined that today's rule falls under the "good cause" exemption in section 553(b)(3)(B) of the Administrative Procedures Act (APA) which, upon finding "good cause," authorizes agencies to dispense with public participation and section 553(d)(3), which allows an agency to make a rule effective immediately (thereby avoiding the 30-day delayed effective date otherwise provided for in the APA). Today's rule simply codifies provisions which are already in effect as a matter of law in Federal and approved State programs. Under section 553 of the APA, an agency may find good cause where procedures are "impractical, unnecessary, or contrary to the public interest." Public comment is "unnecessary" and "contrary to the public interest" since the codification only reflects existing law. Immediate notice in the CFR benefits the public by providing notice of the updated Missouri SIP compilation.

Statutory and Executive Order Reviews

Under the Clean Air Act, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve State choices, provided that they meet the criteria of the Clean Air Act. Accordingly, this action merely approves State law as meeting Federal requirements and does not impose additional requirements beyond those imposed by State law. For that reason, this action:

- Is not a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule does not have Tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country

located in the State, and EPA notes that it will not impose substantial direct costs on Tribal governments or preempt Tribal law.

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

EPA has also determined that the provisions of section 307(b)(1) of the Clean Air Act pertaining to petitions for judicial review are not applicable to this action. This action is simply an announcement of prior rulemakings that have previously undergone notice and comment. Prior EPA rulemaking actions for each individual component of the Missouri SIP compilation previously afforded interested parties the opportunity to file a petition for judicial review in the United States Court of Appeals for the appropriate circuit within 60 days of such rulemaking action.

List of Subjects in 40 CFR Part 52

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

Dated: August 24, 2009.

William Rice,

Acting Regional Administrator, Region 7.

■ 40 CFR part 52 is amended as follows:

PART 52—[AMENDED]

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

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

Subpart CC—Missouri

■ 2. In § 52.1320 paragraphs (b), (c), (d) and (e) are revised to read as follows:

§ 52.1320 Identification of plan.

* * * * *

(b) *Incorporation by reference.* (1) Material listed in paragraphs (c) and (d) of this section with an EPA approval date prior to August 1, 2009, was approved for incorporation by reference by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Material is incorporated as it exists on the date of the approval, and notice of any change in the material will be published in the **Federal Register**. Entries in paragraphs (c) and (d) of this section with EPA approval dates after August 1, 2009, will be incorporated by reference in the next update to the SIP compilation.

(2) EPA Region 7 certifies that the rules/regulations provided by EPA in the SIP compilation at the addresses in paragraph (b)(3) of this section are an exact duplicate of the officially promulgated State rules/regulations which have been approved as part of the SIP as of August 1, 2009.

(3) Copies of the materials incorporated by reference may be inspected at the Environmental Protection Agency, Region 7, Air Planning and Development Branch, 901 North 5th Street, Kansas City, Kansas 66101; at the EPA, Air and Radiation Docket and Information Center, Room Number 3334, EPA West Building, 1301 Constitution Avenue, NW., Washington, DC 20460; or at the National Archives and Records Administration (NARA). If you wish to obtain material from the EPA Regional Office, please call (913) 551–7659; for material from a docket in EPA Headquarters Library, please call the Office of Air and Radiation Docket at (202) 566–1742. 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.*

(c) *EPA-approved regulations.*

EPA-APPROVED MISSOURI REGULATIONS

Missouri citation	Title	State effective date	EPA approval date	Explanation
Missouri Department of Natural Resources Chapter 2—Air Quality Standards and Air Pollution Control Regulations for the Kansas City Metropolitan Area				
10–2.040	Maximum Allowable Emission of Particulate Matter from Fuel Burning Equipment Used for Indirect Heating.	9/4/84	1/24/85, 50 FR 3337.	
10–2.090	Incinerators	2/25/70	3/18/80, 45 FR 17145.	The State has rescinded this rule.
10–2.100	Open Burning Restrictions	4/2/84	8/31/84, 49 FR 34484.	
10–2.150	Time Schedule for Compliance	2/25/70	3/18/80, 45 FR 17145.	
10–2.205	Control of Emissions from Aerospace Manufacture and Rework Facilities.	3/30/01	4/24/02, 67 FR 20036.	
10–2.210	Control of Emissions from Solvent Metal Cleaning.	2/29/08	6/20/08, 73 FR 35074.	
10–2.215	Control of Emissions from Solvent Cleanup Operations.	5/30/01	4/24/02, 67 FR 20036.	
10–2.220	Liquefied Cutback Asphalt Paving Restricted.	6/3/91	6/23/92, 57 FR 27939.	
10–2.230	Control of Emissions from Industrial Surface Coating Operations.	11/20/91	8/24/94, 59 FR 43480.	4/3/95, 60 FR 16806 (correction).
10–2.260	Control of Petroleum Liquid Storage, Loading, and Transfer.	4/30/04	2/2/05, 70 FR 5379.	
10–2.290	Control of Emissions from Rotogravure and Flexographic Printing Facilities.	3/30/92	8/30/93, 58 FR 45451.	The State rule has Sections (6)(A) and (6)(B), which EPA has not approved. 9/6/94, 59 FR 43376 (correction).

EPA-APPROVED MISSOURI REGULATIONS—Continued

Missouri citation	Title	State effective date	EPA approval date	Explanation
10–2.300	Control of Emissions from the Manufacturing of Paints, Varnishes, Lacquers, Enamels and Other Allied Surface Coating Products.	11/20/91	3/26/03, 68 FR 14539.	4/3/95, 60 FR 16806 (correction).
10–2.310	Control of Emissions from the Application of Automotive Underbody Deadeners.	11/20/91	8/24/94, 59 FR 43480.	4/3/95, 60 FR 16806 (correction).
10–2.320	Control of Emissions from Production of Pesticides and Herbicides.	11/20/91	8/24/94, 59 FR 43480.	4/3/95, 60 FR 16806 (correction).
10–2.330	Control of Gasoline Reid Vapor Pressure.	5/30/01	2/13/02, 67 FR 6660.	
10–2.340	Control of Emissions from Lithographic Printing Facilities.	9/30/03	10/30/03, 68 FR 61758.	
10–2.360	Control of Emissions from Bakery Ovens.	11/30/95	7/20/98, 63 FR 38755.	
10–2.390	Kansas City Area Transportation Conformity Requirements.	7/27/07	10/18/07, 72 FR 59014.	
Chapter 3—Air Pollution Control Regulations for the Outstate Missouri Area				
10–3.010	Auto Exhaust Emission Controls	2/1/78	3/18/80, 45 FR 17145.	
10–3.030	Open Burning Restrictions	7/31/98	4/1/99, 64 FR 15688.	
10–3.040	Incinerators	2/1/78	3/18/80, 45 FR 17145.	The State has rescinded this rule.
10–3.060	Maximum Allowable Emissions of Particulate Matter from Fuel Burning Equipment Used for Indirect Heating.	11/30/02	3/18/03, 68 FR 12831.	
Chapter 4—Air Quality Standards and Air Pollution Control Regulations for Springfield-Greene County Area				
10–4.040	Maximum Allowable Emission of Particulate Matter from Fuel Burning Equipment Used for Indirect Heating.	11/30/02	3/18/03, 68 FR 12831.	
10–4.080	Incinerators	12/16/69	3/18/80, 45 FR 17145.	The State has rescinded this rule.
10–4.090	Open Burning Restrictions	4/2/84	8/31/84, 49 FR 34484.	
10–4.140	Time Schedule for Compliance	12/15/69	3/18/80, 45 FR 17145.	
Chapter 5—Air Quality Standards and Air Pollution Control Regulations for the St. Louis Metropolitan Area				
10–5.030	Maximum Allowable Emission of Particulate Matter from Fuel Burning Equipment Used for Indirect Heating.	9/4/84	1/24/85, 50 FR 3337.	
10–5.040	Use of Fuel in Hand-Fired Equipment Prohibited.	9/18/70	3/18/80, 45 FR 17145.	
10–5.060	Refuse Not To Be Burned in Fuel Burning Installations.	9/18/70	3/18/80, 45 FR 17145.	The State has rescinded this rule.
10–5.070	Open Burning Restrictions	1/29/95	2/17/00, 65 FR 8060.	
10–5.080	Incinerators	9/18/70	3/18/80, 45 FR 17145.	The State has rescinded this rule.
10–5.120	Information on Sales of Fuels To Be Provided and Maintained.	9/18/70	3/18/80, 45 FR 17145.	
10–5.130	Certain Coals To Be Washed	9/18/70	3/18/80, 45 FR 17145.	
10–5.220	Control of Petroleum Liquid Storage, Loading and Transfer.	9/30/07	4/2/08, 73 FR 17893.	
10–5.240	Additional Air Quality Control Measures May Be Required When Sources Are Clustered in a Small Land Area.	9/18/70	3/18/80, 45 FR 17145.	
10–5.250	Time Schedule for Compliance	1/18/72	3/18/80, 45 FR 17145.	
10–5.290	More Restrictive Emission Limitations for Sulfur Dioxide and Particulate Matter in the South St. Louis Area.	5/3/82	8/30/82, 47 FR 38123.	The State has deleted all provisions to N.L. Industries, which is no longer in operation, and has made significant changes to the provisions affecting Carondelet Coke.
10–5.295	Control of Emissions from Aerospace Manufacturing and Rework Facilities.	2/29/00	5/18/00, 65 FR 31489.	
10–5.300	Control of Emissions from Solvent Metal Cleaning.	11/30/06	3/9/07, 72 FR 10610.	
10–5.310	Liquefied Cutback Asphalt Restricted	3/1/89	3/5/90, 55 FR 7712.	
10–5.330	Control of Emissions from Industrial Surface Coating Operations.	12/30/00	7/20/01, 66 FR 37904.	

EPA-APPROVED MISSOURI REGULATIONS—Continued

Missouri citation	Title	State effective date	EPA approval date	Explanation
10–5.340	Control of Emissions from Rotogravure and Flexographic Printing Facilities.	3/30/92	8/30/93, 58 FR 45451.	The State rule has Section (6)(A)(B), which EPA has not approved. 9/6/94 59 FR 43376 (correction).
10–5.350	Control of Emissions from Manufacture of Synthesized Pharmaceutical Products.	11/20/91	8/24/94, 59 FR 43480.	4/3/95, 60 FR 16806 (Correction Notice).
10–5.360	Control of Emissions from Polyethylene Bag Sealing Operations.	11/20/91	8/24/94, 59 FR 43480.	4/3/95, 60 FR 16806 (Correction Notice).
10–5.370	Control of Emissions from the Application of Deadeners and Adhesives.	11/20/91	8/24/94, 59 FR 43480.	4/3/95, 60 FR 16806 (Correction Notice).
10–5.380	Motor Vehicle Emissions Inspection	12/30/02	5/12/03, 68 FR 25414.	
10–5.390	Control of Emissions from Manufacture of Paints, Varnishes, Lacquers, Enamels and Other Allied Surface Coating Products.	8/30/00	8/14/01, 66 FR 42605.	
10–5.410	Control of Emissions from Manufacture of Polystyrene Resin.	11/20/91	8/24/94, 59 FR 43480.	4/3/95, 60 FR 16806 (Correction Notice).
10–5.420	Control of Equipment Leaks from Synthetic Organic Chemical and Polymer Manufacturing Plants.	3/11/89	3/5/90, 55 FR 7712.	
10–5.440	Control of Emissions from Bakery Ovens.	12/30/96	2/17/00, 65 FR 8060.	
10–5.442	Control of Emissions from Offset Lithographic Printing Operations.	5/28/95	2/17/00, 65 FR 8060.	
10–5.450	Control of VOC Emissions from Traffic Coatings.	5/28/95	2/17/00, 65 FR 8060.	
10–5.451	Control of Emissions from Aluminum Foil Rolling.	9/30/00	7/20/01, 66 FR 37906.	
10–5.455	Control of Emissions from Solvent Cleaning Operations.	2/28/97	2/17/00, 65 FR 8060.	
10–5.480	St. Louis Area Transportation Conformity Requirements.	7/27/07	10/18/07, 72 FR 59014.	
10–5.490	Municipal Solid Waste Landfills	12/30/96	2/17/00, 65 FR 8060.	
10–5.500	Control of Emissions from Volatile Organic Liquid Storage.	2/29/00	5/18/00, 65 FR 31489.	
10–5.510	Control of Emissions of Nitrogen Oxides.	5/30/06	11/6/06, 71 FR 64888.	
10–5.520	Control of Volatile Organic Compound Emissions from Existing Major Sources.	2/29/00	5/18/00, 65 FR 31489.	
10–5.530	Control of Volatile Organic Compound Emissions from Wood Furniture Manufacturing Operations.	2/29/00	5/18/00, 65 FR 31489.	
10–5.540	Control of Emissions from Batch Process Operations.	2/29/00	5/18/00, 65 FR 31489.	
10–5.550	Control of Volatile Organic Compound Emissions from Reactor Processes and Distillation Operations Processes in the Synthetic Organic Chemical Manufacturing Industry.	2/29/00	5/18/00, 65 FR 31489.	
Chapter 6—Air Quality Standards, Definitions, Sampling and Reference Methods, and Air Pollution Control Regulations **for the State of Missouri**				
10–6.010	Ambient Air Quality Standards	2/28/06	12/5/06, 71 FR 70468.	
10–6.020	Definitions and Common Reference Tables.	9/30/08	4/14/09, 74 FR 17086.	
10–6.030	Sampling Methods for Air Pollution Sources.	2/28/06	12/5/06, 71 FR 70468.	
10–6.040	Reference Methods	2/28/06	12/5/06, 71 FR 70468.	
10–6.050	Start-up, Shutdown, and Malfunction Conditions.	2/28/02	8/27/02, 67 FR 54965.	

EPA-APPROVED MISSOURI REGULATIONS—Continued

Missouri citation	Title	State effective date	EPA approval date	Explanation
10–6.060	Construction Permits Required	12/30/04	10/10/06, 71 FR 59383.	This revision incorporates by reference elements of EPA's NSR reform rule published December 31, 2002. Provisions of the incorporated reform rule relating to the Clean Unit Exemption, Pollution Control Projects, and exemption from recordkeeping provisions for certain sources using the actual-to-projected-actual emissions projections test are not SIP approved. This revision also incorporates by reference the other provisions of 40 CFR 52.21 as in effect on July 1, 2003, which supersedes any conflicting provisions in the Missouri rule. We are conditionally approving references to 10 CSR 10–6.062 contained in the last sentence of Section (1)(B) and all of section (1)(D). Section 9, pertaining to hazardous air pollutants, is not SIP approved.
10–6.061	Construction Permits Exemptions	7/30/06	12/4/06, 70315.	Section (3)(A)2.D. is not included in the SIP.
10–6.062	Construction Permits by Rule	5/30/07	9/26/07, 72 FR 54562.	Section (3)(B)4. is not included in the SIP.
10–6.065	Operating Permits	9/30/05	2/21/07, 72 FR 7829.	Section (4) Basic State Operating Permits, has not been approved as part of the SIP.
10–6.110	Submission of Emission Data, Emission Fees, and Process Information.	12/30/07	9/15/08, 73 FR 53137.	Section (3)(D), Emissions Fees, has not been approved as part of the SIP.
10–6.120	Restriction of Emissions of Lead from Specific Lead Smelter-Refinery Installations.	3/30/05	6/12/06, 71 FR 33622.	
10–6.130	Controlling Emissions During Episodes of High Air Pollution Potential.	11/30/02	3/18/03, 68 FR 12829.	
10–6.140	Restriction of Emissions Credit for Reduced Pollutant Concentrations from the Use of Dispersion Techniques.	5/1/86	3/31/89, 54 FR 13184.	
10–6.150	Circumvention	8/15/90	4/17/91, 56 FR 15500.	
10–6.170	Restriction of Particulate Matter to the Ambient Air Beyond the Premises of Origin.	8/30/98	3/31/00, 65 FR 17164.	
10–6.180	Measurement of Emissions of Air Contaminants.	11/19/90	7/23/91, 56 FR 33714.	
10–6.210	Confidential Information	1/27/95	2/29/96, 61 FR 7714.	
10–6.220	Restriction of Emission of Visible Air Contaminants.	11/30/02	3/18/03, 68 FR 12827.	
10–6.260	Restriction of Emission of Sulfur Compounds.	2/29/08	6/20/08, 73 FR 35071.	Section (3)(B) is not SIP approved.
10–6.280	Compliance Monitoring Usage	3/30/02	8/27/02, 67 FR 54961.	
10–6.300	Conformity of General Federal Actions to State Implementation Plans.	9/17/07	12/4/07, 72 FR 68072.	
10–6.330	Restriction of Emissions from Batch-type Charcoal Kilns.	6/30/98	12/8/98, 63 FR 67591.	
10–6.350	Emissions Limitations and Emissions Trading of Oxides of Nitrogen.	5/30/07	4/2/08, 73 FR 17890.	
10–6.360	Control of NO_X Emissions from Electric Generating Units and Non-Electric Generating Boilers.	5/30/07	4/2/08, 73 FR 17890.	
10–6.362	Clean Air Interstate Rule Annual NO_X Trading Program.	5/18/07	12/14/07, 72 FR 71073.	
10–6.364	Clean Air Interstate Rule Seasonal NO_X Trading Program.	5/18/07	12/14/07, 72 FR 71073.	
10–6.366	Clean Air Interstate Rule SO_2 Trading Program.	5/18/07	12/14/07, 72 FR 71073.	
10–6.380	Control of NO_X Emissions from Portland Cement Kilns.	10/30/05	8/15/06, 71 FR 46860.	

EPA-APPROVED MISSOURI REGULATIONS—Continued

Missouri citation	Title	State effective date	EPA approval date	Explanation
10–6.390	Control of NO_X Emissions from Large Stationary Internal Combustion Engines.	10/30/05	8/15/06, 71 FR 46860.	
10–6.400	Restriction of Emission of Particulate Matter from Industrial Processes.	9/30/01	11/30/01, 66 FR 59706.	
10–6.410	Emissions Banking and Trading	4/30/03	8/11/03, 68 FR 47466.	
Missouri Department of Public Safety Division 50–State Highway Patrol Chapter 2—Motor Vehicle Inspection				
50–2.010	Definitions	4/11/82	8/12/85, 50 FR 32411.	
50–2.020	Minimum Inspection Station Requirements.	10/11/82	8/12/85, 50 FR 32411.	
50–2.030	Inspection Station Classification	12/11/77	8/12/85, 50 FR 32411.	
50–2.040	Private Inspection Stations	5/31/74	8/12/85, 50 FR 32411.	
50–2.050	Inspection Station Permits	11/11/79	8/12/85, 50 FR 32411.	
50–2.060	Display of Permits, Signs and Poster	11/31/74	8/12/85, 50 FR 32411.	
50–2.070	Hours of Operation	11/11/83	8/12/85, 50 FR 32411.	
50–2.080	Licensing of Inspector/Mechanics	4/13/78	8/12/85, 50 FR 32411.	
50–2.090	Inspection Station Operational Requirements.	8/11/78	8/12/85, 50 FR 32411.	
50–2.100	Requisition of Inspection Stickers and Decals.	6/12/80	8/12/85, 50 FR 32411.	
50–2.110	Issuance of Inspection Stickers and Decals.	12/11/77	8/12/85, 50 FR 32411.	
50–2.120	MVI–2 Form	11/11/83	8/12/85, 50 FR 32411.	
50–2.130	Violations of Laws or Rules Penalty	5/31/74	8/12/85, 50 FR 32411.	
50–2.260	Exhaust System	5/31/74	8/12/85, 50 FR 32411.	
50–2.280	Air Pollution Control Devices	12/11/80	8/12/85, 50 FR 32411.	
50–2.290	Fuel Tank	5/3/74	8/12/85, 50 FR 32411.	
50–2.350	Applicability of Motor Vehicle Emission Inspection.	5/1/84	8/12/85, 50 FR 32411.	
50–2.360	Emission Fee	11/1/83	8/12/85, 50 FR 32411.	
50–2.370	Inspection Station Licensing	12/21/90	10/13/92, 57 FR 46778.	
50–2.380	Inspector/Mechanic Licensing	11/1/83	8/12/85, 50 FR 32411.	
50–2.390	Safety/Emission Stickers	11/1/83	8/12/85, 50 FR 32411.	
50–2.401	General Specifications	12/21/90	10/13/92, 57 FR 46778.	
50–2.402	MAS Software Functions	12/21/90	10/13/92, 57 FR 46778.	The SIP does not include Section (6), Safety Inspection.
50–2.403	Missouri Analyzer System (MAS) Display and Program Requirements.	12/21/90	10/13/92, 57 FR 46778.	The SIP does not include Section (3)(B)4, Safety Inspection Sequences or (3)(M)5(II), Safety Inspection Summary.
50–2.404	Test Record Specifications	12/21/90	10/13/92, 57 FR 46778.	The SIP does not include Section (5), Safety Inspection Results.
50–2.405	Vehicle Inspection Certificate, Vehicle Inspection Report, and Printer Function Specifications.	12/21/90	10/13/92, 57 FR 46778.	
50–2.406	Technical Specifications for the MAS	12/21/90	10/13/92, 57 FR 46778.	
50–2.407	Documentation, Logistics and Warranty Requirements.	12/21/90	10/13/92, 57 FR 46778.	
50–2.410	Vehicles Failing Reinspection	12/21/90	10/13/92, 57 FR 46778.	
50–2.420	Procedures for Conducting Only Emission Tests.	12/21/90	10/13/92, 57 FR 46778.	
Kansas City Chapter 8—Air Quality				
8–2	Definitions	12/10/98	12/22/99, 64 FR 71663.	
8–4	Open burning	10/31/96	4/22/98, 63 FR 19823.	
8–5	Emission of particulate matter	12/10/98	12/22/99, 64 FR 71663.	Only subsections 8–5(c)(1)b, 8–5(c)(1)c, 8–5(c)(2)a, 8–5(c)(3)a, 8–5(c)(3)b, 8–5(c)(3)c, 8–5(c)(3)d are approved in the SIP.
Springfield—Chapter 2A—Air Pollution Control Standards				
Article I	Definitions	10/31/96	4/22/98, 63 FR 19823.	Only Section 2A–2 is approved by EPA.
Article VII	Stack Emission Test Method	10/31/96	4/22/98, 63 FR 19823.	Only Section 2A–25 is approved by EPA.
Article IX	Incinerator	10/31/96	4/22/98, 63 FR 19823.	Only Sections 2A–34 through 38 are approved by EPA.

EPA-APPROVED MISSOURI REGULATIONS—Continued

Missouri citation	Title	State effective date	EPA approval date	Explanation
Article XX	Test Methods and Tables	10/31/96	4/22/98, 63 FR 19823.	Only Sections 2A–51, 55, and 56 are approved by EPA.
St. Louis City Ordinance 65645				
Section 6	Definitions	8/28/03	12/9/03, 68 FR 68521.	The phrase "other than liquids or gases" in the Refuse definition has not been approved.
Section 15	Open Burning Restrictions	8/28/03	12/9/03, 68 FR 68521.	

(d) *EPA-approved State source-specific permits and orders.*

EPA-APPROVED MISSOURI SOURCE-SPECIFIC PERMITS AND ORDERS

Name of source	Order/permit number	State effective date	EPA approval date	Explanation
(1) ASARCO Inc. Lead Smelter, Glover, MO.	Order	8/13/80	4/27/81, 46 FR 23412.	
(2) St. Joe Lead (Doe Run) Company Lead Smelter, Herculaneum, MO.	Order	3/21/84	6/11/84, 49 FR 24022.	
(3) AMAX Lead (Doe Run) Company Lead Smelter, Boss, MO.	Order	9/27/84	1/7/85, 50 FR 768.	
(4) Gusdorf Operating Permit, 11440 Lackland Road, St. Louis County, MO.	Permit Nos: 04682–04693	* 4/29/80	10/15/84, 49 FR 40164.	
(5) Doe Run Lead Smelter, Herculaneum, MO.	Consent Order	3/9/90	3/6/92, 57 FR 8076.	
(6) Doe Run Lead Smelter, Herculaneum, MO.	Consent Order	8/17/90	3/6/92, 57 FR 8076.	
(7) Doe Run Lead Smelter, Herculaneum, MO.	Consent Order	7/2/93	5/5/95, 60 FR 22274.	
(8) Doe Run Lead Smelter, Herculaneum, MO.	Consent Order (Modification)	4/28/94	5/5/95, 60 FR 22274	In a notice published on 8/15/97 at 62 FR 43647, EPA required implementation of the contingency measures.
(9) Doe Run Lead Smelter, Herculaneum, MO.	Consent Order (Modification)	11/23/94	5/5/95, 60 FR 22274.	
(10) Doe Run Buick Lead Smelter, Boss, MO.	Consent Order	7/2/93	8/4/95, 60 FR 39851.	
(11) Doe Run Buick Lead Smelter, Iron County, MO.	Consent Order (Modification)	9/29/94	8/4/95, 60 FR 39851.	
(12) ASARCO Glover Lead Smelter, Glover, MO.	Consent Decree CV596–98CC with exhibits A–G.	7/30/96	3/5/97, 62 FR 9970.	
(13) Eagle-Picher Technologies, Joplin, MO.	Consent Agreement	08/26/99	4/24/00, 65 FR 21649.	
(14) Doe Run Resource Recycling Facility near Buick, MO.	Consent Order	5/11/00	10/18/00, 65 FR 62295.	
(15) St. Louis University	Medical Waste Incinerator	9/22/92	4/22/98, 63 FR 19823.	
(16) St. Louis University	Permit Matter No. 00–01–004	1/31/00	10/26/00, 65 FR 64156.	
(17) St. Joseph Light & Power SO_2.	Consent Decree	5/21/01	11/15/01, 66 FR 57389.	
(18) Asarco, Glover, MO	Modification of Consent Decree, CV596–98CC.	7/31/00	4/16/02, 67 FR 18497.	
(19) Doe Run, Herculaneum, MO.	Consent Judgement, CV301–0052C–J1, with Work Practice Manual and S.O.P. for Control of Lead Emissions (Rev 2000).	1/5/01	4/16/02, 67 FR 18497.	
(20) Springfield City Utilities James River Power Station SO_2.	Consent Agreement	12/6/01	3/25/02, 67 FR 13570.	
(21) St. Louis University	Permit Matter No. 00–01–004	8/28/03	12/9/03, 68 FR 68521	Updates a reference in section II.B. to Ordinance No. 65645.
(22) Doe Run Lead Smelter, Glover, MO.	Settlement Agreement	10/31/03	10/29/04, 69 FR 63072.	

EPA-APPROVED MISSOURI SOURCE-SPECIFIC PERMITS AND ORDERS—Continued

Name of source	Order/permit number	State effective date	EPA approval date	Explanation
(23) Grossman Iron and Steel Company.	Permit No. SR00.045A	7/19/06	12/4/06, 71 FR 70312.	
(24) Doe Run Herculaneum, MO.	Consent Judgment Modification, CV301–0052CCJ1.	12/20/05	5/4/07, 72 FR 25203.	

* St Louis County.

(e) *EPA approved nonregulatory provisions and quasi-regulatory measures.*

EPA-APPROVED MISSOURI NONREGULATORY SIP PROVISIONS

Name of nonregulatory SIP provision	Applicable geographic or nonattainment area	State submittal date	EPA approval date	Explanation
(1) Kansas City and Outstate Air Quality Control Regions Plan.	Kansas City and Outstate	1/24/72	5/31/72, 37 FR 10875.	
(2) Implementation Plan for the Missouri portion of the St. Louis Interstate Air Quality Control Region.	St. Louis	1/24/72	5/31/72, 37 FR 10875.	
(3) Effects of adopting Appendix B to NO_2 emissions.	St. Louis	3/27/72	5/31/72, 37 FR 10875.	
(4) CO air quality data base	St. Louis	5/2/72	5/31/72, 37 FR 10875.	
(5) Budget and manpower projections.	Statewide	2/28/72	10/28/72, 37 FR 23089.	
(6) Emergency episode manual	Kansas City	5/11/72	10/28/72, 37 FR 23089.	
(7) Amendments to Air Conservation Law.	Statewide	7/12/72	10/28/72, 37 FR 23089.	
(8) Air monitoring plan	Outstate	7/12/72	10/28/72, 37 FR 23089.	
(9) Amendments to Air Conservation Law.	Statewide	8/8/72	10/28/72, 37 FR 23089.	
(10) Transportation control strategy	Kansas City	5/11/73, 5/21/73	6/22/73, 38 FR 16566.	
(11) Analysis of ambient air quality data and recommendation to not designate the area as an air quality maintenance area.	Kansas City	4/11/74	3/2/76, 41 FR 8962.	
(12) Recommendation to designate air quality maintenance areas.	St. Louis, Columbia, Springfield.	5/6/74	9/9/75, 40 FR 41950.	
(13) Plan to attain the NAAQS	Kansas City, St. Louis	7/2/79	4/9/80, 45 FR 24140	Correction notice published 7/11/80.
(14) Schedule for I/M program and commitment regarding difficult transportation control measures (TCMs).	St. Louis	9/9/80	3/16/81, 46 FR 16895.	
(15) Lead SIP	Statewide	9/2/80, 2/11/81, 2/13/81	4/27/81, 46 FR 23412, 7/19/84, 49 FR 29218	Correction notice published 5/15/81.
(16) Report on recommended I/M program.	St. Louis	12/16/80	8/27/81, 46 FR 43139	No action was taken on the specific recommendations in the report.
(17) Report outlining commitments to TCMs, analysis of TCMs, and results of CO dispersion modeling.	St. Louis	2/12/81, 4/28/81	11/10/81, 46 FR 55518.	
(18) 1982 CO and ozone SIP	St. Louis	12/23/82, 8/24/83	10/15/84, 49 FR 40164.	
(19) Air quality monitoring plan	Statewide	6/6/84	9/27/84, 49 FR 38103.	
(20) Vehicle I/M program	St. Louis	8/27/84	8/12/85, 50 FR 32411.	
(21) Visibility protection plan	Hercules Glades and Mingo Wildlife Area.	5/3/85	2/10/86, 51 FR 4916.	
(22) Plan for attaining the ozone standard by December 31, 1987.	St. Louis	8/1/85	9/3/86, 51 FR 31328.	
(23) PM_{10} plan	Statewide	3/29/88, 6/15/88	7/31/89, 54 FR 31524.	
(24) Construction permit fees including Chapter 643 RSMo.	Statewide	1/24/89, 9/27/89	1/9/90, 55 FR 735.	

EPA-APPROVED MISSOURI NONREGULATORY SIP PROVISIONS—Continued

Name of nonregulatory SIP provision	Applicable geographic or nonattainment area	State submittal date	EPA approval date	Explanation
(25) PSD NOx requirements including a letter from the State pertaining to the rules and analysis.	Statewide	7/9/90	3/5/91, 56 FR 9172.	
(26) Lead plan	Herculaneum	9/6/90, 5/8/91	3/6/92, 57 FR 8076.	
(27) Ozone maintenance plan	Kansas City	10/9/91	6/23/92, 57 FR 27939.	
(28) Small business assistance plan	Statewide	3/10/93	10/26/93, 58 FR 57563.	
(29) Part D Lead plan	Herculaneum	7/2/93, 6/30/94, 11/23/94	5/5/95, 60 FR 22274.	
(30) Intermediate permitting program including three letters pertaining to authority to limit potential to emit hazardous air pollutants.	Statewide	3/31/94, 11/7/94, 10/3/94, 2/10/95	9/25/95, 60 FR 49340.	
(31) Part D lead plan	Bixby	7/2/93, 6/30/94	8/4/95, 60 FR 39851.	
(32) Transportation conformity plans including a policy agreement and a letter committing to implement the State rule consistent with the Federal transportation conformity rule.	St. Louis, Kansas City	2/14/95	2/29/96, 61 FR 7711.	
(33) Emissions inventory update including a motor vehicle emissions budget.	Kansas City	4/12/95	4/25/96, 61 FR 18251.	
(34) Part D Lead Plan	Glover	8/14/96	3/5/97, 62 FR 9970.	
(35) CO Maintenance Plan	St. Louis	6/13/97, 6/15/98	1/26/99, 64 FR 3855.	
(36) 1990 Base Year Inventory	St. Louis	1/20/95	2/17/00, 65 FR 8063.	
(37) 15% Rate-of-Progress Plan	St. Louis	11/12/99	5/18/00, 65 FR 31489.	
(38) Implementation plan for the Missouri inspection maintenance program.	St. Louis	11/12/99	5/18/00, 65 FR 31482.	
(39) Doe Run Resource Recycling Facility near Buick, MO.	Dent Township in Iron County.	5/17/00	10/18/00, 65 FR 62298.	
(40) Commitments with respect to implementation of rule 10 CSR 10–6.350, Emissions Limitations and Emissions Trading of Oxides of Nitrogen.	Statewide	8/8/00	12/28/00, 65 FR 82288.	
(41) Contingency Plan including letter of April 5, 2001.	St. Louis	10/6/97, 4/5/01	6/26/01, 66 FR 34011.	
(42) Ozone 1-Hour Standard Attainment Demonstration Plan for November 2004 including 2004 On-Road Motor Vehicle Emissions Budgets.	St. Louis	11/10/99, 11/2/00, 2/28/01, 3/7/01	6/26/01, 66 FR 34011.	
(43) Doe Run Resources Corporation Primary lead Smelter, 2000 Revision of Lead SIP.	Herculaneum, MO	1/9/01	4/16/02, 67 FR 18502	The SIP was reviewed and approved by EPA on 1/11/01.
(44) Doe Run Resources Corporation Primary Lead Smelter, 2000 Revision of Lead SIP.	Glover, MO	6/15/01	4/16/02, 67 FR 18502	The SIP was reviewed and approved by EPA on 6/26/01.
(45) Maintenance Plan for the Missouri Portion of the St. Louis Ozone Nonattainment Area including 2014 On-Road Motor Vehicle Emission Budgets.	St. Louis	12/6/02	5/12/03, 68 FR 25442.	
(46) Maintenance Plan for the 1-hour ozone standard in the Missouri portion of the Kansas City maintenance area for the second ten-year period.	Kansas City	12/17/02	1/13/04, 69 FR 1923.	
(47) Vehicle I/M Program	St. Louis	10/1/03	5/13/04, 69 FR 26506.	

EPA-APPROVED MISSOURI NONREGULATORY SIP PROVISIONS—Continued

Name of nonregulatory SIP provision	Applicable geographic or nonattainment area	State submittal date	EPA approval date	Explanation
(48) Revised Maintenance Plan of Doe Run Resource Recycling Facility near Buick, MO.	Dent Township in Iron County.	4/29/03	8/24/04, 69 FR 51953	Furnace daily throughput limits required to be consistent with rule 10 CSR 10–6.120. Annual production cap in Doe Run construction permit not affected by this rulemaking.
(49) Lead Maintenance Plan	Iron County (part) within boundaries of Liberty and Arcadia Townships.	1/26/04	10/29/04, 69 FR 63072.	
(50) Revision to Maintenance Plan for the 1-hour ozone standard in the Missouri portion of the Kansas City maintenance area for the second ten-year period.	Kansas City	10/28/05	6/26/06, 71 FR 36210.	
(51) CAA 110(a)(2)(D)(i) SIP—Interstate Transport.	Statewide	2/27/07	5/8/07, 72 FR 25085.	
(52) Submittal of the 2002 Base Year Inventory for the Missouri Portion of the St. Louis 8-hour ozone nonattainment area and Emissions Statement SIP.	St. Louis	6/15/06	5/31/07, 72 FR 30272.	
(53) Maintenance Plan for the 8-hour ozone standard in the Missouri portion of the Kansas City area.	Kansas City	5/23/07	8/9/07, 72 FR 44778	This plan replaces numbers (46) and (50).

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R03–OAR–2009–0593; FRL–8967–1]

Approval and Promulgation of Air Quality Implementation Plans; Delaware; Regulation To Reduce Idling of Heavy-Duty Vehicles

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: EPA is taking direct final action to approve revisions to the Delaware State Implementation Plan (SIP). The revision contains a regulation to reduce engine idling time for operation of most heavy-duty vehicles in the state, with certain exceptions. EPA is approving this revision to the Delaware SIP governing idling of heavy duty vehicles in the State of Delaware. EPA's approval of this SIP revision is being done in accordance with the requirements of the Clean Air Act (CAA).

DATES: This rule is effective on December 7, 2009 without further notice, unless EPA receives adverse written comment by November 9, 2009. If EPA receives such comments, it will publish a timely withdrawal of the direct final rule in the **Federal Register** and inform the public that the rule will not take effect.

ADDRESSES: Submit your comments, identified by Docket ID Number EPA–R03–OAR–2009–0593 by one of the following methods:

A. *http://www.regulations.gov.* Follow the on-line instructions for submitting comments.

B. *E-mail: fernandez.cristina@epa.gov.*

C. *Mail:* EPA–R03–OAR–2009–0593, Cristina Fernandez, Chief, Air Quality Planning Branch, Mailcode 3AP21, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103.

D. *Hand Delivery:* At the previously-listed EPA Region III address. 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 Number EPA–R03–OAR–2009–0593. 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.

Docket: All documents in the electronic docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some information is not publicly available, *i.e.*, CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly

available only in hard copy form. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. Copies of the State submittal are available at the Delaware Department of Natural Resources & Environmental Control, 89 Kings Highway, P.O. Box 1401, Dover, Delaware 19903.

FOR FURTHER INFORMATION CONTACT: Brian Rehn, (215) 814–2176, or by e-mail at *rehn.brian@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this rulemaking action, whenever "we," "us," or "our" is used, we are referring to EPA. The following outline is provided to aid in locating information in this preamble.

I. Summary of the SIP Revision
II. What Action Is EPA Taking?
III. Why Is EPA Approving Delaware's SIP Revision?
IV. Final Action
V. Statutory and Executive Order Reviews

I. Summary of the SIP Revision

EPA is approving a formal revision to the Delaware State Implementation Plan submitted by the state on August 12, 2005. This SIP revision consists of a regulation (formerly titled Regulation No. 45) that restricts extended idling of most on-road heavy-duty vehicles (those having a gross vehicle weight rating (GVWR) of greater than 8,500 pounds) while operating in the State of Delaware. The regulation sets a time limit of three consecutive minutes of idling time (*i.e.,* when a vehicle's engine is on, but it is not in motion). Section 5 of Delaware's Regulation No. 45 specifies exemptions to the idling limit for certain vehicle types and situations. These exemptions include: temperature-based exceptions for cold or hot days; vehicles idling for use of a sleeper berth, where the vehicle is not within 25 miles of a parking facility with available truckstop electrification equipment; vehicles which are stuck in traffic; vehicles being brought to manufacturer's recommended operating temperature; vehicles using auxiliary equipment powered by the engine (*e.g.,* take-off power); emergency vehicles; tactical military vehicles in training operations; school and transit buses with passengers onboard (or within five minutes of passenger boarding); and situations where a vehicle is being repaired or is being tested to ensure safe operation.

Per section 1 of Delaware's rule, this rule applies to "all on-road heavy-duty motor vehicles with a GVWR of greater than 8,500 pounds operating in the State of Delaware." Section 6 of Regulation No. 45 indicates that this regulation is enforceable under Title 7 Chapter 60 §§ 6005 and 6013 of the Delaware Code, with violators subject to a penalty of not less than $60 and no more than $500 for each offense.

On June 15, 2009, Delaware submitted a SIP revision which recodifies and makes general administrative changes to the regulatory language of its approved or submitted SIP rules. This recodification SIP revision does not change the substance of the August 2005 SIP revision, but does affect the numbering and format of the state regulation contained in the August 2005 SIP revision. EPA will take separate action on this renumbered version, Regulation No. 1145, in a separate rulemaking action along with a larger Delaware recodification SIP action.

II. What Rulemaking Action Is EPA Taking?

EPA is approving, via direct final rulemaking action, Delaware's Regulation No. 45, entitled "Excessive Idling of Heavy Duty Vehicles," and is incorporating this rule into the Delaware SIP.

III. Why Is EPA Approving Delaware's SIP Revision?

Delaware Regulation No. 45 results in reduced emissions of pollutants that contribute to nonattainment of National Ambient Air Quality Standards for ozone and fine particulate matter. Specifically Regulation 45 leads to elimination of such pollutants resulting from unnecessary extended idling of heavy-duty vehicles. The pollutants reduced by this regulation are volatile organic compounds and nitrogen oxides, both of which are ground level ozone pollution precursors. Delaware's rule will also reduce emissions of carbon monoxide, fine particulate matter, and the greenhouse gas carbon dioxide.

The approval of Delaware's Regulation No. 45 will strengthen the Delaware SIP and assist the state in meeting and maintaining compliance with air quality standards, including the national ambient air quality standards for ground level ozone and fine particulate matter.

Delaware's Regulation No. 45 is generally consistent with EPA's "Model State Idling Law" (EPA420–S–06–001, April 2006). This model rule was developed with input from the states and affected industry to address extended idling issues in a consistent manner from state to state and to aid those being regulated in compliance with compliance with idling limits. Although Delaware's excessive idling regulation was adopted in 2005, prior to EPA's issuance of its model state idling rule, Delaware captured the major elements of the EPA model rule in its regulation.

IV. Final Action

EPA is approving Delaware's Air Quality Management Regulation No. 45, entitled "Excessive Idling of Heavy Duty Vehicles," and incorporating this rule into the Delaware SIP. The rule is intended to reduce unnecessary idling from heavy duty motor vehicle engines within the boundaries of the state of Delaware.

EPA is publishing this rule without prior proposal because the Agency views this as a noncontroversial amendment and anticipates no adverse comment. Similar provisions for reduced idling have been adopted in other states, and Delaware's regulation has been in place since 2005. Further, Delaware's Regulation No. 45 follows the spirit of EPA's model state idling rule, so we anticipate the regulated parties will understand Delaware's requirements as they relate to other nearby states and localities with similar excessive idling limits. However, in the "Proposed Rules" section of today's **Federal Register,** EPA is publishing a separate document that will serve as the proposal to approve the SIP revision if adverse comments are filed. This rule will be effective on December 7, 2009 without further notice unless EPA receives adverse comment by November 9, 2009. If EPA receives adverse comment, EPA will publish a timely withdrawal in the **Federal Register** informing the public that the rule will not take effect. EPA will address all public comments in a subsequent final rule based on the proposed rule. EPA will not institute a second comment period on this action. Any parties interested in commenting must do so at this time. Please note that if EPA receives adverse comment on an amendment, paragraph, or section of this rule and if that provision may be severed from the remainder of the rule, EPA may adopt as final those provisions of the rule that are not the subject of an adverse comment.

V. Statutory and Executive Order Reviews

A. General Requirements

Under the Clean Air Act, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7410(k);

40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. Accordingly, this action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- Is not a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act; and
- does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the state, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

B. Submission to Congress and the Comptroller General

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

C. Petitions for Judicial Review

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by December 7, 2009. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. Parties with objections to this direct final rule are encouraged to file a comment in response to the parallel notice of proposed rulemaking for this action published in the proposed rules section of today's **Federal Register**, rather than file an immediate petition for judicial review of this direct final rule, so that EPA can withdraw this direct final rule and address the comment in the proposed rulemaking. This action to approve Delaware's SIP revision to reduce unnecessary idling of heavy-duty vehicles may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

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

Dated: September 25, 2009.

William C. Early,

Acting Regional Administrator, Region III.

■ 40 CFR part 52 is amended as follows:

PART 52—[AMENDED]

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

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

Subpart I—Delaware

■ 2. In § 52.420, the table in paragraph (c) is amended by adding an entry for Regulation No. 45 at the end of the table to read as follows:

§ 52.420 Identification of plan.

* * * * *

(c) * * *

EPA-APPROVED REGULATIONS IN THE DELAWARE SIP

State citation	Title/subject	State effective date	EPA approval date	Additional explanation
*	*	*	*	*
Regulation 45 Excessive Idling of Heavy Duty Vehicles				
Section 1	Applicability	4/11/05	10/08/09 [Insert page number where the document begins].	
Section 2	Definitions	4/11/05	10/08/09 [Insert page number where the document begins].	
Section 3	Severability	4/11/05	10/08/09 [Insert page number where the document begins].	
Section 4	Operational Requirements for Heavy Duty Motor Vehicles.	4/11/05	10/08/09 [Insert page number where the document begins].	
Section 5	Exemptions	4/11/05	10/08/09 [Insert page number where the document begins].	

EPA-APPROVED REGULATIONS IN THE DELAWARE SIP—Continued

State citation	Title/subject	State effective date	EPA approval date	Additional explanation
Section 6	Enforcement and Penalty	4/11/05	10/08/09 [Insert page number where the document begins].	

* * * * *

[FR Doc. E9–24187 Filed 10–7–09; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R09–OAR–2009–0435; FRL–8966–3]

Approval and Promulgation of Implementation Plans; Corrections to the Arizona and Nevada State Implementation Plans

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: EPA is deleting certain statutes and rules that were erroneously approved by EPA under the Clean Air Act as part of the Arizona and Nevada state implementation plans. The rules that are the subject of this rule were adopted by Pima County Health Department in Arizona and the State Environmental Commission, Clark County District Board of Health, and Washoe County District Board of Health in Nevada. The statutes and rules that EPA is deleting relate to general declarations of policy, advisory committees, variances, and incidental fees and nuisance odors. EPA has determined that the continued presence of these statutory provisions and rules in the applicable state implementation plans is potentially confusing and thus harmful to affected sources, the state, local agencies, the general public and to EPA. The intended effect of this action is to delete these statutes and rules from the Arizona and Nevada state implementation plans.

DATES: This rule is effective on December 7, 2009 without further notice, unless EPA receives adverse comments by November 9, 2009. If we receive such comments, we will publish a timely withdrawal in the **Federal Register** to notify the public that this direct final rule will not take effect.

ADDRESSES: Submit comments, identified by docket number EPA–R09–OAR–2009–0435, by one of the following methods:

1. Federal eRulemaking Portal: *http://www.regulations.gov.* Follow the on-line instructions.
2. E-mail: *allen.cynthia@epa.gov.*
3. Mail or deliver: Cynthia Allen (AIR–4), U.S. Environmental Protection Agency Region IX, 75 Hawthorne Street, San Francisco, CA 94105–3901.

Instructions: All comments 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 Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Information that you consider CBI or otherwise protected should be clearly identified as such and should not be submitted through *http://www.regulations.gov* or e-mail. The *http://www.regulations.gov* portal is an "anonymous access" system, and EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send e-mail directly to EPA, your e-mail address will be automatically captured and included as part of the public comment. 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.

Docket: The index to the docket for this action is available electronically at *http://www.regulations.gov* and in hard copy at EPA Region IX, 75 Hawthorne Street, San Francisco, California. While all documents in the docket are listed in the index, some information may be publicly available only at the hard copy location (e.g., copyrighted material), and some may not be publicly available in either location (e.g., CBI). To inspect the hard copy materials, please schedule an appointment during normal business hours with the contact listed in the **FOR FURTHER INFORMATION CONTACT** section.

FOR FURTHER INFORMATION CONTACT: Cynthia Allen, Rules Office (AIR–4), U.S. Environmental Protection Agency, Region IX, (415) 947–4120, *allen.cynthia@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document, "we," "us" and "our" refer to EPA.

Table of Contents

I. Why is EPA correcting the SIPs?
II. What Statutory Provisions and rules are being deleted?
III. Public Comment and Final Action
IV. Administrative Requirements

I. Why is EPA correcting the SIPs?

The Clean Air Act (CAA or "Act") was first enacted in 1970. In the 1970's and early 1980s, thousands of state and local agency regulations were submitted to EPA for incorporation into state implementation plans (SIPs) in order to fulfill the new federal requirements. In many cases, states submitted entire regulatory air pollution programs, including many elements not required by the Act. Due to time and resource constraints, EPA's review of these submittals focused primarily on the new substantive requirements, and we approved many other elements into the SIP with minimal review.

We now recognize that many of these elements were not appropriate for approval into the SIPs because they are not required for SIPs and are not related to the SIPs' purpose under CAA section 110(a) of implementing, maintaining, and enforcing the national ambient air quality standards. Examples of inappropriately-approved SIP elements include statutes and rules that consist of general statements of policy; that govern local advisory boards; that specify incidental fees, method of payment, and refunds; and that regulate nuisance odors. Most of the statutes and rules we are deleting in today's action fall under one of these categories.

In addition, we are deleting certain variance-related provisions that were orphaned by a previous EPA rulemaking deleting most such provisions from the Nevada Division of Environmental Protection (NDEP) portion of the Nevada SIP and the Pima County portion of the Arizona SIP. See EPA's proposed rule at 61 FR 38664 (July 25, 1996) and final rule at 62 FR 34641 (June 27, 1997) for the rationale concerning the inappropriateness of variance provisions in a SIP. As explained EPA 1996 rule proposing to remove various variance-related provisions, variance provisions are generally prohibited by, and are not legally enforceable pursuant to, section 110(i) of the Act.

II. What statutory provisions and rules are being deleted?

EPA has determined that the statutes and rules listed in the tables below were inappropriate for inclusion in the SIP, but were previously approved into the SIP in error. Dates that these statutes and rules were submitted by Arizona and Nevada and approved by EPA are provided. We are deleting these statutes and rules from the Arizona and Nevada SIPs under CAA section 110(k)(6) [1] as inconsistent with the requirements of CAA section 110(a).

ARIZONA REVISED STATUTES

Statute No.	Title	Submittal date	Approval date/FR cite
36–770	Declaration of Policy	07/13/81	06/18/82; 47 FR 26382
36–774	County Control Boards	07/13/81	06/18/82; 47 FR 26382
36–775	Powers and Duties	07/13/81	06/18/82; 47 FR 26382
36–776	Authorization to Accept Funds or Grants	07/13/81	06/18/82; 47 FR 26382
36–777	Advisory Council	07/13/81	06/18/82; 47 FR 26382
36–779	Rules & Regulations; Hearing; Limitations	07/13/81	06/18/82; 47 FR 26382

PIMA COUNTY DEPARTMENT OF ENVIRONMENTAL QUALITY

Rule No.	Title	Submittal date	Approval date/FR cite
131	Establishment	10/09/79	04/16/82; 47 FR 16326
132	Composition	10/09/79	04/16/82; 47 FR 16326
133	Terms: Nominations	10/09/79	04/16/82; 47 FR 16326
134	Function	10/09/79	04/16/82; 47 FR 16326
135	Officers; Procedures	10/09/79	04/16/82; 47 FR 16326
136	Meetings; Special Studies; Hearings	10/09/79	04/16/82; 47 FR 16326
137	Compensation; Absences	10/09/79	04/16/82; 47 FR 16326
164	Copies	10/09/79	04/16/82; 47 FR 16326
181	Legal Authority	10/09/79	04/16/82; 47 FR 16326
182	General Procedures	10/09/79	04/16/82; 47 FR 16326
205	Conditional Permits (Variances)	10/09/79	04/16/82; 47 FR 16326
214	Permit Fee Payments	10/09/79	04/16/82; 47 FR 16326
245	Conditional Permit (Variance) Fees	10/09/79	04/16/82; 47 FR 16326
246	Payment of Permit Fees	10/09/79	04/16/82; 47 FR 16326
247	Refund of Permit Fees	10/09/79	04/16/82; 47 FR 16326
248	Fees for Duplicate Permits	10/09/79	04/16/82; 47 FR 16326

NEVADA STATE REGULATIONS

Rule No.	Title	Submittal date	Approval date/FR cite
2.11.7	Untitled, but related to judicial review of variances	12/29/78	08/27/81; 46 FR 43141

CLARK COUNTY DEPARTMENT OF AIR QUALITY AND ENVIRONMENTAL MANAGEMENT

Rule No.	Title	Submittal date	Approval date/FR cite
Section 3, rule 3.1	Air Pollution Control Committee	07/24/79	08/27/81; 46 FR 43141

WASHOE COUNTY DISTRICT HEALTH DEPARTMENT, AIR QUALITY MANAGEMENT DIVISION

Rule No.	Title	Submittal date	Approval date/FR cite
020.020	Adoption, Amending Regulations	06/12/72	07/27/72; 37 FR 15080
020.030	Hearing Board—Powers and Duties	06/12/72	07/27/72; 37 FR 15080
020.075	Technical Reports and Fees	06/12/72	07/27/72; 37 FR 15080
030.3105	Hazardous Materials Processes	07/24/79	08/27/81; 46 FR 43141
030.3107	Untitled, but related to the cost for permit transfer	07/24/79	08/27/81; 46 FR 43141
030.3108	Untitled, but related to the cost for permit replacement	07/24/79	08/27/81; 46 FR 43141
040.055	Nuisance—Odorous or Gaseous Contaminants	06/12/72	07/27/72; 37 FR 15080

We are also taking this opportunity to correct certain clerical and typographical errors in a certain paragraph from the Arizona subpart of part 52 (''Approval and promulgation of implementation plans'') listing

[1] Section 110(k)(6) of the Clean Air Act, as amended in 1990, provides, ''Whenever the Administrator determines that the Administrator's action approving, disapproving, or promulgating any plan or plan revision (or part thereof), area designation, redesignation, classification or reclassification was in error, the Administrator may in the same manner as the approval, disapproval, or promulgation revise such action as appropriate without requiring any further submission from the State. Such determination and the basis thereof shall be provided to the State and the public.''

approved rules from the Pima County Health Department as submitted by Arizona on October 9, 1979, and approved by EPA on April 18, 1982 (47 FR 16326). The subject paragraph is 40 CFR 52.120(c)(38)(i)(A). In our 1982 final rule approving certain Pima County rules, we inadvertently identified the rules approved under "Regulation 21" as "Rules 221–225." The correct listing for the approved rules under "Regulation 21" is "Rules 211–215."

In addition, as noted in an EPA final rule published at 69 FR 2509 (January 16, 2004), beginning with the 1993 version of the Code of Federal Regulations (CFR), the Government Printing Office (GPO) inadvertently omitted two lines of codified rules from 40 CFR 52.120(c)(38)(i)(A), the same paragraph listing the Pima County rules approved by us in 1982. Our 2004 correcting amendment replaced most of the Pima County rules inadvertently omitted by the GPO but inadvertently failed to include "Regulation 21, Rules 221–225," which, as noted above, should read: "Regulation 21: Rules 211–215."

In addition, beginning with the 2004 version of the CFR, the paragraph (that omitted certain Pima County rules) that was intended to be replaced in its entirety through our 2004 correcting amendment has been published in addition to the replacement paragraph. In this action, we are correcting all of these errors with a revision to 40 CFR 52.120(c)(38)(i)(A) that correctly lists the rules approved under "Regulation 21" and that deletes the paragraph that we intended to replace in 2004.

III. Public Comment and Final Action

EPA has reviewed the statutes and rules listed in the tables above and determined that they were previously approved into the respective SIPs in error. Deletion of these rules will not relax the applicable SIP and is consistent with the Act. Therefore, EPA is deleting these statutes and rules under section 110(k)(6) of the Act, which provides EPA authority to remove these statutes and rules without additional State submission.

We do not think anyone will object to this approval, so we are finalizing it without proposing it in advance. However, in the Proposed Rules section of this **Federal Register,** we are simultaneously proposing approval of the same action. If we receive adverse comments by November 9, 2009, we will publish a timely withdrawal in the **Federal Register** to notify the public that the direct final approval will not take effect and we will address the comments in a subsequent final action based on the proposal. If we do not receive timely adverse comments, the direct final approval will be effective without further notice on December 7, 2009.

IV. Administrative Requirements

Under the Clean Air Act, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. Accordingly, this action merely corrects previous actions approving state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- Is not a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the state, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

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

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by December 7, 2009. Parties with objections to this direct final rule are encouraged to file a comment in response to the parallel notice of proposed rulemaking for this action published in the proposed rules section of today's **Federal Register**, rather than file an immediate petition for judicial review of this direct final rule, so that EPA can withdraw this direct final rule and address the comment in the proposed rulemaking. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements (see section 307(b)(2)).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Reporting and recordkeeping requirements.

Dated: September 15, 2009.

Laura Yoshii,

Acting Regional Administrator, Region IX.

■ Part 52, chapter I, title 40 of the Code of Federal Regulations is amended as follows:

PART 52—[AMENDED]

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

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

Subpart D—Arizona

■ 2. Section 52.120 is amended by:
■ a. Revising paragraph (c)(38)(i)(A);
■ b. Adding paragraph (c)(38)(i)(A)(*1*); and
■ c. Adding paragraph (c)(50)(ii)(A)(*1*).

The revision and additions read as follows:

§ 52.120 Identification of plan.

* * * * *

(c) * * *

(38) * * *

(i) * * *

(A) New or amended Regulation 10: Rules 101–103; Regulation 11: Rules 111–113; Regulation 12: Rules 121–123; Regulation 13: Rules 131–137; Regulation 14: Rules 141 and 143–147; Regulation 15: Rule 151; Regulation 16: Rules 161–165; Regulation 17: Rules 172–174; Regulation 18: Rules 181 and 182; Regulation 20: Rules 201–205; Regulation 21: Rules 211–215; Regulation 22: Rules 221–226; Regulation 23: Rules 231–232; Regulation 24: Rules 241 and 243–248; Regulation 25: Rules 251 and 252; Regulation 30: Rules 301 and 302; Regulation 31: Rules 312–316 and 318; Regulation 32: Rule 321; Regulation 33: Rules 331 and 332; Regulation 34: Rules 341–344; Regulation 40: Rules 402 and 403; Regulation 41: 411–413; Regulation 50: Rules 501–503 and 505–507; Regulation 51: Rules 511 and 512; Regulation 60: Rule 601; Regulation 61: Rule 611 (Paragraph A.1 to A.3) and Rule 612; Regulation 62: Rules 621–624; Regulation 63: Rule 631; Regulation 64: Rule 641; Regulation 70: Rules 701–705 and 706 (Paragraphs A to C, D.3, D.4, and E); Regulation 71: Rules 711–714; Regulation 72: Rules 721 and 722; Regulation 80: Rules 801–804; Regulation 81: Rule 811; Regulation 82: Rules 821–823; Regulation 90: Rules 901–904; Regulation 91: Rule 911 (except Methods 13–A, 13–B, 14, and 15), and Rules 912 and 913; Regulation 92: Rules 921–924; and Regulation 93: Rules 931 and 932.

(*1*) Previously approved on April 16, 1982 in paragraph (c)(38)(i)(A) of this section and now deleted from the SIP without replacement Pima County Health Department Regulations: Regulation 13: Rules 131–137; Regulation 16: Rule 164; Regulation 18: Rules 181 and 182; Regulation 20: Rule 205; Regulation 21: Rule 214; and Regulation 24: Rules 245–248.

* * * * *

(50) * * *

(ii) * * *

(A) * * *

(*1*) Previously approved on June 18, 1982 in paragraph (c)(50)(ii)(A) of this section and now deleted from the SIP without replacement Arizona Revised Statutes: sections 36–770, 36–774, 36–775, 36–776, 36–777, and 36–779.

* * * * *

Subpart DD—Nevada

■ 3. Section 52.1470 is amended by:
■ a. Adding paragraphs (c)(2)(i), (c)(14)(vii)(A), (c)(16)(viii)(D), and (c)(16)(ix)(A) to read as follows:

§ 52.1470 Identification of plan.

* * * * *

(c) * * *

(2) * * *

(i) Previously approved on July 27, 1972 in paragraph (c)(2) of this section and now deleted from the SIP without replacement Washoe County Air Quality Regulations: Rules 020.020, 020.030, 020.075, and 040.055.

* * * * *

(14) * * *

(vii) * * *

(A) Previously approved on August 27, 1981 in paragraph (c)(14)(vii) of this section and now deleted from the SIP without replacement Nevada Air Quality Regulations: Rule 2.11.7.

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(16) * * *

(viii) * * *

(D) Previously approved on August 27, 1981 in paragraph (c)(16)(viii) of this section and now deleted from the SIP without replacement Nevada Air Quality Regulations: Clark County District Board of Health Air Pollution Control Regulations: Section 3, Rule 3.1.

(ix) * * *

(A) Previously approved on August 27, 1981 in paragraph (c)(16)(ix) of this section and now deleted from the SIP without replacement Washoe County Air Quality Regulations: Rules 030.3105, 030.3107, and 030.3108.

* * * * *

[FR Doc. E9–24191 Filed 10–7–09; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 0810141351–9087–02]

RIN 0648–XS12

Fisheries of the Exclusive Economic Zone Off Alaska; Reallocation of Yellowfin Sole in the Bering Sea and Aleutian Islands Management Area

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

ACTION: Temporary rule; reallocation.

SUMMARY: NMFS is reallocating the projected unused amount of the 2009 yellowfin sole total allowable catch (TAC) assigned to the Bering Sea and Aleutian Islands trawl limited access sector to the Amendment 80 cooperative in the Bering Sea and Aleutian Islands management area (BSAI). This action is necessary to allow the 2009 total allowable catch of yellowfin sole to be fully harvested.

DATES: Effective October 5, 2009, through 2400 hrs, Alaska local time (A.l.t.), December 31, 2009.

FOR FURTHER INFORMATION CONTACT: Steve Whitney, 907–586–7269.

SUPPLEMENTARY INFORMATION: NMFS manages the groundfish fishery in the BSAI 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.

The 2009 yellowfin sole TAC assigned to the Bering Sea and Aleutian Islands trawl limited access sector is 39,154 metric tons (mt) and to the Amendment 80 cooperative is 87,987 mt in the BSAI as established by the final 2009 and 2010 harvest specifications for groundfish in the BSAI (74 FR 7359, February 17, 2009).

The Administrator, Alaska Region, NMFS, has determined that 6,000 mt of the yellowfin sole TAC assigned to the BSAI trawl limited access sector will not be harvested. Therefore, in accordance with § 679.91(f), NMFS reallocates 6,000 mt of yellowfin sole from the BSAI trawl limited access sector to the Amendment 80 cooperative

in the BSAI. In accordance with § 679.91(f), NMFS will reissue cooperative quota permits for the reallocated yellowfin sole following the procedures set forth in § 679.91(f)(3).

The harvest specifications for yellowfin sole included in the harvest specifications for groundfish in the BSAI (74 FR 7359, February 17, 2009) are corrected as follows: 33,154 mt to the BSAI trawl limited access sector and 93,987 mt to the Amendment 80 cooperative in the BSAI. Table 7a is corrected as set forth below:

TABLE 7a—FINAL 2009 COMMUNITY DEVELOPMENT QUOTA (CDQ) RESERVES, INCIDENTAL CATCH AMOUNTS (ICAS), AND AMENDMENT 80 ALLOCATIONS OF THE ALEUTIAN ISLANDS PACIFIC OCEAN PERCH, AND BSAI FLATHEAD SOLE, ROCK SOLE, AND YELLOWFIN SOLE TACS

[Amounts are in metric tons]

Sector	Pacific ocean perch			Flathead sole	Rock sole	Yellowfin sole
	Eastern Aleutian district	Central Aleutian district	Western Aleutian district	BSAI	BSAI	BSAI
TAC	4,200	4,260	6,520	60,000	90,000	210,000
CDQ	449	456	698	6,420	9,630	22,470
ICA	100	10	10	4,500	5,000	2,000
BSAI trawl limited access	365	379	116	0	0	33,154
Amendment 80	3,286	3,415	5,696	49,080	75,370	146,376
Amendment 80 limited access	1,742	1,811	3,020	5,729	18,559	58,389
Amendment 80 cooperatives	1,543	1,604	2,676	43,351	56,811	93,987

This will enhance the socioeconomic well-being of harvesters dependent upon yellowfin sole in this area. The Regional Administrator considered the following factors in reaching this decision: (1) The current catch of yellowfin sole by the BSAI trawl limited access sector and, (2) the harvest capacity and stated intent on future harvesting patterns of the Amendment 80 cooperative that participates in this BSAI fishery.

Classification

This action responds to the best available information recently obtained from the fishery. The Assistant Administrator for Fisheries, NOAA (AA), finds good cause to waive the requirement to provide prior notice and opportunity for public comment pursuant to the authority set forth at 5 U.S.C. 553(b)(B) as such requirement is impracticable and contrary to the public interest. This requirement is impracticable and contrary to the public interest as it would prevent NMFS from responding to the most recent fisheries data in a timely fashion and would delay the reallocation of yellowfin sole from the BSAI trawl limited access sector to the Amendment 80 cooperative in the BSAI. Since the fishery is currently open, it is important to immediately inform the industry as to the revised allocations. Immediate notification is necessary to allow for the orderly conduct and efficient operation of this fishery, to allow the industry to plan for the fishing season, and to avoid potential disruption to the fishing fleet as well as processors. NMFS was unable to publish a notice providing time for public comment because the most recent, relevant data only became available as of October 1, 2009.

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 § 679.91 and is exempt from review under Executive Order 12866.

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

Dated: October 5, 2009.

Emily H. Menashes,

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

[FR Doc. E9–24282 Filed 10–5–09; 4:15 pm]

BILLING CODE 3510–22–P

Proposed Rules

Federal Register
Vol. 74, No. 194
Thursday, October 8, 2009

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF AGRICULTURE

Food Safety and Inspection Service

9 CFR Parts 391, 590, and 592

[FDMS Docket Number FSIS–2006–0025]

RIN 0583–AD40

Changes in Fees for Meat, Poultry, and Egg Products Inspection Services

AGENCY: Food Safety and Inspection Service, USDA.

ACTION: Proposed rule.

SUMMMARY: The Food Safety and Inspection Service (FSIS) is proposing to amend its regulations to establish formulas for calculating the fees that it charges meat and poultry establishments, egg products plants, importers, and exporters for providing voluntary inspection, identification and certification services, overtime and holiday inspection services, and laboratory services. If the rule becomes effective, FSIS will calculate these fees based on the formulas. For future fiscal years, FSIS will calculate the fees on an annual basis and apply them at the start of the fiscal year. The Agency is also proposing to increase the codified flat annual fee for its Accredited Laboratory Program.

DATES: The Agency must receive comments by November 9, 2009.

ADDRESSES: FSIS invites interested persons to submit comments on this proposed rule. 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 online 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 (USDA), FSIS, Room 2–2127, George Washington Carver Center, 5601 Sunnyside Avenue, Mailstop 5474, Beltsville, MD 20705–5474.

Instructions: All items submitted by mail or electronic mail must include the Agency name and docket number FSIS–2006–0025. 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 to 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.

All comments submitted in response to this proposal, as well as background information used by FSIS in developing this document, will be available for public inspection in 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: For further information concerning policy issues contact Rachel Edelstein, Director, Policy Issuances Division, Office of Policy and Program Development, FSIS, U.S. Department of Agriculture, Room 6065 South Building, 1400 Independence Ave, SW., Washington, DC 20250–3700; telephone (202) 720–0399, fax (202) 690–0486.

For further information concerning fees contact Deborah Patrick, Director, Budget Division, Office of Management, FSIS, U.S. Department of Agriculture, Room 2159 South Building, 1400 Independence Avenue, SW., Washington, DC 20250–3700; telephone (202) 720–2912, fax (202) 720–5399.

SUPPLEMENTARY INFORMATION:

Background

The Federal Meat Inspection Act (FMIA) (21 U.S.C. 601 *et seq.*) and the Poultry Products Inspection Act (PPIA) (21 U.S.C. 451 *et seq.*) provide for mandatory Federal inspection of livestock and poultry slaughtered at official establishments and of meat and poultry processed at official establishments, respectively. The Egg Products Inspection Act (EPIA) (21 U.S.C. 1031 *et seq.*) provides for mandatory inspection of egg products processing at official plants. FSIS bears the cost of mandatory inspection provided during non-overtime and non-holiday hours of operation. Official establishments and egg products plants pay for inspection services performed on holidays or on an overtime basis.

Under the Agricultural Marketing Act of 1946 (AMA), as amended (7 U.S.C. 1621 *et seq.*), FSIS provides a range of voluntary inspection, certification, and identification services to assist in the orderly marketing of various animal products and byproducts. These services include the certification of technical animal fats and the inspection of exotic animal products, such as antelope and elk. The AMA provides that FSIS may prescribe the collection of fees to recover the costs of the voluntary inspection, certification, and identification services it provides.

Also under the AMA, FSIS provides certain voluntary laboratory services that establishments and others may request the Agency to perform. Laboratory services are provided for four types of analytic testing: Microbiological testing, residue chemistry tests, food composition tests, and pathology testing. Again, the AMA provides that FSIS may collect fees to recover the costs of providing these services.

FSIS also accredits non-Federal analytical laboratories under its Accredited Laboratory Program. Such accreditation allows laboratories to conduct analyses of official meat and poultry samples. The Food, Agriculture, Conservation, and Trade Act of 1990, as amended, mandates that laboratory accreditation fees cover the costs of the Accredited Laboratory Program. This same Act mandates an annual payment of an accreditation fee on the anniversary date of each accreditation.

Historically, FSIS amended its regulations annually to change the fees it charges establishments for providing overtime and holiday inspection services; voluntary inspection, certification, and identification services; and laboratory services and accreditation. Because of the length of the rulemaking process, each year the fiscal year would partially elapse before the Agency could publish a final rule to amend its fees. As a result, the Agency was unable to recover the full cost of the services it provided, which represented a considerable fiscal loss to FSIS. In 2006, in an effort to address the delays that resulted from the rulemaking process, FSIS amended its regulations to provide for multiple annual fee

increases in one action (71 FR 2135). With the rulemaking to increase fees for 2006–2008, FSIS established criteria for determining the fee increases on a multi-year basis. While this solution enabled the Agency to collect an increased fee each year, estimates used to set out the annual rates were imprecise and may well have left the Agency collecting too little in fees to fully cover its costs. The difference between the established rate and current economic conditions will likely be small during the first year of a multi-year rule but could well become large during the later years.

The Agency performed a cost analysis in 2008 (at the same time that the new fees analysis was performed) to determine whether the fees established were adequate to recover the costs that it incurred in providing these services. On the basis of this analysis, FSIS determined the necessary fees for FY 2010 and established the proposed formulas to determine the fees for FY 2010 and subsequent fiscal years.

Proposed Formulas

With this rulemaking, FSIS is proposing to amend its regulations to codify formulas in 9 CFR parts 391, 590, and 592 that FSIS will use to calculate and apply annual fees starting with the effective date of this rule and for subsequent fiscal years. FSIS intends to announce the actual annual fees in **Federal Register** notices prior to the start of each fiscal year.

Salary, hours, and all rates used in the formulas will be based on the prior fiscal year's actual costs and hours. In 9 CFR 391.2 and 592.510, FSIS is proposing the following formula to calculate the base time rate per hour per program employee: *Base Time Rate* = Office of Field Operations (OFO) plus Office of International Affairs (OIA) inspection program personnel salaries paid divided by regular hours multiplied by the next year's percentage of cost of living increase (*e.g.,* pay raise of 2.9% for ¼ of FY 2008 + 3.2% for ¾ of FY 2008), plus the benefits rate, plus the travel and operating rate, plus the overhead rate, plus an allowance for bad debt.

For the 2010 base time rate per hour per program employee, the calculation will look like this: [2008 Direct Pay divided by Total Direct Hours ($447,373,444/17,417,642)] = $25.69 * 2.175% (2009 Cost of Living) = $26.25 * 3.125% (2010 Cost of Living) = $27.07 + $6.83 (benefits rate) + $16.55 (travel and operating rate) + $.91 (overhead rate) + $.02 (bad debt allowance rate)= $51.38 (rounded to $51.36; rounding is done to reflect billable quarters).

In 9 CFR 391.3, 590.126 and, 592.520 and 592.530, FSIS is proposing to establish the following formulas for overtime and holiday rates per hour per program employee: *Overtime* = Salary component of Base Time Rate (OFO plus OIA inspection program personnel salaries paid divided by regular hours multiplied by the next year's percentage of cost of living increase) multiplied by 1.5 plus the benefits rate, plus the travel and operating rate, plus the overhead rate, plus an allowance for bad debt.

For the 2010 overtime rate per hour per program employee, the calculation will look like this: $27.07 * 1.5 (Time and one half) = $40.60 + $6.83 + $16.55 + $.91 + $.02 = $64.91 (rounded to $64.88).

Holiday Rate = Salary component of base time rate multiplied by 2, plus benefits rate, plus the travel and operating rate, plus the overhead rate, plus an allowance for bad debt.

For the 2010 holiday rate per hour per program employee, the calculation will look like this: $27.07 * 2 (Double time) = $54.14 + $6.83 + $16.55 + $.91 + $.02 = $78.44.

In 9 CFR 391.4, FSIS is proposing the following formula for the laboratory services rate per hour per program employee: *Laboratory Salary Rate* = Office of Public Health Science (OPHS) salaries paid divided by OPHS Hours worked, multiplied by the next calendar year's percentage cost of living increase, plus the benefits rate, plus the travel and operating rate, plus the overhead rate, plus an allowance for bad debt.

For the 2010 holiday salary per hour per program employee, the calculation will look like this: [2008 Total OPHS Direct Pay/Total OPHS hours (21,312,832/550,424)] = $38.72 * 2.175% (2009 Cost of Living) = $39.56 * 3.125% (2010 Cost of Living) = $40.80 + $6.83 + $16.55 + $.91 + $.02 = $65.11 (rounded to $65.08).

The formulas are based on the prior fiscal year's actual costs and cost of living increases and percentage of inflation factors from the economic assumptions in the Office of Management and Budget (OMB) Memorandum M–08–13, "Update to Civilian Position Full Fringe Benefit Cost Factor, Federal Pay Raise Assumptions, and Inflation Factors used in OMB Circular A–76, Performance of Commercial Activities" Memorandum M–08–13, dated March 11, 2008, which is available at the following link: *http://www.whitehouse.gov/omb/assets/omb/memoranda/fy2008/m08-13.pdf.* Rather than codify a reference to OMB Memorandum M–08–13 in the proposed rule, FSIS intends to use the economic factors in the memo for calculating the fees until new economic assumptions are issued in a new OMB Memorandum in the future.

As is proposed in §§ 391.2 and 592.510, FSIS intends to derive the components of proposed formulas, using previous fiscal year actual costs, as follows:

Benefits Rate: Direct benefits costs multiplied by the next calendar year's percentage cost of living increase. Some examples of direct benefits are health insurance, retirement, life insurance, and Thrift Savings Plan (TSP) retirement basic and matching contributions.

For the 2010 benefits rate per hour per program employee, the calculation will look like this: [2008 Direct Benefits/(Total Direct hours + Total OT hours + Total Holiday hours) ($130,744,894/20,164,116)] = $6.48 * 2.175% (2009 Cost of Living) = $6.62 * 3.125% (2009 Cost of Living) = $6.83.

Travel and Operating Rate: Total direct travel and operating costs multiplied by the percentage of inflation.

For the 2010 travel and operating rate per hour per program employee, the calculation will look like this: [2008 Total Direct Travel and Operating Costs/(Total Direct hours + Total OT hours + Total Holiday hours) (17,489,892/20,164,116)] = $.87 * 2.00% (2009 Inflation) = $.89 * 2.00% (2010 Inflation) = $.91.

Overhead Rate: All indirect costs plus the average information technology (IT) costs over the previous two years in the Public Health Data Communication Infrastructure System Fund plus the Office of Management Program cost in the Reimbursable and Voluntary Funds plus provision for the operating balance less any Greenbook costs (*i.e.,* costs of USDA support services prorated to the service component for which fees are charged) that are not related to food inspection, divided by total direct hours (regular, overtime, and holiday) worked across all funds, multiplied by the percentage of inflation.

For the 2010 the overhead rate per hour per program employee, the calculation will look like this: [2008 Total Overhead/(Total Direct hours + Total OT hours + Total Holiday hours) (320,820,057/20,164,116)] = $15.91 * 2.00% (2009 Inflation) = $16.23 * 2.00% (2010 Inflation) = $16.55.

Allowance for Bad Debt Rate = Total allowance for bad debt (for plants and establishments that declare bankruptcy) divided by total direct hours (regular, overtime, and holiday) worked.

For the 2010 allowance for bad debt rate per hour per program employee, the calculation will look like this: [2008

Total Bad Debt/Total Direct hours + Total OT hours + Total Holiday hours) ($325,481/20,164,116)] = $.02 (for 2009 and after).

As is noted above, the proposed formulas reflect that the cost of providing inspection services includes both direct and overhead costs. Overhead costs include the cost of program and Agency activities that support the food inspection services provided by the industry. Overhead expenditures are allocated across the Agency for each direct hour of inspection. Direct costs include the cost of salaries, employee benefits, travel and operating costs. Because of improvements in accessing data from the accounting system, the Agency has been able to estimate the employee benefits ascribable to overtime work and has included these in the fee calculation.

Section 10703 of the 2002 Farm Bill authorized the Secretary of Agriculture to set the hourly rate of compensation for FSIS employees exempt from the Fair Labor Standards Act (*i.e.,* veterinarians) who work in establishments subject to the FMIA and PPIA at one and one-half times the employee's hourly rate of base pay. In FSIS's January 13, 2006, final rule on fees, FSIS adjusted its overtime fees to reflect these costs. Previously, veterinarians were limited to the time and a half rate paid to employees at grade level GS–10, step 1. This proposed rule continues to provide overtime rates at one and one-half times the employee's hourly rate of base pay.

In this rule, FSIS is proposing to differentiate the holiday rate from the overtime rate in future years in order to collect the full expenditure of providing services on holidays. FSIS inspectors are paid double time for holiday work, while the current overtime rate only accounts for time and a half. Therefore, FSIS is proposing a holiday rate of two times the employee's hourly rate of base pay.

Laboratory Accreditation Fee

The Food, Agriculture, Conservation, and Trade Act of 1990, as amended, mandates that laboratory accreditation fees cover the costs of the Accredited Laboratory Program. This same Act mandates an annual payment of an accreditation fee on the anniversary date of each accreditation. Because these fees are fixed amounts and do not fluctuate with economic conditions, FSIS is not proposing a formula for these fees. FSIS will propose to change the codified laboratory accreditation fees through future rulemaking when necessary.

FSIS needs to raise its fees for the Accredited Laboratory Program to cover its increased direct overhead costs, including those for salary increases, employee benefits, inflation, and bad debt and to maintain an adequate operating reserve. Furthermore, FSIS must maintain a "carryover" amount each year as a reserve and uses it to cover the contractual costs that the Accredited Laboratory Program must pay at the beginning of each fiscal year. The proposed increases are also necessary to cover salaries and other operating expenses during the first two to three months of the fiscal year. Less than 5% of the program's income is received during the first two months of a fiscal year. Approximately 75% of the program's income is received in late December and early January; the remainder of the program's income is distributed about evenly across the rest of the fiscal year. Maintaining an adequate reserve is therefore essential for the Accredited Laboratory Program to be fully functional during the first quarter of any fiscal year.

FSIS is proposing to amend 9 CFR 391.5 to keep the laboratory accreditation fee at $4,500 for FY 2009, 2010, and 2011 and increase it to $5,000 for FY 2012 and FY 2013. These adjustments are necessary to recover FSIS costs for providing these accreditation services, including maintaining an adequate reserve. The amount of the accreditation fee each year is based on the number of expected new and renewal accreditations, the anticipated costs directly related to the accreditation process, and the estimated reserve from previous years. These fees are set based on FSIS's best projections of what it will cost the Agency to provide these services in fiscal years 2010 through 2013.

Projected Fees

The differing proposed fee increases for each type of service are the result of the different amounts that it costs FSIS to provide these four types of services. The differences in costs stem from various factors, including the different salary levels of the program employees who perform the services.

In the Agency's analysis of projected costs, set forth in Table 2, the Agency has identified the bases for the fiscal year 2010 increases in the cost of voluntary base time inspection services, overtime and holiday inspection services, and laboratory services. FSIS calculated its projected increases in salaries and inflation in fiscal year 2010. The average pay raise for Federal employees in calendar year 2010, reflecting both a national cost of living increase and locality differentials, will be 2.9 percent for .25 of the fiscal year and 3.2 percent for .75 of the fiscal year. Inflation for fiscal year 2010 is projected to be 2 percent.

The estimates in the tables below are based on the Presidential Economic Assumptions for FY 2009 and the out years in the OMB Memorandum M–08–13. In Table 1, FSIS estimated fees for subsequent fiscal years based on previous fiscal year actual costs, projected inflation, and cost of living factors.

The current and proposed fees are listed by type of service in Table 1.

TABLE 1—CURRENT AND NEW FEES (PER HOUR PER EMPLOYEE) BY TYPE OF SERVICE

Service	Current rate 2008 & 2009
Base time	$49.93
Overtime & holiday	58.93
Laboratory	70.82

Service	Proposed rate 2010	Projected rate 2011	Projected rate 2012
	(estimates rounded to reflect billable quarters)		
Base Time	$51.36	$52.84	$54.64
Overtime	64.88	66.84	68.84
Holiday	78.44	80.84	83.32
Laboratory	65.08	67.04	69.08

The base time rate for inspection services provided pursuant to §§ 350.7, 351.8, 351.9, 352.5, 354.101, 355.12, and 362.5 is an estimated $51.36 per hour per program employee in fiscal year 2010, $52.84 per hour per program employee in fiscal year 2011, and $54.64 per hour per program employee in fiscal year 2012.

The overtime rate for inspection services provided pursuant to §§ 307.5, 350.7, 351.8, 351.9, 352.5, 354.101, 355.12, 362.5 and 381.38 is an estimated $64.88 per hour per program employee in fiscal year 2010, $66.84 per hour per program employee in fiscal year 2011, and $68.84 per hour per program employee in fiscal year 2012.

The holiday rate for inspection services provided pursuant to §§ 307.5, 350.7, 351.8, 351.9, 352.5, 354.101, 355.12, 362.5 and 381.38 is an estimated hourly rate of $78.44 per hour per program employee in fiscal year 2010, $80.84 per hour per program employee in fiscal year 2011, and $83.82 per hour per program employee in fiscal year 2012.

The rate for laboratory services provided pursuant to §§ 350.7, 351.9, 352.5, 354.101, 355.12, and 362.5 is an estimated $65.08 per hour per program employee in fiscal year 2010, $67.04 per hour per program employee in fiscal year 2011, and $69.08 in fiscal year 2012.

The projected fees for FY 2010, 2011, and 2012 may not be significantly different from current codified fees. Table 2 summarizes the calculations for the different types of services for 2010. See Table 3 for the proposed Laboratory Accreditation Fees.

TABLE 2—CALCULATIONS FOR THE DIFFERENT TYPES OF SERVICES FOR FY 2010

	Actual costs per hour FY 2009	Cost of living allowance	Projected salary costs per hour FY 2010
Base Time:			
Actual 2009 Base Salary (Pay raise of 2.9% for .25 of FY + 3.2% for .75 of FY)	$26.25	3.125%	$27.07
Benefits	6.62	3.125%	6.83
Overhead (Department, Agency, and Program, including IT costs)	16.23	Inflation 2.0%	16.55
Travel/Operating Costs	0.89	2.0%	0.91
Bad Debt Allowance	0.02		0.02
Total Projected Costs			51.38
Overtime	39.37	3.125%	40.60
Holiday Pay	52.50	3.125%	54.14
Laboratory Fees	39.56	3.125%	40.80

* Similar benefits, overhead, travel/operating costs, and bad debt allowance for projected salary costs are also added to arrive to the totals shown in Table 1 for FY 2010 for overtime, holiday, and laboratory projected salary fees.

TABLE 3—CALCULATIONS FOR ACCREDITED LABORATORY FEES FY 2009–2013

	Estimated FY 2009	Proposed FY 2010	Proposed FY 2011	Proposed FY 2012	Proposed FY 2013
Estimated Income	$364,500	$382,500	$382,500	$405,000	$425,000
Estimated Expenses	386,230	423,863	438,453	444,886	456,464
New Accreditation Fee	4,500	4,500	4,500	5,000	5,000

Executive Order 12866 and Regulatory Flexibility Act

Because this proposed rule has been determined to be not significant, the Office of Management and Budget (OMB) did not review it under EO 12866.

The Administrator, FSIS, has determined that this proposed rule would not have a significant economic impact, as defined by the Regulatory Flexibility Act (5 U.S.C. 601), on a substantial number of small entities. The inspection services provided under these proposed fees are voluntary. Meat and poultry establishments and egg products plants requesting these services are likely to have calculated that the revenues generated from additional production will exceed the incremental costs of the services. Similarly, laboratories will determine whether the additional revenue for services that require accreditation will exceed the costs of becoming accredited.

Economic Effects of New Fees

By proposing to codify formulas to calculate future increases in annual fees instead of proposing to codify actual fees, the Agency will streamline the rulemaking process to help ensure that the fee increases are effective at the beginning of each fiscal year. In subsequent years, food safety will be maintained at the establishments affected by this rule as the Agency provides the services. The increased fees will cover inflation and national and locality pay raises but will not support any new budgetary initiative. The costs that industry will experience by the raise in fees are similar to other increases that the industry will experience because of inflation and wage increases.

The total volume of meat and poultry slaughtered under Federal inspection in 2007 was about 91 billion pounds (2007 Livestock, Dairy, Meat, and Poultry Outlook Report, Economic Research Service, USDA). The total volume in egg product production in 2007 was about 2.8 billion pounds (2007 National Agricultural Statistical Service, USDA). The increase in cost per pound of product associated with the new increased fees is, in general, $.0002. Even in competitive industries such as meat, poultry, and egg products, this amount of increase in costs would have an insignificant impact on profits and processes.

Even though this increase in fees is negligible, the industry is likely to pass along a significant portion of the proposed fee increases to consumers because of the inelastic nature of the demand curve facing consumers. Research has shown that consumers are unlikely to reduce demand significantly for meat, poultry, and egg products, when prices increase. Huang estimates that demand would fall by .36 percent for a one percent increase in price (Huang, Kao S., A Complete System for Demand for Food. USDA/ERS Technical Bulletin No. 1821, 1993, p. 24). Because of the inelastic nature of demand and the competitive nature of the industry, individual firms are not likely to experience any change in market share in response to an increase in inspection fees.

As a result of the new Accredited Laboratory Program fees, the Agency expects to collect about $2 million over the next 5 years from 85 laboratories, an average of $4,700 per entity per year.

Paperwork Reduction Act

This rule does not contain any new information collection or record keeping requirements that are subject to the Office of Management and Budget (OMB) approval under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*

E-Government Act

FSIS and USDA are committed to achieving the purposes of the E-Government Act (44 U.S.C. 3601, *et seq.*) by, among other things, promoting the use of the Internet and other information technologies and providing increased opportunities for citizen access to Government information and services, and for other purposes.

Executive Order 12988

This proposed rule has been reviewed under Executive Order 12988, Civil Justice Reform. This proposed rule: (1) Has no retroactive effect; and (2) does not require administrative proceedings before parties may file suit in court challenging this rule. However, the administrative procedures specified in 9 CFR 306.5, 381.35, and 590.300 through 590.370, respectively, must be exhausted before any judicial challenge may be made of the application of the provisions of the proposed rule, if the challenge involves any decision of an FSIS employee relating to inspection services provided under the FMIA, PPIA, or EPIA.

Additional Public Notification

Public awareness of all segments of rulemaking and policy development is important. Consequently, in an effort to ensure that minorities, women, and persons with disabilities are aware of this notice, FSIS will announce it online through the FSIS Web page located at *http://www.fsis.usda.gov/Regulations_&_Policies/2009_Proposed_Rules_Index/index.asp.* FSIS will also 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 constituents and stakeholders. The Update is communicated via Listserv, a free electronic mail subscription service for industry, trade and farm groups, consumer interest groups, allied health professionals, and other individuals who have asked to be included. The Update is also available on the FSIS Web page. Through the Listserv and Web page, FSIS is able to provide information to a much broader and 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.

List of Subjects

9 CFR Part 391

Fees and charges, Government employees, Meat inspection, Poultry products.

9 CFR Part 590

Eggs and egg products, Exports, Food labeling, Imports.

9 CFR Part 592

Eggs and egg products, Exports, Food labeling, Imports.

For the reasons set forth in the preamble, FSIS proposes to amend 9 CFR Chapter III as follows:

PART 391—FEES AND CHARGES FOR INSPECTION AND LABORATORY ACCREDITATION

1. The authority citation for part 391 continues to read as follows:

Authority: 7 U.S.C. 138d; 7 U.S.C. 1622, 1627 and 2219al; 21 U.S.C. 451 *et seq.*; 21 U.S.C 601–695;

2. Section 391.2 is revised to read as follows:

§ 391.2 Base time rate.

(a) For each fiscal year and based on the previous fiscal year's actual costs

and hours, FSIS calculates the base time rate for inspection services, per hour per program employee, provided pursuant to §§ 350.7, 351.8, 351.9, 352.5, 354.101, 355.12, and 362.5 using the following formula: Office of Field Operations plus Office of International Affairs inspection program personnel salaries paid divided by regular hours multiplied by the next year's percentage of cost of living increase, plus the benefits rate, plus the travel and operating rate, plus the overhead rate, plus an allowance for bad debt.

(b) FSIS calculates the components of the base time rate, which are based on previous fiscal year's actual costs, using the following formulas:

(1) *Benefits Rate.* Direct benefits costs multiplied by the next calendar year's percentage cost of living increase. Some examples of direct benefits are health insurance, retirement, life insurance, and Thrift Savings Plan (TSP) retirement basic and matching contributions.

(2) *Travel and Operating Rate.* Total direct travel and operating costs multiplied by the percentage of inflation.

(3) *Overhead Rate.* All indirect costs plus the average information technology (IT) costs over the previous two years in the Public Health Data Communication Infrastructure System Fund plus the Office of Management Program cost in the Reimbursable and Voluntary Funds less any Greenbook costs (*i.e.,* costs of USDA support services prorated to the service component for which fees are charged) that are not related to food inspection, divided by total direct hours (regular, overtime, and holiday) worked across all funds, multiplied by the percentage of inflation.

(4) *Allowance for Bad Debt Rate.* Total allowance for bad debt (for plants and establishments that declare bankruptcy) divided by total direct hours (regular, overtime, and holiday) worked.

(c) The cost of living increases and percentage of inflation factors used in the formulas in this section are based on the Office of Management and Budget's Presidential Economic Assumptions.

3. Section 391.3 is revised to read as follows:

§ 391.3 Overtime and holiday rate.

For each fiscal year and based on the previous fiscal year's actual costs and hours, FSIS calculates the overtime and holiday rates, per hour per program employee, provided pursuant to §§ 307.5, 350.7, 351.8, 351.9, 352.5, 354.101, 355.12, 362.5, and 381.38 using the following formulas:

(a) *Overtime.* Office of Field Operations plus Office of International Affairs inspection program personnel salaries paid divided by regular hours multiplied by the next year's percentage of cost of living increase multiplied by 1.5 plus the benefits rate, plus the travel and operating rate, plus the overhead rate, plus an allowance for bad debt.

(b) *Holiday Rate.* Office of Field Operations plus Office of International Affairs inspection program personnel salaries paid divided by regular hours multiplied by the next year's percentage of cost of living increase multiplied by 2, plus benefits rate, plus the travel and operating rate, plus the overhead rate, plus an allowance for bad debt.

(c) FSIS calculates the benefits rate, travel and operating rate, overhead rate, and allowance for bad debt using the formulas in § 391.2(b), and the cost of living increases and percentage of inflation factors in 391.2(c).

4. Section 391.4 is revised to read as follows:

§ 391.4 Laboratory services rate.

(a) For each fiscal year and based on the previous fiscal year's actual costs and hours, FSIS calculates the laboratory services rate, per hour per program employee, provided pursuant to §§ 350.7, 351.9, 352.5, 354.101, 355.12, and 362.5 will be calculated for future fiscal years using the following formula: Office of Public Health Science (OPHS) salaries paid divided by OPHS hours worked, multiplied by the next calendar year's percentage cost of living increase, plus the benefits rate, plus the travel and operating rate, plus the overhead rate, plus an allowance for bad debt.

(b) FSIS calculates the benefits rate, the travel and operating rate, the overhead rate, and the allowance for bad debt using the formulas in 391.2(b), and the cost of living increases and percentage of inflation factors in 391.2(c).

5. Paragraph (a) of § 391.5 is revised to read as follows:

§ 391.5 Laboratory accreditation fee.

(a) The annual fee for the initial accreditation and maintenance of accreditation provided pursuant to § 439.5 shall be $4,500.00 for fiscal years 2010 and 2011; and $5,000.00 for fiscal years 2012 and 2013.

* * * * *

PART 590—INSPECTION OF EGGS AND EGG PRODUCTS (EGG PRODUCTS INSPECTION ACT)

6. The authority citation for part 590 continues to read as follows:

Authority: 21 U.S.C. 1031–1056.

7. In § 590.126, revise the second sentence to read as follows:

§ 590.126 Overtime inspection service.

* * * The official plant must give reasonable advance notice to the inspector of any overtime service necessary and must pay for such overtime. For each fiscal year and based on previous fiscal year's actual costs and hours, FSIS calculates the overtime rate for inspection service, per hour per program employee, using the following formula: Office of Field Operations plus Office of International Affairs inspection program personnel salaries paid divided by regular hours multiplied by the next year's percentage of cost of living increase multiplied by 1.5 plus the benefits rate, plus the travel and operating rate, plus the overhead rate, plus an allowance for bad debt. FSIS calculates the benefits rate, travel and operating rate, overhead rate, and allowance for bad debt using the formulas in § 592.510(b) and the cost of living increases and percentage of inflation factors in § 592.510(c).

8. In § 590.128(a), revise the second sentence to read as follows:

§ 590.128 Holiday inspection service.

(a) * * * The official plant must, in advance of such holiday work, request the inspector in charge to furnish inspection service during such period and must pay the Agency for such holiday work at the hourly rate. For each fiscal year and based on the previous year's actual costs and hours, FSIS calculates the holiday rate for inspection service, per hour per program employee, using the following formula: Office of Field Operations plus Office of International Affairs inspection program personnel salaries paid divided by regular hours multiplied by the next year's percentage of cost of living increase multiplied by 2, plus benefits rate, plus the travel and operating rate, plus the overhead rate, plus an allowance for bad debt. FSIS calculates the benefits rate, travel and operating rate, overhead rate, and allowance for bad debt using the formulas in § 592.510(b), and the cost of living increases and percentage of inflation factors in § 592.510(c).

* * * * *

PART 592—VOLUNTARY INSPECTION OF EGG PRODUCTS

9. The authority citation for part 592 continues to read as follows:

Authority: 7 U.S.C. 1621–1627.

10. Section 592.510 is revised to read as follows:

§ 592.510 Base time rate.

(a) For each fiscal year and based on the previous fiscal year's actual costs and hours, FSIS calculates the base time rate for inspection services, per hour per program employee, using the following formula: Office of Field Operations plus Office of International Affairs inspection program personnel salaries paid divided by regular hours multiplied by the next year's percentage of cost of living increase, plus the benefits rate, plus the travel and operating rate, plus the overhead rate, plus an allowance for bad debt.

(b) FSIS calculates the components of the base time rate (which are based on previous fiscal year's actual costs) using the following formulas:

(1) *Benefits Rate:* Direct benefits costs multiplied by the next calendar year's percentage cost of living increase. Some examples of direct benefits are health insurance, retirement, life insurance, and Thrift Saving Plan (TSP) retirement basic and matching contributions.

(2) *Travel and Operating Rate:* Total direct travel and operating costs multiplied by the percentage of inflation.

(3) *Overhead Rate:* All indirect costs plus the average information technology (IT) costs over the previous two years in the Public Health Data Communication Infrastructure System Fund plus the Office of Management Program cost in the Reimbursable and Voluntary Funds less any Greenbook costs (*i.e.,* costs of USDA support services prorated to the service component for which fees are charged) that are not related to food inspection, divided by total direct hours (regular, overtime, and holiday) worked across all funds, multiplied by the percentage of inflation.

(4) *Allowance for Bad Debt Rate:* Total allowance for bad debt (for plants and establishments that declare bankruptcy) divided by total direct hours (regular, overtime, and holiday) worked.

(c) The cost of living increases and percentage of inflation factors used in the formulas in this section are based on the Office of Management and Budget's Presidential Economic Assumptions.

12. In § 592.520, revise the second sentence to read as follows:

§ 592.520 Overtime rate.

* * * The official plant must give reasonable advance notice to the inspector of any overtime service necessary. For each fiscal year and based on the previous fiscal year's actual costs and hours, FSIS calculates the overtime rate for inspection service, per hour per program employee, using the following formula: Office of Field Operations plus Office of International Affairs inspection program personnel salaries paid divided by regular hours multiplied by the next year's percentage of cost of living increase multiplied by 1.5 plus the benefits rate, plus the travel and operating rate, plus the overhead rate, plus an allowance for bad debt. FSIS calculates the benefits rate, travel and operating rate, overhead rate, and allowance for bad debt using the formulas in § 592.510(b), and the cost of living increases and percentage of inflation factors in § 592.510(b).

13. In 592.530, revise the second sentence to read as follows:

§ 592.530 Holiday rate.

* * * The official plant must, in advance of such holiday work, request that the inspector in charge furnish inspection service during such period and must pay the Agency for such holiday work at the hourly rate. For each fiscal year and based on the previous fiscal year's actual costs and hours, FSIS calculates the holiday rate for inspection service, per hour per program employee, using the following formula: Office of Field Operations plus Office of International Affairs inspection program personnel salaries paid divided by regular hours multiplied by the next year's percentage of cost of living increase multiplied by 2, plus benefits rate, plus the travel and operating rate, plus the overhead rate, plus an allowance for bad debt. FSIS calculates the benefits rate, travel and operating rate, overhead rate, and allowance for bad debt using the formulas in § 592.510(b), and the cost of living increases and percentage of inflation factors in § 592.510(b).

Done in Washington, DC, on October 5, 2009.

Alfred V. Almanza,

Administrator.

[FR Doc. E9–24283 Filed 10–7–09; 8:45 am]

BILLING CODE 3410–DM–P

FEDERAL RESERVE SYSTEM

[Regulation A; Docket No. R–1371]

12 CFR Part 201

Extensions of Credit by Federal Reserve Banks

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Proposed rule.

SUMMARY: The Board of Governors (Board) is publishing for public comment a proposed amendment to Regulation A that would provide a process by which the Federal Reserve Bank of New York may determine the eligibility of credit rating agencies and the ratings they issue for use in the Term Asset-Backed Securities Loan Facility, which is maintained by the Federal Reserve Bank of New York and for which the Board has expressly set a particular credit rating requirement for collateral offered by the borrower. The proposed rule would not apply to discount window lending or other extensions of credit provided by the Federal Reserve System. In addition, the rule would only apply to asset-backed securities that are not backed by commercial real estate. This proposed amendment is designed to provide the Federal Reserve Bank of New York with a consistent framework for determining the eligibility of ratings issued by individual credit rating agencies when used in conjunction with a separate asset-level risk assessment process. The proposed amendment does not represent a change in the stance of monetary policy. The Board solicits comment on all aspects of the proposal, as well as specific aspects of the proposal as set out in the preamble.

DATES: Written comments on this notice of proposed rulemaking must be submitted on or before November 9, 2009.

ADDRESSES: You may submit comments, identified by Docket Number R–1371, by any of the following methods:

- *Agency Web site: http://www.federalreserve.gov.* Follow the instructions for submitting comments at *http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm.*
- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *E-mail: regs.comments@federalreserve.gov.* Include docket number in the subject line of the message.
- *Fax:* (202) 452–3819 or (202) 452–3102.
- *Mail:* Jennifer J. Johnson, Secretary, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue, NW., Washington, DC 20551.

All public comments are available from the Board's Web site at *http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm,* as submitted, unless modified for technical reasons. Accordingly, your comments will not be edited to remove any identifying or contact information. Public comments may also be viewed electronically or in paper in Room MP–500 of the Board's Martin Building (20th and C Streets, NW.) between 9 a.m. and 5 p.m. on weekdays.

FOR FURTHER INFORMATION CONTACT: William R. Nelson, Associate Director (202/452–3579), Division of Monetary Affairs; Christopher W. Clubb, Senior Counsel (202/452–3904), Legal Division; for users of Telecommunication Devices for the Deaf (TDD) only, contact 202/263–4869.

SUPPLEMENTARY INFORMATION:

I. Background

Credit rating agencies. Credit rating agencies assess the credit risk of corporate or government borrowers and issuers of bonds, debt securities, and other financial obligations.[1] A credit rating is a credit rating agency's opinion of how likely an issuer is to make timely payments on a financial obligation, based on a variety of information regarding the issuer, the market in which the issuer operates, the overall economy, and the nature of the security. Because issuers may issue different types of fixed-income securities, different securities by the same issuer may have different credit ratings according to their different risk profiles. Credit rating agencies issue credit ratings for debt securities of public companies, sovereign governments, and municipalities, and for structured products such as asset-backed securities.[2]

Some credit rating agencies emphasize quantitative models based on statistical analysis of an issuer's financial disclosures to derive their ratings, while other credit rating agencies review both quantitative and qualitative indicators (including information that may be provided by the issuer and other sources) to form an assessment that is recommended to a rating committee, which then assigns the rating. While the exact processes used by a credit rating agency to derive a credit rating may be proprietary in some cases, credit rating agencies generally provide public statements outlining their rating philosophy or general methodology for a particular asset class. After the credit rating is issued, the credit rating agency will generally continue to monitor the issuer and/or its securities on an ongoing basis, although the U.S. Securities and Exchange Commission (SEC) has found that such monitoring tends to be less comprehensive than the initial review.[3]

NRSRO credit ratings. The term "nationally recognized statistical rating organization" was originally adopted by the SEC in 1975 for use in determining capital charges for broker-dealers on different grades of debt securities.[4] The concept of ratings by "nationally recognized statistical rating organizations" has been incorporated into a range of state and federal legislation and regulations.[5]

The Credit Rating Agency Reform Act of 2006 (CRARA) sets out a statutory definition of "nationally recognized statistical rating organization" (NRSRO) and provides the SEC with the authority to implement registration and oversight rules with respect to registered credit rating agencies.[6] The CRARA's provisions, and the grants of SEC rulemaking authority under these provisions, establish a voluntary registration process and regulatory program for credit rating agencies opting to have their credit ratings qualify for purposes of laws and rules using the term "nationally recognized statistical rating organization."[7] Such credit rating agencies are required to register with the SEC; make public certain information to help persons assess their credibility; make and retain certain records; furnish the SEC with certain financial reports; implement policies and manage the handling of material non-public information and conflicts of interest; and abide by certain prohibitions against unfair, coercive, or abusive practices. The CRARA also prohibits the SEC from evaluating the quality of rating methodologies in making a determination about whether a credit rating agency is an NRSRO. The SEC has promulgated regulations to implement the CRARA statutory provisions.[8]

Like other participants in the financial markets, the Federal Reserve System is an active user of NRSRO credit ratings. Credit ratings are used to support the efforts of several System programs, including discount window lending and recent specialized System liquidity and securities lending programs in response to the financial crisis.[9] Reserve Banks make credit available to depository institutions through the discount window to meet various liquidity needs. Under the Board's Regulation A, the Reserve Banks have the discretion to determine when a discount window advance to a depository institution is adequately secured.[10]

TALF. The Term Asset-backed Securities Lending Facility (TALF) is a funding facility to help market participants meet the credit needs of households and businesses by supporting the issuance of new asset-backed securities (ABS) collateralized by loans of various types to consumers and businesses of all sizes.[11] The underlying credit exposures of TALF-eligible ABS must be auto loans, student loans, credit card receivables, equipment loans, floorplan loans, insurance premium finance loans, receivables related to residential mortgage servicing advances (servicing advance receivables), or commercial mortgages.[12] The TALF was established under section 13(3) of the Federal Reserve Act, which permits the Board of Governors of the Federal Reserve Board, in unusual and exigent circumstances, to authorize Reserve Banks to extend credit to individuals, partnerships and corporations that are unable to obtain adequate credit accommodations. The Board has determined the terms and conditions for TALF borrowing and eligible collateral, including minimum credit ratings and the set of credit rating agencies whose ratings may be accepted

[1] *See* International Organization of Securities Commissions, *Report on the Activities of Credit Rating Agencies*, (Sept. 2003).

[2] *See* Securities and Exchange Commission, Proposed Rule: *Oversight of Credit Rating Agencies as Nationally Recognized Statistical Rating Organizations*, 72 FR 6378–01 (Feb. 9, 2007) (herein "CRA Proposed Rule").

[3] U.S. Securities and Exchange Commission, Office of Inspector General, *The SEC's Role Regarding and Oversight of Nationally Recognized Statistical Rating Organizations* (*NRSROs*), (Sept. 2009) p. 44.

[4] U.S. Securities and Exchange Commission, *Report on the Role and Function of Credit Rating Agencies in the Operation of the Securities Markets*, (Jan. 2003) p. 6.

[5] *See, e.g.*, 12 U.S.C. 24a(a)(3)(A)(i) (financial subsidiaries of national banks); 12 U.S.C. 1831e(d)(4)(A) (activities of savings associations); 15 U.S.C. 78c(a)(41) (definition of "mortgage related security"); 15 U.S.C. 80a–6(a)(5)(A)(iv)(I) (exemption from Investment Company Act provisions); and 29 U.S.C. 1341(b)(5)(B)(i)(I) (ERISA termination of single employer plans); Cal. Gov. Code § 53601 (West 2009); N.Y. Gen. Municipal Law § 10 (McKinney 2009).

[6] CRARA (Pub. L. No. 109–291, 120 Stat. 1327) is primarily codified at 15 U.S.C. 78o–7.

[7] The CRARA replaced the existing SEC staff approval system with "a transparent and voluntary registration system that favors no particular business model, thus encouraging purely statistical models to compete with the qualitative models of the dominant rating agencies and investor-based models to compete with fee-based models." S. Rep. No. 109–326 at p. 7.

[8] *See* 17 CFR 240.17g–1 through 240.17g–6.

[9] In addition to the use of ratings in helping to manage the credit risk of the Federal Reserve's balance sheet, credit ratings also play a role in the Federal Reserve's banking supervision and regulation function.

[10] Regulation A states that a Reserve Bank's advance to a depository institution must be secured to the satisfaction of the Reserve Bank. 12 CFR 201.3(a)(2).

[11] For the terms and conditions and frequently asked question of the TALF, refer to *http://www.federalreserve.gov/monetarypolicy/talf.htm*.

[12] Small business loans whose principal and interest payments are fully guaranteed by the full faith and credit of the United States are also accepted at the TALF, however, no credit rating is required for ABS backed by such loans.

for purposes of TALF by the Federal Reserve Bank of New York.

In authorizing the TALF, the Board directed that TALF-eligible collateral must be ABS denominated in U.S. dollars that has a credit rating in the highest long-term or short-term investment-grade rating category from two or more eligible NRSROs and does not have a credit rating below the highest investment-grade category from an eligible NRSRO. When TALF was established, the Board and the Federal Reserve Bank of New York accepted credit ratings from three NRSROs (Standard & Poor's, Moody's Investors Service, and Fitch Ratings). The Federal Reserve put a high priority on making the TALF available expeditiously while ensuring appropriate protection against credit risk for the U.S. taxpayer. In its efforts to provide liquidity to TALF ABS sectors as expeditiously as possible, the Board recognized that market participants have continued to rely upon the ratings of these NRSROs, generally to the exclusion of those with less experience rating ABS.

Since the establishment of TALF, the Federal Reserve has been conducting a broader review of its approach to using rating agencies encompassing the ratings of securities of all types accepted as collateral at all of the Federal Reserve's recently established credit facilities as well as collateral accepted to secure regular discount window loans. In May 2009, the Board announced an extension of eligible TALF collateral to include certain high-quality newly issued and legacy commercial mortgage-backed securities (CMBS).[13] Due to concerns about the historical accuracy of CMBS ratings, the role of ratings in the evaluation of legacy CMBS (which depend on the NRSROs continued monitoring activities), and the presence of two additional NRSROs with substantial experience rating CMBS, the Board and the Federal Reserve Bank of New York conducted a review of the five NRSROs who expressed interest in having their ratings accepted for CMBS pledged to the TALF. The review concluded that the ratings of these five NRSROs were of sufficient quality to provide useful information in the Federal Reserve Bank of New York's verification of the credit quality on the most senior classes of newly issued and legacy CMBS when used in conjunction with a separate asset-level risk assessment process. As a result, the Board amended the terms of the TALF to provide that TALF-eligible CMBS must have a triple-A long-term rating from at least two of those five NRSROs, and not have a lower rating from any of the other five NRSROs. Due to the factors listed above, particularly the importance of verifying the monitoring capabilities of the NRSROs that rate CMBS, the rule proposed in this notice will not apply to the NRSRO ratings that are accepted for CMBS pledged to the TALF.

II. Proposed Rule

The proposed rule presented in this notice is another step in the Federal Reserve's process of reviewing the appropriate use of NRSROs in its credit facilities. By this notice, the Board is proposing an amendment to the Board's Regulation A to govern the Federal Reserve Bank of New York's acceptance of credit ratings in connection with TALF ABS other than CMBS. As noted above, the proposed rule would apply only to the acceptance of credit ratings with respect to ABS pledged to the TALF and does not apply to general discount window lending under the primary, secondary, or seasonal credit facilities established in Regulation A, or any other credit facilities. Extensions of credit through the discount window are structured differently from those extended under TALF and the approach presented in the proposed rule would likely not be feasible in the discount window scenario. In such cases, the Reserve Banks would continue to ensure that they are adequately secured as otherwise provided in Regulation A.[14] The Federal Reserve will continue to review the use of credit ratings with respect to its other credit facilities.

The proposed rule adopts an objective minimal experience-based approach specific to the types of assets accepted as collateral in TALF. The proposed rule is intended to strike a balance between the goal of promoting competition among NRSROs and the goal of ensuring appropriate protection against credit risk for the U.S. taxpayer. As explained below, an additional risk assessment by the Federal Reserve Bank of New York with respect to TALF collateral is an important complement to the proposed rule's broadening of the set of eligible NRSROs.

As a threshold requirement, the proposed rule states that the Federal Reserve Bank of New York may only accept a credit rating issued by a credit rating agency that is registered with the SEC as an NRSRO for issuers of asset-backed securities pursuant to the CRARA. The proposed rule would leverage off of the NRSRO framework established by CRARA and the SEC regulations. A registered NRSRO must comply with SEC rules regarding the prevention of misuse of material nonpublic information; conflicts of interest; and prohibitions against unfair, coercive, or abusive practices. In particular, an NRSRO is expressly prohibited from having certain types of conflicts of interest relating to the issuance of credit ratings (such as the NRSRO being paid by issuers to determine credit ratings with respect to securities they issue) unless the conflicts are publicly disclosed in the NRSRO's registration materials and the NRSRO establishes and enforces written policies and procedures to address and manage the conflict of interest.[15] In addition, SEC rules prohibit NRSROs from having certain enumerated conflicts of interest under any circumstances (such as the NRSRO directly owning securities of the organization that is subject to the credit rating).[16] The Board believes that these disclosure provisions and conflict of interest prohibitions are prudent and relevant to the evaluation of credit rating agencies with respect to TALF.

Registration with the SEC as an NRSRO is not, however, a guarantee of the quality of the credit ratings issued. The CRARA expressly prohibits the SEC and any state from regulating the substance of credit ratings or the procedures and methodologies by which any NRSRO determines credit ratings.[17] Therefore, the Board believes additional criteria should be established to ensure that the Federal Reserve Bank of New York only accepts credit ratings that are reasonably likely to assist in the Federal Reserve Bank of New York's risk assessment to determine eligibility of ABS pledged as collateral to the TALF. The Board specifically solicits public comment regarding whether NRSRO registration is an appropriate threshold requirement for being accepted at TALF and whether NRSRO registration should be the sole requirement for eligibility for use in TALF. In responding, a commenter should explain how credit risk can be controlled with NRSRO registration as the sole criterion.

The Board is proposing a rule for reviewing the acceptability of a particular NRSRO generally by reference to certain experience-based criteria. The experience requirement is consistent

[13] Only ABS issued on or after January 1, 2009 may qualify for TALF funding except for ABS guaranteed by the Small Business Administration, which can be issued on or after January 1, 2008. All outstanding CMBS meeting the other TALF requirements may qualify for TALF funding.

[14] 12 CFR 201.3(a)(2).

[15] SEC Form NRSRO (SEC 1541) (4–09) Exhibits 6 and 7. *See also* 17 CFR 240.17g–5(a) and (b); 15 U.S.C. 78o–7(h).

[16] 17 CFR 240.17g–5(c)(2).

[17] 15 U.S.C. 78o–7(c)(2).

with the intent of CRARA, which requires a measure of market acceptance for NRSRO designation as well as the SEC rules regarding the NRSRO designation that require market acceptance within a defined asset category. Rather than requiring attestations from a particular number of Qualified Institutional Buyers (QIBs) that they rely upon an NRSRO's ratings, the rule would require that the NRSRO had issued ratings on at least ten transactions within a specified asset category. The asset categories are:

- Category 1—auto loans, floorplan loans, and equipment loans TALF sectors;
- Category 2—credit card receivables and insurance premium finance loans TALF sectors;
- Category 3—mortgage servicing advance receivables TALF sector; [18] and
- Category 4—student loans TALF sector.

The Board believes that experience in any of the TALF sectors grouped together in an asset category provides similar experience for each of the TALF sectors within that asset category. For example, Category 1 includes the auto loans, floorplan loans, and equipment loans TALF sectors. The Board believes that the ABS sectors within each category are similar in terms of the types of collateral, the manner in which the collateral is typically evaluated, and typical transactional structures and legal features. Experience across asset categories would not, however, be permitted to be aggregated under the proposed rule because the Board believes that the competencies required for ratings of ABS across different categories are not sufficiently similar.

The four asset categories defined in the rule are significantly narrower than the "ABS" category in which a credit rating agency may be approved as an NRSRO by the SEC. Relying upon the issuance of a minimal number of ratings as opposed to attestations from QIBs in each of the four asset categories should ensure a minimal level of expertise in rating the types of assets for which the ratings will be accepted. Furthermore, the Board believes that credit rating agencies' expertise when rating collateral of any given type can increase considerably upon reviewing a modest number of transactions. The experience requirement, therefore, would ensure that TALF-eligible NRSROs have accumulated sufficient knowledge of the specific asset category. The Board specifically solicits comments on whether an experience-based approach is appropriate for determining the suitability of NRSROs for the TALF program.

In addition, the proposed rule would allow the Federal Reserve Bank of New York to accept credit ratings only from a credit rating agency that has a current and publicly available rating methodology specific to ABS in the particular TALF asset sector (as defined in the TALF haircut schedule) for which the credit rating agency wishes its ratings to be considered for TALF. The Board believes that this is a prudent requirement because it ensures that the NRSRO has carefully thought about its approach to the TALF sector and that market participants are aware of the methodology and have had an opportunity to provide feedback to the NRSRO. The Board requests comment on whether a published methodology specific to asset-backed securities in the relevant TALF sector is an appropriate requirement for credit rating agencies in the TALF program.

In specifying that only transactions denominated in U.S. dollars would qualify under the experience requirement, the Board recognizes that rating opinions rely heavily upon expert judgment regarding conditions in the market within which the collateral is originated, the legal environment in which lenders and borrowers operate (both at origination and in the event of default), and complex transactional features that have resulted as a response to legal and institutional considerations specific to the United States.[19]

The Board considered both the number of transactions and period within which they must have occurred in determining an appropriate experience threshold for the rule. The Board believes that, while the learning curve for rating ABS is relatively steep, developing expertise in assessing the credit risk of an ABS transaction requires exposure to a diversity of transactional features within a given asset category. The types of collateral backing the securities within each of the TALF ABS sectors is relatively more homogenous than other types of ABS (such as CMBS), and therefore a threshold of ten transactions within approximately a three-year period (a little more than three transactions per year) appeared to be appropriate. Recognizing that ABS has evolved and rating agencies have turnover that can degrade institutional memory, a three-year window appeared to be an appropriate amount of time within which past expertise would be generally applicable in the present.

The Board requests comment generally on whether the experience approach set out in the proposed rule is appropriate. In addition, the Board invites comment on whether ten transactions within the approximately three-year window is appropriate to achieve the goals of the proposed rule. The Board also requests comment on whether the TALF asset sectors grouped together in the asset categories set out in the proposed rule are sufficiently similar that experience gained by issuing ratings with respect to one of the TALF sectors in a asset category can act as a substitute for experience gained by issuing ratings with respect to the other TALF sectors in the category. The Board also solicits comment on whether experience issuing credit ratings with respect to residential mortgage-backed securities should be treated as a substitute for experience in issuing credit ratings in the mortgage servicing advances TALF sector. Finally, the Board requests comment on whether the experience requirement is appropriately limited to transactions denominated in U.S. dollars for the reasons set out above.

The proposed rule also describes the process whereby the Federal Reserve Bank of New York would determine whether an NRSRO becomes eligible to have its ratings accepted for TALF ABS. Under the proposal, a credit rating agency that wishes to have its ratings accepted for TALF ABS transactions would send a written notice to the Credit, Investment, and Payment Risk group of the Federal Reserve Bank of New York and include the information addressing the factors listed above (*i.e.*, registered NRSRO for ABS, published methodology, and experience issuing ratings in the TALF category) with respect to each TALF asset sector for which it wishes its ratings to be accepted. The Federal Reserve Bank of New York will review the submission and notify the NRSRO within five business days as to whether any additional information is necessary. After review of all information necessary to determine the eligibility of an NRSRO pursuant to the factors in the proposed rule, the Federal Reserve Bank of New York will notify the NRSRO regarding its eligibility to have its ratings accepted at the TALF. The Board

[18] The proposed rule would permit an NRSRO to aggregate ratings on residential mortgage-backed securities (not currently included in the TALF) for purposes of meeting the ten-transaction requirement for Category 3 (mortgage servicing advance loans TALF sector).

[19] Such legal and institutional considerations include: legal standards for recognition of "true sale" of assets into a special purpose vehicle; legal standards for determining substantive consolidation and their impact on the rights of creditors and the management of "clawback risk"; treatment of issuer bankruptcies across different regulators; and tax considerations.

requests comment on whether this process will be efficient for purposes of NRSROs wishing to have their ratings accepted at TALF and, in particular, whether the proposed time frames are appropriate.

Under the proposed rule, the Federal Reserve Bank of New York could, at any time, review the continued use of ratings from a credit rating agency in one or more TALF ABS sectors and determine that such credit ratings were no longer acceptable if the credit rating agency no longer met the eligibility requirements or conditions. The NRSRO would be notified by the Federal Reserve Bank of New York of its concerns.

Finally, the proposed rule sets out two conditions that the Federal Reserve Bank of New York must ensure are met by an NRSRO in order for an NRSRO to have its credit ratings accepted for TALF ABS. First, the NRSRO must agree to discuss with the Federal Reserve its views of the credit risk of any transaction within the TALF asset sector that has been submitted to TALF and upon which the NRSRO is being or has been consulted by the issuer. The Board recognizes that qualitative analysis and expert judgment constitutes much of the value provided to investors by credit rating agencies and therefore can assist the Federal Reserve Bank of New York in the risk assessment process. In addition, issuers typically consult with several NRSROs about a transaction, but request formal ratings from only a subset. The condition will enable the Federal Reserve to learn the views of NRSROs consulted but ultimately not hired by the issuer to provide a rating. Second, the NRSRO must agree to provide any information requested by the Federal Reserve regarding the credit rating agency's continued eligibility for its ratings to be accepted at TALF under the factors set out in the proposed rules. Submission of this information is necessary to ensure that NRSROs that are accepted for TALF continue to meet the eligibility requirements for TALF under the proposed rule. The Board solicits comment on whether these conditions are appropriate for NRSROs submitting credit ratings for purposes of TALF.

Additional risk assessment. Expanding the set of NRSROs accepted at TALF could increase credit risk in the program by increasing the risk of less rigorous credit rating standards or by increasing the risk of "rating-shopping." To address this and to protect against TALF accepting excessive risk, the Federal Reserve Bank of New York will implement an additional risk assessment process for TALF ABS transactions.[20] The business reasons for the additional risk assessment process are independent of an expansion of the set of NRSROs accepted for purpose of TALF, but the Board believes that such a risk assessment could serve to mitigate any increase in credit risk to the U.S. taxpayer that could potentially result from an expansion of the set of NRSROs accepted at TALF.

In order for the Federal Reserve Bank of New York to be able to conduct the additional risk assessment in a timely manner, the TALF ABS terms and conditions include a provision that each issuer wishing to bring a TALF-eligible ABS transaction to market is required to provide to the Reserve Bank, at least three weeks prior to the subscription date of the transaction, a specific set of information, including, but not limited to, all data the issuer has provided to any NRSRO regarding the transaction. The Federal Reserve Bank of New York (along with the TALF collateral monitor) will use that information to assist in its risk assessment process. Issuers would also be required to submit an executed waiver or consent for each prospective TALF transaction that would authorize any NRSRO from which the issuer has sought preliminary ratings or any other form of feedback on the transaction to share its view of the credit quality of the transaction with the Federal Reserve Bank of New York. This provision is intended to mitigate the credit risk associated with "rating shopping."

III. Administrative Law Matters

A. Initial Regulatory Flexibility Analysis

Congress enacted the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) to address concerns related to the effects of agency rules on small entities and the Board is sensitive to the impact its rules may impose on small entities. The RFA requires agencies either to provide an initial regulatory flexibility analysis with a proposed rule or to certify that the proposed rule will not have a significant economic impact on a substantial number of small entities. Under regulations issued by the Small Business Administration (SBA), a small credit rating agency includes those institutions with $7 million in assets.[21] In accordance with section 3(a) of the RFA, the Board has reviewed the proposed rule. An Initial Regulatory Flexibility Analysis (IRFA) has been prepared in accordance with the RFA.[22]

The Board encourages comments with respect to any aspect of this IRFA, including comments with respect to the number of small entities that may be affected by the proposed rule. Comments should specify the costs of compliance with the proposed rule and suggest alternatives that would accomplish the goals of the rules, including an estimate of any cost savings. Comments will be considered in determining whether a Final Regulatory Flexibility Analysis (FRFA) is required and will be placed in the same public file as comments on the proposed rule. Comments should be submitted to the Board at the addresses previously indicated. The Board will determine whether a FRFA is necessary after consideration of comments received during the public comment period.

1. Reasons for the Proposed Action

As discussed in the preamble above, the Board is proposing these rules to govern the Federal Reserve Bank of New York's determination of eligibility of NRSROs and their credit ratings for use in TALF ABS for which the Board has established a requirement for collateral to be rated by one or more NRSROs. The Board anticipates that implementation of the proposed rule will permit an expansion of the set of NRSROs accepted for TALF ABS, while maintaining appropriate protection against credit risk for the U.S. taxpayer in connection with TALF.

2. Objective

As discussed in the preamble above, the objective of the proposed rule is to govern the Federal Reserve Bank of New York's determinations of eligibility of particular credit ratings for TALF ABS to meet a Board requirement for collateral to be rated by one or more credit rating agencies. The Board intends for the proposed rules to provide for an objective, prudent, and reasonably consistent process for the Federal Reserve Bank of New York to determine the eligibility of NRSROs and their credit ratings for purposes of TALF ABS.

3. Legal Basis

Section 11 of the Federal Reserve Act (12 U.S.C. 248(j)) authorizes the Board

[20] The additional risk assessment is being adopted to clarify and make systematic the process whereby the Federal Reserve Bank of New York determines whether a bond is acceptable as TALF collateral based on the TALF terms and conditions. The Federal Reserve Bank of New York already uses an additional risk assessment process to determine whether CMBS is eligible for TALF. Satisfaction of the Federal Reserve Bank of New York's risk assessment process for ABS is being added to the TALF program terms and conditions.

[21] 13 CFR 121.201.

[22] 5 U.S.C. 603.

to exercise general supervision over the Reserve Banks. The TALF is authorized under section 13(3) of the Federal Reserve Act (12 U.S.C. 343).

4. Small Entities Subject to the Rule

The proposed rule would establish criteria and conditions governing the acceptance of credit ratings by the Federal Reserve Bank of New York for use in TALF. The Board has prepared this IRFA in order to determine any impact on small entities in order to determine if there is a more cost-effective manner to accomplish the goals of the regulation.

At present, there are ten NRSROs registered with the SEC. Of those ten, the Board's review of publicly available information indicates that three NRSROs are not "small entities" under the RFA because their asset size (or the asset size of the NRSRO's parent company) is larger than the level set in the SBA regulation. The Board does not have access to appropriate non-public information on the asset sizes of the other NRSROs. For purposes of estimating costs for this IRFA, the Board will assume that all seven of the NRSROs would qualify as a "small entity" under the SBA regulations and could be indirectly impacted by the proposed rule.

5. Reporting, Recordkeeping, and Other Compliance Requirements

As noted above, the proposed rule would leverage off the SEC's existing NRSRO registration process. The Board believes that the proposed rule would not establish any reporting, recordkeeping, or other compliance requirements that are not already part of the NRSRO registration process or involve records that would not otherwise be created in the normal course of an NRSRO's business. Other than that which is normally required in the credit rating agency industry, special expertise should not be required to compile the information necessary to submit an eligibility request to the Federal Reserve Bank of New York for use of an NRSRO's credit ratings in TALF. An NRSRO that wishes for its credit ratings to be accepted for TALF would merely have to supply its methodology for rating the relevant TALF asset sector and document how it has the relevant experience issuing ratings in the TALF asset sector. Most NRSROs should have this information readily available in the normal and customary course of business. The Board estimates that the costs of compiling this information and submitting a notice to the Federal Reserve Bank of New York would be nominal.[23]

The conditions required for the Federal Reserve Bank of New York to accept ratings from an NRSRO similarly also should require minimal expenditure of resources. If requested by the Federal Reserve Bank of New York, an NRSRO may be requested to provide information on its continued eligibility under the proposed rule. Such information, however, would be in connection with the eligibility criteria in the proposed rule (such as continued NRSRO registration with the SEC) and should be readily available in the normal course of business. An NRSRO that has been consulted on a transaction in TALF may be requested by the Federal Reserve Bank of New York to discuss its views of the particular transaction, but it would not be required to conduct any more analysis than it had already conducted in the course of its business.

The Board requests comment on the description of burden for compliance with the proposed rule described above. Commenters should provide identify any potential burdens not discussed herein, as well as any actual or estimated cost data.

6. Duplicative, Overlapping, or Conflicting Federal Rules

The Board believes that there are no federal rules that duplicate, overlap, or conflict with the proposed rules.

7. Significant Alternatives

Pursuant to section 3(a) of the RFA, the Board must consider certain types of alternatives, including: (1) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for small entities; (3) the use of performance rather than design standards; and (4) an exemption from coverage of the rule, or any part of the rule, for small entities.

The proposed rule does not establish any compliance or reporting requirements, including any performance or design standards. Because the proposed rule provides a process through which credit rating agencies can have their credit ratings accepted by the Federal Reserve Bank of New York for purposes of the TALF, the Board preliminarily believes that small entities that wish to apply should be covered by the rule. Like the NRSRO registration procedure, the process set out in the proposed rule for a credit rating agency to have its ratings accepted by the Federal Reserve Bank of New York is voluntary.

The Board considered two substantive alternatives to the approach adopted in the proposed rule. First, the Board considered accepting for TALF all NRSROs registered with the SEC without any further requirements. The Board determined that this was not prudent as the SEC's registration process did not address the quality of credit ratings issued by registered NRSROs. In addition, the SEC ABS registration does not sufficiently track the TALF asset sectors to ensure that NRSROs would have experience to rate ABS transactions of the type being pledged to TALF. The Board also considered an approach wherein the Federal Reserve Bank of New York would conduct an extensive review of the methodology and resources of each NRSRO applying to be accepted at TALF in order to determine whether the NRSRO had the expertise and facilities to issue ratings suitable for use in each of the TALF asset sectors for which the NRSRO wished its ratings to be accepted. The Board did not propose this approach because of the time and resources that such in-depth reviews would require of the Federal Reserve Bank of New York; these resources also would likely be diverted away from the risk assessment process discussed above. The time and resource issue would be significant as it would involve detailed analysis of multiple NRSROs across seven different TALF asset sectors. Even with unlimited resources, designing the in-depth reviews, including the role that subjective judgment would play, would require time to perfect. TALF is intended as a temporary facility and there is the risk that the in-depth reviews would take longer than the remaining life of TALF.

[23] As noted above, for purposes of this IRFA, the Board assumes that there are no more than seven NRSROs that would qualify as "small entities. The Board estimates that compiling the necessary information and submitting a notice to the Federal Reserve Bank of New York should take no more than four hours per NRSRO. Total cost was estimated using the following formula: percent of staff time, multiplied by annual burden hours, multiplied by hourly rate (30% Administrative or Junior Analyst @ $25, 10% Managerial or Technical @ $55, 10% Senior Management @ $100, and 50% Legal Counsel @ $144). Hourly rate estimates for each occupational group are averages using data from the Bureau of Labor and Statistics (BLS), Occupational Employment and Wages 2007, *http://www.bls.gov/news.release/ocwage.nr0.htm.* Occupations are defined using the BLS Occupational Classification System, *http://www.bls.gov/soc/.* The total costs are estimated at $2,660 if seven small entity NRSROs applied to have their ratings accepted for all TALF sectors.

8. Request for Comments

The Board encourages the submission of comments on any aspect of the IRFA. In addition, the Board specifically requests comments on the estimate of the number of NRSROs that would be considered "small entities" indirectly impacted by the proposed rule for purposes of the RFA. Commenters that disagree with these estimates are requested to describe in detail the basis for their conclusions and identify the sources of any industry statistics they relied on to reach their conclusions. The Board also requests comment on any alternatives to the approach adopted in the proposed rule that would accomplish the goals of the proposed rule in a more cost-effective manner.

B. Paperwork Reduction Act Analysis

Office of Management and Budget (OMB) regulations implementing the Paperwork Reduction Act (PRA) state that agencies must submit "collections of information" contained in proposed rules published for public comment in the **Federal Register** in accordance with OMB regulations.[24] OMB regulations define a "collection of information" as obtaining, causing to be obtained, soliciting, or requiring the disclosure to an agency, third parties or the public of information by or for an agency "by means of identical questions posed to, or identical reporting, recordkeeping, or disclosure requirements imposed on, ten or more persons, whether such collection of information is mandatory, voluntary, or required to obtain or retain a benefit."[25]

In accordance with the PRA, the Board reviewed the proposed rule under the authority delegated to the Board by OMB. The Federal Reserve may not conduct or sponsor, and an organization is not required to respond to, this information collection unless it displays a currently valid OMB control number, which will be assigned. The collections of information that are proposed to be revised by this rulemaking are found in subsection 201.3(e)(1)(ii) and (iii) of the proposed rule (to be codified at 12 CFR 201.3(e)(1)(ii) and (iii)). This information is required to permit the Federal Reserve Bank of New York to determine eligibility of credit rating agencies to have their ratings accepted in TALF in accordance with Board regulations. The respondents are NRSROs, which may be small entities. There is no record retention requirement in the proposed rule.

The estimated burden per response is two hours. It is estimated that there will be ten respondents providing information on a one-time basis. Therefore, the total amount of annual burden is estimated to be 20 hours.

The proposed rule in this notice implements a threshold requirement of registration with the SEC as an NRSRO. As noted above, registration with the SEC as an NRSRO requires, among other things, the completion of the SEC Form NRSRO. This form includes exhibits regarding a general description of the procedures and methodologies used by the credit rating agency to determine credit ratings for the classes of assets for which the credit rating agency is seeking registration. The SEC, however, already budgets for paperwork burden connected with its NRSRO registration program. Accordingly, it would be redundant for the Board to budget additional paperwork burden for the SEC's registration process.

In addition to NRSRO registration, the proposed rule would require the NRSRO to submit to the Federal Reserve Bank of New York additional information to demonstrate that it has sufficient expertise and experience to provide credit ratings that would assist in the Reserve Bank's risk assessment on the most senior classes of newly issued asset-backed securities in a particular TALF asset sector. The additional requirements includes an NRSRO (i) having a current and publicly available rating methodology specific to asset-backed securities in the particular TALF asset sector for which it wishes its ratings to be accepted; and (ii) having made public or made available to a paying subscriber base, since September 30, 2006, at least ten ratings on U.S. dollar-denominated transactions within a particular group of complementary ABS categories as set out in the proposed rule. These requirements are found in subsection 201.3(e)(1)(ii) and (iii) of the proposed rule (to be codified at 12 CFR 201.3(e)(1)(ii) and (iii)).

The Board believes that each of these requirements should require minimal effort on the part of an NRSRO. Most NRSROs that issue credit ratings for a type of asset make public their methodology. In addition, it should be a relatively simple matter for an NRSRO to certify that it has issued ten ratings in the appropriate asset category by enclosing a list containing the CUSIP number and original and current rating of the most senior tranche from at least ten transactions it has rated within the appropriate asset category and timeframe.

Comments are invited regarding (a) whether the proposed collection of information is necessary for the proper performance of the Federal Reserve's functions, including whether the information has practical utility; (b) the accuracy of the Federal Reserve's estimate of the burden of the proposed information collection, including the cost of compliance; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of information collection on respondents, including through the use of automated collection techniques or other forms of information technology. Comments on the collection of information should be sent to Secretary, Board of Governors of the Federal Reserve System, Washington, DC 20551, with copies of such comments to be sent to the Office of Management and Budget, Paperwork Reduction Project, Washington, DC 20503.

C. Plain Language

Each Federal banking agency, such as the Board, is required to use plain language in all proposed and final rulemakings published after January 1, 2000. 12 U.S.C. 4809. The Board has sought to present the proposed rule, to the extent possible, in a simple and straightforward manner. The Board invites comment on whether there are additional steps that could be taken to make the proposed rule easier to understand, such as with respect to the organization of the materials or the clarity of the presentation.

IV. Statutory Authority

Pursuant to the authority set out in the Federal Reserve Act and particularly section 11 (codified at 12 U.S.C. 248(j)), the Board proposes the rules set out below.

V. Text of Proposed Rule

List of Subjects in 12 CFR Part 201

Credit.

Authority and Issuance

For the reasons set forth in the preamble, the Board proposes to amend 12 CFR Chapter II to read as follows:

PART 201—EXTENSIONS OF CREDIT BY FEDERAL RESERVE BANKS (REGULATION A)

1. The authority citation for part 201 continues to read as follows:

Authority: 12 U.S.C. 248(i)–(j), 343 *et seq.*, 347a, 347b, 347c, 348 *et seq.*, 357, 374, 374a, and 461.

2. In § 201.3, paragraph (e) is added to read as follows:

[24] 5 CFR 1320.11. The PRA is codified at 44 U.S.C. 3506 *et seq.*

[25] 5 CFR 1320.11(c).

§ 201.3 Extensions of credit generally.

* * * * *

(e) *Credit ratings for Term Asset-Backed Securities Loan Facility (TALF).*

(1) If the Board requires that a TALF advance, discount, or other extension of credit be against collateral (other than commercial mortgage-backed securities) that is rated by one or more credit rating agencies, the Federal Reserve Bank of New York may accept the ratings of any credit rating agency that:

(i) Is registered with the Securities and Exchange Commission as a Nationally Recognized Statistical Rating Organization for issuers of asset-backed securities;

(ii) Has a current and publicly available rating methodology specific to asset-backed securities in the particular TALF asset sector (as defined in the TALF haircut schedule) for which it wishes its ratings to be accepted; and

(iii) Demonstrates that it has sufficient experience to provide credit ratings that would assist in the Federal Reserve Bank of New York's risk assessment on the most senior classes of newly issued asset-backed securities in the particular TALF asset sector by having made public or made available to a paying subscriber base, since September 30, 2006, ratings on at least ten transactions denominated in U.S. dollars within the particular category to which the particular TALF asset sector is assigned as set out below—

(A) Category 1—auto, floorplan, and equipment TALF sectors;

(B) Category 2—credit card and insurance premium finance TALF sectors;

(C) Category 3—mortgage servicing advances TALF sector; and

(D) Category 4—student loans TALF sector.

(2) For purposes of the requirement in paragraph (e)(1)(iii) of this section, ratings on residential mortgage-backed securities may be included in Category 3 (servicer advances).

(3) The Federal Reserve Bank of New York may in its discretion review at any time the eligibility of a credit rating agency to rate one or more types of assets being offered as collateral.

(4) *Process.*

(i) Credit rating agencies that wish to have their ratings accepted for TALF transactions should send a written notice to the Credit, Investment, and Payment Risk group of the Federal Reserve Bank of New York including information on the factors listed in paragraph (e)(1) of this section with respect to each TALF asset sector for which they wish their ratings to be accepted.

(ii) The Federal Reserve Bank of New York will notify the submitter within 5 business days of receipt of a submission whether additional information needs to be submitted.

(iii) Within 5 business days of receipt of all necessary information to evaluate a credit rating agency pursuant to the factors set out in paragraph (e)(1) of this section, the Federal Reserve Bank of New York will notify the credit rating agency regarding its eligibility.

(5) *Conditions.* The Federal Reserve Bank of New York may accept credit ratings under this subsection only from a credit rating agency that agrees to—

(i) Discuss with the Federal Reserve its views of the credit risk of any transaction within the TALF asset sector that has been submitted to TALF and upon which the credit rating agency is being or has been consulted by the issuer; and

(ii) Provide any information requested by the Federal Reserve regarding the credit rating agency's continued eligibility under paragraph (e)(1) of this section.

By the Board of Governors of the Federal Reserve System, October 5, 2009.

Jennifer J. Johnson,

Secretary.

[FR Doc. E9–24252 Filed 10–7–09; 8:45 am]

BILLING CODE 6210–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 25

[Docket No. NM414 Special Conditions No. 25–09–10–SC]

Special Conditions: Boeing Model 747–8/–8F Series Airplanes; Design Roll Maneuver Requirement

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed special conditions.

SUMMARY: This notice proposes special conditions for the Boeing Model 747–8/–8F airplane. This airplane will have novel or unusual design features when compared to the state of technology envisioned in the airworthiness standards for transport category airplanes. These design features include an electronic flight control system that provides roll control of the airplane through pilot inputs to the flight computers. These proposed special conditions contain the additional safety standards that the Administrator considers necessary to establish a level of safety equivalent to that established by the existing airworthiness standards. Additional special conditions will be issued for other novel or unusual design features of the Boeing 747–8/–8F airplanes.

DATES: Comments must be received on or before November 9, 2009.

ADDRESSES: Comments on this proposal may be mailed in duplicate to: Federal Aviation Administration, Transport Airplane Directorate, Attention: Rules Docket (ANM–113), Docket No. NM414, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; or delivered in duplicate to the Transport Airplane Directorate at the above address. All comments must be marked Docket No. NM414. Comments may be inspected in the Rules Docket weekdays, except Federal holidays, between 7:30 a.m. and 4 p.m.

FOR FURTHER INFORMATION CONTACT: Todd Martin, FAA, Airframe and Cabin Safety Branch, ANM–115, Transport Airplane Directorate, Aircraft Certification Service, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 227–1178; facsimile (425) 227–1232.

SUPPLEMENTARY INFORMATION:

Comments Invited

The FAA invites interested persons to participate in this rulemaking by submitting written comments, data, or views. The most helpful comments reference a specific portion of the special conditions, explain the reason for any recommended change, and include supporting data. We ask that you send us two copies of written comments.

We will file in the docket all comments we receive as well as a report summarizing each substantive public contact with FAA personnel concerning these proposed special conditions. The docket is available for public inspection before and after the comment closing date. If you wish to review the docket in person, go to the address in the **ADDRESSES** section of this notice between 7:30 a.m. and 4 p.m., Monday through Friday, except Federal holidays.

We will consider all comments we receive on or before the closing date for comments. We will consider comments filed late if it is possible to do so without incurring expense or delay. We may change the proposed special conditions based on comments we receive.

If you want the FAA to acknowledge receipt of your comments on this proposal, include with your comments a pre-addressed, stamped postcard on which the docket number appears. We

will stamp the date on the postcard and mail it back to you.

Background

On November 4, 2005, The Boeing Company, PO Box 3707, Seattle, WA, 98124, applied for an amendment to Type Certificate Number A20WE to include the new Model 747–8 series passenger airplane and the new Model 747–8F freighter airplane. The Model 747–8 and the Model 747–8F are derivatives of the 747–400 and the 747–400F, respectively. Both the Model 747–8 and the Model 747–8F are four-engine jet transport airplanes that will have a maximum takeoff weight of 975,000 pounds and new General Electric GEnx –2B67 engines. The Model 747–8 will have two flight crew and the capacity to carry 660 passengers.

Type Certification Basis

Under the provisions of Title 14, Code of Federal Regulations (14 CFR) 21.101, Boeing must show that the Model 747–8 and 747–8F (hereafter referred as 747–8/–8F series) meet the applicable provisions of part 25, as amended by Amendments 25–1 through 25–117, except for earlier amendments as agreed upon by the FAA. These regulations will be incorporated into Type Certificate No. A20WE after type certification approval of the 747–8/–8F.

In addition, the certification basis includes other regulations, special conditions and exemptions that are not relevant to these proposed special conditions. Type Certificate No. A20WE will be updated to include a complete description of the certification basis for these airplanes.

If the Administrator finds that the applicable airworthiness regulations (*i.e.,* 14 CFR part 25) do not contain adequate or appropriate safety standards for the 747–8/–8F because of a novel or unusual design feature, special conditions are prescribed under the provisions of § 21.16.

In addition to the applicable airworthiness regulations and special conditions, the 747–8/–8F series must comply with the fuel vent and exhaust emission requirements of 14 CFR part 34 and the noise certification requirements of 14 CFR part 36.

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

Special conditions are initially applicable to the model for which they are issued. Should the type certificate for that model be amended later to include any other model or series that incorporates the same or similar novel or unusual design feature, or should any other model or series already included on the same type certificate be modified to incorporate the same or similar novel or unusual design feature, the special conditions would also apply to the other model or series under § 21.101.

New or Unusual Design Features

The Boeing Model 747–8/–8F will incorporate the following novel or unusual design features: An electronic flight control system that provides roll control of the airplane through pilot inputs to the flight computers.

Discussion

The 747–8/–8F is equipped with an electronic flight control system that provides roll control of the airplane through pilot inputs to the flight computers. Current part 25 airworthiness regulations account for "control laws," for which aileron deflection is proportional to control wheel deflection. They do not address any nonlinearities [1] or other effects on aileron and spoiler actuation that may be caused by electronic flight controls. Therefore, the FAA considers the flight control system to be a novel and unusual feature compared to those envisioned when current regulations were adopted. Since this type of system may affect flight loads, and therefore the structural capability of the airplane, special conditions are needed to address these effects.

These proposed special conditions differ from current requirements in that the special conditions require that the roll maneuver result from defined movements of the cockpit roll control as opposed to defined aileron deflections. Also, these proposed special conditions require an additional load condition at design maneuvering speed (V_A), in which the cockpit roll control is returned to neutral following the initial roll input.

These proposed special conditions differ from similar special conditions applied to previous designs. These special conditions are limited to the roll axis only, whereas previous special conditions also included pitch and yaw axes. A special condition is no longer needed for the yaw axis because § 25.351 was revised at Amendment 25–91 to take into account effects of an electronic flight control system. No special condition is needed for the pitch axis because the current requirement (§ 25.331(c)) is adequate.

[1] A nonlinearity is a situation where output does not change in the same proportion as input.

Applicability

As discussed above, these proposed special conditions are applicable to Boeing Model 747–8/–8F airplanes. Should Boeing apply at a later date for a change to the type certificate to include another model incorporating the same novel or unusual design features, these proposed special conditions would apply to that model as well under the provisions of § 21.101.

Conclusion

This action affects only certain novel or unusual design features of the Boeing Model 747–8/–8F airplanes. It is not a rule of general applicability.

List of Subjects in 14 CFR Part 25

Aircraft, Aviation safety, Reporting and recordkeeping requirements.

The authority citation for these Special Conditions is as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701, 44702, 44704.

The Proposed Special Conditions

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration (FAA) proposes the following special conditions as part of the type certification basis for the Boeing Model 747–8/–8F series airplanes.

In lieu of compliance with § 25.349(a), the Boeing Model 747–8/–8F must comply with the following special conditions.

The following conditions, speeds, and cockpit roll control motions (except as the motions may be limited by pilot effort) must be considered in combination with an airplane load factor of zero, and separately, two-thirds of the positive maneuvering factor used in design. In determining the resulting control surface deflections, the torsional flexibility of the wing must be considered in accordance with § 25.301(b):

(a) Conditions corresponding to steady rolling velocities must be investigated. In addition, conditions corresponding to maximum angular acceleration must be investigated. For the angular acceleration conditions, zero rolling velocity may be assumed in the absence of a rational time history investigation of the maneuver.

(b) At V_A, sudden movement of the cockpit roll control up to the limit is assumed. The position of the cockpit roll control must be maintained until a steady roll rate is achieved and then must be returned suddenly to the neutral position.

(c) At V_C, the cockpit roll control must be moved suddenly and

maintained so as to achieve a roll rate not less than that obtained in paragraph (b).

(d) At V_D, the cockpit roll control must be moved suddenly and maintained so as to achieve a roll rate not less than one third of that obtained in paragraph (b).

Issued in Renton, Washington, on September 30, 2009.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. E9–24336 Filed 10–7–09; 8:45 am]

BILLING CODE 4910–13–P

POSTAL REGULATORY COMMISSION

39 CFR Parts 3001 and 3005

[Docket No. RM2009–12; Order No. 293]

Subpoena Procedures

AGENCY: Postal Regulatory Commission.

ACTION: Proposed rule.

SUMMARY: The Commission is proposing rules to address issuance of, compliance with, and enforcement of administrative subpoenas directed to the Postal Service. The proposed rules also address orders related to depositions and interrogatory responses. The Commission has developed this proposal in response to new statutory authority. It invites comments on its proposed approach to implementation of this new authority.

DATES: Comments due November 9, 2009. Reply comments due November 23, 2009.

ADDRESSES: Submit comments electronically via the Commission's Filing Online system at *http://www.prc.gov.*

FOR FURTHER INFORMATION CONTACT: Stephen L. Sharfman, General Counsel, 202–789–6820 or *stephen.sharfman@prc.gov.*

SUPPLEMENTARY INFORMATION:

I. Introduction
II. Background
III. Changes Made by the PAEA
IV. Discussion of the Proposed Rules
V. Section-by-Section Analysis
VI. Public Representative
VII. Ordering Paragraphs

I. Introduction

This notice of proposed rulemaking is the latest in a series of actions being taken by the Postal Regulatory Commission (Commission) to implement provisions of the Postal Accountability and Enhancement Act (PAEA), Public Law 109–435, 120 Stat. 3198, December 20, 2006. Section 602 of the PAEA amends section 504 of title 39 of the United States Code by adding a new paragraph 504(f)[1] which, among other things, authorizes: (a) The issuance of subpoenas requiring officers, employees, agents, or contractors of the United States Postal Service (Postal Service) to appear and present testimony or to produce documentary or other evidence; and (b) the issuance of orders that require the taking of depositions and responses to written interrogatories by any of those same persons. As amended, section 504 further authorizes the enforcement of subpoenas by appropriate district courts of the United States. *See* 39 U.S.C. 504(f)(3).

II. Background

Prior to passage of the PAEA, the Commission's authority to compel the production of relevant information from the Postal Service was limited. Section 3603 of the Postal Reorganization Act (PRA)[2] gave the Commission's predecessor, the Postal Rate Commission, the authority to

> promulgate rules and regulations and establish procedures, subject to chapters 5 [Administrative Procedure] and 7 [Judicial Review] of * * * [the Administrative Procedure Act, 5 U.S.C. 101, *et seq.*] * * *, and [to] take any other action they deem necessary and proper to carry out their functions and obligations to the Government of the United States and the people as prescribed under this chapter [of the PRA].

Acting pursuant to these authorities, the Postal Rate Commission established a number of procedures and adopted rules of practice.

Among the procedures regularly used by the Commission and presiding officers in proceedings over the years has been the procedure of issuing information requests. Such requests have been routinely issued to obtain information that supplemented, clarified or more fully explained information presented by, or positions taken by, the Postal Service and other participants in Commission proceedings.

In addition, the Commission's original rules of practice were codified as 39 CFR part 3001. Rule 3 of those rules states that "[t]he rules of practice in this part are applicable to proceedings before the * * * Commission under the Act, including those which involve a hearing on the record before the Commission or its designated presiding officer." Several rules govern discovery in Commission proceedings: Rule 25 (Discovery—general policy); rule 26 (Interrogatories for the purpose of discovery); rule 27 (Requests for production of documents or things for purpose of discovery); and rule 28 (Requests for admission for purpose of discovery).

Prior to passage of the PAEA, there were occasions on which the Commission and the Postal Service could not agree on whether certain information requested by the Commission had to be produced. While in most cases the Commission and the Postal Service were able to resolve their disagreements in a mutually satisfactory manner, there were cases in which disagreements proved to be irreconcilable. In those instances, the Postal Service's refusal to provide information delayed and complicated the Commission's ability to carry out its duties.[3] The Postal Service's refusal to provide the requested information forced the Commission to rely upon alternate and less desirable information in order to carry out its statutory responsibilities.

The Commission's inability to obtain the specific information it had requested in those cases was ultimately due to the fact that the Commission could not enforce its orders. Neither the PRA, nor the Administrative Procedure Act (APA), authorized the Commission to seek a court order directing production of the requested information.

The typical mechanism for enabling an administrative agency to compel production of information is the judicially enforceable administrative subpoena.[4] Without the authority to

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[1] Section 601(a)(3) of the PAEA created section 504 by re-designating then-existing section 3604 of title 39 as section 504.

[2] Sections 601(a)(3), 604(a) and 1010(c)(1) of the PAEA renumbered section 3603 of the PRA as § 503 and amended § 503 by, *inter alia*, replacing "Postal Rate Commission" with "Postal Regulatory Commission."

[3] *See* PRC Op. R94–1, paras. 3188–93 (refusal of Postal Service to comply with order compelling responses to interrogatories); and PRC Op. MC96–3 at 35 (refusal of Postal Service to comply with order directing it to present additional cost presentations).

[4] *See Report to Congress on the Use of Administrative Subpoena Authorities by Executive Branch Agencies and Entities*, U.S. Department of Justice Office of Legal Policy (December 2002). Administrative subpoenas and their enforcement by courts must be specifically provided for by statute. *Id.* The PRA contains no provision for issuing administrative subpoenas. Section 555(d) of the APA provides that "[a]gency subpoenas *authorized by law* shall be issued to a party on request and, when required by rules of procedure, on a statement or showing of general relevance and reasonable scope of the evidence sought." (Emphasis added.) Without further authorization by law, § 555(d) does not give an agency the power to issue subpoenas. Similarly, § 556(c)(2) authorizes presiding officers at agency hearings to "issue subpoenas *authorized by law* * * *." (Emphasis added.) Once again, further authorization is needed for an agency to issue an administrative subpoena. Without the

Continued

issue subpoenas and enforce them in court, the Commission's only recourse was to deal indirectly with the Postal Service's refusal to provide the desired information.[5]

III. Changes Made by the PAEA

While limitations on the Commission's ability to compel the production of information may have been acceptable prior to the passage of the PAEA, that is no longer the case. Implementation of the PAEA's "modern system of regulation" requires that the Commission have access to information needed to insure financial transparency and to make informed decisions.[6] To enable the Commission to carry out its mission, the PAEA strengthened the Commission's ability to obtain information by giving it authority under section 504(f) to compel the production of relevant and material information by order and by subpoena.

The pre-PAEA mechanisms for seeking information from the Postal Service remain available to the Commission. For example, the Commission continues to issue information requests.[7] In addition, the rules of practice in 39 CFR part 3001 remain in effect and will continue to provide important mechanisms for seeking needed information and data from the Postal Service.

Building upon the Commission's existing information collection mechanisms, Congress enacted 39 U.S.C. 504(f)(2)(A) authorizing the issuance of subpoenas and 39 U.S.C. 504(f)(2)(B) authorizing the issuance of orders to take depositions and to provide responses to written interrogatories.

Hopefully, the mere availability of the new authorities in section 504 will facilitate the resolution of future disagreements between the Commission and the Postal Service over the appropriateness of producing requested information and resort to compulsory measures will be rare.[8]

IV. Discussion of the Proposed Rules

The Commission is proposing the adoption of a new part 3005 organized in three subparts. Subpart A integrates subpart 3005 into the Commission's existing rules and regulations by making various existing rules applicable to part 3005. Conforming changes are proposed to 39 CFR 3001.3 of the rules of practice to make clear that the rules of practice apply to the new part 3005. Subpart B establishes regulations governing the issuance and enforcement of subpoenas under the authority of 39 U.S.C. 504(f)(2)(A) and 504(f)(3). Finally, subpart C implements 39 U.S.C. 504(f)(2)(B), which authorizes the ordering of depositions and responses to written interrogatories. Both the regulations in subpart B (governing subpoenas) and subpart C (providing for orders that require depositions and responses to written interrogatories) apply to "covered persons" as defined in 39 U.S.C. 504(f)(4).

A. Part 3001—Rules of Practice and Procedure

Subpart A—Rules of General Applicability. The Commission's authority under 39 U.S.C. 504(f)(2) to compel the Postal Service to provide information applies both to proceedings before the Commission and to situations in which the Commission requires information from the Postal Service to prepare a report in order to carry out its functions and obligations. In both situations, procedures are needed to invoke the authority of 39 U.S.C. 504(f)(2). The proposed amendment to rule 3 is being made to clarify that the rules of practice are to be used in conjunction with part 3005. This change is consistent with the inclusion of references in part 3005 to specific rules of practice.

B. Part 3005—Procedures for Compelling Production of Information by the Postal Service

Subpart A—General. This subpart confirms that part 3005 implements 39 U.S.C. 504(f); makes the Commission's rules of practice applicable to part 3005; and defines certain terms consistent with the definitions and usage of those terms in 39 U.S.C. 504(f).

C. Part 3005—Procedures for Compelling the Production of Information by the Postal Service

Subpart B—Subpoenas. Under the provisions of 39 U.S.C. 504(f)(2)(A), the Chairman, Commissioners designated by the Chairman, and administrative law judges appointed by the Commission may, upon compliance with certain statutory requirements, issue subpoenas to a "covered person." A "covered person" is defined in 39 U.S.C. 504(f)(4) to mean "an officer, employee, agent, or contractor of the Postal Service." For a subpoena to be issued, a majority of the Commissioners holding office must concur in writing prior to its issuance. 39 U.S.C. 504(f)(2). The Commission can apply to an appropriate United States district court to enforce its subpoena. 39 U.S.C. 504(f)(3). Failure to obey an order of the court is punishable as contempt.

The Commission expects that in most cases, its subpoena authority will be exercised as an enforcement mechanism in the sense that it will be used to compel the production of information if a prior attempt to obtain the information was unsuccessful.[9] Any Commissioner, administrative law judge, presiding officer, or third party will have an opportunity to invoke the procedures for issuing a subpoena.[10]

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authority to issue a subpoena, an agency cannot seek judicial enforcement of its attempts to obtain information.

[5] For example, the remedy for failing to obey a Commission order directing compliance with a discovery request is narrowly limited. Rule 25 of the rules of practice states that "[t]he Commission or the presiding officer may make such orders in regard to the failure as are just, and among others, may direct that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the proceeding in accordance with the claim of the participants obtaining the order, or prohibit the disobedient participant from introducing designated matters in evidence, or strike the evidence, complaint or pleadings or parts thereof." 39 CFR 3001.25(c). Notwithstanding the potential availability of those remedies, there have been occasions on which the Postal Service has refused to produce data requested by a party to a Commission proceeding. *See, e.g.,* Docket No. 94–1, Statement of the United States Postal Service Concerning Order No. 1034, November 3, 1994, at 2 (Postal Service refusal to release disputed international mail data under amended protective order).

[6] Prior to enactment of the PAEA, the Commission's need for enhanced authority to compel the production of needed information was expressly recognized by the 2003 Report of the President's Commission on the United States Postal Service entitled *Embracing the Future: Making the Tough Choices to Preserve Universal Mail Service* (Presidential Commission Report). That report recommended that the Commission be given "the authority to request accurate and complete financial information from the Postal Service, including through the use of subpoena powers, if necessary. * * *" Commission access to such information was deemed essential for it "to ensure financial transparency and make fully informed determinations on issues ranging from rate ceilings to cross-subsidies. * * *" *Id.* at 69.

[7] *E.g.,* Docket No. ACR2008, Commission Information Request No. 1, January 14, 2009; Docket No. CP2009–20, Chairman's Information Request No. 1 and Notice of Filing of Questions (Under Seal), January 18, 2009.

[8] Successful implementation of the PAEA depends heavily upon the cooperation of all participants, including the Postal Service. While the Commission considers its authority to compel the production of information an important addition to its regulatory tools, it hopes that resort to that new authority will be unnecessary.

[9] The exception, discussed below, would be presented in those situations in which the Commissioners authorize the issuance of a subpoena without an information request having previously been made because of unique circumstances that require the immediate production of information.

[10] While § 504(f) authorizes only the Chairman, Commissioners designated by the Chairman, and administrative law judges to issue subpoenas, nothing in that section precludes other persons from seeking the issuance of a subpoena by one of the three authorized officials.

The Commission would emphasize that a subpoena issued under 39 U.S.C. 504(f)(2)(A) is not intended to be a new discovery tool for third parties. Instead, it will, in most cases, be a mechanism for enforcing information requests and discovery orders. Issuance of a subpoena will give the Commission the power to obtain information, but will not unnecessarily burden the Postal Service. Accordingly, when discovery disputes arise during a Commission proceeding, the Commission will not, in general, consider the issuance of a subpoena until the normal process of seeking information by means of an order to compel has been unsuccessful. It is at that point that enforcement could be sought by subpoena.

As a means of enforcing information requests or Commission orders to compel, a Commission subpoena differs in important ways from judicial subpoenas.[11] For example, in the district courts of the United States, rule 45 of the Federal Rules of Civil Procedure authorizes the issuance of subpoenas by the clerk of the court or by attorneys as officers of the court without prior court approval. By contrast, the Commission's subpoena power under 39 U.S.C. 504(f)(2) is more narrowly circumscribed and can only be issued by the Chairman, Commissioners designated by the Chairman, or administrative law judges appointed by the Commission under 5 U.S.C. 3105. Moreover, to be issued, a subpoena must receive prior written concurrence from the majority of Commissioners then holding office.

While third parties, such as parties or participants in Commission proceedings, will not be able to issue their own subpoenas unilaterally as is the case in court litigation, they can benefit indirectly from the availability of subpoenas by having the opportunity to request the Commissioners or an administrative law judge to issue a subpoena. The proposed regulations expressly authorize such requests. These requests are analogous to, and a further extension of, the long-standing procedure available to participants in Commission hearings under which they can seek a Commission order compelling compliance with a discovery request. For example, proposed rule 3005.13(a)(1) would permit a party to seek Commission enforcement by subpoena of a Commission order to compel a Postal Service response to the party's discovery request.[12]

Another important difference between a judicial subpoena and a subpoena authorized by 39 U.S.C. 504(f)(2)(A) is that while a judicial subpoena can be issued to obtain information from almost anyone upon whom service can be made, a subpoena authorized by 39 U.S.C. 504(f)(2)(A) can only seek information in the possession of a "covered person," *i.e.*, "an officer, employee, agent, or contractor of the Postal Service."

The process whereby a third party seeks issuance of a subpoena would begin by filing a written motion under rule 21(a) of the rules of practice. In cases in which hearings have been ordered by the Commission, the motion would be filed with the presiding officer.[13] In the interest of avoiding delay, the Commission is proposing that requests for administrative subpoenas be served on the Postal Service even if the information being sought is apt to be in the possession of a third party, such as a Postal Service contractor. Service upon the Postal Service would seem appropriate since the information being sought is information related to the Postal Service and the Postal Service is therefore the real party in interest. Moreover, the Postal Service is in the best position to know who within, or outside of, the Postal Service is in possession of the information. In the event the information is in the possession of such a third party covered person, the Postal Service would be required to transmit the request to the third party.

The Postal Service and others would be permitted to file answers under rule 21(b). Since a covered person other than the Postal Service could ultimately be responsible for producing the requested information, the Postal Service will be required to obtain from that covered person any objections that are personal to that covered person and to presenting such objections in the answer that it files pursuant to rule 21(b).[14]

Upon consideration of the motion, the responses, and any oral presentations, the presiding officer would forward a recommendation to the Commission together with the pleadings and relevant portions of the record. The Commissioners would decide whether issuance of a subpoena is appropriate and, if so, whether any conditions should be attached to the subpoena, including conditions requiring confidential treatment pursuant to part 3007 of the Commission's regulations. In reaching their decision, the Commissioners could, if they deemed it necessary, entertain further written or oral submissions before deciding whether to approve the issuance of a subpoena.

The Commissioners who approve of the issuance of a subpoena would give their approval in writing and the subpoena would be issued by the Chairman, a Commissioner designated by the Chairman, or by the presiding officer (provided the presiding officer was an administrative law judge appointed under 5 U.S.C. 3105).[15]

A similar process for requesting the issuance of subpoenas would apply in situations in which hearings have not been ordered by the Commission. For example, if the Postal Service fails or refuses to respond to an information request issued by the Commission, a third party could file a request for the issuance of a subpoena. In such a case, a motion would be filed with the Secretary of the Commission under rule 21(a). The Postal Service and other interested persons could file answers pursuant to rule 21(b) and the Commission would determine whether the subpoena should be issued.

Individual Commissioners and presiding officers would also be able to seek the enforcement of information and discovery requests by subpoena in the absence of a third party request. Requests by a Commissioner or presiding officer would be made directly to the full Commission. If a majority of the Commissioners give

[11] This is not unusual since the issuance of an administrative subpoena is typically authorized by specific statutory provisions that reflect the unique mission and needs of a particular agency. *See Report to Congress on the Use of Administrative Subpoena Authorities by Executive Branch Agencies and Entities Pursuant to Public Law 106–544*, U.S. Department of Justice, Office of Legal Policy (2001).

[12] The same would be true with respect to a Commission information request. Under current practice, any interested person can request the Commission to issue an information request. *See, e.g.*, Docket No. ACR2008, Valpak Direct Marketing Systems, Inc. and Valpak Dealers' Association, Inc. Motion For Issuance of Commission Information Request Concerning Core Costing Data On Detached Address Labels, January 13, 2009; and United States Postal Service FY2008 Annual Compliance Report, January 30, 2009. If the Commission issues the requested information request, an interested person could also request the issuance of a subpoena to enforce the information request.

[13] The presiding officer could be the Chairman, another Commissioner, an administrative law judge appointed under 5 U.S.C. 3105 or a Commission employee.

[14] By giving individuals served with a subpoena the opportunity to raise objections unique to them, the procedure will ensure their rights to due process are protected. This procedure will also obviate the need, as there is in court litigation, for a motion to quash the subpoena. *See* Fed. R. Civ. P. 45(c)(3). While there would be no motion to quash, per se, objections, attempts to reduce the scope of a subpoena, or requests for protective conditions by the Postal Service, covered persons, and others would be made and considered before issuance of the subpoena.

[15] Attached to this notice is a suggested form for subpoenas that would be issued under this part 3005. Comments are invited on this illustrative sample.

written approval, a subpoena would be issued by the Chairman, a Commissioner designated by the Chairman, or an administrative law judge. Since neither the Postal Service, nor any other interested person would have had an opportunity to oppose the subpoena, the subpoena would be subject to motions to quash, limit, or condition the subpoena.

Although the Commission views the principal purpose of a subpoena to be the enforcement of information or discovery requests, a subpoena could also be used as a primary information collection tool. For example, a properly authorized and issued subpoena could be used to obtain information even if an information or discovery request has not previously been presented to the Postal Service. To insure the availability of subpoenas for this purpose, the Commission has included provisions in its proposed regulations expressly providing for the issuance of subpoenas without requiring prior information requests as a precondition to such issuance.[16] Subpoenas issued as primary information collection tools would also be subject to motions to quash, limit, or condition the subpoena.

Section 504(f)(2)(A) does not specify on whom the subpoena must be served. In a judicial context, when a subpoena seeks information from a particular person or entity, such as a corporation, the subpoena is served upon that person or entity. The judicial procedure is facilitated by the fact that in court litigation there is usually both sufficient time and opportunity (by means of other discovery methods) to ascertain who possesses the needed information. By contrast, the timeframe in which the Commission must act in the wake of the PAEA is relatively tight given the amount of review and analysis that must be accomplished. Moreover, the identity of the individuals or entities in possession of the required information may not be known to the Commission at the time the information is sought.

To facilitate the transmission of the subpoena to the appropriate person or persons, the proposed rules provide that subpoenas would be served on the Postal Service. The Postal Service would, in turn, be required to transmit the subpoena to the persons responsible for providing the requested information. After delivery of the subpoena to the appropriate person, the Postal Service would be required to certify to the Commission that the subpoena had been delivered and to advise the Commission of the manner, date, and time of delivery, and the name, business address, telephone number and e-mail address of the person receiving the subpoena. The Postal Service would also be required to confirm that the person receiving the subpoena had been advised of the return date of the subpoena.

The proposed rules would also establish the parameters for responses to subpoenas. For example, documents are to be produced in the form they are kept in the usual course of business; and claims of undue burden and confidentiality must be adequately supported.

Finally, the rules contemplate the possible need for judicial enforcement of an administrative subpoena issued by the Commission. The filing and service requirements are governed by other federal statutes and rules of court applicable to proceedings in the United States district courts.

D. Part 3005—Procedures for Compelling the Production of Information by the Postal Service

Subpart C—Orders Regarding Depositions and Responses to Written Interrogatories. Section 504(f)(2)(B) of title 39 expressly authorizes the Chairman, Commissioners authorized by the Chairman, and administrative law judges appointed by the Commission to "order the taking of depositions and responses to written interrogatories by a covered person." Concurrence by a majority of the Commissioners is not required for the issuance of such an order.

The authorities contained in this section are in addition to the authorities provided by the PRA and APA which underlie the part 3001 rules of practice and authorize orders compelling discovery. It is the Commission's view that the authority to issue orders under § 504(f)(2)(B) can therefore be exercised in the context of an adjudicatory hearing as an alternative to the procedures in part 3001 for compelling discovery. An order can also be issued under § 504(f)(2)(B) outside the context of a Commission proceeding.

V. Section-By-Section Analysis

Section 3001.3 Scope of rules. The amendment to rule 3 of the rules of practice is intended to clarify that the rules of practice apply both to proceedings before the Commission and to the procedures in part 3005 for compelling the production of information by the Postal Service. This change is consistent with the inclusion in part 3005 of references to specific rules of practice.

Section 3005.1 Scope of rules. This proposed rule states that part 3005 implements 39 U.S.C. 504(f). It also makes applicable the rules of practice in part 3001, unless otherwise ordered by the Commission.

Section 3005.2 Terms defined. This proposed rule provides definitions for the terms "administrative law judge," "Chairman," "covered person," and "designated Commissioner" as used in part 3005.

Section 3005.11 General rule—subpoenas. This proposed rule sets forth the basic requirements for the issuance of a subpoena pursuant to 39 U.S.C. 504(f)(2)(A). Subpoenas may only be issued by the Chairman, a designated Commissioner or an administrative law judge. When authorized in writing by a majority of the Commissioners then in office, a subpoena shall be issued by the Chairman, a designated Commissioner, or an administrative law judge. This rule also lists the purposes for which a subpoena may be issued; the types of conditions or limitations that may be imposed on the subpoena to protect the recipient of the subpoena from oppression, undue burden, or expense, including the possible imposition of confidentiality or non-disclosure conditions as provided in part 3007 of this chapter; and identifies the rule that establishes the service requirements for a subpoena. A proposed form of subpoena is provided as Appendix A to Part 3005—Subpoena Form.

Section 3005.12 Subpoenas issued without receipt of a third-party request. This proposed rule provides for the issuance of a subpoena without a request having been received from a third party. For example, the Commission could deem a subpoena necessary if the Postal Service were to refuse to provide information during preliminary review of a Postal Service filing. Or a subpoena could be needed if the Postal Service were to refuse to provide information needed for the preparation of a report. Finally, a presiding officer might deem it necessary to obtain the issuance of a subpoena to enforce a presiding officer's information request. In such cases, there would be no "third party" request for the subpoena.

From a procedural standpoint, the request would be made directly to the full Commission by a Commissioner or presiding officer. To insure that the Postal Service and other interested persons, including covered persons potentially affected by the subpoena, have an opportunity to oppose the subpoena, or to limit or condition its scope and operation, any duly authorized subpoena would be subject

[16] These provisions are contained in proposed section 3005.12 and are described, *infra*.

to a motion under rule 21(a) to quash, limit, or condition the subpoena. Replies to such a motion could be made by any interested person under rule 21(b).

As a general rule, the Postal Service would be given an opportunity to produce information voluntarily before a subpoena is issued under this section. However, provision is also made for the summary issuance of a subpoena without issuance of a prior information request. While the Commission would expect the summary issuance of a subpoena to rarely, if ever, be necessary, it is including provision for such summary issuance in order to insure the ability to act promptly if necessary. In such cases, the Postal Service would have an opportunity following issuance of the subpoena to file a motion to quash the subpoena, limit its scope, or to place conditions on the subpoena. Objections by covered persons could be asserted in any such filing by the Postal Service. Pending resolution of the Postal Service's motion, the Postal Service and all covered persons would be required to maintain the information being sought by the subpoena.

Section 3005.13 Subpoenas issued in response to a third-party request. This proposed rule establishes procedures by which subpoenas can be requested by third parties. One set of procedures applies to those situations in which the Commission has ordered hearings. Typically, in those cases the subpoena will be available as a means of enforcing the discovery rules in the Commission's part 3001 rules of practice. A second set of procedures applies to situations in which no hearings have been ordered, such as an annual compliance review. In these cases, information will typically be sought by means of information requests, including information requests that have been proposed by a third party and issued by the Commission or a Commissioner. In this latter situation, a third party would be able to request the issuance of a subpoena to enforce the information request. Requests under either procedure must include certain minimum showings and demonstrations in order to be granted, including showings of relevance of the information and adequate specification of the information requested.

Requirements are imposed upon the Postal Service to insure that the covered person expected to produce the requested information has an opportunity to present any objections to the issuance of a subpoena that are unique to that covered person.

Section 3005.14 Service of subpoenas. This proposed rule specifies the manner in which subpoenas are to be served on covered persons. The Commission is proposing that subpoenas will be served initially upon the Postal Service with the requirement that the Postal Service transmit and deliver the subpoena to the person or contractor ultimately responsible for testifying or for otherwise providing the information being sought and that the Postal Service file proof of service with the Secretary of the Commission that identifies the covered person expected to supply the requested information. Finally, provision is made for advising the public as to the return date of the subpoena.

Section 3005.15 Duties in responding to a subpoena. This proposed rule specifies the manner in which the recipient of a subpoena will be required to respond to the subpoena. It covers such subjects as the form in which documentary information is to be produced; the manner in which electronically stored information is to be produced; and the showing that must be made if information is not disclosed on grounds of privilege, confidentiality, or trade secret. Requests for confidential treatment of information produced in response to a subpoena are to be made in the manner provided in part 3007 of the Commission's regulations.

Section 3005.16 Enforcement of subpoenas. This proposed rule implements the authority in 39 U.S.C. 504(f)(3) under which the Commission can seek judicial enforcement of an administrative subpoena issued pursuant to 39 U.S.C. 504(f)(2)(A).

Section 3005.21 Authority to order depositions and responses to written interrogatories. This proposed rule implements the authority of the Chairman, any designated Commissioner or any administrative law judge to order that a deposition be taken of a covered person or that the covered person respond to a written interrogatory.

VI. Public Representative

Pursuant to 39 U.S.C. 505, Cassandra Hicks is appointed to serve as officer of the Commission (Public Representative) to represent the interests of the general public in the captioned docket.

VII. Ordering Paragraphs

It is ordered:

1. Docket No. RM2009–12 is established for the purpose of receiving comments on the Commission's proposed rules establishing procedures for obtaining information from the Postal Service under the Postal Accountability and Enhancement Act.

2. Interested persons may submit initial comments no later than 30 days from the date of publication of this notice in the **Federal Register**.

3. Reply comments may be filed no later than 45 days from the date of publication of this notice in the **Federal Register**.

4. Pursuant to 39 U.S.C. 505, Cassandra Hicks is appointed to represent the interests of the general public in this docket.

5. The Secretary shall arrange for publication of this notice in the **Federal Register**.

List of Subjects

39 CFR Part 3001

Administrative practice and procedure, Postal Service.

39 CFR Part 3005

Administrative practice and procedure, Confidential business information, Postal Service, Reporting and recordkeeping requirements.

By the Commission.

Shoshana M. Grove,

Secretary.

For the reasons discussed in the preamble, the Postal Regulatory Commission proposes to amend chapter III of title 39 of the Code of Federal Regulations as follows:

PART 3001—RULES OF PRACTICE AND PROCEDURE

1. The authority citation for 39 CFR part 3001 is revised to read as follows:

Authority: 39 U.S.C. 404(d); 503; 504; 3661.

2. Revise § 3001.3 to read as follows:

§ 3001.3 Scope of rules.

The rules of practice in this part are applicable to proceedings before the Postal Regulatory Commission under the Act, including those which involve a hearing on the record before the Commission or its designated presiding officer and, as specified in part 3005 of this chapter to the procedures for compelling the production of information by the Postal Service. They do not preclude the informal disposition of any matters coming before the Commission not required by statute to be determined upon notice and hearing.

3. Add part 3005 to read as follows:

PART 3005—PROCEDURES FOR COMPELLING PRODUCTION OF INFORMATION BY THE POSTAL SERVICE

Subpart A—General

Sec.

3005.1 Scope and applicability of other parts of this title.
3005.2 Terms defined for purposes of this part.

Subpart B—Subpoenas

3005.11 General rule—subpoenas.
3005.12 Subpoenas issued without receipt of a third-party request.
3005.13 Subpoena issued in response to a third-party request.
3005.14 Service of subpoenas.
3005.15 Duties in responding to a subpoena.
3005.16 Enforcement of subpoenas.

Subpart C—Depositions and Written Interrogatories

3005.21 Authority to order depositions and responses to written interrogatories.
Appendix A to Part 3005—Subpoena Form

Authority: 39 U.S.C. 503; 504; 3651(c); 3652(d).

Subpart A—General

§ 3005.1 Scope and applicability of other parts of this title.

(a) The rules in this part govern the procedures for compelling the production of information by the Postal Service pursuant to 39 U.S.C. 504(f).

(b) Part 3001, subpart A of this chapter applies unless otherwise stated in this part or otherwise ordered by the Commission.

§ 3005.2 Terms defined for purposes of this part.

(a) *Administrative law judge* means an administrative law judge appointed by the Commission under 5 U.S.C. 3105.

(b) *Chairman* means the Chairman of the Commission.

(c) *Covered person* means an officer, employee, agent, or contractor of the Postal Service.

(d) *Designated Commissioner* means any Commissioner who has been designated by the Chairman to act under this part.

Subpart B—Subpoenas

§ 3005.11 General rule—subpoenas.

(a) Subject to the provisions of this part, the Chairman, any designated Commissioner, and any administrative law judge may issue a subpoena to any covered person.

(b) The written concurrence of a majority of the Commissioners then holding office shall be required before any subpoena may be issued under this subpart. When duly authorized by a majority of the Commissioners then holding office, a subpoena shall be issued by the Chairman, a designated Commissioner, or an administrative law judge.

(c) Subpoenas issued pursuant to this subpart may require the attendance and presentation of testimony or the production of documentary or other evidence with respect to any proceeding conducted by the Commission under title 39 of the United States Code or to obtain information for preparation of a report under said title 39.

(d) Subpoenas issued pursuant to this subpart shall include such conditions as may be necessary or appropriate to protect a covered person from oppression, or undue burden or expense, including the following:

(1) That disclosure may be had only on specified terms and conditions, including the designation of the time or place;

(2) That certain matters not be inquired into, or that the scope of disclosure be limited to certain matters;

(3) That disclosure occur with no one present except persons designated by the Commission;

(4) That a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way as provided in part 3007 of this chapter; and

(5) Such other conditions deemed necessary and appropriate under the circumstances presented.

(e) Subpoenas shall be served in the manner provided by § 3005.14.

§ 3005.12 Subpoenas issued without receipt of a third-party request.

(a) A subpoena duly authorized by a majority of the Commissioners then holding office may be issued by the Chairman, a designated Commissioner, or an administrative law judge under § 3005.11 of this part without a request having been made by a third party under § 3005.13.

(b) Except as provided in paragraph (c) of this section, a subpoena shall not be issued until after the Postal Service has been provided an opportunity to produce the requested information voluntarily.

(c) A subpoena may be issued summarily without first providing an opportunity to produce the requested information voluntarily if a delay in the issuance of the subpoena could unreasonably limit or prevent production of the information being sought.

(d) Subpoenas issued under this section shall be issued subject to the right of the Postal Service and other interested persons to file a motion pursuant to § 3001.21(a) of this chapter to quash the subpoena, to limit the scope of the subpoena, or to condition the subpoena as provided in § 3005.11(d) of this section. Such motion shall include any objections to the subpoena that are personal to the covered person responsible for providing the information being sought. Answers to the motion may be filed by any interested person pursuant to § 3001.21(a) of this chapter. Pending the resolution of any such motion, the Postal Service shall secure and maintain the requested information.

§ 3005.13 Subpoena issued in response to a third-party request.

(a) *Procedure for requesting and issuing subpoenas when hearings have been ordered.* A participant in any proceeding in which a hearing has been ordered by the Commission may request the issuance of a subpoena to a covered person pursuant to § 3005.11.

(1) Subpoenas may be requested to enforce an order to compel previously issued pursuant to the rules of practice with which the Postal Service has failed to comply.

(2) Requests for subpoenas under this section shall be made by written motion filed with the presiding officer in the manner provided in § 3001.21(a) of this chapter. The Postal Service shall transmit a copy of the request to any covered person that it deems likely to be affected by the request.

(3) Answers to the motion may be filed by the Postal Service and by any other participant. In filing an answer, the Postal Service must obtain from the covered person responsible for providing the information being sought any objections that are personal to that covered person and must provide those objections in its answer together with the objections, if any, that the Postal Service wishes to assert on its own behalf. Answers shall be filed as required by § 3001.21(b).

(4) The presiding officer shall forward copies of the motion and any responses to the Commission together with a recommendation of whether or not the requested subpoena should be issued and, if so, the scope and content thereof and conditions, if any, that should be placed on the subpoena. Copies of the presiding officer's recommendation shall be served in accordance with § 3001.12 of this chapter.

(5) Following receipt of the materials forwarded by the presiding officer, the Commissioners shall determine whether the requested subpoena should be issued and, if so, whether any conditions should be placed on the scope or content of the subpoena or on the responses to the subpoena. The Commissioners may, but are not required, to entertain further oral or written submissions from the Postal Service or the participants before acting on the request. In making their

determination, the Commissioners are not bound by any recommendation of a presiding officer.

(b) *Procedure for requesting and issuing subpoenas when no hearings have been ordered.* Any person may request the issuance of a subpoena to a covered person pursuant to § 3005.11 to enforce an information request issued by the Commission or a Commissioner even though no hearings have been ordered by the Commission.

(1) A request for the issuance of a subpoena shall be made by motion as provided by § 3001.21 of this chapter. A copy of the request shall be served upon the Postal Service as provided by § 3001.12 of this chapter and by forwarding a copy to the General Counsel of the Postal Service, or such other person authorized to receive process by personal service, by Express Mail or Priority Mail, or by First-Class Mail, Return Receipt requested. Proof of service of the request upon the Postal Service shall be filed with the Secretary by the person requesting the subpoena. The Secretary shall issue a notice of the filing of proof of service and the deadline for the Postal Service's answer to the request.

(2) Answers to the motion may be filed by the Postal Service and by any other participant. In filing an answer, the Postal Service must obtain from the covered person responsible for providing the information being sought any objections that are personal to that covered person responsible for providing the information being sought and must provide those objections in its answer together with the objections, if any, that the Postal Service wishes to assert on its own behalf. Answers shall be filed as required by § 3001.21 of this chapter.

(3) Following receipt of the request and any answers to the request, the Commissioners shall determine whether the requested subpoena should be issued and, if so, whether any conditions should be placed on the scope or content of the subpoena or on the responses to the subpoena. The Commissioners may, but are not required, to entertain further oral or written submissions before acting. A majority of the Commissioners then holding office must concur in writing before a subpoena may be issued.

(c) *Contents of requests for subpoenas.* Each motion requesting the issuance of a subpoena shall include the following:

(1) A demonstration that the subpoena is being requested with respect to a proceeding conducted by the Commission under title 39 of the United States Code or that the purpose of the subpoena is to obtain information to be used by the Commission to prepare a report under title 39 of the United States Code;

(2) A showing of the relevance and materiality of the testimony, documentary or other evidence being sought;

(3) Specification with particularity of any books, papers, documents, writings, drawings, graphs, charts, photographs, sound recordings, images, or other data or data compilations stored in any medium from which information can be obtained, including, without limitation, electronically stored information which is being sought from the covered person;

(4) In situations in which a hearing has been ordered, the request must include in addition to the information required by paragraphs (c)(1), (2) and (3) of this section, a certification that the Postal Service has failed to comply with an order compelling discovery previously issued pursuant to the Commission's rules of practice; and

(5) In situations in which a hearing has not been ordered, the request must include in addition to the information required by paragraphs (c)(1), (2) and (3) of this section, an explanation of the reason for the request and the purposes for which the appearance, testimony, documentary or other evidence is being sought, and a certification that the Postal Service has failed to comply with a previously issued Commission order or information request.

§ 3005.14 Service of subpoenas.

(a) *Manner of service.* In addition to electronic service as provided by § 3005.12(a), subpoenas must be served by personal service upon the General Counsel of the Postal Service or upon such other representative of the Postal Service as is authorized to receive process. Upon receipt of the subpoena, the Postal Service shall transmit and deliver the subpoena to the person or contractor responsible for providing the information being sought by the subpoena. Service upon any such person or contractor shall be accompanied by a written notice of the return date of the subpoena.

(b) *Return of service.* Proof of service upon the covered person designated as responsible for responding to the subpoena must be filed with the Secretary by the Postal Service within 2 business days following service, unless a shorter period is ordered by the Commission, and must be accompanied by certifications of:

(1) The manner, date, and time of delivery of the subpoena to the person designated as responsible for responding to the subpoena;

(2) The name, business address, telephone number, and e-mail address of the person designated as responsible for responding to the subpoena; and

(3) The return date of the subpoena.

(c) *Notice of service.* The Secretary shall post a notice of service upon the Commission's Web site which specifies the return date of the subpoena.

§ 3005.15 Duties in responding to a subpoena.

(a) A covered person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the subpoena.

(b) If a subpoena does not specify the form or forms for producing electronically stored information, a covered person responding to a subpoena must produce the information in a form or forms in which the covered person ordinarily maintains it or in a form or forms that are reasonably usable.

(c) A covered person responding to a subpoena need not produce the same electronically stored information in more than one form.

(d) A covered person commanded to produce and permit inspection or copying of designated electronically stored information, books, papers, or documents need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing, or trial.

(e) A covered person who fails or refuses to disclose or provide discovery of electronically stored information on the grounds that the sources of such information is not reasonably accessible because of undue burden or cost must show by clear and convincing evidence that the burden or costs are undue.

(f) A covered person who fails or refuses to disclose or provide discovery of information on the grounds that the information is privileged or subject to protection as a trade secret or other confidential research, development, or commercial information must expressly support all such claims and shall provide a description of the nature of the information and the potential harm that is sufficient to enable the Commission to evaluate and determine the propriety of the claim.

(g) Request for confidential treatment of information shall be made in accordance with part 3007 of this chapter.

§ 3005.16 Enforcement of subpoenas.

In the case of contumacy or failure to obey a subpoena issued under this subpart, the Commission may apply for

an order to enforce its subpoena as permitted by 39 U.S.C. 504(f)(3).

Subpart C—Depositions and Written Interrogatories

§ 3005.21 Authority to order depositions and responses to written interrogatories.

The Chairman, any designated Commissioner, or any administrative law judge may order the taking of depositions and responses to written interrogatories by a covered person with respect to any proceeding conducted under title 39 of the United States Code or to obtain information to be used to prepare a report under title 39.

BILLING CODE 7710–FW–P

Appendix A to Part 3005—Subpoena Form

UNITED STATES OF AMERICA POSTAL REGULATORY COMMISSION WASHINGTON, DC 20268-0001	
In the Matter of:	
[Case Name—If Applicable]	[Docket No.—If Applicable]
SUBPOENA	
TO:	
☐ YOU ARE COMMANDED to appear at the place, date, and time specified below to provide testimony in the above matter.	
PLACE OF TESTIMONY	DATE AND TIME
☐ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above matter.	
PLACE OF DEPOSITION	DATE AND TIME
☐ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date, and time specified below (attach additional sheet if necessary):	
PLACE	DATE AND TIME
ISSUING OFFICIAL'S SIGNATURE	DATE

ISSUING OFFICIAL'S NAME AND PHONE NUMBER

ISSUING OFFICIAL IS (CHECK ONE):

☐ CHAIRMAN

☐ COMMISSIONER DESIGNATED BY THE CHAIRMAN

☐ ADMINISTRATIVE LAW JUDGE APPOINTED UNDER 5 U.S.C. 3105

I HEREBY CERTIFY THAT THE MAJORITY OF THE COMMISSIONERS CURRENTLY HOLDING OFFICE HAVE PREVIOUSLY CONCURRED IN WRITING WITH THE ISSUANCE OF THIS SUBPOENA.

ISSUING OFFICIAL'S SIGNATURE DATE

39 CFR 3005.15:

(a) A covered person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the subpoena.

(b) If a subpoena does not specify the form or forms for producing electronically stored information, a covered person responding to a subpoena must produce the information in a form or forms in which the covered person ordinarily maintains it or in a form or forms that are reasonably usable.

(c) A covered person responding to a subpoena need not produce the same electronically stored information in more than one form.

(d) A covered person commanded to produce and permit inspection or copying of designated electronically stored information, books, papers, or documents need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing, or trial.

[FR Doc. E9–24222 Filed 10–7–09; 8:45 am]
BILLING CODE 7710–FW–C

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R03–OAR–2009–0593; FRL–8967–2]

Approval and Promulgation of Air Quality Implementation Plans; Delaware; Regulation To Reduce Idling of Heavy-Duty Vehicles

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA proposes to approve the State Implementation Plan (SIP) revision submitted by the State of Delaware for the purpose of reducing engine idling time for operation of most heavy-duty motor vehicles in the state, with certain exceptions. In the Final Rules section of this **Federal Register**, EPA is approving Delaware's SIP submittal as a direct final rule without prior proposal because the Agency views this as a noncontroversial submittal and anticipates no adverse comments. A detailed rationale for the approval is set forth in the direct final rule. If no adverse comments are received in response to this action, no further activity is contemplated. If EPA receives adverse comments, the direct final rule will be withdrawn and all public comments received will be addressed in a subsequent final rule based on this proposed rule. EPA will not institute a second comment period. Any parties interested in commenting on this action should do so at this time.

DATES: Comments must be received in writing by November 9, 2009.

ADDRESSES: Submit your comments, identified by Docket ID Number EPA–R03–OAR–2009–0593 by one of the following methods:

A. *http://www.regulations.gov.* Follow the on-line instructions for submitting comments.

B. *E-mail: fernandez.cristina@epa.gov.*

C. *Mail:* EPA–R03–OAR–2009–0593, Cristina Fernandez, Chief, Air Quality Planning Branch, Mailcode 3AP21, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103.

D. *Hand Delivery:* At the previously listed EPA Region III address. 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–R03–OAR–2009–0593. 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.

Docket: All documents in the electronic docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some information is not publicly available, i.e., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. Copies of the State submittal are available at the Delaware Department of Natural Resources and Environmental Control, 89 Kings Highway, P.O. Box 1401, Dover, Delaware 19903.

FOR FURTHER INFORMATION CONTACT: Brian Rehn, (215) 814–2176, or by e-mail at *rehn.brian@epa.gov.*

SUPPLEMENTARY INFORMATION:

For further information, please see the information provided in the direct final action, with the same title, that is located in the "Rules and Regulations" section of this **Federal Register** publication. Please note that if EPA receives adverse comment on an amendment, paragraph, or section of this rule to limit idling of heavy duty vehicles in Delaware, and if that provision may be severed from the remainder of the rule, EPA may adopt as final those provisions of the rule that are not the subject of an adverse comment.

Dated: September 25, 2009.

William C. Early,

Acting Regional Administrator, Region III.

[FR Doc. E9–24186 Filed 10–7–09; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R09–OAR–2009–0435; FRL–8966–4]

Approval and Promulgation of Implementation Plans; Corrections to the Arizona and Nevada State Implementation Plans

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to delete certain statutes and rules that were erroneously approved by EPA under the Clean Air Act as part of the Arizona and Nevada state implementation plans. The rules that are the subject of this proposal were adopted by Pima County Health Department in Arizona and the State Environmental Commission, Clark County District Board of Health, and Washoe County District Board of Health in Nevada. The statutes and rules that EPA is proposing to delete relate to general declarations of policy, advisory committees, variances, and incidental fees and nuisance odors. EPA is proposing to delete these statutes and rules under section 110(k)(6) of the Clean Air Act.

DATES: Any comments on this proposal must arrive by November 9, 2009.

ADDRESSES: Submit comments, identified by docket number EPA–R09–OAR–2009–0435, by one of the following methods:

1. Federal eRulemaking Portal: *http://www.regulations.gov.* Follow the on-line instructions.
2. E-mail: *allen.cynthia@epa.gov.*
3. Mail or deliver: Cynthia Allen (AIR–4), U.S. Environmental Protection Agency Region IX, 75 Hawthorne Street, San Francisco, CA 94105–3901.

Instructions: All comments 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 Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Information that you consider CBI or otherwise protected should be clearly identified as such and should not be submitted through *http://www.regulations.gov* or e-mail. The *http://www.regulations.gov* portal is an "anonymous access" system, and EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send e-mail directly to EPA, your e-mail address will be automatically captured and included as part of the public comment. 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.

Docket: The index to the docket for this action is available electronically at *http://www.regulations.gov* and in hard copy at EPA Region IX, 75 Hawthorne Street, San Francisco, California. While all documents in the docket are listed in the index, some information may be publicly available only at the hard copy location (e.g., copyrighted material), and some may not be publicly available in either location (e.g., CBI). To inspect the hard copy materials, please schedule an appointment during normal business hours with the contact listed in the **FOR FURTHER INFORMATION CONTACT** section.

FOR FURTHER INFORMATION CONTACT: Cynthia Allen, Rules Office (AIR–4), U.S. Environmental Protection Agency, Region IX, (415) 947–4120, *allen.cynthia@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document, "we," "us" and "our" refer to EPA. This proposal addresses a number of statutes and rules that EPA has determined were previously approved in error into the Arizona and Nevada state implementation plans (SIPs). EPA is proposing to delete these statutes and rules from the respective SIPs under section 110(k)(6) of the Clean Air Act, which provides EPA authority to remove these statutes and rules without additional State submission.

In the Rules and Regulations section of this **Federal Register**, we are deleting these statutes and rules in a direct final action without prior proposal because we believe the deletion of them is not controversial. Please see the direct final action for a list of the specific statutes and rules that are the subject of this action. If we receive adverse comments, however, we will publish a timely withdrawal of the direct final rule and address the comments in a subsequent action based on this proposed rule. Please note that if we receive adverse comment on an amendment, paragraph, or section of this rule and if that provision may be severed from the remainder of the rule, we may adopt as final those provisions of the rule that are not the subject of an adverse comment.

We do not plan to open a second comment period, so anyone interested in commenting should do so at this time. If we do not receive adverse comments, no further activity is planned. For further information, please see the direct final action.

Dated: September 15, 2009.

Laura Yoshii,

Acting Regional Administrator, Region IX.

[FR Doc. E9–24192 Filed 10–7–09; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R8–ES–2008–0089; 81420–1117–8B10 B4]

RIN 1018–AV90

Endangered and Threatened Wildlife and Plants; Revised Designation of Critical Habitat for the California Red-Legged Frog (Rana aurora draytonii)

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule; reopening of comment period, availability of revised draft economic analysis, and amended required determinations.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), announce the reopening of the comment period on our September 16, 2008, and April 28, 2009, proposal to revise the designation of critical habitat for the California red-legged frog under the Endangered Species Act of 1973, as amended (Act). We also announce the availability of a revised draft economic analysis (DEA). We are reopening the comment period to allow all interested parties an opportunity to comment simultaneously on the proposed revision of critical habitat and the associated revised DEA. Comments previously submitted on this rulemaking do not need to be resubmitted. These comments have already been incorporated into the public record and will be fully considered in preparation of the final rule.

DATES: We will accept comments received on or before November 9, 2009.

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

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments to Docket No. FWS–R8–ES–2008–0089.
- *U.S. mail or hand-delivery:* Public Comments Processing, Attn: FWS–R8–ES–2008–0089; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, Suite 222; Arlington, VA 22203.

We will not accept e-mail or faxes. We will post all comments on *http://www.regulations.gov.* This generally means that we will post any personal information you provide us (see the Public Comments section below for more information).

FOR FURTHER INFORMATION CONTACT: Susan Moore, Field Supervisor, U.S. Fish and Wildlife Service, Sacramento Fish and Wildlife Office, 2800 Cottage Way, Room W–2605, Sacramento, CA 95825; telephone 916–414–6600; facsimile 916–414–6712. If you use a telecommunications device for the deaf (TDD), call the Federal Information Relay Service (FIRS) at 800–877–8339.

SUPPLEMENTARY INFORMATION:

Public Comments

We will accept written comments and information during this reopened comment period on our proposed revision to critical habitat for the California red-legged frog published in the **Federal Register** on September 16, 2008 (73 FR 53492), and revised in the **Federal Register** on April 28, 2009 (74 FR 19184), and the current revised DEA (IEc 2009b) of the proposed revised designation. We will consider information and recommendations from all interested parties. We are particularly interested in comments concerning:

(1) The reasons why we should or should not designate habitat as critical habitat under section 4 of the Act (16 U.S.C. 1531 *et seq.*), including whether there are threats to the subspecies from human activity, the degree of which can be expected to increase due to the designation, and whether that increase in threat outweighs the benefit of designation such that the designation of critical habitat is not prudent.

(2) Specific information on:

- The amount and distribution of California red-legged frog habitat,
- Locations within the geographical area occupied at the time of listing that contain features essential to the conservation of the subspecies that we should include in the designation and why, and
- Locations not within the geographical area occupied at the time of listing that are essential to the conservation of the subspecies and why.

(3) Land use designations and current or planned activities in the subject areas and their possible impacts on proposed revised critical habitat.

(4) Probable economic, national security, or other relevant impacts of designating particular areas as critical habitat. We are particularly interested in any impacts on small entities, and the benefits of including or excluding areas that exhibit these impacts.

(5) The potential exclusion from final revised critical habitat, and whether such exclusion is appropriate and why, of non-Federal lands:

- Covered by the East Contra Costa County Habitat Conservation Plan (ECCHCP),
- Owned and managed by the East Bay Regional Park District within the boundaries of the ECCHCP,
- Covered by the Western Riverside County Multiple Species Habitat Conservation Plan (MSHCP), and
- Covered by the Bonny Doon Settlement Ponds Habitat Conservation Plan.

(6) Whether the lands proposed as critical habitat on Department of Defense land at Vandenberg Air Force Base in Santa Barbara County and Camp San Luis Obispo in San Luis Obispo County should be exempted under section 4(a)(3) of the Act or excluded under section 4(b)(2) of the Act and why.

(7) Whether the U.S. Forest Service lands managed under the Sierra Nevada Forest Plan Amendment within the units being proposed as critical habitat should be excluded under section 4(b)(2) of the Act and why.

(8) Whether Unit CAL–1 (Young's Creek) in Calaveras County should be excluded under section 4(b)(2) of the Act and why.

(9) Whether changes made to the proposed critical habitat Unit MEN–1 in Mendocino County appropriately reflect the current knowledge of the subspecies distribution and occurrence within the area and whether that area should be designated as critical habitat.

(10) Information on the extent to which any Federal, State, and local environmental protection measures we reference in the revised DEA were adopted largely as a result of the subspecies' listing.

(11) Information on whether the revised DEA identifies all Federal, State, and local costs and benefits attributable to the proposed revision of critical habitat, and information on any costs or benefits that we may have overlooked.

(12) Information on whether the revised DEA makes appropriate assumptions regarding current practices and any regulatory changes that likely may occur if we designate revised critical habitat.

(13) Information on whether the revised DEA correctly assesses the effect on regional costs associated with any land use controls that may result from

the revised designation of critical habitat.

(14) Information on areas that the revised critical habitat designation could potentially impact to a disproportionate degree.

(15) Information on whether the revised DEA identifies all costs that could result from the proposed revised designation.

(16) Information on any quantifiable economic benefits of the revised designation.

(17) Whether the benefits of excluding any particular area outweigh the benefits of including that area under section 4(b)(2) of the Act.

(18) Economic data on the incremental costs of designating a particular area as revised critical habitat.

(19) Whether we could improve or modify our approach to designating critical habitat to provide for greater public participation and understanding, or assist us in accommodating public concerns and comments.

(20) Any foreseeable impacts on energy supplies, distribution, and use resulting from the proposed designation and, in particular, any impacts on electricity production, and the benefits of including or excluding areas that exhibit these impacts.

If you submitted comments or information on the proposed revised rule (73 FR 53492) during the initial comment period from September 16, 2008, to November 17, 2008, or the comment period on the revised proposal (74 FR 19184) from April 28, 2009, to May 28, 2009, please do not resubmit them. These comments are included in the public record for this rulemaking, and we will fully consider them in the preparation of our final determination. Our final determination concerning revised critical habitat will take into consideration all written comments and any additional information we receive during both comment periods. On the basis of public comments, we may, during the development of our final determination, find that areas within those proposed do not meet the definition of critical habitat, that some modifications to the described boundaries are appropriate, or that areas are appropriate for exclusion under section 4(b)(2) of the Act.

You may submit your comments and materials concerning the proposed revised rule or DEA by one of the methods listed in the **ADDRESSES** section.

If you submit a comment via *http://www.regulations.gov*, your entire comment—including any personal identifying information—will be posted on the Web site. If you submit a hardcopy comment that includes personal identifying information, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so. We will post all hardcopy comments on *http://www.regulations.gov*.

Comments and materials we receive, as well as supporting documentation we used in preparing this proposed revised rule, will be available for public inspection on *http://www.regulations.gov*, or by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, Sacramento Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**).

You may obtain copies of the original proposed revision of critical habitat and associated DEA on the Internet at *http://www.regulations.gov*, on the Sacramento Fish and Wildlife Office Web page at *http://www.fws.gov/sacramento*, or by contacting the Sacramento Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**).

Background

Critical habitat for the California red-legged frog was first designated on March 13, 2001 (66 FR 14625), and has been revised several times since then. For more information on previous Federal actions concerning the California red-legged frog, refer to the proposals to revise the designation of critical habitat published in the **Federal Register** on September 16, 2008 (73 FR 53492), and on April 28, 2009 (74 FR 19184). Comments received on our previous Draft Economic Analysis (DEA) (IEc 20009a) during the second public comment period led to this revised DEA.

On December 12, 2007, the Center for Biological Diversity filed a complaint in the U.S. District Court for the Northern District of California challenging our designation of critical habitat for the California red-legged frog (*Center for Biological Diversity* v. *Kempthorne, et al.*, Case No. C–07–6404–WHA). On April 2, 2008, the court entered a consent decree requiring a proposed revised critical habitat rule to be submitted to the **Federal Register** by August 29, 2008, and a final revised critical habitat designation to be submitted to the **Federal Register** by August 31, 2009. The consent decree was modified on August 31, 2009, and now requires that we submit a final revised critical habitat designation to the **Federal Register** by March 1, 2010.

Section 3 of the Act defines critical habitat as the specific areas within the geographical area occupied by a species, at the time it is listed in accordance with the Act, on which are found those physical or biological features essential to the conservation of the species which may require special management considerations or protection, and specific areas outside the geographical area occupied by a species at the time it is listed, upon a determination that such areas are essential for the conservation of the species. If the proposed rule is made final, section 7 of the Act will prohibit destruction or adverse modification of critical habitat by any activity funded, authorized, or carried out by any Federal agency. Federal agencies proposing actions affecting areas designated as critical habitat must consult with us on the effects of their proposed actions, under section 7(a)(2) of the Act.

Under section 4(b)(2) of the Act, we may exclude an area from critical habitat if we determine that the benefits of such exclusion outweigh the benefits of including that particular area as critical habitat, unless failure to designate that specific area as critical habitat will result in the extinction of the species. In making a decision to exclude areas, we consider the economic impact, impact on national security, or any other relevant impact of the designation.

Draft Economic Analysis

Section 4(b)(2) of the Act requires that we designate or revise critical habitat based upon the best scientific and commercial data available, after taking into consideration the economic impact, impact on national security, or any other relevant impact of specifying any particular area as critical habitat. We have prepared a revised DEA of our April 28, 2009 (74 FR 19184), proposed rule to revise designated critical habitat for the California red-legged frog.

The intent of the revised DEA (IEc 2009b) is to identify and analyze the potential economic impacts associated with the proposed revised critical habitat designation for the California red-legged frog. Additionally, the economic analysis looks retrospectively at costs incurred since the May 23, 1996 (61 FR 25813), listing of the California red-legged frog as threatened. The revised DEA quantifies the economic impacts of all potential conservation efforts for the California red-legged frog; some of these costs will likely be incurred regardless of whether we designate revised critical habitat. The economic impact of the proposed revised critical habitat designation is analyzed by comparing scenarios both "with critical habitat" and "without

critical habitat.'' The ''without critical habitat'' scenario represents the baseline for the analysis, considering protections already in place for the subspecies (for example, under the Federal listing and other Federal, State, and local regulations). The baseline, therefore, represents the costs incurred regardless of whether critical habitat is designated. The ''with critical habitat'' scenario describes the incremental impacts associated specifically with the designation of critical habitat for the subspecies. The incremental conservation efforts and associated impacts are those not expected to occur absent the designation of critical habitat for the subspecies. In other words, the incremental costs are those attributable solely to the designation of critical habitat above and beyond the baseline costs; these are the costs we may consider in the final designation of critical habitat. The analysis looks retrospectively at baseline impacts incurred since the subspecies was listed, and forecasts both baseline and incremental impacts likely to occur if we finalize the proposed revised critical habitat.

The revised DEA estimates the reasonably foreseeable economic impacts of the proposed revised critical habitat designation. The economic analysis identifies potential incremental costs as a result of the proposed revised critical habitat designation; these are those costs attributed to critical habitat over and above those baseline costs attributed to the subspecies being listed within the Act. The revised DEA describes economic impacts of California red-legged frog conservation efforts associated with the following categories of activity: (1) Residential and Commercial Development; (2) Water Management; (3) Agriculture; (4) Ranching and Grazing; (5) Timber Harvest; (6) Transportation; (7) Fire Management; (8) Utility and Oil and Gas Pipeline Construction and Maintenance; and (9) Habitat and Vegetation Management.

The baseline economic impacts are those impacts that result from listing and other conservation efforts for the California red-legged frog. Conservation efforts related to development activities constitute the majority of total baseline costs (approximately 77 to 82 percent) in areas of proposed revised critical habitat. Impacts to agriculture make up the majority of the remainder of the costs associated with the proposed revised designation. The total future baseline impacts (potential costs related to the subspecies being listed and other conservation-related activities) are estimated to be $510 million to $1.34 billion ($46.1 million to $121 million on an annualized basis), assuming a 7 percent discount rate, through the year 2030.

The majority of incremental impacts attributed to the proposed revised critical habitat designation are expected to be related to development (approximately 90 percent) followed by agricultural impacts (approximately 10 percent). Impacts to all other activities represent less than one percent of the total incremental impacts. The DEA estimates total potential incremental economic impacts in areas proposed as revised critical habitat over the next 22 years (2009 to 2030) to be $183 million to $566 million ($16.5 to $51.2 million annualized) in present value terms using a 7 percent discount rate. For development, the estimated incremental impacts range from $124 million to $507 million, assuming a 7 percent discount rate; for agriculture, the estimated incremental impacts range from $58.3 million to $80.9 million, assuming a 7 percent discount rate.

The revised DEA considers both economic efficiency and distributional effects. In the case of habitat conservation, efficiency effects generally reflect the ''opportunity costs'' associated with the commitment of resources to comply with habitat protection measures (e.g., lost economic opportunities associated with restrictions on land use). The revised DEA also addresses how potential economic impacts are likely to be distributed, including an assessment of any local or regional impacts of habitat conservation and the potential effects of conservation activities on government agencies, private businesses, and individuals. The revised DEA measures lost economic efficiency associated with residential and commercial development and public projects and activities, such as economic impacts on water management and transportation projects, Federal lands, small entities, and the energy industry. Decision-makers can use this information to assess whether the effects of the revised designation might unduly burden a particular group or economic sector.

As we stated earlier, we are soliciting data and comments from the public on the revised DEA, as well as on all aspects of the proposed revised critical habitat rule. The final revised critical habitat rule may differ from the proposed revised rule based on new information we receive during the public comment periods. In particular, we may exclude an area from critical habitat if we determine that the benefits of excluding the area outweigh the benefits of including the area as critical habitat, provided the exclusion will not result in the extinction of the subspecies.

Required Determinations—Amended

In our proposed rule dated September 16, 2008 (73 FR 53492), we indicated that we would defer our determination of compliance with several statutes and Executive Orders until the information concerning potential economic impacts of the revised designation and potential effects on landowners and stakeholders became available in the DEA. We have now made use of the revised DEA to make these determinations. In this document, we affirm the information in our proposed rule concerning Executive Order (E.O.) 13132, E.O. 12988, the Paperwork Reduction Act, the National Environmental Policy Act, and the President's memorandum of April 29, 1994, ''Government-to-Government Relations with Native American Tribal Governments'' (59 FR 22951). However, based on the DEA data, we revised our required determinations concerning E.O. 12866 and the Regulatory Flexibility Act, E.O. 13211 (Energy, Supply, Distribution, and Use), the Unfunded Mandates Reform Act, and E.O. 12630 (Takings).

Regulatory Planning and Review (E.O. 12866)

The Office of Management and Budget (OMB) has determined that this proposed revised designation is not significant and has not reviewed this proposed rule under Executive Order 12866 (E.O. 12866). OMB bases its determination upon the following four criteria:

(a) Whether the rule will have an annual effect of $100 million or more on the economy or adversely affect an economic sector, productivity, jobs, the environment, or other units of the government.

(b) Whether the rule will create inconsistencies with other Federal agencies' actions.

(c) Whether the rule will materially affect entitlements, grants, user fees, loan programs, or the rights and obligations of their recipients.

(d) Whether the rule raises novel legal or policy issues.

Regulatory Flexibility Act (5 U.S.C. 601 et seq.)

Under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), as amended by the Small Business Regulatory Enforcement Fairness Act (5 U.S.C. 802(2)), whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory

flexibility analysis that describes the effect of the rule on small entities (*i.e.,* small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of an agency certifies the rule will not have a significant economic impact on a substantial number of small entities. Based on our revised DEA of the proposed revised designation, we provide our analysis for determining whether the proposed revised rule would result in a significant economic impact on a substantial number of small entities. Based on comments we receive, we may revise this determination as part of a final rulemaking.

According to the Small Business Administration, small entities include small organizations, such as independent nonprofit organizations; small governmental jurisdictions, including school boards and city and town governments that serve fewer than 50,000 residents; and small businesses (13 CFR 121.201). Small businesses include manufacturing and mining concerns with fewer than 500 employees, wholesale trade entities with fewer than 100 employees, retail and service businesses with less than $5 million in annual sales, general and heavy construction businesses with less than $27.5 million in annual business, special trade contractors doing less than $11.5 million in annual business, and agricultural businesses with annual sales less than $750,000. To determine if potential economic impacts to these small entities are significant, we considered the types of activities that might trigger regulatory impacts under this designation as well as types of project modifications that may result. In general, the term significant economic impact is meant to apply to a typical small business firm's business operations.

To determine if the proposed revised designation of critical habitat for the California red-legged frog would affect a substantial number of small entities, we consider the number of small entities affected within particular types of economic activities, such as residential and commercial development. In order to determine whether it is appropriate for our agency to certify that this rule would not have a significant economic impact on a substantial number of small entities, we considered each industry or category individually. In estimating the numbers of small entities potentially affected, we also considered whether their activities have any Federal involvement. Critical habitat designation will not affect activities that do not have any Federal involvement.

Designation of critical habitat only affects activities conducted, funded, permitted, or authorized by Federal agencies. Some kinds of activities are unlikely to have any Federal involvement and so will not be affected by critical habitat designation. In areas where the subspecies is present, Federal agencies already are required to consult with us under section 7 of the Act on activities they fund, permit, or implement that may affect the California red-legged frog. Federal agencies also must consult with us if their activities may affect revised designated critical habitat.

In the revised DEA of the proposed revision to critical habitat, we evaluate the potential economic effects on small business entities resulting from implementation of conservation actions related to the proposed revision to critical habitat for the California red-legged frog. The revised DEA identifies the estimated incremental impacts associated with the proposed rulemaking as described in Chapters 4 through 13 of the revised DEA, and evaluates the potential for economic impacts related to activity categories including urban development, water management, agriculture, grazing and ranching, timber harvest activities, transportation, utility pipeline construction and maintenance, fire management activities, and habitat management. The revised DEA concludes that the incremental impacts resulting from this rulemaking that may be borne by small businesses will be associated with urban development and agriculture. Incremental impacts are either not expected for the other types of activities considered or, if expected, will not be borne by small entities.

As discussed in Appendix A of the revised DEA, the largest impacts of the proposed rule result from section 7 consultations with the Service on development projects not subject to an existing habitat conservation plan, and to a lesser degree, similar types of costs resulting from the California Environmental Quality Act (CEQA) review of development projects lacking a Federal nexus. The analysis assumes full build-out of all areas identified as likely to be developed (as defined in Chapter 4 of the DEA; IEC 2009b) within the next 22 years. The DEA (Exhibit 4–5) identifies approximately 2,226 ac (860 ha) of projected development in areas likely to experience impacts as a result of the designation of critical habitat (incremental impact).

This analysis assumes incremental development-related costs will be borne either by developers or current landowners, depending on the developers' ability to offset critical habitat costs by paying lower prices for developable acres at the outset of projects. Current landowners may be individuals or families that are not legally considered to be businesses. As shown in Exhibit A–2, nearly all developers in the counties overlapping proposed critical habitat are, by definition, small entities. To understand the potential impact development-related costs on small entities, the IRFA assigns all costs to small development firms. This assumption is likely to overstate the actual impacts to such entities.

Assuming a 100-acre (40-hectare) average development size yields approximately 22 affected development projects over the next 22 years, or approximately 1 project annually. The incremental impact due to critical habitat is estimated to range from $11.2 to $45.9 million on an annualized basis, assuming a 7 percent discount rate.

The incremental costs attributed to agriculture are explained in Chapter 6 of the DEA. As described in Chapter 6, a stipulated injunction issued by the U.S. District Court for the Northern District of California restricts pesticide application in designated critical habitat. This analysis assumes these restrictions will continue through 2030 as a result of future section 7 consultation between the Service and U.S. Environmental Protection Agency. The analysis assumes that the lands affected by this prohibition will be taken out of production; to the extent that there are alternative beneficial uses of agricultural land (such as organic farming or grazing), or the section 7 consultation process results in less prohibitive use of pesticides, this analysis may overstate future economic impacts.

To estimate the potential incremental impact on small farmers, we began by estimating the probability that affected areas are likely to be found on small farms based on the percentage of total cropland in each county cultivated by small entities. We divided the resulting areas by the median farm size per county to estimate that a minimum of 217 small farms are likely to be affected. If less than 100 percent of these farms overlaps affected areas, then the number of farms affected could be higher. Total annualized impacts associated with these areas are anticipated to be as high as $2.7 million (see Exhibit A–6), assuming a 7 percent discount rate, or $500 to $168,000 per farm, depending on the type of crops affected. Note that, if the number of small farms affected is greater than 217, the per farm impacts will be lower.

In summary, we have considered whether the revised proposed rule would result in a significant economic impact on a substantial number of small entities. As a result of the uncertainty that exists regarding both the numbers of entities that may be impacted by the revised proposed rule and the degree of impact on individual entities, we have developed an Initial Regulatory Flexibility Analysis (IRFA) (DEA 2009b, Appendix A). However, due to the number of uncertainties identified in the DEA, we have prepared this IRFA without first making the threshold determination of whether the revised proposed critical habitat designation could be certified as not having a significant economic impact on a substantial number of small entities. This IRFA is intended to improve the Service's understanding of the effects of the proposed rule on small entities and to identify opportunities to minimize these impacts in the final rulemaking.

Executive Order 13211—Energy Supply, Distribution, and Use

E.O. 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions that may affect the supply, distribution, and use of energy. This proposed revision to critical habitat for the California red-legged frog is not considered a significant regulatory action under E.O. 12866. OMB's guidance for implementing this Executive Order outlines nine outcomes that may constitute "a significant adverse effect" when compared to no regulatory action. As highlighted in Chapter 10 (Exhibits 10–2 and 10–3), a number of oil and gas companies own and operate pipelines that pass through the proposed revised critical habitat, and Waste Management and the Linde Group plan to build the world's largest landfill gas plant in Unit ALA–2. However, the incremental impact to these entities over the next 22 years is solely attributable to the costs of section 7 consultation and no measurable impacts to the quantity or cost of energy production and distribution are likely to result from the revised designation of critical habitat (such as a reduction in electricity production or an increase in the cost of energy production or distribution), and a Statement of Energy Effects is not required.

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

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501), the Service makes the following findings:

(a) This rule will not produce a Federal mandate. In general, a Federal mandate is a provision in legislation, statute, or regulation that would impose an enforceable duty upon State, local, or tribal governments, or the private sector, and includes both "Federal intergovernmental mandates" and "Federal private sector mandates." These terms are defined in 2 U.S.C. 658(5)–(7). "Federal intergovernmental mandate" includes a regulation that "would impose an enforceable duty upon State, local, or tribal governments," with two exceptions. It excludes "a condition of federal assistance." It also excludes "a duty arising from participation in a voluntary Federal program," unless the regulation "relates to a then-existing Federal program under which $500,000,000 or more is provided annually to State, local, and tribal governments under entitlement authority," if the provision would "increase the stringency of conditions of assistance" or "place caps upon, or otherwise decrease, the Federal government's responsibility to provide funding" and the State, local, or tribal governments "lack authority" to adjust accordingly. "Federal private sector mandate" includes a regulation that "would impose an enforceable duty upon the private sector, except (i) a condition of Federal assistance; or (ii) a duty arising from participation in a voluntary Federal program."

Critical habitat designation does not impose a legally binding duty on non-Federal Government entities or private parties. Under the Act, the only regulatory effect is that Federal agencies must ensure that their actions do not destroy or adversely modify critical habitat under section 7. Designation of critical habitat may indirectly impact non-Federal entities that receive Federal funding, assistance, or permits, or that otherwise require approval or authorization from a Federal agency for an action that may destroy or adversely modify critical habitat. However, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency. Furthermore, to the extent that non-Federal entities are indirectly impacted because they receive Federal assistance or participate in a voluntary Federal aid program, the Unfunded Mandates Reform Act would not apply, nor would critical habitat shift the costs of the large entitlement programs listed above to State governments.

(b) We do not believe that this rule would significantly or uniquely affect small governments because it would not produce a Federal mandate of $100 million or greater in any year; that is, it is not a "significant regulatory action" under the Unfunded Mandates Reform Act. The revised DEA concludes incremental impacts may occur due to project modifications that may need to be made for development and tribal activities; however, these are not expected to affect small governments as the costs attributed to development is limited to private lands and not those owned by local governments. Consequently, we do not believe that the revised critical habitat designation would significantly or uniquely affect small government entities. As such, a Small Government Agency Plan is not required.

Executive Order 12630–Takings

In accordance with E.O. 12630 ("Government Actions and Interference with Constitutionally Protected Private Property Rights"), we have analyzed the potential takings implications of proposing revised critical habitat for the California red-legged frog in a takings implications assessment. Our takings implications assessment concludes that the proposed revision to critical habitat for the California red-legged frog does not pose significant takings implications.

References Cited

A complete list of all references we cited in the proposed rule and in this document is available on the Internet at *http://www.regulations.gov* or by contacting the Sacramento Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT** section).

Authors

The primary authors of this rulemaking are the staff members of the Sacramento Fish and Wildlife Office.

Dated: September 29, 2009.

Thomas L. Strickland,

Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. E9–24327 Filed 10–7–09; 8:45 am]

BILLING CODE 4310–55–P

Notices

Federal Register

Vol. 74, No. 194

Thursday, October 8, 2009

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.

AFRICAN DEVELOPMENT FOUNDATION

ADF Board of Directors Meeting Notice; Correction

Dates: October 5, 2009.

ADF has the following corrections to the notice for the Board of Directors meeting, document 2009–23526, Category Notices, which was published and put on public display in the **Federal Register** on Wednesday, September 30, 2009. The additional meetings are listed below:

1. On page 50162, under "Entry Time" add the line "Open Session, Tuesday, October 13, 2009, *1 p.m. to 4 p.m.*"

2. On page 50162 under "Entry Status" add the line "Open Session, Tuesday, October 13, 2009, *1 p.m. to 4 p.m.*"

Lloyd O. Pierson,

President.

[FR Doc. E9–24326 Filed 10–5–09; 4:15 pm]

BILLING CODE 6117–01–P

DEPARTMENT OF AGRICULTURE

Office of the Secretary

Determination of Total Amounts of Fiscal Year 2010 Tariff-Rate Quotas for Raw Cane Sugar and Certain Sugars, Syrups and Molasses; Correction

AGENCY: Foreign Agricultural Service, USDA.

ACTION: Notice; correction.

SUMMARY: The Foreign Agricultural Service published a document in the **Federal Register** of September 29, 2009, providing notice of the establishment of the Fiscal Year (FY 2010) in-quota aggregate quantity of the raw, as well as, refined and specialty sugar Tariff-Rate Quotas (TRQ) as required under the U.S. World Trade Organization (WTO) commitments. The document contained an incorrect date.

FOR FURTHER INFORMATION CONTACT: Angel Gonzalez, (202) 720–2916.

Correction

In the **Federal Register** of September 29, 2009, in FR Doc. E9–23447, on page 49848, in the second column, the 3rd sentence in last paragraph should read: "The first tranche, totaling 1,656 MTRV, will open October 20, 2009." All other information remains unchanged.

Signed at Washington, DC the 2nd day of October 2009.

Thomas J. Vilsack,

United States Secretary of Agriculture.

[FR Doc. E9–24312 Filed 10–7–09; 8:45 am]

BILLING CODE 3410–10–P

DEPARTMENT OF AGRICULTURE

Forest Service

Shasta-Trinity National Forest, CA; Supplemental Environmental Impact Statement for the Gemmill Thin Project

AGENCY: Forest Service, USDA.

ACTION: Notice of intent to supplement an environmental impact statement.

SUMMARY: On April 16, 2009, J. Sharon Heywood, Forest Supervisor for the Shasta-Trinity National Forest, issued a Record of Decision (ROD) for the Gemmill Thin Project Final Environmental Impact Statement (FEIS). The decision to implement Alternative 1 (proposed action) as described in the FEIS and ROD was appealed by the Klamath Siskiyou Wildlands Center and the Conservation Congress on behalf of Citizens for Better Forestry and the Klamath Forest Alliance. On July 23, 2009, Appeal Deciding Officer/Deputy Regional Forester, Beth Pendleton, reversed the decision due to the lack of a reasonable range of alternatives analyzed in the FEIS. The Shasta-Trinity National Forest will prepare a supplemental environmental impact statement (SETS) for the Gemmill Thin Project to provide analysis of additional alternatives to the proposed action.

DATES: The draft SETS is expected to be issued in November 2009 and the final SETS is expected in March 2010.

ADDRESSES: Shasta-Trinity National Forest, 3644 Avtech Parkway, Redding, CA 96002.

FOR FURTHER INFORMATION CONTACT: Bobbie DiMonte Miller, Natural Resource Planner, Shasta-Trinity National Forest, 3644 Avtech Parkway, Redding, CA 96002, telephone (530) 226–2425, e-mail *bdimonte@fs.fed.us.*

SUPPLEMENTARY INFORMATION: The Forest Service is proposing to prepare a supplement to the final environmental impact statement for the Gemmill Thin Project in accordance with FSH 1909.15—Chapter 10—Section 18.1 and Section 18.2.

This "SEIS will address and respond specifically to the Appeal Reviewing Officer's Findings and Recommendations" found in the Appeal Deciding Officer's letter dated July 23, 2009, which states: "Appeal Reviewing Officer (ARO), Tina Terrell, Forest Supervisor of the Sequoia National Forest found that Forest Supervisor Sharon Heywood's decision was an appropriate and reasonable response to direction in the Northwest Forest Plan and the Shasta-Trinity National Forest Land and Resource Management Plan. The Forest Supervisor provided information supporting the logic and rationale in selecting the proposed alternative and the associated activities. Documentation provided by the Forest Supervisor demonstrated compliance with the Forest Land and Resource Management Plan in light of the appeal issues. However, the Forest Supervisor failed to analyze a reasonable range of alternatives in the FEIS. ARO Tina Terrell recommended reversing the Forest Supervisor's decision. I agree with the ARO's analysis as presented in the recommendation letter. All appeal issues raised have been considered. I reverse the Forest Supervisor's decision to implement Alternative 1 due to the lack of a reasonable range of alternatives analyzed in the FEIS."

The original notice of intent for this project was published in the **Federal Register** December 12, 2005, and again June 1, 2007. The notice of availability of the Gemmill Thin Project draft environmental impact statement was published in the **Federal Register** on November 11, 2008, and the notice of availability of the FEIS was published in the **Federal Register** on May 1, 2009. The April 2009 ROD for the Gemmill Thin Project FEIS and other relevant documentation can be found on the Forest Web site at: *http://www.fs.fed.us/*

r5/shastatrinity/projects/sfmuprojects.shtml.

Purpose and Need for Action

The purpose and need for the project remains as described in Chapter 1, pages through 11, of the FEIS. The draft SEIS will provide additional analysis and supplemental information specific to the development of a reasonable range of alternatives.

As noted in the FEIS (page 4) under Purpose and Need: The need for action was determined by comparing existing conditions in the field with the desired future condition as described in the Forest Plan (pages 4–165 through 4–168) for the Wildwood Management Area. Existing conditions were identified from extensive field review, computer modeling of fuels reduction treatments and wildfire behavior/effects and interdisciplinary planning. The interdisciplinary team identified several resource conditions where desired conditions described in the Forest Plan differ from the existing condition. The following existing conditions, with associated management goals, describe the purpose and need and are the basis for the proposed action:

- Excessive fuel accumulations and fuel ladders. There is a need to reduce the risk of losing existing and developing late-successional habitat due to wildfire and a need to use fire as a tool to maintain lower fuel loading.
- Insufficient amount of late-successional habitat. There is a need to encourage or accelerate the development of contiguous late-successional and old growth habitat.

Proposed Action

The proposed action would reduce fuels in the wildland urban interface and intermix areas adjacent to the rural community of Wildwood, California, and support the development of contiguous high quality old-growth habitat in the Chanchellula Late-Successional Reserve.

The proposed action, summarized below, encompasses a total of 1,618 acres.

- Thinning from below on approximately 1,279 acres of mixed conifer forest, which includes 300 acres of thinning within Riparian Reserve land allocation.
- Thinning from below on approximately 268 acres of mixed conifer forest to reconstruct a 30-year-old ridgetop shaded fuelbreak.
- Thinning 20-year-old plantations including mastication and/or biomass removal on approximately 44 acres.
- Fuels hazard reduction on approximately 27 acres of mid-slope fuel buffers adjacent to private land. Remove and pile by hand all snags ó19 inches in diameter and dead ground fuels for burning.
- Logging systems include: Tractor—1266 acres, cable—142 acres, helicopter—139 acres.

The proposed action includes additional post-harvest fuel reduction in thinning and fuels break units which will be accomplished by hand piling and burning, mastication, and/or biomass removal. Connected road-related activities include approximately 23.6 miles of road reconstruction, 1.7 miles of temporary road and 12.1 miles of road decommissioning post-project. There would be no new system road construction.

Lead and Cooperating Agencies

Lead Agency: USDA, Forest Service.

Responsible Official

J. Sharon Heywood, Forest Supervisor, Shasta-Trinity National Forest, 3644 Avtech Parkway, Redding, CA 96002.

Nature of Decision To Be Made

The Responsible Official will review the supplemental information and determine if modifications should be made to the decision presented in the April 16, 2009 ROD.

Scoping Process

Scoping is not required for supplements to environmental impact statements (40 CFR 1502.9(c)4).

Early Notice of Importance of Public Participation in Subsequent Environmental Review

A draft SETS will be prepared for review and comment. A legal notice will be published in the newspaper of record. A notice of availability will be published in the **Federal Register** to inform the public that the draft SETS is available for review. The draft SETS will be distributed to all holders of the April 2009 FEIS and ROD for the project, including those parties that appealed the April 2009 decision. The comment period on the draft SEIS will be 45 days from the publication date of the notice of availability in the **Federal Register**.

Timely submittal of comments on the draft SEIS ensures they can be meaningfully considered and responded to in the final SEIS. To assist the Forest Service in identifying and considering issues and concerns on the project, comments on the draft SETS should be as specific as possible. Comments should refer to specific pages or chapters of the draft SEIS. Comments may also address the adequacy of the draft SETS or the merits of the alternatives formulated and discussed in the statement. In addressing these points, reviewers may wish to refer to the Council on Environmental Quality Regulations for implementing the procedural provisions of the National Environmental Policy Act at 40 CFR 1503.3.

Comments received, including the names and addresses of those who comment, will be considered part of the public record on this proposal and will be available for public inspection (per 40 CFR 1501.7 and 1508.22).

Dated: September 30, 2009.

J. Sharon Heywood,

Forest Supervisor, Shasta-Trinity National Forest.

[FR Doc. E9–24145 Filed 10–7–09; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF AGRICULTURE

Forest Service

Tehama County Resource Advisory Committee

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: The Tehama County Resource Advisory Committee (RAC) will meet in Red Bluff, California. Agenda items to be covered include: (1) Introductions, (2) Approval of Minutes, (3) Public Comment, (4) Chairman's Perspective, (5) FY09 RAC Proposal Voting, (6) Next Agenda.

DATES: The meeting will be held on October 15, 2009 from 9 a.m. and end at approximately 12 p.m.

ADDRESSES: The meeting will be held at the Lincoln Street School, Pine Room, 1135 Lincoln Street, Red Bluff, CA. Individuals wishing to speak or propose agenda items must send their names and proposals to Randy Jero, Committee Coordinator, 825 N. Humboldt Ave., Willows, CA 95988.

FOR FURTHER INFORMATION CONTACT: Randy Jero, Committee Coordinator, USDA, Mendocino National Forest, Grindstone Ranger District, 825 N. Humboldt Ave., Willows, CA 95988. (530) 934–1269; E-mail *rjero@fs.fed.us.*

SUPPLEMENTARY INFORMATION: The meeting is open to the public. Committee discussion is limited to Forest Service staff and Committee members. However, persons who wish to bring matters to the attention of the Committee may file written statements with the Committee staff before or after the meeting. Public input sessions will

be provided and individuals who made written requests by October 13, 2009 will have the opportunity to address the committee at those sessions.

Dated: October 2, 2009.

Eduardo Olmedo,

Designated Federal Official.

[FR Doc. E9–24286 Filed 10–7–09; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF AGRICULTURE

Forest Service

Newspapers To Be Used for Publication of Legal Notice of Appealable Decisions and Publication of Notice of Proposed Actions for Southern Region; Alabama, Kentucky, Georgia, Tennessee, Florida, Louisiana, Mississippi, Virginia, West Virginia, Arkansas, Oklahoma, North Carolina, South Carolina, Texas, Puerto Rico

AGENCY: Forest Service, USDA.

ACTION: Notice.

SUMMARY: Deciding Officers in the Southern Region will publish notice of decisions subject to administrative appeal under 36 CFR parts 215 and 217 in the legal notice section of the newspapers listed in the **SUPPLEMENTARY INFORMATION** section of this notice. As provided in 36 CFR part 215.5 and 36 CFR part 217.5(d), the public shall be advised through **Federal Register** notice, of the newspaper of record to be utilized for publishing legal notice of decisions. Newspaper publication of notice of decisions is in addition to direct notice of decisions to those who have requested it and to those who have participated in project planning. Responsible Officials in the Southern Region will also publish notice of proposed actions under 36 CFR part 215 in the newspapers that are listed in the **SUPPLEMENTARY INFORMATION** section of this notice. As provided in 36 CFR 215.5, the public shall be advised, through **Federal Register** notice, of the newspaper of record to be utilized for publishing notices on proposed actions. Additionally, the Deciding Officers in the Southern Region will publish notice of the opportunity to object to a proposed authorized hazardous fuel reduction project under 36 CFR part 218.4 or developing, amending or revising land management plans under 36 CFR 219.9 in the legal notice section of the newspapers listed in the **SUPPLEMENTARY INFORMATION** section of this notice.

DATES: Use of these newspapers for purposes of publishing legal notice of decisions subject to appeal under 36 CFR parts 215 and 217, notices of proposed actions under 36 CFR part 215, and notices of the opportunity to object under 36 CFR 218 and 36 CFR 219 shall begin the first day after the date of this publication.

FOR FURTHER INFORMATION CONTACT: James W. Bennett, Regional Appeal Review Team Manager, Southern Region, Planning, 1720 Peachtree Road, NW., Atlanta, Georgia 30309, Phone: 404/347–2788.

SUPPLEMENTARY INFORMATION: Deciding Officers in the Southern Region will give legal notice of decisions subject to appeal under 36 CFR part 217, the Responsible Officials in the Southern Region will give notice of decisions subject to appeal under 36 CFR part 215 and opportunity to object to a proposed authorized hazardous fuel reduction project under 36 CFR part 218 or developing, amending or revising land management plans under 36 CFR 219.9 in the following newspapers which are listed by Forest Service administrative unit. Responsible Officials in the Southern Region will also give notice of proposed actions under 36 CFR part 215 in the following newspapers of record which are listed by Forest Service administrative unit. The timeframe for comment on a proposed action shall be based on the date of publication of the notice of the proposed action in the newspaper of record. The timeframe for appeal shall be based on the date of publication of the legal notice of the decision in the newspaper of record for 36 CFR parts 215 and 217. The timeframe for an objection shall be based on the date of publication of the legal notice of the opportunity to object for projects subject to 36 CFR part 218 or 36 CFR part 219.

Where more than one newspaper is listed for any unit, the first newspaper listed is the newspaper of record that will be utilized for publishing the legal notice of decisions and calculating timeframes. Secondary newspapers listed for a particular unit are those newspapers the Deciding Officer/Responsible Official expects to use for purposes of providing additional notice.

The following newspapers will be used to provide notice.

Southern Region

Regional Forester Decisions

Affecting National Forest System lands in more than one Administrative unit of the 15 in the Southern Region, Atlanta Journal-Constitution, published daily in Atlanta, GA. Affecting National Forest System lands in only one Administrative unit or only one Ranger District will appear in the newspaper of record elected by the National Forest, National Grassland, National Recreation Area, or Ranger District as listed below.

National Forests in Alabama, Alabama

Forest Supervisor Decisions

Affecting National Forest System lands in more than one Ranger District of the 6 in the National Forests in Alabama, Montgomery Advertiser, published daily in Montgomery, AL. Affecting National Forest System lands in only one Ranger District will appear in the newspaper of record elected by the Ranger District as listed below.

District Ranger Decisions

Bankhead Ranger District: Northwest Alabamian, published bi-weekly (Wednesday & Saturday) in Haleyville, AL.

Conecuh Ranger District: The Andalusia Star News, published daily (Tuesday through Saturday) in Andalusia, AL.

Oakmulgee Ranger District: The Tuscaloosa News, published daily in Tuscaloosa, AL.

Shoal Creek Ranger District: The Anniston Star, published daily in Anniston, AL.

Talladega Ranger District: The Daily Home, published daily in Talladega, AL.

Tuskegee Ranger District: Tuskegee News, published weekly (Thursday) in Tuskegee, AL.

Chattahoochee-Oconee National Forest, Georgia

Forest Supervisor Decisions

The Times, published daily in Gainesville, GA.

District Ranger Decisions

Blue Ridge Ranger District: The News Observer (newspaper of record) published bi-weekly (Tuesday & Friday) in Blue Ridge, GA.

North Georgia News, (newspaper of record) published weekly (Wednesday) in Blairsville, GA.

The Dahlonega Nuggett, (secondary) published weekly (Wednesday) in Dahlonega, GA.

Towns County Herald, (secondary) published weekly (Thursday) in Hiawassee, GA.

Conasauga Ranger District: Daily Citizen, published daily in Dalton, GA.

Chattooga River Ranger District: The Northeast Georgian, (newspaper of record) published bi-weekly (Tuesday & Friday) in Cornelia, GA.

Clayton Tribune, (newspaper of record) published weekly (Thursday) in Clayton, GA.

The Toccoa Record, (secondary) published weekly (Thursday) in Toccoa, GA.

White County News, (secondary) published weekly (Thursday) in Cleveland, GA.

Oconee Ranger District: Eatonton Messenger, published weekly (Thursday) in Eatonton, GA.

Cherokee National Forest, Tennessee

Forest Supervisor Decisions

Knoxville News Sentinel, published daily in Knoxville, TN.

District Ranger Decisions

Nolichucky-Unaka Ranger District: Greeneville Sun, published daily (except Sunday) in Greeneville, TN.

Ocoee-Hiwassee Ranger District: Polk County News, published weekly (Wednesday) in Benton, TN.

Tellico Ranger District: Monroe County Advocate & Democrat, published triweekly (Wednesday, Friday, and Sunday) in Sweetwater, TN.

Watauga Ranger District: Johnson City Press, published daily in Johnson City, TN.

Daniel Boone National Forest, Kentucky

Forest Supervisor Decisions

Lexington Herald-Leader, published daily in Lexington, KY.

District Ranger Decisions

Cumberland Ranger District: Lexington Herald-Leader, published daily in Lexington, KY.

London Ranger District: The Sentinel-Echo, published triweekly (Monday, Wednesday, and Friday) in London, KY.

Redbird Ranger District: Manchester Enterprise, published weekly (Thursday) in Manchester, KY.

Stearns Ranger District: McCreary County Record, published weekly (Tuesday) in Whitley City, KY.

El Yunque National Forest, Puerto Rico

Forest Supervisor Decisions

El Nuevo Dia, published daily in Spanish in San Juan, PR.

Puerto Rico Daily Sun, published daily in English in San Juan, PR.

National Forests in Florida, Florida

Forest Supervisor Decisions

The Tallahassee Democrat, published daily in Tallahassee, FL.

District Ranger Decisions

Apalachicola Ranger District: Calhoun-Liberty Journal, published weekly (Wednesday) in Bristol, FL.

Lake George Ranger District: The Ocala Star Banner, published daily in Ocala, FL.

Osceola Ranger District: The Lake City Reporter, published daily (MondaySaturday) in Lake City, FL.

Seminole Ranger District: The Daily Commercial, published daily in Leesburg, FL.

Wakulla Ranger District: The Tallahassee Democrat, published daily in Tallahassee, FL.

Francis Marion & Sumter National Forests, South Carolina

Forest Supervisor Decisions

The State, published daily in Columbia, SC.

District Ranger Decisions

Andrew Pickens Ranger District: The Daily Journal, published daily (Tuesday through Saturday) in Seneca, SC.

Enoree Ranger District: Newberry Observer, published triweekly (Monday, Wednesday, and Friday) in Newberry, SC.

Long Cane Ranger District: Index-Journal, published daily in Greenwood, SC.

Wambaw Ranger District: Post and Courier, published daily in Charleston, SC.

Witherbee Ranger District: Post and Courier, published daily in Charleston, SC.

George Washington and Jefferson National Forests, Virginia and West Virginia

Forest Supervisor Decisions

Roanoke Times, published daily in Roanoke, VA.

District Ranger Decisions

Clinch Ranger District: Coalfield Progress, published bi-weekly (Tuesday and Friday) in Norton, VA.

North River Ranger District: Daily News Record, published daily (except Sunday) in Harrisonburg, VA.

Glenwood-Pedlar Ranger District: Roanoke Times, published daily in Roanoke, VA.

James River Ranger District: Virginian Review, published daily (except Sunday) in Covington, VA.

Lee Ranger District: Shenandoah Valley Herald, published weekly (Wednesday) in Woodstock, VA.

Mount Rogers National Recreation Area: Bristol Herald Courier, published daily in Bristol, VA.

Eastern Divide Ranger District: Roanoke Times, published daily in Roanoke, VA.

Warm Springs Ranger District: The Recorder, published weekly (Thursday) in Monterey, VA.

Kisatchie National Forest, Louisiana

Forest Supervisor Decisions

The Town Talk, published daily in Alexandria, LA.

District Ranger Decisions

Calcasieu Ranger District: The Town Talk, (newspaper of record) published daily in Alexandria, LA.

The Leesville Daily Leader, (secondary) published daily in Leesville, LA.

Caney Ranger District: Minden Press Herald, (newspaper of record) published daily in Minden, LA.

Homer Guardian Journal, (secondary) published weekly (Wednesday) in Homer, LA.

Catahoula Ranger District: The Town Talk, published daily in Alexandria, LA.

Kisatchie Ranger District: Natchitoches Times, published daily (Tuesday thru Friday and on Sunday) in Natchitoches, LA.

Winn Ranger District: Winn Parish Enterprise, published weekly (Wednesday) in Winnfield, LA.

Land Between the Lakes National Recreation Area, Kentucky and Tennessee

Area Supervisor Decisions

The Paducah Sun, published daily in Paducah, KY.

National Forests in Mississippi, Mississippi.

Forest Supervisor Decisions

Clarion-Ledger, published daily in Jackson, MS.

District Ranger Decisions

Bienville Ranger District: Clarion-Ledger, published daily in Jackson, MS.

Chickasawhay Ranger District: Clarion-Ledger, published daily in Jackson, MS.

Delta Ranger District: Clarion-Ledger, published daily in Jackson, MS.

De Soto Ranger District: Clarion Ledger, published daily in Jackson, MS.

Holly Springs Ranger District: Clarion-Ledger, published daily in Jackson, MS.

Homochitto Ranger District: Clarion-Ledger, published daily in Jackson, MS.

Tombigbee Ranger District: Clarion-Ledger, published daily in Jackson, MS.

National Forests in North Carolina, North Carolina

Forest Supervisor Decisions

The Asheville Citizen-Times, published Wednesday thru Sunday, in Asheville, NC.

District Ranger Decisions

Appalachian Ranger District: The Asheville Citizen-Times, published

Wednesday thru Sunday, in Asheville, NC.

Cheoah Ranger District: Graham Star, published weekly (Thursday) in Robbinsville, NC.

Croatan Ranger District: The Sun Journal, published daily in New Bern, NC.

Grandfather Ranger District: McDowell News, published daily in Marion, NC.

Nantahala Ranger District: The Franklin Press, published bi-weekly (Tuesday and Friday) in Franklin, NC.

Pisgah Ranger District: The Asheville Citizen-Times, published Wednesday thru Sunday, in Asheville, NC.

Tusquitee Ranger District: Cherokee Scout, published weekly (Wednesday) in Murphy, NC.

Uwharrie Ranger District: Montgomery Herald, published weekly (Wednesday) in Troy, NC.

Ouachita National Forest, Arkansas and Oklahoma

Forest Supervisor Decisions

Arkansas Democrat-Gazette, published daily in Little Rock, AR.

District Ranger Decisions

Caddo-Womble Ranger District: Arkansas Democrat-Gazette, published daily in Little Rock, AR.

Jessieville-Winona-Fourche Ranger District: Arkansas Democrat-Gazette, published daily in Little Rock, AR.

Mena-Oden Ranger District: Arkansas Democrat-Gazette, published daily in Little Rock, AR.

Oklahoma Ranger District (Choctaw; Kiamichi; and Tiak) Tulsa World, published daily in Tulsa, OK.

Poteau-Cold Springs Ranger District: Arkansas Democrat-Gazette, published daily in Little Rock, AR.

Ozark-St. Francis National Forests, Arkansas

Forest Supervisor Decisions

The Courier, published daily (Tuesday through Sunday) in Russellville, AR.

District Ranger Decisions

Bayou Ranger District: The Courier, published daily (Tuesday through Sunday) in Russellville, AR.

Boston Mountain Ranger District: Southwest Times Record, published daily in Fort Smith, AR.

Buffalo Ranger District: Newton County Times, published weekly in Jasper, AR.

Magazine Ranger District: Southwest Times Record, published daily in Fort Smith, AR.

Pleasant Hill Ranger District: Johnson County Graphic, published weekly (Wednesday) in Clarksville, AR.

St. Francis National Forest: The Daily World, published daily (Sunday through Friday) in Helena, AR.

Sylamore Ranger District: Stone County Leader, published weekly (Wednesday) in Mountain View, AR.

National Forests and Grasslands in Texas, Texas

Forest Supervisor Decisions

The Lufkin Daily News, published daily in Lufkin, TX.

District Ranger Decisions

Angelina National Forest: The Lufkin Daily News, published daily in Lufkin, TX.

Caddo & LBJ National Grasslands: Denton Record-Chronicle, published daily in Denton, TX.

Davy Crockett National Forest: The Lufkin Daily News, published daily in Lufkin, TX.

Sabine National Forest: The Lufkin Daily News, published daily in Lufkin, TX.

Sam Houston National Forest: The Courier, published daily in Conroe, TX.

Dated: September 28, 2009.

Mary A. Morris,

Deputy Regional Forester.

[FR Doc. E9–24147 Filed 10–7–09; 8:45 am]

BILLING CODE 3410–11–M

COMMISSION ON CIVIL RIGHTS

Sunshine Act Notice

AGENCY: United States Commission on Civil Rights.

ACTION: Notice of meeting.

DATE AND TIME: Friday, October 16, 2009; 9:30 a.m. EDT.

PLACE: 624 9th St., NW., Room 540, Washington, DC 20425.

Meeting Agenda

This meeting is open to the public.

I. Approval of Agenda.

II. Approval of Minutes of September 3, September 11 and September 24 Meetings.

III. Announcements.

IV. Staff Director's Report.

V. Program Planning.

- Update on Status of 2010 Enforcement Report
- Approval of First Quarter FY 2010 Briefing Report Topic
- Update on Status of Briefing Reports; Approval of Commissioner Deadlines for Consideration of Briefing Reports
- Approval of Calendar of 2010 Commission Meetings
- National Conference Subcommittee Issues
- Motion to Appoint Additional Member to the Subcommittee
- Motion to Delegate to the Subcommittee the Authority to Set the National Conference Date

VI. State Advisory Committee Issues.

- Reconsideration of a Nominee for the Hawaii SAC

VII. Adjourn.

CONTACT PERSON FOR FURTHER INFORMATION: Lenore Ostrowsky, Acting Chief, Public Affairs Unit (202) 376–8591. TDD: (202) 376–8116.

Persons with a disability requiring special services, such as an interpreter for the hearing impaired, should contact Pamela Dunston at least seven days prior to the meeting at 202–376–8105. TDD: (202) 376–8116.

Dated: October 6, 2009.

Martin Dannenfelser,

Staff Director.

[FR Doc. E9–24433 Filed 10–6–09; 4:15 pm]

BILLING CODE 6335–01–P

DEPARTMENT OF COMMERCE

International Trade Administration

[–580–836]

Certain Cut–to-Length Carbon–Quality Steel Plate from the Republic of Korea: Correction to the Preliminary Results of Antidumping Duty Administrative Review and Intent to Rescind Administrative Review in Part

AGENCY: Import Administration, International Trade Administration, Department of Commerce

SUMMARY: On September 24, 2009, the Department of Commerce published in the **Federal Register** the preliminary results of the administrative review of the antidumping duty order on certain cut–to-length carbon–quality steel plate from the Republic of Korea for the period of review February 1, 2008, through January 31, 2009. The notice contained two incorrect citations to memoranda. The correct citations are indicated below.

EFFECTIVE DATE: October 8, 2009.

FOR FURTHER INFORMATION CONTACT: Yang Jin Chun or Richard Rimlinger, AD/CVD Operations, Office 5, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230; telephone: (202) 482–5760 and (202) 482–4477, respectively.

SUPPLEMENTARY INFORMATION:

Background

On September 24, 2009, the Department of Commerce published in the **Federal Register** the preliminary results of the administrative review of the antidumping duty order on certain cut–to-length carbon–quality steel plate from the Republic of Korea for the period of review February 1, 2008, through January 31, 2009. *See Certain Cut–to-Length Carbon–Quality Steel Plate From the Republic of Korea: Preliminary Results of Antidumping Duty Administrative Review and Intent to Rescind Administrative Review in Part*, 74 FR 48716 (September 24, 2009) (*Preliminary Results*). The *Preliminary Results* contained two incorrect citations to memoranda. First, in the "Corroboration of Information" section of the *Preliminary Results*, we stated:

> See the September XX, 2009, memorandum to the File entitled "Certain Cut–to-Length Carbon–Quality Steel Plate from the Republic of Korea: Placement on Record" for details which contain DSM's business–proprietary information.

See *Preliminary Results*, 74 FR at 48718. This statement should read as follows:

> See the September 18, 2009, memorandum to the File entitled "Certain Cut–to-Length Carbon–Quality Steel Plate from the Republic of Korea: Placement on Record" for details which contain DSM's business–proprietary information.

Second, in Footnote 1 of the *Preliminary Results*, we stated:

> See the September XX, 2009, memorandum to the File entitled "Certain Cut–to-Length Carbon–Quality Steel Plate from the Republic of Korea: All–Others Cash–Deposit Rate" for details on the calculation of this rate.

See *Preliminary Results*, 74 FR at 48719. Footnote 1 should read as follows:

> See the September 18, 2009, memorandum to the File entitled "Certain Cut–to-Length Carbon–Quality Steel Plate from the Republic of Korea: All–Others Cash–Deposit Rate" for details on the calculation of this rate.

We are issuing and publishing this notice in accordance with sections 751(a)(1) and 777(i)(1) of the Tariff Act of 1930, as amended, and 19 CFR 351.221(b)(4).

Dated: October 2, 2009.

Ronald K. Lorentzen,

Acting Assistant Secretary for Import Administration.

[FR Doc. E9–24335 Filed 10–7–09; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Availability of Seats for the Monterey Bay National Marine Sanctuary Advisory Council

AGENCY: Office of National Marine Sanctuaries (ONMS), National Ocean Service (NOS), National Oceanic and Atmospheric Administration (NOAA), Department of Commerce (DOC).

ACTION: Notice and request for applications.

SUMMARY: The ONMS is seeking applications for the following vacant seats on the Monterey Bay National Marine Sanctuary Advisory Council: Agriculture, At-Large (2), Business/Industry, Commercial Fishing, Recreation (Non extractive), Recreational Fishing, Research, and Conservation. Applicants are chosen based upon their particular expertise and experience in relation to the seat for which they are applying; community and professional affiliations; philosophy regarding the protection and management of marine resources; and possibly the length of residence in the area affected by the sanctuary. Applicants who are chosen should expect to serve until February 2013.

DATES: Applications are due by November 13, 2009.

ADDRESSES: Application kits may be obtained from 299 Foam Street, Monterey, CA 93940 or online at *http://montereybay.noaa.gov/*. Completed applications should be sent to the same address.

FOR FURTHER INFORMATION CONTACT: Nicole Capps, 299 Foam Street, Monterey, CA 93940, (831) 647–4206, *nicole.capps@noaa.gov*.

SUPPLEMENTARY INFORMATION: The MBNMS Advisory Council was established in March 1994 to assure continued public participation in the management of the Sanctuary. Since its establishment, the Advisory Council has played a vital role in decisions affecting the Sanctuary along the central California coast.

The Advisory Council's twenty voting members represent a variety of local user groups, as well as the general public, plus seven local, state and federal governmental jurisdictions. In addition, the respective managers or superintendents for the four California National Marine Sanctuaries (Channel Islands National Marine Sanctuary, Cordell Bank National Marine Sanctuary, Gulf of the Farallones National Marine Sanctuary and the Monterey Bay National Marine Sanctuary) and the Elkhorn Slough National Estuarine Research Reserve sit as non-voting members.

Four working groups support the Advisory Council: The Research Activity Panel ("RAP") chaired by the Research Representative, the Sanctuary Education Panel ("SEP") chaired by the Education Representative, the Conservation Working Group ("CWG") chaired by the Conservation Representative, and the Business and Tourism Activity Panel ("BTAP") chaired by the Business/Industry Representative, each dealing with matters concerning research, education, conservation and human use. The working groups are composed of experts from the appropriate fields of interest and meet monthly, or bi-monthly, serving as invaluable advisors to the Advisory Council and the Sanctuary Superintendent.

The Advisory Council represents the coordination link between the Sanctuary and the state and federal management agencies, user groups, researchers, educators, policy makers, and other various groups that help to focus efforts and attention on the central California coastal and marine ecosystems.

The Advisory Council functions in an advisory capacity to the Sanctuary Superintendent and is instrumental in helping develop policies, program goals, and identify education, outreach, research, long-term monitoring, resource protection, and revenue enhancement priorities. The Advisory Council works in concert with the Sanctuary Superintendent by keeping him or her informed about issues of concern throughout the Sanctuary, offering recommendations on specific issues, and aiding the Superintendent in achieving the goals of the Sanctuary program within the context of California's marine programs and policies.

Authority: 16 U.S.C. Sections 1431, *et seq.*

(Federal Domestic Assistance Catalog Number 11.429, Marine Sanctuary Program)

Dated: September 29, 2009.

Daniel J. Basta,

Director, Office of National Marine Sanctuaries, National Ocean Service, National Oceanic and Atmospheric Administration.

[FR Doc. E9–24277 Filed 10–7–09; 8:45 am]

BILLING CODE 3510–NK–M

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XR99

Endangered Species; File No. 14634

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

ACTION: Notice; receipt of application.

SUMMARY: Notice is hereby given that Douglas Peterson, PhD, University of Georgia, Warnell School of Forest Resources, Athens, GA 30602, has applied in due form for a permit to take shortnose sturgeon (*Acipenser brevirostrum*) for purposes of scientific research.

DATES: Written, telefaxed, or e-mail comments must be received on or before November 9, 2009.

ADDRESSES: The application and related documents are available for review by selecting "Records Open for Public Comment" from the Features box on the Applications and Permits for Protected Species (APPS) home page, *https://apps.nmfs.noaa.gov/index.cfm*, and then selecting File No. 14634 from the list of available applications. The application and related documents are available for review upon written request or by appointment in the following offices:

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; and

Southeast Region, NMFS, 263 13th Avenue South, St. Petersburg, FL 33701; phone (727)824–5312; fax (727)824–5309.

Written comments or requests for a public hearing on this application should be mailed to the Chief, Permits, Conservation and Education Division, F/PR1, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13705, Silver Spring, MD 20910. Those individuals requesting a hearing should set forth the specific reasons why a hearing on this particular request would be appropriate.

Comments may also be submitted by facsimile at (301)713–0376, provided the facsimile is confirmed by hard copy submitted by mail and postmarked no later than the closing date of the comment period.

Comments may also be submitted by e-mail. The mailbox address for providing e-mail comments is *NMFS.Pr1Comments@noaa.gov*. Include in the subject line of the e-mail comment the following document identifier: File No. 14634.

FOR FURTHER INFORMATION CONTACT: Malcolm Mohead or Jennifer Skidmore, (301)713–2289.

SUPPLEMENTARY INFORMATION: The subject permit is requested under the authority of 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 222–226).

Dr. Douglas Peterson, Warnell School of Forest Resources (Fisheries Division), University of Georgia, Athens, Georgia 30602, has requested a 5–year permit to maintain and conduct research on 95 hatchery-reared shortnose sturgeon at the University of Georgia to meet the following objectives: (1) quantify differences in the environmental tolerances of northern versus southern range shortnose sturgeon and (2) evaluate ontogenetic changes in the environmental tolerances of juvenile shortnose sturgeon. The fish would be obtained from the Warm Springs National Fish Hatchery and Regional Fisheries Center (USFWS), Warm Springs, Georgia 31830, under NMFS Permit 1604. Using a series of replicated laboratory (lethal and non-lethal) experiments, the researcher would evaluate the individual, additive, and interactive effects of the three habitat variables most critical in determining summer habitat quality for both juveniles and adult shortnose sturgeon: maximum water temperature, maximum salinity, and minimum concentration of dissolved oxygen. Researchers would also examine how environmental tolerances of shortnose sturgeon change with age and conditioning (chronic exposure). Future scientific research with these fish would involve studies of nutrition, tagging, physiology, environmental tolerance, contaminants, fish health, behavioral, tagging, genetics, and fish culture techniques. The permit would not authorize any takes from the wild, nor would it authorize any release of captive sturgeon into the wild.

Dated: October 2, 2009.

P. Michael Payne,

Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. E9–24310 Filed 10–7–09; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XS05

Marine Mammals; File No. 14802

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

ACTION: Notice; receipt of application.

SUMMARY: Notice is hereby given that the Oregon Coast Aquarium, 2820 S.E. Ferry Slip Road, Newport, OR 97365, has applied in due form for a permit to import up to eight non-releasable harbor seals (*Phoca vitulina*) for the purposes of public display.

DATES: Written or telefaxed comments must be received on or before November 9, 2009.

ADDRESSES: The application and related documents are available for review upon written request or by appointment in the following offices:

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; and

Northwest Region, NMFS, 7600 Sand Point Way NE, BIN C15700, Bldg. 1, Seattle, WA 98115–0700; phone (206)526–6150; fax (206)526–6426.

Written comments or requests for a public hearing on this application should be mailed to the Chief, Permits, Conservation and Education Division, F/PR1, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13705, Silver Spring, MD 20910. Those individuals requesting a hearing should set forth the specific reasons why a hearing on this particular request would be appropriate.

Comments may also be submitted by facsimile at (301)713–0376, provided the facsimile is confirmed by hard copy submitted by mail and postmarked no later than the closing date of the comment period.

Comments may also be submitted by e-mail. The mailbox address for providing e-mail comments is *NMFS.Pr1Comments@noaa.gov*. Include in the subject line of the e-mail

comment the following document identifier: File No. 14802.

FOR FURTHER INFORMATION CONTACT: Jennifer Skidmore or Kristy Beard, (301)713–2289.

SUPPLEMENTARY INFORMATION: The subject permit is requested under the authority of the Marine Mammal Protection Act of 1972, as amended (16 U.S.C. 1361 *et seq.*), and the regulations governing the taking and importing of marine mammals (50 CFR part 216).

The applicant requests authorization to import up to eight non-releasable harbor seals (*Phoca vitulina*) from the Vancouver Aquarium Science Center, Vancouver, British Columbia, Canada to the Oregon Coast Aquarium. The applicant requests these imports for the purpose of public display. The receiving facility, Oregon Coast Aquarium, 2820 S.E. Ferry Slip Road, Newport, OR 97365 is: (1) open to the public on regularly scheduled basis with access that is not limited or restricted other than by charging for an admission fee; (2) offers an educational program based on professionally accepted standards of the American Association of Zoos and Aquariums; and (3) holds an Exhibitor's License, number 92–C–0057, issued by the U.S. Department of Agriculture under the Animal Welfare Act (7 U.S.C. §§ 2131–59).

In addition to determining whether the applicant meets the three public display criteria, NMFS must determine whether the applicant has demonstrated that the proposed activity is humane and does not represent any unnecessary risks to the health and welfare of marine mammals; that the proposed activity by itself, or in combination with other activities, will not likely have a significant adverse impact on the species or stock; and that the applicant's expertise, facilities and resources are adequate to accomplish successfully the objectives and activities stated in the application.

In compliance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*), an initial determination has been made that the activity proposed is categorically excluded from the requirement to prepare an environmental assessment or environmental impact statement.

Concurrent with the publication of this notice in the **Federal Register**, NMFS is forwarding copies of this application to the Marine Mammal Commission and its Committee of Scientific Advisors.

Dated: October 2, 2009.

P. Michael Payne,

Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. E9–24308 Filed 10–7–09; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XS08

Pacific Fishery Management Council; Public Meeting

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

ACTION: Notice of a public meeting.

SUMMARY: The Pacific Fishery Management Council's (Pacific Council) Enforcement Consultants Committee (EC) will hold a working meeting, which is open to the public.

DATES: The EC meeting will be held Monday, October 26, 2009, from 1 p.m. until business for the day is completed.

ADDRESSES: The Pacific Council EC will meet via a telephone conference and will have a listening station for public access at the Pacific Council office, 7700 NE Ambassador Place, Suite 101, Portland, OR 97220.

Council address: Pacific Fishery Management Council, 7700 NE Ambassador Place, Suite 101, Portland, OR 97220–1384.

FOR FURTHER INFORMATION CONTACT: Mr. Jim Seger, Staff Officer; telephone: (503) 820–2280.

SUPPLEMENTARY INFORMATION: The purpose of the EC meeting is to review the Pacific Council's November 2009 agenda and prepare for reports to be provided to the Pacific Council at the meeting. The EC will continue development of its reports for the Pacific Council at a subsequent meeting starting at 10 a.m. on Saturday, October 31. Notice of the EC's October 31 meeting will be provided with the announcement of the Pacific Council's October 31 through November 5 meeting.

Although non-emergency issues not contained in the meeting agenda may come before the EC for discussion, those issues may not be the subject of formal EC action during this meeting. EC action will be restricted to those issues specifically listed in this notice and any issues arising after publication of this notice that require emergency action under Section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the EC's intent to take final action to address the emergency.

Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Ms. Carolyn Porter at (503) 820–2280 at least 5 days prior to the meeting date.

Dated: October 2, 2009.

Tracey L. Thompson,

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

[FR Doc. E9–24194 Filed 10–7–09; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

International Trade Administration

[A–583–816]

Certain Stainless Steel Butt-Weld Pipe Fittings From Taiwan: Rescission of Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

DATES: *Effective Date:* October 8, 2009.

SUMMARY: In response to a request from respondent Ta Chen Stainless Pipe Co., Ltd. ("Ta Chen"), the Department of Commerce ("the Department") initiated an administrate review of the antidumping duty order on certain stainless steel butt-weld pipe fittings from Taiwan. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Deferral of Administrative Reviews*, 74 FR 37690 (July 29, 2009) ("*Initiation Notice*"). This administrative review covers the period June 1, 2008, through May 31, 2009. We are now rescinding this review due to Ta Chen's withdrawal of its review request.

FOR FURTHER INFORMATION CONTACT: John Drury or Angelica Mendoza, AD/CD Operations, Office 7, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482–0195 or (202) 482–3019, respectively.

SUPPLEMENTARY INFORMATION:

Background

On June 1, 2009, the Department published in the **Federal Register** a notice of "Opportunity to Request an

Administrative Review'' of the antidumping order on certain stainless steel butt-weld pipe fittings from Taiwan for the period June 1, 2008, through May 31, 2009. *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review*, 74 FR 26202 (June 1, 2009).

On June 30, 2009, in accordance with 19 CFR 351.213(b), the Department received a timely request from Ta Chen to conduct an administrative review of its sales during the period of review (''POR''), *i.e.*, June 1, 2008, through May 31, 2009. Ta Chen was the only party to request an administrative review.

On July 29, 2009, the Department published a notice of initiation of the antidumping duty administrative review of certain stainless steel butt-weld pipe fittings from Taiwan. *See Initiation Notice*, 74 FR 37691 (July 29, 2009).

On September 15, 2009, Ta Chen timely withdrew its request for review.

Rescission of Administrative Review

Pursuant to 19 CFR 351.213(d)(1), the Secretary will rescind an administrative review, in whole or in part, if the parties that requested a review withdraw the request within 90 days of the date of publication of the notice of initiation of the requested review. *See* 19 CFR 351.213(d)(1). Ta Chen's request is timely, as it falls within 90 days of the publication date of the notice of initiation. Additionally, no other party requested an administrative review of the antidumping duty order on certain stainless steel butt-weld pipe fittings from Taiwan for the period June 1, 2008, through May 31, 2009. Therefore, in response to Ta Chen's withdrawal of its request for review, and pursuant to 19 CFR 351.213(d)(1), the Department hereby rescinds the administrative review of the antidumping duty order on certain stainless steel butt-weld pipe fittings from Taiwan for the period June 1, 2008, through May 31, 2009.

Assessment

The Department will instruct U.S. Customs and Border Protection (''CBP'') to assess antidumping duties on all appropriate entries. Since this review is being rescinded, the antidumping duties shall be assessed at rates equal to the cash deposit of estimated antidumping duties required at the time of entry, or withdrawal from warehouse, for consumption, in accordance with 19 CFR 351.212(c)(1)(i). The Department intends to issue appropriate assessment instructions to CBP 15 days after publication of this rescission notice in the **Federal Register**.

Notification to Importers

This notice serves as a reminder to importers of their responsibility under 19 CFR 351.402(f)(2) 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.

Notification Regarding Administrative Protective Orders

This notice serves as a final reminder to parties subject to administrative protection orders (APO) of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3). Timely written notification of the return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a sanctionable violation.

This notice is issued and published in accordance with sections 751(a)(1) and 777(i)(1) of the Tariff Act of 1930, as amended, 19 CFR 351.213(d)(4).

Dated: October 1, 2009.

John M. Andersen,

Acting Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. E9–24215 Filed 10–7–09; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

Foreign–Trade Zones Board

[Docket 3–2007]

Foreign–Trade Zone 43 Battle Creek, Michigan, Termination of Review of Sourcing Change, Subzone 43D, Perrigo Company (Ibuprofen Products), Allegan, Michigan

Notice is hereby given of termination of a sourcing change review relating to the over–the-counter (OTC) ibuprofen operations at Subzone 43D at the Perrigo Company (Perrigo) OTC pharmaceutical manufacturing facilities in Allegan, Michigan (72 FR 10642, 3/9/07). The termination is based on an analysis of the record and resulting determination that no Board action is warranted.

Dated: October 1, 2009.

Andrew McGilvray,

Executive Secretary.

[FR Doc. E9–24337 Filed 10–7–09; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF DEFENSE

Department of the Navy

Notice of Meeting of the Ocean Research and Resources Advisory Panel

AGENCY: Department of the Navy, DOD.

ACTION: Notice of open meeting.

SUMMARY: The Ocean Research and Resources Advisory Panel (ORRAP) will meet to discuss National Ocean Research Leadership Council (NORLC) and Interagency Committee on Ocean Science and Resource Management Integration (ICOSRMI) activities. All sessions of the meeting will remain open to the public.

DATES: The meeting will be held on Tuesday, November 17, 2009, from 8:30 a.m. to 5:30 p.m. and Wednesday, November 18, 2009, from 8:30 a.m. to 2:45 p.m. In order to maintain the meeting time schedule, members of the public will be limited in their time to speak to the Panel. Members of the public should submit their comments one week in advance of the meeting to the meeting point of contact.

ADDRESSES: The meeting will be held at Disney's Coronado Springs Resort, 1001 West Buena Vista Drive, Lake Buena Vista, FL 32830.

FOR FURTHER INFORMATION CONTACT: Dr. Charles L. Vincent, Office of Naval Research, 875 North Randolph Street, Suite 1425, Arlington, VA 22203–1995, telephone (703) 696–4118.

SUPPLEMENTARY INFORMATION: This notice of open meeting is provided in accordance with the Federal Advisory Committee Act (5 U.S.C. App. 2). The meeting will include discussions on ocean research to applications, ocean observing, professional certification programs, and other current issues in the ocean science and resource management communities.

Dated: October 1, 2009.

A.M. Vallandingham,

Lieutenant Commander, Judge Advocate General's Corps, U.S. Navy, Federal Register Liaison Officer.

[FR Doc. E9–24323 Filed 10–7–09; 8:45 am]

BILLING CODE 3810–FF–P

DEPARTMENT OF EDUCATION

Office of Management; Notice of Membership of the Performance Review Board

AGENCY: Department of Education.

ACTION: Notice of membership of the Performance Review Board.

SUMMARY: The Secretary announces the members of the Performance Review Board (PRB) for the Department of Education for the Senior Executive Service (SES) performance cycle that ended September 30, 2009. Under 5 U.S.C. 4314(c)(1) through (5), each agency is required to establish one or more PRBs.

Composition and Duties

The PRB of the Department of Education for 2009 is composed of career senior executives and a noncareer senior executive.

The PRB reviews and evaluates the initial appraisal of each senior executive's performance, along with any comments by that senior executive and by any higher-level executive or executives. The PRB makes recommendations to the appointing authority relative to the performance of the senior executive, including recommendations on performance awards. The Department of Education's PRB also makes recommendations on SES pay adjustments for career senior executives.

Membership

The Secretary has selected the following executives of the Department of Education for the specified SES performance cycle: Chair: JoAnn Ryan, Michael Roark, Thomas Skelly, Danny Harris, James Manning, Linda Stracke, Winona Varnon, Joe Conaty, and Sue Betka.

FOR FURTHER INFORMATION CONTACT: Mary Beth Pultz, Director, Executive Resources Team, Human Resources Services, Office of Management, U.S. Department of Education, 400 Maryland Avenue, SW., Room 2E124, LBJ, Washington, DC 20202–4573. Telephone: (202) 401–0853.

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 may obtain this document in an alternative format (*e.g.*, Braille, large print, audiotape, or computer diskette) on request to the contact person listed under **FOR FURTHER INFORMATION CONTACT**.

Electronic Access to This Document

You may view this document, as well as all 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. If you have questions about using PDF, call the U.S. Government Printing Office (GPO), toll free, at 1–888–293–6498; or in the Washington, DC, area at (202) 512–1530.

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: October 2, 2009.

Arne Duncan,

Secretary of Education.

[FR Doc. E9–24209 Filed 10–7–09; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

National Advisory Committee on Institutional Quality and Integrity

AGENCY: Department of Education, Office of Postsecondary Education.

ACTION: Notice of Reestablishment of the National Advisory Committee on Institutional Quality and Integrity (NACIQI).

SUMMARY: The U.S. Secretary of Education (Secretary) announces the reestablishment of the NACIQI. The Federal Advisory Committee Act (FACA) (Pub. L. 92–463, as amended; 5 U.S.C.A., Appendix 2), except for section 14 of FACA, will govern the NACIQI.

Purpose: The charter for the NACIQI has expired. The Secretary needs to reestablish the NACIQI as provided for in section 106 of the Higher Education Opportunity Act (HEOA), Public Law 110–315, 122 Stat. 3078 *et seq.* The HEOA amended section 114 of the Higher Education Act of 1965, as amended (HEA), establishing the NACIQI. The revised NACIQI charter incorporates the changes outlined in the HEOA, including:

- Committee structure—number of members.
- Member appointments—nominating sources, qualifications, length of terms, and timing (including the timing of the notices to be published soliciting nominations for the positions to be filled by the Secretary).
- Selection of the chairperson.
- Meetings—agenda, Secretary's designee, and timing of **Federal Register** meeting notices.
- Reports—timing, review, and distribution of the annual report.

Sections 101(c) and 487(c)(4)of the HEA, and section 801(6) of the Public Health Service Act, 42 U.S.C. 296(6), require the Secretary to publish lists of State approval agencies, nationally recognized accrediting agencies, and State approval and accrediting agencies for programs of nurse education, that the Secretary determines to be reliable authorities as to the quality of education provided by the institutions and programs they accredit. Eligibility of higher education institutions and programs for participation in various Federal assistance programs requires accreditation by an agency listed by the Secretary. The NACIQI advises the Secretary in the discharge of these and other functions, as follows:

1. Advises the Secretary with respect to the establishment and enforcement of the standards of accrediting agencies or associations under subpart 2 of part H of Title IV, HEA;

2. Advises the Secretary with respect to the recognition of a specific accrediting agency or association;

3. Advises the Secretary with respect to the preparation and publication of the list of nationally recognized accrediting agencies and associations;

4. Advises the Secretary with respect to the eligibility and certification process for institutions of higher education under Title IV, HEA, together with recommendations for improvements in such process;

5. Advises the Secretary with respect to the relationship between—

A. Accreditation of institutions of higher education and the certification and eligibility of such institutions; and

B. State licensing responsibilities with respect to such institutions;

6. Carries out such other advisory functions relating to accreditation and institutional eligibility as the Secretary may prescribe by regulation.

For Additional Information Contact: U.S. Department of Education, White House Liaison Office, Washington, DC 20202, telephone: (202) 401–3677.

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.*

Arne Duncan,

Secretary of Education.

[FR Doc. E9–24293 Filed 10–7–09; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings

October 2, 2009.

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

Docket Numbers: RP09–1076–000.
Applicants: Dominion Cove Point LNG, LP.
Description: Dominion Cove Point LNG, LP submits Ninth Revised Sheet 200 *et al* to FERC Gas Tariff, Original Volume 1.
Filed Date: 09/28/2009.
Accession Number: 20090929–0089.
Comment Date: 5 p.m. Eastern Time on Tuesday, October 13, 2009.

Docket Numbers: RP09–1077–000.
Applicants: Guardian Pipeline, L.L.C.
Description: Guardian Pipeline, LLC submits Twenty Third Revised Sheet 5 *et al* to FERC Gas Tariff, Original Volume 1 to be effective 11/1/09.
Filed Date: 09/29/2009.
Accession Number: 20090929–0099.
Comment Date: 5 p.m. Eastern Time on Tuesday, October 13, 2009.

Docket Numbers: RP09–1078–000.
Applicants: Dominion Transmission, Inc.
Description: Dominion Transmission, Inc. submits Thirty Ninth Revised Sheet 31 *et al* to its FERC Gas Tariff, Third Revised Volume 1 to be effective 11/1/09.
Filed Date: 09/30/2009.
Accession Number: 20091001–0051.
Comment Date: 5 pm Eastern Time on Tuesday, October 13, 2009.

Docket Numbers: RP09–1079–000.
Applicants: Iroquois Gas Transmission System, L.P.
Description: Iroquois Gas Transmission System, LP submits Twenty-fourth Revised Sheet No 4A to its FERC Gas Tariff, First Revised Volume No 1.
Filed Date: 09/30/2009.
Accession Number: 20090930–0077.
Comment Date: 5 p.m. Eastern Time on Tuesday, October 13, 2009.

Docket Numbers: RP09–1081–000.
Applicants: Williston Basin Interstate Pipeline Co.
Description: Williston Basin Interstate Pipeline Company submits Tenth Revised Sheet 358I to its FERC Gas Tariff, Second Revised Volume 1.
Filed Date: 09/30/2009.
Accession Number: 20090930–0079.
Comment Date: 5 p.m. Eastern Time on Tuesday, October 13, 2009.

Docket Numbers: RP09–1082–000.
Applicants: Gas Transmission Northwest Corporation.
Description: Gas Transmission Northwest Corporation submits Eighteenth Revised Sheet No 4 to its FERC Gas Tariff, Third Revised Volume No 1–A.
Filed Date: 09/30/2009.
Accession Number: 20090930–0080.
Comment Date: 5 p.m. Eastern Time on Tuesday, October 13, 2009.

Docket Numbers: RP09–1083–000.
Applicants: Dominion Transmission, Inc.
Description: Dominion Transmission, Inc. submits Fortieth Revised Sheet 31 *et al* to its FERC Gas Tariff, Third Revised Volume 1, to be effective 11/1/09.
Filed Date: 09/30/2009.
Accession Number: 20091001–0050.
Comment Date: 5 p.m. Eastern Time on Tuesday, October 13, 2009.

Docket Numbers: RP09–1084–000.
Applicants: El Paso Natural Gas Company.
Description: El Paso Natural Gas Co. submits Third Revised Sheet No. 324A *et al* to FERC Electric Gas Tariff, Second Revised Volume No. 1A, to be effective 11/1/09.
Filed Date: 09/28/2009.
Accession Number: 20090930–0076.
Comment Date: 5 p.m. Eastern Time on Tuesday, October 13, 2009.

Docket Numbers: RP09–1085–000.
Applicants: Equitrans, L.P.
Description: Equitrans, LP submits non conforming transportation service agreement.
Filed Date: 09/30/2009
Accession Number: 20090930–0081.
Comment Date: 5 p.m. Eastern Time on Tuesday, October 13, 2009.

Docket Numbers: RP09–1087–000.
Applicants: Texas Gas Transmission. LLC.
Description: Texas Gas Transmission, LLC submits Third Revised Sheet No. 35A *et al* to its FERC Gas Tariff, Third Revised Volume No. 1.
Filed Date: 09/30/2009.
Accession Number: 20091001–0072.
Comment Date: 5 p.m. Eastern Time on Tuesday, October 13, 2009.

Docket Numbers: RP09–1088–000.
Applicants: Texas Eastern Transmission LP.
Description: Texas Eastern Transmission, LP submits Third Revised Sheet No. 297A *et al* to its FERC Gas Tariff, Seventh Revised Volume No. 1.
Filed Date: 09/30/2009.
Accession Number: 20091001–0071.
Comment Date: 5 p.m. Eastern Time on Tuesday, October 13, 2009.

Docket Numbers: RP09–1089–000.
Applicants: Northwest Pipeline GP.
Description: Northwest Pipeline GP submits Third Revised Sheet No. 395 *et al* to its FERC Gas Tariff, Fourth Revised Volume No. 1.
Filed Date: 09/30/2009.
Accession Number: 20091001–0070.
Comment Date: 5 p.m. Eastern Time on Tuesday, October 13, 2009.

Docket Numbers: RP10–1–000.
Applicants: Trunkline Gas Company, LLC.
Description: Trunkline Gas Company, LLC submits Twenty-Second Revised Sheet No. 10 *et al* to its FERC Gas Tariff, Third Revised Volume No. 1.
Filed Date: 10/01/2009.
Accession Number: 20091001–0069.
Comment Date: 5 p.m. Eastern Time on Tuesday, October 13, 2009.

Docket Numbers: RP10–2–000.
Applicants: Southwest Gas Storage Company.
Description: Southwest Gas Storage Company submits Twenty-Eighth Revised Sheet No. 5 to its FERC Gas Tariff, First Revised Volume No. 1.
Filed Date: 10/01/2009.
Accession Number: 20091001–0068.
Comment Date: 5 p.m. Eastern Time on Tuesday, October 13, 2009.

Docket Numbers: RP10–3–000.
Applicants: Transcontinental Gas Pipe Line Company, LLC.
Description: Transcontinental Gas Pipe Line Company, LLC submits Third Revised Sheet No. 55 *et al* to its FERC Gas Tariff, Fourth Revised Volume No. 1.
Filed Date: 10/01/2009.
Accession Number: 20091001–0067.
Comment Date: 5 p.m. Eastern Time on Tuesday, October 13, 2009.

Docket Numbers: RP10–4–000.
Applicants: Transcontinental Gas Pipe Line Company.
Description: Transcontinental Gas Pipe Line Company, LLC submits Fourth Revised Sheet No. 28 to its FERC Gas Tariff, Fourth Revised Volume No. 1.
Filed Date: 10/01/2009.
Accession Number: 20091001–0066.
Comment Date: 5 p.m. Eastern Time on Tuesday, October 13, 2009.

Docket Numbers: RP10–5–000.
Applicants: CenterPoint Energy Gas Transmission Co.
Description: CenterPoint Energy Gas Transmission Co submits an amended negotiated rate agreement with Laclede Energy Resources, Inc.
Filed Date: 10/01/2009.
Accession Number: 20091001–0065.
Comment Date: 5 p.m. Eastern Time on Tuesday, October 13, 2009.

Docket Numbers: RP10–6–000.

Applicants: Gulf South Pipeline Company, LP.
Description: Gulf South Pipeline Company, LP submits a capacity release agreement containing negotiated rate provisions with Q-West Energy Co.
Filed Date: 10/01/2009.
Accession Number: 20091001–0064.
Comment Date: 5 p.m. Eastern Time on Tuesday, October 13, 2009.

Docket Numbers: RP10–7–000.
Applicants: Trunkline Gas Company, LLC.
Description: Trunkline Gas Company, LLC submits annual report of flow through of cash out and penalty revenue.
Filed Date: 10/01/2009.
Accession Number: 20091001–0063.
Comment Date: 5 p.m. Eastern Time on Tuesday, October 13, 2009.

Docket Numbers: RP10–8–000.
Applicants: Gulf South Pipeline Company, LP.
Description: Gulf South Pipeline Company, LP submits replacement negotiated rate letter agreement.
Filed Date: 10/01/2009.
Accession Number: 20091001–0062.
Comment Date: 5 p.m. Eastern Time on Tuesday, October 13, 2009.

Docket Numbers: RP10–9–000.
Applicants: Gulf South Pipeline Company, LP.
Description: Gulf South Pipeline Company, LP submits capacity release agreement.
Filed Date: 10/01/2009.
Accession Number: 20091001–0061.
Comment Date: 5 p.m. Eastern Time on Tuesday, October 13, 2009.

Docket Numbers: RP10–10–000.
Applicants: Panhandle Eastern Pipe Line Company, LP.
Description: Panhandle Eastern Pipe Line Company, LP submits Twenty-Fifth Revised Sheet No. 4 *et al* to its FERC Gas Tariff, Third Revised Volume No. 1.
Filed Date: 10/01/2009.
Accession Number: 20091001–0060.
Comment Date: 5 p.m. Eastern Time on Tuesday, October 13, 2009.

Docket Numbers: RP10–11–000.
Applicants: Gulf South Pipeline Company, LP.
Description: Gulf South Pipeline Company, LP submits capacity release agreement.
Filed Date: 10/01/2009.
Accession Number: 20091001–0059.
Comment Date: 5 p.m. Eastern Time on Tuesday, October 13, 2009.

Docket Numbers: RP10–12–000.
Applicants: Mississippi Canyon Gas Pipeline, LLC.
Description: Mississippi Canyon Gas Pipeline, LLC submits Third Revised Sheet No. 0 *et al* to its FERC Gas Tariff, First Revised Volume No. 1.
Filed Date: 10/01/2009.
Accession Number: 20091001–0058.
Comment Date: 5 p.m. Eastern Time on Tuesday, October 13, 2009.

Docket Numbers: RP10–13–000.
Applicants: Carolina Gas Transmission Corporation.
Description: Carolina Gas Transmission Corporation submits Seventh Revised Sheet No. 10 *et al* to its FERC Gas Tariff, Original Volume No. 1.
Filed Date: 10/01/2009.
Accession Number: 20091001–0057.
Comment Date: 5 p.m. Eastern Time on Tuesday, October 13, 2009.

Docket Numbers: RP10–14–000.
Applicants: Transcontinental Gas Pipe Line Company.
Description: Transcontinental Gas Pipe Line Company, LLC submits First Revised Sheet No. 29A to its FERC Gas Tariff, Fourth Revised Volume No. 1.
Filed Date: 10/01/2009.
Accession Number: 20091001–0056.
Comment Date: 5 p.m. Eastern Time on Tuesday, October 13, 2009.

Docket Numbers: RP10–15–000.
Applicants: Dauphin Island Gathering Partners.
Description: Dauphin Island Gathering Partners submits Forty-Eighth Revised Sheet No. 9 *et al* to FERC Gas Tariff, First Revised Volume No. 1.
Filed Date: 10/01/2009.
Accession Number: 20091001–0055.
Comment Date: 5 p.m. Eastern Time on Tuesday, October 13, 2009.

Docket Numbers: RP10–16–000.
Applicants: ANR Pipeline Company.
Description: ANR Pipeline Company submits amendment to Rate Schedule FTS–1 negotiated rate agreement between ANR and Nexen Marketing USA, Inc.
Filed Date: 10/01/2009.
Accession Number: 20091001–0054.
Comment Date: 5 p.m. Eastern Time on Tuesday, October 13, 2009.

Any person desiring to intervene or to protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214) on or before 5 p.m. Eastern time on the specified comment date. It is not necessary to separately intervene again in a subdocket related to a compliance filing if you have previously intervened in the same docket. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant. In reference to filings initiating a new proceeding, interventions or protests submitted on or before the comment deadline need not be served on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov*. To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 14 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First St., NE., Washington, DC 20426.

The filings in the above proceedings are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Nathaniel J. Davis, Sr.,
Deputy Secretary.
[FR Doc. E9–24271 Filed 10–7–09; 8:45 am]
BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings

October 1, 2009.

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

Docket Numbers: RP93–162–021.
Applicants: Transcontinental Gas Pipe Line Company, LLC.
Description: Transcontinental Gas Pipe Line Company, LLC submits its cash-out report for the annual period 8/1/09 through 7/31/09 and its reports of cash-out refunds for the Annual Period.
Filed Date: 09/29/2009.
Accession Number: 20090929–0102.
Comment Date: 5 p.m. Eastern Time on Tuesday, October 13, 2009.

Docket Numbers: RP09–317–003.

Applicants: Texas Gas Transmission, LLC.

Description: Texas Gas Transmission, LLC submits Substitute Second Revised Sheet No. 2200 to FERC Gas Tariff, Third Revised Volume No. 1.

Filed Date: 09/30/2009.

Accession Number: 20090930–0082.

Comment Date: 5 p.m. Eastern Time on Tuesday, October 13, 2009.

Docket Numbers: RP09–747–001.

Applicants: Rockies Express Pipeline LLC.

Description: Rockies Express Pipeline LLC Substitute First Revised Sheet No. 250 to its FERC Gas Tariff, Second Revised Volume No. 1.

Filed Date: 09/30/2009.

Accession Number: 20090930–0083.

Comment Date: 5 p.m. Eastern Time on Tuesday, October 13, 2009.

Docket Numbers: RP96–272–097.

Applicants: Northern Natural Gas Company.

Description: Northern Natural Gas Company submits Seventeenth Revised Sheet No. 66B 01 et al to its FERC Gas Tariff, Fifth Revised Volume No. 1.

Filed Date: 09/30/2009.

Accession Number: 20090930–0084.

Comment Date: 5 p.m. Eastern Time on Tuesday, October 13, 2009.

Docket Numbers: RP00–305–040.

Applicants: CenterPoint Energy-Mississippi River Transmission Corporation.

Description: CenterPoint Energy—Mississippi River Transmission Corporation submits Third Revised Sheet No. 10D to its FERC Gas Tariff, Third Revised Volume No. 1.

Filed Date: 09/28/2009.

Accession Number: 20090929–0090.

Comment Date: 5 p.m. Eastern Time on Tuesday, October 13, 2009.

Docket Numbers: RP09–427–002.

Applicants: Southern Natural Gas Company.

Description: Southern Natural Gas Company submits Fifth Revised Sheet No. 1 et al to its FERC Gas Tariff, Seventh Revised Volume No. 1.

Filed Date: 09/28/2009.

Accession Number: 20090929–0091.

Comment Date: 5 p.m. Eastern Time on Tuesday, October 13, 2009.

Any person desiring to protest this filing must file in accordance with Rule 211 of the Commission's Rules of Practice and Procedure (18 CFR 385.211). Protests to this filing will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Such protests must be filed on or before 5 p.m. Eastern Time on the specified comment date. Anyone filing a protest must serve a copy of that document on all the parties to the proceeding.

The Commission encourages electronic submission of protests in lieu of paper using the "eFiling" link at *http://www.ferc.gov*. Persons unable to file electronically should submit an original and 14 copies of the protest to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible online at *http://www.ferc.gov*, using the "eLibrary" link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an "eSubscription" link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Nathaniel J. Davis, Jr.,

Deputy Secretary.

[FR Doc. E9–24273 Filed 10–7–09; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings No. 1

September 29, 2009.

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

Docket Numbers: RP09–1071–000.

Applicants: Tennessee Gas Pipeline Company.

Description: Tennessee Gas Pipeline Co submits a gas transportation agreement with Massachusetts Development Finance Agency.

Filed Date: 09/25/2009.

Accession Number: 20090925–0014.

Comment Date: 5 p.m. Eastern Time on Wednesday, October 07, 2009.

Docket Numbers: RP09–1072–000.

Applicants: National Fuel Gas Supply Corporation.

Description: National Fuel Gas Supply Corp submits Fifth Revised Sheet No. 40 *et al* to FERC Gas Tariff, Fourth Revised Volume No. 1.

Filed Date: 09/25/2009.

Accession Number: 20090925–0013.

Comment Date: 5 p.m. Eastern Time on Wednesday, October 07, 2009.

Docket Numbers: RP09–1073–000.

Applicants: Discovery Gas Transmission LLC.

Description: Discovery Gas Transmission LLC submits Third Revised Sheet No 23 to FERC Gas Tariff, Original Volume No 1.

Filed Date: 09/25/2009.

Accession Number: 20090925–0029.

Comment Date: 5 p.m. Eastern Time on Wednesday, October 07, 2009.

Docket Numbers: RP09–1074–000.

Applicants: Natural Gas Pipeline Company of America.

Description: Natural Gas Pipeline Company of America LLC submits Penalty Revenue Crediting Report.

Filed Date: 09/25/2009.

Accession Number: 20090925–0031.

Comment Date: 5 p.m. Eastern Time on Wednesday, October 07, 2009.

Docket Numbers: RP09–1075–000.

Applicants: Guardian Pipeline, L.L.C.

Description: Guardian Pipeline, LLC submits Twenty-Second Revised Sheet 5 *et al* to its FERC Gas Tariff Original Volume 1, to be effective 11/1/09.

Filed Date: 09/28/2009.

Accession Number: 20090928–0084.

Comment Date: 5 p.m. Eastern Time on Tuesday, October 13, 2009.

Any person desiring to intervene or to protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214) on or before 5 p.m. Eastern time on the specified comment date. It is not necessary to separately intervene again in a subdocket related to a compliance filing if you have previously intervened in the same docket. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant. In reference to filings initiating a new proceeding, interventions or protests submitted on or before the comment deadline need not be served on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov*. To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 14 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First St., NE., Washington, DC 20426.

The filings in the above proceedings are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed dockets(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov.* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. E9–24274 Filed 10–7–09; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings No. 2

September 29, 2009.

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

Docket Numbers: RP09–611–003.

Applicants: Carolina Gas Transmission Corporation.

Description: Carolina Gas Transmission Corporation submits Third Substitute Second Revised Sheet 212 to FERC Gas Tariff, Original Volume 1, to be effective 8/1/09.

Filed Date: 09/24/2009.

Accession Number: 20090925–0009.

Comment Date: 5 p.m. Eastern Time on Tuesday, October 06, 2009.

Docket Numbers: RP09–194–001.

Applicants: Tennessee Gas Pipeline Company.

Description: Tennessee Gas Pipeline Company submits Fourth Revised Sheet No 158 to FERC Gas Tariff, Fifth Revised Volume No 1.

Filed Date: 09/25/2009.

Accession Number: 20090925–0027.

Comment Date: 5 p.m. Eastern Time on Wednesday, October 07, 2009.

Docket Numbers: RP09–737–002.

Applicants: Tennessee Gas Pipeline Company.

Description: Tennessee Gas Pipeline Company submits Twelfth Revised Sheet No 347 to FERC Gas Tariff, Fifth Revised Volume No 1.

Filed Date: 09/25/2009.

Accession Number: 20090925–0028.

Comment Date: 5 p.m. Eastern Time on Wednesday, October 07, 2009.

Docket Numbers: RP96–312–200.

Applicants: Tennessee Gas Pipeline Company.

Description: Tennessee Gas Pipeline Company submits a gas transportation agreement and negotiated rate letter agreement between Tennessee and Energy North Natural Gas, Inc.

Filed Date: 09/25/2009.

Accession Number: 20090925–0030.

Comment Date: 5 p.m. Eastern Time on Wednesday, October 07, 2009.

Docket Numbers: RP09–980–001.

Applicants: Enbridge Pipelines (Midla) L.L.C.

Description: Enbridge Pipelines (Midla) LLC submits Original Sheet 369 of its FERC Gas, Tariff Fifth Revised Volume 1, to be effective 10/01/09.

Filed Date: 09/28/2009.

Accession Number: 20090928–0085.

Comment Date: 5 p.m. Eastern Time on Tuesday, October 13, 2009.

Any person desiring to protest this filing must file in accordance with Rule 211 of the Commission's Rules of Practice and Procedure (18 CFR 385.211). Protests to this filing will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Such protests must be filed on or before 5 p.m. Eastern time on the specified comment date. Anyone filing a protest must serve a copy of that document on all the parties to the proceeding.

The Commission encourages electronic submission of protests in lieu of paper using the "eFiling" link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the protest to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

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Nathaniel J. Davis, Jr.,

Deputy Secretary.

[FR Doc. E9–24272 Filed 10–7–09; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

October 1, 2009.

Take notice that the Commission received the following electric corporate filings:

Docket Numbers: EC09–105–000.

Applicants: MxEnergy Electric Inc.

Description: Notice of MxEnergy Electric Inc.

Filed Date: 09/30/2009.

Accression Number: 20090930–5123.

Comment Date: 5 p.m. Eastern Time on Wednesday, October 21, 2009.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER96–719–026; ER97–2801–027; ER99–2156–019.

Applicants: MidAmerican Energy Company; PacifiCorp; Cordova Energy Company LLC.

Description: MidAmerican Energy Co and Cordova Energy Co, LLC *et al.* submit Notice of Change in Status re certain jurisdictional transmission facilities.

Filed Date: 09/30/2009.

Accression Number: 20090930–0097.

Comment Date: 5 p.m. Eastern Time on Wednesday, October 21, 2009.

Docket Numbers: ER99–1522–005; ER07–557–002; ER07–556–002; ER07–555–002; ER07–554–002; ER07–553–002; ER06–796–003; ER04–359–003; ER02–723–004.

Applicants: Bangor Hydro-Electric Company, Emera Energy Services Subsidiary No. 1 L, Emera Energy Services Subsidiary No. 2 L, Emera Energy Services Subsidiary No. 3 L, Emera Energy Services Subsidiary No. 4 L, Emera Energy Services Subsidiary No. 5 L, Emera Energy U.S. Subsidiary No. 1, Inc, Emera Energy U.S. Subsidiary No. 2, Inc., Emera Energy Services, Inc.

Description: Change in Status Filing of Bangor Hydro-Electric Company, *et al.*

Filed Date: 09/29/2009.

Accression Number: 20090929–5094.

Comment Date: 5 p.m. Eastern Time on Tuesday, October 20, 2009.

Docket Numbers: ER08–100–010; ER07–1215–009; ER07–265–011;

Applicants: Sempra Energy Solutions LLC, Sempra Energy Trading LLC, The Royal Bank of Scotland plc.

Description: Notice of Non-Material Change in Status of Sempra Energy Trading LLC, *et al.*

Filed Date: 09/30/2009.

Accession Number: 20090930–5095.
Comment Date: 5 p.m. Eastern Time on Wednesday, October 21, 2009.

Docket Numbers: ER08–1227–000.
Applicants: Rail Splitter Wind Farm, LLC.
Description: Notice of Non-Material Change in Status of Rail Splitter Wind Farm, LLC.
Filed Date: 09/30/2009.
Accession Number: 20090930–5041.
Comment Date: 5 p.m. Eastern Time on Wednesday, October 21, 2009.

Docket Numbers: ER09–1503–001.
Applicants: Niagara Mohawk Power Corporation.
Description: Refund Report of Niagara Mohawk Power Corporation d/b/a National Grid.
Filed Date: 09/30/2009.
Accession Number: 20090930–5122.
Comment Date: 5 p.m. Eastern Time on Wednesday, October 21, 2009.

Docket Numbers: ER09–1607–001.
Applicants: Barton Windpower II LLC.
Description: Barton Windpower II, LLC submits Substitute Original Sheet 1 *et al.* to FERC Electric Tariff, First Revised Volume 1.
Filed Date: 09/23/2009.
Accession Number: 20090924–0038.
Comment Date: 5 p.m. Eastern Time on Wednesday, October 14, 2009.

Docket Numbers: ER09–1682–000.
Applicants: New York Independent System Operator, Inc.
Description: New York Independent System Operator, Inc.'s Corrected Pages for Confidential Attachment E.
Filed Date: 09/30/2009.
Accession Number: 20090930–5048.
Comment Date: 5 p.m. Eastern Time on Wednesday, October 21, 2009.

Docket Numbers: ER09–1710–001.
Applicants: KEB Trading LLC.
Description: KEB Trading, LLC submits proposed FERC Electric Tariff, with revised Attachment 1 Cover Page, Original Sheet 1 and 2 etc.
Filed Date: 09/30/2009.
Accession Number: 20090930–0098.
Comment Date: 5 p.m. Eastern Time on Wednesday, October 21, 2009.

Docket Numbers: ER09–1725–000.
Applicants: Cross Border Energy, LLC.
Description: Cross Border Energy, LLC submits Petition for Acceptance of Initial Tariff, Waivers and Blanket Authority.
Filed Date: 09/29/2009.
Accession Number: 20090929–0103.
Comment Date: 5 p.m. Eastern Time on Tuesday, October 20, 2009.

Docket Numbers: ER09–1747–000.
Applicants: Fox Islands Electric Cooperative Inc.
Description: Fox Islands Electric Cooperative, Inc. submits Petition for Order Accepting Market-Based Rate Tariff for Filing Granting Waivers and Blanket Approvals & Rate Schedule FERC 1.
Filed Date: 09/29/2009.
Accession Number: 20090929–0104.
Comment Date: 5 p.m. Eastern Time on Tuesday, October 20, 2009.

Docket Numbers: ER09–1749–000.
Applicants: PacifiCorp.
Description: PacifiCorp submits Large Generator Interconnection Agreement Facilities Maintenance Agreement.
Filed Date: 09/28/2009.
Accession Number: 20090928–0102.
Comment Date: 5 p.m. Eastern Time on Monday, October 19, 2009.

Docket Numbers: ER09–1762–000.
Applicants: Westar Energy, Inc.
Description: Westar Energy, Inc. submits its Full Requirements Electric Service Rate Schedule and Electric Service Agreement.
Filed Date: 09/28/2009.
Accession Number: 20090928–0104.
Comment Date: 5 p.m. Eastern Time on Monday, October 19, 2009.

Docket Numbers: ER09–1764–000.
Applicants: New England Power Company.
Description: New England Power Co *et al.* submits a First Amended and Restated Transmission Support Agreement with Seabrook Transmission Substation, namely Florida Power & Light Co. *et al.*
Filed Date: 09/29/2009.
Accession Number: 20090930–0088.
Comment Date: 5 p.m. Eastern Time on Tuesday, October 20, 2009.

Docket Numbers: ER09–1765–000.
Applicants: MidAmerican Energy Company.
Description: MidAmerican Energy Company *et al.* submits revisions to Attachment O of the Midwest ISO Tariff.
Filed Date: 09/29/2009.
Accession Number: 20090930–0087.
Comment Date: 5 p.m. Eastern Time on Tuesday, October 20, 2009.

Docket Numbers: ER09–1766–000.
Applicants: ISO New England Inc. & New England Power.
Description: ISO New England, Inc. *et al.* submits revisions to the Forward Reserve Market Rules relating to the implementation of the Forward Capacity Market.
Filed Date: 09/29/2009.
Accession Number: 20090930–0089.
Comment Date: 5 p.m. Eastern Time on Tuesday, October 20, 2009.

Docket Numbers: ER09–1767–000.
Applicants: PJM Interconnection, L.L.C.
Description: PJM Interconnection, LLC submits executed interconnection service agreement entered into among PJM, Meadow Lake Wind Farm, LLC and Indiana Michigan Power Company.
Filed Date: 09/30/2009.
Accession Number: 20090930–0090.
Comment Date: 5 p.m. Eastern Time on Wednesday, October 21, 2009.

Docket Numbers: ER09–1768–000.
Applicants: Central Hudson Gas & Electric Corp.
Description: Central Hudson Gas & Electric Corporation submits First Revised Sheet No 4 *et al.* to FERC Rate Schedule No 206.
Filed Date: 09/30/2009.
Accession Number: 20090930–0091.
Comment Date: 5 p.m. Eastern Time on Wednesday, October 21, 2009.

Docket Numbers: ER09–1769–000.
Applicants: Midwest Independent Transmission System Operator, Inc.
Description: Midwest Independent Transmission System Operator, Inc. submits notice of cancellation of the amended CRSG agreement.
Filed Date: 09/30/2009.
Accession Number: 20090930–0092.
Comment Date: 5 p.m. Eastern Time on Wednesday, October 21, 2009.

Docket Numbers: ER09–1770–000.
Applicants: New England Power Pool.
Description: New England Power Pool Participants Committee submits counterpart signature pages of the New England Power Agreement.
Filed Date: 09/30/2009.
Accession Number: 20090930–0093.
Comment Date: 5 p.m. Eastern Time on Wednesday, October 21, 2009.

Docket Numbers: ER09–1771–000.
Applicants: Westar Energy, Inc.
Description: Westar Energy, Inc. submits notice of cancellation of a supplemental generation between Westar and the City of Burlingame.
Filed Date: 09/30/2009.
Accession Number: 20090930–0094.
Comment Date: 5 p.m. Eastern Time on Wednesday, October 21, 2009.

Docket Numbers: ER09–1772–000.
Applicants: Westar Energy, Inc.
Description: Westar Energy, Inc. submits Notice of Cancellation of a Supplemental Generation Agreement with City of Herington, Kansas.
Filed Date: 09/30/2009.
Accession Number: 20090930–0095.
Comment Date: 5 p.m. Eastern Time on Wednesday, October 21, 2009.

Docket Numbers: ER09–1774–000.
Applicants: Westar Energy, Inc.
Description: Westar Energy, Inc. submits Notice of Cancellation of a Supplemental Generation Agreement with Osage City, Kansas.

Filed Date: 09/30/2009.
Accession Number: 20090930–0096.
Comment Date: 5 p.m. Eastern Time on Wednesday, October 21, 2009.

Docket Numbers: ER09–1775–000.
Applicants: PJM Interconnection, L.L.C.
Description: PJM Interconnection, LLC submits revised tariff sheets of the PJM Open Access Transmission Tariff etc.
Filed Date: 09/30/2009.
Accession Number: 20090930–0099.
Comment Date: 5 p.m. Eastern Time on Wednesday, October 21, 2009.

Docket Numbers: ER09–1776–000.
Applicants: Allegheny Power.
Description: Allegheny Power submits First Revised Sheet 313A to the Open Access Transmission Tariff of PJM Interconnection, LLC, FERC Electric Tariff, Sixth revised Volume 1.
Filed Date: 09/30/2009.
Accession Number: 20090930–0100.
Comment Date: 5 p.m. Eastern Time on Wednesday, October 21, 2009.

Docket Numbers: ER09–1777–000.
Applicants: Delmarva Power & Light Company.
Description: Delmarva Power & Light Co. submits an executed Interconnection and Mutual Operating Agreement with City of Seaford, Delaware.
Filed Date: 09/30/2009.
Accession Number: 20090930–0101.
Comment Date: 5 p.m. Eastern Time on Wednesday, October 21, 2009.

Take notice that the Commission received the following electric securities filings:
Docket Numbers: ES09–58–000.
Applicants: Northeast Utilities Service Co.
Description: Application to Issue Short-Term Debt of Northeast Utilities Service Co. on Behalf of CL&P and WMECO.
Filed Date: 09/30/2009.
Accession Number: 20090930–5043.
Comment Date: 5 p.m. Eastern Time on Wednesday, October 21, 2009.

Docket Numbers: ES09–59–000.
Applicants: National Grid USA.
Description: Application under Federal Power Act Section 204 of National Grid USA.
Filed Date: 09/30/2009.
Accession Number: 20090930–5128.
Comment Date: 5 p.m. Eastern Time on Wednesday, October 21, 2009.

Docket Numbers: ES09–60–000.
Applicants: PPL Electric Utilities Corporation.
Description: PPL Electric Utilities Corporation submits an application for approval to issue promissory notes and other evidences of secured and unsecured short-term indebtedness through 12/31/11 etc.
Filed Date: 09/29/2009.
Accession Number: 20091001–0053.
Comment Date: 5 p.m. Eastern Time on Tuesday, October 20, 2009.

Any person desiring to intervene or to protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214) on or before 5 p.m. Eastern time on the specified comment date. It is not necessary to separately intervene again in a subdocket related to a compliance filing if you have previously intervened in the same docket. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant. In reference to filings initiating a new proceeding, interventions or protests submitted on or before the comment deadline need not be served on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 14 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First St., NE., Washington, DC 20426.

The filings in the above proceedings are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed dockets(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov.* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Nathaniel J. Davis, Sr.,
Deputy Secretary.
[FR Doc. E9–24270 Filed 10–7–09; 8:45 am]
BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EL09–78–000; Docket No. ER09–1214–000]

Notice of Complaint

October 1, 2009.

In the matter of: South Mississippi Electric Power Association, Arkansas Electric Cooperative Corporation, Mississippi Delta Energy Agency, Clarksdale Public Utilities Commission, Public Service Commission of Yazoo City, Conway Corporation, West Memphis Utilities Commission, City of Prescott, Arkansas, Louisiana Energy and Power Authority, Lafayette Utilities System, and Municipal Energy Agency of Mississippi, Complainants, v. Docket No. EL09–78–000 Entergy Services, Inc., Respondent; Entergy Services, Inc. Docket No. ER09–1214–000 (Not Consolidated).

Take notice that on September 28, 2009, South Mississippi Electric Power Association, Arkansas Electric Cooperative Corporation, Mississippi Delta Energy Agency and its two members, the Clarksdale Public Utilities Commission of the City of Clarksdale, Mississippi and the Public Service Commission of Yazoo City of the City of Yazoo City, Mississippi, Conway Corporation, West Memphis Utilities Commission, City of Prescott, Arkansas, Louisiana Energy and Power Authority, Lafayette Utilities System, and Municipal Energy Agency of Mississippi (collectively, Joint Complainants) filed a formal complaint against Entergy Services, Inc. (Entergy) pursuant to sections 206, 306, and 309 of the Federal Power Act (FPA), 16 U.S.C. 824e, 825e, and 825h, and Rules 206 and 212 of the Commission's Rules of Practice and Procedure, 18 CFR 385.206 and 385.212 (2009), alleging that Entergy has not properly implemented the rate redetermination procedures contained in its tariff (2009 Update), and therefore, the 2009 Update filed by Entergy in Docket No. ER09–1214–00 would impose rates and charges that are contrary to the Tariff on file with the Commission and are unjust and unreasonable in violation of the FPA.

Joint Complainants certify that copies of the complaint were served on the contacts for Entergy as listed on the Commission's list of Corporate Officials.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. The Respondent's answer and all interventions, or protests must be filed on or before the comment date. The Respondent's answer, motions to intervene, and protests must be served on the Complainants.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the "eFiling" link at *http://www.ferc.gov*. Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov*, using the "eLibrary" link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an "eSubscription" link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5 p.m. Eastern Time on October 19, 2009.

Kimberly D. Bose,

Secretary.

[FR Doc. E9–24254 Filed 10–7–09; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 12589–001–CO]

Public Service Company of Colorado; Notice of Availability of Final Environmental Assessment

October 1, 2009.

In accordance with the National Environmental Policy Act of 1969, as amended, and the Federal Energy Regulatory Commission's (Commission or FERC) regulations, 18 CFR part 380 (Order No. 486, 52 FR 47897), the Office of Energy Projects has reviewed the application for a new major license for the Tacoma Hydroelectric Project (FERC No. 12589), located on Cascade, Little Cascade and Elbert Creeks in San Juan and La Plata Counties, Colorado. The project currently occupies, in part, 233.4 acres of federal land in the San Juan National Forest administered by the U.S. Forest Service.

Staff prepared a final environmental assessment (EA) that analyzes the probable environmental effects of relicensing the project and concludes that relicensing the project, with appropriate staff-recommended environmental measures, would not constitute a major federal action significantly affecting the quality of the human environment.

A copy of the EA is on file with the Commission and is available for public inspection. The EA may also be viewed on the Commission's Web site at *http://www.ferc.gov* using the "eLibrary" link. Enter the docket number excluding the last three digits in the docket number field to access documents. For assistance, contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at 1–866–208–3676, or for TTY, (202) 502–8659.

You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via e-mail of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

For further information, contact David Turner at (202) 502–6091.

Kimberly D. Bose,

Secretary.

[FR Doc. E9–24255 Filed 10–7–09; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP09–447–000]

Natural Gas Pipeline Company of America LLC; Notice of Intent To Prepare an Environmental Assessment for the Proposed Luminant Tatum Mine Project and Request for Comments on Environmental Issues

October 1, 2009.

The staff of the Federal Energy Regulatory Commission (FERC or Commission) will prepare an environmental assessment (EA) that will discuss the environmental impacts of the proposed Luminant Tatum Mine Project (Project) involving construction and operation of facilities by Natural Gas Pipeline Company of America LLC (Natural) in Panola County, Texas.[1] The EA will be used by the Commission in its decision-making process to determine whether the project is in the public convenience and necessity.

This notice announces the opening of the scoping process we[2] will use to gather input from the public and interested agencies on the project. Your input will help the Commission staff determine which issues need to be evaluated in the EA. Please note that the scoping period will close on November 2, 2009.

This notice is being sent to affected landowners; Federal, State, and local government representatives and agencies; elected officials; environmental and public interest groups; Native American Tribes; other interested parties; and local libraries and newspapers. State and local government representatives are asked to notify their constituents of this planned project and encourage them to comment on their areas of concern.

If you are a landowner receiving this notice, you may be contacted by a Natural representative about survey permission and/or the acquisition of an easement to construct, operate, and maintain the proposed facilities. The company would seek to negotiate a mutually acceptable agreement. However, if the project is approved by the Commission, that approval conveys with it the right of eminent domain. Therefore, if easement negotiations fail to produce an agreement, the natural gas company could initiate condemnation proceedings in accordance with state law.

A fact sheet prepared by the FERC entitled "An Interstate Natural Gas Facility On My Land? What Do I Need To Know?" is available for viewing on the FERC Web site (*http://www.ferc.gov*). This fact sheet addresses a number of typically asked questions, including the use of eminent domain and how to participate in the Commission's proceedings. It is available for viewing on the FERC Internet Web site (*http://www.ferc.gov*).

Summary of the Proposed Project

Natural seeks to utilize, for mining purposes, lands currently occupied by three existing pipeline segments. To

[1] On July 22, 2009, Natural filed its application for CP09–447–000 with the Commission under section 7 of the Natural Gas Act and Part 157 of the Commission's regulations. The Commission issued its Notice of Application on August 6, 2009.

[2] "We", "us", and "our" refer to the environmental staff of the Office of Energy Projects (OEP).

allow the proposed surface mining operations to proceed, the affected pipeline segments must be relocated.

Therefore, Natural proposes to construct and operate two approximately 5.55 mile-long segments of new 30-inch diameter pipeline and one approximately 5.55 mile-long segment of new 36-inch diameter pipeline, all in parallel and sharing a common right-of-way. The new pipelines would also parallel an existing pipeline owned by DCP Midstream. The pipelines would become part of Natural's existing Gulf Coast Mainline Nos. 1, 2, and 3, respectively, in Panola County, TX. Additionally, Natural proposes to abandon by exchange and transfer to Luminant Mining Company LLC two approximately 4.3 mile-long segments of existing 30-inch-diameter pipeline and one approximately 4.3 mile-long segment of existing 36-inch-diameter pipeline which are part of Natural's existing Gulf Coast Mainline Nos. 1, 2, and 3 in Panola County, TX.

The specific location of the project facilities is shown in Appendix 1.[3]

If approved, Natural proposes to commence construction of the proposed facilities in March 2010.

Land Requirements for Construction

Approximately 137 acres would be required for construction of the three new pipeline segments, including approximately 77.14 acres of upland forest, 48.8 acres of upland pasture, and 0.47 acres of wetlands. The new pipeline segments would be located almost entirely on Luminant's property. Additional impacts are expected from the ultimate removal of the lines being abandoned. This removal would be performed by Luminant and would occur exclusively on lands owned by Luminant.

The EA Process

The National Environmental Policy Act (NEPA) requires the Commission to take into account the environmental impacts that could result from an action whenever it considers the issuance of a Certificate of Public Convenience and Necessity. NEPA also requires us to discover and address concerns the public may have about proposals. This process is referred to as "scoping." The main goal of the scoping process is to focus the analysis in the EA on the important environmental issues. By this Notice of Intent, the Commission staff requests public comments on the scope of the issues to address in the EA. All comments received are considered during the preparation of the EA. State and local government representatives are encouraged to notify their constituents of this proposed action and encourage them to comment on their areas of concern.

In the EA we will discuss impacts that could occur as a result of the construction and operation of the proposed project under these general headings:

- Geology and soils.
- Land use.
- Water resources, fisheries, and wetlands.
- Cultural resources.
- Vegetation and wildlife.
- Air quality and noise.
- Endangered and threatened species.
- Public safety.

We will also evaluate reasonable alternatives to the proposed project or portions of the proposed project, and make recommendations on how to lessen or avoid impacts on the various resource areas.

Our independent analysis of the issues will be in the EA. Depending on the comments received during the scoping process, the EA may be published and mailed to Federal, State, and local agencies, public interest groups, interested individuals, affected landowners, newspapers, libraries, and the Commission's official service list for this proceeding. A comment period will be allotted for review if the EA is published. We will consider all comments on the EA before we make our recommendations to the Commission. To ensure your comments are considered, please carefully follow the instructions in the public participation section below.

With this NOI, we are asking Federal, State, and local agencies with jurisdiction and/or special expertise with respect to environmental issues to formally cooperate with us in the preparation of the EA. These agencies may choose to participate once they have evaluated the proposal relative to their responsibilities. Additional agencies that would like to request cooperating agency status should follow the instructions for filing comments provided under the Public Participation section of this NOI.

Currently Identified Environmental Issues

We have already identified several issues that we think deserve attention based on a preliminary review of the proposed facilities and the environmental information provided by Natural. This preliminary list of issues may be changed based on your comments and our analysis.

- Disturbance caused by project construction and abandonment activities may contribute to water and wind erosion of soils.
- Disturbance caused by the project may result in the temporary and permanent alteration and/or loss of wildlife including migratory bird habitat.
- Pipeline construction would cross 14 ephemeral, intermittent or perennial streams, and would impact approximately 0.47 acres of wetlands.

Public Participation

You can make a difference by providing us with your specific comments or concerns about the Luminant Tatum Mine Project. Your comments should focus on the potential environmental effects, reasonable alternatives, and measures to avoid or lessen environmental impacts. The more specific your comments, the more useful they will be. To ensure that your comments are timely and properly recorded, please send in your comments so that they will be received in Washington, DC on or before November 2, 2009.

For your convenience, there are three methods which you can use to submit your comments to the Commission. In all instances please reference the project docket number CP09–447–000 with your submission. The Commission encourages electronic filing of comments and has dedicated eFiling expert staff available to assist you at 202–502–8258 or *efiling@ferc.gov.*

(1) You may file your comments electronically by using the Quick Comment feature, which is located on the Commission's internet Web site at *http://www.ferc.gov* under the link to *Documents and Filings.* A Quick Comment is an easy method for interested persons to submit text-only comments on a project;

(2) You may file your comments electronically by using the eFiling feature, which is located on the Commission's internet Web site at *http://www.ferc.gov* under the link to Documents and Filings. eFiling involves preparing your submission in the same manner as you would if filing on paper, and then saving the file on your computer's hard drive. You will attach that file as your submission. New eFiling users must first create an account by clicking on "Sign up" or "eRegister." You will be asked to select

[3] The appendices referenced in this notice are not being printed in the **Federal Register**. Copies of all appendices are available on the Commission's Web site at the "eLibrary" link or from the Commission's Public Reference Room, 888 First Street, NE., Washington, DC 20426, or call (202) 502–8371. For instructions on connecting to eLibrary, refer to the last page of this notice. Copies of the appendices were sent to all those receiving this notice in the mail.

the type of filing you are making. A comment on a particular project is considered a "Comment on a Filing;" or

(3) You may file your comments via mail to the Commission by sending an original and two copies of your letter to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First St., NE., Room 1A, Washington, DC 20426.

Label one copy of the comments for the attention of Gas Branch 3, PJ11.3.

Environmental Mailing List

An effort is being made to send this notice to all individuals, organizations, and government entities interested in and/or potentially affected by the proposed project. This includes all landowners who are potential right-of-way grantors, whose property may be used temporarily for project purposes.

If you do not want to send comments at this time but still want to remain on our mailing list, please return the Information Request (Appendix 2). If you do not return the Information Request, you will be taken off the mailing list.

Becoming an Intervenor

In addition to involvement in the EA scoping process, you may want to become an "intervenor," which is an official party to the proceeding. Intervenors play a more formal role in the process and are able to file briefs, appear at hearings, and be heard by the courts if they choose to appeal the Commission's final ruling. An intervenor formally participates in a Commission proceeding by filing a request to intervene. Instructions for becoming an intervenor are included in the User's Guide under the "e-filing" link on the Commission's Web site.

Additional Information

Additional information about the project is available from the Commission's Office of External Affairs, at 1–866–208–FERC or on the FERC Internet Web site (*http://www.ferc.gov*) using the eLibrary link. Click on the eLibrary link, click on "General Search" and enter the docket number excluding the last three digits in the Docket Number field. Be sure you have selected an appropriate date range. For assistance, please contact FERC Online Support at *FercOnlineSupport@ferc.gov* or toll free at 1–866–208–3676, or for TTY, contact (202) 502–8659. The eLibrary link also provides access to the texts of formal documents issued by the Commission, such as orders, notices, and rulemakings.

In addition, the Commission now offers a free service called eSubscription which allows you to keep track of all formal issuances and submittals in specific dockets. This can reduce the amount of time you spend researching proceedings by automatically providing you with notification of these filings, document summaries and direct links to the documents. Go to *http://www.ferc.gov/esubscribenow.htm.*

Finally, public meetings or route evaluations, if applicable, will be posted on the Commission's calendar located at *http://www.ferc.gov/EventCalendar/EventsList.aspx* along with other related information.

Kimberly D. Bose,

Secretary.

[FR Doc. E9–24256 Filed 10–7–09; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RM06–16–000]

Mandatory Reliability Standards for the Bulk Power System; Notice of Extension of Time

October 1, 2009.

On September 30, 2009, the North American Electric Reliability Corporation (NERC) filed a request for an extension of time to file comments in response to the Commission's September 10, 2009 notice [1] requesting comments on the Topological and Impedance Element Ranking (TIER) Report in the above-docketed proceeding. In its motion, NERC states that it requires additional time to address questions that were raised at a public presentation for the TIER report and to submit responsive comments.

Upon consideration, notice is hereby given that an extension of time for filing comments on the TIER report is granted to and including October 28, 2009.

Kimberly D. Bose,

Secretary.

[FR Doc. E9–24253 Filed 10–7–09; 8:45 am]

BILLING CODE 6717–01–P

[1] *Mandatory Reliability Standards for the Bulk Power System,* RM06–16–000 (Notice of Public Meeting) (September 10, 2009).

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OW–2006–0369; FRL–8967–5]

Agency Information Collection Activities; Proposed Collection; Comment Request; National Estuary Program (Renewal); EPA ICR No. 1500.07, OMB Control No. 2040–0138

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) (44 U.S.C. 3501 *et seq.*), this document announces that EPA is planning to submit a request to renew an existing approved Information Collection Request (ICR) to the Office of Management and Budget (OMB). This ICR is scheduled to expire on 01/31/2010. Before submitting the ICR to OMB for review and approval, EPA is soliciting comments on specific aspects of the proposed information collection as described below.

DATES: Comments must be submitted on or before December 7, 2009.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–OW–2006–0369 by one of the following methods:

- *http://www.regulations.gov:* Follow the on-line instructions for submitting comments.
- *E-mail: OW-Docket@epa.gov.*
- *Fax:* (202) 566–9744.
- *Mail:* EPA–HQ–OW–2006–0369, Environmental Protection Agency, EPA Docket Center (EPA/DC), Water Docket—Mail Code 28221T, 1200 Pennsylvania Avenue, NW., Washington, DC 20460.
- *Hand Delivery:* Office of Water Docket, Environmental Protection Agency, Public Reading Room, Room B102, 1301 Constitution Ave., NW., Washington, DC 20004. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–HQ–OW–2006–0369. 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/dockets.*

FOR FURTHER INFORMATION CONTACT: Nell Orscheln, Oceans and Coastal Protection Division, Office of Wetlands, Oceans, and Watersheds, Mail Code 4504T, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number: (202) 566–2102; fax number: (202) 566–1336; e-mail address: *Orscheln.nell@epa.gov.*

SUPPLEMENTARY INFORMATION:

How Can I Access the Docket and/or Submit Comments?

EPA has established a public docket for this ICR under Docket ID No. EPA–HQ–OW–2006–0369, which is available for online viewing at *http://www.regulations.gov,* or in person viewing at the Water Docket in the EPA Docket Center (EPA/DC), EPA West, Room 3334, 1301 Constitution Ave., NW., Washington, DC. The EPA/DC Public Reading Room is open from 8 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Reading Room is 202–566–1744, and the telephone number for the Water Docket is 202–566–2426.

Use *http://www.regulations.gov,* to obtain a copy of the draft collection of information, submit or view public comments, access the index listing of the contents of the docket, and to access those documents in the public docket that are available electronically. Once in the system, select "search," then key in the docket ID number identified in this document.

What Information Is EPA Particularly Interested in?

Pursuant to section 3506(c)(2)(A) of the PRA, EPA specifically solicits comments and information to enable it to:

(i) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility;

(ii) Evaluate the accuracy of the Agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(iii) Enhance the quality, utility, and clarity of the information to be collected; and

(iv) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses. In particular, EPA is requesting comments from very small businesses (those that employ less than 25 people) on examples of specific additional efforts that EPA could make to reduce the paperwork burden for very small businesses affected by this collection.

What Should I Consider When I Prepare My Comments for EPA?

You may find the following suggestions helpful for preparing your comments:

1. Explain your views as clearly as possible and provide specific examples.
2. Describe any assumptions that you used.
3. Provide copies of any technical information and/or data you used that support your views.
4. If you estimate potential burden or costs, explain how you arrived at the estimate that you provide.
5. Offer alternative ways to improve the collection activity.
6. Make sure to submit your comments by the deadline identified under **DATES.**
7. To ensure proper receipt by EPA, be sure to identify the docket ID number assigned to this action in the subject line on the first page of your response. You may also provide the name, date, and **Federal Register** citation.

What Information Collection Activity or ICR Does This Apply to?

Affected entities: Entities potentially affected by this action are those state or local agencies or nongovernmental organizations in the National Estuary Program (NEP) who receive grants under Section 320 of the Clean Water Act.

Title: National Estuary Program (Renewal).

ICR Numbers: EPA ICR No. 1500.07, OMB Control No. 2040–0138.

ICR Status: This ICR is currently scheduled to expire 01/31/2010. An Agency may not conduct or sponsor, and a person is not required to respond to, a collection of information, unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in title 40 of the CFR, after appearing in the **Federal Register** when approved, are listed in 40 CFR part 9, are displayed either by publication in the **Federal Register** or by other appropriate means, such as on the related collection instrument or form, if applicable. The display of OMB control numbers in certain EPA regulations is consolidated in 40 CFR part 9.

Abstract:

Annual Workplans: The NEP involves collecting information from the state or local agency or nongovernmental organizations that receive funds under § 320 of the Clean Water Act. The regulation requiring this information is found at 40 CFR Part 35. Prospective grant recipients seek funding to develop or oversee and coordinate implementation of Comprehensive Conservation Management Plans (CCMPs) for estuaries of national significance. In order to receive funds, grantees must submit an annual workplan to EPA. The workplan consists of two parts: (a) Progress on projects funded previously; and (b) new projects proposed with dollar amounts and completion dates. The workplan is reviewed by EPA and also serves as the scope of work for the grant agreement. EPA also uses these workplans to track performance of each of the 28 estuary programs currently in the NEP.

Program Evaluations: EPA provides funding to NEPs to support long-term implementation of CCMPs if such programs pass a program evaluation process. The primary purpose of the program evaluation process is to help EPA determine whether the 28 programs included in the National Estuary Program (NEP) are making adequate progress implementing their CCMPs and therefore merit continued funding under § 320 of the Clean Water Act. Continued funding for each NEP under § 320 of the CWA is contingent upon Congress appropriating sufficient funds to the EPA for the purpose of implementing the NEP. The program evaluation process also is useful for highlighting

environmental results; highlighting strengths and challenges in program management; demonstrating continued stakeholder commitment; assessing the progress of the NEP as a national program; and transferring lessons learned within EPA, among NEPs, and with other watershed programs. For this ICR cycle, program evaluations will be required for nine programs in FY2010, nine programs in FY2011, and ten programs in 2012.

Government Performance Results Act: EPA requests that each of the 28 NEPs receiving § 320 funds report information that can be used in the GPRA reporting process. This reporting is done on an annual basis and is used to show environmental results that are being achieved within the overall NEP Program. This information is ultimately submitted to Congress along with GPRA information from other EPA programs.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average 218 hours per response. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements which have subsequently changed; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

The ICR provides a detailed explanation of the Agency's estimate, which is only briefly summarized here:

Estimated total number of potential respondents: 28.

Frequency of response: Annual.

Estimated total average number of responses for each respondent: 2.3.

Estimated total annual burden hours: 5,833.

Estimated total annual costs: $409,349, includes $0 annualized capital or O&M costs.

Are There Changes in the Estimates from the Last Approval?

There are no changes in burden from the last approval.

What is the Next Step in the Process for this ICR?

EPA will consider the comments received and amend the ICR as appropriate. The final ICR package will then be submitted to OMB for review and approval pursuant to 5 CFR 1320.12. At that time, EPA will issue another **Federal Register** notice pursuant to 5 CFR 1320.5(a)(1)(iv) to announce the submission of the ICR to OMB and the opportunity to submit additional comments to OMB. If you have any questions about this ICR or the approval process, please contact the technical person listed under **FOR FURTHER INFORMATION CONTACT.**

Dated: October 1, 2009.

Suzanne Schwartz,

Director, Office of Wetlands, Oceans, and Watersheds.

[FR Doc. E9–24341 Filed 10–7–09; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OW–2007–1189 FRL–8963–6]

RIN 2040–AD99

Drinking Water Contaminant Candidate List 3—Final

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Environmental Protection Agency is publishing the third Contaminant Candidate List (CCL 3) since the Safe Drinking Water Act (SDWA) amendments of 1996. The CCL 3 is a list of contaminants that are currently not subject to any proposed or promulgated national primary drinking water regulations, that are known or anticipated to occur in public water systems, and which may require regulation under SDWA. Today's final CCL 3 includes 104 chemicals or chemical groups and 12 microbiological contaminants.

ADDRESSES: EPA has established a docket for this action under Docket ID No. EPA–HQ–OW–2007–1189. All documents in the docket are listed on *http://www.regulations.gov.* Although listed in the index, some information is not publicly available. For example, confidential business information or other information whose disclosure is restricted by statute is not publicly available. Certain other material, such as copyrighted material, is not placed on the Internet and is only in hard copy form. Publicly available docket materials are available either electronically through *http://www.regulations.gov* or in hard copy at the Water 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 EPA Docket Center is (202) 566–2426.

FOR FURTHER INFORMATION CONTACT: For information on chemical contaminants contact Thomas Carpenter, Office of Ground Water and Drinking Water, Standards and Risk Management Division, at (202) 564–4885 or e-mail *carpenter.thomas@epa.gov.* For information on microbial contaminants contact Tracy Bone, Office of Ground Water and Drinking Water, at (202) 564–5257 or e-mail *bone.tracy@epa.gov.* For general information contact the EPA Safe Drinking Water Hotline at (800) 426–4791 or e-mail: *hotline-sdwa@epa.gov.*

Abbreviations and Acronyms

CASRN—Chemical Abstract Services Registry Number
CDC—Centers for Disease Control and Prevention
CCL—Contaminant Candidate List
CCL 1—EPA's First Contaminant Candidate List
CCL 2—EPA's Second Contaminant Candidate List
CCL 3—EPA's Third Contaminant Candidate List
CERCLA—Comprehensive Environmental Response, Compensation, and Liability Act
CFR—Code of Federal Regulations
CSF—Cancer Slope Factor
DBP—disinfection byproduct
EPA—United States Environmental Protection Agency
ESA—ethanesulfonic acid
FDA—United States Food and Drug Administration
FIFRA—Federal Insecticide, Fungicide, and Rodenticide Act
FR—**Federal Register**
HRL—Health Reference Level
ICR—Information Collection Request
IUR—Inventory Update Rule
MCL—maximum contaminant level
MCLG—maximum contaminant level goal
NCFAP—National Center for Food and Agricultural Policy
NDWAC—National Drinking Water Advisory Council
NDMA—N-nitrosodimethylamine
NIRS—National Inorganic Radiological Survey
NRC—National Academies of Science's National Research Council
NPDWR—national primary drinking water regulation
OPP—Office of Pesticide Programs
PCCL—Preliminary CCL
PFOA—perfluorooctanoic acid
PFOS—perfluorooctane sulfonic acid

PWS—public water system
RAISHE—Risk Assessment Information System, Health Effects
RDX– Cyclotrimethylenetrinitramine
RfD—reference dose
RTECS—Registry of Toxic Effects for Chemical Substances
SAB—EPA Science Advisory Board
SDWA—Safe Drinking Water Act
TRI—Toxics Release Inventory
TNT—2, 4, 6-trinitrotoluene
UCMR—Unregulated Contaminant Monitoring Regulation
UCMR 1—First Unregulated Contaminant Monitoring Regulation
UCMR 2—Second Unregulated Contaminant Monitoring Regulation
UCM R1/2—Unregulated Contaminant Monitoring Round ½
U.S.—United States of America
USGS—United States Geological Survey
WBDO—waterborne disease outbreak
WHO—World Health Organization

SUPPLEMENTARY INFORMATION:

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1. Using the CDC WBDO's as a Scoring Criteria
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I. General Information

A. Does This Action Impose Any Requirements on My Public Water System?

The final Contaminant Candidate List 3 (CCL 3) will not impose any requirements on anyone. Instead, this action notifies interested parties of the availability of U.S. EPA's final CCL 3, and provides information on the Agency's next steps to evaluate these contaminants.

B. What Is the Purpose of This Action?

The purpose of this action is to present the final CCL 3, a summary of the comments received on the draft CCL 3, and a description of the Agency's process for identifying contaminants to be placed on the list. Pursuant to section 1412(b)(1)(B)(i) of SDWA, as amended in 1996, EPA is required to publish a list of contaminants (1) that are currently unregulated, (2) that are known or anticipated to occur in public water systems, and (3) which may require regulations under the Safe Drinking Water Act (SDWA). This section briefly summarizes the statutory requirements for CCL 3, and related activities surrounding the contaminants included on the final CCL 3.

C. SDWA Risk Management Provisions

1. Contaminant Candidate List 3

SDWA section 1412(b)(1) requires that in the development of the CCL, EPA consider specific data sources and include the scientific community. EPA must evaluate substances identified in section 101(14) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) of 1980 and substances registered as pesticides under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). SDWA also requires the Agency to consider the National Contaminant Occurrence Database established under section 1445(g) of SDWA. SDWA directs the Agency to consult with the scientific community, including the Science Advisory Board (SAB). In addition it directs the Agency to consider the health effects and occurrence information for unregulated contaminants to identify those contaminants that present the greatest public health concern related to exposure from drinking water.

EPA interprets the criterion that contaminants are known or anticipated to occur in public water systems broadly. In evaluating this criterion, EPA considers not only public water system monitoring data, but also data on ambient concentrations in surface and ground waters, and releases to the environment (*e.g.*, Toxics Release Inventory). While such data may not establish conclusively that contaminants are known to occur in public water systems, EPA believes these data are sufficient to anticipate that contaminants may occur in public water systems and to place them on the CCL. Once contaminants have been placed on the CCL, EPA identifies if there are any additional data needs, including gaps in occurrence data.

In selecting contaminants for the CCL 3, each of the above requirements was met. The Agency considered adverse health effects that may pose a greater risk to life stages and other sensitive groups which represent a meaningful portion of the population. Adverse health effects associated with infants, children, pregnant women, the elderly, and individuals with a history of serious illness were evaluated for both chemicals and microbes.

2. Regulatory Determinations

SDWA section 1412(b)(1) requires EPA to determine whether to regulate at least five contaminants from the CCL every five years. SDWA specifies that EPA shall regulate a contaminant if the Administrator determines that:

- The contaminant may have an adverse effect on the health of persons;
- The contaminant is known to occur, or there is a substantial likelihood that the contaminant will occur in public water systems with a frequency and at levels of public health concern; and
- In the sole judgment of the Administrator, regulation of such contaminant presents a meaningful opportunity for health risk reduction for persons served by public water systems.

EPA interprets these criteria as more rigorous than what is used to place contaminants on the CCL. Section IV of this notice presents the current data needs for regulatory determination for the CCL 3 contaminants.

If EPA makes a determination that a national primary drinking water regulation is needed, then the Agency has 24 months to publish a proposed Maximum Contaminant Level Goal (MCLG) [1] and a proposed National Primary Drinking Water Rule (NPDWR).[2] After the proposal, the Agency has 18 months to publish a final

[1] An MCLG is the "maximum level of a contaminant in drinking water at which no known or anticipated adverse effect on the health of persons would occur, and which allows an adequate margin of safety. Maximum contaminant level goals are non-enforceable health goals" (40 CFR 141.2).

[2] An NPDWR is a legally enforceable standard that applies to public water systems. An NPDWR sets a legal limit (called a maximum contaminant level or MCL) or specifies a certain treatment technique (TT) for public water systems for a specific contaminant or group of contaminants.

MCLG and promulgate a final NPDWR (SDWA 1412(b)(1)(E)).[3]

3. Unregulated Contaminant Monitoring

SDWA provides EPA with the authority to require all large and a subset of small systems to monitor for up to 30 unregulated contaminants every five years under the Unregulated Contaminant Monitoring Regulation (UCMR). The second unregulated contaminant monitoring rule (UCMR 2), which was promulgated on January 4, 2007 (72 FR 367; USEPA, 2007a), requires monitoring for several pesticides and pesticide degradates, five polybrominated diphenyl ether (PBDE) flame retardants, a group of nitrosamines, and two munitions (TNT and RDX). All of the chemicals on UCMR 2 were included among the contaminants evaluated for CCL 3.

Data collected under the UCMR are an important source of occurrence information for both the CCL and Regulatory Determination processes. There is an additional discussion of the relationship between CCL and UCMR in Section III. D of this **Federal Register** (FR) notice.

II. What Is on EPA's Drinking Water Contaminant Candidate List 3?

The draft CCL 3 was published on February 21, 2008 (73 FR 9628; USEPA 2008a), and included 93 chemicals or chemical groups and 11 microbiological contaminants. EPA provided information and sought comment on its efforts to expand and strengthen the underlying CCL listing process, the draft list, and EPA's efforts to improve the contaminant selection process for future CCLs.

In developing the draft CCL 3, EPA implemented a new process from that used for CCL 1 and CCL 2. This new process builds on evaluations from previous CCLs, and was based on substantial expert input and recommendations from various groups, including the National Academy of Science's National Research Council (NRC) and the National Drinking Water Advisory Council (NDWAC). This process is summarized in the draft CCL 3 FR notice.

In general, the criteria for including a contaminant on the CCL consisted of determining whether the occurrence or anticipated occurrence of a contaminant was likely at levels of concern to human health. The draft CCL 3 notice solicited input from the public, and specifically requested comments on (1) the approach EPA used to create the list; (2) contaminants on the list; and (3) on specific contaminants such as pharmaceuticals, perfluorinated compounds, and microbes.

The final CCL 3 includes 104 chemicals or chemical groups and 12 microbiological contaminants (Exhibit 1). The list includes, among others, pesticides, biological toxins, disinfection byproducts, chemicals used in commerce, and waterborne pathogens. The Agency considered the best available data and information on health effects and occurrence to evaluate 7,500 unregulated contaminants and selected 116 candidates for the final CCL 3, which have the potential to present health risks through drinking water exposure.

Exhibit 1. Final Contaminant Candidate List 3:

CHEMICAL CONTAMINANTS

CASRN	Common name—registry name
630206	1,1,1,2-Tetrachloroethane.
75343	1,1-Dichloroethane.
96184	1,2,3-Trichloropropane.
106990	1,3-Butadiene.
99650	1,3-Dinitrobenzene.
123911	1,4-Dioxane.
57910	17 alpha-Estradiol.
71363	1-Butanol.
109864	2-Methoxyethanol.
107186	2-Propen-1-ol.
16655826	3-Hydroxycarbofuran.
101779	4,4′-Methylenedianiline.
30560191	Acephate.
75070	Acetaldehyde.
60355	Acetamide.
34256821	Acetochlor.
187022113	Acetochlor ethanesulfonic acid (ESA).
184992444	Acetochlor oxanilic acid (OA).
107028	Acrolein.
142363539	Alachlor ethanesulfonic acid (ESA).
171262172	Alachlor oxanilic acid (OA).
319846	Alpha-Hexachlorocyclohexane.
62533	Aniline.
741582	Bensulide.
100447	Benzyl chloride.
25013165	Butylated hydroxyanisole.
133062	Captan.
14866683	Chlorate.
74873	Chloromethane (Methyl chloride).
110429624	Clethodim.
7440484	Cobalt.
80159	Cumene hydroperoxide.
NA	Cyanotoxins.
141662	Dicrotophos.
55290647	Dimethipin.
60515	Dimethoate.
298044	Disulfoton.
330541	Diuron.
517099	Equilenin.
474862	Equilin.

CHEMICAL CONTAMINANTS—Continued

CASRN	Common name—registry name
114078	Erythromycin.
50282	Estradiol (17-beta estradiol).
50271	Estriol.
53167	Estrone.
57636	Ethinyl Estradiol (17-alpha Ethynyl Estradiol).
13194484	Ethoprop.
107211	Ethylene glycol.
75218	Ethylene oxide.
96457	Ethylene thiourea.
22224926	Fenamiphos.
50000	Formaldehyde.
7440564	Germanium.
74975	Halon 1011 (bromochloromethane).
75456	HCFC-22.
110543	Hexane.
302012	Hydrazine.
72333	Mestranol.
10265926	Methamidophos.
67561	Methanol.
74839	Methyl bromide (Bromomethane).
1634044	Methyl tert-butyl ether.
51218452	Metolachlor.
171118095	Metolachlor ethanesulfonic acid (ESA).
152019733	Metolachlor oxanilic acid (OA).
2212671	Molinate.
7439987	Molybdenum.
98953	Nitrobenzene.
55630	Nitroglycerin.
872504	N-Methyl-2-pyrrolidone.
55185	N-Nitrosodiethylamine (NDEA).
62759	N-nitrosodimethylamine (NDMA).
621647	N-Nitroso-di-n-propylamine (NDPA).
86306	N-Nitrosodiphenylamine.
930552	N-nitrosopyrrolidine (NPYR).
68224	Norethindrone (19-Norethisterone).
103651	N-Propylbenzene.
95534	O-Toluidine.
75569	Oxirane, methyl-.
301122	Oxydemeton-methyl.
42874033	Oxyfluorfen.
14797730	Perchlorate.
1763231	Perfluorooctane sulfonic acid (PFOS).
335671	Perfluorooctanoic acid (PFOA).
52645531	Permethrin.
41198087	Profenofos.
91225	Quinoline.
121824	RDX.
135988	Sec-Butylbenzene.
7440246	Strontium.
107534963	Tebuconazole.
112410238	Tebufenozide.
13494809	Tellurium.
13071799	Terbufos.
56070167	Terbufos sulfone.
59669260	Thiodicarb.
23564058	Thiophanate-methyl.
26471625	Toluene diisocyanate.

[3] The statute authorizes a nine month extension of this promulgation date.

CHEMICAL CONTAMINANTS—Continued

CASRN	Common name—registry name
78488	Tribufos.
121448	Triethylamine.
76879	Triphenyltin hydroxide (TPTH).
51796	Urethane.
7440622	Vanadium.
50471448	Vinclozolin.
137304	Ziram.

MICROBIAL CONTAMINANTS

Adenovirus
Caliciviruses
Campylobacter jejuni
Enterovirus
Escherichia coli (0157)
Helicobacter pylori
Hepatitis A virus
Legionella pneumophila
Mycobacterium avium
Naegleria fowleri
Salmonella enterica
Shigella sonnei

III. What Comments Did EPA Receive on the Draft CCL 3 and How Did the Agency Respond?

EPA received comments from 177 individuals or organizations on the draft CCL 3. Commenters identified several issues on the draft CCL 3 and the process used to select contaminants for the list. Many commenters noted the substantial effort, overall improvement, improved scientific rigor, and increased stakeholder involvement employed by EPA to develop the draft CCL 3. Commenters also provided information and recommendations for the Agency to consider as it finalized the CCL 3. The Agency has provided responses to individual comments in the "Final Comment Response Document for the Third Drinking Water Contaminant Candidate List 3 (Categorized Public Comments)" document that is available in the docket (USEPA 2009c).

A. Advisory From the EPA Science Advisory Board

The EPA SAB and its Drinking Water Committee reviewed the draft CCL 3 during 2008, and provided an advisory to the Administrator on January 29, 2009. EPA staff met with the SAB to provide an overview of the draft CCL 3, to answer questions from the Drinking Water Committee, and to clarify questions from the full SAB. The Agency also participated in teleconferences with SAB during the development of the "SAB Advisory on EPA's Draft Third Drinking Water Contaminant Candidate List (CCL 3)" (USEPA 2009d). SAB comments on the overall CCL 3 process and documentation are summarized in the following paragraphs.

The SAB noted that the process used to develop the draft CCL 3 represents a major improvement over the previous CCL processes and recognized the adaptive management strategies employed by EPA as an appropriate approach that should continue to be used in future CCLs. However, the SAB also believes the documentation of the process used to develop the draft CCL 3 lacks transparency. For example, one suggestion stated that EPA should document and justify why each of the contaminants from previous CCL lists were excluded from the draft CCL 3.

The SAB also stated that the current list may be too large for chemicals; and it may include too few pathogens. The SAB acknowledged that the CCL 3 has dual goals of developing regulatory determinations and identifying longer-term research needs. They also recommended that EPA prioritize the list to better identify regulatory priorities, research needs, and longer term needs for the next CCL.

EPA Response to SAB Recommendations

The Agency has updated the technical support documents for the CCL 3 to increase the transparency of the process that was used to determine which contaminants to include on the final CCL 3. Several specific suggestions to improve the transparency of the process are addressed in the supporting documents and identified in Section III of this notice. Documents describing the process and tables that identify the data used to select contaminants can be found on EPA's Web site at: *http://www.epa.gov/safewater/ccl/index.html.* More detailed information on the contaminants, such as the "Final CCL 3 Contaminant Information Sheets.", (USEPA, 2009e) and the "Final Contaminant Candidate List 3 Microbes: PCCL to CCL Process" can be found in the docket (USEPA, 2009g) and on EPA's Web site.

In Section IV of this FR notice, the Agency has also identified which contaminants will need additional data and information on their occurrence, health effects, and analytical methods. As the Agency continues to evaluate contaminants on the CCL 3, we will work with EPA and non-EPA scientists to develop and collect the best available science to support decision making for future regulatory determinations.

B. Chemical Contaminants

EPA evaluated data and information on chemical contaminants provided by commenters and collected by the Agency after the draft CCL 3 was published. EPA used the same process described in the draft CCL 3 FR notice (73 FR 9628, USEPA 2008a) to evaluate contaminants for which data became available after the publication of the draft CCL 3. Based on these analyses, EPA is taking the following actions on chemical contaminants: EPA is removing two pesticides from the CCL 3 that are no longer used in the United States, and the Agency is adding 13 chemical contaminants to the final CCL 3. EPA concluded that one antibiotic (erythromycin), nine hormones (17 alpha-estradiol, 17 beta-estradiol, equilenin, equilin, estriol, estrone, ethinyl estradiol, mestranol, and norethindrone), two potential disinfection byproducts (DBP) (Halon 1011 (bromochloeromethane) and chlorate), and one perfluorinated compound (Perfluorooctanoic sulfonic acid (PFOS)) should be included on the CCL 3 based on their potential adverse health effects and potential for occurrence in public water systems. The Agency has summarized the comments and information used to evaluate these contaminants in this section of the FR notice. The specific data used to evaluate these contaminants can be found in the response to comment document (USEPA, 2009c) and the "Final CCL 3 Contaminant Information Sheets" in the docket (USEPA, 2009e).

1. Pesticides and Degradates

EPA received more than 65 public comments on pesticides and their related degradates. Some commenters were concerned about the number of pesticides listed on the draft CCL 3. One commenter states, "* * * in the process of narrowing the universe of 7,500 unregulated chemicals down to 93 * * * EPA selected nearly half (42 out of 93) to be pesticides or pesticide degradates." This and other commenters viewed the listing of pesticides as a selection bias and noted that EPA has not clearly demonstrated, in the process used to derive the draft CCL 3, that these 42 pesticides and degradates pose the greatest public health concern. In addition, this commenter believed that the inclusion and proportional share of pesticides and their degradates on the draft CCL 3 should take into account the Agency's regulatory determination findings where none of the pesticides or degradates evaluated were ultimately determined to provide a meaningful opportunity to provide public health protection. In contrast, some commenters were in agreement with the pesticides included on the draft CCL 3, and in some cases, commenters

suggested placing additional pesticides on the final CCL 3.

EPA Response: EPA does not agree with the commenter's statement that there is a selection bias for pesticides. The CCL 3 process was developed to evaluate contaminants from a broad universe of chemicals in accordance with the NRC and NDWAC recommendations. The chemicals are subject to consistent screening and evaluation based on chemical specific factors such as physical properties, health effects data, and their potential to occur in public water systems. SDWA requires EPA to evaluate substances registered as pesticides under FIFRA. All pesticides identified in the universe of chemicals were evaluated by EPA using the same process as other chemicals. Previous regulatory determinations not to develop a NPDWR for 10 pesticides or degradates in Regulatory Determinations 1 and 2 are irrelevant to other pesticides on the CCL 3. The regulatory determination process, like the CCL process, is data driven. To make a regulatory determination, EPA evaluates the available occurrence and health effects data for that contaminant against the criteria in SDWA Section 1412 (b)(1)(a). The Agency has responded to comments on specific pesticides in the response to comment document (USEPA, 2009c).

2. Cancelled Pesticides Registrations

SAB and other public commenters suggested that specific pesticide active ingredients (Nitrofen and Ethion) should be removed from the CCL 3 because they are no longer used in registered pesticides. The SAB also commented that EPA should consider removing pesticides from the CCL 3 that are no longer registered products or are in the process of being phased out of use. The pesticides identified by the commenters, Nitrofen and Ethion, are not included on the final CCL 3. The evaluation of these two pesticides is summarized in the following paragraphs.

a. Nitrofen

EPA received comment from the public and the SAB that Nitrofen should not be included on the final CCL 3. Commenters noted that the available information on use, release, and potential environmental occurrence of Nitrofen indicate that it should not be anticipated to occur in public water systems (PWS).

EPA Response: EPA agrees with the commenters that Nitrofen should be removed from the CCL 3. It is no longer manufactured or sold in the United States. Its inclusion on the draft list was based on a reported TRI release which, when investigated, indicated that Nitrofen stocks were recently found in a warehouse and properly disposed of in accordance with the Resource Conservation and Recovery Act Subtitle C landfill regulations. TRI requires that information on landfill releases, even releases in compliance with regulations, be reported; therefore, the Nitrofen release was incorporated in the total TRI data used in the CCL process. Based on this information, Nitrofen is not anticipated to occur in PWSs, and the Agency has not included Nitrofen on the final CCL 3.

b. Ethion

Commenters noted that the registration for Ethion was cancelled and therefore EPA should not include Ethion on the final CCL 3.

EPA Response: EPA agrees with the commenters and has not included Ethion on the final CCL 3. On March 22, 2002, EPA published a cancellation order discontinuing the manufacture of Ethion containing products as of October 1, 2003, and prohibiting the use of existing stocks after December 31, 2004 (67 FR 13328; USEPA, 2002). A July 23, 2004 action revoked the remaining Ethion tolerances, as of October 1, 2008 (69 FR 43918; USEPA, 2004). EPA notes that SDWA criteria consider whether a contaminant is known or anticipated to occur in PWSs and may have an adverse effect. It is possible for a contaminant to occur in a PWS even after its uses are canceled if it is very persistent in the environment. Ethion is moderately persistent in the environment, but is not likely to contaminate surface water through dissolved runoff. Based on laboratory and field data, including monitoring data compiled in EPA's Pesticides in Ground Water Database, EPA does not expect that Ethion will contaminate ground water (USEPA, 2001). Based on Ethion's discontinued registration status, prohibited use of stocks, and moderate persistence, the Agency does not anticipate that it will occur in PWSs; therefore, it is not included on the final CCL 3.

3. Perfluorinated Compounds

In the draft CCL 3 FR notice, EPA sought comments on its proposed decisions to include perfluorooctanoic acid (PFOA) and not to include PFOS on the draft CCL 3 (73 FR 9652, USEPA 2008a). The majority of commenters agreed with the inclusion of PFOA on the CCL 3. Commenters pointed out that PFOA warrants inclusion on the CCL due to its known occurrence in drinking water supplies and systems and its potential adverse health effects. A number of these commenters also wrote in support of regulating PFOA under SDWA. The SAB also stated that PFOA should be a high priority for consideration by the Agency for the CCL 3. One commenter argued that EPA did not use the most relevant information in the CCL 3 process to characterize PFOA's health effects and occurrence. Some of the commenters who were in support of including PFOA on the CCL also recommended adding PFOS and other perfluorinated compounds to the list. The SAB noted that perfluorochemicals may be a class of contaminants that the Agency should consider as a group based on their similar structures and chemical makeup.

EPA Response: The Agency agrees with commenters that potential health effects based on animal studies and the occurrence of PFOA in drinking water supplies warrant its inclusion on the CCL 3. The Agency used the best available science and information to evaluate and list drinking water contaminant candidates. PFOA has been detected in a number of drinking water supplies and ambient waters. It is also highly persistent in the environment and has been shown to be toxic in animal studies. Based on these potential adverse health effects and occurrence information, EPA concludes that PFOA is known or anticipated to occur in public water systems and may require regulation. Therefore EPA has included PFOA on the final CCL 3.

PFOS was not included on the draft CCL 3, but has been included on the final CCL 3. A major factor in EPA's decision to not include PFOS on the draft CCL 3 was the voluntary phase-out of production of PFOS in the U.S. between 2000 and 2002 (FR 73 9652; USEPA 2008a). However, EPA has evaluated new information from the October 9, 2007, significant new use rule (SNUR) that shows there are ongoing uses of PFOS that could lead to its occurrence in water (FR 72 57222–57235; USEPA 2007b). The Agency concluded, based upon this potential to occur in PWSs, existing data on environmental persistence, and toxicity in animal studies, that PFOS is known or anticipated to occur in public water systems and may require regulation. Therefore, EPA has included this compound on the final CCL 3.

The Agency continues to analyze the data and information related to the possible adverse health effects associated with PFOA and PFOS. As noted in the draft CCL 3 FR notice, the SAB completed a review of a draft PFOA risk assessment in 2006 and made

recommendations for the further development of the risk assessment (USEPA, 2006a). A number of important studies are underway, and the Agency continues to participate in research regarding the toxicity of related perfluorochemicals, as well as research to help identify routes of human exposure. EPA is evaluating additional research and has not made any definitive conclusions on the risk assessment at this time. The Agency also issued "Provisional Health Advisories for PFOA and PFOS" (USEPA 2009f) to provide technical information to State and local officials, and PWSs for consideration in addressing local contamination of drinking water to protect public health. This information has been included in the docket and the "Final CCL 3 Contaminant Information Sheets" for PFOA and PFOS (USEPA, 2009e).

While the Agency did not specifically seek comment on other perfluorinated compounds in the draft CCL 3 FR notice, some of these compounds were included in the CCL 3 Universe. However, the Agency had only limited data on the potential occurrence of these compounds and potential adverse health effects. Commenters did not provide additional occurrence or health effects data than those already evaluated by the Agency; therefore, they are not listed on the CCL at this time. The Agency will continue to evaluate perfluorinated compounds to ascertain whether they possess similar toxicological properties and if they are anticipated or known to occur in public water systems.

4. Pharmaceuticals

In the draft CCL 3 FR notice (73 FR 9652; USEPA, 2008a), EPA explained how pharmaceuticals were evaluated in the CCL 3 process, and sought additional data and information on the concentrations of pharmaceuticals in finished or ambient water. EPA also requested comment on how pharmaceuticals have been considered in the CCL 3 process. In addition, EPA sent a letter to State public health and environmental departments requesting information on the States' activities and initiatives involving pharmaceuticals. The Agency specifically requested information on pharmaceuticals in the areas of occurrence, human health effects research, analytical methods development, and stewardship. EPA received a number of comments on pharmaceuticals and the CCL 3. Commenters pointed out that additional research is needed to address the health effects and occurrence of pharmaceuticals in drinking water. Commenters also noted that the contaminants were detected at low levels. Commenters differed on whether pharmaceuticals should be included on the CCL 3. Some commenters provided references from the published literature on the occurrence of pharmaceuticals in water and on the health effects of pharmaceuticals. In its comments, the SAB noted that pharmaceuticals may be a class of contaminants that need special attention when considering them for CCL 3 or future CCLs, and recommended that EPA use additional data on occurrence of pharmaceuticals in water from the United States Geological Survey (USGS), or studies in the peer-reviewed literature (USEPA, 2009d).

EPA Response: EPA is actively working to evaluate the potential risks to human health and aquatic life posed by trace amounts of pharmaceuticals and personal care products in water, and to identify measures to minimize their occurrence. The Agency has a number of activities underway and will continue to add activities as appropriate. All of these activities are described in further detail on our Web site located at *http://www.epa.gov/waterscience/ppcp*. Additional information on the Agency's research related to pharmaceuticals can be found at *http://www.epa.gov/ppcp*.

In the CCL 3 process, EPA evaluated the potential adverse health effects of pharmaceuticals and their occurrence in public drinking water systems to determine if pharmaceuticals should be added to the list. Since the draft CCL 3 was published, several publications have focused on the occurrence of pharmaceuticals in ambient water and drinking water. In response to comments, EPA has conducted additional data collection efforts to comprehensively review recent published information from USGS and other sources, including those cited by commenters, to identify the best available occurrence information for pharmaceuticals. EPA identified new occurrence data for 81 contaminants from 22 sources. The Agency also conducted additional literature reviews to identify the best available health effects information and identified data from sources including: EPA Office of Pesticide Programs, the Food and Drug Administration (FDA) Center for Veterinary Medicine, the Joint Food and Agriculture Organization/World Health Organization (WHO) Expert Committee on Food Additives, and the European Medicines Agency, and the FDA Center for Drug Evaluation and Research. EPA used the new data in the same process that was described in the draft CCL 3 FR notice to further evaluate pharmaceutical contaminants.

Based upon this re-evaluation with new data, EPA concluded that one antibiotic (erythromycin) and nine hormones (17 alpha-estradiol, 17 beta-estradiol, equilenin, equilin, estriol, estrone, ethinyl estradiol, mestranol, and norethindrone), should be included on the CCL 3 because these contaminants are known or anticipated to occur in public water systems and may require regulation. The specific data used to evaluate these contaminants can be found in the "Final CCL 3 Contaminant Information Sheets" (USEPA, 2009e).

5. Perchlorate

EPA received several comments on perchlorate in response to the draft CCL 3. Commenters noted that perchlorate should be included on the final CCL 3 and provided occurrence and health effects data. Commenters also identified potential sources of perchlorate in the environment.

EPA Response: EPA included perchlorate on the first CCL in 1998 and on the second CCL in 2005. EPA is including perchlorate on CCL 3 while the Agency continues to evaluate scientific information related to a regulatory determination.

EPA published a preliminary regulatory determination for perchlorate in the FR on October 10, 2008 (73 FR 60262; USEPA, 2008b). In this notice, EPA solicited public comment on its preliminary determination not to regulate perchlorate. The Agency issued an interim health advisory for perchlorate to provide technical information to State and local officials and PWSs for consideration in addressing local contamination of drinking water (USEPA, 2008c).

EPA received more than 32,000 comments on the preliminary regulatory determination (73 FR 60262; USEPA 2008b). The majority of comments were submitted by individuals opposed to the decision. There were also unique comments that recommended further scientific evaluation of the information EPA used to make the preliminary determination. These commenters included EPA's NDWAC, SAB, and Children's Health Protection Advisory Committee. All of the comments received on the preliminary regulatory determination FR notice can be reviewed on *www.regulations.gov*. Refer to docket number EPA–HQ–OW–2008–0692.

6. Disinfection Byproducts (DBP)

EPA received several comments on unregulated disinfection byproducts.

Most comments supported the inclusion of N-nitrosodimethylamine (NDMA) and the other N-nitrosamines (N-nitrosodiethylamine, N-nitroso-di-n-propylamine, N-nitrosodiphenylamine, N-nitrosopyrrolidine) on CCL 3, citing the evidence for their carcinogenicity and the overarching need to evaluate this risk. The SAB advised EPA to consider N-nitrosamines as a group because of their similar toxicities and likelihood to occur together. One commenter expressed concern that two N-nitrosamines: N-nitroso-di-n-butylamine and N-nitroso-methylethylamine (which are included in UCMR 2) are not listed on the draft CCL 3. Several commenters expressed concern about the overall lack of DBPs on the draft CCL 3, citing their assumed presence as a result of drinking water disinfection. One commenter requested that the remaining halo-acetic acids not covered under the current DBP regulation (bromochloroacetic acid, dibromochloroacetic acid, bromodichloroacetic acid, and tribromoacetic acid) be added to the CCL 3. Several commenters mentioned groups of chemicals, such as halo-nitriles, halo-aldehydes, halo-nitromethanes, and other nitrogenous DBPs that they believed should be included on the CCL 3.

EPA Response: The CCL 3 process took into consideration the potential formation of DBPs in disinfected and treated drinking water. Potential DBPs with available health information were added to the CCL Chemical Universe even if they did not have measured occurrence data. This is because DBPs were considered to have "default" occurrence for the Universe since they are potentially formed in treated drinking water supplies (USEPA 2009a). In screening chemicals from the Universe to the Preliminary CCL (PCCL), EPA added DBPs to the PCCL that lacked quantitative occurrence data but were in the Toxicity Category 1 or Toxicity Category 2 groupings because of their potential presence in disinfected and treated drinking water (USEPA 2009b). EPA attempted to identify additional health effects and occurrence data for these DBPs to determine whether to include them on the CCL 3. Quantitative occurrence data were needed in order for DBPs to be evaluated for inclusion on the CCL 3. The Agency sought comment on the approach and the data used to select contaminants in the draft CCL 3.

EPA evaluated 85 chemicals in the groups of potential DBPs mentioned by the commenters, but the available data showed that most DBPs had limited or low levels of occurrence, or lacked health effects data. For example, the two UCMR 2 nitrosamines that are not on CCL 3 lacked sufficient occurrence information for inclusion on the list. There is additional discussion of the interrelationship between the CCL and UCMR in Section III.D of this FR notice.

Several commenters mentioned chemicals that were not included in the Universe data compilation, but they did not submit the health effects and/or occurrence information that would be necessary to support their inclusion on the final CCL 3.

In addition to the data used by the Agency in the draft CCL 3, such as the May 14, 1996, DBP Information Collection Rule (ICR) (61 FR 24354, USEPA 1996), EPA used drinking water occurrence data from the State of California Department of Health Services ICR and studies cited by commenters (Krasner *et al.,* 2006) to evaluate the occurrence of DBPs. The Agency also sought and identified new health effects information. A study EPA requested during the development of the Stage 2 Rule on chlorate was completed (NTP 2008) and occurrence information on bromochloromethane (Halon 1011) was also identified. EPA concluded that chlorate and bromochloromethane are known or anticipated to occur in PWSs and may require regulation. Therefore the Agency added these two contaminants to the CCL 3.

EPA continues to participate in research concerning the toxicity, occurrence, exposure, and treatment of unregulated disinfection byproducts. This research will inform the development of future CCLs and the regulatory determination process, as well as future reviews of existing drinking water regulations.

C. Microbial Contaminants

EPA is including twelve pathogens on the final CCL 3, one more than the eleven pathogens on the draft CCL 3. The Agency is adding Adenovirus, Enterovirus, and *Mycobacterium avium* to the final CCL 3, and is removing *Vibrio cholerae* and *Entamoeba histolytica* from the final CCL 3.

The protocol EPA used to select the microbial contaminants for the CCL 3 is described in detail in the draft CCL 3, notice (73 FR 9631, 9644; USEPA, 2008a). Except for a minor change discussed in Section III.C.1, the protocol for selecting pathogens for the final CCL 3 remains the same as the protocol for the draft CCL 3; EPA selected the pathogens based on their health effects and occurrence in drinking water.

Based on public comment, EPA modified the waterborne disease outbreak (WBDO) protocol. The Agency removed older, Centers for Disease Control (CDC) reported WBDOs (prior to 1990) from the occurrence analysis to account for the impact of drinking water regulations that have been implemented since 1990. This change in the WBDO protocol resulted in the exclusion of *Vibrio cholerae* and *Entamoeba hystolitica* from the final CCL 3 and the inclusion of Adenovirus and Enterovirus to the final CCL 3.

Based on public comment, EPA reviewed the health score for *Mycobacterium avium.* After re-evaluating the health effects information, EPA determined that a higher health effects score was appropriate for this pathogen.

1. Using the CDC WBDO's as a Scoring Criterion

A commenter recommended the use of outbreak data tied to the implementation of the SDWA and its amendments (*i.e.,* after 1990). The commenter, as well as SAB, also encouraged EPA to develop its own occurrence database instead of relying on CDC reported WBDOs. A few commenters noted that, in general, the information on occurrence of pathogens in drinking water is limited, and that EPA should develop more occurrence information.

EPA Response: EPA agrees in part with this recommendation, and recognizes that after implementation of SDWA and its amendments, PWSs should have changed their practices resulting in fewer outbreaks. Therefore, early outbreaks (*i.e.,* before 1990) may not represent the current situation and controls at PWSs operating under these regulations. EPA removed CDC WBDOs prior to 1990 from the occurrence analysis. This change resulted in the exclusion of *Vibrio cholerae* and *Entamoeba hystolitica* from the final CCL 3 because their WBDO scores were reduced due to the removal of older documented WBDOs from consideration (USEPA, 2009e).

EPA disagrees with abandoning the CDC database and continues to use the CDC documented WBDOs in the CCL 3 pathogen scoring process. CDC collects statistical data on WBDOs every year (since 1920). CDC has consistently applied a definition for WBDO as well as consistently investigated and verified epidemiological information related to illnesses. This consistency in definitions and methods allows EPA to consistently compare the WBDO data. In contrast, individual research studies on isolated outbreaks may have different methods and goals, and therefore disparate study designs, making evaluation of the results difficult from a

national perspective. No other national database on drinking-water related illnesses exists.

EPA contributes and collaborates with CDC on the *Morbidity and Mortality Weekly Report's* annual surveillance summary, and is confident of the quality of the information in the report. EPA agrees with the commenter that there is a need for more information on occurrence of pathogens in drinking water; however, EPA believes that the CDC WBDO data is the best available information at this time.

2. *Mycobacterium Avium*

EPA received more than a dozen comments requesting that EPA re-examine the health effects score for *Mycobacterium avium* and to include the pathogen on the final CCL 3. Commenters pointed to the long treatment duration and the severity of the disease particularly for the elderly population. Commenters also cited the increased incidence of disease, particularly amongst the elderly.

EPA Response: EPA re-evaluated *Mycobacterium avium's* health effects information and increased the health effects score for one of the sensitive life stages, or populations; specifically, the elderly. The Agency agrees with commenters that the potential health effects on the elderly and the occurrence of *Mycobacterium avium* in drinking water supplies warrant its inclusion on the CCL 3. The health effects score was increased based on the severity and treatment duration on the elderly as described in Murray 2007 (USEPA, 2009g). Based on this information, EPA anticipates that *Mycobacterium avium* may occur in PWSs and require regulation. Therefore the Agency has included *Mycobacterium avium* on the final CCL 3.

3. *Vibrio cholerae* and *Entamoeba hystolitica*

EPA received a few comments recommending the exclusion of both *Vibrio cholerae* and *Entamoeba hystolitica* from the final CCL 3. Commenters recommended that EPA not include these pathogens because cholera and amebiasis are currently rare in the United States, even though they are still common in other countries. Also, commenters felt that current treatment practices (*i.e.,* disinfection) will provide sufficient protection against *Vibrio cholerae.* However, one commenter supported keeping *Vibrio cholerae* because its occurrence is likely to increase and expand as climate change continues.

EPA Response: Based on public comment discussed earlier, EPA changed the WBDO protocol. The Agency removed older, CDC reported WBDOs (prior to 1990) from the occurrence analysis to account for recently implemented regulations (*e.g.,* Surface Water Treatment Rule, Total Coliform Rule). This change in the WBDO protocol resulted in the reduction of the WBDO score for both *Vibrio cholerae* and *Entamoeba hystolitica,* and their exclusion from the final CCL 3. However, EPA did not consider treatment as one of the parameters for inclusion or exclusion of a pathogen onto the CCL 3 because many public water systems are not required to treat, as discussed in the draft CCL 3 FR notice (73 FR 9648; USEPA, 2008a). Further, EPA acknowledges the potential impact climate change may have on water quality; however, at this time EPA does not have enough information to assess the risk.

D. Other Comments

1. Data Sources for Contaminant Candidate Lists

Several commenters noted that EPA used occurrence data sources that could only identify a contaminant's potential to occur in PWSs. These included data from the TRI, National Center for Food and Agricultural Policy (NCFAP), modeled occurrence data for pesticides, and chemical production data. While some commenters urged EPA to rely on this type of data, other commenters suggested that production data should only be used to identify chemicals for initial consideration (*i.e.,* inclusion on the CCL 3 Universe) and more rigorous data should be used to screen or include chemicals on the CCL.

EPA response: The Agency used data from the TRI and modeled occurrence data for pesticides developed by the Office of Pesticide Programs (OPP) to support the inclusion of contaminants on the CCL 3, but EPA did not rely on the Chemical Update System (CUS) and the Inventory Update Rule (IUR) data (*i.e.,* production volume).

In developing the CCL, SDWA requires that EPA consider unregulated contaminants that are known or anticipated to occur in PWSs and may require regulation. EPA believes that the TRI and the OPP data are sufficient for it to anticipate that a contaminant that is released into the environment may occur in a PWS. The Agency coupled these data with health effects information to evaluate contaminants. The NRC (2001) and NDWAC (2004) reports included specific recommendations on data and information that the Agency could use to anticipate the occurrence of contaminants in PWSs. Both of these panels cited the importance of identifying contaminants that did not yet have occurrence information indicating detections in source waters or drinking water. NDWAC recognized that the Agency could apply a hierarchy to the use of detected occurrence over potential occurrence, but also noted that the use of these types of data enables the Agency to be proactive in protecting public health.

EPA also conducted several reviews of the data sources and information used to develop the CCL 3. EPA sought contaminants for the Agency to consider in its FR notice, seeking nominations (71 FR 65573, USEPA 2006b). The Agency published a list of data sources including the TRI, CUSIUR, and NCFAP. Many of the nominated contaminants are chemicals included solely on those lists. The Agency also conducted several expert panels to review the types of data and information it used to evaluate contaminants. While these panels provided recommendation to qualify these types of data, which the Agency implemented, the panels did not recommend excluding these data sources. Based on this input from stakeholders and expert reviews, the Agency included 51 contaminants with TRI and/or modeled occurrence data for pesticides to support inclusion on the CCL 3 because EPA anticipates that these contaminants may occur in PWSs and may require regulation.

2. Contaminant Candidate List and Unregulated Contaminant Monitoring Regulation

Several commenters requested clarification on the interrelationship between the UCMR and the CCL. Commenters wanted to know whether the CCL draws from chemicals on the UCMR, or the UCMR draws from chemicals on the CCL to develop the respective lists. One commenter encouraged EPA to "improve correlation between the CCL and the UCMR."

EPA response: The 1996 amendments to SDWA instituted the CCL and UCMR programs to provide information EPA needs to determine which drinking water contaminants have the greatest potential to present a meaningful opportunity to reduce health risk through a NPWDR. The CCL is the primary mechanism for the identification of contaminants that may require regulation, while UCMR provides EPA with the data necessary to determine if a contaminant occurs at a frequency and at levels of public health concern. The CCL and UCMR are parts

of the risk management process, and they support and inform each other.

The UCMR sampling program was designed to consider the technical difficulty and expense of analyzing up to 30 contaminants as well as their potential to occur in treated drinking water at levels of public health concern. The UCMR approach includes three different sampling design options, with the determination of the appropriate option for each contaminant based primarily on the difficulty and expense of the analytical methods used, and the associated issue of laboratory capacity. The sampling designs described below are discussed in detail in the proposed UCMR 2 (70 FR 49094; USEPA 2005). Assessment monitoring is the most extensive, and is used when the technology of the analytical methods is in common use in drinking water laboratories. Screening monitoring relies more on identifying a statistically valid representation of the universe of PWSs in order to reduce the number of utilities impacted by the monitoring. It is designed to assure the necessary laboratory capacity in those cases where the analytical technology is more complex and/or expensive. The pre-screening monitoring option detailed in the UCMR program is based on assessing the vulnerability of selected PWSs and may be used when the analytical techniques are so complex that commercial laboratory capacity is severely limited; this option has not been exercised to date.

EPA promulgated UCMR 2 on January 4, 2007 (72 FR 367; USEPA 2007a). The UCMR program was developed in coordination with the development of the CCL. Both programs consider the adverse health effects a contaminant may pose through drinking water exposures.

Sixteen contaminants on the UCMR 2 monitoring list are also on the final CCL 3. The final CCL 3 includes acetochlor and its degradates, alachlor degradates, dimethoate, 1,3-dinitrobenzene, metolachlor and its degradates, RDX, terbufos sulfone, and four of the nitrosamines that are a part of UCMR 2. In addition to the health effects data and potential occurrence, the UCMR 2 also considers analytical method availability and cost, availability of analytical standards, and laboratory capacity to support a nationwide monitoring program in selecting contaminants.

The UCMR 2 includes nine contaminants that are not on the final CCL 3. The five polybrominated flame retardants can be measured by the same analytical method used for terbufos sulfone. The polybrominated flame retardants are listed on UCMR 2 because of concern that these have become more widespread environmental contaminants (Darnerud *et al.,* 2001). The polybrominated flame retardants lacked sufficient occurrence information to be listed on final CCL 3 (73 FR 9628; USEPA 2008a). This UCMR 2 monitoring data will provide information for future CCLs. Similarly, 2,4,6-trinitrotoluene (TNT) and two of the nitrosamines not on CCL 3 are also measured by an analytical method in the UCMR 2. Alachor was listed on UCMR 2 for monitoring along with its degradates to allow for the measurement of co-concurrence between the parent compound and its degradates. It was removed from consideration for CCL 3 because it is currently regulated. The Agency will use the results from UCMR 2 as a source of occurrence information during the development of CCL 4, as well as for CCL 3 regulatory determinations.

IV. Data Needs for CCL 3 Contaminants

After the listing process, the CCL 3 contaminants are evaluated further to determine if a contaminant has sufficient data to meet the regulatory determination criteria set forth in SDWA section 1412(b)(1) and previously outlined in Section I.C of this notice. If the data are sufficient, a regulatory determination may be made. EPA must make regulatory determinations on at least five CCL 3 contaminants every five years.

The SAB and other commenters have indicated that the CCL 3 may be too large and recommended additional priority ranking of contaminants to focus resources. EPA acknowledges that many contaminants on the CCL 3 have substantial data and information needs that will have to be met before the Agency can make a regulatory determination in accordance with SDWA 1412 (b)(1)(A). Currently, several of the CCL 3 contaminants have data or information needs. These are described in the following section.

A. Chemical Contaminants

EPA assessed the data and information gathered on the CCL 3 chemical contaminants and generated a table (Exhibit 2) to help identify data/information needs for further regulatory determination evaluations. In general, EPA characterized each chemical contaminant included on the final CCL 3 for their data needs in three categories; health effects, occurrence, and analytical methods. The data needs were characterized as no data needs, specific data needs, or substantial data needs. The health effects, occurrence, and analytical methods data/information used to classify data needs are featured in the supporting documentation and in the "Final CCL 3 Contaminant Information Sheets" in the docket (USEPA, 2009e). Blank cells in Exhibit 2 generally indicate that there is no data need for that contaminant in that category. Cells with a "2" indicate that the data are under evaluation by EPA and the contaminant has a specific need. Cells with a "1" indicate that there is a data need for that contaminant, and that need may be substantial. The following sections describe the types of data or information gaps outlined in Exhibit 2 and provide examples.

1. Health Effects

EPA categorized the health effects data needs for Exhibit 2 using the following set of assumptions. Any chemical that had an existing EPA quantitative assessment (Reference Dose (RfD) or Cancer Slope Factor (CSF)) for the oral route of exposure is identified on the table as not having a health effect data need based on the assumption that EPA will be able to use the existing data along with more recent studies to develop a quantitative health effects assessment. These chemicals are designated with a blank cell in the health effects column. There may well be opportunities to further elucidate mode of action or to reduce uncertainty for the analyses associated with these contaminants, but such data would not be necessary to develop an assessment. Similarly, any chemical that has an assessment being developed by EPA is not identified on the table as having a data need, and is represented by a blank cell because that work is currently ongoing.

The next category of chemicals with health effects data needs have quantitative assessments conducted by other government agencies such as WHO, and Agency for Toxic Substances and Disease Registry. These chemicals are designated with a "2" in the health effects column on the table, signifying that an EPA assessment is needed and sufficient information may be available to initiate the assessment. These data apply to oral exposures that can be used to support a quantitative assessment of risk; however, EPA has not yet thoroughly evaluated the existing risk assessment to determine if it and the supporting data meet EPA data quality guidelines and is compatible with EPA risk assessment policies. For example, at times there may be an RfD-equivalent for oral exposures based on inhalation data (*i.e.,* California EPA), which is an approach EPA does not typically use unless there is a physiologically-based

pharmacokinetic model that supports the cross route extrapolation. The Agency is currently evaluating whether this type of model information and results are available. For a few chemicals marked with the "2" designation in the health effects column, there is no assessment by another agency, but EPA identified a critical study suitable for quantification of likely cancer risk during the development of the CCL 3 process. In these cases, an assessment is needed based on the data identified.

The final group of chemicals on Exhibit 2 is designated with a "1" in the health effects column of the table. For these chemicals, the CCL process used data from a small group of studies identified through the Registry of Toxic Effects for Chemical Substances (RTECS), a provisional Risk Assessment Information System Health Effects assessment, and/or a limited literature search for the health effects component of the CCL 3 evaluation. These chemicals have the most substantial health effects data gaps and information collection needs.

2. Occurrence

EPA categorized the occurrence data needs for Exhibit 2, after evaluating data availability from UCMR 1 and 2, Unregulated Contaminant Monitoring Round 1 and 2 (UCM R1/2), National Inorganic Radiological Survey (NIRS), NAWQA, TRI, NCFAP, and other supplemental data sources.

Chemicals with finished water occurrence data from UCMR 1, UCMR 2, or UCM R1/2 were generally characterized as not having an occurrence data gap because these data are considered nationally representative; therefore, they have sufficient occurrence data to be further evaluated if it is consistent with the health effects information. These chemicals are designated with a blank cell in the occurrence column of Exhibit 2.

Contaminants from data sources with limited PWS monitoring data (*i.e.,* ground water systems only), spatial or geographical data limitations, and/or a small sample size were identified as having a data gap because additional monitoring data may be needed for further evaluation as part of the regulatory determinations process. These were given a "2" in the occurrence column of Exhibit 2, and examples of data sources with this type of data include the UCMR screening survey, NIRS, DBP ICR data, and others.

Chemicals from occurrence data sources with ambient monitoring data, environmental release data, or modeled data were given a "1" in the occurrence column because there are substantial additional data needs to be considered and evaluated as part of the regulatory determinations process. Examples of data sources with this type of data include USGS's NAWQA, National Reconnaissance of Emerging Contaminants, TRI, and others with similar data.

3. Analytical Methods

To conduct nationally representative drinking water occurrence studies, and support a regulatory determination, EPA must have an analytical method that is suitable for the drinking water matrix and is robust enough to be used by many laboratories to conduct national studies and/or compliance monitoring. The analytical method should be sensitive enough to allow for quantitation of the chemical at a concentration below the HRL, or as close to the HRL as practically feasible.

EPA categorized available analytical methods for the CCL chemicals to define the data needs presented in Exhibit 2. EPA reviewed the methods to assess if they had been developed for drinking water and then evaluated estimated reporting levels for the chemical by that method. When available, method-specific reporting levels, lowest concentration minimum reporting levels, and promulgated minimum reporting levels were also used to measure method sensitivity. When this was not possible, EPA used a value of five times the method detection limit or detection limit; this approach has been used in the past.

Chemicals with blanks in the analytical methods column of Exhibit 2 are generally those chemicals for which EPA has an established drinking water method, with estimated reporting levels that are adequate for analysis relative to the HRL. However, in some cases, a blank may also signify that EPA is currently in the process of developing a method that it believes will have adequate reporting levels. Chemicals with a "2" in the analytical method column of Exhibit 2 have a drinking water method that is under development by EPA. EPA has evaluated the available methods for each of these chemicals and determined that the reporting level does not allow for quantitation of the chemical at a concentration below the HRL or as close to the HRL as practical. Therefore, EPA has designated that these methods require further development to increase their sensitivity and lower the estimated method reporting level or method detection level. Those chemicals listed as a "1" in the methods column do not have an established method for drinking water or a method that is suitable for a national drinking water occurrence study.

Key to Exhibit 2

The following key is a reference guide to reading Exhibit 2 and interpreting the data presented in the table.

Note: Categories are based on the extent of available data for each contaminant.

1. *Health Effects:*

1 = Substantial data needs (RTECS, RAISHE, and other small study data); 2 = Assessments exist from other government agencies. Sufficient information may exist to conduct an EPA assessment; Blank = Existing or ongoing EPA quantitative assessment (*e.g.,* IRIS)

2. *Occurrence:*

1 = No comprehensive drinking water occurrence data (*e.g.,* often only environmental release data such as TRI, or ambient water data), 2 = Limited available drinking water monitoring data; however, data may be limited by scope and sample size (*e.g.,* UCMR 1 Screening Survey, NIRS); Blank = EPA has more extensive national drinking water monitoring data (*e.g.,* UCMR, UCM R1/2)

3. *Analytical Method:*

1 = No analytical method suitable for national drinking water occurrence studies; 2 = Drinking water method in development or being re-evaluated for comparison with new health effects information; Blank = EPA has a method or is in the process of developing a method that could be used for national drinking water monitoring.

EXHIBIT 2. REGULATORY DETERMINATION DATA/INFORMATION NEEDS FOR CCL 3 CHEMICALS

CASRN	Common name	Health effects	Occurrence	Analytical methods
630206	1,1,1,2-Tetrachloroethane			
75343	1,1-Dichloroethane	1		2
96184	1,2,3-Trichloropropane			
106990	1,3-Butadiene	1	1	2
99650	1,3-Dinitrobenzene			

EXHIBIT 2. REGULATORY DETERMINATION DATA/INFORMATION NEEDS FOR CCL 3 CHEMICALS—Continued

CASRN	Common name	Health effects	Occurrence	Analytical methods
123911	1,4-Dioxane		1	
71363	1-Butanol		1	1
109864	2-Methoxyethanol	2	1	1
107186	2-Propen-1-ol		1	1
16655826	3-Hydroxycarbofuran	2		
101779	4,4'-Methylenedianiline	2	1	1
30560191	Acephate		1	2
75070	Acetaldehyde		2	
60355	Acetamide	2	1	1
34256821	Acetochlor			
187022113	Acetochlor ethanesulfonic acid (ESA)	2		
184992444	Acetochlor oxanilic acid (OA)	2		
107028	Acrolein		1	1
142363539	Alachlor ethanesulfonic acid (ESA)	2		
171262172	Alachlor oxanilic acid (OA)	2		
319846	alpha-Hexachlorocyclohexane		1	2
64285069	Anatoxin-a		1	2
62533	Aniline	2	1	1
741582	Bensulide		1	1
100447	Benzyl chloride		1	1
25013165	Butylated hydroxyanisole	2	1	2
133062	Captan		1	2
14866683	Chlorate		2	
74873	Chloromethane (Methyl chloride)	2		
110429624	Clethodim		1	2
7440484	Cobalt		2	
80159	Cumene hydroperoxide	1	1	1
143545908	Cylindrospermopsin		1	2
141662	Dicrotophos		1	2
55290647	Dimethipin		1	2
60515	Dimethoate			
298044	Disulfoton		2	
330541	Diuron		2	
114078	Erythromycin	2	1	1
13194484	Ethoprop		1	2
107211	Ethylene glycol		1	1
75218	Ethylene oxide	1	1	1
96457	Ethylene thiourea		1	2
22224926	Fenamiphos		1	2
50000	Formaldehyde		2	
7440564	Germanium	1	2	2
74975	Halon 1011 (bromochloromethane)	1		2
75456	HCFC–22	1	1	2
110543	Hexane	1	1	1
302012	Hydrazine		1	1
10265926	Methamidophos		1	2
67561	Methanol		1	1
74839	Methyl bromide (Bromomethane)			
1634044	Methyl tert-butyl ether			
51218452	Metolachlor			
171118095	Metolachlor ethanesulfonic acid (ESA)	2		
152019733	Metolachlor oxanilic acid (OA)	2		
101043372	Microcystin-LR		1	2
2212671	Molinate			
7439987	Molybdenum		2	
98953	Nitrobenzene			
55630	Nitroglycerin	2	1	1
872504	N-Methyl-2-pyrrolidone	2	1	1
55185	N-Nitrosodiethylamine (NDEA)			
62759	N-nitrosodimethylamine (NDMA)			
621647	N-Nitroso-di-n-propylamine (NDPA)			
86306	N-Nitrosodiphenylamine		1	1
930552	N-nitrosopyrrolidine (NPYR)			
103651	n-Propylbenzene	1		2
95534	o-Toluidine	2	1	2
75569	Oxirane, methyl-		1	1
301122	Oxydemeton-methyl		1	2
42874033	Oxyfluorfen		1	2
14797730	Perchlorate			
1763231	Perfluorooctane sulfonic acid (PFOS)	2	1	
335671	Perfluorooctanoic acid (PFOA)	2	1	

EXHIBIT 2. REGULATORY DETERMINATION DATA/INFORMATION NEEDS FOR CCL 3 CHEMICALS—Continued

CASRN	Common name	Health effects	Occurrence	Analytical methods
52645531	Permethrin		1	2
41198087	Profenofos		1	2
91225	Quinoline		1	2
121824	RDX			
135988	sec-Butylbenzene	1		2
7440246	Strontium		2	
107534963	Tebuconazole		1	2
112410238	Tebufenozide		1	1
13494809	Tellurium	1	2	2
13071799	Terbufos		2	
56070167	Terbufos sulfone	2		
59669260	Thiodicarb		1	2
23564058	Thiophanate-methyl		1	2
26471625	Toluene diisocyanate	2	1	1
78488	Tribufos		1	2
121448	Triethylamine	1	1	1
76879	Triphenyltin hydroxide (TPTH)		1	1
51796	Urethane	2	1	1
7440622	Vanadium	2	2	
50471448	Vinclozolin		1	2
137304	Ziram		1	1
57910	17alpha-estradiol	1	1	1
517099	Equilenin	1	1	1
474862	Equilin	1	1	1
50282	Estradiol (17-beta estradiol)	2	1	
50271	Estriol	1	1	2
53167	Estrone	1	1	2
57636	Ethinyl Estradiol (17-alpha ethynyl estradiol)	1	1	2
72333	Mestranol	1	1	1
68224	Norethindrone (19-Norethisterone)	1	1	1

B. Microbial Contaminants

EPA intends to look at the over-arching risk posed by pathogens in drinking water. To this end, EPA is planning to evaluate the CCL 3 pathogens in the context of the existing drinking water regulatory program to determine the sufficiency of the barriers that help to prevent exposure.

Commenters noted a need for information on the national occurrence of pathogens in drinking water. Development of such data would aid EPA in determining the likelihood that pathogens will occur in public water systems and thus clarify the extent to which they represent a significant public health threat. One aspect of determining the occurrence of any contaminant is the availability of a method to monitor for that contaminant. While there are many methods for monitoring the CCL 3 pathogens available from scientific papers and consensus organizations, not all of them may be appropriate for use in drinking water or for a national monitoring effort. Of the CCL 3 pathogens, only enterovirus has an EPA-approved method for drinking water. EPA is working on developing and approving drinking water methods for some of the pathogens, and is considering the need for additional occurrence information. In addition, EPA is evaluating the suitability of current microbial indicators as well as the reliability of other indicators for CCL pathogens.

Furthermore, the Agency is actively working with stakeholders on additional information on distribution system issues needed to inform national risk management actions such as regulations and guidance. Based on currently available information, EPA and other stakeholders have identified the following issues as being the most relevant to protecting public health and maintaining the integrity of drinking water distribution systems for future consideration: cross connections and backflow of contaminated water; storage facility design, operation, or maintenance; main installation, repair or rehabilitation practices; intrusion due to pressure conditions; significance and control of biofilm and microbial growth; nitrification issues; and accumulation and release of contaminants from distribution system scales and sediments. These issues may be applicable to chemicals as well as microbial contaminants.

V. Next Steps/Future Candidate Contaminant Lists

The CCL process is a critical input to shaping the future direction of the drinking water program. The Agency will continue to gather information and evaluate contaminants on the CCL 3 to make a regulatory determination for at least five contaminants by 2013. The Agency will also continue to refine the CCL process and gather more data to identify contaminants for the fourth CCL by 2014. EPA will also continue to work to prioritize contaminants on the CCL 3, both for regulatory determination and for additional research and data collection.

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Dated: September 21, 2009.

Michael H. Shapiro,

Acting Assistant Administrator, Office of Water.

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FEDERAL ELECTION COMMISSION

Sunshine Act Notices

AGENCY: Federal Election Commission.

DATE AND TIME: Tuesday, October 6, 2009, at 10 a.m.

PLACE: 999 E Street, NW., Washington, DC (Ninth Floor).

STATUS: This meeting will be closed to the public.

ITEMS TO BE DISCUSSED:

Compliance matters pursuant to 2 U.S.C. 437g.

Audits conducted pursuant to 2 U.S.C. 437g, § 438(b), and Title 26, U.S.C.

Matters concerning participation in civil actions or proceedings or arbitration.

Internal personnel rules and procedures or matters affecting a particular employee.

DATE AND TIME: Thursday, October 8, 2009, at 10 a.m.

PLACE: 999 E Street, NW., Washington, DC (Ninth Floor).

STATUS: This meeting will be open to the public.

ITEMS TO BE DISCUSSED:

Correction and Approval of Minutes.

Notices of Proposed Rulemaking Implementing DC Court of Appeals Opinion in Shays v. FEC.

Draft Advisory Opinion 2009–22: Democratic Senatorial Campaign Committee, by Marc Elias, Esquire.

Draft Advisory Opinion 2009–23: Virginia Chapter of Sierra Club, by B. Holly Schadler and Michael B. Trister, Esqs.

Draft Advisory Opinion 2009–24: Illinois Green Party, by John Ailey, Treasurer.

Management and Administrative Matters.

Individuals who plan to attend and require special assistance, such as sign language interpretation or other reasonable accommodations, should contact Mary Dove, Commission Secretary, at (202) 694–1040, at least 72 hours prior to the hearing date.

PERSON TO CONTACT FOR INFORMATION: Judith Ingram, Press Officer, Telephone: (202) 694–1220.

Mary W. Dove,

Secretary of the Commission.

[FR Doc. E9–24141 Filed 10–6–09; 11:15 am]

BILLING CODE 6715–01–M

FEDERAL RESERVE SYSTEM

Change in Bank Control Notices; Acquisition of Shares of Bank or Bank Holding Companies

The notificants listed below have applied under the Change in Bank Control Act (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire a bank or bank holding company. The factors that are considered in acting on the notices are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The notices are available for immediate inspection at the Federal Reserve Bank indicated. The notices also will be available for inspection at the office of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank indicated for that notice or to the offices of the Board of Governors. Comments must be received not later than October 24, 2009.

A. Federal Reserve Bank of Minneapolis (Jacqueline G. King, Community Affairs Officer) 90 Hennepin Avenue, Minneapolis, Minnesota 55480-0291:

1. Darin J. Latterall, Kelliher, Minnesota, to acquire 25 percent or more of the voting shares of Kelliher Bancshares, Inc., Kelliher, Minnesota, and thereby indirectly gain control of Citizens State Bank of Kelliher, Kelliher, Minnesota

Board of Governors of the Federal Reserve System, October 5, 2009.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. E9–24276 Filed 10–7–09; 8:45 am]

BILLING CODE 6210–01–S

FEDERAL RESERVE SYSTEM

Sunshine Act Meeting

AGENCY HOLDING THE MEETING: Board of Governors of the Federal Reserve System.

TIME AND DATE: 11:30 a.m., Tuesday, October 13, 2009.

PLACE: Marriner S. Eccles Federal Reserve Board Building, 20th and C Streets, N.W., Washington, D.C. 20551.

STATUS: Closed.

MATTERS TO BE CONSIDERED:

1. Personnel actions (appointments, promotions, assignments, reassignments, and salary actions) involving individual Federal Reserve System employees.

2. Any items carried forward from a previously announced meeting.

FOR FURTHER INFORMATION CONTACT: Michelle Smith, Director, or Dave Skidmore, Assistant to the Board, Office of Board Members at 202–452–2955.

SUPPLEMENTARY INFORMATION: You may call 202–452–3206 beginning at approximately 5 p.m. two business days before the meeting for a recorded announcement of bank and bank holding company applications scheduled for the meeting; or you may contact the Board's Web site at *http://www.federalreserve.gov* for an electronic announcement that not only lists applications, but also indicates procedural and other information about the meeting.

Board of Governors of the Federal Reserve System, October 6, 2009.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. E9–24369 Filed 10–7–09; 8:45 am]

BILLING CODE 6210–01–S

FEDERAL MARITIME COMMISSION

Ocean Transportation Intermediary License Applicants

Notice is hereby given that the following applicants have filed with the Federal Maritime Commission an application for license as a Non-Vessel-Operating Common Carrier and Ocean Freight Forwarder-Ocean Transportation Intermediary pursuant to section 19 of the Shipping Act of 1984 as amended (46 U.S.C. Chapter 409 and 46 CFR part 515).

Persons knowing of any reason why the following applicants should not receive a license are requested to contact the Office of Transportation Intermediaries, Federal Maritime Commission, Washington, DC 20573.

Non-Vessel-Operating Common Carrier and Ocean Freight Forwarder Transportation Intermediary Applicants:

Ves-Aire Shipping Inc., 5740 Hollywood Blvd. Ste. 201, Hollywood, FL 33021, Officers: Edgar D. Diaz, President (Qualifying Individual), Carmen Diaz, Vice President.

Global Logistics Services, Inc., 9667 NW. 33 Street, Miami, FL 33172, Officers: Ana Conlan, Vice President (Qualifying Individual), Ed Boroski, CEO.

Overseas Express Shipping LLC, 1139 East Jersey Street, Ste. 209, Elizabeth, NJ 07201, Officer: Thomas Osei, Sr., General Manager (Qualifying Individual), Yaw Amankwah, President.

JTS Freight Systems LLC, 81 Belvidere Rd., Glen Rock, NJ 07452, Officer: Frank Savino, President (Qualifying Individual).

Ocean Freight Forwarder-Ocean Transportation Intermediary Applicants:

Gene Y. Taguchi, 15504 S. Western Ave., Ste. 201–23, Gardena, CA 90249 (Qualifying Individual).

MIG Express LLC, 174 Main Street, Ste. 14, Nashua, NH 03060, Officer: Igors Ngin, Manager (Qualifying Individual).

Wilmoth Fast Forwarding, Inc., 13302 Michaelangelo Drive, Bakersfield, CA 93314, Officer: Marvin J. Hodgson, President (Qualifying Individual).

Total Global Solutions, Inc., 4290 Bells Ferry Rd., #224, Ste. 106, Kennesaw, GA 30144, Officers: Tomomi Hamamura, CFO/Treasurer (Qualifying Individual), Dennis R. Smith, CEO/President.

AAWI Logistical Services LLC, 1303 Columbia Drive, Ste. 217, Richardson, TX 75081, Officers: Rebecca Kelley-James, President, (Qualifying Individual), Dell James, Vice President.

Dated: October 5, 2009.

Karen V. Gregory,

Secretary.

[FR Doc. E9–24292 Filed 10–7–09; 8:45 am]

BILLING CODE P

FEDERAL MARITIME COMMISSION

Ocean Transportation Intermediary License Revocations

The Federal Maritime Commission hereby gives notice that the following Ocean Transportation Intermediary licenses have been revoked pursuant to section 19 of the Shipping Act of 1984 (46 U.S.C. Chapter 409) and the regulations of the Commission pertaining to the licensing of Ocean Transportation Intermediaries, 46 CFR part 515, effective on the corresponding date shown below:

License Number: 020097N.

Name: Direct Services Solutions, Inc.

Address: 2 Giralda Farms, Madison Ave., P.O. Box 880, Madison, NJ 07904–0880.

Date Revoked: August 21, 2009.

Reason: Surrendered license voluntarily.

License Number: 001307F.

Name: Elite Customs Brokers, Inc.

Address: 2016 Linden Blvd., Ste. 18, Elmont, NY 11003.

Date Revoked: September 13, 2009.

Reason: Failed to maintain a valid bond.

License Number: 021025F.

Name: Marietha International Forwarding, Inc.

Address: 3501 N. Causeway Blvd., Ste. 324, Metairie, LA 70002.

Date Revoked: September 16, 2009.

Reason: Failed to maintain a valid bond.

License Number: 002023F.

Name: Pike Shipping Co., Inc.

Address: 2325 N. Hullen, Ste. 105, Metairie, LA 70001.

Date Revoked: September 12, 2009.

Reason: Failed to maintain a valid bond.

License Number: 019791N.

Name: Ruky International Company.

Address: 149 Isabelle Street, Metuchen, NJ 08840.

Date Revoked: September 14, 2009.

Reason: Failed to maintain a valid bond.

License Number: 021690F.

Name: Scrap Freight, Inc.

Address: 801 S. Garfield Ave., Ste. 101, Alhambra, CA 91801.

Date Revoked: September 25, 2009.

Reason: Surrendered license voluntarily.

License Number: 018092F.

Name: Shipping Corporation International,

Address: Conley Terminal Massport Admin. Bldg., Ste. 210/215, So. Boston, MA 02127.

Date Revoked: September 12, 2009.

Reason: Failed to maintain a valid bond.

License Number: 020295NF.

Name: Yavid Corporation.

Address: 10451 NW. 28th Street, Ste. F–101, Miami, FL 33172.

Date Revoked: September 17, 2009.

Reason: Failed to maintain valid bonds.

Sandra L. Kusumoto,

Director, Bureau of Certification and Licensing.

[FR Doc. E9–24291 Filed 10–7–09; 8:45 am]

BILLING CODE P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2009–D–0438]

Guidance for Industry and Food and Drug Administration Staff; Implementation of Medical Device Establishment Registration and Device Listing Requirements Established by the Food and Drug Administration Amendments Act of 2007; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the availability of the guidance entitled "Implementation of Medical Device Establishment Registration and Device Listing Requirements Established by the Food and Drug Administration Amendments Act of 2007." The purpose of this guidance is to explain recent changes in the device registration and listing program to owner/operators and official correspondents of device establishments and to help them fulfill these new requirements. The guidance also describes the information that owner/operators of device establishments must submit to register their establishments and list their devices electronically, using FDA Form No. 3673. Those owner/operators seeking a waiver from the electronic submission requirement must submit their requests in writing to FDA with a complete explanation of why their registration and listing information cannot reasonably be submitted electronically. This guidance document is immediately in effect, but it remains subject to comment in accordance with the agency's good guidance practices (GGPs).

DATES: Submit written or electronic comments on this guidance at any time. General comments on agency guidelines are welcome at any time.

ADDRESSES: Submit written requests for single copies of the guidance document entitled "Implementation of Medical Device Establishment Registration and Device Listing Requirements Established by the Food and Drug Administration Amendments Act of 2007" to the Division of Small Manufacturers, International, and Consumer Assistance, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, rm. 4613, Silver Spring, MD 20993–0002. Send one self-addressed adhesive label to assist that office in processing your request, or fax your request to 301–847–8149. See the **SUPPLEMENTARY INFORMATION** section for information on electronic access to the guidance.

Submit written comments concerning this guidance to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. Submit electronic comments to *http://www.regulations.gov*. Identify comments with the docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: David Racine, Center for Devices and Radiological Health (HFZ–410), Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, rm. 2672, Silver Spring, MD 20993–0002, 301–796–5777.

SUPPLEMENTARY INFORMATION:

I. Background

In October 2002, section 510 of the Federal Food, Drug, and Cosmetic Act (the act) (21 U.S.C. 360) was amended by section 207 of the Medical Device User Fee and Modernization Act of 2002 (Public Law 107–250) to add a requirement for electronic submission of registration information. On September 27, 2007, the Food and Drug Administration Amendments Act of 2007 (FDAAA) (Public Law–110–85) further amended the device registration and listing provisions in section 510 of the act and also added provisions to sections 737 and 738 of the act (21 U.S.C. 379i and 379j) to require certain types of device establishments to pay user fees in connection with their initial or annual registration beginning on October 1, 2007. As amended, section 510(p) of the act now requires all device establishments to submit their device registration and listing information by electronic means unless FDA grants their request for a waiver.

The guidance described in this document explains the new, electronic process for registration and listing using the Internet and the process for requesting a waiver from FDA. In addition, the guidance specifies the user fee amounts for each fiscal year (FY) through FY 2012.

FDAAA imposes new requirements on device establishments to submit their registration and listing information to FDA through electronic means and to pay user fees in connection with their registration beginning on October 1, 2007. FDAAA was signed into law September 27, 2007. Because the law was immediately in effect, FDA determined that it was not feasible to obtain public participation prior to implementing the new FDAAA requirements described in this guidance. Therefore, in accordance with FDA's GGP procedures at 21 CFR 10.115(g)(2), FDA is issuing this as a level 1 guidance that is immediately in effect and will accept comments on the guidance at any time.

II. Significance of Guidance

This guidance is being issued consistent with FDA's GGPs regulation (21 CFR 10.115). The guidance represents the agency's current thinking on this topic. It does not create or confer any rights for or on any person and does not operate to bind FDA or the public. An alternative approach may be used if such approach satisfies the requirements of the applicable statute and regulations.

III. Electronic Access

Persons interested in obtaining a copy of the guidance may do so by using the Internet. To receive "Implementation of Medical Device Establishment Registration and Device Listing Requirements Established by the Food and Drug Administration Amendments Act of 2007," you may either send an e-mail request to *dsmica@fda.hhs.gov* to receive an electronic copy of the document or send a fax request to 301–847–8149 to receive a hard copy. Please use the document number (1657) to identify the guidance you are requesting.

CDRH maintains a web site on the Internet for easy access to information including text, graphics, and files that may be downloaded to a personal computer with Internet access. Updated on a regular basis, the CDRH home page includes device safety alerts, **Federal Register** reprints, information on premarket submissions (including lists of approved applications and manufacturers' addresses), small manufacturer's assistance, information on video conferencing and electronic submissions, Mammography Matters, and other device-oriented information. The CDRH web site may be accessed at *http://www.fda.gov/cdrh*. A search capability for all CDRH guidance documents is available at *http://www.fda.gov/cdrh/guidance.html*. Guidance documents are also available at *http://www.regulations.gov*.

IV. Paperwork Reduction Act of 1995

This guidance contains information collection provisions that are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). The collections of information in

this guidance were approved under OMB control number 0910–0625.

V. Comments

Interested persons may submit to the Division of Dockets Management (see ADDRESSES) written or electronic comments on this guidance document. Submit a single copy of electronic comments or two paper copies of any mailed comments, except that individuals may submit one paper copy. Comments are to be identified with the docket number found in brackets in the heading of this document. Received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m. Monday through Friday.

Dated: September 30, 2009.

Jeffrey Shuren,

Acting Director, Center for Devices and Radiological Health.

[FR Doc. E9–24349 Filed 10–7–09; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Cancellation of Meeting

Notice is hereby given of the cancellation of the Center for Scientific Review Special Emphasis Panel, October 23, 2009, 8 a.m. to October 23, 2009, 12 p.m., InterContinental Mark Hopkins San Francisco, One Nob Hill, 999 California Street, San Francisco, CA, 94108 which was published in the **Federal Register** on September 25, 2009, 74 FR 48979.

The meeting was cancelled due to administration problems.

Dated: October 1, 2009.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E9–24278 Filed 10–7–09; 8:45 am]

BILLING CODE 4140–01–M

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; Neuroprotection and Neurodegeneration.

Date: October 27–28, 2009.

Time: 8 a.m. to 11:59 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Virtual Meeting).

Contact Person: Peter B. Guthrie, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4142, MSC 7850, Bethesda, MD 20892, (301) 435–1239, *guthriep@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Biobehavioral Regulation, Learning and Ethology.

Date: October 27, 2009.

Time: 10 a.m. to 8 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Virtual Meeting).

Contact Person: Cheri Wiggs, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3180, MSC 7848, Bethesda, MD 20892, (301) 435–1261, *wiggs@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Cancer Diagnostics and Therapeutics SBIR/STTR.

Date: October 29–30, 2009.

Time: 9 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: Lambratu Rahman, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6214, MSC 7804, Bethesda, MD 20892, 301–451–3493, *rahmanl@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Signaling and DNA Repair.

Date: October 29, 2009.

Time: 9 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: Manzoor Zarger, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6208, MSC 7804, Bethesda, MD 20892, (301) 435–2477, *zargerma@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Tooth Development.

Date: October 29, 2009.

Time: 3 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: Priscilla B. Chen, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4104, MSC 7814, Bethesda, MD 20892, (301) 435–1787, *chenp@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Vascular Biology.

Date: October 30, 2009.

Time: 7 a.m. to 6 p.m.

Agenda: To review and evaluate grant applications.

Place: Embassy Suites Hotel at the Chevy Chase Pavilion, 4300 Military Road, NW., Washington, DC 20015.

Contact Person: Bukhtiar H. Shah, DVM, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4120, MSC 7802, Bethesda, MD 20892, (301) 435–1233, *shahb@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Research Resource Review.

Date: November 1–3, 2009.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Best Western Boston—The Inn at Longwood Medical, 342 Longwood Avenue, Boston, MA 02115.

Contact Person: Lee Rosen, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5116, MSC 7854, Bethesda, MD 20892, (301) 435–1171, *rosenl@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Drug Discovery for Neurodegenerative Diseases and Drug Abuse.

Date: November 3–4, 2009.

Time: 11 a.m. to 4:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Virtual Meeting).

Contact Person: Geoffrey G. Schofield, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4040–A, MSC 7850, Bethesda, MD 20892, 301–435–1235, *geoffreys@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Synchrotron Structural Biology Resource.

Date: November 3–5, 2009.

Time: 6 p.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Stanford Park Hotel, 100 El Camino Real, Menlo Park, CA 94025.

Contact Person: Nuria E. Assa-Munt, Ph.D., Scientific Review Officer, Center for

Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4164, MSC 7806, Bethesda, MD 20892, (301) 451–1323, *assamunu@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; BioTherapeutic Delivery Technology Resource Center.

Date: November 3–5, 2009.

Time: 6 p.m. to 4 p.m.

Agenda: To review and evaluate grant applications.

Place: Georgia Tech Hotel and Conference Center, 800 Spring Street, NW., Atlanta, GA 30308.

Contact Person: James J. Li, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5148, MSC 7849, Bethesda, MD 20892, 301–435–2417, *lijames@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Shared Mass Spectrometry Instrumentation.

Date: November 12–13, 2009.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Ritz Carlton Hotel, 1150 22nd Street, NW., Washington, DC 20037.

Contact Person: Kathryn M. Koeller, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4166, MSC 7806, Bethesda, MD 20892, 301–435–2681, *koellerk@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Small Business Hematology.

Date: November 13, 2009.

Time: 8 a.m. to 4 p.m.

Agenda: To review and evaluate grant applications.

Place: Doubletree Hotel Bethesda, 8120 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: Delia Tang, MD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4126, MSC 7802, Bethesda, MD 20892, 301–435–2506, *tangd@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; RFA–OD–09–008 BRDG—SPAN and RFA–OD–09–009 Catalyst ARRA.

Review Panel #13

Date: November 13, 2009.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Melrose Hotel, 2430 Pennsylvania Avenue, NW., Washington, DC 20037.

Contact Person: Claire E. Gutkin, Ph.D., MPH, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3138, MSC 7759, Bethesda, MD 20892, 301–594–3139, *gutkincl@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: October 1, 2009.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E9–24280 Filed 10–7–09; 8:45 am]

BILLING CODE 4140–01–M

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; Cancer Health Disparities.

Date: November 1–2, 2009

Time: 7 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Ritz Carlton Hotel, 1150 22nd Street, NW., Washington, DC 20037.

Contact Person: Elaine Sierra-Rivera, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6184, MSC 7804, Bethesda, MD 20892, 301–435–1779, *riverase@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Genome Instrumentation 1.

Date: November 9–10, 2009.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: The Westin St. Francis Hotel, 335 Powell Street, San Francisco, CA 94102.

Contact Person: Richard Panniers, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 2212, MSC 7890, Bethesda, MD 20892, (301) 435–1741, *pannierr@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Shared Instrumentation.

Date: November 9–10, 2009.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Pier 5 Hotel, 711 Eastern Avenue, Baltimore, MD 21202.

Contact Person: Richard A. Currie, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 1108, MSC 7890, Bethesda, MD 20892, (301) 435–1219, *currieri@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Behavioral Neuroscience Fellowship.

Date: November 9–10, 2009.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Doubletree Guest Suites Santa Monica, 1707 Fourth Street, Santa Monica, CA 90401.

Contact Person: Kristin Kramer, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5205, MSC 7846, Bethesda, MD 20892, (301) 435–1172, *kramerkm@csr.nihgov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Shared Instrumentation: Neuroscience.

Date: November 9, 2009.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Ritz Carlton Hotel, 1155 22nd Street, NW., Washington, DC 20037.

Contact Person: Keith Crutcher, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5207, MSC 7846, Bethesda, MD 20892, 301–435–1278, *crutcherka@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; RFA–OD–09–008 BRDG–SPAN and RFA–OD–09–009 Catalyst ARRA Review Panel 10.

Date: November 9, 2009.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Ritz Carlton Hotel, 1150 22nd Street, NW., Washington, DC 20037.

Contact Person: Angela Y. Ng, Ph.D., MBA, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6200, MSC 7804 (For courier delivery, use MD 20817), Bethesda, MD 20892, 301–435–1715, *nga@csr.nih.gov.*

Name of Committee: AIDS and Related Research Integrated Review Group; AIDS Molecular and Cellular Biology Study Section.

Date: November 9, 2009.

Time: 8 a.m. to 6 p.m.

Agenda: To review and evaluate grant applications.

Place: Ritz Carlton Hotel, 1150 22nd Street, NW., Washington, DC 20037.

Contact Person: Kenneth A. Roebuck, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5214, MSC 7852, Bethesda, MD 20892, (301) 435–1166, *roebuckk@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; High End Shared Instruments.

Date: November 9–10, 2009.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.
Place: Doubletree Hotel Chicago O'Hare Airport-Rosemont, 5460 North River Road, Rosemont, IL 60018.
Contact Person: Lee Rosen, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5116, MSC 7854, Bethesda, MD 20892, (301) 435–1171, *rosenl@csr.nih.gov.*
Name of Committee: Center for Scientific Review Special Emphasis Panel; Fellowships: Biophysical and Physiological Neuroscience.
Date: November 9–10, 2009.
Time: 8 a.m. to 5 p.m.
Agenda: To review and evaluate grant applications.
Place: The Fairmont Washington, DC, 2401 M Street, NW., Washington, DC 20037.
Contact Person: Eugene Carstea, Ph.D., Scientific Review Officer, Center for Scientific Review Nationa Institutes of Health, 6701 Rockledge Drive, Room 5199, MSC 7846, Bethesda, MD 20892, (301) 435–0634, *carsteae@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Biophysics of Membrane Fusion.
Date: November 9–10, 2009.
Time: 12 p.m. to 8 p.m.
Agenda: To review and evaluate grant applications.
Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).
Contact Person: William A. Greenberg, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4168, MSC 7806, Bethesda, MD 20892, (301) 435–1726, *greenbergwa@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Review of AIDS/HIV Small Business Innovative Research Applications.
Date: November 10–12, 2009.
Time: 6 a.m. to 2 p.m.
Agenda: To review and evaluate grant applications.
Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).
Contact Person: Kenneth A. Roebuck, Ph.D, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5106, MSC 7852, Bethesda, MD 20892, (301) 435–1166, *roebuckk@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Shared Instrumentation: Microscopy and Imaging.
Date: November 12–13, 2009.
Time: 8 a.m. to 5 p.m.
Agenda: To review and evaluate grant applications.
Place: Hilton Alexandria Old Town, 1767 King Street, Alexandria, VA 22314.
Contact Person: Ross D. Shonat, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5156, MSC 7849, Bethesda, MD 20892, 301–435–2786, *shonatr@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Program Project in Cell Biology.
Date: November 12–13, 2009.
Time: 8 a.m. to 6 p.m.
Agenda: To review and evaluate grant applications.
Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).
Contact Person: Alexandra M. Ainsztein, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5144, MSC 7840, Bethesda, MD 20892, 301–451–3848, *ainsztea@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Shared Instrumentation: Microscopy and Imaging.
Date: November 12–13, 2009.
Time: 8 a.m. to 5 p.m.
Agenda: To review and evaluate grant applications.
Place: Hotel Palomar, 2121 P Street, NW., Washington, DC 20037.
Contact Person: Steven Nothwehr, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5183, MSC 7840, Bethesda, MD 20892, 301–435–2492, *nothwehrs@mail.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; RFA–OD–09–008 BRDG–SPAN and RFA–OD–09–009 Catalyst ARRA Review Panel 11.
Date: November 12, 2009.
Time: 8 a.m. to 5 p.m.
Agenda: To review and evaluate grant applications.
Place: Ritz Carlton Hotel, 1150 22nd Street, NW., Washington, DC 20037.
Contact Person: Syed M. Quadri, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6210, MSC 7804, Bethesda, MD 20892, 301–435–1211, *quadris@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Shared Instrumentation: Microscopy and Imaging.
Date: November 12–13, 2009.
Time: 8 a.m. to 5 p.m.
Agenda: To review and evaluate grant applications.
Place: The Allerton Hotel, 701 North Michigan Avenue, Chicago, IL 60611.
Contact Person: Cathleen L. Cooper, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4208, MSC 7812, Bethesda, MD 20892, 301–443–4512, *cooperc@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Neuropharmacology.
Date: November 12–13, 2009.
Time: 8 a.m. to 5 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: Aidan Hampson, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5199, MSC 7850, Bethesda, MD 20892, (301) 435–0634, *hampsona@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Confocal Microscopy and Advanced Imaging.
Date: November 12, 2009.
Time: 8:30 a.m. to 5 p.m.
Agenda: To review and evaluate grant applications.
Place: Sheraton La Jolla Hotel, 3299 Holiday Court, La Jolla, CA 92037.
Contact Person: Jonathan Arias, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5170, MSC 7840, Bethesda, MD 20892, 301–435–2406, *ariasj@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Alzheimer's Disease Pilot Clinical Trials.
Date: November 13, 2009.
Time: 7 a.m. to 9 p.m.
Agenda: To review and evaluate grant applications.
Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).
Contact Person: Estina E. Thompson, Ph.D., MPH, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3178, MSC 7848, Bethesda, MD 20892, 301–496–5749, *thompsone@mail.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: September 30, 2009.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E9–24144 Filed 10–7–09; 8:45 am]

BILLING CODE 4140–01–M

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; Obstetrics and Maternal-Fetal Biology Subcommittee.

Date: November 2, 2009.

Time: 8:30 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Marriott Courtyard Gaithersburg Washingtonian Ctr., 204 Boardwalk Place, Gaithersburg, MD 20878.

Contact Person: Peter Zelazowski, Ph.D., Scientific Review Officer, Division of Scientific Review, Eunice Kennedy Shriver National Institute of Child Health and Human Development, NIH, 6100 Executive Blvd., Bethesda, MD 20892. 301–435–6902, *Peter.Zelazowski@Nih.Gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.864, Population Research; 93.865, Research for Mothers and Children; 93.929, Center for Medical Rehabilitation Research; 93.209, Contraception and Infertility Loan Repayment Program, National Institutes of Health, HHS)

Dated: October 1, 2009.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E9–24227 Filed 10–7–09; 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 Director's Council of Public Representatives.

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: Director's Council of Public Representatives.

Date: October 30, 2009.

Time: 9 a.m. to 5 p.m.

Agenda: Key topics for this meeting will focus on emerging issues of public importance in biomedical and behavioral research. Further information will be available on the COPR Web site.

Place: National Institutes of Health, Building 31, Conference Room 6, 9000 Rockville Pike, Bethesda, MD 20852.

Contact Person: Kelli L. Carrington, Executive Secretary/Public Liaison Officer, Office of Communications and Public Liaison, Office of the Director, National Institutes of Health, 9000 Rockville Pike, Building 1, Room 344, Bethesda, MD 20892, 301–594–4575, *carringk@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.copr.nih.gov,* 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: September 28, 2009.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E9–23790 Filed 10–7–09; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Toxicology Program (NTP); Report on Carcinogens (RoC); Announcement of the Formaldehyde Expert Panel Meeting: Amended Notice

AGENCY: National Institute of Environmental Health Sciences (NIEHS); National Institutes of Health (NIH).

ACTION: Availability of web conferencing and updated draft agenda.

SUMMARY: This notice announces the availability of web conferencing and an updated draft agenda for the RoC expert panel meeting on formaldehyde. The NTP has reserved web conferencing for the first 50 registrants; individuals who want to access the meeting remotely must pre-register by October 21, 2009. The web conferencing will be available during the public sessions of the meeting. The expert panel will meet on November 2–4, 2009, starting at 8:30 AM Eastern Standard Time, at the Hilton Raleigh-Durham Airport at Research Triangle Park Hotel, 4810 Page Creek Lane, Durham, NC 27703. Information regarding the formaldehyde expert panel meeting was announced in the **Federal Register** (74 FR 44845) published on August 31, 2009, and is available on the RoC Web site (*http://ntp.niehs.nih.gov/go/29679*). The guidelines and deadlines published in the August 31 **Federal Register** notice for submitting written public comments or making an oral presentation at the meeting in North Carolina still apply.

DATES: The RoC expert panel will meet on November 2–4, 2009, and convene each day at 8:30 a.m. Eastern Standard Time. October 21, 2009 is the deadline for meeting registration and requests for remote access. October 28, 2009 is the deadline for submission of oral statements and visual presentations.

ADDRESSES: The meeting will be held at the Hilton Raleigh-Durham Airport at Research Triangle Park Hotel, 4810 Page Creek Lane, Durham, NC 27703. Access to on-line registration to either attend the meeting in person in North Carolina or via Web conferencing is available on the RoC Web site (*http://ntp.niehs.nih.gov/go/29679*). Written public comments should be sent to Dr. Ruth M. Lunn, RoC Center, NIH/NIEHS, P.O. Box 12233, MD K2–14, Research Triangle Park, NC 27709, FAX: (919) 541–0144, or *lunn@niehs.nih.gov.* Courier address: Report on Carcinogens Center, 530 Davis Drive, Room 2006, Morrisville, NC 27560. Persons needing assistive technology in order to attend the meeting via web conferencing should contact Dr. Ruth Lunn (see **FOR FURTHER INFORMATION CONTACT** below). Requests should be made at least 7 business days in advance of the meeting.

FOR FURTHER INFORMATION CONTACT: Dr. Ruth M. Lunn, Director, RoC Center, (919) 316–4637, *lunn@niehs.nih.gov.*

SUPPLEMENTARY INFORMATION:

Web Conferencing

In response to public interest in the formaldehyde expert panel meeting, the NTP will provide web conferencing to facilitate remote access to the public sessions of the meeting. Web conferencing using Adobe® Connect™ will be available for the first 50 registrants. Individuals interested in attending the meeting remotely must register by October 21, 2009. Registration can be completed online at the RoC Web site (*http://ntp.niehs.nih.gov/go/29679*) or by

contacting Dr. Ruth Lunn (see **FOR FURTHER INFORMATION CONTACT** above). NTP will send registrants instructions to access the meeting remotely on or before October 30, 2009. Web conferencing is a new remote access option for RoC meetings. NTP will make every effort to ensure the best possible technical quality for these remote access options, but the audio and video quality cannot be guaranteed.

Attendees registered for remote access are invited to present oral comments. The formal public comment period is scheduled for November 2, 2009. Oral public comments should not exceed 7 minutes in length and each organization is allowed only one comment slot (in person or by remote access). Every effort will be made to accommodate the public, but the total time allotted for oral comments and the time allotted per speaker by remote access will depend on the number of people who register online to speak. Remote speakers who wish to use slides with their oral comments, must send an electronic file to Dr. Lunn by October 28, 2009, for the slides to be available for Web conferencing. In addition, speakers may send a copy of their oral statement or talking points, which can supplement and/or expand the oral presentation, for distribution at the meeting and for the meeting record.

Updated Draft Agenda

The updated draft agenda includes a scientific presentation on formaldehyde and leukemia requested by the NTP. Following this presentation, there will be opportunity for public comments on this topic. Pre-registration is not required to comment on this topic, and there is a 3-minute limit for each speaker.

Details about the meeting, including the updated draft agenda, are available at *http://ntp.niehs.nih.gov/go/29679* or by contacting Dr. Lunn (see **FOR FURTHER INFORMATION CONTACT** above). Updates to the meeting will be posted on this Web site.

Dated: October 1, 2009.

John R. Bucher,

Associate Director, National Toxicology Program.

[FR Doc. E9–24345 Filed 10–7–09; 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 Council of Councils.

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: Council of Councils.

Date: November 16–17, 2009.

Time: 9 a.m. to 12 p.m.

Agenda: Among the topics proposed for discussion are: updates on the Common Fund, American Recovery and Reinvestment Act, and NIH Roadmap initiatives; role of the Council.

Place: National Institutes of Health, Building 31C, 31 Center Drive, Conference Room 6, Bethesda, MD 20892.

Contact Person: Robin Kawazoe, Executive Secretary, Division of Program Coordination, Planning, and Strategic Initiatives, Office of the Director, NIH, Building 1, Room 260B, Bethesda, MD 20892, *kawazoer@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 shuffles 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.

(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: September 29, 2009.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E9–24279 Filed 10–7–09; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

National Health and Nutrition Examination Survey (NHANES) DNA Samples: Guidelines for Proposals To Use Samples and Cost Schedule [Correction]

The notice "National Health and Nutrition Examination Survey (NHANES) DNA Samples: Guidelines for Proposals to Use Samples and Cost Schedule," was published in the **Federal Register** on September 3rd, 2009, (Vol. 74 FR No. 170). This notice is corrected as follows:

On page 45647 first column, under Public Availability of Data, the Web site should read: *http://www.cdc.gov/nchs/nhanes/genetics/genetic_types.htm.*

Proposals for secondary data analyses linking NHANES public use data with genetic variation data will be reviewed by the Research Data Center see: *http://www.cdc.gov/nchs/r&d/rdc.htm* for proposal guidelines.

Dated: October 1, 2009.

James Stephens,

Associate Director for Science, Centers for Disease Control and Prevention.

[FR Doc. E9–24297 Filed 10–7–09; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

ODS Nutrient Biomarkers Analytical Methodology: Vitamin D Workshop; Notice

Notice is hereby given of the National Institutes of Health (NIH) Office of Dietary Supplements (ODS) Nutrient Biomarkers Analytical Methodology: Vitamin D Workshop to be held Wednesday, December 16, 2009 at the Bethesda North Marriott Hotel & Conference Center in Bethesda, Maryland 20852.

Summary: Vitamin D is a fat-soluble vitamin that is naturally present in very few foods, added to others, and available as a dietary supplement. It is also produced endogenously when ultraviolet rays from sunlight strike the

skin and trigger vitamin D synthesis. Vitamin D obtained from sun exposure, food, and supplements is biologically inert and must undergo two hydroxylations in the body for activation. The first occurs in the liver and converts vitamin D to 25-hydroxyvitamin D [25(OH)D], also known as calcidiol. The second occurs primarily in the kidney and forms the physiologically active 1,25-dihydroxyvitamin D [1,25$(OH)_2$D], also known as calcitriol.

Serum concentration of 25(OH)D is the best indicator of exposure to vitamin D from all sources. It reflects vitamin D produced cutaneously and that obtained from food and supplements. There is considerable discussion of the serum concentrations of 25(OH)D associated with deficiency (*e.g.,* rickets), adequacy for bone health, and optimal overall health. In fact, different assay methods are used to assess 25(OH)D. The methods themselves vary and there are considerable differences among laboratory results even when they use the same method.

Given the uncertainties in vitamin D measurement, the NIH/ODS will host this one-day workshop to evaluate the state of analytical methods. The intent of the Nutrient Biomarkers Analytical Methodology: Vitamin D Workshop is to develop strategies for resolving inconsistencies between results obtained following quantitative determination of selected nutrients in biological materials such as serum when different measurement techniques are used. The desired outcomes of this meeting are to identify strengths and weaknesses of analytical approaches available for the quantification of the nutritional biomarker of Vitamin D status, circulating 25(OH)D in biological samples and to discuss analytical methods, including criteria for selection of method(s); role of reference methods and samples; sample preparation and interpretation of results.

The workshop will consist of a series of short, focused podium presentations interspersed with open discussion sessions on the currently available analytical methods and interpretation of findings. A final session will summarize the discussions, identify knowledge gaps, and suggest a research agenda for future studies.

The sponsor of this meeting is the NIH Office of Dietary Supplements.

Registration

Space is limited and will be filled on a first-come first-served basis. There is no registration fee to attend the workshop. To register please forward your name and complete mailing address including phone number via e-mail to Ms. Tricia Wallich at *twallich@csionweb.com*. Ms. Wallich will be coordinating the registration for this meeting. If you wish to make an oral presentation during the meeting, you must indicate this when you register and submit the following information: (1) A brief written statement of the general nature of the comments that you wish to present, (2) the name and address of the person(s) who will give the presentation, and (3) the approximate length of time that you are requesting for your presentation. Depending on the number of people who register to make presentations, we may have to limit the time allotted for each presentation. If you don't have access to e-mail please call Ms. Wallich at 301–670–0270.

Dated: October 2, 2009.

Paul M. Coates,

Director, Office of Dietary Supplements, National Institutes of Health.

[FR Doc. E9–24334 Filed 10–7–09; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

Agency Information Collection Activities: Customs Declaration (Form 6059B)

AGENCY: U.S. Customs and Border Protection (CBP), Department of Homeland Security.

ACTION: 60-Day Notice and request for comments; Revision of an existing collection of information: 1651–0009.

SUMMARY: As part of its continuing effort to reduce paperwork and respondent burden, CBP invites the general public and other Federal agencies to comment on an information collection requirement concerning the Customs Declaration. This request for comment is being made pursuant to the Paperwork Reduction Act of 1995 (Pub. L. 104–13; 44 U.S.C. 3505(c)(2)).

DATES: Written comments should be received on or before December 7, 2009, to be assured of consideration.

ADDRESSES: Direct all written comments to U.S. Customs and Border Protection, Attn: Tracey Denning, Office of Regulations and Rulings, 799 9th Street, NW., 7th Floor, Washington, DC 20229–1177.

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be directed to Tracey Denning, U.S. Customs and Border Protection, Office of Regulations and Rulings, 799 9th Street, NW., 7th Floor, Washington, DC. 20229–1177, at 202–325–0265.

SUPPLEMENTARY INFORMATION: CBP invites the general public and other Federal agencies to comment on proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (Pub. L. 104–13; 44 U.S.C. 3505(c)(2)). The comments should address: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimates of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden including the use of automated collection techniques or the use of other forms of information technology; and (e) the annual costs burden to respondents or record keepers from the collection of information (a total capital/startup costs and operations and maintenance costs). The comments that are submitted will be summarized and included in the CBP request for Office of Management and Budget (OMB) approval. All comments will become a matter of public record. In this document CBP is soliciting comments concerning the following information collection:

Title: Customs Declaration.

OMB Number: 1651–0009.

Form Number: CBP Form 6059B.

Abstract: The Customs Declaration, CBP Form 6059B, requires basic information to facilitate the clearance of persons and goods arriving in the United States and helps CBP officers determine if any duties or taxes are due. The form is also used for the enforcement of CBP and other agencies laws and regulations. CBP proposes to increase the burden hours for this collection as a result of better estimates regarding the number of respondents filling out the Form 6059B. Specifically, CBP is revising the number of respondents to this information collection from 60,000,000 to 105,606,000. This increase in the number of respondents also results in an increase to the burden hours. In addition, CBP proposes to make a minor change to the estimated time per response by decreasing the time from 4 minutes and 5 seconds to 4 minutes. No changes were made to the Form.

Current Actions: This submission is being made to extend the expiration date with a change to the burden hours.

Type of Review: Extension (with change).

Affected Public: Individuals.

Estimated Number of Respondents: 105,606,000.

Estimated Number of Annual Responses per Respondent: 1.

Estimated Number of Total Annual Responses: 105,606,000.

Estimated Time per Response: 4 minutes.

Estimated Total Annual Burden Hours: 7,075,602.

Dated: October 5, 2009.

Tracey Denning,

Agency Clearance Officer, Customs and Border Protection.

[FR Doc. E9–24294 Filed 10–7–09; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5281–N–72]

FHA-Insured Mortgage Loan Servicing Involving the Loss Mitigation Programs

AGENCY: Office of the Chief Information Officer, HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below has been submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

FHA insurance is an important source of mortgage credit for low and moderate-income borrowers and neighborhoods. Providing assistance, as needed, to enable families to cure their delinquencies and retain their homes delinquencies and retain their homes stabilizes neighborhoods that might otherwise suffer from deterioration and problems associated with vacant and abandoned properties. Avoidance of foreclosure and the resultant costs also serve to further stabilize the mortgage insurance premiums charge by FHA and the Federal budget receipts generated from those premiums. The information collection request for OMB review seeks to combine the requirements of several existing OMB collections under one collection; they are as follows OMB collections 2502–0301, 2502–0464 and 2502–0523.

DATES: *Comments Due Date:* November 9, 2009.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB approval Number (2539–0008) and should be sent to: HUD Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, DC 20503; fax: 202–395–5806.

FOR FURTHER INFORMATION CONTACT: Lillian Deitzer, Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; e-mail Lillian Deitzer at *Lillian_L._Deitzer@HUD.gov* or telephone (202) 402–8048. This is not a toll-free number. Copies of available documents submitted to OMB may be obtained from Ms. Deitzer.

SUPPLEMENTARY INFORMATION: This notice informs the public that the Department of Housing and Urban Development has submitted to OMB a request for approval of the Information collection described below. This notice is soliciting comments from members of the public and affecting agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

This Notice Also Lists the Following Information

Title of Proposal: FHA-Insured Mortgage Loan Servicing Involving the Loss Mitigation Programs.

OMB Approval Number: 2502–NEW.

Form Numbers: HUD—1__Settlement Statement, HUD—27011__Single Family Application for Benefits, HUD–90035—Information Disclosure, HUD–90041—Request for Variance, Pre-foreclosure sale procedure, HUD–90045—Approval to Participate, HUD–90051—Sale Contract Review, HUD–90052—Closing Worksheet, HUD–92068–F—Request for Financial Information, HUD–PA–426—How To Avoid Foreclosure.

Description of the Need for the Information and Its Proposed Use

FHA insurance is an important source of mortgage credit for low and moderate-income borrowers and neighborhoods. Providing assistance, as needed, to enable families to cure their delinquencies and retain their homes delinquencies and retain their homes stabilizes neighborhoods that might otherwise suffer from deterioration and problems associated with vacant and abandoned properties. Avoidance of foreclosure and the resultant costs also serve to further stabilize the mortgage insurance premiums charge by FHA and the Federal budget receipts generated from those premiums. The information collection request for OMB review seeks to combine the requirements of several existing OMB collections under one collection; they are as follows OMB collections 2502–0301, 2502–0464 and 2502–0523.

Frequency of Submission: On occasion, Monthly.

	Number of respondents	Annual responses	×	Hours per response	=	Burden hours
Reporting Burden:	83,110	6.12		1.527		777,494

Total Estimated Burden Hours: 777,494.

Status: New Collection.

Authority: Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. 35, as amended.

Dated: October 1, 2009.

Lillian Deitzer,

Departmental Reports Management Officer, Office of the Chief Information Officer.

[FR Doc. E9–24298 Filed 10–7–09; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R1–ES–2009–N195; 10120–1112–0000–F2]

Endangered and Threatened Wildlife and Plants; Permit Application, Northern Spotted Owl, Oregon

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Reopening of public comment period.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), announce the reopening of the public comment period for the Oregon Department of Forestry's (ODF) enhancement of survival permit (permit) application under the Endangered Species Act of 1973, as amended. The permit application includes a proposed programmatic safe harbor agreement (Agreement) between ODF, the U.S. Department of Agriculture—Natural Resources Conservation Service (NRCS), and the Service. The requested permit would authorize ODF to extend incidental take coverage with assurances through issuance of Certificates of Inclusion to eligible landowners willing to carry out habitat management measures expected to benefit the northern spotted owl (*Strix occidentalis caurina*), which is federally listed as threatened. We are reopening the comment period for 30 days. The original notice of availability was published in the **Federal Register** on July 21, 2009 (74 FR 35883), and contains additional information regarding the permit application. Previous comments need not be resubmitted.

DATES: To ensure consideration, please send your written comments by November 9, 2009.

ADDRESSES: You may submit your written comments to State Supervisor (see **SUPPLEMENTARY INFORMATION** below). Include your name and address in your comments and refer to the "Spotted Owl Programmatic Safe Harbor Agreement."

FOR FURTHER INFORMATION CONTACT: Richard Szlemp (see **SUPPLEMENTARY INFORMATION** below), telephone (503) 231–6179. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 800/877–8339, 24 hours a day, 7 days a week.

SUPPLEMENTARY INFORMATION:

Document Availability

You may obtain copies of the draft documents by contacting the State Supervisor, Oregon Fish and Wildlife Office, U.S. Fish and Wildlife Service, 2600 SE. 98th Ave., Suite 100, Portland, OR 97266; telephone (503) 231–6179; facsimile (503) 231–6195; or by making an appointment to view the documents at the above address during normal business hours. You may also view the documents on the Internet at *http://www.fws.gov/oregonfwo/species/*. The Service is furnishing this notice to provide the public, other State and Federal agencies, and interested Tribes an opportunity to review and comment on the draft documents.

Public Availability of Comments

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 Service will evaluate the permit application, associated documents, and comments submitted thereon to determine whether the permit application meets the requirements of section 10(a)(1)(A) of the Act and that other applicable requirements have been satisfied. If we determine that all requirements are met, we will sign the Agreement and issue an enhancement of survival permit under section 10(a)(1)(A) of the Act to ODF for the take of northern spotted owls, incidental to otherwise lawful activities in accordance with the terms of the Agreement. This notice is provided pursuant to section 10(c) of the Act and NEPA regulations (40 CFR 1506.6).

Dated: October 2, 2009.

Miel Corbett,

Acting State Supervisor, Fish and Wildlife Service, Oregon Fish and Wildlife Office, Portland, Oregon.

[FR Doc. E9–24346 Filed 10–7–09; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R8–MB–2009–N193; 80213–9410–0000–7B]

Federal Sport Fish Restoration; California Department of Fish and Game Fish Hatchery and Stocking Program

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability and request for comments: draft environmental impact report/environmental impact statement (EIR/EIS).

SUMMARY: The U.S. Fish and Wildlife Service (FWS) announces the availability of the draft EIR/EIS for the California Department of Fish and Game's (CDFG) Fish Hatchery and Stocking Program (Program). FWS is lead agency, under the National Environmental Policy Act (NEPA) of 1969, as amended, for the draft EIR/EIS jointly prepared with CDFG. Under the Sport Fish Restoration Act (SFRA), FWS proposes to fund actions associated with the operation of CDFG's 14 trout hatcheries and the Mad River Hatchery for the anadromous steelhead, and stocking from the 15 hatcheries. The Federal action does not include funding CDFG's other anadromous fish hatcheries and associated stocking, nor its issuance of private stocking permits. SFRA funding may also support CDFG's Fishing in the City and Classroom Aquarium Education Programs. CDFG is the lead agency under the California Environmental Quality Act (CEQA) and proposes to implement hatchery operations and stocking funded by FWS, as well as all other components of the CDFG Program, including anadromous fish hatchery operations and associated stocking, and issuance of stocking permits to private parties seeking to stock fish in California's inland waters. We invite and encourage interested persons to review the draft EIR/EIS and submit written comments regarding alternatives addressed in the document.

DATES: We must receive written comments at the address below on or before November 30, 2009. We will hold

four public meetings to solicit comments. The meeting dates are:

1. Wednesday, October 21, 2009, from 5:30 p.m. to 7:30 p.m., Sacramento, CA.
2. Monday, October 26, 2009, from 5:30 p.m. to 7:30 p.m., Redding, CA.
3. Wednesday, October 28, 2009, from 5:30 p.m. to 7:30 p.m., Bakersfield, CA.
4. Thursday, October 29, 2009, from 5:30 p.m. to 7:30 p.m., Carson, CA.

ADDRESSES: The public meeting locations are:

1. Sacramento—Elks Lodge, 6446 Riverside Boulevard, Sacramento, CA 95831.
2. Redding—Shasta Builder's Exchange Training Facility, Shasta Room, 2985 Innsbruck Drive, Redding, CA 96003.
3. Bakersfield—Double Tree Hotel, California Grill Room, 3100 Camino Del Rio Court, Bakersfield, CA 93308.
4. Carson—Carson Community Center, Main Hall, 3 Civic Plaza Drive, Carson, CA 90745.

Mail comments to Mr. Bart Prose, U.S. Fish and Wildlife Service, 2800 Cottage Way, Room W–1729, Sacramento, CA 95825; via e-mail to *bart_prose@fws.gov;* or via fax to (916) 978–6155. Copies of the draft EIR/EIS can be downloaded from the CDFG Web site at *http://www.dfg.ca.gov/news/pubnotice/hatchery/.*

FOR FURTHER INFORMATION CONTACT: Mr. Bart Prose, (916) 978–6152 (phone); *bart_prose@fws.gov* (e-mail).

SUPPLEMENTARY INFORMATION: Under the SFRA (Pub. L. 106–408), FWS has authority to grant Federal funds from the Sport Fish Restoration and Boating Trust Fund to support actions associated with CDFG's Program. The Trust Fund is financed through collection of excise taxes on sport-fishing equipment, electric motors, and sonar; import duties on fishing tackle, yachts, and pleasure craft; the portion of gasoline tax attributable to motorboats and small engines; and interest on the Trust Fund.

CDFG has been rearing and stocking fish in the inland waters of California since the late 1800s, when the State of California enacted legislation to restore and preserve fish in State waters. This legislation called for the newly formed California State Fish and Game Commission, to establish ''fish breederies'' to stock and supply streams, lakes, and bays with both foreign and domestic fish. Since that time in the late 1800s, CDFG has continued that mandate by rearing and stocking both inland trout and anadromous species of fish reared at 24 hatcheries and planting bases located throughout the state.

For the past approximately 100 years, CDFG has stocked nonnative trout throughout the State. CDFG's Program currently operates 14 trout hatcheries throughout the state, rearing 6 trout species and 3 salmon species. Trout hatcheries rear rainbow, golden, cutthroat, brown, lake, and brook trout. Salmon species reared include Chinook, Coho, and kokanee. CDFG's Mad River Hatchery for anadromous fish presently rears only steelhead. Over the past 5 years, CDFG planted over 3.6 million pounds of combined trout and inland salmon, annually, from its 14 trout hatcheries into hundreds of locations, including high mountain lakes, low elevation reservoirs, and various streams and creeks. The Mad River Hatchery planted over 39,000 pounds of steelhead, annually, into the Mad River.

Funding CDFG Program activities provides freshwater angling opportunities and recreation throughout the state. Operations and stocking associated with the 14 trout hatcheries and the Mad River anadromous fish hatchery are eligible for SFRA grants. FWS does not fund operations or stocking associated with other anadromous hatcheries because they are mitigation hatcheries, which are funded through other sources.

In 2005, State Assembly Bill 7 added Section 13007 to the California Fish and Game Code (FGC 13007), which established annual minimum release targets for hatchery trout based upon sport-fishing license sales, and required CDFG to deposit one-third of sport-fishing license fees into its Hatchery and Inland Fisheries Fund for specified fisheries management purposes. Per CDFG's implementation plan for FGC 13007, funding for the stocking program was scheduled to increase from almost $8 million for State fiscal year (FY) 2005–2006, to $15 million for State FY 2006–2007. In addition, a State court order in 2006 required CDFG to complete an environmental review for its Program. To expediently address Program changes due to FGC 13007, the court-ordered environmental review, and associated SFRA funding contributions to the Program, FWS and CDFG agreed to prepare a joint EIR/EIS. FWS published a notice of intent to prepare the EIR/EIS in the **Federal Register** on August 5, 2008 (73 FR 45470).

The objectives of CDFG's Program are to continue the rearing and stocking of fish for the recreational use of anglers, while balancing the interaction between State- and privately stocked fish and threatened and endangered species. The purpose of FWS's proposed SFRA funding is to support operations of CDFG's 14 trout hatcheries and the Mad River Hatchery for the anadromous steelhead, and associated stocking of fish produced at those hatcheries. SFRA funding also supports CDFG's Fishing in the City and Classroom Aquarium Education Programs. The need addressed by the proposed action is the support of viable recreational fishing in California, through increased angler success that is provided by stocking of hatchery fish in both urban and rural water bodies. Provision of SFRA funds for support of private stocking permits, or operation of other anadromous fish hatcheries and their associated stocking efforts, is outside the scope of actions contemplated by FWS at this time.

Hatchery operations and stocking activities associated with CDFG's inland water hatchery program, including potential increases in fish rearing and stocking in the future, have been evaluated for their effects on the environment. Potential impacts to native amphibians and fish, which have experienced declines within the state, are of chief interest. Results of the evaluations and alternative courses of action are presented in the draft EIR/EIS, in accordance with CEQA (PRC 21000 *et seq.*) and NEPA (42 U.S.C. 4321 *et seq.*).

Alternatives

Four alternatives were developed for CDFG's Fish Hatchery and Stocking Program, and each is included for detailed analysis in the draft EIS/EIR. All Program components are subject to CEQA, but only the subset of components with Federal discretionary involvement (associated with SFRA funding) are subject to NEPA; i.e., operations of CDFG's 14 trout hatcheries and the Mad River Hatchery for steelhead, associated stocking of fish produced at those hatcheries, and the Fishing in the City and Classroom Aquarium Education Programs. Only the components of the 4 alternatives pertinent to NEPA are described here.

Preferred Alternative

Under the Preferred Alternative, FWS will continue to provide funding, as modified by certain mitigation provisions, for operations of CDFG's 14 trout hatcheries and the Mad River Hatchery for steelhead, and associated stocking of fish produced at those hatcheries. Although hatchery operations will remain unchanged from those conducted during the last 5 years, decisions on stocking of trout will be made using a statewide tiered review process that emphasizes protection of native, sensitive, or legally protected species. In high mountain lake areas where Aquatic Biodiversity Management Plans (ABMPs) have been

prepared, stocking will continue to follow guidelines that ensure expansion of habitats for native amphibians and fish. In areas without ABMPs, trout stocking will be based on site-specific evaluations of risk to native, sensitive, or legally protected species. Where appropriate surveys have yet to be completed, stocking will be suspended until the appropriate evaluations have been completed. ABMPs or other similar plans may be developed and implemented prior to reinitiation of stocking in those locations. Depending on the specific location, such plans could include eradication of nonnative fish from water bodies currently or formerly harboring sensitive native species, genetic analysis of native fish to determine degree of hybridization, cessation of nonnative trout stocking in waters occupied by native trout populations, and implementation of measures consistent with FWS recovery plans and CDFG management plans. Stocking of Mad River steelhead will continue with measures intended to reduce the interaction between hatchery reared fish and naturally reproducing populations and consistent with the Draft Hatchery and Genetic Management Plan submitted to the National Marine Fisheries Service. The Fishing in the City and Classroom Aquarium Education Programs will continue under uniform protocols developed to ensure that stocking locations are properly screened to protect native, sensitive, and legally protected species. Implementation of Program activities following development of any ABMPs or uniform protocols for the Fishing in the City and Classroom Aquarium Education Programs may require additional, site-specific NEPA compliance tiered from the EIR/EIS.

Continuation of Interim Program Provisions Alternative

Under the Continuation of Interim Program Provisions Alternative, FWS will continue to provide funding for operations of CDFG's 14 trout hatcheries and the Mad River Hatchery for steelhead, and associated stocking of fish produced at those hatcheries, consistent with the court-ordered prohibitions and exceptions on fish stocking that were put into place for the interim period between the date of the court order and completion of the EIR/EIS. The interim provisions prohibit stocking nonnative fish in any California fresh water body where surveys have demonstrated the presence of 25 specified amphibian or fish species, or where a survey for those species has not yet been completed. The order does not address the stocking of native fish into native waters. Exceptions to the prohibitions include stocking in human-made reservoirs larger than 1000 acres; stocking in human-made reservoirs less than 1000 acres that are not connected to a river or stream, are not within California red-legged frog critical habitat, or are not where California red-legged frogs are known to exist; stocking as required for state or federal mitigation; stocking for the purpose of enhancing salmon and steelhead populations and funded by the Commercial Trollers Salmon Stamp; stocking of steelhead from the Mad River Hatchery into the Mad River Basin; CDFG's Aquarium in the Classroom program; stocking actions to support scientific research; and stocking done under an existing private stocking permit or to be completed under a new permit with terms similar to one that was issued in the last 4 years. The Fishing in the City and Classroom Aquarium Education Programs will continue under uniform protocols developed to ensure that stocking locations are properly screened to protect native, sensitive, and legally protected species.

Continuation of Existing Program Alternative

The Continuation of Existing Program Alternative (consistent with the CEQA No Project Alternative) is continuation of SFRA funding for the existing Fish Hatchery and Stocking Program. The hatcheries' operation and stocking activities undertaken by CDFG over the past 5 years would continue unchanged (some activities may be inconsistent with the court-ordered prohibitions and exceptions), and the SFRA funding process for these activities will continue as it has over the same period.

No Action Alternative

Under the No Action Alternative, FWS would not approve SFRA grant funds to be used by CDFG to support actions associated with operations of the CDFG Fish Hatchery and Stocking Program. Because of State statutory and public trust requirements related to the hatchery program, CDFG would attempt to continue to implement its State hatchery program, seeking other funding sources to replace the Federal funds.

Special Assistance for Public Meetings

If special assistance is required at the public meetings, please contact Mr. Bart Prose, (916) 978–6152 (phone); *bart_prose@fws.gov* (e-mail). Please notify Mr. Prose as far in advance of the meetings as possible to enable FWS to secure the needed services. If a request cannot be honored, the requestor will be notified.

Public Disclosure

Before including your name, address, phone number, e-mail address, or other personal identifying information in comments, please 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. We will use the comments to prepare a final EIR/EIS. A decision will be made no sooner than 30 days after the publication of the final EIR/EIS. We anticipate that a Record of Decision will be issued by FWS in 2010.

Authority: National Environmental Policy Act (42 U.S.C. 4321 *et seq.*); Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act (40 CFR parts 1500–1508).

Dated: October 2, 2009.

Margaret Kolar,

Acting Regional Director.

[FR Doc. E9–24342 Filed 10–7–09; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

Indian Gaming

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice of amendment to Approved Tribal-State Compact

SUMMARY: This notice publishes the Approval of the Eighth Amendment to the Tribal/State Compact for Class III Gaming between the Tulalip Tribe of Washington and the State of Washington.

DATES: *Effective Date:* October 8, 2009.

FOR FURTHER INFORMATION CONTACT: Paula L. Hart, Acting Director, Office of Indian Gaming, Office of the Deputy Assistant Secretary—Policy and Economic Development, Washington, DC 20240, (202) 219–4066.

SUPPLEMENTARY INFORMATION: Pursuant to section 11 of the Indian Gaming Regulatory Act of 1988 (IGRA), Public Law 100–497, 25 U.S.C. 2710, the Secretary of the Interior shall publish in the **Federal Register** notice of the approved Tribal-State Compact Amendment for the purpose of engaging in Class III gaming activities on Indian lands. The Amendment clarifies and generally simplifies what kind of

entities must be licensed by the State of Washington. The Amendment also significantly modifies the dispute resolution processes to a more collaborative model providing a prompt ''meet and confer'' requirement, then mediation, and finally, as a last resort, either arbitration or litigation. The Tribe's limited waiver of sovereign immunity is clarified and narrowed to include only disputes arising under the compact. The State similarly waives its sovereign immunity, including a specific waiver of the State's Eleventh Amendment immunity from suit for the purposes of enforcing the compact. Finally, the proposed amendment changes the annual licensing requirements from annually to every three years.

Dated: September 30, 2009.

Larry Echo Hawk,

Assistant Secretary—Indian Affairs.

[FR Doc. E9–24300 Filed 10–7–09; 8:45 am]

BILLING CODE 4310–4N–P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

Indian Gaming

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice of amendment to Approved Tribal-State Compact.

SUMMARY: This publishes notice of an Amendment to a Compact between the Nottawaseppi Huron Band of Pottawatomi Indians and the State of Michigan providing for the Conduct of Tribal Class III Gaming by the Nottawaseppi Huron Band of Pottawatomi Indians taking effect.

DATES: *Effective Date:* October 8, 2009.

FOR FURTHER INFORMATION CONTACT: Paula L. Hart, Acting Director, Office of Indian Gaming, Office of the Deputy Assistant Secretary—Policy and Economic Development, Washington, DC 20240, (202) 219–4066.

SUPPLEMENTARY INFORMATION: Under section 11 of the Indian Gaming Regulatory Act of 1988 (IGRA), Public Law 100–497, 25 U.S.C. 2710, the Secretary of the Interior shall publish in the **Federal Register** notice of approved Tribal-State compacts for the purpose of engaging in Class III gaming activities on Indian lands. The amendment changes the regulatory payment amount to a minimum of $50,000 or .05% of the Tribe's annual Class III net win, whichever is greater. This amendment also modifies the Tribe's revenue sharing payments conditioned on the Tribe's net win falling below certain levels. The amendment permits downward adjustments of the Tribe's revenue sharing payments.

Dated: September 30, 2009.

Larry Echo Hawk,

Assistant Secretary—Indian Affairs.

[FR Doc. E9–24301 Filed 10–7–09; 8:45 am]

BILLING CODE 4310–4N–P

DEPARTMENT OF THE INTERIOR

Bureau of Reclamation

Colorado River Basin Salinity Control Advisory Council

AGENCY: Bureau of Reclamation, Interior.

ACTION: Notice of public meeting.

SUMMARY: The Colorado River Basin Salinity Control Advisory Council (Council) was established by the Colorado River Basin Salinity Control Act of 1974 (Public Law 93–320) (Act) to receive reports and advise federal agencies on implementing the Act. In accordance with the Federal Advisory Committee Act, the Bureau of Reclamation announces that the Council will meet as detailed below.

DATES AND LOCATION: The Council will conduct a meeting at the following time and location:

Tuesday, October 27, 2009—Phoenix, Arizona—The meeting will be held at the Central Arizona Water Conservation District Office, 23636 North 7th Street, Phoenix, Arizona. The meeting will begin at 8:30 a.m., recess at approximately 2:30 p.m., and reconvene briefly the following day at approximately 1 p.m.

ADDRESSES: The meeting of the Council is open to the public. Any member of the public may file written statements with the Council before, during, or up to 30 days after the meeting either in person or by mail. To the extent that time permits, the Council chairman will allow public presentation of oral comments at the meeting. To allow full consideration of information by Council members, written notice must be provided to Mr. Kib Jacobson, Bureau of Reclamation, Upper Colorado Regional Office, 125 South State Street, Room 6107, Salt Lake City, Utah 84138–1147; telephone (801) 524–3753; facsimile (801) 524–3826; e-mail at: *kjacobson@usbr.gov* at least FIVE (5) days prior to the meeting. Any written comments received prior to the meeting will be provided to Council members at the meeting.

FOR FURTHER INFORMATION CONTACT: Kib Jacobson, telephone (801) 524–3753; facsimile (801) 524–3826; e-mail at: *kjacobson@usbr.gov.*

SUPPLEMENTARY INFORMATION: The purpose of the meeting will be to discuss the accomplishments of federal agencies and make recommendations on future activities to control salinity. Council members will be briefed on the status of salinity control activities and receive input for drafting the Council's annual report. The Bureau of Reclamation, Bureau of Land Management, U.S. Fish and Wildlife Service, and United States Geological Survey of the Department of the Interior; the Natural Resources Conservation Service of the Department of Agriculture; and the Environmental Protection Agency will each present a progress report and a schedule of activities on salinity control in the Colorado River Basin. The Council will discuss salinity control activities, the contents of the reports, and the Basin States Program created by Public Law 110–246, which amended the Act.

Public Disclosure

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.

Dated: September 15, 2009.

Brent Rhees,

Assistant Regional Director—Upper Colorado Region.

[FR Doc. E9–24295 Filed 10–7–09; 8:45 am]

BILLING CODE 4310–MN–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLNV912000.L16400000.PH0000.006F; 10–08807; TAS: 14X1109]

Notice of Public Meeting: Resource Advisory Councils, Nevada

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of public meeting.

SUMMARY: In accordance with the Federal Land Policy and Management Act and the Federal Advisory Committee Act of 1972 (FACA), the Department of the Interior, Bureau of Land Management (BLM) Nevada will hold a joint meeting of its three

Resource Advisory Councils (RACs), the Sierra Front-Northwestern Great Basin RAC, the Northeastern Great Basin RAC, and the Mojave-Southern Great Basin RAC in Elko, Nevada. The meeting is open to the public and a public comment period will be available.

Dates and Times: Thursday, November 19, 2009, from 8 a.m. to 5 p.m., and Friday,

November 20, 2009, from 8 a.m. to 12 p.m. A public comment period will be provided at 3 p.m. on Thursday, November 19.

FOR FURTHER INFORMATION CONTACT: Rochelle Ocava, telephone: (775) 861–6588, e-mail: *rochelle_ocava@blm.gov.*

SUPPLEMENTARY INFORMATION: The three 15-member Nevada councils advise the Secretary of the Interior, through the BLM Nevada State Director, on a variety of planning and management issues associated with public land management in Nevada. The meeting will be held at the Elko Convention Center, 700 Moren Way, Elko, Nevada. Agenda topics include a presentation and discussion of accomplishments during 2009 and the outlook for 2010 for the BLM in Nevada; opening remarks and closeout reports of the three RACs; breakout meetings of each group category; breakout meetings of the three RACs; discussion of a recreation subgroup of the existing RACs; and setting of schedules for meetings of the individual RACs for the upcoming year. An agenda will be available 30 days prior to the meeting at *http://www.blm.gov/nv.* The public may provide written comments to the three RAC groups or the individual RACs. Individuals who plan to attend and need further information about the meeting or need special assistance such as sign language interpretation or other reasonable accommodations may contact Rochelle Ocava.

Mike Holbert,

Deputy State Director, Nevada.

[FR Doc. E9–24348 Filed 10–7–09; 8:45 am]

BILLING CODE 4310–HC–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R9–FHC–2009–N197; 94240–1341–9BIS–N5]

Aquatic Nuisance Species Task Force Meeting

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of meeting.

SUMMARY: This notice announces a meeting of the Aquatic Nuisance Species (ANS) Task Force. The meeting is open to the public. The meeting topics are identified in the **SUPPLEMENTARY INFORMATION** section.

DATES: The ANS Task Force will meet from 8 a.m. to 5 p.m. on Wednesday, November 4 through Thursday, November 5, 2009.

ADDRESSES: The ANS Task Force meeting will take place at the National Oceanic and Atmospheric Administration, 1315 East West Highway, Silver Spring, MD 20910 (301–713–0174). You may inspect minutes of the meeting at the office of the Chief, Division of Fisheries and Aquatic Resource Conservation, U.S. Fish and Wildlife Service, 4401 North Fairfax Drive, Arlington, VA 22203, during regular business hours, Monday through Friday. You may also view the minutes on the ANS Task Force Web site at: *http://anstaskforce.gov/meetings.php.*

FOR FURTHER INFORMATION CONTACT: Susan Mangin, ANS Task Force, Executive Secretary, at (703) 358–2466, or by e-mail at *Susan_Mangin@fws.gov.*

SUPPLEMENTARY INFORMATION: Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (5 U.S.C. App.), this notice announces meetings of the ANS Task Force. The ANS Task Force was established by the Nonindigenous Aquatic Nuisance Prevention and Control Act of 1990.

Topics that the ANS Task Force plans to cover during the meeting include: the ANS Task Force Strategic Plan, Regional Panel issues and recommendations, the *Quagga-Zebra Mussel Action Plan for Western U.S. Waters,* and consideration for approval of state ANS management plans. The agenda and other related meeting information are on the ANS Task Force Web site at: *http://anstaskforce.gov/meetings.php.*

Dated: September 29, 2009.

Jeffrey Underwood,

Acting Co-Chair, Aquatic Nuisance Species Task Force, Deputy Assistant Director—Fisheries & Habitat Conservation.

[FR Doc. E9–24333 Filed 10–7–09; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLORV00000.L10200000.DD0000; HAG 9–0373]

Southeast Oregon Resource Advisory Council

AGENCY: Bureau of Land Management, Interior.

ACTION: Southeast Oregon Resource Advisory Council.

SUMMARY: Pursuant to the Federal Land Policy and Management Act and the Federal Advisory Committee Act, the U.S. Department of the Interior, Bureau of Land Management (BLM) Southeast Oregon Resource Advisory Council (SEORAC) will meet as indicated below:

DATES: The SEORAC meeting will begin 8 a.m. PST on November 10, 2009.

ADDRESSES: The SEORAC will meet at the Burns District Office Conference Room, 28910 Highway 20 West, Hines, Oregon 97738.

FOR FURTHER INFORMATION CONTACT: Mark Wilkening, 100 Oregon Street, Vale, Oregon 97918, (541) 473–6218 or e-mail *mark_wilkening@blm.gov.*

SUPPLEMENTARY INFORMATION: The business meeting will take place on November 10, 2009 at the Burns District Office Conference Room, 28910 Highway 20 West, Hines Oregon, from 8 a.m.to 4 p.m. The meeting may include such topics as New Member Orientation, Election of Officers, 2010 SEORAC Work Plan, BLM Energy Project Team Status Report, Updates on Lakeview and Southeast Oregon Resource Management Plans, Fremont-Winema Travel Subcommittee, Phase II Blue Mountain Forest Plan revision, litigation updates, an update on the BLM sagebrush/sage-grouse teams, and other matters as may reasonably come before the council. The public is welcome to attend all portions of the meeting and may make oral comments to the Council at 1 p.m. on November 10, 2009. Those who verbally address the SEORAC are asked to provide a *written* statement of their comments or presentation. Unless otherwise approved by the SEORAC Chair, the public comment period will last no longer than 15 minutes, and each speaker may address the SEORAC for a maximum of five minutes. If reasonable accommodation is required, please contact the BLM Vale District Office at (541) 473–6213 as soon as possible.

Dated: September 30, 2009.

David R. Henderson,

Vale District Manager.

[FR Doc. E9–24322 Filed 10–7–09; 8:45 am]

BILLING CODE 4310–33–P

DEPARTMENT OF JUSTICE

[OMB Number 1105–0082]

Civil Division; Agency Information Collection Activities: Revision of a Currently Approved Collection

ACTION: 30-Day Notice of Information Collection Under Review: Annuity Broker Qualification Declaration Form.

The Department of Justice (DOJ), Civil Division, will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The proposed information collection is published to obtain comments from the public and affected agencies. This proposed information collection was previously published in the **Federal Register** Volume 74, Number 147, page 38471 on August 3, 2009, allowing for a 60 day comment period.

The purpose of this notice is to allow for an additional 30 days for public comment until November 9, 2009. This process is conducted in accordance with 5 CFR 1320.10.

Written comments and/or suggestions regarding the items contained in this notice, especially the estimated public burden and associated response time, should be directed to the Office of Management and Budget, Office of Information and Regulatory Affairs, Attention Department of Justice Desk Officer, Washington, DC 20503. Additionally, comments may be submitted to OMB via facsimile to (202) 395–5806. Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

—Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

—Evaluate the accuracy of the agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

—Enhance the quality, utility, and clarity of the information to be collected; and

—Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses.

Overview of This Information Collection

(1) *Type of Information Collection:* Revision of a currently approved collection.

(2) *Title of the Form/Collection:* Annuity Broker Qualification Declaration Form.

(3) *Agency form number, if any, and the applicable component of the Department sponsoring the collection:* Civil Division, U.S. Department of Justice.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Individuals. This declaration is to be submitted annually to determine whether a broker meets the qualifications to be listed as an annuity broker pursuant to section 11015(b) of Public Law 107–273.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* It is estimated that 300 respondents will complete the form annually within approximately 1 hour.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total estimated annual burden hours to complete the certification form is 300 hours.

If additional information is required contact: Lynn Bryant, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Patrick Henry Building, Suite 1600, 601 D Street, NW., Washington, DC 20530.

Dated: October 5, 2009.

Lynn Bryant,

Department Clearance Officer, PRA, U.S. Department of Justice.

[FR Doc. E9–24343 Filed 10–7–09; 8:45 am]

BILLING CODE 4410–12–P

DEPARTMENT OF JUSTICE

Notice of Lodging of Consent Decree Under the Clean Air Act, Clean Water Act, Resource Conservation and Recovery Act, and Emergency Planning and Community Right-To-Know Act

Notice is hereby given that on September 29, 2009, a proposed Consent Decree in *United States* v. *Formosa Plastics Corporation, Texas, Formosa Hydrocarbons Company, Inc., and Formosa Plastics Corporation, Louisiana,* Civil Action No. 6:09-cv-00061, was lodged with the United States District Court for the Southern District of Texas, Victoria Division.

In its complaint, the United States alleged that Defendants violated Clean Air Act ("CAA") provisions regulating the leaks of air pollutants from chemical manufacturing equipment and emissions of vinyl chloride, Resource Conservation and Recovery Act ("RCRA") provisions governing hazardous waste management, and Clean Water Act ("CWA") wastewater discharge limits. The United States also alleges that Formosa Plastics Corporation, Texas violated CAA provisions regulating benzene waste operations and Emergency Planning and Community Right-to-Know Act ("EPCRA") toxic release inventory reporting obligations. The alleged violations occurred at co-located facilities in Point Comfort, Texas, owned and operated by Formosa Plastics Corporation, Texas and Formosa Hydrocarbons Company, Inc., and a facility located in Baton Rouge, Louisiana, that is owned and operated by Formosa Plastics Corporation, Louisiana.

Under the Consent Decree, Defendants will pay a civil penalty of $2.8 million, and will implement a comprehensive leak detection and repair ("LDAR") program, implement an innovative vinyl chloride leak detection and elimination program, perform a comprehensive assessment of benzene waste operations, implement measures to prevent future CWA violations, change RCRA hazardous waste management practices, and conduct a comprehensive assessment of toxic release reporting under EPCRA.

The Department of Justice will receive for a period of thirty (30) days from the date of this publication comments relating to the Consent Decree. Comments should be addressed to the Assistant Attorney General, Environmental and Natural Resources Division, and either e-mailed to *pubcomment-ees.enrd@usdoj.gov* or e-

mailed to P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611, and should refer to *United States* v. *Formosa Plastics Corporation, Texas, Formosa Hydrocarbons Company, Inc., and Formosa Plastics Corporation, Louisiana,* D.J. Ref. 90–5–2–1–08995.

The Consent Decree may be examined at the Office of the United States Attorney, Southern District of Texas, 919 Milam Street, Houston, Texas, and at U.S. EPA Region 6, 1445 Ross Avenue, Suite 1200, Dallas, TX. During the public comment period, the Consent Decree may also be examined on the following Department of Justice Web site, *http://www.usdoj.gov/enrd/Consent_Decrees.html.* A copy of the Consent Decree may also be obtained by mail from the Consent Decree Library, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611 or by faxing or e-mailing a request to Tonia Fleetwood (*tonia.fleetwood@usdoj.gov*), fax no. (202) 514–0097, phone confirmation number (202) 514–1547. In requesting a copy from the Consent Decree Library, please enclose a check in the amount of $18.50 (25 cents per page reproduction costs of Consent Decree and Appendices) payable to the U.S. Treasury or, if by e-mail or fax, forward a check in the amount to the Consent Decree Library at the stated address.

Maureen M. Katz,

Assistant Section Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. E9–24240 Filed 10–7–09; 8:45 am]

BILLING CODE 4410–15–P

DEPARTMENT OF JUSTICE

Notice of Lodging of Consent Decree Under the Comprehensive Environmental Response, Compensation, and Liability Act

Notice is hereby given that on September 25, 2009, a proposed de minimis party consent decree with the City of De Pere ("Consent Decree") in *United States, et al.* v. *George A. Whiting Paper Co., et al.,* Civil Action No. 1:09-cv-00692 was lodged with the United States District Court for the Eastern District of Wisconsin.

In this action the United States and the State of Wisconsin sought to recover unreimbursed costs incurred for response activities undertaken in response to the release and threatened release of hazardous substances from a facility at and near the Lower Fox River and Green Bay Site in northeastern Wisconsin and damages for injury to, loss of, or destruction of natural resources in order to compensate for and restore natural resources injured by the release of hazardous substances into the environment at the Site.

The Consent Decree reflects the conclusion of the United States and the State of Wisconsin that the City of De Pere qualifies for treatment as a CERCLA Section 122(g) *de minimis* party. The proposed Consent Decree requires the City of De Pere to pay of $210,000.

The Department of Justice will receive for a period of thirty (30) days from the date of this publication comments relating to the Consent Decree. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, and either emailed to *pubcomment-ees.enrd@usdoj.gov* or mailed to P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611, and should refer to *United States, et al.* v. *George A. Whiting Paper Co., et al.,* D.J. Ref. 90–11–2–1045/7.

The Consent Decree may be examined at the Office of the United States Attorney, Eastern District of Wisconsin, 530 Federal Building, 517 East Wisconsin Avenue, Milwaukee, WI 53202, and at U.S. EPA Region Region 5, 77 West Jackson Blvd., Chicago, IL 60604. During the public comment period, the Consent Decree may also be examined on the following Department of Justice Web site, *http://www.usdoj.gov/enrd/Consent_Decrees.html.* A copy of the Consent Decree may also be obtained by mail from the Consent Decree Library, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611 or by faxing or e-mailing a request to Tonia Fleetwood (*tonia.fleetwood@usdoj.gov*), fax no. (202) 514–0097, phone confirmation number (202) 514–1547. In requesting a copy from the Consent Decree Library, please enclose a check in the amount of $7.75 (25 cents per page reproduction cost) payable to the U.S. Treasury or, if by e-mail or fax, forward a check in that amount to the Consent Decree Library at the stated address.

Maureen Katz,

Assistant Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. E9–24241 Filed 10–7–09; 8:45 am]

BILLING CODE 4410–15–P

DEPARTMENT OF JUSTICE

Office of Information Policy; Attorney General Memorandum for Executive Departments and Agencies Concerning the Freedom of Information Act

Correction

In notice document E9–23375 beginning on page 49892 in the issue of Tuesday, September 29, 2009, make the following correction:

On page 49893, in the first column, immediately following the signature block, three photo pages did not appear. The photo pages are printed below in their entirety.

Federal Register / Vol. 74, No. 194 / Thursday, October 8, 2009 / Notices 51879

Office of the Attorney General

Washington, D.C. 20530

March 19, 2009

MEMORANDUM FOR HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

FROM: THE ATTORNEY GENERAL

SUBJECT: The Freedom of Information Act (FOIA)

The Freedom of Information Act (FOIA), 5 U.S.C. § 552, reflects our nation's fundamental commitment to open government. This memorandum is meant to underscore that commitment and to ensure that it is realized in practice.

A Presumption of Openness

As President Obama instructed in his January 21 FOIA Memorandum, "The Freedom of Information Act should be administered with a clear presumption: In the face of doubt, openness prevails." This presumption has two important implications.

First, an agency should not withhold information simply because it may do so legally. I strongly encourage agencies to make discretionary disclosures of information. An agency should not withhold records merely because it can demonstrate, as a technical matter, that the records fall within the scope of a FOIA exemption.

Second, whenever an agency determines that it cannot make full disclosure of a requested record, it must consider whether it can make partial disclosure. Agencies should always be mindful that the FOIA requires them to take reasonable steps to segregate and release nonexempt information. Even if some parts of a record must be withheld, other parts either may not be covered by a statutory exemption, or may be covered only in a technical sense unrelated to the actual impact of disclosure.

At the same time, the disclosure obligation under the FOIA is not absolute. The Act provides exemptions to protect, for example, national security, personal privacy, privileged records, and law enforcement interests. But as the President stated in his memorandum, "The Government should not keep information confidential merely because public officials might be embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears."

Pursuant to the President's directive that I issue new FOIA guidelines, I hereby rescind the Attorney General's FOIA Memorandum of October 12, 2001, which stated that the Department of Justice would defend decisions to withhold records "unless they lack a sound

legal basis or present an unwarranted risk of adverse impact on the ability of other agencies to protect other important records."

Instead, the Department of Justice will defend a denial of a FOIA request only if (1) the agency reasonably foresees that disclosure would harm an interest protected by one of the statutory exemptions, or (2) disclosure is prohibited by law. With regard to litigation pending on the date of the issuance of this memorandum, this guidance should be taken into account and applied if practicable when, in the judgment of the Department of Justice lawyers handling the matter and the relevant agency defendants, there is a substantial likelihood that application of the guidance would result in a material disclosure of additional information.

FOIA Is Everyone's Responsibility

Application of the proper disclosure standard is only one part of ensuring transparency. Open government requires not just a presumption of disclosure but also an effective system for responding to FOIA requests. Each agency must be fully accountable for its administration of the FOIA.

I would like to emphasize that responsibility for effective FOIA administration belongs to all of us—it is not merely a task assigned to an agency's FOIA staff. We all must do our part to ensure open government. In recent reports to the Attorney General, agencies have noted that competing agency priorities and insufficient technological support have hindered their ability to implement fully the FOIA Improvement Plans that they prepared pursuant to Executive Order 13392 of December 14, 2005. To improve FOIA performance, agencies must address the key roles played by a broad spectrum of agency personnel who work with agency FOIA professionals in responding to requests.

Improving FOIA performance requires the active participation of agency Chief FOIA Officers. Each agency is required by law to designate a senior official at the Assistant Secretary level or its equivalent who has direct responsibility for ensuring that the agency efficiently and appropriately complies with the FOIA. That official must recommend adjustments to agency practices, personnel, and funding as may be necessary.

Equally important, of course, are the FOIA professionals in the agency who directly interact with FOIA requesters and are responsible for the day-to-day implementation of the Act. I ask that you transmit this memorandum to all such personnel. Those professionals deserve the full support of the agency's Chief FOIA Officer to ensure that they have the tools they need to respond promptly and efficiently to FOIA requests. FOIA professionals should be mindful of their obligation to work "in a spirit of cooperation" with FOIA requesters, as President Obama has directed. Unnecessary bureaucratic hurdles have no place in the "new era of open Government" that the President has proclaimed.

Working Proactively and Promptly

Open government requires agencies to work proactively and respond to requests promptly. The President's memorandum instructs agencies to "use modern technology to inform citizens what is known and done by their Government." Accordingly, agencies should readily and systematically post information online in advance of any public request. Providing more information online reduces the need for individualized requests and may help reduce existing backlogs. When information not previously disclosed is requested, agencies should make it a priority to respond in a timely manner. Timely disclosure of information is an essential component of transparency. Long delays should not be viewed as an inevitable and insurmountable consequence of high demand.

In that regard, I would like to remind you of a new requirement that went into effect on December 31, 2008, pursuant to Section 7 of the OPEN Government Act of 2007, Pub. L. No. 110-175. For all requests filed on or after that date, agencies must assign an individualized tracking number to requests that will take longer than ten days to process, and provide that tracking number to the requester. In addition, agencies must establish a telephone line or Internet service that requesters can use to inquire about the status of their requests using the request's assigned tracking number, including the date on which the agency received the request and an estimated date on which the agency will complete action on the request. Further information on these requirements is available on the Department of Justice's website at www.usdoj.gov/oip/foiapost/2008foiapost30.htm.

*****

Agency Chief FOIA Officers should review all aspects of their agencies' FOIA administration, with particular focus on the concerns highlighted in this memorandum, and report to the Department of Justice each year on the steps that have been taken to improve FOIA operations and facilitate information disclosure at their agencies. The Department of Justice's Office of Information Policy (OIP) will offer specific guidance on the content and timing of such reports.

I encourage agencies to take advantage of Department of Justice FOIA resources. OIP will provide training and additional guidance on implementing these guidelines. In addition, agencies should feel free to consult with OIP when making difficult FOIA decisions. With regard to specific FOIA litigation, agencies should consult with the relevant Civil Division, Tax Division, or U.S. Attorney's Office lawyer assigned to the case.

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

[FR Doc. Z9–23375 Filed 10–7–09; 8:45 am]

BILLING CODE 1301–00–D

DEPARTMENT OF JUSTICE

Federal Bureau of Investigation Training Division

[OMB Number 1110–NEW]

FBI National Academy Level I Evaluation Proposed Collection, Comments Requested

ACTION: 60–Day Notice of Information Collection Under Review: Approval of a New Collection.

FBI National Academy Level 1 Evaluation: Student Course Questionnaire.

FBI National Academy: General Remarks Questionnaire.

The Department of Justice (DOJ), Federal Bureau of Investigation (FBI), Training Division's Office of Technology, Research, and Curriculum Development (OTRCD) will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The proposed information collection is published to obtain comments from the public and affected agencies. Comments are encouraged and will be accepted for 60 days until December 7, 2009. This process is conducted in accordance with 5 CFR 1320.10.

If you have comments (especially on the estimated public burden or associated response time), suggestions, or need a copy of the proposed information collection instrument with instructions or additional information, please contact *Candace Matthews, Evaluation Program Manager, Federal Bureau of Investigation, Training Division, Curriculum Development and Evaluation Unit, FBI Academy, Quantico, Virginia 22135 or facsimile at (703) 632–3111.*

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency/component, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's/component's estimate of the burden of the proposed collection of the information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses.

Overview of this information:

1. *Type of Information Collection:* Approval of a New Collection.

2. *Title of the Forms:*

FBI National Academy Level 1 Evaluation: Student Course Questionnaire.

FBI National Academy: General Remarks Questionnaire.

3. *Agency Form Number, if any, and the applicable component of the department sponsoring the collection:*

Form Number: 1110–XXXX.

Sponsor: Training Division of the Federal Bureau of Investigation (FBI), Department of Justice (DOJ).

4. *Affected Public who will be asked or required to respond, as well as a brief abstract:*

Primary: FBI National Academy students that represent State and local police and sheriffs' departments, military police organizations, and Federal law enforcement agencies from the United States and over 150 foreign nations.

Brief Abstract: This collection is requested by FBI National Academy. These surveys have been developed to measure the effectiveness of services that the FBI National Academy provides. We will utilize the students' comments to improve upon the current curriculum.

5. *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:*

Approximately 1,020 FBI National Academy students per year will respond to two types of questionnaires. (1) FBI National Academy Level 1 Evaluation: Student Course Questionnaire and (2) FBI National Academy: General Remarks Questionnaire. It is predicted that we will receive a 75% respond rate for both surveys. Each student will respond to approximately six to seven Student Course Questionnaires—one for each class they have completed. The average time for reading the directions to each questionnaire is estimated to be 2 minutes; the time to complete each questionnaire is estimated to be approximately 20 minutes. Thus the total time to complete the Student Course Questionnaire is 22 minutes.

For the FBI National Academy: General Remarks Questionnaire, students will respond to one questionnaire. The average time for reading the directions to this questionnaire is estimated to be 2 minutes; the time to complete each questionnaire is estimated to be approximately 10 minutes. Thus the total time to complete the General Remarks Questionnaire is 12 minutes. The total hour burden for both surveys is 2,822 hours.

6. *An estimate of the total public burden (in hours) associated with the collection:*

The average hour burden for completing all the surveys combined is 2,822 hours.

If additional information is required, contact: Ms. Lynn Bryant, Department Clearance Officer, United States Department of Justice, Policy and Planning Staff, Justice Management Division, Suite 1600, Patrick Henry Building, 601 D Street, NW., Washington, DC 20530.

Dated: October 5, 2009.

Lynn Bryant,

Department Clearance Officer, PRA, United States Department of Justice.

[FR Doc. E9–24307 Filed 10–7–09; 8:45 am]

BILLING CODE 4410–02–P

NUCLEAR REGULATORY COMMISSION

[NRC–2009–0142]

State of New Jersey: Discontinuance of Certain Commission Regulatory Authority Within the State; Notice of Agreement Between the Nuclear Regulatory Commission and the State of New Jersey

AGENCY: Nuclear Regulatory Commission.

ACTION: Notice of Agreement between the U.S. Nuclear Regulatory Commission and the State of New Jersey.

SUMMARY: This notice is announcing that on September 2, 2009, Gregory B. Jaczko, Chairman of the U.S. Nuclear Regulatory Commission (NRC or Commission), and on September 23, 2009, Governor Jon S. Corzine, of the State of New Jersey, signed an Agreement as authorized by Section 274b of the Atomic Energy Act of 1954, as amended (the Act). The Agreement provides for the Commission to discontinue its regulatory authority and for New Jersey to assume regulatory authority over the possession and use of byproduct material as defined in

Sections 11e.(1), 11e.(3), and 11e.(4) of the Act, source material, special nuclear materials (in quantities not sufficient to form a critical mass), and the regulation of land disposal of byproduct, source, or special nuclear material waste received from other persons. Under the Agreement, a person in New Jersey possessing these materials is exempt from certain Commission regulations. The exemptions have been previously published in the **Federal Register** (FR) and are codified in the Commission's regulations as 10 CFR part 150. The Agreement is published here as required by Section 274e of the Act.

DATES: The effective date of the Agreement is September 30, 2009.

ADDRESSES: You can access publicly available documents, including public comments related to this notice using the following methods:

NRC's Public Document Room (PDR): The public may examine and have copied for a fee publicly available documents at the NRC's PDR, Public File Area O1 F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland.

NRC's Agencywide Documents Access and Management System (ADAMS): Publicly available documents created or received at the NRC are available electronically at the NRC's Electronic Reading Room at *http://www.nrc.gov/reading-rm/adams.html.* From this page, the public can gain entry into ADAMS, which provides text and image files of NRC's public documents. If you do not have access to ADAMS or if there are problems in accessing the documents located in ADAMS, contact the NRC's PDR reference staff at 1–800–397–4209, 301–415–4737, or by e-mail to *pdr.resource@nrc.gov.* The ADAMS Accession numbers for the request for an Agreement by the Governor of New Jersey, including all information and documentation submitted in support of the request, and the NRC Draft Staff Assessment are: ML090510713, ML090510708, ML090510709, ML090510710, ML090510711, ML090510712, ML090770116, and ML091400097.

FOR FURTHER INFORMATION CONTACT: Torre Taylor, Division of Materials Safety and State Agreements, Office of Federal and State Materials and Environmental Management Programs, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001. Telephone (301) 415–7900; e-mail: *torre.taylor@nrc.gov.*

SUPPLEMENTARY INFORMATION: The NRC published the draft Agreement in the **Federal Register** for comment once each week for 4 consecutive weeks on May 27, 2009 (74 FR 25283), June 3, 2009 (74 FR 26739), June 10, 2009 (74 FR 27572), and June 17, 2009 (74 FR 28728), as required by the Act. The comment period ended on June 26, 2009. The Commission received six comment letters—two supporting the Agreement, two opposed, one that supported the rationale of States assuming regulatory authority but not the fee differences that will occur, and one general comment that did not express support or opposition. The comments did not affect the NRC staff's assessment, which finds that the New Jersey Agreement State program is adequate to protect public health and safety and compatible with the NRC's program. The proposed New Jersey Agreement is consistent with Commission policy and thus meets the criteria for an Agreement with the Commission.

After considering the request for an Agreement by the Governor of New Jersey, the supporting documentation submitted with the request for an Agreement, and its interactions with the staff of the New Jersey Department of Environmental Protection, the NRC staff completed an assessment of the New Jersey program. The agency made a copy of the staff assessment available in the NRC's Public Document Room (PDR) and electronically on NRC's Web site. Based on the staff's assessment, the Commission determined on September 2, 2009, that the proposed New Jersey program for control of radiation hazards is adequate to protect public health and safety, and compatible with the Commission's program.

Dated at Rockville, Maryland, this 2nd day of October 2009.

For the Nuclear Regulatory Commission.

J. Samuel Walker,

Acting Secretary of the Commission.

An Agreement Between the United States Nuclear Regulatory Commission and the State of New Jersey for the Discontinuance of Certain Commission Regulatory Authority and Responsibility Within the State Pursuant to Section 274 of the Atomic Energy Act of 1954, as Amended

Whereas, The United States Nuclear Regulatory Commission (the Commission) is authorized under Section 274 of the Atomic Energy Act of 1954, as amended, 42 U.S.C. 2011 *et seq.* (hereinafter referred to as the Act), to enter into Agreements with the Governor of any State/Commonwealth providing for discontinuance of the regulatory authority of the Commission within the State/Commonwealth under Chapters 6, 7, and 8, and Section 161 of the Act with respect to byproduct materials as defined in Sections 11e.(1), (2), (3), and (4) of the Act, source materials, and special nuclear materials in quantities not sufficient to form a critical mass; and,

Whereas, The Governor of the State of New Jersey is authorized under The Radiation Protection Act, N.J.S.A. 26:2D–1, to enter into this Agreement with the Commission; and,

Whereas, The Governor of the State of New Jersey certified on October 16, 2008, that the State of New Jersey (the State) has a program for the control of radiation hazards adequate to protect public health and safety with respect to the materials within the State covered by this Agreement and that the State desires to assume regulatory responsibility for such materials; and,

Whereas, The Commission found on September 2, 2009, that the program of the State for the regulation of the materials covered by this Agreement is compatible with the Commission's program for the regulation of such materials and is adequate to protect public health and safety; and,

Whereas, The State and the Commission recognize the desirability and importance of cooperation between the Commission and the State in the formulation of standards for protection against hazards of radiation and in assuring that State and Commission programs for protection against hazards of radiation will be coordinated and compatible; and,

Whereas, The Commission and the State recognize the desirability of the reciprocal recognition of licenses, and of the granting of limited exemptions from licensing of those materials subject to this Agreement; and,

Whereas, This Agreement is entered into pursuant to the provisions of the Act;

Now, therefore, It is hereby agreed between the Commission and the Governor of the State acting on behalf of the State as follows:

Article I

Subject to the exceptions provided in Articles II, IV, and V, the Commission shall discontinue, as of the effective date of this Agreement, the regulatory authority of the Commission in the State under Chapters 6, 7, and 8, and Section 161 of the Act with respect to the following materials:

1. Byproduct materials as defined in Section 11e.(1) of the Act;
2. Byproduct materials as defined in Section 11e.(3) of the Act;
3. Byproduct materials as defined in Section 11e.(4) of the Act;
4. Source materials;
5. Special nuclear materials in quantities not sufficient to form a critical mass; and
6. The regulation of the land disposal of byproduct, source, or special nuclear waste materials received from other persons.

Article II

This Agreement does not provide for discontinuance of any authority and the Commission shall retain authority and responsibility with respect to:

1. The regulation of the construction and operation of any production or utilization facility or any uranium enrichment facility;
2. The regulation of the export from or import into the United States of byproduct, source, or special nuclear material, or of any production or utilization facility;
3. The regulation of the disposal into the ocean or sea of byproduct, source, or special nuclear materials waste as defined in the regulations or orders of the Commission;

4. The regulation of the disposal of such other byproduct, source, or special nuclear materials waste as the Commission from time to time determines by regulation or order should, because of the hazards or potential hazards thereof, not be disposed without a license from the Commission;

5. The evaluation of radiation safety information on sealed sources or devices containing byproduct, source, or special nuclear materials and the registration of the sealed sources or devices for distribution, as provided for in regulations or orders of the Commission;

6. The regulation of byproduct material as defined in Section 11e.(2) of the Act.

Article III

With the exception of those activities identified in Article II.1 through 4, this Agreement may be amended, upon application by the State and approval by the Commission, to include one or more of the additional activities specified in Article II, whereby the State may then exert regulatory authority and responsibility with respect to those activities.

Article IV

Notwithstanding this Agreement, the Commission may from time to time by rule, regulation, or order, require that the manufacturer, processor, or producer of any equipment, device, commodity, or other product containing source, byproduct, or special nuclear material shall not transfer possession or control of such product except pursuant to a license or an exemption from licensing issued by the Commission.

Article V

This Agreement shall not affect the authority of the Commission under Subsection 161b or 161i of the Act to issue rules, regulations, or orders to protect the common defense and security, to protect restricted data, or to guard against the loss or diversion of special nuclear material.

Article VI

The Commission will cooperate with the State and other Agreement States in the formulation of standards and regulatory programs of the State and the Commission for protection against hazards of radiation and to assure that Commission and State programs for protection against hazards of radiation will be coordinated and compatible.

The State agrees to cooperate with the Commission and other Agreement States in the formulation of standards and regulatory programs of the State and the Commission for protection against hazards of radiation and to assure that the State's program will continue to be compatible with the program of the Commission for the regulation of materials covered by this Agreement.

The State and the Commission agree to keep each other informed of proposed changes in their respective rules and regulations, and to provide each other the opportunity for early and substantive contribution to the proposed changes.

The State and the Commission agree to keep each other informed of events, accidents, and licensee performance that may have generic implication or otherwise be of regulatory interest.

Article VII

The Commission and the State agree that it is desirable to provide reciprocal recognition of licenses for the materials listed in Article I licensed by the other party or by any other Agreement State.

Accordingly, the Commission and the State agree to develop appropriate rules, regulations, and procedures by which such reciprocity will be accorded.

Article VIII

The Commission, upon its own initiative after reasonable notice and opportunity for hearing to the State, or upon request of the Governor of the State, may terminate or suspend all or part of this Agreement and reassert the licensing and regulatory authority vested in it under the Act if the Commission finds that (1) such termination or suspension is required to protect public health and safety, or (2) the State has not complied with one or more of the requirements of Section 274 of the Act.

The Commission may also, pursuant to Section 274j of the Act, temporarily suspend all or part of this Agreement if, in the judgment of the Commission, an emergency situation exists requiring immediate action to protect public health and safety and the State has failed to take necessary steps. The Commission shall periodically review actions taken by the State under this Agreement to ensure compliance with Section 274 of the Act which requires a State program to be adequate to protect public health and safety with respect to the materials covered by this Agreement and to be compatible with the Commission's program.

Article IX

This Agreement shall become effective on September 30, 2009, and shall remain in effect unless and until such time as it is terminated pursuant to Article VIII.

Done at Rockville, Maryland, in triplicate, this 8th day of September, 2009.

FOR THE UNITED STATES NUCLEAR REGULATORY COMMISSION

/RA/

Gregory B. Jaczko, Chairman.

Done at Trenton, New Jersey, in triplicate, this 23rd day of September, 2009.

FOR THE STATE OF NEW JERSEY

/RA/

Jon S. Corzine, Governor.

[FR Doc. E9–24281 Filed 10–7–09; 8:45 am]

BILLING CODE 7590–01–P

RAILROAD RETIREMENT BOARD

Sunshine Act; Notice of Public Meeting

Notice is hereby given that the Railroad Retirement Board will hold a meeting on October 14, 2009, 10 a.m. at the Board's meeting room on the 8th floor of its headquarters building, 844 North Rush Street, Chicago, Illinois, 60611. The agenda for this meeting follows:

(1) Executive Committee Reports

The entire meeting will be open to the public. The person to contact for more information is Beatrice Ezerski, Secretary to the Board, Phone No. 312–751–4920.

Dated: October 5, 2009.

Beatrice Ezerski,

Secretary to the Board.

[FR Doc. E9–24372 Filed 10–6–09; 11:15 am]

BILLING CODE 7905–01–P

RECOVERY ACCOUNTABILITY AND TRANSPARENCY BOARD

Proposed Information Collection Activities

ACTION: Notice and request for comments.

SUMMARY: The Recovery Accountability and Transparency Board (Board) invites comments on the proposed information collection request as required by the Paperwork Reduction Act of 1995.

DATES: Interested persons are invited to submit comments on or before December 7, 2009.

ADDRESSES: Send all comments to Jennifer Dure, Office of General Counsel, Recovery Accountability and Transparency Board, 1717 Pennsylvania Avenue, NW., Suite 700, Washington, DC 20006.

SUPPLEMENTARY INFORMATION: The Paperwork Reduction Act of 1995 (PRA), Public Law 104–13, section 2, 109 Stat. 163 (1995) (codified as revised at 44 U.S.C. 3501–3520), and its implementing regulations, 5 CFR Part 1320, require Federal agencies to provide 60 days' notice to the public for comment on information collection activities. Specifically, the Board invites interested respondents to comment on the following summary of proposed information collection activities regarding (i) whether the information collection activities are necessary for the Board to properly execute its functions; (ii) the accuracy of the Board's estimates of the burden of the information collection activities; (iii) ways for the Board to enhance the quality, utility, and clarity of the information being collected; and (iv) ways for the Board to minimize the burden of information collection activities on the public. The Office of Management and Budget (OMB) has approved, on an emergency basis, this collection of information.

That approval is set to expire on March 31, 2010.

Below is a brief summary of the proposed information collection:

Title of Collection: Section 1512 Data Standards.

OMB Control No.: 0430–0004.

Description: The American Recovery and Reinvestment Act of 2009 (Pub. L. 111–5, 123 Stat. 115 (2009)) (the Recovery Act) established the Board and required that the Board establish and maintain a public-facing Web site to track covered funds. Section 1512 of the Recovery Act requires recipients of Federal financial assistance—namely, grants, cooperative agreements, contracts and loans—to report on the use of funds. These reports are to be submitted to FederalReporting.gov, and certain information from these reports will later be posted on the public-facing Web site Recovery.gov. More specifically, prime recipients, sub-recipients, and vendors who receive Recovery Act funds are required to submit section 1512 data elements as set forth in the *Recipient Reporting Data Model* (available electronically at *https://www.federalreporting.gov/federalreporting/downloads.do*). On June 22, 2009, OMB issued the following reporting guidance in its "Implementing Guidance for the Reports on Use of Funds Pursuant to the American Recovery and Reinvestment Act of 2009" (OMB Guidance):

Prime Recipients: The prime recipient is ultimately responsible for the reporting of all data required by section 1512 of the Recovery Act and the OMB Guidance, including the Federal Funding Accountability and Transparency Act (FFATA) data elements for the sub-recipients of the prime recipient required under section 1512(c)(4). In addition, the prime recipient must report three additional data elements associated with any vendors receiving funds from the prime recipient for any payments greater than $25,000. Specifically, the prime recipient must report the identity of the vendor by reporting the DUNS number, the amount of the payment, and a description of what was obtained in exchange for the payment. If the vendor does not have a DUNS number, then the name and zip code of the vendor's headquarters will be used for identification.

Sub-Recipients of the Prime Recipient: The sub-recipients of the prime recipient may be required by the prime recipient to report the FFATA data elements required under section 1512(c)(4) for payments from the prime recipient to the sub-recipient. The reporting sub-recipients must also report one data element associated with any vendors receiving funds from that sub-recipient. Specifically, the sub-recipient must report, for any payments greater than $25,000, the identity of the vendor by reporting the DUNS number, if available, or otherwise the name and zip code of the vendor's headquarters.

Required Data: The specific data elements to be reported by prime recipients and sub-recipients are included in the *Recipient Reporting Data Model.* Below are the basic reporting requirements to be reported on prime recipients, recipient vendors, sub-recipients, and sub-recipient vendors.

Prime Recipient

1. Federal Funding Agency Name
2. Award identification
3. Recipient DUNS
4. Parent DUNS
5. Recipient CCR information
6. CFDA number, if applicable
7. Recipient account number
8. Project/grant period
9. Award type, date, description, and amount
10. Amount of Federal Recovery Act funds expended to projects/activities
11. Activity code and description
12. Project description and status
13. Job creation narrative and number
14. Infrastructure expenditures and rationale, if applicable
15. Recipient primary place of performance
16. Recipient area of benefit
17. Recipient officer names and compensation (Top 5)
18. Total number and amount of small sub-awards; less than $25,000

Recipient Vendor

1. DUNS or Name and zip code of Headquarters (HQ)
2. Expenditure amount
3. Expenditure description

Sub-Recipient (Also Referred to as FFATA Data Elements)

1. Sub-recipient DUNS
2. Sub-recipient CCR information
3. Sub-recipient type
4. Amount received by sub-recipient
5. Amount awarded to sub-recipient
6. Sub-award date
7. Sub-award period
8. Sub-recipient place of performance
9. Sub-recipient area of benefit
10. Sub-recipient officer names and compensation (Top 5)

Sub-Recipient Vendor

1. DUNS or Name and zip code of HQ

Affected Public: All recipients, as defined in section 1512(b)(1) of the Recovery Act, of Recovery funds (specifically, Federal financial assistance).

Total Estimated Number of Respondents: 133,993.

Frequency of Responses: Quarterly.

Total Estimated Annual Burden Hours: 1,339,930.

Ivan Flores,

Paralegal Specialist, Recovery Accountability and Transparency Board.

[FR Doc. E9–24320 Filed 10–7–09; 8:45 am]

BILLING CODE 6820–GA–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 30e–1, SEC File No. 270–21, OMB Control No. 3235–0025.

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission (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.

This notice supersedes the notice regarding the comment request on the collection of information, "Rule 30e–1 (CFR 270.30e–1) under the Investment Company Act of 1940, (15 U.S.C. 80a–1 *et seq.*) Reports to Stockholders of Management Companies" published in the **Federal Register** on July 30, 2009 (74 FR 38065) because the methodology of calculating the burden of the collection of information has been revised.

The title for the collection of information is: "Rule 30e–1 under the Investment Company Act of 1940, Reports to Stockholders of Management Companies." Section 30(e) (15 U.S.C. 80a–29(e)) of the Investment Company Act of 1940 ("Investment Company Act") requires a registered investment company ("fund") to transmit to its shareholders, at least semi-annually, reports containing financial statements and other financial information as the Commission may prescribe by rules and regulations. In addition, Section 30(f) permits the Commission to require by rule that semi-annual reports include such other information as the Commission deems necessary or

appropriate in the public interest or for the protection of investors. Rule 30e–1 generally requires a fund to transmit to its shareholders, at least semi-annually, reports containing the information that is required to be included in such reports by the fund's registration statement form under the Investment Company Act. Failure to require the collection of this information would seriously impede the amount of current information available to shareholders and the public about funds and would prevent the Commission from implementing the regulatory program required by statute. Approximately 2,800 funds, with a total of approximately 10,460 portfolios, respond to rule 30e–1 annually. The estimate of the total annual reporting burden of the collection of information is approximately 114.2 hours per portfolio, and the total estimated annual burden for the industry is 1,194,532 hours (114.2 hours × 10,460 portfolios). Providing the information required by rule 30e–1 is mandatory. Responses will not be kept confidential. Estimates of the burden hours are made solely for the purposes of the Paperwork Reduction Act, and are not derived from a comprehensive or even a representative survey or study of the costs of SEC rules and forms.

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 proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. 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.*

Dated: October 2, 2009.

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E9–24269 Filed 10–7–09; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–60754; File No. SR–FINRA–2009–059]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of Proposed Rule Change To Adopt NASD Rules 2360 and 2361 Into the Consolidated Rulebook as FINRA Rules 2130 and 2270

October 2, 2009.

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 September 9, 2009, Financial Industry Regulatory Authority, Inc. ("FINRA") (f/k/a National Association of Securities Dealers, Inc. ("NASD")) filed with the Securities and Exchange Commission ("SEC" or "Commission") a proposed rule change to adopt NASD Rule 2360 (Approval Procedures for Day-Trading Accounts) as FINRA Rule 2130 and to adopt NASD Rule 2361 (Day-Trading Risk Disclosure Statement) as FINRA Rule 2270 in the consolidated FINRA rulebook, with minor changes, as described in Items I, II, and III below, which Items substantially have 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

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

As part of the process of developing a new consolidated rulebook ("Consolidated FINRA Rulebook"),[3] FINRA is proposing to adopt NASD Rules 2360 and 2361 in the consolidated FINRA rulebook with minor changes, as FINRA Rules 2130 and 2270 respectively.

NASD Rules 2360 and 2361 focus on members' obligations to disclose to non-institutional customers[4] the basic risks of engaging in a "day-trading strategy" and to assess the appropriateness of day-trading strategies for such customers. The rules define a "day-trading strategy" as "an overall trading strategy characterized by the regular transmission by a customer of intra-day orders to effect both purchase and sale transactions in the same security or securities."[5] NASD Rule 2360 creates an obligation on members that promote a day-trading strategy regarding account-opening approval procedures for non-institutional customers. NASD Rule 2361 creates an obligation on such members to disclose to non-institutional customers the unique risks of engaging in a day-trading strategy.

NASD Rule 2360 prohibits a member promoting a day-trading strategy from opening an account for a non-institutional customer unless, prior to opening the account, the member has furnished the customer with a risk disclosure statement (as described in NASD Rule 2361) and has either (1) approved the customer's account for a day-trading strategy and prepared a record setting forth the basis for the

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The current FINRA rulebook consists of (1) FINRA Rules; (2) NASD Rules; and (3) rules incorporated from NYSE ("Incorporated NYSE Rules") (together, the NASD Rules and Incorporated NYSE Rules are referred to as the "Transitional Rulebook"). While the NASD Rules generally apply to all FINRA members, the Incorporated NYSE Rules apply only to those members of FINRA that are also members of the NYSE ("Dual Members"). The FINRA Rules apply to all FINRA members, unless such rules have a more limited application by their terms. For more information about the rulebook consolidation process, *see Information Notice,* March 12, 2008 (Rulebook Consolidation Process).

[4] For purposes of these rules, the term "non-institutional customer" means a customer that does not qualify as an "institutional account" under NASD Rule 3110(c)(4). *See* NASD Rule 2360(f); NASD Rule 2361(d). FINRA is proposing to adopt NASD Rule 3110(c)(4) as FINRA Rule 4512(c). *See Regulatory Notice* 08–25 (May 2008).

[5] *See* NASD Rule 2360(e); NASD Rule 2361(c).

approval; or (2) obtained from the customer a written agreement stating that the customer does not intend to use the account to engage in a day-trading strategy. The rule further requires that, in order to approve a customer's account for a day-trading strategy, a member must have reasonable grounds to make a determination that a day-trading strategy is appropriate for the customer.[6]

NASD Rule 2361 requires members that promote a day-trading strategy to deliver to their non-institutional customers, prior to opening an account for such customers, a risk disclosure statement, as specified in paragraph (a) of the rule (the "Disclosure Statement").[7] In addition, members that promote a day-trading strategy must post the Disclosure Statement on their Web sites in a clear and conspicuous manner. The Disclosure Statement includes seven specific points, described in more detail in the statement itself, addressing the following factors that a customer should consider before engaging in day-trading, as follows:

(1) Day trading can be extremely risky.

(2) Be cautious of claims of large profits from day trading.

(3) Day trading requires knowledge of securities markets.

(4) Day trading requires knowledge of a firm's operations.

(5) Day trading will generate substantial commissions, even if the per trade cost is low.

(6) Day trading on margin or short selling may result in losses beyond your initial investment.

(7) Potential registration requirements (*i.e.,* persons providing investment advice for others or managing securities accounts for others may need to register as an investment adviser or broker or dealer; such activities also may trigger state registration requirements).

Although these rules define "day-trading strategy," neither defines "promoting a day-trading strategy." NASD Rule 2360 does provide, however, that a firm will *not* be deemed to be "promoting a day-trading strategy" solely by engaging in the following activities:

(1) promoting efficient execution services or lower execution costs based on multiple trades;

(2) providing general investment research or advertising the high quality or prompt availability of such general research; and

(3) Having a Web site that provides general financial information or news or that allows the multiple entry of intra-day purchases and sales of the same securities.[8]

Additional guidance regarding as to what constitutes "promoting a day-trading strategy" can be found in the SEC order approving the adoption of NASD Rule 2360 and 2361 (the "2000 SEC Approval Order") and FINRA's *Notice* announcing SEC approval of the rules (the "2000 FINRA *Notice*").[9] For example, the 2000 FINRA *Notice* provides:

> A member will be subject to the day-trading rules if it affirmatively promotes day-trading activities or strategies through advertising, training seminars, or direct outreach programs. For instance, a firm generally will be subject to the new rules if its advertisements address the benefits of day trading, rapid-fire trading, or momentum trading, or encourages persons to trade or profit like a professional trader. A firm also will be subject to the new rules if it promotes its day-trading services through a third party. Moreover, the fact that many of a firm's customers are engaging in a day-trading strategy will be relevant in determining whether a firm has promoted itself in this way.[10]

The 2000 SEC Approval Order and the 2000 FINRA *Notice* also state that a member may submit an advertisement to FINRA's Advertising Department for review and guidance on whether the content of the advertisement constitutes "promoting a day-trading strategy" for purposes of NASD Rules 2360 and 2361.[11]

Proposed FINRA Rule 2130

The proposed rule change would transfer NASD Rule 2360 with the following minor changes into the Consolidated FINRA Rulebook as FINRA Rule 2130. First, the proposed rule change would add Supplementary Material to clarify the concept of "promoting a day-trading strategy," based on guidance provided in the 2000 FINRA *Notice* and the 2000 SEC Approval Order, as follows:

.01 Promoting a Day-Trading Strategy

(a) A member shall be deemed to be "promoting a day-trading strategy" if it affirmatively endorses a "day-trading strategy," as defined in paragraph (e) of this Rule, through advertising, its Web site, training seminars or direct outreach programs. For example, a member generally shall be deemed to be "promoting a day-trading strategy" if its advertisements address the benefits of day trading, rapid-fire trading, or momentum trading, or encourage persons to trade or profit like a professional trader. A member also shall be deemed to be "promoting a day-trading strategy" if it promotes its day-trading services through a third party. Moreover, the fact that many of a member's customers are engaging in a day-trading strategy will be relevant in determining whether a member has promoted itself in this way.[12]

Second, the proposed rule change would add Supplementary Material, based on guidance provided in the 2000 SEC Approval Order and the 2000 FINRA *Notice,* to specifically provide that a member may submit advertising materials to FINRA's Advertising Department for review and guidance on whether the content of the advertisement constitutes "promoting a day-trading strategy," as follows:

.02 Review by FINRA's Advertising Department

A member may submit its advertisements to FINRA's Advertising Department for review and guidance on whether the content of the advertisement constitutes "promoting a day-trading strategy" for purposes of this Rule.

Third, the proposed rule change would add Supplementary Material to alert members of additional FINRA rules specifically addressing day-trading, including the rule addressing the Disclosure Statement (further discussed below) and rules regarding margin requirements.[13]

Finally, the proposal would make minor changes to the rule to update cross-references and format.

Proposed FINRA Rule 2270

The proposed rule change would transfer NASD Rule 2361 with the following minor changes into the Consolidated FINRA Rulebook as FINRA Rule 2270.

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[6] In making such determination, the rule requires a member to exercise reasonable diligence to ascertain the essential facts relative to the customer, including investment objectives, investment and trading experience and knowledge, financial situation, tax status, employment status, marital status, number of dependents and age. *See* NASD Rule 2360(b).

[7] The rule provides that, in lieu of the disclosure statement specified in the rule, a member may use an alternative disclosure statement, provided that it is substantially similar to the specified disclosure statement and is approved by FINRA's Advertising Department prior to use. *See* NASD Rule 2361(b).

[8] *See* NASD Rule 2360(g).

[9] *See* Securities Exchange Act Release No. 43021 (July 10, 2000), 65 FR 44082 (July 17, 2000) (Approval Order; File No. SR–NASD–99–41); *Notice to Members* 00–62 (September 2000) (announcing SEC approval of Rules 2360 and 2361).

[10] *See* 2000 FINRA *Notice. See also* 2000 SEC Approval Order, 65 FR at 44082–83.

[11] *See* 2000 SEC Approval Order, 65 FR at 44083–44084; 2000 FINRA *Notice,* at note 2.

[12] To enhance the readability of the rule, the proposed rule change would relocate paragraph (g) of Rule 2360 regarding those activities that would not constitute "promoting a day-trading strategy," as paragraph (b) of this new Supplementary Material .01.

[13] *See* proposed Supplementary Material .03 to proposed FINRA Rule 2130.

First, the proposed rule change would slightly modify the rule's existing provisions regarding form of delivery of documents. Currently, the rule provides that the disclosure statements may be provided to individuals either "in writing or electronically." Because in some circumstances electronic documents may be considered a form of "writing," the proposal would amend the rule to clarify that the documents may be provided "in paper or electronic form."

Second, to comport with the proposed revisions to NASD Rule 2360, the proposed rule change would add a statement to FINRA Rule 2270 that the term "promoting a day-trading strategy" shall have the meaning as provided in FINRA Rule 2130.

Third, the proposed rule change would add Supplementary Materials similar to those proposed to be added to FINRA Rule 2130, as discussed above, to specifically provide that a member may submit advertising materials to FINRA's Advertising Department for review and guidance on whether the content of the advertisement constitutes "promoting a day-trading strategy" and to alert members of additional FINRA rules specifically addressing day-trading.[14]

Finally, the proposed rule change would make minor changes to the rule to update cross-references and format.

FINRA intends to announce the implementation date of the proposed rule change in a *Regulatory Notice* to be published no later than 90 days following 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,[15] 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 continues to believe that the required approval process for day-trading accounts serves to protect investors engaged in day-trading activities, and the requisite disclosures in the Disclosure Statement increase investors' understanding of the risks associated with day trading. FINRA believes that the proposed rule change will provide greater clarity regarding these requirements.

[14] *See* proposed Supplementary Material .01 and .02 to proposed FINRA Rule 2270.

[15] 15 U.S.C. 78*o*–3(b)(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.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve such proposed rule change, or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–FINRA–2009–059 on the subject line.

Paper Comments

- Send paper comments in triplicate to Florence E. Harmon, Deputy Secretary, Securities and Exchange Commission, 100 F Street, NE,. Washington, DC 20549–1090.

All submissions should refer to File Number SR–FINRA–2009–059. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of 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–2009–059 and should be submitted on or before October 29, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[16]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E9–24259 Filed 10–7–09; 8:45 am]

BILLING CODE 8011–01–P

[16] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–60774; File No. SR–FINRA–2009–062]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Update Certain Cross-References Within Certain FINRA Rules

October 2, 2009.

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 September 18, 2009, Financial Industry Regulatory Authority, Inc. ("FINRA") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by FINRA. FINRA has designated the proposed rule change as constituting a "non-controversial" rule change under paragraph (f)(6) of

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

Rule 19b–4 under the Act,[3] which renders the proposal effective upon receipt of this filing by the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

FINRA is proposing to update certain cross-references within certain FINRA rules to reflect changes adopted in the consolidated FINRA rulebook.

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 is in the process of developing a new consolidated rulebook ("Consolidated FINRA Rulebook").[4] That process involves FINRA submitting to the Commission for approval a series of proposed rule changes over time to adopt rules in the Consolidated FINRA Rulebook. The phased adoption and implementation of those rules necessitates periodic amendments to update rule cross-references and other non-substantive technical changes in the Consolidated FINRA Rulebook.

The proposed rule change updates references to NASD Rule 2820 (Variable Contracts of an Insurance Company) to reflect the incorporation of NASD Rule 2820 into the Consolidated FINRA Rulebook as FINRA Rule 2320. This rule change was made in FINRA–2009–023, which was approved by the Commission on June 10, 2009 and will become effective on Oct. 19, 2009.[5] In addition, the proposed rule change amends FINRA Rule 9217 (Violations Appropriate for Disposition Under Plan Pursuant to SEA Rule 19d–1(c)(2)) to delete references to NYSE Rules 134(c) and (e) and 440I. NYSE Rules 134 and 440I were repealed in an approved FINRA rule change that became effective on August 17, 2009.[6]

FINRA has filed the proposed rule change for immediate effectiveness. The implementation date will be October 19, 2009, the effective date of FINRA–2009–023.

2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,[7] 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 the proposed rule change will provide greater clarity to members and the public regarding FINRA's rules.

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.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days after the date of the filing, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, it has become effective pursuant to Section 19(b)(3)(A)[8] of the Act and Rule 19b–4(f)(6) thereunder.[9]

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml);* or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–FINRA–2009–062 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–2009–062. 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

[3] 17 CFR 240.19b–4(f)(6).

[4] The current FINRA rulebook consists of (1) FINRA Rules; (2) NASD Rules; and (3) rules incorporated from NYSE ("Incorporated NYSE Rules") (together, the NASD Rules and Incorporated NYSE Rules are referred to as the "Transitional Rulebook"). While the NASD Rules generally apply to all FINRA members, the Incorporated NYSE Rules apply only to those members of FINRA that are also members of the NYSE ("Dual Members"). The FINRA Rules apply to all FINRA members, unless such rules have a more limited application by their terms. For more information about the rulebook consolidation process, *see Information Notice,* March 12, 2008 (Rulebook Consolidation Process).

[5] *See* Securities Exchange Act Release No. 60086 (June 10, 2009), 74 FR 28743 (June 17, 2009) (Order Approving File No. SR–FINRA–2009–023).

[6] *See* Securities Exchange Act Release No. 60367 (July 22, 2009), 74 FR 38077 (July 30, 2009) (Order Approving File No. SR–FINRA–2009–038).

[7] 15 U.S.C. 78*o*–3(b)(6).

[8] 15 U.S.C. 78s(b)(3)(A).

[9] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. FINRA has satisfied this requirement.

proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of 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–2009–062 and should be submitted on or before October 29, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[10]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E9–24265 Filed 10–7–09; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–60779; File No. SR–CBOE–2009–73]

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend on CBSX the Taker Fees and Maker Rebates

October 2, 2009.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on October 1, 2009, the Chicago Board Options Exchange, Incorporated (the "Exchange" or "CBOE") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. CBOE has designated this proposal as one establishing or changing a due, fee, or other charge applicable only to a member under Section 19(b)(3)(A)(ii) of the Act[3] and Rule 19b–4(f)(2) thereunder,[4] which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend its CBOE Stock Exchange ("CBSX") Fees Schedule. The text of the proposed rule change is available on the Exchange's Web site (*http://www.cboe.org/legal*), at the Exchange's Office of the Secretary, and at the Commission.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

CBSX proposes to make fee modifications in order to better attract business to the exchange. Specifically, CBSX proposes to change to $0.0010 per share its Taker Fee applicable to transactions of securities priced at $1 or greater (including for ISO and IOC orders). CBSX proposes to change to 0.29% its Taker Fee for transactions in securities priced less than $1. CBSX proposes to change to $0.0005 per share the rebate for Makers, applicable to transactions in securities priced at $1 or greater.

CBSX also proposes to eliminate its enhanced Maker rebate for Market-Makers when Liquidity Provider Guidelines ("LPGs") are met regarding transactions in securities priced at $1 or greater. Indeed, CBSX proposes to eliminate from its Fees Schedule all references to LPGs, including current footnote 2 and the LPG table. Without the enhanced rebate, the LPG table is no longer necessary.

CBSX also proposes to change its Maker rebate for transactions in securities priced less than $1 to 0.20% of the dollar value of the transaction. CBSX proposes to change the fee for the sweep portion of cross and sweep orders for transactions in securities priced less than $1 to 0.40% of the dollar value of the sweep portion. CBSX proposes to change the fees for orders routed away to $0.0029 per share for transactions in securities priced at $1 or greater and 0.29% of the dollar value of the transaction for transactions in securities priced less than $1.

Finally, CBSX also proposes to modify its pricing for NBBO Step-Up trades. The order that is flashed will be charged $0.0005 per share executed, and there will be no Maker rebates.

2. Statutory Basis

The proposed rule change is consistent with Section 6(b) of the Securities Exchange Act of 1934 ("Act"),[5] in general, and furthers the objectives of Section 6(b)(4)[6] of the Act in particular, in that it is designed to provide for the equitable allocation of reasonable dues, fees, and other charges among CBOE members and other persons using its facilities.

B. Self-Regulatory Organization's Statement on Burden on Competition

CBOE does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The proposed rule change is designated by the Exchange as establishing or changing a due, fee, or other charge, thereby qualifying for effectiveness on filing pursuant to Section 19(b)(3)(A)(ii) of the Act[7] and subparagraph (f)(2) of Rule 19b–4 thereunder.[8] At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

[10] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(ii).

[4] 17 CFR 240.19b–4(f)(2).

[5] 15 U.S.C. 78f(b).

[6] 15 U.S.C. 78f(b)(4)

[7] 15 U.S.C. 78f(b)(3)(A)(ii).

[8] 17 CFR 240.19b–4(f)(2).

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–CBOE–2009–73 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–CBOE–2009–73. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–CBOE–2009–73 and should be submitted on or before October 29, 2009.

[9] 17 CFR 200.30–3(a)(12).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[9]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E9–24267 Filed 10–7–09; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–60776; File No. SR–NASDAQ–2009–086]

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of a Proposal To Amend NASDAQ Rule 11890 Governing Clearly Erroneous Executions

October 2, 2009.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on October 1, 2009, The NASDAQ Stock Market LLC ("Exchange" or "NASDAQ") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. NASDAQ has designated the proposed rule change as constituting a rule change under Rule 19b–4(f)(6) under the Act,[3] which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

NASDAQ is proposing to amend NASDAQ Rule 11890 governing clearly erroneous executions. The text of the filing is available at *http://nasdaqomx.cchwallstreet.com* 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. NASDAQ has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

NASDAQ proposes to amend NASDAQ Rule 11890 in order to improve the exchange's rule regarding clearly erroneous executions. The proposed changes are part of a market-wide effort designed to provide transparency and finality with respect to clearly erroneous executions. This effort seeks to achieve consistent results for participants across U.S. equities exchanges while maintaining a fair and orderly market, protecting investors and protecting the public interest. In addition, NASDAQ has attempted to shorten and combine existing sections of Rule 11890 and has incorporated all of the prior Interpretive Materials into the body of the rule. NASDAQ believes this will create a clearer and more concise rule that will assist market participants in complying with its terms. The proposed changes are more fully discussed below.

Definition

NASDAQ will amend the meaning of the definition of a clearly erroneous execution, to add clarifying language with respect to cancelled trades. The proposed change identifies that a transaction made in error and agreed to be canceled by both parties or determined by NASDAQ to be clearly erroneous will be removed from the Consolidated Tape. A trade will only be removed from the Consolidated Tape when the determination is deemed final and any applicable appeals have been exhausted.

Member Initiated Review Requests

NASDAQ proposes to amend Rule 11890 to update the procedures for requesting a review of a clearly erroneous transaction. NASDAQ proposes that requests for review must be received by the exchange within 30 minutes of the execution time for orders initially routed to and executed on NASDAQ. This is consistent with NASDAQ's current practice and will be applied uniformly by other markets to provide a level of consistency and certainty across market centers. As is the case under the current rule, NASDAQ proposes that members submit certain essential identifying information with the request including the time of the transaction(s), security

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 17 CFR 240.19b–4(f)(6).

symbol(s), number of shares, price(s), side (bought or sold), and factual basis for believing that the trade is clearly erroneous. The current rule allows members additional time to file at market open. However, NASDAQ believes that a uniform 30 minutes is an appropriate time frame for all trades that affords the requesting party sufficient time to gather and submit all required information.

The proposed rule also requires NASDAQ to notify the counterparty to a trade upon receipt of a timely filed request for review that satisfies the numerical guidelines set forth within the Rule (referred to in the proposed amendments as "Numerical Guidelines," which are discussed in detail below). This proposed language eliminates the requirement that counterparties be notified of every request for a ruling and instead requires notice only when a request is filed in a timely manner and satisfies the Numerical Guidelines. This change alleviates the burden on NASDAQ of notifying the counterparties when a request for review does not merit a ruling to break the trades at issue.

In addition, notification may be by one of several means, including press release, system status, Web posting or any other method reasonably expected to provide rapid notice to many market participants. For example, NASDAQ anticipates streamlining the notification process for counterparties when NASDAQ receives a high volume of clearly erroneous filings. In such circumstances it might issue an electronic system status message indicating which trades were under review instead of more time consuming individual calls to each counterparty. This will benefit market participants by expediting notification that trades are under review and the decision with respect to particular trades. NASDAQ would advise market participants of what notification processes it will use through a Notice to Members or Head Trader Alert.

Routed Executions

NASDAQ proposes to give other market centers an additional 30 minutes from the receipt of their participant's timely filing to request a ruling, but no longer than 60 minutes from the time of the execution under review. This provision accounts for those executions initially directed to an away market center and subsequently routed by that away market center to NASDAQ.

For example, assume an order is initially routed by a participant to Market Center A and subsequently routed to NASDAQ where the order is executed at a price outside of the Numerical Guidelines. Without additional time Market Center A might be late in filing with NASDAQ if its customer takes almost 30 minutes to file the original complaint. The proposal would give Market Center A up to 30 additional minutes from the time its customer files with Market Center A to file with NASDAQ for review. This provision caps the filing deadline for an away market center at 60 minutes from the time of the execution under review.

Outlier Transactions

The proposed amendments to Rule 11890 provide that an Official [4] may consider requests for review received after thirty minutes, but not longer than sixty minutes after the execution in question in the case of an Outlier Transaction. An Outlier Transaction is a transaction where (1) the execution price of the security is greater than three times the current Numerical Guidelines, or (2) the execution price of the security breaches the 52-week high or low, in which case NASDAQ may consider Additional Factors to determine if the transaction qualifies for review or if NASDAQ shall decline to act.

Deletion of Current Rule 11890(a)(2)(D) Inside Price Minimum Thresholds

NASDAQ proposes to delete the inside price minimum thresholds that currently apply to transactions during regular market hours (9:30 a.m. to 4:00 p.m.). These thresholds establish which trades are eligible for review and are different than the Numerical Guidelines. NASDAQ believes that these thresholds, which predate the use of Numerical Guidelines, add an extra layer of complexity to the filing process without providing any meaningful benefit to investors or NASDAQ.

Numerical Guidelines

Currently, the Interpretive Materials to Rule 11890 provide specific numerical guidelines for determining what constitutes a clearly erroneous transaction. NASDAQ proposes codifying these numerical thresholds, referred to as "Numerical Guidelines," in the rule to explicitly state what constitutes a clearly erroneous execution. The proposal also adds Numerical Guidelines for leveraged ETFs and ETNs, which are securities that have become increasingly popular since the original numerical thresholds were adopted. The proposed Numerical Guidelines state that a transaction executed during the Core Trading Session [5] or the Opening and Late Trading Sessions [6] may be found to be clearly erroneous only if the price of the transaction is greater in the case of a buy, or less in the case of a sale, than the reference price by an amount that equals or exceeds the Numerical Guidelines for a particular transaction category. The Reference Price shall be equal to the consolidated last sale immediately prior to the execution under review, unless unusual circumstances are present.

The proposed Numerical Guidelines for sales greater than $0.00 and up to and including $25.00 are 10% for the Core Trading Session and 20% for the Opening and Late Trading Sessions. The proposed Numerical Guidelines for sales greater than $25.00 up to and including $50.00 are 5% for the Core Trading Session and 10% for Opening and Late Trading Sessions. The proposed Numerical Guidelines for sales greater than $50.00 are 3% for the Core Trading Session and 6% for Opening and Late Trading Sessions. A filing involving five or more securities by the same member may be considered a "Multi-Stock Event." In the case of a Multi-Stock Event, the proposed guidelines are 10% for the Core Trading Session and 10% for the Opening and Late Trading Sessions. In the case of Leveraged ETF/ETN securities, the above guidelines are to be multiplied by the leverage multiplier of the security. Executions that do not meet or exceed the Numerical Guidelines will not be eligible to be broken under this section. The following chart summarizes the proposed Numerical Guidelines.

[4] As is the case under the current Rule 11890, designated employees of NASDAQ ("Officials") would have authority to review member initiated requests under Rule 11890(a).

[5] The Core Trading Session begins at 9:30:00 a.m. and ends at 4:00:00 p.m. The Core Trading Session includes the NASDAQ Closing Crosses, which are sometimes disseminated to the market a few seconds after 4 p.m. due to the cross calculation process.

[6] The Opening Session begins at 07:00:00 a.m. and concludes with the start of the Core Trading Session. The Late Trading Session begins at the end of the Core Trading Session and continues until 8:00:00 p.m.

Reference price: Consolidated last sale	Core Trading Session Numerical Guidelines (subject transaction's % difference from the consolidated last sale):	Opening and late trading session numerical guidelines (subject transaction's % difference from the consolidated last sale):
Greater than $0.00 up to and including $25.00	10%	20%
Greater than $25.00 up to and including $50.00	5%	10%
Greater than $50.00	3%	6%
Filings involving five or more securities by the same participant may be considered a "Multi-Stock Event".	10%	10%
Leveraged ETF/ETN securities	Core Trading Session Numerical Guidelines multiplied by the leverage multiplier (i.e., 2×).	Core Trading Session Numerical Guidelines multiplied by the leverage multiplier (i.e., 2×).

The following example explains the application of these guidelines. ABC has a consolidated last sale of $10.00. During the Core Trading Session Customer A enters a market order to buy 10,000 shares, although it had intended a market order for 1,000 shares. Executions occur, moving through the depth of the NASDAQ Book, as follows:

Trade #1—1,000 shares @ $10.00 (0% difference from Reference Price)
Trade #2—5,000 shares @ $10.50 (5% difference from Reference Price)
Trade #3—2,000 shares @ $11.00 (10% difference from Reference Price)
Trade #4—1,000 shares @ $11.50 (15% difference from Reference Price)
Trade #5—1,000 shares @ $12.00 (20% difference from Reference Price)

In this example, to be clearly erroneous the trades must be at a price that is at least 10% higher than the consolidated last sale prior to the series of executions. Absent any Unusual Circumstances or Additional Factors (each discussed below), the NASDAQ Official would break trades #3 through #5, priced at $11.00 and above, as clearly erroneous, but would let stand trades #1 and #2. If instead the trade happened in the Late Trading Session, where the a 20% difference from the Reference Price is required for trades to be clearly erroneous, the NASDAQ Official would break only Trade #5 and trades #1 through #4 would stand.

Establishing Numerical Guidelines within the rule gives regulatory transparency and consistency in the application of the rules of NASDAQ. These Numerical Guidelines, which are substantially similar to existing NASDAQ guidance, represent the general consensus developed based on the collective experiences of a market-wide group. NASDAQ believes that the Numerical Guidelines are fair and appropriate and apply evenly to all participants.

Unusual Circumstances

NASDAQ further proposes that in unusual circumstances NASDAQ may, in its discretion and with a view toward maintaining a fair and orderly market and protecting investors and the public interest, use a Reference Price other than the consolidated last sale. "Unusual Circumstances" may include periods of extreme market volatility, sustained illiquidity, or widespread system issues. Other Reference Prices that NASDAQ may use would include the consolidated inside price, the consolidated opening price, the consolidated prior close, or the consolidated last sale prior to a series of executions.

Under the proposed rule NASDAQ may also use a higher Numerical Guideline if, after market participants have been alerted to erroneous activity, the price of the security returns toward its prior trading range but continues to trade beyond the price it would have normally been broken.

Joint Market Rulings

In the interest of achieving consistency across markets, the proposal would give NASDAQ the ability to use a different Reference Price and/or Numerical Guideline in events that involve other markets. In these instances the Reference Price would be determined based on a consensus among the exchanges where the transactions occurred.

Additional Factors

The proposed amendments to Rule 11890 also enumerate some additional factors that an Official may consider when determining whether an execution is clearly erroneous. These factors include, but are not limited to, system malfunctions or disruptions, volume and volatility for the security, derivative securities products that correspond to greater than 100% in the direction of a tracking index, news released for the security, whether trading in the security was recently halted/resumed, whether the security is an IPO, whether the security was subject to a stock-split, reorganization, or other corporate action, overall market conditions, Opening and Late Session executions, validity of the consolidated tapes trades and quotes, consideration of primary market indications, and executions inconsistent with the trading pattern in the stock. Each additional factor shall be considered with a view toward maintaining a fair and orderly market, the protection of investors and the public interest. NASDAQ believes market participants recognize that such factors will be considered in reviewing potentially erroneous trades because Rule 11890 currently includes similar provisions.

Numerical Guidelines Applicable to Volatile Market Opens

The proposed amendments give NASDAQ the ability to expand the Numerical Guidelines applicable to transactions occurring between 9:30 a.m. and 10:00 a.m. based on the disseminated value of the S&P 500 Futures at 9:15 a.m. When the S&P Futures are up or down 3%, or up to but not including 5% at 9:15 a.m., the Numerical Guidelines are doubled. When the S&P Futures are up or down 5% or greater at 9:15 a.m., the Numerical Guidelines are tripled. NASDAQ believes that the S&P 500 futures contract is an appropriate and reliable barometer of market activity prior to the market opening due to its broad based market coverage and deep liquidity. Using the S&P 500 Futures disseminated value at 9:15 a.m. as the barometer of market activity, NASDAQ is providing a transparent means of offering adjusted guidelines in times of volatile market activity.

Review Procedures

Initial Determination

NASDAQ proposes adding language stating that a determination shall be made generally within 30 minutes of receipt of the complaint, but in no case later than the start of Core Trading on the following trading day. Rulings made outside of 30 minutes will not fail for lack of timeliness. The guideline simply provides participants an appropriate expectation that a ruling will generally be made within 30 minutes and in no case later than the start of Core Trading on the following trading day.

Appeals

The current rule provides that the Market Operation Review Committee ("MORC") shall review and render a decision upon an appeal. The proposed

rule offers more definite guidelines to ensure the expedient resolution of appeals. It requires the MORC to review appeals as soon as practicable, but generally on the same day as the executions under review. Appeals received between 3 p.m. ET and the close of trading in the Late Trading Session should be made as soon as practicable, but in no case later than the trading day following the date of the execution under review. While decisions by the MORC that do not meet these time guidelines will still be valid, these guidelines will provide participants with reasonable expectations of when a ruling on appeal will generally be made. As is currently the case, all decisions rendered under Rule 11890(a) (complaints of market participants) will be subject to appeal to the MORC as will decisions rendered by a NASDAQ Senior Official under Rule 11890(b) (decisions on NASDAQ's own motion), except in cases where the Senior Official determines that the ruling should not be eligible for appeal because finality is necessary to maintain a fair and orderly market and to protect investors and the public interest. This provision simply clarifies the fact that nothing in the proposed rule limits or impedes the rights of the parties to arbitrate their dispute.

NASDAQ Acting on Its Own Motion

The proposed rule would allow a designated "Senior Official" of NASDAQ[7] to review executions pursuant to Rule 11890(b). NASDAQ's Rule 11890(b) is consistent with NYSE ARCA, Inc.'s Rule 7.10(g). The Senior Official's decision would still be guided by the Numerical Guidelines (including the Multi-Stock Event 10% threshold), Unusual Circumstances and Additional Factors outlined above. In extraordinary circumstances a Senior Official may apply a lower Numerical Guideline if such action is necessary to maintain a fair and orderly market or protect investors and the public interest. In some instances NASDAQ may detect a single execution that breaches the Numerical Guidelines but is not the subject of a ruling request. This provision gives NASDAQ the ability to review such executions. In other cases, clearly erroneous executions commonly involve multiple parties and multiple executions. All affected parties may not request a ruling. NASDAQ proposes this provision to permit a Senior Official to rule on a group of transactions related to the same occurrence or event as a whole, without a formal request for a ruling from every affected party.

As is currently the case, NASDAQ could break all trades in a security if a pervasive mistake resulted in trading that should not have occurred. For example, trades in a security that was incorrectly authorized for trading prior to the date of its actual initial public offering would all be broken. Similarly, if NASDAQ systems executed orders in the NASDAQ opening cross or closing cross at a price that was inconsistent with the rules governing the operation of the cross, either due to a NASDAQ system error or because an underlying erroneous order resulted in an erroneous opening or closing price, NASDAQ may break all of the affected trades. Under Rule 11890(b), a NASDAQ Senior Official may adjust trades, but this adjustment authority is limited to extraordinary circumstances involving the closing cross.

This rule change shall be effective October 5, 2009.

2. Statutory Basis

NASDAQ believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,[8] in general, and with Section 6(b)(5) of the Act,[9] in particular, in that the proposal is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. The proposed rule change would coordinate standards of review of clearly erroneous trades across markets, thereby eliminating conflicting rulings among exchanges and disparate treatment of similarly priced trades.

B. Self-Regulatory Organization's Statement on Burden on Competition

Nasdaq does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act[10] and Rule 19b–4(f)(6) thereunder.[11]

A proposed rule change filed pursuant to Rule 19b–4(f)(6) under the Act[12] normally does not become operative for 30 days after the date of its filing. However, Rule 19b–4(f)(6)[13] permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange requests that the Commission waive the 30-day operative delay so that it may implement the new rule on October 5, 2009, the same date as the other equities exchanges. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest because it will allow the Exchange to begin applying the new rule on the same date as the other equities exchanges.[14] Application of the new rule on this date should help foster transparency and consistency among those exchanges that adopt clearly erroneous execution rules substantially similar to those previously approved by the Commission.[15] For these reasons, the Commission designates that the proposed rule change become operative on October 5, 2009.

At any time within 60 days of the filing of the proposed rule change, the

[7] Currently only NASDAQ Executive Vice Presidents designated by NASDAQ's President are eligible to make rulings under Rule 11890(b). NASDAQ proposes to expand this to include other officers and senior level employees of NASDAQ as "Senior Officials" eligible to make rulings. NASDAQ's Chief Regulatory Officer would designate Senior Officials with relevant market experience to adjudicate these matters.

[8] 15 U.S.C. 78f.

[9] 15 U.S.C. 78f(b)(5).

[10] 15 U.S.C. 78s(b)(3)(A).

[11] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b-4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[12] 17 CFR 240.19b–4(f)(6).

[13] 17 CFR 240.19b–4(f)(6).

[14] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposal's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[15] *See* Securities Exchange Act Release No. 60706 (September 22, 2009), 74 FR 49416 (September 28, 2009) (NYSEArca–2009–36).

Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–NASDAQ–2009–086 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–NASDAQ–2009–086. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the 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 publicly available. All submissions should refer to File Number SR–NASDAQ–2009–086 and should be submitted on or before October 29, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[16]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E9–24243 Filed 10–7–09; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–60780; File No. SR–ISE–2009–71]

Self-Regulatory Organizations; International Securities Exchange, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to PrecISE Fees

October 2, 2009.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act"),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on September 30, 2009, the International Securities Exchange, LLC (the "Exchange" or "ISE") filed with the Securities and Exchange Commission the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The ISE proposes to amend its fees relating to the Exchange's proprietary PrecISE Trade® order entry terminals. The text of the proposed rule change is available on the Exchange's Web site (*http://www.ise.com*), at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of this proposed rule change is to amend ISE's fees relating to the Exchange's proprietary PrecISE Trade® order entry terminals. First, the Exchange currently has a monthly PrecISE sponsored customer fee of $250 per terminal, with a maximum of $1,500 per sponsored customer. A "Sponsored Customer" is a non-Member of the Exchange that trades under a sponsoring Member's execution and clearing identity. The Exchange permits Sponsored Customers of Members to access the Exchange directly via a PrecISE trade terminal, provided certain conditions are met. The Exchange's sponsored customer fees have been in place since 2007.[3]

Earlier this year, the Exchange amended its PrecISE terminal fees by increasing those fees from $300 to $350 per month for the first 10 users and from $50 to $100 per month for all subsequent users.[4] The Exchange increased its PrecISE terminal fees to cover its costs of building out an enhanced PrecISE terminal. The PrecISE terminals that sponsored customers use have the same functionalities as the terminals that are used by ISE Members. ISE now proposes to amend its PrecISE sponsored customer fee by aligning this fee with its PrecISE terminal fees. Accordingly, the Exchange proposes to increase its PrecISE sponsored customer fee from $300 to $350 per terminal per month for the first 10 users and from $50 to $100 per month for all subsequent users.

In the PrecISE Fee Filing, the Exchange also changed the method for calculating its PrecISE terminal fees.[5] ISE now proposes to adopt the same method for calculating its PrecISE sponsored customer fee that it currently uses for calculating the PrecISE terminal fee, which is to charge users for the total number of logins used during a month per Sponsored Customer.

Second, the Exchange proposes to remove the PrecISE through VPN fee from its fee schedule. The Exchange no longer supports a PrecISE through VPN

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[16] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Exchange Act Release No. 34–56496 (September 21, 2007), 72 FR 55268 (September 28, 2007).

[4] *See* Exchange Act Release No. 34–60208 (July 1, 2009), 74 FR 33012 (July 9, 2009) (the "PrecISE Fee Filing").

[5] *Id.*

connection. Members that used to connect to the Exchange through a VPN now connect to the Exchange via the Internet.

These proposed fee changes will be operative on October 1, 2009.

2. Statutory Basis

The basis under the Securities Exchange Act of 1934 (the "Exchange Act") for this proposed rule change is the requirement under Section 6(b)(4) that an exchange have an equitable allocation of reasonable dues, fees and other charges among its members and other persons using its facilities. In particular, these fees will enable the Exchange to cover its costs for providing an enhanced version of its front-end trading system to sponsored customers.

B. Self-Regulatory Organization's Statement on Burden on Competition

The proposed rule change does not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any unsolicited written comments from members or other interested parties.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3) of the Act [6] and Rule 19b–4(f)(2) [7] thereunder. At any time within 60 days of the filing of such proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–ISE–2009–71 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–ISE–2009–71. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File No. SR–ISE–2009–71 and should be submitted on or before October 29, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[8]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E9–24268 Filed 10–7–09; 8:45 am]

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[6] 15 U.S.C. 78s(b)(3)(A).

[7] 17 CFR 19b–4(f)(2).

[8] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–60778; File No. SR–ISE–2009–72]

Self-Regulatory Organizations; International Securities Exchange, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Customer Fees for Certain Complex Orders

October 2, 2009.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on October 1, 2009, the International Securities Exchange, LLC (the "Exchange" or "ISE") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by ISE. ISE filed the proposed rule change pursuant to Section 19(b)(3)(A) of the Act [3] and Rule 19b–4(f)(2) thereunder,[4] which renders the proposed rule change effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The ISE proposes to amend its fee schedule for customer fees for certain Complex Orders. The text of the proposed rule change is available on the Exchange's Web site (*http://www.ise.com*), at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the 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 self-regulatory organization has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A).

[4] 17 CFR 19b–4(f)(2).

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of this proposed rule change is to amend ISE's fee schedule for customer fees for certain Complex Orders.[5] The Exchange currently has a fee of $0.20 per contract applicable to customers that transact in Complex Orders, *i.e.*, customer orders that interact with Complex Orders residing on the complex order book thereby taking liquidity from the complex order book.[6] The Exchange waives this fee for the first 15,000 contracts transacted in a month by a member on behalf of its customers. This fee applies once a member transacts more than 15,000 contracts in a month (whether on behalf of one or more than one of its customers) that take liquidity from the complex order book. This fee generally applies to non-broker-dealer individuals and entities that have access to information and technology that enables them to trade, generally in large volume, in the same manner as a broker-dealer, *i.e.*, these customers are able to quickly hit the bid or lift an offer on the Exchange's complex order book.

The Exchange notes the current fee waiver at times affects retail investor orders. The purpose of the fee is to charge customers that trade like market professionals and are able to take liquidity from the exchange's complex order book in large volume because of their sophisticated trading systems. Therefore, ISE proposes to refine this fee by adopting a threshold of 1,000 orders rather than 15,000 contracts. The Exchange believes switching the threshold from contracts-based to orders-based will capture the trading activity of those customers that intentionally engage in the business of taking liquidity from the Exchange's complex order book. The Exchange believes that retail investors that interact with Complex Orders resident on the complex order book are not likely to exceed 1,000 orders and thus are not likely to be charged this fee.

The Exchange also proposes to increase this fee from $0.20 per contract to $0.25 per contract. ISE proposes to implement this fee change on October 1, 2009.

2. Basis

The basis under the Act for this proposed rule change is the requirement under Section 6(b)(4) that an exchange have an equitable allocation of dues, fees and other charges among its members and other persons using its facilities. In particular, the Exchange believes it is reasonable to charge customers that trade like market professionals and take liquidity from the Exchange's complex order book the same fee that the Exchange charges broker-dealers and market makers for taking liquidity from the Exchange's complex order book.

B. Self-Regulatory Organization's Statement on Burden on Competition

The proposed rule change does not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any unsolicited written comments from members or other interested parties.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act[7] and Rule 19b–4(f)(2)[8] thereunder because it establishes a due, fee, or other charge imposed by ISE.

At any time within 60 days of the filing of such proposed rule change the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–ISE–2009–72 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, Station Place, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–ISE–2009–72. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of ISE. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make publicly available. All submissions should refer to File Number SR–ISE–2009–72 and should be submitted on or before October 29, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[9]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E9–24266 Filed 10–7–09; 8:45 am]

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[5] Complex Orders are defined in ISE Rule 722(a).

[6] *See* Exchange Act Release No. 55247 (February 6, 2007), 72 FR 7099 (February 14, 2007).

[7] 5 U.S.C. 78s(b)(3)(A).

[8] 17 CFR 19b–4(f)(2).

[9] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–60770; File No. SR–ISE–2009–69]

Self-Regulatory Organizations; International Securities Exchange, LLC; Notice of Filing and Order Granting Accelerated Approval to a Proposed Rule Change Relating to the Amounts That Direct Edge ECN, in Its Capacity as an Introducing Broker for Non-ISE Members, Passes Through to Such Non-ISE Members

October 2, 2009.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act"),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on September 30, 2009, the International Securities Exchange, LLC (the "Exchange" or the "ISE") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by ISE. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons, and is approving the proposal on an accelerated basis.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to modify the amounts that Direct Edge ECN ("DECN"), in its capacity as an introducing broker for non-ISE Members, passes through to such non-ISE Members.

The text of the proposed rule change is available on the Exchange's Internet Web site at *http://www.ise.com.*

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item III below. The self-regulatory organization has prepared summaries, set forth in sections A, B and C below, of the most significant aspects of such statements.

[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

DECN, a facility of ISE, operates two trading platforms, EDGX and EDGA. On September 30, 2009, the ISE filed for immediate effectiveness a proposed rule change to: (i) Amend DECN's fee schedule for ISE Members [3] to adopt new fees and rebates and associated flags; [4] (ii) amend the criteria for meeting the Ultra Tier; [5] (iii) to amend the descriptions of certain flags in the schedule; [6] and (iv) to amend its fee schedule to reflect pass through charges of other market centers.[7] The fee changes made pursuant to SR–ISE–2009–68 became operative on October 1, 2009.

In its capacity as a member of ISE, DECN currently serves as an introducing broker for the non-ISE Member subscribers of DECN to access EDGX and EDGA. DECN, as an ISE Member and introducing broker, receives rebates and is assessed charges from DECN for transactions it executes on EDGX or EDGA in its capacity as introducing broker for non-ISE Members. Since the amounts of such rebates and charges were changed pursuant to SR–ISE–2009–68, DECN wishes to make corresponding changes to the amounts it passes through to non-ISE Member subscribers of DECN for which it acts as introducing broker. As a result, the per share amounts that non-ISE Member subscribers receive and are charged will be the same as the amounts that ISE Members receive and are charged.

ISE is seeking accelerated approval of this proposed rule change, as well a retroactive effective date of October 1, 2009. ISE represents that this proposal

[3] References to ISE Members in this filing refer to DECN Subscribers who are ISE Members.

[4] In SR–ISE–2009–68, the Exchange also adopted additional fees and rebates and associated flags. First, the Exchange added new fee categories for the INET order type. When a member routes to Nasdaq using the INET order type and removes liquidity on Tapes A or C, the member incurs a fee of $0.0030 on either EDGA or EDGX. Such situation yields new Flag "L". The INET order type sweeps the EDGA or EDGX book, and routes the remainder to Nasdaq. If the order is marketable, it will remove liquidity from the EDGA or EDGX book, as applicable, first. If the order is non-marketable, the order will post on Nasdaq. With regards to a Member's use of the INET order type for Tapes A or C securities, Members routing an average daily volume ("ADV"): (i) Less than 5,000,000 shares are charged $0.0030 per share, as described in the schedule; (ii) equal to or greater than 5,000,000 shares but less than 20,000,000 shares are charged $0.0027 per share; (iii) equal to or greater than 20,000,000 shares but less than 30,000,001 shares are charged $0.0026 per share; and (iv) equal to or greater than 30,000,001 shares are charged $0.0025 per share. The rates, in all cases, are calculated for shares removed from Nasdaq. The Exchange believes that these tier-based rates incent Members to sweep the EDGA or EDGX book first and then offer a discounted rate to Nasdaq's rates if the remainder of the order is routed to Nasdaq. These discounted rates arise in part from reduced administrative costs associated with certain volume levels.

Similarly, the Exchange also added an additional fee category for the INET order type when a member routes to Nasdaq using the INET order type and removes liquidity on Tape B. Such situation yields new flag "2". With regards to a Member's use of the INET order type for Tape B securities, Members routing an ADV: (i) Less than 20,000,000 shares are charged $0.0030 per share, as described in the schedule; (ii) equal to or greater than 20,000,000 but less than 30,000,001 shares are charged $0.0029 per share; and (iii) equal to or greater than 30,000,001 shares are charged $0.0028 per share.

Furthermore, the Exchange adopted a new rebate. Members receive a rebate of $0.0032 per share for all liquidity posted on EDGX if they add or route at least 10,000,000 shares of ADV to EDGX prior to 9:30 a.m. EST or after 4 p.m. EST (includes all flags except N and W) and add a minimum of 75,000,000 shares of ADV on EDGX in total, including during both market hours and pre and post-trading hours. This rebate is designed to reward members who add or route significant order flow to EDGX both during market hours and pre and post-trading hours. It is also designed to increase the liquidity of the pre and post markets.

[5] In SR–ISE–2009–68, the Exchange amended the criteria for meeting the Ultra Tier by allowing ISE Members to receive a $0.0032 rebate per share for securities priced at or above $1.00 when ISE Members add liquidity on EDGX if the attributed MPID posts 1% of the Total Consolidated Volume ("TCV") in ADV. TCV is defined as volume reported by all exchanges and trade reporting facilities to the consolidated transaction reporting plans for Tape A, B, and C securities. The Ultra Tier rebate ($0.0032 per share), which is a higher rebate than the Super Tier ($0.0030 per share), is also more difficult to reach than the Super Tier rebate, as a higher volume threshold is required based on recent TCV figures. For example, 1% of the average TCV for July 2009 (8.8 billion) was approximately 88 million shares. This threshold far exceeds the criteria to meet the Super Tier rebate. In addition, the higher rebate also results in part from lower administrative costs associated with higher volume.

Previously, ISE Members were provided a $0.0032 rebate per share for securities priced at or above $1.00 when ISE Members added liquidity on EDGX if the attributed MPID satisfied one of the following criteria on a daily basis, measured monthly: (i) Adding 100,000,000 shares or more on EDGX; or (ii) adding 50,000,000 shares or more of liquidity to EDGX, so long as added liquidity on EDGX is at least 20,000,000 shares greater than the previous calendar month. In SR–ISE–2009–68, the Exchange also deleted the Full Sweep Tier, which provided a $0.0035 rebate per share for liquidity added on EDGX if the attributed MPID added 50,000,000 shares or more on a daily basis, measured monthly, by using the ROUT routing strategy.

[6] In SR–ISE–2009–68, the Exchange also amended the descriptions of the "N" and "W" flags to display which Tape liquidity is removed from. For the "N" flag, the Exchange amended the description to state that liquidity is removed from Tapes B & C. For the "W" flag, the Exchange amended the description to state that liquidity is removed from Tape A.

[7] In SR–ISE–2009–68, the Exchange amended its fee schedule to pass through to ISE members the actual transaction fees assessed by away markets. Specifically, the Exchange amended its fees schedule to reflect Nasdaq's reduction in rebate from 0.0006 to 0.0001 for removing liquidity from Nasdaq OMX BX.

will ensure that both ISE Members and non-ISE Members (by virtue of the pass-through described above) will in effect receive and be charged equivalent amounts and that the imposition of such amounts will begin on the same October 1, 2009 start date.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the objectives of Section 6 of the Act,[8] in general, and furthers the objectives of Section 6(b)(4),[9] 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. In particular, this proposal will ensure that dues, fees and other charges imposed on ISE Members are equitably allocated to both ISE Members and non-ISE Members (by virtue of the pass-through described above).

B. Self-Regulatory Organization's Statement on Burden on Competition

The proposed rule change does not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any unsolicited written comments from members or other interested parties.

III. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File No. SR–ISE–2009–69 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–ISE–2009–69. 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 Commissions Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the ISE. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–ISE–2009–69 and should be submitted on or before October 29, 2009.

IV. Commission's Findings and Order Granting Accelerated Approval of Proposed Rule Change

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.[10] Specifically, the Commission finds that the proposed rule change is consistent with Section 6(b)(4)[11] of the Act, which requires that the rules of a national securities exchange provide for the equitable allocation of reasonable dues, fees, and other charges among members and issuers and other persons using its facilities.

As described more fully above, ISE recently amended DECN's fee schedule for ISE Members to, among other things, amend the criteria for meeting the Ultra Tier rebate, delete the Full Sweep Tier, adopt fees in connection with the use of INET routing strategies, and to adopt a new rebate for liquidity posted on EDGX during pre and post hours trading.[12] The fee changes made pursuant to the Member Fee Filing became operative on October 1, 2009. DECN receives rebates and is charged fees for transactions it executes on EGDX or EDGA in its capacity as an introducing broker for its non-ISE member subscribers.

The current proposal, which will apply retroactively to October 1, 2009, will allow DECN to pass through the revised rebates and fees to the non-ISE member subscribers for which it acts an introducing broker. The Commission finds that the proposal is consistent with the Act because it will provide rebates and charge fees to non-ISE member subscribers that are equivalent to those established for ISE member subscribers in the Member Fee Filing.[13]

ISE has requested that the Commission find good cause for approving the proposed rule change prior to the thirtieth day after publication of notice of filing thereof in the **Federal Register**. As discussed above, the proposal will allow DECN to pass through to non-ISE member subscribers the revised rebate and fees established for ISE member subscribers in the Member Fee Filing, resulting in equivalent rebates and fees for ISE member and non-member subscribers. In addition, because the proposal will apply the revised rebates and fees retroactively to October 1, 2009, the revised rebates and fees will have the same effective date, thereby promoting consistency in the DECN's fee schedule. Accordingly, the Commission finds good cause, pursuant to Section 19(b)(2) of the Act, for approving the proposed rule change prior to the thirtieth day after the date of publication of notice of filing thereof in the **Federal Register**.

V. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[14] that the proposed rule change (SR–ISE–2009–69) be, and hereby is, approved on an accelerated basis.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[15]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E9–24264 Filed 10–7–09; 8:45 am]

BILLING CODE 8011–01–P

[8] 15 U.S.C. 78f.

[9] 15 U.S.C. 78f(b)(4).

[10] In approving this proposal, the Commission has considered its impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[11] 15 U.S.C. 78f(b)(4).

[12] *See* File No. SR–ISE–2009–68 (the "Member Fee Filing").

[13] *Id.*

[14] 15 U.S.C. 78s(b)(2).

[15] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–60763; File No. SR–NYSE–2009–94]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by New York Stock Exchange LLC To Modify Its Requirements With Respect to Quarterly Earnings Releases

October 1, 2009.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Exchange Act"),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on September 16, 2009, New York Stock Exchange, LLC (the "NYSE" or the "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Exchange has designated this proposal eligible for immediate effectiveness pursuant to Rule 19b–4(f)(6)[3] under the Exchange Act. 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 Section 203.02 of the Listed Company Manual to provide that companies can disseminate their quarterly earnings releases by means of any Regulation Fair Disclosure ("Regulation FD") compliant method (or combination of methods). This filing also amends Section 203.01 to provide that the press release required under that section must be published in a manner consistent with the guidance provided in Section 202.06(C) for companies complying with the Exchange's timely release policy by issuing a press release.

The text of the proposed rule change is available on the Exchange's Web site (*http://www.nyse.com*), at the Exchange's Office of the Secretary and at the Commission's Public Reference room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The NYSE 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

Section 203.02 of the Listed Company Manual requires any listed company that is required to file interim financial statements with the SEC to release to the press an interim earnings release as soon as its interim financial statements are available. Section 203.02 refers the reader to Section 202.06 for an understanding of how to issue a quarterly earnings release in a manner consistent with the Exchange's immediate release policy. Section 202.06(A) explicitly states that annual and quarterly earnings releases are always subject to the immediate release policy.

The Exchange recently amended Section 202.06 to provide that listed companies can comply with the Exchange's immediate release policy by disseminating the information using any method (or combination of methods) that constitutes compliance with Regulation FD.[4] The Exchange now proposes to amend Section 203.02 to harmonize its requirements with those of Section 202.06 as amended, by providing that companies can disseminate their quarterly earnings releases in compliance with the timely alert policy as recently amended. Consequently, companies will have the option of disseminating their quarterly earnings releases either by issuing a press release or by using any other method (or combination of methods) that constitutes compliance with Regulation FD. The Exchange believes that this is consistent with Nasdaq's approach to quarterly earnings releases under its immediate release policy.[5]

Section 203.01 requires any company that does not comply with the SEC's proxy rules to post to its Web site a prominent undertaking in the English language to provide all holders (including preferred stockholders and bondholders) the ability, upon request, to receive a hard copy of the company's complete audited financial statements free of charge and simultaneously issue a press release stating that its annual report has been filed with the SEC. This press release must also specify the company's Web site address and indicate that shareholders have the ability to receive a hard copy of the company's complete audited financial statements free of charge upon request. Section 203.01 currently provides that this press release must be published pursuant to the Exchange's press release policy. In order to clarify this requirement in light of the recent amendment to Section 202.06, the Exchange proposes to revise Section 203.01 to specify that the press release requirement of Section 203.01 may only be complied with by issuing a press release in a manner consistent with the immediate release policy for press releases and not by any other means permitted by the immediate release policy.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b)[6] of the Exchange Act in general and furthers the objectives of Section 6(b)(5) of the Exchange Act,[7] in particular in that it is designed to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. The Exchange believes that the proposed amendment is consistent with the investor protection objectives of Exchange Act in that it harmonizes the Exchange's immediate release policies with respect to quarterly reporting with the SEC's requirements in Regulation FD and makes clear that the press release required by Section 203.01 in connection with the filing of a listed company's annual report must be disseminated in compliance with the press release policy of Section 202.06 and not by any other Regulation FD compliant method.

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

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 17 CFR 240.19b–4(f)(6).

[4] *See* Securities Exchange Act Release No. 59823 (April 27, 2009), 74 FR 20516 (May 4, 2009) (SR–NYSE–2009–40).

[5] *See* Securities Exchange Act Release No. 46288 (July 31, 2002), 67 FR 51306 (August 7, 2002) (SR–NASD–2002–85) (the "Nasdaq Amendment").

[6] 15 U.S.C. 78f(b).

[7] 15 U.S.C. 78f(b)(5).

necessary or appropriate in furtherance of the purposes of Exchange Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the proposed rule change: (i) Does not significantly affect the protection of investors or the public interest; (ii) does not impose any significant burden on competition; and (iii) does not become operative for 30 days after the date of the filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, provided that the self-regulatory organization has given the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change or such shorter time as designated by the Commission, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of Exchange Act[8] and Rule 19b–4(f)(6) thereunder.[9]

At any time within 60 days of the filing of such proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of Exchange 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 Exchange Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–NYSE–2009–94 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–NYSE–2009–94. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSE–2009–94 and should be submitted on or before October 29, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[10]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E9–24260 Filed 10–7–09; 8:45 am]

BILLING CODE 8011–01–P

[8] 15 U.S.C. 78s(b)(3)(A).

[9] 17 CFR 240.19b–4(f)(6).

[10] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–60767; File No. SR–ISE–2009–67]

Self-Regulatory Organizations; International Securities Exchange, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Fee Changes

October 1, 2009.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act"),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on September 25, 2009, the International Securities Exchange, LLC (the "Exchange" or the "ISE") filed with the Securities and Exchange Commission the proposed rule change as described in Items I, II, and III below, which items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The ISE is proposing to amend its Schedule of Fees to change its Competitive Market Maker ("CMM") Inactivity Fee. The text of the proposed rule change is available on the Exchange's Web site (*http://www.ise.com*), at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in sections A, B and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

ISE currently charges the owner[3] of a CMM membership an Inactivity Fee of $5,000 a month per trading right, with a cap of $25,000 on a per-firm basis,[4] if the owner does not (i) itself operate the CMM membership, (ii) lease the CMM trading right to another member which operates the CMM membership, or (iii) avail itself to one of the exemptions specifically authorized in the Notes to the CMM Inactivity Fee on the Schedule of Fees. The CMM Inactivity Fee was

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The Note to the CMM Inactivity Fee on the Schedule of Fees provides that the fee applies to the owner of the CMM membership, unless the inactive CMM membership is subject to a lease that was approved by the Exchange prior to the effective date of the fee, in which case the fee would apply to the lessee.

[4] A firm that owns five or more inactive CMMs would pay the $25,000 maximum fee.

adopted by the Exchange in 2002[5] at a time when there was significant demand for CMM memberships and some owners were holding onto inactive memberships. The purpose of the CMM Inactivity Fee has always been to promote greater trading activity on the Exchange.

The Exchange subsequently lowered this fee because, in the Exchange's opinion, the circumstances that lead to the enactment of the fee no longer existed to the same degree they did in 2002.[6] For one thing, the demand for trading rights had waned. There were a number of other reasons that were taken into consideration by the Exchange when it lowered this fee.[7] With the demand for CMM trading rights now much greater, the Exchange proposes to reinstitute the original fee. Specifically, the Exchange proposes to increase the fee to $25,000 per month per trading right and to eliminate the current cap. The Exchange believes that anything short of full utilization of its trading rights has adverse consequences. Not only does the Exchange lose fee revenues that these trading rights would generate, the ISE market place loses liquidity that additional market making would provide. Further, since this fee was reduced in 2006, the Exchange has relaxed quoting requirements applicable to CMMs thus making the operation of these trading rights more manageable.[8]

The options industry has grown exponentially over the last few years with exchanges notching record trading volumes. The increased trading volume has resulted in additional lost revenue for the Exchange because all of its trading rights are not fully utilized. ISE believes the proposed fee change will allow the Exchange to recoup some lost revenue.[9] This proposed fee change will be operative on October 1, 2009.

Also, as a matter of "housekeeping," the Exchange proposes to replace certain language in the Notes to the CMM Inactivity Fee with language that accurately reflects CMM memberships as trading rights.

2. Statutory Basis

The basis under the Securities Exchange Act of 1934 (the "Exchange Act") for this proposed rule change is the requirement under Section 6(b)(4) that an exchange have an equitable allocation of reasonable dues, fees and other charges among its members and other persons using its facilities. In particular, the proposed fee change will allow the Exchange to recoup lost revenue because its trading rights are not being fully utilized.

B. Self-Regulatory Organization's Statement on Burden on Competition

The proposed rule change does not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any unsolicited written comments from members or other interested parties.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3) of the Act[10] and Rule 19b–4(f)(2)[11] thereunder. At any time within 60 days of the filing of such proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–ISE–2009–67 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–ISE–2009–67. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the 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 publicly available. All submissions should refer to File Number SR–ISE–2009–67 and should be submitted on or before October 29, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[12]

Florence E. Harmon,

Deputy Secretary.

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BILLING CODE 8011–01–P

[5] *See* Securities Exchange Act Release No. 46272 (July 26, 2002); 67 FR 50497 (August 2, 2002).

[6] *See* Securities Exchange Act Release No. 53223 (February 3, 2006); 71 FR 7098 (February 10, 2006).

[7] *Id.*

[8] *See* Securities Exchange Act Release No. 59066 (December 8, 2008), 73 FR 76080 (December 15, 2008).

[9] ISE represents that it based the amount of the fee on a conservative estimate of the revenues lost for an inactive CMM. ISE notes that the amount of the proposed fee is the same as the amount that ISE previously assessed to an inactive CMM. *See* e-mail from Samir Patel, Assistant General Counsel, Exchange, to Nicholas Shwayri, Law Clerk, Division of Trading and Markets, Commission dated September 30, 2009.

[10] 15 U.S.C. 78s(b)(3)(A).

[11] 17 CFR 19b–4(f)(2).

[12] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–60769; File No. SR–ISE–2009–68]

Self-Regulatory Organizations; International Securities Exchange, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating To Amending the Direct Edge ECN Fee Schedule

October 2, 2009.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act"),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on September 30, 2009, the International Securities Exchange, LLC (the "Exchange" or the "ISE") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Direct Edge ECN's ("DECN") fee schedule for ISE Members [3] to (i) adopt new fees and rebates and associated flags; (ii) amend the criteria for meeting the Ultra Tier; (iii) to amend the descriptions of certain flags in the schedule; and (iv) to amend its fee schedule to reflect pass through charges of other market centers. All of the changes described herein are applicable to ISE Members.

All of the changes described herein are applicable to ISE Members. The text of the proposed rule change is available on the Exchange's Internet Web site at *http://www.ise.com.*

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in sections A, B and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

DECN, a facility of ISE, operates two trading platforms, EDGX and EDGA. On July 1, 2009,[4] the Exchange adopted a new Ultra Tier Rebate, as defined below, whereby ISE Members are provided a $0.0032 rebate per share for securities priced at or above $1.00 when ISE Members add liquidity on EDGX if the attributed MPID satisfies one of the following criteria on a daily basis, measured monthly: (i) Adding 100,000,000 shares or more on EDGX; or (ii) adding 50,000,000 shares or more of liquidity to EDGX, so long as added liquidity on EDGX is at least 20,000,000 shares greater than the previous calendar month. The rebate described above is referred to as an "Ultra Tier Rebate" on the DECN fee schedule.

The Exchange is now proposing to amend the criteria for meeting this tier by allowing ISE Members to receive a $0.0032 rebate per share for securities priced at or above $1.00 when ISE Members add liquidity on EDGX if the attributed MPID posts 1% of the Total Consolidated Volume ("TCV") in average daily volume ("ADV"). TCV is defined as volume reported by all exchanges and trade reporting facilities to the consolidated transaction reporting plans for Tape A, B, and C securities. At the same time, the Exchange is proposing to delete the Full Sweep Tier, which provided a $0.0035 rebate per share for liquidity added on EDGX if the attributed MPID added 50,000,000 shares or more on a daily basis, measured monthly, by using the ROUT routing strategy.

The Ultra Tier rebate ($0.0032 per share), which is a higher rebate than the Super Tier ($0.0030 per share), is also more difficult to reach than the Super Tier rebate, as a higher volume threshold is required based on recent TCV figures. For example, 1% of the average TCV for July 2009 (8.8 billion) was approximately 88 million shares. This threshold far exceeds the criteria to meet the Super Tier rebate. In addition, the higher rebate also results in part from lower administrative costs associated with higher volume.

The Exchange also proposes to adopt additional fees and rebates. First, the Exchange proposes to add new fee categories for the INET order type. When a member routes to Nasdaq using the INET order type and removes liquidity on Tapes A or C, the member would incur a fee of $0.0030 on either EDGA or EDGX. Such situation would yield new Flag "L". The INET order type sweeps the EDGA or EDGX book, and routes the remainder to Nasdaq. If the order is marketable, it will remove liquidity from the EDGA or EDGX book, as applicable, first. If the order is non-marketable, the order will post on Nasdaq. With regards to a Member's use of the INET order type for Tapes A or C securities, Members routing an ADV: (i) Less than 5,000,000 shares will be charged $0.0030 per share, as described in the schedule; (ii) equal to or greater than 5,000,000 shares but less than 20,000,000 shares will be charged $0.0027 per share; (iii) equal to or greater than 20,000,000 shares but less than 30,000,001 shares will be charged $0.0026 per share; and (iv) equal to or greater than 30,000,001 shares will be charged $0.0025 per share. The rates, in all cases, are calculated for shares removed from Nasdaq. The Exchange believes that these tier-based rates will incent Members to sweep the EDGA or EDGX book first and then offer a discounted rate to Nasdaq's rates if the remainder of the order is routed to Nasdaq. These discounted rates arise in part from reduced administrative costs associated with certain volume levels.

Similarly, the Exchange also proposes to add an additional fee category for the INET order type when a member routes to Nasdaq using the INET order type and removes liquidity on Tape B. Such situation would yield new flag "2". With regards to a Member's use of the INET order type for Tape B securities, Members routing an ADV: (i) Less than 20,000,000 shares will be charged $0.0030 per share, as described in the schedule; (ii) equal to or greater than 20,000,000 but less than 30,000,001 shares will be charged $0.0029 per share; and (iii) equal to or greater than 30,000,001 shares will be charged $0.0028 per share.

Furthermore, the Exchange proposes to adopt a new rebate. Members will receive a rebate of $0.0032 per share for all liquidity posted on EDGX if they add or route at least 10,000,000 shares of ADV to EDGX prior to 9:30 AM EST or after 4:00 PM EST (includes all flags except N and W) and add a minimum of 75,000,000 shares of ADV on EDGX in total, including during both market hours and pre- and post-trading hours. This rebate is designed to reward members who add or route significant order flow to EDGX both during market

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] References to ISE Members in this filing refer to DECN Subscribers who are ISE Members.

[4] *See* Securities and Exchange Act Release No. 60232 (July 2, 2009), 74 FR 33309 (July 10, 2009) (SR–ISE–2009–43).

hours and pre and post-trading hours. It is also designed to increase the liquidity of the pre and post markets.

The Exchange proposes to amend the descriptions of the "N" and "W" flags to display which Tape liquidity is removed from. For the "N" flag, the Exchange proposes to amend the description to state that liquidity is removed from Tapes B & C. For the "W" flag, the Exchange proposes to amend the description to state that liquidity is removed from Tape A.

Finally, the Exchange proposes to pass through to Exchange members the actual transaction fees assessed by away markets. Specifically, the Exchange is proposing to amend its fees schedule to reflect Nasdaq's reduction in rebate from 0.0006 to 0.0001 for removing liquidity from Nasdaq OMX BX.

The fee changes discussed in this filing will become operative on October 1, 2009.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the objectives of Section 6 of the Act,[5] in general, and furthers the objectives of Section 6(b)(4),[6] 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. In particular, adopting an additional rebate and providing tier-based rates if Members use the INET order type provide pricing incentives to market participants who route orders to DECN, allowing DECN to remain competitive. ISE notes that DECN operates in a highly competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive. The proposed rule change reflects a competitive pricing structure designed to incent market participants to direct their order flow to DECN. ISE believes the fees and credits remain competitive with those charged by other venues and therefore continue to be reasonable and equitably allocated to those members that opt to direct orders to DECN rather than competing venues. The rebates also provide incentives to members who add or route significant order flow to EDGX both during market hours and pre and post-trading hours and are designed to increase the liquidity of the pre and post markets. Finally, the Exchange believes that the proposed rates are equitable in that they apply uniformly to all Members and provide higher rebates for higher volume thresholds, resulting from lower administrative costs.

B. Self-Regulatory Organization's Statement on Burden on Competition

The proposed rule change does not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any unsolicited written comments from members or other interested parties.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3) of the Act[7] and Rule 19b–4(f)(2)[8] thereunder. At any time within 60 days of the filing of such proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–ISE–2009–68 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–ISE–2009–68. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the ISE. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

All submissions should refer to File Number SR–ISE–2009–68 and should be submitted on or before October 29, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[9]

Florence E. Harmon,

Deputy Secretary.

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BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–60768; File No. SR–NYSE–2009–98]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by New York Stock Exchange LLC To Discontinue Rebates Paid to Floor Brokers for Orders Swept Into the Close

October 2, 2009.

Pursuant to Section 19(b)(1)[1] of the Securities Exchange Act of 1934 (the "Act"),[2] and Rule 19b–4 thereunder,[3] notice is hereby given that on September 24, 2009, New York Stock Exchange LLC (the "NYSE" or the "Exchange") filed with the Securities and Exchange Commission (the

[5] 15 U.S.C. 78f.

[6] 15 U.S.C. 78f(b)(4).

[7] 15 U.S.C. 78s(b)(3)(A).

[8] 17 CFR 19b–4(f)(2).

[9] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a *et seq.*

[3] 17 CFR 240.19b–4.

"Commission") the proposed rule changes 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 changes from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to discontinue its current $0.0012 per share credit applicable to executions by floor brokers at the close, with effect from October 1, 2009. Going forward, floor broker executions swept into the close will not qualify for a credit but will be free of charge. The text of the proposed rule change is available on the Exchange's Web site (*http://www.nyse.com*), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The NYSE 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

Currently, the NYSE pays a credit of $0.0012 per share to floor brokers for executions swept into the close (*i.e.*, orders executed at the close other than market at-the-close and limit at-the-close orders). Effective October 1, 2009, floor broker executions swept into the close will no longer qualify for a credit but will be free of charge. This is consistent with the treatment of all other orders from Member Organizations (except for Designated Market Makers and Supplemental Liquidity Providers) swept into the close, which are currently free of charge but do not qualify for a credit.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6[4] of the Act in general and Section 6(b)(4) of the Act[5] in particular, in that it is designed to provide for the equitable allocation of reasonable dues, fees and other charges among its members and other persons using its facilities. The Exchange believes that the proposal does not constitute an inequitable allocation of dues, fees and other charges as it conforms the treatment of orders from floor brokers swept into the close with that afforded to all other orders from Member Organizations (except Designated Market Makers and Supplemental Liquidity Providers) swept into the close.

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 purpose of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change is effective upon filing pursuant to Section 19(b)(3)(A)[6] of the Act and Rule 19b–4(f)(2)[7] thereunder.

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such 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–NYSE–2009–98 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–NYSE–2009–98. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSE–2009–98 and should be submitted on or before October 29, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[8]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E9–24262 Filed 10–7–09; 8:45 am]

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[4] 15 U.S.C. 78f.

[5] 15 U.S.C. 78f(b)(4).

[6] 15 U.S.C. 78s(b)(3)(A).

[7] 17 CFR 240.19b–4(f)(2).

[8] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–60761; File No. SR–ISE–2009–73]

Self-Regulatory Organizations; International Securities Exchange, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change and Amendment No. 1 Thereto Relating to Clearly Erroneous Executions

October 1, 2009.

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 September 28, 2009, the International Securities Exchange, LLC ("Exchange" or "ISE") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. On October 1, 2009, the ISE filed Amendment No. 1 to the proposed rule change. The ISE has designated the proposed rule change as constituting a rule change under Rule 19b–4(f)(6) under the Act,[3] which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The ISE proposes to amend ISE Rule 2128 governing clearly erroneous executions.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in sections A, B and C below, of the most significant aspects of such statements.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 17 CFR 240.19b–4(f)(6).

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend ISE Rule 2128 by replacing the current rule text, in its entirety, with newly proposed rule text in order to improve the Exchange's policies and procedures regarding clearly erroneous executions. The newly proposed rule text is part of a market-wide effort designed to provide transparency and finality with respect to clearly erroneous executions. This effort seeks to achieve consistent results for participants across U.S. equities exchanges while maintaining a fair and orderly market, protecting investors and protecting the public interest. This proposed rule change shall be effective on October 5, 2009. The proposed rule text is more fully discussed below.

Definition

The Exchange proposes to adopt a definition of a clearly erroneous execution and adopt language addressing cancelled trades. The proposed rule text states that a transaction is "clearly erroneous" when there is an obvious error in any term, such as price, number of shares or other unit of trading, or identification of the security. The proposed rule text also states that a transaction made in clearly erroneous error and agreed to be canceled by both parties or determined by the Exchange to be clearly erroneous will be removed "from the Consolidated Tape."[4] A trade will only be removed from the Consolidated Tape when the determination is deemed final and any applicable appeals have been exhausted.

Equity Electronic Access Member Initiated Review Requests

In ISE Rule 2128(b), the Exchange proposes procedures for requesting a review of a clearly erroneous transaction. First, the proposed rule would require that requests for review be made only by electronic mail ("e-mail") or other electronic means specified from time to time by the Exchange. Requiring requests for review to be made via e-mail creates a standard format that can easily be logged and tracked. The Exchange will publish the email address or other electronic means to be used for all clearly erroneous filings in a circular distributed to Equity Electronic Access Members ("Equity EAMs").

The Exchange further proposes that requests for review must be received by the Exchange within 30 minutes of the execution time for orders initially routed to and executed on the Exchange. The Exchange proposes that Equity EAMs submit certain essential identifying information with the request including the time of the transaction(s), security symbol(s), number of shares, price(s), side (bought or sold), and factual basis for believing that the trade is clearly erroneous. The Exchange believes that 30 minutes is an appropriate time frame that offers the requesting party sufficient time to gather and submit all required information.

The proposed rule also requires the Exchange to notify the counterparty to a trade upon receipt of a timely filed request for review that satisfies the numerical guidelines set forth within the Rule. The Exchange proposes to adopt language allowing an Officer of the Exchange or such other employee designee ("Officer") of ISE to request additional information from each party to a transaction under review. Parties to the review will have 30 minutes from the time of the request to provide additional supporting information.

Routed Executions

The Exchange proposes to give other market centers an additional 30 minutes from the receipt of their participant's timely filing to request a ruling, but no longer than 60 minutes from the time of the execution under review. This provision accounts for those executions initially directed to an away market center and subsequently routed by that away market center to the Exchange.

For example, assume an order is initially routed by a participant to Market Center A and subsequently routed to ISE where the order is executed at a price outside of the Numerical Guidelines. This provision generally requires Market Center A to file with the Exchange within 30 minutes from the time it receives its participant's timely filed request for review. This provision caps the filing deadline for an away market center at 60 minutes from the time of the execution under review.

Threshold Factors

The Exchange proposes adding certain numerical thresholds to the Rule that explicitly state what constitutes a clearly erroneous execution.

Numerical Guidelines

The proposed numerical guidelines state that a transaction executed during

[4] For purposes of this Rule, "removed from the Consolidate Tape" means that a subsequent message will be sent to the Consolidated Tape indicating that a previously executed trade has been cancelled.

the Regular Market Session [5] or the Pre-Market Session [6] and Post-Market Session [7] may be found to be clearly erroneous only if the price of the transaction to buy is greater, or less in the case of a sale, than the reference price by an amount that equals or exceeds the numerical guidelines for a particular transaction category. The Reference Price shall be equal to the Consolidated Last Sale immediately prior to the execution under review, unless unusual circumstances are present. The proposed guidelines for sales greater than $0.00 and up to and including $25.00 are 10% for the Regular Market Session and 20% for the Pre-Market Session and Post-Market Sessions. The proposed guidelines for sales greater than $25.00 and up to and including $50.00 are 5% for the Regular Market Session and 10% for Pre-Market Session and Post-Market Sessions. The proposed guidelines for sales greater than $50.00 are 3% for the Regular Market Session and 6% for Pre-Market Session and Post-Market Sessions. A filing involving five or more securities by the same Equity EAM will be aggregated into a single filing called a "Multi-Stock Event." In the case of a Multi-Stock Event, the proposed guidelines are 10% for the Regular Market Session and 10% for the Pre-Market Session and Post-Market Sessions. In the case of Leveraged ETF/ETN securities, the above guidelines are to be multiplied by the leverage multiplier of the security. Executions that do not meet or exceed the Numerical Guidelines will not be eligible for review under this section. The following chart summarizes the proposed Numerical Guidelines.

Reference price: Consolidated last sale	Regular market session numerical guidelines (subject transaction's percent difference from the consolidated last sale):	Pre-market session and post-market session numerical guidelines (subject transaction's percent difference from the consolidated last sale):
Greater than $0.00 and up to and including $25.00.	10%	20%.
Greater than $25.00 and up to and including $50.00.	5%	10%.
Greater than $50.00	3%	6%.
Multi-Stock Event—Filings involving five or more securities by the same Equity EAM will be aggregated into a single filing.	10%	10%.
Leveraged ETF/ETN securities	Regular Market Session Numerical Guidelines multiplied by the leverage multiplier (*i.e.* 2x).	Regular Market Session Numerical Guidelines multiplied by the leverage multiplier (*i.e.* 2x).

Establishing Numerical Guidelines within the Rule brings regulatory transparency and consistency in the application of the rules of the Exchange. These Numerical Guidelines represent the general consensus approach and were developed based on the collective experiences of a market-wide group. The Exchange believes that the Thresholds established are fair and appropriate and apply evenly to all participants.

Unusual Circumstances

ISE further proposes that in Unusual Circumstances the Exchange may, in its discretion and with a view toward maintaining a fair and orderly market, use a Reference Price other than the consolidated last sale. Unusual Circumstances may include periods of extreme market volatility, sustained illiquidity, or widespread system issues. Other Reference Prices that the Exchange may use would include the consolidated inside price, the consolidated opening price, the consolidated prior close, or the consolidated last sale prior to a series of executions.

The following example explains the use of a Reference Price equal to the consolidated last sale prior to a series of executions.

ABC has a consolidated last sale of $10.00. During the Regular Market Session Customer A enters a market order to buy 10,000 shares, although it had intended a market order for 1,000 shares. The size of the order is such that the order sweeps the ISE Book, which reflects 1,000 shares of liquidity offered at each of following prices. Executions occur, moving through the depth of Book, as follows:

Trade #1—1,000 shares @ $10.00 (9,000 remaining)
Trade #2—1,000 shares @ $10.20 (8,000 remaining)
Trade #3—1,000 shares @ $10.40 (7,000 remaining)
Trade #4—1,000 shares @ $10.60 (6,000 remaining)
Trade #5—1,000 shares @ $10.80 (5,000 remaining)
Trade #6—1,000 shares @ $11.00 (4,000 remaining)
Trade #7—1,000 shares @ $11.20 (3,000 remaining)
Trade #8—1,000 shares @ $11.40 (2,000 remaining)
Trade #9—1,000 shares @ $11.60 (1,000 remaining)
Trade #10—1,000 shares @ $11.80 (complete)

Thus, to be eligible for review, a transaction must be at a price that is at least 10% higher than the consolidated last sale prior to the series of executions. Customer A could request a ruling for trades #6 through #10, priced at $11.00 and above, but trades #1 through #5 would not be eligible for review.

Under the proposed rule the Exchange may also use a higher numerical guideline if, after market participants have been alerted to erroneous activity, the price of the security returns toward its prior trading range but continues to trade beyond the price it would have normally been busted.

Joint Market Rulings

In the interest of achieving consistency across markets, the Exchange proposes that, in events that involve other markets, the Exchange would have the ability to use a different Reference Price and/or Numerical Guideline. In these instances the Reference Price would be determined based on a consensus among the Exchanges where the transactions occurred. Furthermore, when a ruling is made across markets, the Exchange may

[5] The Regular Market Session begins for each security with the Opening Transaction, as defined in Rule 2106, and continues until the primary listing market closes such security. See ISE Rule 2102(b) and (c).

[6] The Pre-Market Session begins at 8 a.m. and concludes with the Opening Transaction of a security. See ISE Rule 2102(a).

[7] The Post-Market Session begins following the conclusion of the Regular Market Session and concludes at 8 p.m. See ISE Rule 2102(d).

determine that the ruling is not eligible for appeal because immediate finality is necessary to maintain a fair and orderly market and to protect investors and the public interest.

Additional Factors

The proposed amendments to ISE Rule 2128 also enumerate some additional factors that an Officer may consider when determining whether an execution is clearly erroneous. These factors include, but are not limited to, system malfunctions or disruptions, volume and volatility for the security, derivative securities products that correspond to greater than 100% in the direction of a tracking index, news released for the security, whether trading in the security was recently halted/resumed, whether the security is an IPO, whether the security was subject to a stock-split, reorganization, or other corporate action, overall market conditions, Pre-Market and Post-Market Session executions, validity of the consolidated tapes trades and quotes, consideration of primary market indications, and executions inconsistent with the trading pattern in the stock. Each additional factor shall be considered with a view toward maintaining a fair and orderly market, the protection of investors and the public interest.

Numerical Guidelines Applicable to Volatile Market Opens

The Exchange proposes to expand the Numerical Guidelines applicable to transactions occurring between 9:30 a.m. and 10 a.m. based on the disseminated value of the S&P 500 Futures at 9:15 a.m. When the S&P Futures are up or down from 3% to up to but not including 5% at 9:15 a.m., the Numerical Guidelines are doubled. When the S&P Futures are up or down 5% or greater at 9:15 a.m., the Numerical Guidelines are tripled. The Exchange believes that the S&P 500 futures contract is an appropriate and reliable barometer of market activity prior to the market opening due to its broad based market coverage and deep liquidity. By using the S&P 500 Futures disseminated value at 9:15 a.m. as the barometer of market activity, the Exchange is providing a transparent means of offering adjusted guidelines in times of volatile market activity.

Outlier Transactions

The proposed amendments to ISE Rule 2128 provide that an Officer of the Exchange may consider requests for review received after thirty minutes, but not longer than sixty minutes after the execution in question in the case of an Outlier Transaction. An Outlier Transaction is a transaction where, (1) The execution price of the security is greater than three times the current Numerical Guidelines, or (2) the execution price of the security breaches the 52-week high or low, in which case the Exchange may consider Additional Factors to determine if the transaction qualifies for review or if the Exchange shall decline to act.

Review Procedures

Initial Determination

Under the proposed rule, the Officer will only have the authority to break the trades or rule to let the trades stand and will no longer have the authority to adjust one or more terms of the transaction. This limitation attempts to remove the subjectivity from the rule that is necessitated by an adjustment.

The Exchange also proposes adding language stating that a determination shall be made generally within 30 minutes of receipt of the complaint, but in no case later than the start of the Regular Market Session on the following trading day. Rulings made outside of 30 minutes by an Officer will not fail for lack of timeliness. The guideline simply provides participants an appropriate expectation that a ruling will generally be made within 30 minutes, and in no case later than the start of the Regular Market Session on the following trading day.

Appeals

The Exchange proposes to amend the appeals procedure for trades that are deemed to be clearly erroneous. First, the Exchange will no longer accept appeal requests via facsimile. Similar to the proposed language for an initial request for a ruling, all appeal requests must be made via e-mail.

The current rule provides that the Exchange shall review and render a decision upon an appeal within a timeframe provided by the Exchange. The proposed rule offers more definite guidelines to ensure the expedient resolution of appeals. It requires the Exchange to review appeals as soon as practicable, but generally on the same day as the executions under review. Appeals received between 3 p.m. ET and the close of trading in the Post-Market Session should be made as soon as practicable, but in no case later than the trading day following the date of the execution under review. Appeals will not fail for lack of timeliness. This revised provision provides participants a reasonable expectation of when a ruling on appeal will generally be made.

Further, the proposed rule declares that any determination made by an Officer or by the CEE Panel shall be rendered without prejudice as to the right of the parties to the transaction to submit their dispute to arbitration. This provision simply clarifies the fact that nothing in the proposed rule limits or impedes the rights of the parties to arbitrate their dispute.

System Disruption and Malfunctions

Currently, within the System Disruptions and Malfunctions section of the rule, after an Officer determines that a trade was clearly erroneous he may declare the transaction null and void or modify the trade to attempt to achieve and equitable rectification of the error. The proposed Rule eliminates the Exchange's ability to modify a clearly erroneous execution. The Exchange must either uphold or nullify the execution based upon the findings of the Officer reviewing the execution.

The proposed Rule provides that, in the event of a disruption or a malfunction, an Officer of the Exchange or other senior level employee designee will rely on the proposed numerical guidelines in determining whether an execution is clearly erroneous. However, the Officer or senior level employee may also use a lower Numerical Guideline if necessary to maintain a fair and orderly market, protect investors, and protect the public interest. The proposed rule also adds that actions taken under these circumstances must be taken within 30 minutes of detection of the erroneous transaction in the ordinary case, and by no later than the start of the Regular Market Session on the day following the date of the execution under review when extraordinary circumstances exist.

Officers Acting on Their Own Motion

The Exchange proposes to add a section to the Rule that will grant an Officer of the Exchange or other senior level employee designee the ability to act on their own motion to review potentially erroneous executions. Under the current rule, Officers have the ability to act upon their own motion only in the event of a system disruption or malfunction. The proposed rule would allow an Officer of the Exchange or other senior level employee designee to review executions and rely on the Numerical Guidelines, under any circumstance. In extraordinary circumstances an Officer of the Exchange or other senior level employee designee may apply a lower Numerical Guideline if it is determined that such action is necessary to maintain a fair and orderly market or protect investors and the public interest. In some instances the Exchange may detect a

single execution that breaches the Numerical Guidelines but is not the subject of a ruling request. This provision gives the Exchange the ability to review such executions. Additionally, in practice clearly erroneous executions commonly involve multiple parties and multiple executions. In such instances, all affected parties may not request a ruling. The Exchange proposes this provision to permit an Officer of the Exchange or other senior level employee designee to rule on a group of transactions related to the same occurrence or event as a whole, without a formal request for a ruling from every affected party.

Trade Nullification for UTP Securities that are Subject of Initial Public Offerings

The proposed rule also modifies ISE's policy on trade nullification and for UTP securities that are subject to initial public offerings. Under the proposed rule, an Officer of the Exchange or other senior level employee designee must either declare an opening transaction null and void or decline to take action, but can no longer be adjusted. Furthermore, the proposed rule requires that, in extraordinary circumstances, the reviewing Officer of the Exchange or other senior level employee designee may take action by no later than the start of the Regular Market Session on the day following the date of the execution under review.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the objectives of Section 6 of the Act,[8] in general, and furthers the objectives of Section 6(b)(4),[9] in particular, in that it is designed to provide for the equitable allocation of reasonable dues, fees and other charges among its members and other persons using its facilities. The proposed rule change provides transparency and finality for Equity EAMs and creates consistent results across U.S. equities exchanges with respect to clearly erroneous executions. This proposed change further promotes the maintenance of a fair and orderly market, the protection of investors and the protection of the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

The proposed rule change does not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

[8] 15 U.S.C. 78f.

[9] 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

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any unsolicited written comments from members or other interested parties.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act[10] and Rule 19b–4(f)(6) thereunder.[11]

A proposed rule change filed pursuant to Rule 19b–4(f)(6) under the Act[12] normally does not become operative for 30 days after the date of its filing. However, Rule 19b–4(f)(6)[13] permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange requests that the Commission waive the 30-day operative delay so that it may implement the new rule on October 5, 2009, the same date as the other equities exchanges. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest because it will allow the Exchange to begin applying the new rule on the same date as the other equities exchanges.[14] Application of the new rule on this date should help foster transparency and consistency among those exchanges that adopt clearly erroneous execution rules substantially similar to those previously approved by the Commission.[15] For these reasons, the Commission designates that the proposed rule change, as amended, become operative on October 5, 2009.

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.[16]

[10] 15 U.S.C. 78s(b)(3)(A).

[11] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[12] 17 CFR 240.19b–4(f)(6).

[13] 17 CFR 240.19b–4(f)(6).

[14] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposal's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[15] *See* Securities Exchange Act Release No. 60706 (September 22, 2009) 74 FR 49416 (September 28, 2009) (NYSEArca–2009–36).

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–ISE–2009–73 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–ISE–2009–73. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m.

[16] The Commission considers the 60-day period within which the Commission may summarily abrogate the proposal pursuant to Section 19(b)(3)(C) of the Act, 15 U.S.C. 78s(b)(3)(C), to commence on October 1, 2009, the date ISE filed Amendment No. 1 to the proposal.

Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make publicly available. All submissions should refer to File Number SR–ISE–2009–73 and should be submitted on or before October 29, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[17]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E9–24250 Filed 10–7–09; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–60762; File No. SR–NSX–2009–05]

Self-Regulatory Organizations; National Stock Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend NSX Rule 11.19 Governing Clearly Erroneous Executions

October 1, 2009.

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 September 30, 2009, the National Stock Exchange, Inc. ("Exchange" or "NSX") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. NSX has designated the proposed rule change as constituting a rule change under Rule 19b–4(f)(6) under the Act,[3] which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

NSX is proposing to amend NSX Rule 11.19 governing clearly erroneous executions.

The text of the proposed rule change is available on the Exchange's Web site at *http://www.nsx.com*, at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the 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 parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend NSX Rule 11.19 in order to improve the Exchange's rule regarding clearly erroneous executions. The proposed changes are part of a market-wide effort designed to provide transparency and finality with respect to clearly erroneous executions. This effort seeks to achieve consistent results for participants across U.S. equities exchanges while maintaining a fair and orderly market, protecting investors and protecting the public interest. The proposed changes are more fully discussed below.

Definition

The Exchange will maintain the meaning of the definition of a clearly erroneous execution, but proposes to add clarifying language with respect to cancelled trades. The proposed change identifies that a transaction made in clearly erroneous error and agreed to be canceled by both parties or determined by the Corporation to be clearly erroneous will be removed "from the Consolidated Tape."[4] A trade will only be removed from the Consolidated Tape when the determination is deemed final and any applicable appeals have been exhausted.

ETP Holder Initiated Review Requests

The Exchange proposes to amend NSX Rule 11.19 to update the procedures for requesting a review of a clearly erroneous transaction. First, the proposed rule would require that requests for review be made only by electronic mail ("e-mail") or other electronic means specified from time to time by the Exchange. Under the current policy, the Exchange also allows requests to be made via telephone and facsimile. Requiring requests for review to be made via e-mail creates a standard format that can easily be logged and tracked. The Exchange will publish the e-mail address or other electronic means to be used for all clearly erroneous filings in a circular distributed to Equity Trading Permit ("ETP") Holders.[5]

The Exchange further proposes that requests for review must be received by the Exchange within 30 minutes of the execution time for orders initially routed to and executed on the Exchange. The Exchange proposes that ETP Holders submit certain essential identifying information with the request including the time of the transaction(s), security symbol(s), number of shares, price(s), side (bought or sold), and factual basis for believing that the trade is clearly erroneous. The current rule requires requests for review to be received within 15 minutes of the execution and does not specify what information is required. The Exchange believes that 30 minutes is an appropriate time frame that offers the requesting party sufficient time to gather and submit all required information.

The proposed rule also requires the Exchange to notify the counterparty to a trade upon receipt of a timely filed request for review that satisfies the numerical guidelines set forth within the Rule ("Numerical Guidelines"). This proposed language eliminates the requirement that counterparties be notified of every request for a ruling and instead requires notice only when a request is filed in a timely manner and satisfies the Numerical Guidelines. This change alleviates the burden on the Exchange of notifying the counterparty when a request for review does not merit a ruling.

The Exchange proposes to amend NSX Rule 11.19 to allow an Officer of the Exchange or such other employee designee ("Officer") to request additional information from each party to a transaction under review. Parties to the review will have 30 minutes from the time of the request to provide additional supporting information.

[17] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 17 CFR 240.19b–4(f)(6).

[4] For purposes of this Rule, "removed from the Consolidate Tape" means that a subsequent message will be sent to the Consolidated Tape indicating that a previously executed trade has been cancelled.

[5] NSX Rule 1.5E defines an "ETP" as an Equity Trading Permit issued by the Exchange for effecting approved securities transactions on the Exchange's trading facilities. An ETP may be issued to a "sole proprietorship, partnership, corporation, limited liability company or other organization which is a registered broker or dealer pursuant to Section 15 of the Act, and which has been approved by the Exchange.

Routed Executions

The Exchange proposes to give other market centers an additional 30 minutes from the receipt of their participant's timely filing to request a ruling, but no longer than 60 minutes from the time of the execution under review. This provision accounts for those executions initially directed to an away market center and subsequently routed by that away market center to the Exchange.

For example, assume an order is initially routed by a participant to Market Center A and subsequently routed to NSX, where the order is executed at a price outside of the Numerical Guidelines. This provision generally requires Market Center A to file with the Exchange within 30 minutes from the time it receives its participant's timely filed request for review. This provision caps the filing deadline for an away market center at 60 minutes from the time of the execution under review.

Threshold Factors

Currently, the Exchange's Clearly Erroneous Execution rule does not identify specific numeric guidelines for determining what constitutes a clearly erroneous transaction. The current rule simply provides that "an Officer of the Exchange or such other designee of the Exchange shall review the transaction under dispute and determine whether it is clearly erroneous, with a view toward maintaining a fair and orderly market and the protection of investors and the public interest." [6] The Exchange proposes adding certain numerical thresholds to the Rule that explicitly state what constitutes a clearly erroneous execution.

Numerical Guidelines

The proposed numerical guidelines state that a transaction executed during Regular Trading Hours [7] or outside Regular Trading Hours may be found to be clearly erroneous only if the price of the transaction to buy is greater, or less in the case of a sale, than the reference price by an amount that equals or exceeds the numerical guidelines for a particular transaction category. The execution time of the transaction under review determines whether the guidance threshold is Regular Trading Hours or outside Regular Trading Hours. The Reference Price shall be equal to the Consolidated Last Sale immediately prior to the execution(s) under review, unless unusual circumstances are present. The proposed guidelines for sales greater than $0.00 up to and including $25.00 are 10% for Regular Trading Hours and 20% for outside Regular Trading Hours. The proposed guidelines for sales greater than $25.00 up to and including $50.00 are 5% for Regular Trading Hours and 10% for outside Regular Trading Hours. The proposed guidelines for sales greater than $50.00 are 3% for Regular Trading Hours and 6% for outside Regular Trading Hours. A filing involving five or more securities by the same ETP Holder will be aggregated into a single filing called a "Multi-Stock Event." In the case of a Multi-Stock Event, the proposed guidelines are 10% for Regular Trading Hours and 10% for outside Regular Trading Hours. In the case of Leveraged ETF/ETN securities, the above guidelines are to be multiplied by the leverage multiplier of the security. Executions that do not meet or exceed the Numerical Guidelines will not be eligible for review under this section. The following chart summarizes the proposed Numerical Guidelines:

Reference price: Consolidated last sale	Regular trading hours numerical guidelines (subject transaction's % difference from the consolidated last sale):	Outside regular trading numerical guidelines (subject transaction's % difference from the consolidated last sale):
Greater than $0.00 up to and including $25.00	10%	20%.
Greater than $25.00 up to and including $50.00	5%	10%.
Greater than $50.00	3%	6%.
Multi-Stock Event—Filings involving five or more securities by the same ETP Holder will be aggregated into a single filing.	10%	10%.
Leveraged ETF/ETN securities	Core Trading Session Numerical Guidelines multiplied by the leverage multiplier (i.e. 2×).	Core Trading Session Numerical Guidelines multiplied by the leverage multiplier (i.e. 2×)

Establishing Numerical Guidelines within the Rule brings regulatory transparency and consistency in the application of the rules of the Exchange. These Numerical Guidelines represent the general consensus approach and were developed based on the collective experiences of a market-wide group. The Exchange believes that the Thresholds established are fair and appropriate and apply evenly to all participants.

Unusual Circumstances

NSX further proposes that in Unusual Circumstances the Exchange may, in its discretion and with a view toward maintaining a fair and orderly market and the protection of investors and the public interest, use a Reference Price other than the consolidated last sale. Unusual Circumstances may include periods of extreme market volatility, sustained illiquidity, or widespread system issues. Other Reference Prices that the Exchange may use would include the consolidated inside price, the consolidated opening price, the consolidated prior close, or the consolidated last sale prior to a series of executions.

The following example explains the use of a Reference Price equal to the consolidated last sale prior to a series of executions.

ABC has a consolidated last sale of $10.00. During Regular Trading Hours, Customer A enters a market order to buy 10,000 shares, although it had intended a market order for 1,000 shares. The size of the order is such that the order sweeps the NSX Book, which reflects 1,000 shares of liquidity offered at each of following prices. Executions occur, moving through the depth of the NSX Book, as follows:

Trade #1—1,000 shares @ $10.00 (9,000 remaining)
Trade #2—1,000 shares @ $10.20 (8,000 remaining)
Trade #3—1,000 shares @ $10.40 (7,000 remaining)
Trade #4—1,000 shares @ $10.60 (6,000 remaining)
Trade #5—1,000 shares @ $10.80 (5,000 remaining)
Trade #6—1,000 shares @ $11.00 (4,000 remaining)
Trade #7—1,000 shares @ $11.20 (3,000 remaining)

[6] NSX Rule 11.19(b)(i) (prior to the instant rule change).

[7] Regular Trading Hours begin for each security at "8:30:00 am (Central Time) and conclude at 3:00:00 pm (Central Time)." NSX Rule 1.5R.

Trade #8—1,000 shares @ $11.40 (2,000 remaining)
Trade #9—1,000 shares @ $11.60 (1,000 remaining)
Trade #10—1,000 shares @ $11.80 (complete)

Thus, to be eligible for review, a transaction must be at a price that is at least 10% higher than the consolidated last sale prior to the series of executions. Customer A could request a ruling for trades #6 through #10, priced at $11.00 and above, but trades #1 through #5 would not be eligible for review.

Under the proposed rule the Exchange may also use a higher numerical guideline if, after market participants have been alerted to erroneous activity, the price of the security returns toward its prior trading range but continues to trade beyond the price it would have normally been broken.

Joint Market Rulings

In the interest of achieving consistency across markets, the Exchange proposes that, in events that involve other markets, the Exchange would have the ability to use a different Reference Price and/or Numerical Guideline. In these instances the Reference Price would be determined based on a consensus among the Exchanges where the transactions occurred. Furthermore, when a ruling is made across markets, the Exchange may determine that the ruling is not eligible for appeal because immediate finality is necessary to maintain a fair and orderly market and to protect investors and the public interest.

Additional Factors

The proposed amendments to NSX Rule 11.19 also enumerate some additional factors that an officer of the Exchange or certain other employee designee may consider when determining whether an execution is clearly erroneous. These factors include, but are not limited to, system malfunctions or disruptions, volume and volatility for the security, derivative securities products that correspond to greater than 100% in the direction of a tracking index, news released for the security, whether trading in the security was recently halted/resumed, whether the security is an IPO, whether the security was subject to a stock-split, reorganization, or other corporate action, overall market conditions, Opening and Late Session executions, validity of the consolidated tapes trades and quotes, consideration of primary market indications, and executions inconsistent with the trading pattern in the stock. Each additional factor shall be considered with a view toward maintaining a fair and orderly market, the protection of investors and the public interest.

Numerical Guidelines Applicable to Volatile Market Opens

The Exchange proposes to give the Exchange the ability to expand the Numerical Guidelines applicable to transactions occurring between 9:30 a.m. and 10 a.m. (Eastern Time)[8] based on the disseminated value of the S&P 500 Futures at 9:15 a.m. When the S&P Futures are up or down from 3% but less than 5% at 9:15 a.m., the Numerical Guidelines are doubled. When the S&P Futures are up or down 5% or more at 9:15 a.m., the Numerical Guidelines are tripled. The Exchange believes that the S&P 500 futures contract is an appropriate and reliable barometer of market activity prior to the market opening due to its broad based market coverage and deep liquidity. Using the S&P 500 Futures disseminated value at 9:15 a.m. as the barometer of market activity, the Exchange is providing a transparent means of offering adjusted guidelines in times of volatile market activity.

Outlier Transactions

The proposed amendments to NSX Rule 11.19 provide that an Officer may consider requests for review received after thirty minutes, but not longer than sixty minutes after the execution in question in the case of an Outlier Transaction. An Outlier Transaction is a transaction where, (1) the execution price of the security is greater than three times the current Numerical Guidelines or (2) the execution price of the security breaches the 52-week high or low, in which case the Exchange may consider Additional Factors to determine if the transaction qualifies for review or if the Corporation shall decline to act.

Review Procedures

Initial Determination

The Exchange proposes removing language that currently allows an Officer to modify one or more of the terms of a transaction under review. Under the proposed rule, the Officer will only have the authority to break the trades or rule to let the trades stand. This change attempts to remove the subjectivity from the rule that is necessitated by an adjustment.

The Exchange also proposes adding language stating that a determination shall be made generally within 30 minutes of receipt of the complaint, but in no case later than the start of Core Trading on the following trading day. Rulings made outside of 30 minutes by an Officer will not fail for lack of timeliness. The guideline simply provides participants an appropriate expectation that a ruling will generally be made within 30 minutes, and in no case later than the start of Regular Trading Hours on the following trading day.

Appeals

The Exchange proposes to amend the appeals procedure for trades that are deemed to be clearly erroneous. First, the Exchange will no longer accept appeal requests via facsimile. Similar to the proposed language for an initial request for a ruling, all appeal requests must be made via e-mail.

The current rule provides that the Exchange shall review and render a decision upon an appeal within a timeframe provided by the Exchange. The proposed rule offers more definite guidelines to ensure the expedient resolution of appeals. It requires the Exchange to review appeals as soon as practicable, but generally on the same day as the executions under review. Appeals received between 3:00 ET and the closing of business on the Exchange should be made as soon as practicable, but in no case later than the trading day following the date of the execution under review. Appeals will not fail for lack of timeliness. This revised provision provides participants a reasonable expectation of when a ruling on appeal will generally be made.

Further, the proposed rule declares that any determination made by an Officer or by the CEE Panel shall be rendered without prejudice as to the right of the parties to the transaction to submit their dispute to arbitration. This provision simply clarifies the fact that nothing in the proposed rule limits or impedes the rights of the parties to arbitrate their dispute. Notwithstanding anything to the contrary in Chapter X (Adverse Action) of the NSX Rules, the proposed rule provides that all determinations by the CEE Panel shall constitute final action by the Exchange on the matter at issue.

System Disruption and Malfunctions

Currently, within the System Disruptions and Malfunctions section of the rule, after an officer of the Exchange or such other senior level employee designee ("Senior Officer") determines that a trade was clearly erroneous he may declare the transaction null and void or modify the trade to attempt to achieve and equitable rectification of the error. The proposed Rule eliminates the Exchange's ability to modify a

[8] All times referenced are Eastern Time ("ET").

clearly erroneous execution. The Exchange must either uphold or nullify the execution based upon the findings of the Senior Officer reviewing the execution.

The proposed Rule provides that, in the event of a disruption or a malfunction, a Senior Officer will rely on the proposed numerical guidelines in determining whether an execution is clearly erroneous. However, the Senior Officer may also use a lower Numerical Guideline if necessary to maintain a fair and orderly market, protect investors, and protect the public interest. The proposed rule also adds that actions taken under these circumstances must be taken within 30 minutes of detection of the erroneous transaction in the ordinary case, and by no later than the start of the Core Trading Session on the day following the date of the execution under review when extraordinary circumstances exist.

Officers Acting on Their Own Motion

The Exchange proposes to add a section to the Rule that will grant Senior Officers the ability to act on their own motion to review potentially erroneous executions. Under the current rule, Senior Officers have the ability to act upon their own motion only in the event of a system disruption or malfunction. The proposed rule would allow a Senior Officer to review executions and rely on the Numerical Guidelines, under any circumstance. In extraordinary circumstances a Senior Officer may apply a lower Numerical Guideline if it is determined that such action is necessary to maintain a fair and orderly market or protect investors and the public interest. In some instances the Exchange may detect a single execution that breaches the Numerical Guidelines but is not the subject of a ruling request. This provision gives the Exchange the ability to review such executions. Additionally, in practice, clearly erroneous executions commonly involve multiple parties and multiple executions. In such instances, all affected parties may not request a ruling. The Exchange proposes this provision to permit a Senior Officer to rule on a group of transactions related to the same occurrence or event as a whole, without a formal request for a ruling from every affected party.

Trade Nullification for UTP Securities That Are Subject to Initial Public Offerings

The proposed rule also modifies NSX's policy on trade nullification and for UTP securities that are subject to initial public offerings. Under the proposed rule, Senior Officers must either declare an opening transaction null and void or decline to take action, but can no longer be adjusted. Furthermore, the proposed rule requires that, in extraordinary circumstances, the reviewing Senior Officer may take action by no later than the start of Core Trading on the day following the date of the execution under review.

Effective Date

The Exchange requests that the effective date for the instant rule change be October 5, 2009.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6(b) of the Act,[9] in general, and furthers the objectives of Section 6(b)(5)[10] in particular in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, and to remove impediments to and perfect the mechanism of a free and open market and a national market system. The proposed rule change provides transparency and finality for participants and creates consistent results across U.S. equities exchanges with respect to clearly erroneous executions. This proposed change further promotes the maintenance of a fair and orderly market, the protection of investors and the protection of the public interest.

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 Exchange Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

The Exchange has neither solicited nor received written comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act[11] and Rule 19b–4(f)(6) thereunder.[12]

A proposed rule change filed pursuant to Rule 19b–4(f)(6) under the Act[13] normally does not become operative for 30 days after the date of its filing. However, Rule 19b–4(f)(6)[14] permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange requests that the Commission waive the 30-day operative delay so that it may implement the new rule on October 5, 2009, the same date as the other equities exchanges. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest because it will allow the Exchange to begin applying the new rule on the same date as the other equities exchanges.[15] Application of the new rule on this date should help foster transparency and consistency among those exchanges that adopt clearly erroneous execution rules substantially similar to those previously approved by the Commission.[16] For these reasons, the Commission designates that the proposed rule change become operative on October 5, 2009.

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act.

[9] 15 U.S.C. 78f(b).

[10] 15 U.S.C. 78f(b)(4).

[11] 15 U.S.C. 78s(b)(3)(A).

[12] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[13] 17 CFR 240.19b–4(f)(6).

[14] 17 CFR 240.19b–4(f)(6).

[15] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposal's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[16] *See* Securities Exchange Act Release No. 60706 (September 22, 2009) 74 FR 49416 (September 28, 2009) (NYSEArca-2009–36).

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–NSX–2009–05 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–NSX–2009–05. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the 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 publicly available. All submissions should refer to File Number SR–NSX–2009–05 and should be submitted on or before October 29, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[17]

Florence E. Harmon,

Deputy Secretary.

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[17] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–60760; File No. SR–CBOE–2009–071]

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Regarding the CBSX Obvious Error Rule

October 1, 2009.

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 September 25, 2009, the Chicago Board Options Exchange, Incorporated ("Exchange" or "CBOE") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. CBOE has designated the proposed rule change as constituting a rule change under Rule 19b–4(f)(6) under the Act,[3] which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to modify the CBOE Stock Exchange ("CBSX") obvious error rule. The text of the proposed rule change is available on the Exchange's Web site *(http://www.cboe.org/Legal),* at the Exchange's Office of the Secretary and at the Commission.

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.

[3] 17 CFR 240.19b–4(f)(6).

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend Rule 52.4 in order to improve the CBSX rule regarding clearly erroneous executions. The proposed changes are part of a market-wide effort designed to provide transparency and finality with respect to clearly erroneous executions. This effort seeks to achieve consistent results for participants across U.S. equities exchanges while maintaining a fair and orderly market, protecting investors and protecting the public interest. The proposed changes are more fully discussed below.

As proposed, the term "clearly erroneous" would be defined as when there is an obvious error in any term, such as price, number of shares or other unit of trading, or identification of the security. Further, a transaction made in clearly erroneous error and cancelled by both parties or determined by CBSX to be clearly erroneous will be removed from the Consolidated Tape. A trade will only be removed from the Consolidated Tape when the determination is deemed final and any applicable appeals have been exhausted.

Under the proposed rule, a CBSX Trader[4] that receives an execution on an order that was submitted erroneously to CBSX for its own or customer account may request that CBSX review the transaction. One or more senior level officials of CBSX designated by the President ("Official") shall review the transaction under dispute and determine whether it is clearly erroneous, with a view toward maintaining a fair and orderly market and the protection of investors and the public interest. Such request for review shall be made in writing via e-mail or other electronic means specified from time to time by CBSX in a circular distributed to CBSX Traders. Requests for review must be received within thirty (30) minutes of execution time and shall include information concerning the time of the transaction(s), security symbol(s), number of shares, price(s), side (bought or sold), and factual basis for believing that the trade is clearly erroneous. Upon receipt of a timely filed request that satisfies the numerical guidelines set forth in paragraph (c)(1) of the Rule, the counterparty to the trade shall be notified by CBSX as soon as practicable,

[4] A CBSX Trader is defined as an individual who or organization which has the right to trade on CBSX (See Rule 50.1).

but generally within 30 minutes. An Official may request additional supporting written information to aid in the resolution of the matter. If requested, each party to the transaction shall provide, within thirty (30) minutes of the request, any supporting written information. Either party to the disputed trade may request the supporting written information provided by the other party on the matter.

A transaction executed on CBSX may be found to be clearly erroneous only if the price of the transaction to buy (sell) that is the subject of the complaint is greater than (less than) the Reference Price by an amount that equals or exceeds the Numerical Guidelines set forth in the Rule (see chart below). The execution time of the transaction under review determines whether the guideline threshold is regular trading hours or between 8:15 a.m. CT to 8:30 a.m. CT (which occurs before regular trading hours).

Reference price: Consolidated Last Sale	Regular trading hours numerical guidelines (subject transaction's % difference from the consolidated last sale)	8:15 a.m. CT to 8:30 a.m. CT numerical guidelines (subject transaction's % difference from the consolidated last sale)
Greater than $0.00 and up to and including $25.00	10%	20%.
Greater than $25.00 and up to and including $50.00	5%	10%.
Greater than $50.00	3%	6%.
Multi-Stock Event-Filings involving five or more securities by the same CBSX Trader will be aggregated into a single filing.	10%	10%.
Leveraged ETF/ETN securities	Regular Trading Hours Numerical Guidelines multiplied by the leverage multiplier (i.e. 2×).	Regular Trading Hours Numerical Guidelines multiplied by the leverage multiplier (i.e. 2×)

Establishing Numerical Guidelines within the rule brings regulatory transparency and consistency in the application of the rules of the Exchange. The Numerical Guidelines represent the general consensus approach and were developed based on the collective experiences of a market-wide group. CBSX believes that the thresholds established are fair and appropriate and apply evenly to all participants.

In Unusual Circumstances, which may include periods of extreme market volatility, sustained illiquidity, or widespread system issues, CBSX may, in its discretion and with a view toward maintaining a fair and orderly market and the protection of investors and the public interest, use a Reference Price other than the consolidated last sale. Other Reference Prices may include the consolidated inside price, the consolidated opening price, the consolidated prior close, or the consolidated last sale prior to a series of executions. It may also be necessary to use a higher Numerical Guideline if, after market participants have been alerted to the existence of erroneous activity, the price of the security returns toward its prior trading range but continues to trade beyond the price at which trades would normally be broken. CBSX also may use a different Reference Price and/or higher Numerical Guideline in events that involve other markets in an effort to coordinate a Reference Price and/or Numerical Guideline that is consistent across markets. In order to achieve consistent results across markets, when a ruling is made in conjunction with another market center it may be determined that the number of affected transactions is such that immediate finality is necessary to maintain a fair and orderly market and to protect investors and the public interest.

In events that involve other markets, CBSX would have the ability to use a different reference price and/or numerical guidelines. In these instances, the reference price would be determined based on a consensus among the Exchanges where the transactions occurred. Furthermore, when a ruling is made across markets, CBSX may determine that the ruling is not eligible for appeal because immediate finality is necessary to maintain a fair and orderly market and to protect investors and the public interest.

An Official may also consider additional factors to determine whether an execution is clearly erroneous, including but not limited to, system malfunctions or disruptions, volume and volatility for the security, derivative securities products that correspond to greater than 100% in the direction of a tracking index, news released for the security, whether trading in the security was recently halted/resumed, whether the security is an IPO, whether the security was subject to a stock-split, reorganization, or other corporate action, overall market conditions, validity of the consolidated tape's trades and quotes, consideration of primary market indications, and executions inconsistent with the trading pattern in the stock. Each additional factor shall be considered with a view toward maintaining a fair and orderly market and the protection of investors and the public interest.

CBSX may expand the Numerical Guidelines applicable to transactions occurring between 8:30 a.m. CT and 9 a.m. CT based on the disseminated value of the S & P 500 Futures at 8:15 a.m. CT. When the S & P 500 Futures are up or down from 3% to up to but not including 5% at 8:15 a.m. the Numerical Guidelines are doubled for executions occurring between 8:30 a.m. and 9 a.m. Also, when the S & P 500 Futures are up or down 5% or greater at 8:15 a.m. the Numerical Guidelines are tripled for executions occurring between 8:30 a.m. and 9 a.m.

In the case of an Outlier Transaction, an Official may at his or her sole discretion, and on a case-by-case basis, consider requests received after 30 minutes, but not longer than sixty minutes after the transaction in question, depending on the facts and circumstances surrounding such request. An "Outlier Transaction" is a transaction where: (i) The execution price of the security is greater than three times the current Numerical Guidelines set forth in paragraph (c)(1) of the Rule, or (ii) the execution price of the security in question is not within the Outlier Transaction parameters set forth in paragraph (d)(1)(A) of the Rule but breaches the 52-week high or 52-week low, CBSX may consider Additional Factors (as outlined in paragraph (c)(3) of the Rule), in determining if the transaction qualifies for further review or if the Corporation shall decline to act.

Unless both parties to the disputed transaction agree to withdraw the initial request for review, the transaction under dispute shall be reviewed, and a determination shall be rendered by the Official. If the Official determines that

the transaction is not clearly erroneous, the Official shall decline to take any action in connection with the completed trade. In the event that the Official determines that the transaction in dispute is clearly erroneous, the Official shall declare the transaction null and void. A determination shall be made generally within 30 minutes of receipt of the complaint, but in no case later than the start of trading on the following trading day. The parties shall be promptly notified of the determination. Under the proposed rule, the Official will only have the authority to break the trades or rule to let the trades stand. This attempts to remove subjectivity that is necessitated by an adjustment.

If a CBSX Trader affected by a determination made under this Rule so requests within the time permitted below, a Clearly Erroneous Execution Panel ("CEE Panel") will review decisions made by the Official; provided however that the CEE Panel will not review decisions made by an official under paragraph (f) of the Rule (regarding system disruptions and malfunctions) if such Official also determines under paragraph (f) that the number of the affected transactions is such that immediate finality is necessary to maintain a fair and orderly market and to protect investors and the public interest.[5]

The CEE Panel will consist of the Exchange's Chief Regulatory Officer ("CRO"), or a designee of the CRO, and representatives from two (2) CBSX Traders. Further, CBSX shall designate at least ten (10) CBSX Trader representatives to be called upon to serve on the CEE Panel as needed. In no case shall a CEE Panel include a person affiliated with a party to the trade in question. To the extent reasonably possible, the Exchange shall call upon the designated representatives to participate on a CEE Panel on an equally frequent basis.

A request for review on appeal must be made via e-mail within thirty (30) minutes after the party making the appeal is given notification of the initial determination being appealed. The CEE Panel shall review the facts and render a decision as soon as practicable, but generally on the same trading day as the execution(s) under review. On requests for appeal received between 2 CT and the close of trading, a decision will be rendered as soon as practicable, but in no case later than the trading day following the date of the execution under review. The CEE Panel may overturn or modify an action taken by the Official under the Rule. All determinations by the CEE Panel shall constitute final action by CBSX on the matter at issue.[6]

CBSX proposes to add a section to the Rule that will grant Officials the ability to act on their own motion to review potentially erroneous executions. The proposed rule would allow an Official to review executions and rely on the Numerical Guidelines, under any circumstance. In extraordinary circumstances an Official may apply a lower Numerical Guideline if it is determined that such action is necessary to maintain a fair and orderly market or protect investors and the public interest. In some instances the Exchange may detect a single execution that breaches the Numerical Guidelines but is not the subject of a ruling request. This provision gives the Exchange the ability to review such executions. Additionally, in practice, clearly erroneous executions commonly involve multiple parties and multiple executions. In such instances, all affected parties may not request a ruling. The Exchange proposes this provision to permit an Official to rule on a group of transactions related to the same occurrence or event as a whole, without a formal request for a ruling from every affected party.

The proposed rule also modifies CBSX's policy on trade nullification and for UTP securities that are subject to initial public offerings. Under the proposed rule, Officials must either declare an opening transaction null and void or decline to take action, but can no longer be adjusted. Furthermore, the proposed rule requires that, in extraordinary circumstances, the reviewing Official must take action in a timely fashion.

The proposed rule language is based on language adopted by NYSE Arca in SR–NYSEArca–2009–36.[7] CBSX anticipates this new obvious error policy to become effective on October 5, 2009.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Securities Exchange Act of 1934 (the "Act")[8] and the rules and regulations thereunder and, in particular, the requirements of Section 6(b) of the Act.[9] Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[10] requirements that the rules of an exchange be designed to promote just and equitable principles of trade, to prevent fraudulent and manipulative acts, to remove impediments to and to perfect the mechanism for a free and open market and a national market system, and, in general, to promote the maintenance of fair and orderly markets, and to protect investors and the public interest. The proposed rule change provides transparency and finality for participants and creates consistent results across U.S. equities exchanges with respect to clearly erroneous executions.

B. Self-Regulatory Organization's Statement on Burden on Competition

CBOE does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

The Exchange neither solicited nor received comments on the proposal.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section

[5] In the event of any disruption or a malfunction in the use or operation of any electronic communications and trading facilities of CBSX, or extraordinary market conditions or other circumstances in which the nullification of transactions may be necessary for the maintenance of a fair and orderly market or the protection of investors and the public interest exist, the Official, on his or her own motion, may review such transactions and declare such transactions arising out of the use or operation of such facilities during such period null and void. In such events, the Official will rely on the provisions of paragraph (c)(1)–(3) of the Rule, but in extraordinary circumstances may also use a lower Numerical Guideline if necessary to maintain a fair and orderly market, protect investors and the public interest. Absent extraordinary circumstances, any such action of the Official pursuant to paragraph (f) shall be taken within thirty (30) minutes of detection of the erroneous transaction. When extraordinary circumstances exist, any such action of the Official must be taken by no later than the start of trading on the day following the date of execution(s) under review. Each CBSX Trader involved in the transaction shall be notified as soon as practicable, and the CBSX Trader aggrieved by the action may appeal such action.

[6] If the CEE Panel votes to uphold the decision made pursuant to paragraph (e)(1) of this Rule, CBSX will assess a $500.00 fee against the CBSX Trader(s) who initiated the request for appeal.

[7] *See* Exchange Act Release No. 34–60706 (approving SR–NYSEArca–2009–36).

[8] 15 U.S.C. 78s(b)(1).

[9] 15 U.S.C. 78f(b).

[10] 15 U.S.C. 78f(b)(5).

19(b)(3)(A) of the Act[11] and Rule 19b–4(f)(6) thereunder.[12]

A proposed rule change filed pursuant to Rule 19b–4(f)(6) under the Act[13] normally does not become operative for 30 days after the date of its filing. However, Rule 19b–4(f)(6)[14] permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange requests that the Commission waive the 30-day operative delay so that it may implement the new rule on October 5, 2009, the same date as the other equities exchanges. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest because it will allow the Exchange to begin applying the new rule on the same date as the other equities exchanges.[15] Application of the new rule on this date should help foster transparency and consistency among those exchanges that adopt clearly erroneous execution rules substantially similar to those previously approved by the Commission.[16] For these reasons, the Commission designates that the proposed rule change become operative on October 5, 2009.

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–CBOE–2009–071 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–CBOE–2009–071. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the 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 publicly available. All submissions should refer to File Number SR–CBOE–2009–071 and should be submitted on or before October 29, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[17]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E9–24248 Filed 10–7–09; 8:45 am]

BILLING CODE 8011–01–P

[11] 15 U.S.C. 78s(b)(3)(A).

[12] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[13] 17 CFR 240.19b–4(f)(6).

[14] 17 CFR 240.19b–4(f)(6).

[15] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposal's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[16] *See* Securities Exchange Act Release No. 60706 (September 22, 2009) 74 FR 49416 (September 28, 2009) (NYSEArca–2009–36).

[17] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–60759; File No. SR–BATS–2009–030]

Self-Regulatory Organizations; BATS Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend BATS Rule 11.17, Entitled "Clearly Erroneous Executions"

October 1, 2009.

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 September 28, 2009, BATS Exchange, Inc. ("Exchange" or "BATS") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. BATS has designated the proposed rule change as constituting a rule change under Rule 19b–4(f)(6) under the Act,[3] which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is proposing to amend BATS Rule 11.17, entitled "Clearly Erroneous Executions," to modify the Exchange's rule regarding clearly erroneous executions.

The text of the proposed rule change is available at the Exchange's Web site at *http://www.batstrading.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the 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 parts of such statements.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 17 CFR 240.19b–4(f)(6).

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend BATS Rule 11.17 in order to modify the Exchange's rule regarding clearly erroneous executions. The proposed changes are part of a market-wide effort designed to provide transparency and finality with respect to clearly erroneous executions. This effort seeks to achieve consistent results for participants across U.S. equities exchanges while maintaining a fair and orderly market, protecting investors and protecting the public interest. The proposed changes are more fully discussed below.

Definition

The Exchange will maintain the meaning of the definition of a clearly erroneous execution, but proposes to add clarifying language with respect to cancelled trades. The proposed change identifies that a transaction made in clearly erroneous error and agreed to be canceled by both parties or determined by the Exchange to be clearly erroneous will be removed "from the Consolidated Tape."[4] A trade will only be removed from the Consolidated Tape when the determination is deemed final and any applicable appeals have been exhausted.

Member Initiated Review Requests

The Exchange proposes to amend BATS Rule 11.17 to update the procedures for requesting a review of a clearly erroneous transaction. The Exchange currently requires requests for review of a clearly erroneous execution to be made both by electronic mail ("e-mail") and telephone. The proposed amended rule would require that requests for review be made by e-mail or "other electronic means specified from time to time by the Exchange." Requiring requests for review to be made via e-mail creates a standard format that can easily be logged and tracked. Due to the evolution of electronic systems, however, it is possible that the Exchange will develop a more efficient means of electronic submission, and thus, has proposed language with a broader scope. The Exchange will publish the e-mail address or other electronic means to be used for all clearly erroneous filings in a circular distributed to Members.[5]

In order to be consistent with the clearly erroneous execution rules of other exchanges, the language of the proposed rule slightly differs from the current rule with respect to the information that must be included with a request for review. The only substantive difference between the current rule and proposed rule in this regard, however, is that the Exchange will no longer request that a Member indicate a requested resolution of the matter (*i.e.,* break or adjust) and will require a Member to include the factual basis for the request.

The proposed rule also requires the Exchange to notify the counterparty to a trade upon receipt of a timely filed request for review that satisfies the numerical guidelines set forth within the Rule (the "Numerical Guidelines"). This proposed language eliminates the requirement that counterparties be notified of every request for a ruling and instead requires notice only when a request is filed in a timely manner and satisfies the Numerical Guidelines. This change alleviates the burden on the Exchange of notifying the counterparty when a request for review does not merit a ruling.

The Exchange proposes to amend BATS Rule 11.17 to allow an Officer of the Exchange or such other employee designee ("Officer") of the Exchange to request additional information from each party to a transaction under review. Parties to the review will have 30 minutes from the time of the request to provide additional supporting information.

Routed Executions

The Exchange proposes to give other market centers an additional thirty (30) minutes from the receipt of their participant's timely filing to request a ruling, but no longer than sixty (60) minutes from the time of the execution under review. This provision accounts for those executions initially directed to an away market center and subsequently routed by that away market center to the Exchange. For example, assume an order is initially routed by a participant to Market Center A and subsequently routed to BATS where the order is executed at a price outside of the Numerical Guidelines. This provision generally requires Market Center A to file with the Exchange within 30 minutes from the time it receives its participant's timely filed request for review. This provision caps the filing deadline for an away market center at 60 minutes from the time of the execution under review.

Threshold Factors

Currently, the Exchange's Clearly Erroneous Execution rule does not identify specific numeric guidelines for determining what constitutes a clearly erroneous transaction. The current rule simply provides that an Exchange Official "shall review the transaction under dispute and determine whether it is clearly erroneous, with a view toward maintaining a fair and orderly market and the protection of investors and the public interest."[6] The Exchange proposes adding certain numerical thresholds to the Rule that explicitly state what constitutes a clearly erroneous execution.

Numerical Guidelines

The proposed numerical guidelines state that a transaction executed during Regular Trading Hours[7] or the Pre-Opening[8] and After Hours Trading Sessions[9] may be found to be clearly erroneous only if the price of the transaction to buy is greater, or less in the case of a sale, than the reference price by an amount that equals or exceeds the numerical guidelines for a particular transaction category. The execution time of the transaction under review determines whether the guidance threshold is Regular Trading Hours or Pre-Opening or After Hours Trading Sessions (which occur before and after the Regular Trading Hours). The Reference Price shall be equal to the Consolidated Last Sale immediately prior to the execution under review, unless unusual circumstances are present. The proposed guidelines for sales greater than $0.00 up to and including $25.00 are 10% for Regular Trading Hours and 20% for the Pre-Opening and After Hours Trading Sessions. The proposed guidelines for sales greater than $25.00 up to and including $50.00 are 5% for Regular Trading Hours and 10% for the Pre-Opening and After Hours Trading Sessions. The proposed guidelines for sales greater than $50.00 are 3% for Regular Trading Hours and 6% for the Pre-Opening and After Hours Trading Sessions. A filing involving five or more

[4] For purposes of this Rule, "removed from the Consolidate Tape" means that a subsequent message will be sent to the Consolidated Tape indicating that a previously executed trade has been cancelled.

[5] BATS Rule 1.5(n) defines a Member as "any registered broker or dealer that has been admitted to membership in the Exchange."

[6] BATS Rule 11.17(b).

[7] Regular Trading Hours last from 9:30 a.m. until 4:00 p.m. (Eastern Time). BATS Rule 1.5(w).

[8] The Pre-Opening Session begins at 8:00 a.m. and concludes 9:30 a.m. (Eastern Time). BATS Rule 1.5(r).

[9] The After Hours Trading Session begins at 4:00 p.m. and concludes at 5:00 p.m. (Eastern Time). BATS Rule 1.5(c).

securities by the same Member will be aggregated into a single filing called a "Multi-Stock Event." In the case of a Multi-Stock Event, the proposed guidelines are 10% for Regular Trading Hours and 10% for the Pre-Opening and After Hours Trading Sessions. In the case of Leveraged ETF/ETN securities, the above guidelines are to be multiplied by the leverage multiplier of the security. Executions that do not meet or exceed the Numerical Guidelines will not be eligible for review under this section. The following chart summarizes the proposed Numerical Guidelines.

Reference price	Regular trading hours numerical guidelines (subject transaction's % difference from the reference price):	Pre-opening and after hours trading session numerical guidelines (subject transaction's % difference from the reference price):
Greater than $0.00 up to and including $25.00	10%	20%.
Greater than $25.00 up to and including $50.00.	5%	10%.
Greater than $50.00	3%	6%.
Multi-Stock Event—Filings involving five or more securities by the same Member will be aggregated into a single filing.	10%	10%.
Leveraged ETF/ETN securities	Regular Trading Hours Numerical Guidelines multiplied by the leverage multiplier (*i.e.*, 2×).	Regular Trading Hours Numerical Guidelines multiplied by the leverage multiplier (*i.e.*, 2×).

Establishing Numerical Guidelines within the Rule brings regulatory transparency and consistency in the application of the rules of the Exchange. These Numerical Guidelines represent the general consensus approach and were developed based on the collective experiences of a market-wide group. The Exchange believes that the Thresholds established are fair and appropriate and apply evenly to all participants.

Unusual Circumstances

The Exchange further proposes that in Unusual Circumstances the Exchange may, in its discretion and with a view toward maintaining a fair and orderly market and the protection of investors and the public interest, use a Reference Price other than the consolidated last sale. Unusual Circumstances may include periods of extreme market volatility, sustained illiquidity, or widespread system issues. Other Reference Prices that the Exchange may use would include the consolidated inside price, the consolidated opening price, the consolidated prior close, or the consolidated last sale prior to a series of executions.

The following example explains the use of a Reference Price equal to the consolidated last sale prior to a series of executions.

ABC has a consolidated last sale of $10.00. During Regular Trading Hours Customer A enters a market order to buy 10,000 shares, although it had intended a market order for 1,000 shares. The size of the order is such that the order sweeps the BATS Book, which reflects 1,000 shares of liquidity offered at each of following prices. Executions occur, moving through the depth of Book, as follows:

Trade #1—1,000 shares @ $10.00 (9,000 remaining)
Trade #2—1,000 shares @ $10.20 (8,000 remaining)
Trade #3—1,000 shares @ $10.40 (7,000 remaining)
Trade #4—1,000 shares @ $10.60 (6,000 remaining)
Trade #5—1,000 shares @ $10.80 (5,000 remaining)
Trade #6—1,000 shares @ $11.00 (4,000 remaining)
Trade #7—1,000 shares @ $11.20 (3,000 remaining)
Trade #8—1,000 shares @ $11.40 (2,000 remaining)
Trade #9—1,000 shares @ $11.60 (1,000 remaining)
Trade #10—1,000 shares @ $11.80 (complete)

Thus, to be eligible for review, a transaction must be at a price that is at least 10% higher than the consolidated last sale prior to the series of executions. Customer A could request a ruling for trades #6 through #10, priced at $11.00 and above, but trades #1 through #5 would not be eligible for review.

Under the proposed rule the Exchange may also use a higher numerical guideline if, after market participants have been alerted to erroneous activity, the price of the security returns toward its prior trading range but continues to trade beyond the price it would have normally been broken.

Joint Market Rulings

In the interest of achieving consistency across markets, the Exchange proposes that, in events that involve other markets, the Exchange would have the ability to use a different Reference Price and/or Numerical Guideline. In these instances the Reference Price would be determined based on a consensus among the Exchanges where the transactions occurred. Furthermore, when a ruling is made across markets, the Exchange may determine that the ruling is not eligible for appeal because immediate finality is necessary to maintain a fair and orderly market and to protect investors and the public interest.

Additional Factors

The proposed amendments to BATS Rule 11.17 also enumerate some additional factors that an Officer may consider when determining whether an execution is clearly erroneous. These factors include, but are not limited to, system malfunctions or disruptions, volume and volatility for the security, derivative securities products that correspond to greater than 100% in the direction of a tracking index, news released for the security, whether trading in the security was recently halted/resumed, whether the security is an initial public offering, whether the security was subject to a stock-split, reorganization, or other corporate action, overall market conditions, Pre-Opening or After Hours Trading Session executions, validity of the consolidated tapes trades and quotes, consideration of primary market indications, and executions inconsistent with the trading pattern in the stock. Each additional factor shall be considered with a view toward maintaining a fair and orderly market, the protection of investors and the public interest.

Numerical Guidelines Applicable to Volatile Market Openings

The proposed Rule would give the Exchange the ability to expand the Numerical Guidelines applicable to transactions occurring between 9:30 a.m. and 10 a.m. based on the disseminated value of the S&P 500 Futures at 9:15 a.m. When the S&P

Futures are up or down from 3% up to but not including 5% at 9:15 a.m., the Numerical Guidelines are doubled. When the S&P Futures are up or down 5% or greater at 9:15 a.m., the Numerical Guidelines are tripled. The Exchange believes that the S&P 500 Futures contract is an appropriate and reliable barometer of market activity prior to the market opening due to its broad based market coverage and deep liquidity. Using the S&P 500 Futures disseminated value at 9:15 a.m. as the barometer of market activity, the Exchange is providing a transparent means of offering adjusted guidelines in times of volatile market activity.

Outlier Transactions

The proposed amendments to BATS Rule 11.17 provide that an Officer may consider requests for review received after 30 minutes, but not longer than 60 minutes after the execution in question in the case of an Outlier Transaction. An Outlier Transaction is a transaction where the execution price of the security is greater than three times the current Numerical Guidelines. In addition, if the execution price of the security breaches the 52-week high or low, then the Exchange may consider Additional Factors to determine if the transaction qualifies for review or if the Exchange shall decline to act.

Review Procedures

Initial Determination: The Exchange proposes removing language that currently allows an Officer to modify one or more of the terms of a transaction under review. Under the proposed rule, the Officer of the Exchange will only have the authority to break the trades or rule to let the trades stand. This change attempts to remove the subjectivity from the rule that is necessitated by an adjustment. The Exchange also proposes adding language stating that a determination shall be made generally within 30 minutes of receipt of the complaint, but in no case later than the start of Regular Trading Hours on the following trading day. Rulings made outside of 30 minutes by an Officer will not fail for lack of timeliness. The guideline simply provides participants an appropriate expectation that a ruling will generally be made within 30 minutes, and in no case later than the start of Regular Trading Hours on the following trading day.

Appeals: The Exchange proposes to amend the appeals procedure for trades that are deemed to be clearly erroneous. First, the Exchange will no longer accept appeal requests via facsimile. Similar to the proposed language for an initial request for a ruling, all appeal requests must be made via e-mail or other electronic means specified by the Exchange.

The current rule provides that the Exchange shall review and render a decision upon an appeal within a timeframe prescribed by the Exchange. The proposed rule offers more definite guidelines to ensure the expedient resolution of appeals. It requires the Exchange to review appeals as soon as practicable, but generally on the same day as the executions under review. Appeals received between 3 Eastern Time and the close of trading of the After Hours Trading Session should be made as soon as practicable, but in no case later than the trading day following the date of the execution under review. Appeals will not fail for lack of timeliness. This revised provision provides participants a reasonable expectation of when a ruling on appeal will generally be made.

Further, the proposed rule declares that any determination made by an Officer or by the CEE Panel shall be rendered without prejudice as to the right of the parties to the transaction to submit their dispute to arbitration. This provision simply clarifies the fact that nothing in the proposed rule limits or impedes the rights of the parties to arbitrate their dispute.

System Disruption and Malfunctions

Within the System Disruptions and Malfunctions section of current BATS Rule 11.17, after an Officer determines that a trade was clearly erroneous he may declare the transaction null and void or modify the trade to attempt to achieve an equitable rectification of the error. The proposed Rule eliminates the Exchange's ability to modify a clearly erroneous execution. The Exchange must either uphold or nullify the execution based upon the findings of the Officer reviewing the execution. The proposed Rule provides that, in the event of a disruption or a malfunction, an Officer of the Corporation or other senior level employee designee will rely on the proposed Numerical Guidelines in determining whether an execution is clearly erroneous. However, the Officer or senior level employee may also use a lower Numerical Guideline if necessary to maintain a fair and orderly market, protect investors, and protect the public interest. The proposed rule also adds that actions taken under these circumstances must be taken within 30 minutes of detection of the erroneous transaction in the ordinary case, and by no later than the start of Regular Trading Hours on the day following the date of the execution under review when extraordinary circumstances exist.

Officers Acting on Their Own Motion

The Exchange proposes to add a section to the Rule that will grant an Officer of the Exchange or other senior level employee designee the ability to act on his or her own motion to review potentially erroneous executions. Under the current rule, an Officer of the Exchange or other senior level employee designee has the ability to act upon his or her own motion only in the event of a system disruption or malfunction. The proposed rule would allow an Officer of the Corporation or other senior level employee designee to review executions and rely on the Numerical Guidelines, under any circumstance. In extraordinary circumstances an Officer or senior level employee designee may apply a lower Numerical Guideline if it is determined that such action is necessary to maintain a fair and orderly market or protect investors and the public interest. In some instances the Exchange may detect a single execution that breaches the Numerical Guidelines but is not the subject of a ruling request. This provision gives the Exchange the ability to review such executions. Additionally, in practice, clearly erroneous executions commonly involve multiple parties and multiple executions. In such instances, all affected parties may not request a ruling. The Exchange proposes this provision to permit an Officer of the Exchange or other senior level employee designee to rule on a group of transactions related to the same occurrence or event as a whole, without a formal request for a ruling from every affected party.

As noted above, the proposed rule is the result of a market-wide effort to harmonize the clearly erroneous rules of U.S. equities exchanges so that market participants receive more uniform rulings regarding their executions on different exchanges. To best achieve such harmonization, the Exchange believes that the rules those national securities exchanges that are amending their rules should be amended as of the same date, and such implementation is currently planned for October 5, 2009.

2. Statutory Basis

The rule change proposed in this submission is consistent with the requirements of the Act and the rules and regulations thereunder that are applicable to a national securities exchange, and, in particular, with the requirements of Section 6(b) of the Act.[10] Specifically, the proposed change is consistent with Section 6(b)(5) of the

[10] 15 U.S.C. 78f(b).

Act,[11] because it would promote just and equitable principles of trade, remove impediments to, and perfect the mechanism of, a free and open market and a national market system. The proposed rule change provides transparency and finality for participants and creates consistent results across U.S. equities exchanges with respect to clearly erroneous executions. This proposed change further promotes the maintenance of a fair and orderly market, the protection of investors and the protection of the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change imposes any burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

The Exchange has neither solicited nor received written comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act[12] and Rule 19b–4(f)(6) thereunder.[13]

A proposed rule change filed pursuant to Rule 19b–4(f)(6) under the Act[14] normally does not become operative for 30 days after the date of its filing. However, Rule 19b–4(f)(6)[15] permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange requests that the Commission waive the 30-day operative delay so that it may implement the new rule on October 5, 2009, the same date as the other equities exchanges. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest because it will allow the Exchange to begin applying the new rule on the same date as the other equities exchanges.[16] Application of the new rule on this date should help foster transparency and consistency among those exchanges that adopt clearly erroneous execution rules substantially similar to those previously approved by the Commission.[17] For these reasons, the Commission designates that the proposed rule change become operative on October 5, 2009.

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–BATS–2009–030 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–BATS–2009–030. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the 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 publicly available. All submissions should refer to File Number SR–BATS–2009–030 and should be submitted on or before October 29, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[18]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E9–24247 Filed 10–7–09; 8:45 am]

BILLING CODE 8011–01–P

[11] 15 U.S.C. 78f(b)(5).

[12] 15 U.S.C. 78s(b)(3)(A).

[13] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[14] 17 CFR 240.19b–4(f)(6).

[15] 17 CFR 240.19b–4(f)(6).

[16] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposal's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[17] *See* Securities Exchange Act Release No. 60706 (September 22, 2009) 74 FR 49416 (September 28, 2009) (NYSEArca–2009–36).

[18] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–60782; File No. SR–NYSEAmex–2009–69]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by NYSE Amex LLC Amending NYSE Amex Equities Rule 128 Governing Clearly Erroneous Executions for NYSE Amex Equities

October 2, 2009.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on October 2, 2009, NYSE Amex LLC ("Exchange" or "NYSE Amex") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. NYSE Amex has designated the proposed rule change as constituting a rule change under Rule

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

19b–4(f)(6) under the Act,[3] which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend NYSE Amex Equities Rule 128 (Clearly Erroneous Executions for NYSE Amex Equities) governing clearly erroneous executions for NYSE Amex equities. The text of the proposed rule change is available at the Exchange, the Commission's Public Reference Room, and *http://www.nyse.com.*

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend Rule 128 in order to improve the Exchange's policies and procedures regarding clearly erroneous executions that occur on the NYSE Amex equities and on other national market centers. The proposed changes are part of a market-wide effort designed to provide transparency and finality with respect to clearly erroneous executions. This effort seeks to achieve consistent results for participants across U.S. equities exchanges while maintaining a fair and orderly market, protecting investors and protecting the public interest. The proposed changes are more fully discussed below.

Definition

The Exchange will maintain the meaning of the definition of a clearly erroneous execution, but proposes to add clarifying language with respect to cancelled trades. The proposed change identifies that when a clearly erroneous execution occurs and both parties agree to cancel the execution and when a trade is determined by the Exchange to be clearly erroneous such executions will be removed "from the Consolidated Tape."[4] A trade will be removed from the Consolidated Tape only when the determination is deemed final and any applicable appeals have been exhausted.

Member or Member Organization Initiated Review Requests

The Exchange proposes to amend Rule 128 to update the procedures for requesting a review of a clearly erroneous execution. First, and throughout Rule 128, the term "Officer" will be defined as an Officer of the Exchange or such other senior level employee designee. Next, the proposed rule will require that requests for review be made by electronic mail ("e-mail") or other electronic means specified from time to time by the Exchange, except for market participants who trade on the Floor of the Exchange, who will continue to be permitted to make such requests for review in person on the Floor of the Exchange. Requiring requests for review to be made electronically, except those requests made in person on the Floor of the Exchange, creates a standard format that can easily be logged and tracked. The Exchange will continue to publish the e-mail address and other electronic means to be used for all clearly erroneous filings in a circular distributed to members and member organizations.

The Exchange further proposes that requests for review must be received by the Exchange within thirty (30) minutes of the execution time for orders initially routed to and executed on the Exchange. The Exchange proposes that members and member organizations submit certain essential identifying information with the request including the time of the execution(s), security symbol(s), number of shares, price(s), side (bought or sold), and factual basis for believing that the trade is clearly erroneous. The current rule requires requests for review to be received within fifteen (15) minutes of the execution and does not specify what information is required. The Exchange believes that thirty (30) minutes is an appropriate time frame that offers the requesting party sufficient time to gather and submit all required information.

The proposed rule also requires the Exchange to notify the counterparty to a trade upon receipt of a timely filed request for review that satisfies the Numerical Guidelines set forth within the rule. This proposed language eliminates the requirement that counterparties be notified of every request for a ruling and instead requires notice only when a request is filed in a timely manner and satisfies the Numerical Guidelines. This change alleviates the burden on the Exchange of notifying the counterparty when a request for review does not merit a ruling.

The Exchange proposes to amend Rule 128 to allow an Officer to request additional information from each party to an execution under review. Parties to an execution under review will have thirty (30) minutes from the time of the request to provide additional supporting information.

Routed Executions

The Exchange proposes to give other market centers an additional thirty (30) minutes from the receipt of their participant's timely filing to request a ruling, but no longer than sixty (60) minutes from the time of the execution under review. This provision accounts for those executions initially directed to an away market center and subsequently routed by that away market center to the Exchange.

For example, assume an order is initially routed by a participant to Market Center A and subsequently routed to the NYSE Amex where the order is executed at a price outside of the Numerical Guidelines. This provision generally requires Market Center A to file with the Exchange within thirty (30) minutes from the time it receives its participant's timely filed request for review. This provision caps the filing deadline for an away market center at sixty (60) minutes from the time of the execution under review.

Threshold Factors

Currently, the Exchange's Clearly Erroneous Execution rule does not identify specific numeric guidelines for determining what constitutes a clearly erroneous execution. The current rule simply provides that "an Officer of the Exchange * * * shall review the transaction * * * and determine whether it is clearly erroneous, with a view toward maintaining a fair and orderly market and the protection of investors and the public interest."[5] In practice, the Exchange currently incorporates the internal guidelines in the Exchange's Clearly Erroneous Execution policy. The Exchange proposes adding certain numerical

[3] 17 CFR 240.19b–4(f)(6).

[4] For purposes of this Rule, "removed from the Consolidate Tape" means that a subsequent message will be sent to the Consolidated Tape indicating that a previously executed trade has been cancelled.

[5] NYSE Amex Equities Rule 128(b).

thresholds to the Rule that explicitly state what constitutes, among other factors, a possible clearly erroneous execution.

Numerical Guidelines

The proposed Numerical Guidelines state that an execution executed during the regular trading hours and after hours of the Exchange may be found to be clearly erroneous only if the price of the execution to buy is greater, or less in the case of a sale, than the Reference Price by an amount that equals or exceeds the numerical guidelines for a particular execution category. The execution time of the transaction under review determines whether the Numerical Guideline applied is for the regular trading hours or the after hours of the Exchange. The Reference Price shall be equal to the Consolidated Last Sale immediately prior to the execution under review, unless unusual circumstances are present. The proposed guidelines for sales greater than $0.00 up to and including $25.00 are 10% for the regular trading hours and 20% for the after hours of the Exchange. The proposed guidelines for sales greater than $25.00 up to and including $50.00 are 5% for the regular trading hours and 10% for the after hours of the Exchange. The proposed guidelines for sales greater than $50.00 are 3% for the regular trading hours and 6% for the after hours of the Exchange. A filing involving five or more securities by the same member or member organization will be aggregated into a single filing called a ''Multi-Stock Event.'' In the case of a Multi-Stock Event, the proposed guidelines are 10% per security for the regular trading hours and after hours of the Exchange. In the case of Leveraged ETF/ETN securities, the above guidelines are to be multiplied by the leverage multiplier of the security. Executions that do not meet or exceed the Numerical Guidelines will not be eligible for review under this section. The following chart summarizes the proposed Numerical Guidelines.

Reference price: Consolidated last sale	Regular trading hours of the exchange numerical guidelines (subject execution's % difference from the consolidated last sale)	After hours of the exchange numerical guidelines (subject execution's % difference from the consolidated last sale)
Greater than $0.00 up to and including $25.00	10%	20%.
Greater than $25.00 up to and including $50.00.	5%	10%.
Greater than $50.00	3%	6%.
Multi-Stock Event—Filings involving five or more securities by the same member or member organization will be aggregated into a single filing.	10%	10%.
Leveraged ETF/ETN securities	Regular Trading Hours of the Exchange Numerical Guidelines multiplied by the leverage multiplier (*i.e.* 2×).	After Hours of the Exchange Numerical Guidelines multiplied by the leverage multiplier (*i.e.* 2×).

Establishing Numerical Guidelines within the Rule brings regulatory transparency and consistency in the application of the rules of the Exchange. These Numerical Guidelines represent the general consensus approach and were developed based on the collective experiences of a market-wide group. The Exchange believes that the thresholds established are fair and appropriate and apply evenly to all participants.

Unusual Circumstances

The Exchange further proposes that in Unusual Circumstances the Exchange may, in its discretion and with a view toward maintaining a fair and orderly market and the protection of investors and the public interest, use a Reference Price other than the consolidated last sale. Unusual Circumstances may include periods of extreme market volatility, sustained illiquidity, or widespread system issues. Other Reference Prices that the Exchange may use would include the consolidated inside price, the consolidated opening price, the consolidated prior close, or the consolidated last sale prior to a series of executions.

The following example explains the use of a Reference Price equal to the consolidated last sale prior to a series of executions.

ABC has a consolidated last sale of $10.00. During the regular trading hours of the Exchange Customer A enters a market order to buy 10,000 shares, although it had intended a market order for 1,000 shares. The size of the order is such that the order sweeps the NYSE Amex Display Book, which reflects 1,000 shares of liquidity offered at each of following prices. Executions occur, moving through the depth of Book, as follows:

Trade #1–1,000 shares @ $10.00 (9,000 remaining)
Trade #2–1,000 shares @ $10.20 (8,000 remaining)
Trade #3–1,000 shares @ $10.40 (7,000 remaining)
Trade #4–1,000 shares @ $10.60 (6,000 remaining)
Trade #5–1,000 shares @ $10.80 (5,000 remaining)
Trade #6–1,000 shares @ $11.00 (4,000 remaining)
Trade #7–1,000 shares @ $11.20 (3,000 remaining)
Trade #8–1,000 shares @ $11.40 (2,000 remaining)
Trade #9–1,000 shares @ $11.60 (1,000 remaining)
Trade #10–1,000 shares @ $11.80 (complete)

Thus, to be eligible for review, an execution must be at a price that is at least 10% higher than the consolidated last sale prior to the series of executions. Customer A could request a ruling for trades #6 through #10, priced at $11.00 and above, but trades #1 through #5 would not be eligible for review.

Under the proposed rule the Exchange may also use a higher Numerical Guideline if, after market participants have been alerted to erroneous activity, the price of the security returns toward its prior trading range but continues to trade at a price beyond the Numerical Guidelines.

Joint Market Rulings

In the interest of achieving consistency across markets, the Exchange proposes that, in events that involve other markets, the Exchange would have the ability to use a different Reference Price and/or Numerical Guideline. In these instances the Reference Price would be determined based on a consensus among the Exchanges where the executions occurred. Furthermore, when a ruling is made across markets, the Exchange may determine that the ruling is not eligible

for appeal because immediate finality is necessary to maintain a fair and orderly market and to protect investors and the public interest. While the Exchange will coordinate its review of a clearly erroneous execution with other affected market centers with the goal of rendering consistent results across the market, the Exchange is not bound by joint market rulings when such rulings would violate other NYSE Amex equities rules or are inconsistent with internal policies of the Exchange.

Additional Factors

The proposed amendments to Rule 128 also enumerate some additional factors that an Officer may consider when determining whether an execution is clearly erroneous. These factors include, but are not limited to, system malfunctions or disruptions, volume and volatility for the security, derivative securities products that correspond to greater than 100% in the direction of a tracking index, news released for the security, whether trading in the security was recently halted/resumed, whether the security is an IPO, whether the security was subject to a stock-split, reorganization, or other corporate action, overall market conditions, Opening and Late Session executions, validity of the consolidated tape's trades and quotes, consideration of primary market indications, Liquidity Replenishment Points ("LRPs"), Depth Guidelines and executions inconsistent with the trading pattern in the stock. Each additional factor shall be considered with a view toward maintaining a fair and orderly market, the protection of investors and the public interest.

Numerical Guidelines Applicable to Volatile Market Opens

The Exchange proposes to give the Exchange the ability to expand the Numerical Guidelines applicable to executions occurring between 9:30 a.m. and 10 a.m. based on the disseminated value of the S&P 500 Futures at 9:15 a.m. When the S&P Futures are up or down 3% up to but not including 5% at 9:15 a.m., the Numerical Guidelines are doubled. When the S&P Futures are up or down 5% or greater at 9:15 a.m., the Numerical Guidelines are tripled. The Exchange believes that the S&P 500 futures contract is an appropriate and reliable barometer of market activity prior to the market opening due to its broad based market coverage and deep liquidity. Using the S&P 500 Futures disseminated value at 9:15 a.m. as the barometer of market activity, the Exchange is providing a transparent means of offering adjusted guidelines in times of volatile market activity.

Outlier Executions

The proposed amendments to Rule 128 provide that the Officer may consider requests for review received after thirty (30) minutes, but not longer than sixty (60) minutes after the execution in question in the case of an Outlier Execution. An Outlier Execution is an execution where, (1) the execution price of the security is greater than three times the current Numerical Guidelines, or (2) the execution price of the security breaches the 52-week high or low, in which case the Exchange may consider Additional Factors to determine if the execution qualifies for review or if the Exchange shall decline to act.

Review Procedures

Initial Determination

Under the current rule, if the Officer determines that the execution is not clearly erroneous, the Officer shall not take any action in connection with the completed execution. In the event that the Officer determines that the execution in dispute is clearly erroneous, the Officer shall either declare the execution null and void or modify one or more of the terms of the transaction to achieve an equitable rectification of the error that would place the parties in the same position, or as close as possible to the same position that they would have been in, had the error not occurred. In the proposed rule, in the event the Officer determines there is a clearly erroneous execution, the Officer may declare the execution null and void or, if such transaction occurred only on the Exchange and no contemporaneous transaction(s) occurred on another market center(s) at a price that meets or exceeds the applicable Numerical Guidelines and if the Exchange has no actual knowledge of a clearly erroneous execution review of a contemporaneous transaction of the subject security on another market center, modify one or more of the terms of the transaction to achieve an equitable rectification of the error that would place the parties in the same position, or as close as possible to the same position that they would have been in, had the error not occurred.

For purposes of the proposed Rule, a transaction will be considered to have been contemporaneous if it was reported to the Consolidated Tape within a reasonable time frame of the transaction under review. Such time frame shall be determined by the Officer at the time of the clearly erroneous determination based on the liquidity of the relevant security, but shall in no case be less than one (1) second before or after the time of execution on the Exchange. In assessing whether there was a contemporaneous transaction on another market center, the Exchange will consider the existence of any clearly erroneous review of a transaction in the subject security on another market center of which it has actual knowledge, which may be indicative that the transaction under review on such other market center was contemporaneous with the transaction under review on the Exchange. However, the Exchange will not be required to initiate communication with other market centers to determine the existence of any such review(s).

For purposes of the proposed rule, whenever the rule provides authority for the Officer to modify or adjust a clearly erroneous execution, in addition to the Officer's ability to declare a clearly erroneous execution null and void, the Officer's authority to modify or adjust the clearly erroneous execution is subject to the conditions that there were no contemporaneous transactions on other markets and that the Exchange had no actual knowledge of a clearly erroneous execution review of a contemporaneous transaction of the subject security on another market center, as described above.

The Exchange also proposes adding language stating that a determination shall be made generally within thirty (30) minutes of receipt of the complaint, but in no case later than the start of the regular trading hours of the Exchange on the following trading day. Rulings made outside of thirty (30) minutes by an Officer will not fail for lack of timeliness. The guideline simply provides participants an appropriate expectation that a ruling will generally be made within thirty (30) minutes and in no case later than the start of the regular trading hours of the Exchange on the following trading day.

Appeals

The Exchange proposes to amend the appeals procedure for trades that are deemed to be clearly erroneous. First, the Exchange will no longer accept appeal requests via facsimile. Similar to the proposed language for an initial request for a ruling, all appeal requests must be made via e-mail, except for those requests for appeals from Exchange members who trade on the Floor of the Exchange. Members who trade on the Floor of the Exchange may also submit requests for appeals in person from the Floor.

The current rule provides that the Exchange shall review and render a

decision upon an appeal within a timeframe provided by the Exchange. The proposed rule offers more definite guidelines to ensure the expedient resolution of appeals. It requires the Exchange to review appeals as soon as practicable, but generally on the same day as the executions under review. Appeal requests received between 3 ET and the close of trading should be made as soon as practicable, but in no case later than the trading day following the date of the execution under review. Appeal decisions will not fail for lack of timeliness. This revised provision provides participants a reasonable expectation of when a ruling on appeal will generally be made.

Further, the proposed rule declares that any determination made by an Officer or by the CEE Panel shall be rendered without prejudice as to the right of the parties to the execution to submit their dispute to arbitration. This provision simply clarifies the fact that nothing in the proposed rule limits or impedes the rights of the parties to arbitrate their dispute.

System Disruption and Malfunctions

Currently, within the System Disruptions and Malfunctions section of the Rule, after an Officer determines that a trade was clearly erroneous he may declare the execution null and void or modify the trade to attempt to achieve an equitable rectification of the error. Under the proposed rule, when the Office determines that an execution is clearly erroneous, the officer shall either declare the transaction null and void or, if such transaction occurred only on the Exchange and no contemporaneous transaction(s) occurred on another market center(s) at a price that meets or exceeds the applicable Numerical Guidelines and if the Exchange has no actual knowledge of a clearly erroneous execution review of a contemporaneous transaction of the subject security on another market center, modify one or more of the terms of the transaction to achieve an equitable rectification of the error that would place the parties in the same position, or as close as possible to the same position that they would have been in, had the error not occurred. This rule change supports the goal to provide market-wide consistency to the resolution of clearly erroneous executions that occur on multiple markets.

The proposed rule also provides that, in the event of a disruption or a malfunction, the Officer will rely on the proposed Numerical Guidelines in determining whether an execution is clearly erroneous. However, the Officer may also use a lower Numerical Guideline if necessary to maintain a fair and orderly market, protect investors, and protect the public interest. The proposed rule also adds that actions taken under these circumstances must be taken within thirty (30) minutes of detection of the erroneous execution in the ordinary case, and by no later than the start of the regular trading hours of the Exchange on the day following the date of the execution under review when extraordinary circumstances exist.

Officers Acting on Their Own Motion

The Exchange proposes to add a section to the Rule that will grant an Officer the ability to act on his or her own motion to review potentially erroneous executions. Under the current rule, an Officer has the ability to act upon his or her own motion only in the event of a System Disruption or Malfunction. The proposed rule would allow an Officer to review executions and rely on the Numerical Guidelines under any circumstance.

Under the proposed rule, an Officer acting on its own motion, may review potentially erroneous executions that occur on the Exchange and shall either declare the transaction null and void or, if such transaction occurred only on the Exchange and no contemporaneous transaction(s) occurred on another market center(s) at a price that meets or exceeds the applicable Numerical Guidelines and if the Exchange has no actual knowledge of a clearly erroneous execution review of a contemporaneous transaction of the subject security on another market center, modify one or more of the terms of the transaction to achieve an equitable rectification of the error that would place the parties in the same position, or as close as possible to the same position that they would have been in, had the error not occurred. This rule change supports the goal to provide market-wide consistency to the resolution of clearly erroneous executions that occur on multiple markets.

In extraordinary circumstances an Officer may apply a lower Numerical Guideline to review a trade if it is determined that such action is necessary to maintain a fair and orderly market or protect investors and the public interest. In some instances the Exchange may detect a single execution that breaches the Numerical Guidelines but is not the subject of a ruling request. This provision gives the Exchange the ability to review such executions. Additionally, in practice clearly erroneous executions may involve multiple parties and multiple executions. The Exchange proposes this provision to permit an Officer to rule on a group of executions related to the same occurrence or event as a whole, with or without a formal request for a ruling from an affected party.

Trade Nullification and Price Adjustments for UTP Securities That Are the Subject of Initial Public Offerings

The proposed Rule also modifies the Exchange's policy on trade nullification and UTP securities that are subject to initial public offerings. Under the current Rule, a clearly erroneous execution may be deemed to have occurred in the opening execution of the subject security if the execution price of the opening execution on the Exchange is the lesser of $1.00 or 10% away from the opening price on the listing exchange or association. Under the proposed rule, in such circumstances, the Officer shall either decline to take action in connection with the completed transaction, declare the transaction null and void or, if such transaction occurred only on the Exchange and no contemporaneous transaction(s) occurred on another market center(s) at a price that meets or exceeds the applicable Numerical Guidelines and if the Exchange has no actual knowledge of a clearly erroneous execution review of a contemporaneous transaction of the subject security on another market center, adjust the transaction price to the opening price on the listing exchange or association.

Pursuant to the proposed rule, clearly erroneous executions of subsequent executions of the subject security will be reviewed in the same manner as the procedure set forth in (e)(1). Absent extraordinary circumstances, action of the Officer must be taken in a timely fashion, generally within thirty (30) minutes of the detection of the erroneous execution. In extraordinary circumstances, the reviewing Officer may take action by no later than the start of the regular trading hours of the Exchange on the day following the date of the execution under review.

2. Statutory Basis

The proposed rule change is consistent with Section 6(b)[6] of the Securities Exchange Act of 1934 (the "Exchange Act"), in general, and furthers the objectives of Section 6(b)(5)[7] in particular in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and

[6] 15 U.S.C. 78f(b).

[7] 15 U.S.C. 78f(b)(5).

coordination with persons engaged in facilitating transactions in securities, and to remove impediments to and perfect the mechanism of a free and open market and a national market system. The proposed rule change provides transparency and finality for participants and creates consistent results across U.S. equities exchanges with respect to clearly erroneous executions. This proposed change further promotes the maintenance of a fair and orderly market, the protection of investors and the protection of the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act[8] and Rule 19b–4(f)(6) thereunder.[9]

A proposed rule change filed pursuant to Rule 19b–4(f)(6) under the Act[10] normally does not become operative for 30 days after the date of its filing. However, Rule 19b–4(f)(6)[11] permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange requests that the Commission waive the 30-day operative delay so that it may implement the new rule on October 5, 2009, the same date as the other equities exchanges. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest because it will allow the Exchange to begin applying the new rule on the same date as the other equities exchanges.[12] Application of the new rule on this date should help foster transparency and consistency among those exchanges that adopt clearly erroneous execution rules substantially similar to those previously approved by the Commission.[13] For these reasons, the Commission designates that the proposed rule change become operative on October 5, 2009.

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–NYSEAmex–2009–69 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–NYSEAmex–2009–69. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the 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 publicly available. All submissions should refer to File Number SR–NYSEAmex–2009–69 and should be submitted on or before October 29, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[14]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E9–24246 Filed 10–7–09; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–60781; File No. SR–NYSE–2009–103]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by New York Stock Exchange LLC Amending NYSE Interim Rule 128 Governing Clearly Erroneous Executions for NYSE Equities

October 2, 2009.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on October 2, 2009, the New York Stock Exchange LLC ("Exchange" or "NYSE") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. NYSE has designated the proposed rule change as constituting a rule change under Rule

[8] 15 U.S.C. 78s(b)(3)(A).

[9] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[10] 17 CFR 240.19b–4(f)(6).

[11] 17 CFR 240.19b–4(f)(6).

[12] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposal's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[13] *See* Securities Exchange Act Release No. 60706 (September 22, 2009), 74 FR 49416 (September 28, 2009) (NYSEArca–2009–36).

[14] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

19b–4(f)(6) under the Act,[3] which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend NYSE interim Rule 128 (Clearly Erroneous Executions for NYSE Equities) governing clearly erroneous executions for NYSE equities. The text of the proposed rule change is available at the Exchange, the Commission's Public Reference Room, and *http://www.nyse.com.*

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend interim Rule 128 in order to improve the Exchange's policies and procedures regarding clearly erroneous executions that occur on the NYSE and on other national market centers. The proposed changes are part of a market-wide effort designed to provide transparency and finality with respect to clearly erroneous executions. This effort seeks to achieve consistent results for participants across U.S. equities exchanges while maintaining a fair and orderly market, protecting investors and protecting the public interest. The proposed changes are more fully discussed below.

Definition

The Exchange will maintain the meaning of the definition of a clearly erroneous execution, but proposes to add clarifying language with respect to cancelled trades. The proposed change identifies that when a clearly erroneous execution occurs and both parties agree to cancel the execution and when a trade is determined by the Exchange to be clearly erroneous such executions will be removed "from the Consolidated Tape."[4] A trade will be removed from the Consolidated Tape only when the determination is deemed final and any applicable appeals have been exhausted.

Member or Member Organization Initiated Review Requests

The Exchange proposes to amend interim Rule 128 to update the procedures for requesting a review of a clearly erroneous execution. First, and throughout Rule 128, the term "Officer" will be defined as an Officer of the Exchange or such other senior level employee designee. Next, the proposed rule will require that requests for review be made by electronic mail ("e-mail") or other electronic means specified from time to time by the Exchange, except for market participants who trade on the Floor of the Exchange, who will continue to be permitted to make such requests for review in person on the Floor of the Exchange. Requiring requests for review to be made electronically, except those requests made in person on the Floor of the Exchange, creates a standard format that can easily be logged and tracked. The Exchange will continue to publish the e-mail address and other electronic means to be used for all clearly erroneous filings in a circular distributed to members and member organizations.

The Exchange further proposes that requests for review must be received by the Exchange within thirty (30) minutes of the execution time for orders initially routed to and executed on the Exchange. The Exchange proposes that members and member organizations submit certain essential identifying information with the request including the time of the execution(s), security symbol(s), number of shares, price(s), side (bought or sold), and factual basis for believing that the trade is clearly erroneous. The current rule requires requests for review to be received within fifteen (15) minutes of the execution and does not specify what information is required. The Exchange believes that thirty (30) minutes is an appropriate time frame that offers the requesting party sufficient time to gather and submit all required information.

The proposed rule also requires the Exchange to notify the counterparty to a trade upon receipt of a timely filed request for review that satisfies the Numerical Guidelines set forth within the rule. This proposed language eliminates the requirement that counterparties be notified of every request for a ruling and instead requires notice only when a request is filed in a timely manner and satisfies the Numerical Guidelines. This change alleviates the burden on the Exchange of notifying the counterparty when a request for review does not merit a ruling.

The Exchange proposes to amend interim Rule 128 to allow an Officer to request additional information from each party to an execution under review. Parties to an execution under review will have thirty (30) minutes from the time of the request to provide additional supporting information.

Routed Executions

The Exchange proposes to give other market centers an additional thirty (30) minutes from the receipt of their participant's timely filing to request a ruling, but no longer than sixty (60) minutes from the time of the execution under review. This provision accounts for those executions initially directed to an away market center and subsequently routed by that away market center to the Exchange.

For example, assume an order is initially routed by a participant to Market Center A and subsequently routed to the NYSE where the order is executed at a price outside of the Numerical Guidelines. This provision generally requires Market Center A to file with the Exchange within thirty (30) minutes from the time it receives its participant's timely filed request for review. This provision caps the filing deadline for an away market center at sixty (60) minutes from the time of the execution under review.

Threshold Factors

Currently, the Exchange's Clearly Erroneous Execution rule does not identify specific numeric guidelines for determining what constitutes a clearly erroneous execution. The current rule simply provides that "an Officer of the Exchange * * * shall review the transaction * * * and determine whether it is clearly erroneous, with a view toward maintaining a fair and orderly market and the protection of investors and the public interest."[5] In practice, the Exchange currently incorporates the internal guidelines in the Exchange's Clearly Erroneous Execution policy. The Exchange proposes adding certain numerical thresholds to the Rule that explicitly state what constitutes, among other

[3] 17 CFR 240.19b–4(f)(6).

[4] For purposes of this Rule, "removed from the Consolidate Tape" means that a subsequent message will be sent to the Consolidated Tape indicating that a previously executed trade has been cancelled.

[5] NYSE Rule 128(b).

factors, a possible clearly erroneous execution.

Numerical Guidelines

The proposed Numerical Guidelines state that an execution executed during the regular trading hours and after hours of the Exchange may be found to be clearly erroneous only if the price of the execution to buy is greater, or less in the case of a sale, than the Reference Price by an amount that equals or exceeds the numerical guidelines for a particular execution category. The execution time of the transaction under review determines whether the Numerical Guideline applied is for the regular trading hours or the after hours of the Exchange. The Reference Price shall be equal to the Consolidated Last Sale immediately prior to the execution under review, unless unusual circumstances are present. The proposed guidelines for sales greater than $0.00 up to and including $25.00 are 10% for the regular trading hours and 20% for the after hours of the Exchange. The proposed guidelines for sales greater than $25.00 up to and including $50.00 are 5% for the regular trading hours and 10% for the after hours of the Exchange. The proposed guidelines for sales greater than $50.00 are 3% for the regular trading hours and 6% for the after hours of the Exchange. A filing involving five or more securities by the same member or member organization will be aggregated into a single filing called a "Multi-Stock Event." In the case of a Multi-Stock Event, the proposed guidelines are 10% per security for the regular trading hours and after hours of the Exchange. In the case of Leveraged ETF/ETN securities, the above guidelines are to be multiplied by the leverage multiplier of the security. Executions that do not meet or exceed the Numerical Guidelines will not be eligible for review under this section. The following chart summarizes the proposed Numerical Guidelines.

Reference price: Consolidated Last Sale	Regular trading hours of the exchange numerical guidelines (subject execution's % difference from the consolidated last sale):	After hours of the exchange numerical guidelines (subject execution's % difference from the consolidated last sale):
Greater than $0.00 up to and including $25.00	10%	20%.
Greater than $25.00 up to and including $50.00	5%	10%.
Greater than $50.00	3%	6%.
Multi-Stock Event—Filings involving five or more securities by the same member or member organization will be aggregated into a single filing.	10%	10%.
Leveraged ETF/ETN securities	Regular Trading Hours of the Exchange Numerical Guidelines multiplied by the leverage multiplier (*i.e.* 2×).	After Hours of the Exchange Numerical Guidelines multiplied by the leverage multiplier (*i.e.* 2×).

Establishing Numerical Guidelines within the Rule brings regulatory transparency and consistency in the application of the rules of the Exchange. These Numerical Guidelines represent the general consensus approach and were developed based on the collective experiences of a market-wide group. The Exchange believes that the thresholds established are fair and appropriate and apply evenly to all participants.

Unusual Circumstances

The Exchange further proposes that in Unusual Circumstances the Exchange may, in its discretion and with a view toward maintaining a fair and orderly market and the protection of investors and the public interest, use a Reference Price other than the consolidated last sale. Unusual Circumstances may include periods of extreme market volatility, sustained illiquidity, or widespread system issues. Other Reference Prices that the Exchange may use would include the consolidated inside price, the consolidated opening price, the consolidated prior close, or the consolidated last sale prior to a series of executions.

The following example explains the use of a Reference Price equal to the consolidated last sale prior to a series of executions.

ABC has a consolidated last sale of $10.00. During the regular trading hours of the Exchange Customer A enters a market order to buy 10,000 shares, although it had intended a market order for 1,000 shares. The size of the order is such that the order sweeps the NYSE Display Book, which reflects 1,000 shares of liquidity offered at each of following prices. Executions occur, moving through the depth of Book, as follows:

Trade #1—1000 shares @ $10.00 (9000 remaining)
Trade #2—1000 shares @ $10.20 (8000 remaining)
Trade #3—1000 shares @ $10.40 (7000 remaining)
Trade #4—1000 shares @ $10.60 (6000 remaining)
Trade #5—1000 shares @ $10.80 (5000 remaining)
Trade #6—1000 shares @ $11.00 (4000 remaining)
Trade #7—1000 shares @ $11.20 (3000 remaining)
Trade #8—1000 shares @ $11.40 (2000 remaining)
Trade #9—1000 shares @ $11.60 (1000 remaining)
Trade #10—1000 shares @ $11.80 (complete)

Thus, to be eligible for review, an execution must be at a price that is at least 10% higher than the consolidated last sale prior to the series of executions. Customer A could request a ruling for trades #6 through #10, priced at $11.00 and above, but trades #1 through #5 would not be eligible for review.

Under the proposed rule the Exchange may also use a higher Numerical Guideline if, after market participants have been alerted to erroneous activity, the price of the security returns toward its prior trading range but continues to trade at a price beyond the Numerical Guidelines.

Joint Market Rulings

In the interest of achieving consistency across markets, the Exchange proposes that, in events that involve other markets, the Exchange would have the ability to use a different Reference Price and/or Numerical Guideline. In these instances the Reference Price would be determined based on a consensus among the Exchanges where the executions occurred. Furthermore, when a ruling is made across markets, the Exchange may determine that the ruling is not eligible for appeal because immediate finality is necessary to maintain a fair and orderly market and to protect investors and the public interest. While the Exchange will coordinate its review of a clearly erroneous execution with other affected market centers with the goal of rendering consistent results across the market, the Exchange is not bound by joint market rulings when such rulings

would violate other NYSE rules or are inconsistent with internal policies of the Exchange.

Additional Factors

The proposed amendments to interim Rule 128 also enumerate some additional factors that an Officer may consider when determining whether an execution is clearly erroneous. These factors include, but are not limited to, system malfunctions or disruptions, volume and volatility for the security, derivative securities products that correspond to greater than 100% in the direction of a tracking index, news released for the security, whether trading in the security was recently halted/resumed, whether the security is an IPO, whether the security was subject to a stock-split, reorganization, or other corporate action, overall market conditions, Opening and Late Session executions, validity of the consolidated tape's trades and quotes, consideration of primary market indications, Liquidity Replenishment Points ("LRPs"), Depth Guidelines and executions inconsistent with the trading pattern in the stock. Each additional factor shall be considered with a view toward maintaining a fair and orderly market, the protection of investors and the public interest.

Numerical Guidelines Applicable to Volatile Market Opens

The Exchange proposes to give the Exchange the ability to expand the Numerical Guidelines applicable to executions occurring between 9:30 a.m. and 10 a.m. based on the disseminated value of the S&P 500 Futures at 9:15 a.m. When the S&P Futures are up or down 3% up to but not including 5% at 9:15 a.m., the Numerical Guidelines are doubled. When the S&P Futures are up or down 5% or greater at 9:15 a.m., the Numerical Guidelines are tripled. The Exchange believes that the S&P 500 futures contract is an appropriate and reliable barometer of market activity prior to the market opening due to its broad based market coverage and deep liquidity. Using the S&P 500 Futures disseminated value at 9:15 a.m. as the barometer of market activity, the Exchange is providing a transparent means of offering adjusted guidelines in times of volatile market activity.

Outlier Executions

The proposed amendments to interim Rule 128 provide that the Officer may consider requests for review received after thirty (30) minutes, but not longer than sixty (60) minutes after the execution in question in the case of an Outlier Execution. An Outlier Execution is an execution where, (1) the execution price of the security is greater than three times the current Numerical Guidelines, or (2) the execution price of the security breaches the 52-week high or low, in which case the Exchange may consider Additional Factors to determine if the execution qualifies for review or if the Exchange shall decline to act.

Review Procedures

Initial Determination

Under the current rule, if the Officer determines that the execution is not clearly erroneous, the Officer shall not take any action in connection with the completed execution. In the event that the Officer determines that the execution in dispute is clearly erroneous, the Officer shall either declare the execution null and void or modify one or more of the terms of the transaction to achieve an equitable rectification of the error that would place the parties in the same position, or as close as possible to the same position that they would have been in, had the error not occurred. Pursuant to the proposed rule, in the event the Officer determines there is a clearly erroneous execution, the Officer may declare the execution null and void or, if such transaction occurred only on the Exchange and no contemporaneous transaction(s) occurred on another market center(s) at a price that meets or exceeds the applicable Numerical Guidelines and if the Exchange has no actual knowledge of a clearly erroneous execution review of a contemporaneous transaction of the subject security on another market center, modify one or more of the terms of the transaction to achieve an equitable rectification of the error that would place the parties in the same position, or as close as possible to the same position that they would have been in, had the error not occurred.

For purposes of the proposed Rule, a transaction will be considered to have been contemporaneous if it was reported to the Consolidated Tape within a reasonable time frame of the transaction under review. Such time frame shall be determined by the Officer at the time of the clearly erroneous determination based on the liquidity of the relevant security, but shall in no case be less than one (1) second before or after the time of execution on the Exchange. In assessing whether there was a contemporaneous transaction on another market center, the Exchange will consider the existence of any clearly erroneous review of a transaction in the subject security on another market center of which it has actual knowledge, which may be indicative that the transaction under review on such other market center was contemporaneous with the transaction under review on the Exchange. However, the Exchange will not be required to initiate communication with other market centers to determine the existence of any such review(s).

For purposes of the proposed rule, whenever the rule provides authority for the Officer to modify or adjust a clearly erroneous execution, in addition to authority to declare the execution null and void, the Officer's authority to modify or adjust the clearly erroneous execution is subject to the conditions that there were no contemporaneous transactions on other markets and that the Exchange had no actual knowledge of a clearly erroneous execution review of a contemporaneous transaction of the subject security on another market center, as described above.

The Exchange also proposes adding language stating that a determination shall be made generally within thirty (30) minutes of receipt of the complaint, but in no case later than the start of the regular trading hours of the Exchange on the following trading day. Rulings made outside of thirty (30) minutes by an Officer will not fail for lack of timeliness. The guideline simply provides participants an appropriate expectation that a ruling will generally be made within thirty (30) minutes and in no case later than the start of the regular trading hours of the Exchange on the following trading day.

Appeals

The Exchange proposes to amend the appeals procedure for trades that are deemed to be clearly erroneous. First, the Exchange will no longer accept appeal requests via facsimile. Similar to the proposed language for an initial request for a ruling, all appeal requests must be made via e-mail, except for those requests for appeals from Exchange members who trade on the Floor of the Exchange. Members who trade on the Floor of the Exchange may also submit requests for appeals in person from the Floor.

The current rule provides that the Exchange shall review and render a decision upon an appeal within a timeframe provided by the Exchange. The proposed rule offers more definite guidelines to ensure the expedient resolution of appeals. It requires the Exchange to review appeals as soon as practicable, but generally on the same day as the executions under review. Appeal requests received between 3 ET and the close of trading should be made as soon as practicable, but in no case later than the trading day following the date of the execution under review. Appeal decisions will not fail for lack of

timeliness. This revised provision provides participants a reasonable expectation of when a ruling on appeal will generally be made.

Further, the proposed rule declares that any determination made by an Officer or by the CEE Panel shall be rendered without prejudice as to the right of the parties to the execution to submit their dispute to arbitration. This provision simply clarifies the fact that nothing in the proposed rule limits or impedes the rights of the parties to arbitrate their dispute.

System Disruption and Malfunctions

Currently, within the System Disruptions and Malfunctions section of the Rule, after an Officer determines that a trade was clearly erroneous he may declare the execution null and void or modify the trade to attempt to achieve an equitable rectification of the error. Under the proposed rule, when the Officer determines that an execution is clearly erroneous, the Officer shall either declare the transaction null and void or, if such transaction occurred only on the Exchange and no contemporaneous transaction(s) occurred on another market center(s) at a price that meets or exceeds the applicable Numerical Guidelines and if the Exchange has no actual knowledge of a clearly erroneous execution review of a contemporaneous transaction of the subject security on another market center, modify one or more of the terms of the transaction to achieve an equitable rectification of the error that would place the parties in the same position, or as close as possible to the same position that they would have been in, had the error not occurred. This rule change supports the goal to provide market-wide consistency to the resolution of clearly erroneous executions that occur on multiple markets.

The proposed rule also provides that, in the event of a disruption or a malfunction, the Officer will rely on the proposed Numerical Guidelines in determining whether an execution is clearly erroneous. However, the Officer may also use a lower Numerical Guideline if necessary to maintain a fair and orderly market, protect investors, and protect the public interest. The proposed rule also adds that actions taken under these circumstances must be taken within thirty (30) minutes of detection of the erroneous execution in the ordinary case, and by no later than the start of the regular trading hours of the Exchange on the day following the date of the execution under review when extraordinary circumstances exist.

Officers Acting on Their Own Motion

The Exchange proposes to add a section to the Rule that will grant an Officer the ability to act on his or her own motion to review potentially erroneous executions. Under the current rule, an Officer has the ability to act upon his or her own motion only in the event of a System Disruption or Malfunction. The proposed rule would allow an Officer to review executions and rely on the Numerical Guidelines under any circumstance.

Under the proposed rule, an Officer acting on its own motion, may review potentially erroneous executions that occur on the Exchange and shall either declare the transaction null and void or, if such transaction occurred only on the Exchange and no contemporaneous transaction(s) occurred on another market center(s) at a price that meets or exceeds the applicable Numerical Guidelines and if the Exchange has no actual knowledge of a clearly erroneous execution review of a contemporaneous transaction of the subject security on another market center, modify one or more of the terms of the transaction to achieve an equitable rectification of the error that would place the parties in the same position, or as close as possible to the same position that they would have been in, had the error not occurred. This rule change supports the goal to provide market-wide consistency to the resolution of clearly erroneous executions that occur on multiple markets.

In extraordinary circumstances an Officer may apply a lower Numerical Guideline to review a trade if it is determined that such action is necessary to maintain a fair and orderly market or protect investors and the public interest. In some instances the Exchange may detect a single execution that breaches the Numerical Guidelines but is not the subject of a ruling request. This provision gives the Exchange the ability to review such executions. Additionally, in practice clearly erroneous executions may involve multiple parties and multiple executions. The Exchange proposes this provision to permit an Officer to rule on a group of executions related to the same occurrence or event as a whole, with or without a formal request for a ruling from an affected party.

Trade Nullification and Price Adjustments for UTP Securities That Are the Subject of Initial Public Offerings

The proposed Rule also modifies the Exchange's policy on trade nullification and UTP securities that are subject to initial public offerings. Under the current Rule, a clearly erroneous execution may be deemed to have occurred in the opening execution of the subject security if the execution price of the opening execution on the Exchange is the lesser of $1.00 or 10% away from the opening price on the listing exchange or association. Under the proposed rule, in such circumstances, the Officer shall either decline to take action in connection with the completed transaction, declare the transaction null and void or, if such transaction occurred only on the Exchange and no contemporaneous transaction(s) occurred on another market center(s) at a price that meets or exceeds the applicable Numerical Guidelines and if the Exchange has no actual knowledge of a clearly erroneous execution review of a contemporaneous transaction of the subject security on another market center, adjust the transaction price to the opening price on the listing exchange or association.

Pursuant to the proposed rule, clearly erroneous executions of subsequent executions of the subject security will be reviewed in the same manner as the procedure set forth in (e)(1). Absent extraordinary circumstances, action of the Officer must be taken in a timely fashion, generally within thirty (30) minutes of the detection of the erroneous execution. In extraordinary circumstances, the reviewing Officer may take action by no later than the start of the regular trading hours of the Exchange on the day following the date of the execution under review.

2. Statutory Basis

The proposed rule change is consistent with Section 6(b)[6] of the Securities Exchange Act of 1934 (the "Exchange Act"), in general, and furthers the objectives of Section 6(b)(5)[7] in particular in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, and to remove impediments to and perfect the mechanism of a free and open market and a national market system. The proposed rule change provides transparency and finality for participants and creates consistent results across U.S. equities exchanges with respect to clearly erroneous executions. This proposed change further promotes the maintenance of a fair and orderly market, the protection

[6] 15 U.S.C. 78f(b).

[7] 15 U.S.C. 78f(b)(5).

of investors and the protection of the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act[8] and Rule 19b–4(f)(6) thereunder.[9]

A proposed rule change filed pursuant to Rule 19b–4(f)(6) under the Act[10] normally does not become operative for 30 days after the date of its filing. However, Rule 19b–4(f)(6)[11] permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange requests that the Commission waive the 30-day operative delay so that it may implement the new rule on October 5, 2009, the same date as the other equities exchanges. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest because it will allow the Exchange to begin applying the new rule on the same date as the other equities exchanges.[12] Application of the new rule on this date should help foster transparency and consistency among those exchanges that adopt clearly erroneous execution rules substantially similar to those previously approved by the Commission.[13] For these reasons, the Commission designates that the proposed rule change become operative on October 5, 2009.

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–NYSE–2009–103 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–NYSE–2009–103. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the 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 publicly available. All submissions should refer to File Number SR–NYSE–2009–103 and should be submitted on or before October 29, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[14]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E9–24245 Filed 10–7–09; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–60777; File No. SR–BX–2009–060]

Self-Regulatory Organizations; NASDAQ OMX BX; Notice of Filing and Immediate Effectiveness of a Proposal To Amend Exchange Rule 11890 Governing Clearly Erroneous Executions Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")[1] and Rule

DATES: October 2, 2009.

19b–4 thereunder,[2] notice is hereby given that on October 1, 2009, NASDAQ OMX BX ("Exchange" or "BX") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. BX has designated the proposed rule change as constituting a rule change under Rule 19b-4(f)(6) under the Act,[3] which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

BX is proposing to amend Exchange Rule 11890 governing clearly erroneous executions. The text of the filing is available at *http://*

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[8] 15 U.S.C. 78s(b)(3)(A).

[9] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[10] 17 CFR 240.19b–4(f)(6).

[11] 17 CFR 240.19b–4(f)(6).

[12] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposal's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[13] *See* Securities Exchange Act Release No. 60706 (September 22, 2009), 74 FR 49416 (September 28, 2009) (NYSEArca–2009–36).

[14] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 17 CFR 240.19b–4(f)(6).

nasdaqomx.cchwallstreet.com 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, BX 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. BX has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend Exchange Rule 11890 in order to improve the Exchange's rule regarding clearly erroneous executions. The proposed changes are part of a market-wide effort designed to provide transparency and finality with respect to clearly erroneous executions. This effort seeks to achieve consistent results for participants across U.S. equities exchanges while maintaining a fair and orderly market, protecting investors and protecting the public interest. In addition, the Exchange has attempted to shorten and combine existing sections of Rule 11890 and has incorporated all of the prior Interpretive Materials into the body of the rule. The Exchange believes this will create a clearer and more concise rule that will assist market participants in complying with its terms. The proposed changes are more fully discussed below.

Definition

The Exchange will amend the meaning of the definition of a clearly erroneous execution, to add clarifying language with respect to cancelled trades. The proposed change identifies that a transaction made in error and agreed to be canceled by both parties or determined by the Exchange to be clearly erroneous will be removed from the Consolidated Tape. A trade will only be removed from the Consolidated Tape when the determination is deemed final and any applicable appeals have been exhausted.

Member Initiated Review Requests

The Exchange proposes to amend Rule 11890 to update the procedures for requesting a review of a clearly erroneous transaction. The Exchange proposes that requests for review must be received by the exchange within 30 minutes of the execution time for orders initially routed to and executed on the Exchange. This is consistent with the Exchange's current practice and will be applied uniformly by other markets to provide a level of consistency and certainty across market centers. As is the case under the current rule, the Exchange proposes that members submit certain essential identifying information with the request including the time of the transaction(s), security symbol(s), number of shares, price(s), side (bought or sold), and factual basis for believing that the trade is clearly erroneous. The current rule allows members additional time to file at market open. However, the Exchange believes that a uniform 30 minutes is an appropriate time frame for all trades that affords the requesting party sufficient time to gather and submit all required information.

The proposed rule also requires the Exchange to notify the counterparty to a trade upon receipt of a timely filed request for review that satisfies the numerical guidelines set forth within the Rule (referred to in the proposed amendments as "Numerical Guidelines," which are discussed in detail below). This proposed language eliminates the requirement that counterparties be notified of every request for a ruling and instead requires notice only when a request is filed in a timely manner and satisfies the Numerical Guidelines. This change alleviates the burden on the Exchange of notifying the counterparties when a request for review does not merit a ruling to break the trades at issue.

In addition, notification may be by one of several means, including press release, system status, web posting or any other method reasonably expected to provide rapid notice to many market participants. For example, the Exchange anticipates streamlining the notification process for counterparties when the Exchange receives a high volume of clearly erroneous filings. In such circumstances it might issue an electronic system status message indicating which trades were under review instead of more time consuming individual calls to each counterparty. This will benefit market participants by expediting notification that trades are under review and the decision with respect to particular trades. The Exchange would advise market participants of what notification processes it will use through a Notice to Members or Head Trader Alert.

Routed Executions

The Exchange proposes to give other market centers an additional 30 minutes from the receipt of their participant's timely filing to request a ruling, but no longer than 60 minutes from the time of the execution under review. This provision accounts for those executions initially directed to an away market center and subsequently routed by that away market center to the Exchange.

For example, assume an order is initially routed by a participant to Market Center A and subsequently routed to the Exchange where the order is executed at a price outside of the Numerical Guidelines. Without additional time Market Center A might be late in filing with the Exchange if its customer takes almost 30 minutes to file the original complaint. The proposal would give Market Center A up to 30 additional minutes from the time its customer files with Market Center A to file with the Exchange for review. This provision caps the filing deadline for an away market center at 60 minutes from the time of the execution under review.

Outlier Transactions

The proposed amendments to Rule 11890 provide that an Official[4] may consider requests for review received after thirty minutes, but not longer than sixty minutes after the execution in question in the case of an Outlier Transaction. An Outlier Transaction is a transaction where (1) the execution price of the security is greater than three times the current Numerical Guidelines, or (2) the execution price of the security breaches the 52-week high or low, in which case NASDAQ may consider Additional Factors to determine if the transaction qualifies for review or if the Exchange shall decline to act.

Deletion of Current Rule 11890(a)(2)(D) Inside Price Minimum Thresholds

The Exchange proposes to delete the inside price minimum thresholds that currently apply to transactions during regular market hours (9:30 a.m. to 4:00 p.m.). These thresholds establish which trades are eligible for review and are different than the Numerical Guidelines. The Exchange believes that these thresholds, which predate the use of Numerical Guidelines, add an extra layer of complexity to the filing process

[4] Designated Officers of the Exchange and designated employees of the Exchange or The NASDAQ Stock Market LLC who are authorized to act on behalf of the Exchange pursuant to the Regulatory Service Agreement (RSA) between the Exchange and NASDAQ Stock Market LLC (collectively "Officials") would have authority to review member initiated requests under Rule 11890(a). This will allow one Official to review related transactions in affiliated markets to expedite and ensure uniformity of decisions among affiliated exchanges.

without providing any meaningful benefit to investors or the Exchange.

Numerical Guidelines

Currently, the Interpretive Materials to Rule 11890 provide specific numerical guidelines for determining what constitutes a clearly erroneous transaction. The Exchange proposes codifying these numerical thresholds, referred to as "Numerical Guidelines," in the rule to explicitly state what constitutes a clearly erroneous execution. The proposal also adds Numerical Guidelines for leveraged ETFs and ETNs, which are securities that have become increasingly popular since the original numerical thresholds were adopted. The proposed Numerical Guidelines state that a transaction executed during the Core Trading Session [5] or the Opening and Late Trading Sessions [6] may be found to be clearly erroneous only if the price of the transaction is greater in the case of a buy, or less in the case of a sale, than the reference price by an amount that equals or exceeds the Numerical Guidelines for a particular transaction category. The Reference Price shall be equal to the consolidated last sale immediately prior to the execution under review, unless unusual circumstances are present.

The proposed Numerical Guidelines for sales greater than $0.00 and up to and including $25.00 are 10% for the Core Trading Session and 20% for the Opening and Late Trading Sessions. The proposed Numerical Guidelines for sales greater than $25.00 up to and including $50.00 are 5% for the Core Trading Session and 10% for Opening and Late Trading Sessions. The proposed Numerical Guidelines for sales greater than $50.00 are 3% for the Core Trading Session and 6% for Opening and Late Trading Sessions. A filing involving five or more securities by the same member may be considered a "Multi-Stock Event." In the case of a Multi-Stock Event, the proposed guidelines are 10% for the Core Trading Session and 10% for the Opening and Late Trading Sessions. In the case of Leveraged ETF/ETN securities, the above guidelines are to be multiplied by the leverage multiplier of the security. Executions that do not meet or exceed the Numerical Guidelines will not be eligible to be broken under this section. The following chart summarizes the proposed Numerical Guidelines.

Reference price: Consolidated Last Sale	Core Trading Session Numerical Guidelines (subject transaction's % difference from the Consolidated Last Sale):	Opening and Late Trading Session Numerical Guidelines (subject transaction's % difference from the Consolidated Last Sale):
Greater than $0.00 up to and including $25.00	10%	20%.
Greater than $25.00 up to and including $50.00	5%	10%.
Greater than $50.00	3%	6%.
Filings involving five or more securities by the same participant may be considered a "Multi-Stock Event".	10%	10%.
Leveraged ETF/ETN securities	Core Trading Session Numerical Guidelines multiplied by the leverage multiplier (i.e. 2×).	Core Trading Session Numerical Guidelines multiplied by the leverage multiplier (i.e. 2×).

The following example explains the application of these guidelines. ABC has a consolidated last sale of $10.00. During the Core Trading Session Customer A enters a market order to buy 10,000 shares, although it had intended a market order for 1,000 shares. Executions occur, moving through the depth of the Exchange Book, as follows:

Trade #1—1000 shares @ $10.00 (0% difference from Reference Price)
Trade #2—5000 shares @ $10.50 (5% difference from Reference Price)
Trade #3—2000 shares @ $11.00 (10% difference from Reference Price)
Trade #4—1000 shares @ $11.50 (15% difference from Reference Price)
Trade #5—1000 shares @ $12.00 (20% difference from Reference Price)

In this example, to be clearly erroneous the trades must be at a price that is at least 10% higher than the consolidated last sale prior to the series of executions. Absent any Unusual Circumstances or Additional Factors (each discussed below), the Exchange Official would break trades #3 through #5, priced at $11.00 and above, as clearly erroneous, but would let stand trades #1 and #2. If instead the trade happened in the Late Trading Session, where a 20% difference from the Reference Price is required for trades to be clearly erroneous, the Official would break only Trade #5 and trades #1 through #4 would stand.

Establishing Numerical Guidelines within the rule gives regulatory transparency and consistency in the application of the rules of the Exchange. These Numerical Guidelines, which are substantially similar to existing Exchange guidance, represent the general consensus developed based on the collective experiences of a market-wide group. The Exchange believes that the Numerical Guidelines are fair and appropriate and apply evenly to all participants.

Unusual Circumstances

The Exchange further proposes that in unusual circumstances the Exchange may, in its discretion and with a view toward maintaining a fair and orderly market and protecting investors and the public interest, use a Reference Price other than the consolidated last sale. "Unusual Circumstances" may include periods of extreme market volatility, sustained illiquidity, or widespread system issues. Other Reference Prices that the Exchange may use would include the consolidated inside price, the consolidated opening price, the consolidated prior close, or the consolidated last sale prior to a series of executions.

Under the proposed rule the Exchange may also use a higher Numerical Guideline if, after market participants have been alerted to erroneous activity, the price of the security returns toward its prior trading range but continues to trade beyond the price it would have normally been broken.

Joint Market Rulings

In the interest of achieving consistency across markets, the proposal would give the Exchange the ability to use a different Reference Price and/or Numerical Guideline in events that involve other markets. In these instances the Reference Price would be determined based on a consensus among the exchanges where the transactions occurred.

Additional Factors

[5] The Core Trading Session begins at 9:30 a.m. and ends at 4 p.m.

[6] The Opening Session begins at 7 a.m. and concludes with the start of the Core Trading Session. The Late Trading Session begins at the end of the Core Trading Session and continues until 8 p.m.

The proposed amendments to Rule 11890 also enumerate some additional factors that an Official may consider when determining whether an execution is clearly erroneous. These factors include, but are not limited to, system malfunctions or disruptions, volume and volatility for the security, derivative securities products that correspond to greater than 100% in the direction of a tracking index, news released for the security, whether trading in the security was recently halted/resumed, whether the security is an IPO, whether the security was subject to a stock-split, reorganization, or other corporate action, overall market conditions, Opening and Late Session executions, validity of the consolidated tapes trades and quotes, consideration of primary market indications, and executions inconsistent with the trading pattern in the stock. Each additional factor shall be considered with a view toward maintaining a fair and orderly market, the protection of investors and the public interest. The Exchange believes market participants recognize that such factors will be considered in reviewing potentially erroneous trades because Rule 11890 currently includes similar provisions.

Numerical Guidelines Applicable to Volatile Market Opens

The proposed amendments give the Exchange the ability to expand the Numerical Guidelines applicable to transactions occurring between 9:30 a.m. and 10 a.m. based on the disseminated value of the S&P 500 Futures at 9:15 a.m. When the S&P Futures are up or down 3%, or up to but not including 5% at 9:15 a.m., the Numerical Guidelines are doubled. When the S&P Futures are up or down 5% or greater at 9:15 a.m., the Numerical Guidelines are tripled. The Exchange believes that the S&P 500 futures contract is an appropriate and reliable barometer of market activity prior to the market opening due to its broad based market coverage and deep liquidity. Using the S&P 500 Futures disseminated value at 9:15 a.m. as the barometer of market activity, the Exchange is providing a transparent means of offering adjusted guidelines in times of volatile market activity.

Review Procedures

Initial Determination

The Exchange proposes adding language stating that a determination shall be made generally within 30 minutes of receipt of the complaint, but in no case later than the start of Core Trading on the following trading day. Rulings made outside of 30 minutes will not fail for lack of timeliness. The guideline simply provides participants an appropriate expectation that a ruling will generally be made within 30 minutes and in no case later than the start of Core Trading on the following trading day.

Appeals

The current rule provides that the Market Operation Review Committee ("MORC") shall review and render a decision upon an appeal. The proposed rule offers more definite guidelines to ensure the expedient resolution of appeals. It requires the MORC to review appeals as soon as practicable, but generally on the same day as the executions under review. Appeals received between 3 p.m. ET and the close of trading in the Late Trading Session should be made as soon as practicable, but in no case later than the trading day following the date of the execution under review. While decisions by the MORC that do not meet these time guidelines will still be valid, these guidelines will provide participants with reasonable expectations of when a ruling on appeal will generally be made. As is currently the case, all decisions rendered under Rule 11890(a) (complaints of market participants) will be subject to appeal to the MORC as will decisions rendered by a Senior Official under Rule 11890(b) (decisions on the Exchange's own motion), except in cases where the Senior Official determines that the ruling should not be eligible for appeal because finality is necessary to maintain a fair and orderly market and to protect investors and the public interest. This provision simply clarifies the fact that nothing in the proposed rule limits or impedes the rights of the parties to arbitrate their dispute.

Exchange Acting on Its Own Motion

The proposed rule would allow a designated "Senior Official" of the Exchange[7] to review executions pursuant to Rule 11890(b). The Exchange's Rule 11890(b) is consistent with NYSE ARCA, Inc.'s Rule 7.10(g). The Senior Official's decision would still be guided by the Numerical Guidelines (including the Multi-Stock Event 10% threshold), Unusual Circumstances and Additional Factors outlined above. In extraordinary circumstances a Senior Official may apply a lower Numerical Guideline if such action is necessary to maintain a fair and orderly market or protect investors and the public interest. In some instances the Exchange may detect a single execution that breaches the Numerical Guidelines but is not the subject of a ruling request. This provision gives the Exchange the ability to review such executions. In other cases, clearly erroneous executions commonly involve multiple parties and multiple executions. All affected parties may not request a ruling. The Exchange proposes this provision to permit a Senior Official to rule on a group of transactions related to the same occurrence or event as a whole, without a formal request for a ruling from every affected party.

As is currently the case, the Exchange could break all trades in a security if a pervasive mistake resulted in trading that should not have occurred. For example, trades in a security that was incorrectly authorized for trading prior to the date of its actual initial public offering would all be broken. Similarly, if the Exchange systems executed orders at a price that was inconsistent with the rules governing the operation of the system, either due to an Exchange system error or because an underlying erroneous order resulted in an erroneous price, the Exchange may break all of the affected trades.

This rule change shall be effective October 5, 2009.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,[8] in general, and with Section 6(b)(5) of the Act,[9] in particular, in that the proposal is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market

[7] Currently only Executive Vice Presidents designated by the Exchange's President are eligible to make rulings under Rule 11890(b). The Exchange proposes to expand this to include other officers from the Exchange and senior level employees of the Exchange or The NASDAQ Stock Market LLC "Senior Officials" who are authorized to act on behalf of the Exchange pursuant to the Regulatory Service Agreement (RSA) between the Exchange and NASDAQ Stock Market LLC. All designated Exchange Officers and a subset of senior level employees will be designated as "Senior Officials" with the authority to review transactions pursuant to Rule 11890(b). The Exchange anticipates that only a subset of more senior employees allowed to review transactions under Rule 11890(a) would be authorized to review trades under Rule 11890(b). This will allow one Senior Official to review related transactions in affiliated markets to expedite and ensure uniformity of decisions among affiliated exchanges. The Exchange's Chief Regulatory Officer would designate Officials and Senior Officials with relevant market experience to adjudicate these matters.

[8] 15 U.S.C. 78f.

[9] 15 U.S.C. 78f(b)(5).

system, and, in general, to protect investors and the public interest. The proposed rule change would coordinate standards of review of clearly erroneous trades across markets, thereby eliminating conflicting rulings among exchanges and disparate treatment of similarly priced trades.

B. Self-Regulatory Organization's Statement on Burden on Competition

BX 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

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act[10] and Rule 19b–4(f)(6) thereunder.[11]

A proposed rule change filed pursuant to Rule 19b–4(f)(6) under the Act[12] normally does not become operative for 30 days after the date of its filing. However, Rule 19b–4(f)(6)[13] permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange requests that the Commission waive the 30-day operative delay so that it may implement the new rule on October 5, 2009, the same date as the other equities exchanges. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest because it will allow the Exchange to begin applying the new rule on the same date as the other equities exchanges.[14] Application of the new rule on this date should help foster transparency and consistency among those exchanges that adopt clearly erroneous execution rules substantially similar to those previously approved by the Commission.[15] For these reasons, the Commission designates that the proposed rule change become operative on October 5, 2009.

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–BX–2009–060 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–BX–2009–060. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the 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 publicly available. All submissions should refer to File Number SR–BX–2009–060 and should be submitted on or before October 29, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[16]

Florence E. Harmon,

Deputy Secretary.

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[10] 15 U.S.C. 78s(b)(3)(A).

[11] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[12] 17 CFR 240.19b–4(f)(6).

[13] 17 CFR 240.19b–4(f)(6).

[14] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposal's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[15] *See* Securities Exchange Act Release No. 60706 (September 22, 2009), 74 FR 49416 (September 28, 2009) (NYSEArca–2009–36).

[16] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–60775; File No. SR–CHX–2009–11]

Self-Regulatory Organizations; Chicago Stock Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposal Relating to Exchange Rule Regarding Clearly Erroneous Transactions

October 2, 2009.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on October 1, 2009, Chicago Stock Exchange, Inc. ("Exchange" or "CHX") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. CHX has designated the proposed rule change as constituting a rule change under Rule 19b–4(f)(6) under the Act,[3] which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 17 CFR 240.19b–4(f)(6).

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The CHX proposes to amend its rules regarding clearly erroneous transactions. The text of this proposed rule change is available on the Exchange's Web site at (*http://www.chx.com*) and in 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 CHX included statements concerning the purpose of and basis for the proposed rule changes and discussed any comments it received regarding the proposal. The text of these statements may be examined at the places specified in Item IV below. The CHX has prepared summaries, set forth in sections A, B and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to modify Article 20, Rules 10 and 11 in order to improve the Exchange's policies and procedures regarding clearly erroneous executions. The proposed changes are part of a market-wide effort designed to provide transparency and finality with respect to clearly erroneous executions. This effort seeks to achieve consistent results for participants across U.S. equities exchanges while maintaining a fair and orderly market, protecting investors and protecting the public interest. The proposed changes are more fully discussed below.

Definition

The Exchange will maintain the meaning of the definition of a clearly erroneous execution, but proposes to add clarifying language with respect to cancelled trades. The proposed change identifies that a transaction made in clearly erroneous error and agreed to be canceled by both parties or determined by the Exchange to be clearly erroneous will be removed "from the Consolidated Tape."[4] A trade will only be removed from the Consolidated Tape when the determination is deemed final and any applicable appeals have been exhausted.

Participant Initiated Review Requests

The Exchange proposes to amend Article 20, Rule 10(b) to update the procedures for requesting a review of a clearly erroneous transaction. First, the proposed rule would require that requests for review be made only by electronic mail ("email") or other electronic means specified from time to time by the Exchange. Under its current rules, the Exchange also allows requests to be made via facsimile. Requiring requests for review to be made via email creates a standard format that can easily be logged and tracked. The Exchange will republish the email address or other electronic means to be used for all clearly erroneous filings in a circular distributed to Participants.[5]

The amended rule specifies that requests for review must be received by the Exchange within 30 minutes of the execution time for orders initially routed to and executed on the Exchange. The Exchange proposes that Participants submit certain essential identifying information with the request including the time of the transaction(s), security symbol(s), number of shares, price(s), side (bought or sold), and factual basis for believing that the trade is clearly erroneous. The current rule already requires requests for review to be received within 30 minutes of the execution, but only requires submission of such information which is "reasonably necessary for use by the Exchange in resolving the matter."

The proposed rule also requires the Exchange to notify the counterparty to a trade upon receipt of a timely filed request for review that satisfies the numerical guidelines set forth within the Rule. This proposed language requires notice only when a request is filed in a timely manner and satisfies the Numerical Guidelines. This change alleviates any potential burden on the Exchange of notifying the counterparty when a request for review does not merit a ruling.

The Exchange proposes to amend Article 20, Rule 10 to allow an Officer of the Exchange or such other employee designee ("Officer") of CHX to request additional information from each party to a transaction under review. Parties to the review will have 30 minutes from the time of the request to provide additional supporting information.

Routed Executions

The Exchange proposes to give other market centers an additional 30 minutes from the receipt of their participant's timely filing to request a ruling, but no longer than 60 minutes from the time of the execution under review. This provision accounts for those executions initially directed to an away market center and subsequently routed by that away market center to the Exchange.

For example, assume an order is initially routed by a participant to Market Center A and subsequently routed to the CHX where the order is executed at a price outside of the Numerical Guidelines. This provision generally requires Market Center A to file with the Exchange within 30 minutes from the time it receives its participant's timely filed request for review. This provision caps the filing deadline for an away market center at 60 minutes from the time of the execution under review.

Threshold Factors

Currently, the Exchange's Clearly Erroneous Execution rule specifies numeric guidelines for determining what constitutes a clearly erroneous transaction. These guidelines are an offset of at least twenty percent (20%) from the prevailing National Best Bid or Offer ("NBBO") at the time of trade execution for transactions under $1. For transactions at or exceeding $1, the relevant NBBO offset is ten percent (10%). The Exchange proposes to modify its existing numerical thresholds to conform to those being adopted by other trading centers.

Numerical Guidelines

The proposed numerical guidelines state that a transaction executed during the Early Session,[6] Regular Trading Session,[7] Late Trading Session[8] or Late Crossing Session[9] may be found to be clearly erroneous only if the price of the transaction to buy is greater, or less in the case of a sale, than the reference price by an amount that equals or exceeds the numerical guidelines for a particular transaction category. The Reference Price shall be equal to the Consolidated Last Sale immediately prior to the execution under review, unless unusual circumstances are present. The proposed guidelines for sales greater than $0.00 up to and including $25.00 are 10% for the Regular Trading Session and 20% for the Early, Late Trading and Late Crossing Sessions. The proposed guidelines for sales greater than $25.00

[4] For purposes of this Rule, "removed from the Consolidate Tape" means that a subsequent message will be sent to the Consolidated Tape indicating that a previously executed trade has been cancelled.

[5] Article 1, Rule 1(s) defines a Participant as any Participant Firm that holds a valid Trading Permit.

[6] The Early Session " shall begin at 6 a.m. and shall end at 8:30 a.m. [Central Time] and shall end at 8:30 a.m. [Central Time]." Article 20, Rule 1(b).

[7] The Regular Trading Session "shall begin at 8:30 a.m. [Central Time] and shall end at 3 p.m. each day for all securities." Article 20, Rule 1(b).

[8] The Late Trading Session begins "immediately after the close of the second session and shall end at 3:15 p.m. [Central Time]." Article 20, Rule 1(b).

[9] The Late Crossing Session begins "immediately after the close of the third session and shall end at 4 p.m. [Central Time]." Article 20, Rule 1(b).

up to and including $50.00 are 5% for the Regular Trading Session and 10% for the Early, Late Trading and Late Crossing Sessions. The proposed guidelines for sales greater than $50.00 are 3% for the Regular Trading Session and 6% for the Early, Late Trading and Late Crossing Sessions. A filing involving five or more securities by the same ETP Holder will be aggregated into a single filing called a "Multi-Stock Event." In the case of a Multi-Stock Event, the proposed guidelines are 10% for the Regular Trading Session and 10% for the Early, Late Trading and Late Crossing Sessions. In the case of Leveraged ETF/ETN securities, the above guidelines are to be multiplied by the leverage multiplier of the security. Executions that do not meet or exceed the Numerical Guidelines will not be eligible for review under this section. The following chart summarizes the proposed Numerical Guidelines.

Reference price: Consolidated Last Sale	Regular Trading Session Numerical Guidelines (subject transaction's % difference from the Consolidated Last Sale):	Early, Late Trading and Late Crossing Session Numerical Guidelines (subject transaction's % difference from the Consolidated Last Sale):
Greater than $0.00 up to and including $25.00	10%	20%.
Greater than $25.00 up to and including $50.00	5%	10%.
Greater than $50.00	3%	6%.
Multi-Stock Event—Filings involving five or more securities by the same ETP Holder will be aggregated into a single filing.	10%	10%.
Leveraged ETF/ETN securities	Regular Trading Session Numerical Guidelines multiplied by the leverage multiplier (i.e., 2×).	Regular Trading Session Numerical Guidelines multiplied by the leverage multiplier (i.e., 2×).

Establishing Numerical Guidelines which are consistent with other market centers within the Rule brings regulatory transparency and consistency in the application of the rules of the Exchange. These Numerical Guidelines represent the general consensus approach and were developed based on the collective experiences of a market-wide group. The Exchange believes that the Thresholds established are fair and appropriate and apply evenly to all participants.

Unusual Circumstances

The CHX further proposes that in Unusual Circumstances the Exchange may, in its discretion and with a view toward maintaining a fair and orderly market, use a Reference Price other than the consolidated last sale. Unusual Circumstances may include periods of extreme market volatility, sustained illiquidity, or widespread system issues. Other Reference Prices that the Exchange may use would include the consolidated inside price, the consolidated opening price, the consolidated prior close, or the consolidated last sale prior to a series of executions.

The following example explains the use of a Reference Price equal to the consolidated last sale prior to a series of executions.

ABC has a consolidated last sale of $10.00. During the Regular Trading Session Customer A enters a market order to buy 10,000 shares, although it had intended a market order for 1,000 shares. The size of the order is such that the order sweeps the CHX Book, which reflects 1,000 shares of liquidity offered at each of the following prices. Executions occur, moving through the depth of Book, as follows:

Trade #1—1000 shares @ $10.00 (9000 remaining)
Trade #2—1000 shares @ $10.20 (8000 remaining)
Trade #3—1000 shares @ $10.40 (7000 remaining)
Trade #4—1000 shares @ $10.60 (6000 remaining)
Trade #5—1000 shares @ $10.80 (5000 remaining)
Trade #6—1000 shares @ $11.00 (4000 remaining)
Trade #7—1000 shares @ $11.20 (3000 remaining)
Trade #8—1000 shares @ $11.40 (2000 remaining)
Trade #9—1000 shares @ $11.60 (1000 remaining)
Trade #10—1000 shares @ $11.80 (complete)

Thus, to be eligible for review, a transaction must be at a price that is at least 10% higher than the consolidated last sale prior to the series of executions. Customer A could request a ruling for trades #6 through #10, priced at $11.00 and above, but trades #1 through #5 would not be eligible for review.

Under the proposed rule the Exchange may also use a higher numerical guideline if, after market participants have been alerted to erroneous activity, the price of the security returns toward its prior trading range but continues to trade beyond the price it would have normally been busted.

Joint Market Rulings

In the interest of achieving consistency across markets, the Exchange proposes that, in events that involve other markets, the Exchange would have the ability to use a different Reference Price and/or Numerical Guideline. In these instances the Reference Price would be determined based on a consensus among the Exchanges where the transactions occurred. Furthermore, when a ruling is made across markets, the Exchange may determine that the ruling is not eligible for appeal because immediate finality is necessary to maintain a fair and orderly market and to protect investors and the public interest.

Additional Factors

The proposed amendments to Article 20, Rules 10 and 11 also enumerate some additional factors that an Officer may consider when determining whether an execution is clearly erroneous. These factors include, but are not limited to, system malfunctions or disruptions, volume and volatility for the security, derivative securities products that correspond to greater than 100% in the direction of a tracking index, news released for the security, whether trading in the security was recently halted/resumed, whether the security is an IPO, whether the security was subject to a stock-split, reorganization, or other corporate action, overall market conditions, Late Session executions, validity of the consolidated tapes trades and quotes, consideration of primary market indications, and executions inconsistent with the trading pattern in the stock. Each additional factor shall be considered with a view toward maintaining a fair and orderly market, the protection of investors and the public interest.

Numerical Guidelines Applicable to Volatile Market Opens

The Exchange proposes to give itself the ability to expand the Numerical Guidelines applicable to transactions occurring between 9:30 a.m. and 10 a.m. ET based on the disseminated value of the S & P 500 Futures at 9:15 a.m. ET. When the S&P Futures are up or down from 3% up to but not including 5% at

9:15 a.m., the Numerical Guidelines are doubled. When the S&P Futures are up or down 5% or greater at 9:15 a.m., the Numerical Guidelines are tripled. The Exchange believes that the S&P 500 futures contract is an appropriate and reliable barometer of market activity prior to the market opening due to its broad based market coverage and deep liquidity. Using the S&P 500 Futures disseminated value at 9:15 a.m. as the barometer of market activity, the Exchange is providing a transparent means of offering adjusted guidelines in times of volatile market activity.

Outlier Transactions

The proposed amendments to Article 20, Rule 10 provide that an Officer of the Exchange may consider requests for review received after thirty minutes, but not longer than sixty minutes after the execution in question in the case of an Outlier Transaction. An Outlier Transaction is a transaction where, (1) the execution price of the security is greater than three times the current Numerical Guidelines, or (2) the execution price of the security breaches the 52-week high or low, in which case the Exchange may consider Additional Factors to determine if the transaction qualifies for review or if the Exchange shall decline to act.

Review Procedures

Initial Determination

The Exchange proposes to remove language in Article 20, Rules 10 and 11 that currently allows an Officer to modify one or more of the terms of a transaction under review. Under the proposed rule, the Officer of the Exchange will only have the authority to break the trades or rule to let the trades stand. This change attempts to remove the subjectivity from the rule that is necessitated by an adjustment.

The Exchange also proposes adding language stating that a determination shall be made generally within 30 minutes of receipt of the complaint, but in no case later than the start of Regular Trading on the following trading day. Rulings made outside of 30 minutes by an Officer will not fail for lack of timeliness. The guideline simply provides participants an appropriate expectation that a ruling will generally be made within 30 minutes, and in no case later than the start of Regular Trading on the following trading day.

Appeals

The Exchange proposes to amend the appeals procedure for trades that are deemed to be clearly erroneous. First, the Exchange will no longer accept appeal requests via facsimile or in writing (i.e., hand delivered). Similar to the proposed language for an initial request for a ruling, all appeal requests must be made via email.

The current rule provides that the Exchange shall review and render a decision upon an appeal without specifying any particular timeframe in which a decision would be provided by the Exchange. The proposed rule offers more definite guidelines to ensure the expedient resolution of appeals. It requires the Exchange to review appeals as soon as practicable, but generally on the same day as the executions under review. Appeals received between 2 p.m. CT and the close of trading in the Late Crossing Session should be made as soon as practicable, but in no case later than the trading day following the date of the execution under review. This revised provision provides participants a reasonable expectation of when a ruling on appeal will generally be made.

Further, the proposed rule declares that any determination made by an Officer or by the Committee on Exchange Procedure shall be rendered without prejudice as to the right of the parties to the transaction to submit their dispute to arbitration. This provision simply clarifies the fact that nothing in the proposed rule limits or impedes the rights of the parties to arbitrate their dispute.

System Disruption and Malfunctions

Currently, Systems Disruptions and Malfunctions are addressed in Article 20, Rule 11. The Exchange proposes to consolidate these provisions within Article 20, Rule 10 for the sake of inter-market consistency. Within the current System Disruptions and Malfunctions provisions, after an Officer determines that a trade was clearly erroneous he may declare the transaction null and void or modify the trade to attempt to achieve and equitable rectification of the error. The proposed Rule eliminates the Exchange's ability to modify a clearly erroneous execution. The Exchange must either uphold or nullify the execution based upon the findings of the Officer reviewing the execution.

The proposed Rule provides that, in the event of a disruption or a malfunction, an Officer of the Exchange or other senior level employee designee will rely on the proposed numerical guidelines in determining whether an execution is clearly erroneous. However, the Officer or senior level employee may also use a lower Numerical Guideline if necessary to maintain a fair and orderly market, protect investors, and protect the public interest. The proposed rule also adds that actions taken under these circumstances must be taken within 30 minutes of detection of the erroneous transaction in the ordinary case, and by no later than the start of the Regular Trading Session on the day following the date of the execution under review when extraordinary circumstances exist.

Officers Acting on Their Own Motion

The Exchange proposes to add a section to the Rule that will grant Officers (or such other senior level employee designee) the ability to act on their own motion to review potentially erroneous executions. Under the current rule, Officers have the ability to act upon their own motion only in the event of a system disruption or malfunction, or when extraordinary market conditions or other circumstances exist in which the nullification or modification of transactions may be necessary for the maintenance of a fair and orderly market or the protection of investors and the public interest. The proposed rule would allow an Officer of the Exchange or other senior level employee designee to review executions and rely on the Numerical Guidelines, under any circumstance. In extraordinary circumstances an Officer (or such other senior level employee designee) may apply a lower Numerical Guideline if it is determined that such action is necessary to maintain a fair and orderly market or protect investors and the public interest. In some instances the Exchange may detect a single execution that breaches the Numerical Guidelines but is not the subject of a ruling request. This provision gives the Exchange the ability to review such executions. Additionally, in practice clearly erroneous executions commonly involve multiple parties and multiple executions. In such instances, all affected parties may not request a ruling. The Exchange proposes this provision to permit an Officer (or such other senior level employee designee) to rule on a group of transactions related to the same occurrence or event as a whole, without a formal request for a ruling from every affected party.

Trade Nullification for UTP Securities That Are Subject of Initial Public Offerings

The proposed rule also provides a specific policy on trade nullification and for UTP securities that are subject to initial public offerings. Under the proposed rule, Officers must either declare an opening transaction null and void or decline to take action, but can no longer be adjusted. Furthermore, the proposed rule requires that, in extraordinary circumstances, the reviewing Officer (or such other senior

level employee designee) may take action by no later than the start of Regular Trading on the day following the date of the execution under review.

Effective Date

As noted above, the proposed rule amendments are submitted as part of a marketwide initiative to standardize the various clearly erroneous rules of national securities exchanges. As such, the exchanges have agreed to a coordinated implementation and effective date of October 5, 2009 for these changes.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act in general,[10] and furthers the objectives of Section 6(b)(5) in particular,[11] in that it is designed to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transaction in securities, to remove impediments and perfect the mechanisms of a free and open market, and, in general, to protect investors and the public interest. The proposed rule change provides transparency and finality for participants and creates consistent results across U.S. equities exchanges with respect to clearly erroneous executions. This proposed change further promotes the maintenance of a fair and orderly market, the protection of investors and the protection of the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

No written comments were solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act[12] and Rule 19b–4(f)(6) thereunder.[13]

A proposed rule change filed pursuant to Rule 19b–4(f)(6) under the Act[14] normally does not become operative for 30 days after the date of its filing. However, Rule 19b–4(f)(6)[15] permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange requests that the Commission waive the 30-day operative delay so that it may implement the new rule on October 5, 2009, the same date as the other equities exchanges. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest because it will allow the Exchange to begin applying the new rule on the same date as the other equities exchanges.[16] Application of the new rule on this date should help foster transparency and consistency among those exchanges that adopt clearly erroneous execution rules substantially similar to those previously approved by the Commission.[17] For these reasons, the Commission designates that the proposed rule change become operative on October 5, 2009.

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–CHX–2009–11 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–CHX–2009–11. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the 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 publicly available. All submissions should refer to File Number SR–CHX–2009–11 and should be submitted on or before October 29, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[18]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E9–24242 Filed 10–7–09; 8:45 am]

BILLING CODE 8011–01–P

[10] 15 U.S.C. 78f(b).

[11] 15 U.S.C. 78f(b)(5).

[12] 15 U.S.C. 78s(b)(3)(A).

[13] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[14] 17 CFR 240.19b–4(f)(6).

[15] 17 CFR 240.19b–4(f)(6).

[16] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposal's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[17] *See* Securities Exchange Act Release No. 60706 (September 22, 2009), 74 FR 49416 (September 28, 2009) (NYSEArca–2009–36).

[18] 17 CFR 200.30–3(a)(12).

SOCIAL SECURITY ADMINISTRATION

Privacy Act of 1974; as Amended Proposed Alteration to an Existing Privacy Act System of Records, and New Routine Use

AGENCY: Social Security Administration (SSA).

ACTION: Altered system of records and routine use.

SUMMARY: We are issuing public notice of our intent to alter an existing system of records and to add a routine use applicable to this system of records in accordance with the Privacy Act (5 U.S.C. 552a(e)(4) and (e)(11)). The system of records is entitled the *Attorney and Eligible Direct Pay Non-Attorney (EDPNA) 1099–MISC File* (60–0325), hereinafter referred to as the *Appointed Representative File.*

We propose the following changes:

- Expand the purpose for the *Appointed Representative File* system of records to allow us to collect, maintain, and use information covered by the system of records to administer activities (*e.g.,* authentication, registration, payment, monitoring, and termination of appointment) of appointed representatives.
- Expand the category of persons covered by the system of records to include non-professional persons (*e.g.,* a friend, neighbor, or minister). In 2010, we will expand the category of persons further to include firms and other professional entities as representatives.
- Expand the category of records we maintain in the system to include the representative's date of birth, cell phone information, and assigned representative identification number.
- Change the system of records name from the *Attorney and Eligible Direct Pay Non-Attorney (EDPNA) 1099–MISC File* to the *Appointed Representative File* to more accurately reflect the persons covered by the system of records. The change also reflects that we have created a single repository, identified as the Appointed Representative Database, in which we will maintain all representational data.
- Add our data protection routine use to the system of records to allow us to release information to appropriate entities, persons, and Federal, State, and local agencies when we suspect or confirm an unauthorized release of personally identifiable information.

We discuss the altered system of records and new routine use in the Supplementary Information section below. We invite public comments on this proposal.

DATES: We filed a report of the altered *Appointed Representative File* system of records and new routine use disclosure with the Chairman of the Senate Committee on Homeland Security and Governmental Affairs, the Chairman of the House Committee on Oversight and Government Reform, and the Director, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB) on September 23, 3009. The altered *Appointed Representative File* system of records and new routine use will become effective on November 6, 2009, unless we receive comments before that date that would result in a contrary determination.

ADDRESSES: Interested persons may comment on this publication by writing to the Executive Director, Office of Privacy and Disclosure, Office of the General Counsel, Social Security Administration, Room 3–A–6 Operations Building, 6401 Security Boulevard, Baltimore, Maryland 21235–6401. All comments we receive will be available for public inspection at the above address.

FOR FURTHER INFORMATION CONTACT: Christine W. Johnson, Social Insurance Specialist (Senior Analyst), Disclosure Policy Development and Services Division I, Office of Privacy and Disclosure, Office of the General Counsel, Social Security Administration, Room 3–A–6 Operations Building, 6401 Security Boulevard, Baltimore, Maryland 21235–6401, telephone: (410) 965–8563 or e-mail: *chris.w.johnson@ssa.gov.*

SUPPLEMENTARY INFORMATION:

I. Background and Purpose of the Appointed Representative File System of Records

A. General Background

In order to increase the number of disability claims and appeals filed online, we established the Disability Direct initiative and created a staggered roll-out process to automate the disability claims and services process, to the maximum extent possible. Through the Disability Direct initiative, we will: (1) Simplify the online application process; (2) establish an automated suite of services for appointed representatives; and (3) receive application data and medical records by direct transmission from third parties and medical service providers. The Disability Direct initiative will improve online disability claims and appeals to help offset our labor-intensive disability workload.

On September 8, 2008, we published revisions to the Rules on Representation of Parties in the **Federal Register** (*See* 73 FR 51963 (September 8, 2008)) to make it easier for representatives to do business with us electronically. We are altering the *Appointed Representative File* system of records specifically to implement an online suite of services for representatives. The online services will enable us to establish a framework of new business processes and systems enhancements and to provide comprehensive online services for representatives who wish to perform services on behalf of our claimants.

To ensure that we administer the appointed representative business process in a more efficient and effective manner, we propose to: (1) Expand the purpose for which we collect, maintain, and use the information covered by this system of records to include the overall administration of all representational activities of appointed representatives; (2) expand the category of persons covered by the system of records to include non-professional persons (*e.g.,* a friend, neighbor, or minister); (3) expand the category of records we maintain in the system to include the representative's date of birth, cell phone information, and representative identification number; (4) change the name of the system of records to more accurately reflect the persons covered by the system of records; and (5) add our data protection routine use to the system of records.

Our long-standing policy is to recognize only persons as representatives. However, in the decades since we adopted that policy, the business practices of claimants' representatives have changed significantly. For example, many claimants prefer to hire a firm rather than a single person within a firm. Accordingly, to provide claimants better flexibility in pursuing matters before us, starting in 2010, we will recognize firms and other professional entities as representatives.

We will maintain all information about appointed representatives, regardless of the category, payment type, or representational status of the representative, in a single repository identified as the Appointed Representative Database, covered by the *Appointed Representative File* system of records.

B. Discussion of Appointed Representative File System of Records

We believe that the proposed alteration will significantly strengthen the framework of the appointed representative business process, as well as our efforts to enhance the infrastructure for electronic paperless processes. The alteration brings together related information in a single repository designed to increase

communication efficiency with other key agency systems. It will also increase accuracy in the way we administer the representative process.

C. Discussion of New Routine Use

As recommended by the President's Identity Theft Task Force, as mandated by the Office of Management and Budget (OMB) in Memorandum M–07–16, and in accordance with the Privacy Act (5 U.S.C. 552a(e)(4) and (11)), we established a routine use that specifically permits us to disclose our information when we respond to the unintentional release of agency information (a data security breach). Such a routine use serves to protect the interests of the people whose information is at risk by allowing us to take appropriate steps to facilitate a timely and effective response to a data breach. (*See* 72 FR 69723 (December 10, 2007)).

II. Records Storage Medium and Safeguards for the Information Covered by the Appointed Representative File System of Records

We will maintain, in paper and electronic form, appointed representative information covered by the *Appointed Representative File* system of records. We will keep paper records in locked cabinets or in other secure areas. We will safeguard the security of the electronic information covered by the *Appointed Representative File* system of records by requiring the use of access codes to enter the computer system that will house the data.

We annually provide all of our employees and contractors with appropriate security awareness and training that includes reminders about the need to protect personally identifiable information and the criminal penalties that apply to unauthorized access to, or disclosure of, personally identifiable information. *See* 5 U.S.C. 552a(i)(1). Employees and contractors with access to databases maintaining personally identifiable information must sign a sanction document annually, acknowledging their accountability for inappropriately accessing or disclosing such information.

III. Effects of the Appointed Representative File System of Records and Routine Use Disclosure on the Rights of Individuals

A. Discussion Relating to the Alteration

We propose altering the *Appointed Representative File* system of records as part of our responsibilities in continuing to expand our business processes. We will adhere to all applicable statutory requirements, including those under the Social Security Act and the Privacy Act, in carrying out our responsibilities. Therefore, we do not anticipate that the proposed alteration to this system of records will have any adverse effect on the privacy or other rights of the persons covered by the system of records.

B. Discussion Relating to the New Routine Use

The new routine use will serve to protect the interests of persons whose information could be at risk. We will take appropriate steps to facilitate a timely and effective response to a security breach of our data, thereby improving our ability to prevent, minimize, or remedy any harm that may result from a compromise of data maintained in our system of records. We do not anticipate that the new routine use will have any adverse effect on the rights of persons whose data might be disclosed.

IV. Compatibility of Proposed Routine Use

As mandated by OMB, as recommended by the President's Identity Theft Task Force, and in accordance with the Privacy Act (5 U.S.C. 552a(a)(7) and (b)(3)) and our disclosure regulation (20 CFR Part 401), we are permitted to release information under a published routine use for a purpose that is compatible with the purpose for which we collected the information. Section 401.20 of our regulations provides that we will disclose information required by law. Since OMB has mandated its publication, this routine use is appropriate and meets the relevant statutory and regulatory criteria. In addition, we disclose to other agencies, entities, and persons, when necessary, to respond to an unintentional release. These disclosures are compatible with the reasons we collect the information, as helping to prevent and minimize the potential for harm is consistent with taking appropriate steps to protect information entrusted to us. *See* 5 U.S.C. 552a(e)(10).

Dated: September 23, 2009.

Michael J. Astrue,

Commissioner.

Social Security Administration

Notice of System of Records Required by the Privacy Act of 1974; as Amended

System Number:

60–0325.

SYSTEM NAME:

Appointed Representative File, Social Security Administration (SSA), Office of Disability Adjudication and Review and Deputy Commissioner for Retirement and Disability Policy.

SECURITY CLASSIFICATION:

None.

SYSTEM LOCATION:

Social Security Administration, Office of Systems, 6401 Security Boulevard, Baltimore, Maryland 21235.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

This system covers all claimants' representatives who are currently eligible to represent SSA claimants or have represented SSA claimants in the past at the administrative or court level in SSA matters. A representative may be any person (*e.g.,* attorney, eligible direct pay non-attorney, or non-professional such as a friend, neighbor, or minister), a firm, or other professional entity that provides representative services, regardless of whether the representative charges or collects a fee for providing the representational services.

CATEGORIES OF RECORDS IN THE SYSTEM:

This system will contain personally identifiable information and contact information for all appointed representatives. For example, we collect name (regardless of category, payment type, or representational status), date of birth, tax identification number (TIN)/ Social Security number (SSN), representative identification number, tax mailing address, notice address, payment address, telephone numbers (*e.g.,* business, fax, and cell phone) and type of representative (*i.e.,* attorney, eligible direct pay non-attorney, non-professional, a firm, or other professional entity).

The system will also contain information about the representative's legal standing and business affiliations. For example, we collect current bar and court information (*e.g.,* year admitted, license number, present standing), sanction-related information (*e.g.,* "Disqualified or Suspended," and start/ stop date of sanction), date the appointment was signed, termination of service date, business affiliation information (*e.g.,* sole proprietor or single-member Limited Liability Company/Limited Liability partnership, partner, or salaried employee), name and address of the firm or entity, employer identification number (EIN) of the entity, and banking information.

The system will also maintain relevant claimants' SSNs.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Sections 205, 206, 1631(d)(1) and 1631(d)(2) of the Social Security Act, as amended, sections 6041 and 6045 of the Internal Revenue Code, and implementing regulations at 26 CFR part 1.

PURPOSE(S):

By altering the *Appointed Representative File* system of records, we will more efficiently collect, maintain, and use information about appointed representatives, regardless of category, payment type, or representational status, and strengthen the overall representative business process. We use information in this system to verify, document, and organize information about representatives.

ROUTINE USES OF RECORDS COVERED BY THE APPOINTED REPRESENTATIVE FILE SYSTEM OF RECORDS, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

Routine use disclosures are indicated below; however, we will not disclose any information defined as "return or return information" under 26 U.S.C. 6103 of the Internal Revenue Code (IRC), unless authorized by the IRC, the Internal Revenue Service (IRS), or IRS regulations.

1. To the Office of the President in response to an inquiry made at the request of the subject of the record or a third party on that person's behalf.

2. To a congressional office in response to an inquiry from that office made at the request of the subject of the record or a third party on that person's behalf.

3. To the IRS and to State and local government tax agencies in response to inquiries regarding receipt of fees we paid directly starting in calendar year 2007.

4. To the IRS to permit its auditing of our compliance with the safeguard provisions of the IRC of 1986, as amended.

5. To the Department of Justice (DOJ), a court, other tribunal, or another party before such court or tribunal when:

(a) SSA or any component thereof;

(b) any SSA employee in his or her official capacity;

(c) any SSA employee in his or her individual capacity when DOJ (or SSA when we are authorized to do so) has agreed to represent the employee; or

(d) the United States, or any agency thereof, when we determine that the litigation is likely to affect the operations of SSA or any of its components, is a party to litigation or has an interest in such litigation, and we determine that the use of such records by DOJ, a court, other tribunal, or another party before such court or tribunal is relevant and necessary to the litigation. In each case, however, we must determine that such disclosure is compatible with the purpose for which we collected the records.

6. To DOJ for:

(a) investigating and prosecuting violations of the Social Security Act to which criminal penalties attach;

(b) representing the Commissioner; or

(c) investigating issues of fraud or violation of civil rights by agency officers or employees.

7. To contractors and other Federal agencies, as necessary, to assist us in efficiently administering our programs. We will disclose information under this routine use only in situations in which we may enter into a contractual or similar agreement with a third party to assist in accomplishing an agency function relating to this system of records.

8. To student volunteers, persons working under a personal services contract, and others who are not technically Federal employees, when they are performing work for us, as authorized by law, and they need access to information in our records in order to perform their assigned duties.

9. To Federal, State, and local law enforcement agencies and private security contractors as appropriate, information as necessary:

(a) to enable them to assure the safety of our employees and customers, the security of our workplace, and the operation of our facilities; or

(b) to assist investigations or prosecutions with respect to activities that affect such safety and security or activities that disrupt the operation of our facilities.

10. To the General Services Administration and the National Archives and Records Administration (NARA) under 44 U.S.C. 2904 and 2906, as amended by the NARA Act, information that is not restricted from disclosure by Federal law for their use in conducting records management studies.

11. To employers to assist us in collecting debts owed by claimants' representatives who received an excess or erroneous representational fee payment and owe a delinquent debt to us. Disclosure under this routine use is authorized under the Debt Collection Improvement Act of 1966 (Pub. L. 104–134) and implemented through administrative wage garnishment provisions of this Act. *See* 31 U.S.C. 3720D.

12. To employers of claimants' representatives (*e.g.,* law firms, partnerships, or other business entities) in accordance with the requirements of sections 6041 and 6045(f) of the IRC as implemented by the IRS Regulations found at 26 CFR 1.6041–1, and as necessary for us to carry out the requirements for fee reporting to appointed representatives.

13. To the appropriate Federal, State, and local agencies, entities, and persons when: (1) We suspect or confirm that the security or confidentiality of information in this system of records has been compromised; (2) we determine that as a result of the suspected or confirmed compromise there is a risk of harm to economic or property interests, risk of identity theft or fraud, or harm to the security or integrity of this system or our other systems or programs that rely upon the compromised information; and (3) we determine that disclosing the information to such agencies, entities, and persons is necessary to assist in our efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm. We will use this routine use to respond only to those incidents involving an unintentional release of our records.

We will disclose appointed representative information under this routine use specifically in connection with response and remediation efforts in the event of an unintentional release of agency information, otherwise known as a "data security breach." This routine use will protect the interests of the people whose information is at risk by allowing us to take appropriate steps to facilitate a timely and effective response to a data breach. The routine use will also help us improve our ability to prevent, minimize, or remedy any harm that may result from a compromise of data covered in this system of records.

DISCLOSURE TO CONSUMER REPORTING AGENCIES:

Pursuant to 5 U.S.C. 552a(b)(12) of the Privacy Act, we may disclose information to consumer reporting agencies as defined in the Fair Credit Reporting Act (15 U.S.C. 1681a(f)) or the Federal Claims Collection Act of 1966 (31 U.S.C. 3701, *et seq.*), as amended. We will make the disclosure in accordance with 31 U.S.C. 3711(e) when authorized by sections 204(f), 808(e), or 1631(b)(4) of the Social Security Act (42 U.S.C. 404(f), 1008(e), or 1383(b)(4)). We may disclose under these circumstances to facilitate the collection of outstanding debts owed to the Federal government, to provide an incentive for debtors to repay delinquent Federal government debts by making the debts part of their credit records. The information we

disclose is limited to the person's name, address, SSN, and other information necessary to establish the person's identity, the amount, status, and history of the debt, and the agency or program under which the debt arose.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

We will store records in this system in paper and electronic form.

RETRIEVABILITY:

We will retrieve records by SSN, representative identification number, or alphabetically by the person's name.

SAFEGUARDS:

We retain paper and electronic files with personal identifiers in secure storage areas accessible only to our authorized employees and contractors. We limit access to data with personal identifiers from this system to only our authorized personnel who have a need for the information when performing their official duties.

We provide appropriate security awareness and training annually to all our employees and contractors that include reminders about the need to protect personally identifiable information and the criminal penalties that apply to unauthorized access to, or disclosure of, personally identifiable information. *See* 5 U.S.C. 552a(i)(l). Furthermore, employees and contractors with access to databases maintaining personally identifiable information must sign a sanction document annually, acknowledging their accountability for inappropriately accessing or disclosing such information.

RETENTION AND DISPOSAL:

For purposes of records management dispositions authority, we follow the NARA and Department of Defense (DOD) 5015.2 regulations (DOD Design Criteria Standard for Electronic Records Management Software Applications). We will destroy paper and electronic records three years after the final action is taken.

SYSTEM MANAGER(S) AND ADDRESS(ES):

Deputy Commissioner for Budget, Finance and Management, Social Security Administration, 6401 Security Boulevard, Baltimore, MD 21235.

NOTIFICATION PROCEDURES:

Persons can determine if this system contains a record about them by writing to the system manager at the above address to verify their identity or they must certify in the request that they are the person they claim to be and understand that the knowing and willful request for, or acquisition of, a record pertaining to another person under false pretenses is a criminal offense.

Persons requesting notification of records in person should provide the same information, as well as provide an identity document, preferably with a photograph, such as a driver's license. Persons lacking identification documents sufficient to establish their identity must certify in writing that they are the person they claim to be and that they understand that the knowing and willful request for, or acquisition of, a record pertaining to another person under false pretenses is a criminal offense.

Persons requesting notification by telephone must verify their identity by providing identifying information that parallels the information in the record about which they are requesting notification. If we determine that the identifying information the person provides by telephone is insufficient, we will require the person to submit a request in writing or in person. If a person requests information by telephone on behalf of another person, the subject person must be on the telephone with the requesting person and us in the same phone call. We will establish the subject person's identity (his or her name, SSN, address, date of birth, and place of birth, along with one other piece of information such as mother's maiden name) and ask for his or her consent to provide information to the requesting person. These procedures are in accordance with SSA Regulations (20 CFR 401.40 and 401.45).

RECORD ACCESS PROCEDURES:

Same as notification procedures. Requesters also should reasonably specify the record contents they are seeking. These procedures are in accordance with SSA Regulations (20 CFR 401.40(c)).

CONTESTING RECORD PROCEDURES:

Same as notification procedures. Persons also should reasonably identify the record, specify the information they are contesting, and state the corrective action sought and the reasons for the correction with supporting justification showing how the record is incomplete, untimely, inaccurate, or irrelevant. These procedures are in accordance with SSA Regulations (20 CFR 401.65(a)).

RECORD SOURCE CATEGORIES:

We obtain information covered by the Appointed Representative File system of records from claimant representatives and SSA records, such as the Master Beneficiary Record, Supplemental Security Record, and Master Files of Social Security Number (SSN) Holders and SSN Applications.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

[FR Doc. E9–24275 Filed 10–7–09; 8:45 am]

BILLING CODE P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA–2009–0161]

Notice 1 Receipt of Petition for Decision That Nonconforming 2009 Harley Davidson FX, FL, XL and VR Series Motorcycles Are Eligible for Importation

AGENCY: National Highway Traffic Safety Administration, DOT

ACTION: Notice of receipt of petition for decision that nonconforming 2009 Harley Davidson FX, FL, XL and VR Series Motorcycles are eligible for importation.

SUMMARY: This document announces receipt by the National Highway Traffic Safety Administration (NHTSA) of a petition for a decision that 2009 Harley Davidson FX, FL, XL and VR Series Motorcycles that were not originally manufactured to comply with all applicable Federal motor vehicle safety standards (FMVSS) are eligible for importation into the United States because (1) they are substantially similar to vehicles that were originally manufactured for sale in the United States and that were certified by their manufacturer as complying with the safety standards, and (2) they are capable of being readily altered to conform to the standards.

DATES: The closing date for comments on the petition is November 9, 2009.

ADDRESSES: Comments should refer to the docket and notice numbers above and be submitted 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: Comments must be written in the English language, and be no greater than 15 pages in length, although there is no limit to the length of necessary attachments to the comments. If comments are submitted in hard copy form, please ensure that two copies are provided. If you wish to receive confirmation that your comments were received, please enclose a stamped, self-addressed postcard with the comments. Note that all comments received will be posted without change to *http://www.regulations.gov*, including any personal information provided. Please see the Privacy Act heading below.

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 (65 FR 19477–78).

How to Read Comments Submitted to the Docket: You may read the comments received by Docket Management at the address and times given above. You may also view the documents from the Internet at *http://www.regulations.gov.* Follow the online instructions for accessing the dockets. The docket ID number and title of this notice are shown at the heading of this document notice. Please note that even after the comment closing date, we will continue to file relevant information in the Docket as it becomes available. Further, some people may submit late comments. Accordingly, we recommend that you periodically search the Docket for new material.

FOR FURTHER INFORMATION CONTACT: Coleman Sachs, Office of Vehicle Safety Compliance, NHTSA (202–366–3151).

SUPPLEMENTARY INFORMATION:

Background

Under 49 U.S.C. 30141(a)(1)(A), a motor vehicle that was not originally manufactured to conform to all applicable FMVSS shall be refused admission into the United States unless NHTSA has decided that the motor vehicle is substantially similar to a motor vehicle originally manufactured for sale in the United States, certified under 49 U.S.C. 30115, and of the same model year as the model of the motor vehicle to be compared, and is capable of being readily altered to conform to all applicable FMVSS.

Petitions for eligibility decisions may be submitted by either manufacturers or importers who have registered with NHTSA pursuant to 49 CFR part 592. As specified in 49 CFR 593.7, NHTSA publishes notice in the **Federal Register** of each petition that it receives, and affords interested persons an opportunity to comment on the petition. At the close of the comment period, NHTSA decides, on the basis of the petition and any comments that it has received, whether the vehicle is eligible for importation. The agency then publishes this decision in the **Federal Register.**

J.K. Technologies, LLC, of Baltimore, Maryland (J.K.)(Registered Importer 90–006) has petitioned NHTSA to decide whether non-U.S. certified 2009 Harley Davidson FX, FL, XL and VR series motorcycles are eligible for importation into the United States. The vehicles that J.K. believes are substantially similar are 2009 Harley Davidson FX, FL, XL and VR series motorcycles that were manufactured for sale in the United States and certified by their manufacturer as conforming to all applicable FMVSS.

The petitioner claims that it carefully compared non-U.S. certified 2009 Harley Davidson FX, FL, XL and VR series motorcycles to their U.S. certified counterparts, and found the vehicles to be substantially similar with respect to compliance with most FMVSS.

J.K. submitted information with its petition intended to demonstrate that non-U.S. certified 2009 Harley Davidson FX, FL, XL and VR series motorcycles, as originally manufactured, conform to many FMVSS in the same manner as their U.S. certified counterparts, or are capable of being readily altered to conform to those standards.

Specifically, the petitioner claims that non-U.S. certified 2009 Harley Davidson FX, FL, XL and VR series motorcycles are identical to their U.S. certified counterparts with respect to compliance with Standard Nos. 106 *Brake Hoses,* 111 *Rearview Mirrors,* 116 *Brake Fluid,* 119 *New Pneumatic Tires for Vehicles other than Passenger Cars,* 123 *Motorcycle Controls and Displays,* and 122 *Motorcycle Brake Systems.*

The petitioner further contends that the vehicles are capable of being readily altered to meet the following standards, in the manner indicated below:

Standard No. 108 *Lamps, Reflective Devices and Associated Equipment:* installation of the following U.S.-certified components on vehicles not already so equipped: (a) Headlamp; (b) front and rear side-mounted reflex reflectors; (c) rear-mounted reflex reflector; (d) rear turn signal lamps; (e) stoplamp; (f) taillamp; and (g) license plate lamp.

Standard No. 120 *Tire Selection and Rims for Vehicles other than Passenger Cars:* installation of a tire information placard.

Standard No. 205 *Glazing Materials:* inspection of all vehicles, and removal of noncompliant glazing or replacement of the glazing with U.S.-certified components on vehicles that are not already so equipped.

All comments received before the close of business on the closing date indicated above will be considered, and will be available for examination in the docket at the above addresses both before and after that date. To the extent possible, comments filed after the closing date will also be considered. Notice of final action on the petition will be published in the **Federal Register** pursuant to the authority indicated below.

Authority: 49 U.S.C. 30141(a)(1)(A) and (b)(1); 49 CFR 593.8; delegations of authority at 49 CFR 1.50 and 501.8.

Issued on: October 5, 2009.

Claude H. Harris,

Director, Office of Vehicle Safety Compliance.

[FR Doc. E9–24330 Filed 10–7–09; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Tier 1 Environmental Impact Statement: Lafayette Parish, LA

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice of intent amendment.

SUMMARY: The FHWA is issuing this notice to advise the public that the December 16, 2005 Notice of Intent for the subject Tier 1 Environmental Impact Statement is amended to: (1) change the name of the proposed project from the Lafayette Metropolitan Expressway to the Lafayette Regional Xpressway (LRX) and (2) add the Louisiana Department of Transportation and Development (DOTD) as a Joint Lead Agency.

FOR FURTHER INFORMATION CONTACT: Mr. Carl M. Highsmith, Project Delivery Team Leader, Federal Highway Administration, 5304 Flanders Drive, Suite A, Baton Rouge, Louisiana 70808, Telephone: (225) 757–7615, or Mr. Michael Mangham, Commission Chairperson, Lafayette Metropolitan Expressway Commission, 406 Audubon Boulevard, Lafayette, Louisiana 70503, Telephone: (337) 233–6200, or Ms. Noel Ardoin, Environmental Engineer Administrator, Louisiana Department of Transportation and Development, Room 502P, 1201 Capitol Access Road, Post

Office Box 94245, Baton Rouge, Louisiana 70804–9245, Telephone: (225) 242–4502. Project information may be obtained from the project Internet Web site at *http://lrxpressway.com.*

SUPPLEMENTARY INFORMATION: The Lafayette Metropolitan Expressway Commission (LMEC) changed the name of the proposed project from the Lafayette Metropolitan Expressway to the Lafayette Regional Xpressway (LRX). The name of the project was changed to reflect the regional context and setting of the proposed toll facility.

The Louisiana Department of Transportation and Development agreed to be a Joint Lead Agency for the Lafayette Regional Xpressway Tier 1 Environmental Impact Statement.

(Catalog of Federal Domestic Assistance Program Number 20.205, Highway Research, Planning and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation of Federal programs and activities, apply to this program.)

Authority: 23 U.S.C., 315; 23 CFR 771.123.

Dated: September 30, 2009.

Charles W. Bolinger,

Division Administrator, FHWA, Louisiana Division.

[FR Doc. E9–24218 Filed 10–7–09; 8:45 am]

BILLING CODE P

DEPARTMENT OF THE TREASURY

Office of Thrift Supervision

Irwin Union Bank, F.S.B., Louisville, KY; Notice of Appointment of Receiver

Notice is hereby given that, pursuant to the authority contained in section 5(d)(2) of the Home Owners' Loan Act, the Office of Thrift Supervision (OTS) has duly appointed the Federal Deposit Insurance Corporation as sole Receiver for Irwin Union Bank, F.S.B., Louisville, Kentucky (OTS No. 16835), on September 18, 2009.

Dated: October 2, 2009.

By the Office of Thrift Supervision.

Sandra E. Evans,

Federal Register Liaison.

[FR Doc. E9–24285 Filed 10–7–09; 8:45 am]

BILLING CODE 6720–01–M

DEPARTMENT OF THE TREASURY

Office of Thrift Supervision

[Docket ID: OTS–2009–0017]

Open Meeting of the OTS Minority Depository Institutions Advisory Committee

AGENCY: Department of the Treasury, Office of Thrift Supervision.

ACTION: Notice of meeting.

SUMMARY: The OTS Minority Depository Institutions Advisory Committee (MDIAC) will convene a meeting on Friday, November 6, 2009, at the Office of Thrift Supervision Central Region Office, at 9 a.m. Central Time. The meeting will be open to the public.

DATES: The meeting will take place on Friday, November 6, 2009, at 9 a.m. Central Time.

ADDRESSES: The MDIAC will meet at the Office of Thrift Supervision Central Region Office, located at 1 South Wacker Drive, Suite 2000, Chicago, IL. The public is invited to make a three minute oral statement at the MDIAC meeting, or submit written statements to the MDIAC by any one of the following methods:

- *E-mail address: Commaffairs@ots.treas.gov;* or
- *Mail:* To Cassandra McConnell, Designated Federal Official, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552, in triplicate.

The agency must receive written statements no later than Friday, October 30, 2009.

FOR FURTHER INFORMATION CONTACT: Cassandra McConnell, Designated Federal Official, (202) 906–5750, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552.

SUPPLEMENTARY INFORMATION: By this notice, the Office of Thrift Supervision is announcing that the OTS Minority Depository Institutions Advisory Committee will convene a meeting on Friday, November 6, 2009, at the Office of Thrift Supervision Central Region Office, 1 South Wacker Drive, Suite 2000, Chicago, IL, beginning at 8:30 a.m. Central Time. The meeting will be open to the public. Because the meeting will be held in a secured facility with limited space, members of the public who plan to attend the meeting, and members of the public who require auxiliary aid, must contact the Office of Community Affairs at 202–906–7891 by 5 p.m. Eastern Time on Thursday, October 29, 2009, to inform OTS of their desire to attend the meeting and to provide the information that will be required to facilitate entry into the building. To enter the building, attendees should provide a government issued ID (*e.g.,* driver's license, voter registration card, etc.) with their full name, date of birth, and address. The purpose of the meeting is to advise OTS on ways to meet the goals established by section 308 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Public Law 101–73, Title III, 103 Stat. 353, 12 U.S.C.A. § 1463 note. The goals of section 308 are to preserve the present number of minority institutions, preserve the minority character of minority-owned institutions in cases involving mergers or acquisitions, provide technical assistance, and encourage the creation of new minority institutions. The meeting agenda will be posted to the Office of Thrift Supervision Web site at *http://www.ots.gov.*

Dated: October 2, 2009.

By the Office of Thrift Supervision.

Cassandra E. McConnell,

Designated Federal Official, OTS Minority Depository Institutions Advisory Committee.

[FR Doc. E9–24325 Filed 10–7–09; 8:45 am]

BILLING CODE 6720–01–P

DEPARTMENT OF THE TREASURY

Office of Thrift Supervision

[Docket ID: OTS–2009–0019]

Open Meeting of the OTS Mutual Savings Association Advisory Committee

AGENCY: Department of the Treasury, Office of Thrift Supervision.

ACTION: Notice of meeting.

SUMMARY: The OTS Mutual Savings Associations Advisory Committee (MSAAC) will convene a meeting on Wednesday, October 28, 2009, in the Chicago Office of the Office of Thrift Supervision, One South Wacker Drive, Suite 2000, Chicago, Illinois beginning at 8:30 a.m. Central Time. The meeting will be open to the public.

DATES: The meeting will be held on Wednesday, October 28, 2009, at 8:30 a.m. Central Time.

ADDRESSES: The meeting will be held at the Office of Thrift Supervision, One South Wacker Drive, Suite 2000, Chicago, Illinois. The public is invited to submit written statements to the MSAAC by any one of the following methods:

- *E-mail address: mutualcommittee@ots.treas.gov;* or
- *Mail:* To Charlotte Bahin, Designated Federal Official, Office of

Thrift Supervision, 1700 G Street, NW., Washington, DC 20552 in triplicate.

The agency must receive statements no later than October 21, 2009.

FOR FURTHER INFORMATION CONTACT: Charlotte M. Bahin, Designated Federal Official, (202) 906–6452, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552.

SUPPLEMENTARY INFORMATION: By this notice, the Office of Thrift Supervision is announcing that the OTS Mutual Savings Association Advisory Committee will convene a meeting on Wednesday, October 28, 2009, in the Chicago Office of the at the Office of Thrift Supervision, One South Wacker Drive, Suite 2000, Chicago, Illinois, beginning at 8:30 a.m. Central Time. The meeting will be open to the public. Because the meeting will be held in a secured facility with limited space, members of the public who plan to attend the meeting, and members of the public who require auxiliary aid, must contact the Office of Thrift Supervision at 202–906–6429 by 5 p.m. Eastern Time on Wednesday, October 21, 2009, to inform OTS of their desire to attend the meeting and to provide the information that will be required to facilitate entry into the OTS building. To enter the building, attendees should provide their full name, e-mail address and organization. The purpose of the meeting is to advise OTS on what regulatory changes or other steps OTS may be able to take to ensure the continued health and viability of mutual savings associations, and other issues of concern to the existing mutual savings associations.

Dated: October 2, 2009.

By the Office of Thrift Supervision.

Deborah Dakin,

Acting Chief Counsel.

[FR Doc. E9–24324 Filed 10–7–09; 8:45 am]

BILLING CODE P

DEPARTMENT OF VETERANS AFFAIRS

Advisory Committee on Homeless Veterans; Notice of Meeting

The Department of Veterans Affairs (VA) gives notice under Public Law 92–463 (Federal Advisory Committee Act) that a meeting of the Advisory Committee on Homeless Veterans will be held on Monday, November 2, 2009, in the Coolidge Room at the Washington Marriot Wardman Park Hotel, 2660 Woodley Road, NW., Washington, DC, from 8 a.m. to 4 p.m. The meeting is open to the public.

The purpose of the Committee is to provide the Secretary of Veterans Affairs with an on-going assessment of the effectiveness of the policies, organizational structures, and services of the Department in assisting homeless Veterans. The Committee shall assemble and review information relating to the needs of homeless Veterans and provide on-going advice on the most appropriate means of providing assistance to homeless Veterans. The Committee will make recommendations to the Secretary regarding such activities.

The agenda will include briefings from VA and other officials regarding services for homeless Veterans. The Committee will also discuss final preparation of its upcoming annual report and recommendations to the Secretary.

Those wishing to attend the meeting should contact Mr. Pete Dougherty, Department of Veterans Affairs, at (202) 461–7401. No time will be allocated for receiving oral presentations from the public. However, the Committee will accept written comments from interested parties on issues affecting homeless Veterans. Such comments should be referred to the Committee at the following address: Advisory Committee on Homeless Veterans, Homeless Veterans Programs Office (075D), U.S. Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420.

Dated: October 1, 2009.

By Direction of the Secretary.

Vivian Drake,

Acting Committee Management Officer.

[FR Doc. E9–24311 Filed 10–7–09; 8:45 am]

BILLING CODE P

DEPARTMENT OF VETERANS AFFAIRS

Advisory Committee on Cemeteries and Memorials; Notice of Meeting

The Department of Veterans Affairs (VA) gives notice under Public Law 92–463 (Federal Advisory Committee Act) that a meeting of the Advisory Committee on Cemeteries and Memorials will be held November 17–18, 2009, at the Hamilton Crowne Plaza, 14th and K Streets, NW., Washington, DC. The sessions will begin at 8 a.m. on November 17 and at 8:30 a.m. on November 18 and adjourn at 4 p.m. on both days. The meeting is open to the public.

The purpose of the Committee is to advise the Secretary of Veterans Affairs on the administration of national cemeteries, soldiers' lots and plots, the selection of new national cemetery sites, the erection of appropriate memorials, and the adequacy of Federal burial benefits.

On November 17, the Committee will receive updates on National Cemetery Administration issues. On November 18, the Committee will tour the Baltimore National Cemetery, 5501 Frederick Avenue, Baltimore, Maryland, from approximately 9:30 a.m. to 10:30 a.m., and reconvene at the hotel for a business session, including discussions of committee recommendations, future meeting sites, and potential agenda topics for upcoming meetings.

Time will be allocated for receiving public comments at 1 p.m. on November 18. Public comments will be limited to three minutes each. Individuals wishing to make oral statements before the Committee will be accommodated on a first-come, first-served basis. Individuals who speak are invited to submit 1–2 page summaries of their comments at the time of the meeting for inclusion in the official meeting record.

Members of the public may direct questions or submit written statements for review by the Committee in advance of the meeting to Mr. Michael Nacincik, Designated Federal Officer, Department of Veterans Affairs, National Cemetery Administration (41C2), 810 Vermont Avenue, NW., Washington, DC, or by e-mail at *Michael.n@va.gov*. In the public's communications with the Committee, the writers must identify themselves and state the organizations, associations, or persons they represent. Any member of the public wishing to attend the meeting should contact Mr. Nacincik at (202) 461–6240.

Dated: October 2, 2009.

By Direction of the Secretary.

Vivian Drake,

Acting Committee Management Officer.

[FR Doc. E9–24313 Filed 10–7–09; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

Joint Biomedical Laboratory Research and Development and Clinical Science Research and Development Services Scientific Merit Review Board; Notice of Meetings

The Department of Veterans Affairs gives notice under the Public Law 92–463 (Federal Advisory Committee Act) that the subcommittees of the Joint Biomedical Laboratory Research and Development and Clinical Science Research and Development Services Scientific Merit Review Board will meet from 8 a.m. to 5 p.m. on the dates indicated below:

Subcommittee for	Date(s)	Location
Mental Hlth & Behav Sci-B	November 10, 2009	L'Enfant Plaza Hotel.
Cellular & Molecular Medicine	November 13, 2009	Embassy Suites—Chevy Chase.
Nephrology	November 13, 2009	L'Enfant Plaza Hotel.
Surgery	November 16, 2009	*VA Central Office.
Infectious Diseases-B	November 18, 2009	L'Enfant Plaza Hotel.
Mental Hlth & Behav Sci-A	November 19, 2009	Embassy Suites—Chevy Chase.
Hematology	November 20, 2009	*VA Central Office.
Respiration	November 20, 2009	L'Enfant Plaza Hotel.
Endocrinology-A	November 23, 2009	L'Enfant Plaza Hotel.
Neurobiology-D	November 30, 2009	L'Enfant Plaza Hotel.
Endocrinology-B	December 1, 2009	*VA Central Office.
Clinical Research Program	December 2, 2009	*VA Central Office.
Oncology	December 3–4, 2009	Embassy Suites—Chevy Chase.
Neurobiology-A	December 4, 2009	L'Enfant Plaza Hotel.
Immunology	December 4, 2009	L'Enfant Plaza Hotel.
Cardiovascular Studies	December 7, 2009	L'Enfant Plaza Hotel.
Neurobiology-E	December 7, 2009	L'Enfant Plaza Hotel.
Epidemiology	December 9, 2009	*VA Central Office.
Gastroenterology	December 11, 2009	L'Enfant Plaza Hotel.
Infectious Diseases-A	December 11, 2009	*VA Central Office.
Neurobiology-C	December 17–18, 2009	L'Enfant Plaza Hotel.

The addresses of the hotels and VA Central Office are:
Embassy Suites at the Chevy Chase Pavilion, 4300 Military Road, NW., Washington, DC.
L'Enfant Plaza Hotel, 480 L'Enfant Plaza, SW., Washington, DC.
*VA Central Office, 1722 Eye Street, NW., Washington, DC.
*Teleconference.

The purpose of the Merit Review Board is to provide advice on the scientific quality, budget, safety and mission relevance of investigator-initiated research proposals submitted for VA merit review consideration. Proposals submitted for review by the Board involve a wide range of medical specialties within the general areas of biomedical, behavioral and clinical science research.

The subcommittee meetings will be open to the public for approximately one hour at the start of each meeting to discuss the general status of the program. The remaining portion of each subcommittee meeting will be closed to the public for the review, discussion, and evaluation of initial and renewal research proposals.

The closed portion of each meeting involves discussion, examination, reference to staff and consultant critiques of research proposals. During this portion of each meeting, discussion and recommendations will deal with qualifications of personnel conducting the studies, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, as well as research information, the premature disclosure of which could significantly frustrate implementation of proposed agency action regarding such research proposals.

As provided by subsection 10(d) of Public Law 92–463, as amended, closing portions of these subcommittee meetings is in accordance with 5 U.S.C., 552b(c) (6) and (9)(B). Those who plan to attend or would like to obtain a copy of minutes of the subcommittee meetings and rosters of the members of the subcommittees should contact LeRoy G. Frey, Ph.D., Chief, Program Review (121F), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC, 20420 at (202) 461–1664.

Dated: September 25, 2009.

By Direction of the Secretary.

Vivian Drake,

Acting Committee Management Officer.

[FR Doc. E9–24315 Filed 10–7–09; 8:45 am]

BILLING CODE P

Federal Register

Thursday,
October 8, 2009

Part II

Environmental Protection Agency

40 CFR Part 60

Standards of Performance for Coal Preparation and Processing Plants; Final Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 60

[EPA–HQ–OAR–2008–0260; FRL–8965–3]

RIN 2060–AO57

Standards of Performance for Coal Preparation and Processing Plants

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is promulgating amendments to the new source performance standards for coal preparation and processing plants. These final amendments include revisions to the emission limits for particulate matter and opacity standards for thermal dryers, pneumatic coal cleaning equipment, and coal handling equipment (coal processing and conveying equipment, coal storage systems, and coal transfer and loading systems) located at coal preparation and processing plants. These revised limits apply to affected facilities that commence construction, modification, or reconstruction after April 28, 2008. The amendments also establish a sulfur dioxide (SO_2) emission limit and a combined nitrogen oxide (NO_X) and carbon monoxide (CO) emissions limit for thermal dryers located at coal preparation and processing plants. In addition, the amendments establish work practice standards to control fugitive coal dust emissions from open storage piles located at coal preparation and processing plants. The SO_2 limit, the NO_X/CO limit, and the work practice standards apply to affected facilities that commence construction, modification, or reconstruction of which commences after May 27, 2009. We are also modifying the definition of thermal dryer to include both direct contact and indirect contact thermal dryers drying all coal ranks. We are modifying the definition of pneumatic coal-cleaning equipment to include equipment cleaning all coal ranks. We are also amending the definition of coal for purposes of subpart Y to include coal refuse. The modified definitions of thermal dryer, pneumatic coal cleaning equipment, and coal will be used to determine whether and how the standards apply to facilities that commence construction, modification, or reconstruction after May 27, 2009.

DATES: This final rule is effective on October 8, 2009. The incorporation by reference of certain publications listed in the regulation is approved by the Director of the Federal Register as of October 8, 2009.

ADDRESSES: EPA has established a docket for this action which is Docket ID No. EPA–HQ–OAR–2008–0260. All documents in the docket are listed in the *http://www.regulations.gov* index. 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 EPA Docket Center, Standards of Performance for Coal Preparation and Processing Plants Docket, 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 Docket Center is (202) 566–1742.

FOR FURTHER INFORMATION CONTACT: Ms. Mary Johnson, Energy Strategies Group, Sector Policies and Programs Division (D243–01), U.S. EPA, Research Triangle Park, NC 27711, telephone number (919) 541–5025, facsimile number (919) 541–5450, electronic mail (e-mail) address: *johnson.mary@epa.gov.*

SUPPLEMENTARY INFORMATION: The supplementary information presented in this preamble is organized as follows:

I. General Information
A. Does This Action Apply to Me?
B. Where Can I Get a Copy of This Document?
C. Judicial Review
II. Background Information on Subpart Y
III. Summary of the Final Amendments to Subpart Y and Changes Since Proposal
A. Affected Facilities
B. Emission Limits
C. Emissions Testing and Monitoring Requirements
D. Opacity Testing and Monitoring Requirements
E. Recordkeeping and Reporting Requirements
F. Electronic Reporting
G. Additional Amendments
IV. Summary of Significant Comments and Responses
A. Regulated Pollutants
B. Applicability and Definitions
C. Subcategorization
D. Coal Drying Standards
E. Coal Processing and Conveying Equipment, Coal Storage Systems, Transfer and Loading Systems, and Open Storage Piles Standards
F. Testing and Monitoring Requirements
G. Recordkeeping and Reporting Requirements
H. Assessment of Impacts
V. Summary of Cost, Environmental, Energy, and Economic Impacts
A. What Are the Primary Air Impacts?
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VI. Statutory and Executive Order Reviews
A. Executive Order 12866: Regulatory Planning and Review
B. Paperwork Reduction Act
C. Regulatory Flexibility Act
D. Unfunded Mandates Reform Act
E. Executive Order 13132: Federalism
F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments
G. Executive Order 13045: Protection of Children From Environmental, Health and Safety Risks
H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use
I. National Technology Transfer Advancement Act
J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations
K. Congressional Review Act

I. General Information

A. Does This Action Apply to Me?

Categories and entities potentially regulated by the final amendments to New Source Performance Standards (NSPS) for Coal Preparation and Processing Plants (40 CFR part 60, subpart Y) include:

Category	NAICS code [1]	Examples of regulated entities
Industry	212111	Bituminous Coal and Lignite Surface Mining.
	212112	Bituminous Coal Underground Mining.
	221112	Fossil Fuel Electric Power Generation.
	212113	Anthracite Mining.
	213113	Support Activities for Coal Mining.
	322121	Paper (except Newsprint) Mills.
	324199	All other petroleum and coal products manufacturing.
	325110	Petrochemical Manufacturing.

Category	NAICS code [1]	Examples of regulated entities
	327310	Cement Manufacturing.
	331111	Iron and Steel Mills.
Federal Government	22112	Fossil fuel-fired electric utility steam generating units owned by the Federal Government.
State/local/Tribal government	22112	Fossil fuel-fired electric utility steam generating units owned by municipalities.
	921150	Fossil fuel-fired electric steam generating units in Indian Country.

[1] North American Industry Classification System.

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be regulated by this final action. To determine whether your facility would be regulated by this final action, you should examine the applicability criteria in 40 CFR 60.250 and definitions in § 60.251 (subpart Y). If you have any questions regarding the applicability of this final action to a particular entity, contact the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

B. Where Can I Get a Copy of This Document?

In addition to being available in the docket, an electronic copy of this final action is available on the Worldwide Web (WWW) through the Technology Transfer Network (TTN). Following signature, a copy of this final action will be posted on the TTN's policy and guidance page for newly proposed or promulgated rules at *http://www.epa.gov/ttn/oarpg*. The TTN provides information and technology exchange in various areas of air pollution control.

C. Judicial Review

Under section 307(b)(1) of the Clean Air Act (CAA), judicial review of this final rule is available only by filing a petition for review in the United States Court of Appeals for the District of Columbia Circuit by December 7, 2009. Under section 307(b)(2) of the CAA, the requirements established by this final rule may not be challenged separately in any civil or criminal proceedings brought by EPA to enforce these requirements.

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

II. Background Information on Subpart Y

NSPS implement CAA section 111(b) and are issued for categories of sources which have been identified as causing, or contributing significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare. The primary purpose of the NSPS are to help States attain and maintain ambient air quality by ensuring that the best demonstrated emission control technologies are installed as the industrial infrastructure is modernized. Since 1970, the NSPS have been successful in achieving long-term emissions reductions in numerous industries by assuring cost-effective controls are installed on new, reconstructed, and modified sources.

CAA section 111 requires that the NSPS reflect the degree of emission limitation achievable through application of the best system of emissions reductions which (taking into consideration the cost of achieving such emissions reductions, any non-air quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated. This level of control is commonly referred to as best demonstrated technology (BDT). Standards of performance for coal preparation plants (40 CFR part 60, subpart Y) were promulgated in the **Federal Register** on January 15, 1976 (41 FR 2232). The standards are applicable to facilities which process more than 181 megagrams (Mg) (200 tons) of coal per day that commenced construction, reconstruction, or modification after October 24, 1974.

CAA section 111(b)(1)(B) requires EPA to periodically review and revise the standards of performance, as necessary, to reflect improvements in methods for reducing emissions. The first review of the coal preparation plants NSPS was completed on April 14, 1981 (46 FR 21769). The second review of the coal preparation plants NSPS was completed on April 3, 1989 (54 FR 13384). EPA did not make changes to the NSPS as a result of either review.

We proposed amendments to the coal preparation plants NSPS on April 28, 2008 (73 FR 22901) as a result of the current review. We received a total of 42 comments from coal preparation plants, industry trade associations, control technology vendors, environmental groups, and State environmental agencies during the comment period. After reviewing those comments and considering additional data, EPA decided to publish a supplemental proposal which revised some of the emission limits and monitoring requirements proposed on April 28, 2008, added additional limits, and applied the requirements to additional affected facilities. The supplemental action was proposed on May 27, 2009 (74 FR 25304). A total of 44 comments were received from coal preparation plants, other types of industrial facilities, industry associations, environmental groups, and State environmental agencies. This final rule reflects our consideration of all the comments we received regarding the April 2008 and May 2009 proposals. Detailed responses to the comments not included in this preamble are contained in the Summary of Public Comments and Responses document which is included in the docket for this rulemaking.

III. Summary of the Final Amendments to Subpart Y and Changes Since Proposal

A. Affected Facilities

Subpart Y regulates affected facilities located at coal preparation and processing plants which process more than 181 megagrams (Mg) (200 tons) of coal per day. A coal preparation and processing plant begins at the first hopper (*i.e.*, drop point) used to unload coal and ends at the load-out (*i.e.*, distribution) of the coal either to a method of transportation (*e.g.*, truck, train) or to the end-use piece of equipment (*e.g.*, boiler).

The affected facilities regulated by this final rule are thermal dryers, pneumatic coal-cleaning equipment, coal processing and conveying equipment (including breakers and crushers), coal storage systems, transfer and loading systems, and open storage piles. This final rule expands applicability of the existing NSPS by revising the definitions of thermal dryers, pneumatic coal-cleaning equipment, and coal. It also establishes work practice standards for open storage piles. The final rule amends the definition of thermal dryer for units constructed, reconstructed, or modified after May 27, 2009, to include both direct and indirect dryers drying all coal ranks (*i.e.*, bituminous, subbituminous, lignite, and anthracite coals) and coal refuse. The final rule regulates emissions of SO_2 and NO_X/CO only from thermal dryers that receive thermal input from the combustion of coal, coal refuse, or residual oil; PM and opacity are regulated from all thermal dryers.

The emissions standards for thermal dryers apply to emissions from the heat source for an indirect thermal dryer only if those emissions are not otherwise regulated under another NSPS. Indirect thermal dryers use a heat transfer medium to supply heat and blow air over the coal to evaporate the water. If the source of heat (the source of combustion or furnace) is subject to another subpart of Part 60, then the furnace and the associated emissions are not considered part of the subpart Y affected facility (*i.e.*, the thermal dryer). However, if the source of heat is not subject to another subpart of Part 60, then the furnace and the associated emissions are part of the subpart Y affected facility. In situations where the source of heat is part of the affected facility and its exhaust is combined with the dryer exhaust in a single stack, the combined exhaust is subject to all subpart Y requirements applicable to the thermal dryer exhaust. However, in situations where the furnace is part of the affected facility and its exhaust is not combined with the dryer exhaust, the subpart Y requirements for thermal dryers apply differently to the dryer exhaust and the combustion (*i.e.*, heat source or furnace) exhaust. All of the thermal dryer requirements of subpart Y apply to the combustion exhaust, whereas, only a subset of the subpart Y requirements for thermal dryers apply to the dryer exhaust. In addition, thermal dryers that use residual or waste heat from the combustion of coal, coal refuse, or residual oil, or that obtain all of their thermal input from gaseous fuels (*e.g.*, blast furnace gas, coke oven gas, natural gas) or distillate oil also are only be subject to certain subset of the subpart Y requirements for thermal dryers.

Further, a thermal dryer that is part of an in-line coal mill at a Portland cement manufacturing plant where all of the thermal input is supplied by cement kiln exhaust or clinker cooler exhaust, is not subject to the requirements in subpart Y, but, rather, must meet the applicable requirements in the appropriate Portland Cement kiln regulations (40 CFR 60 subpart F and 40 CFR 63 subpart LLL). The amended subpart Y emissions limits for thermal dryers apply to new, reconstructed, or modified thermal dryers at Portland cement manufacturing plants in situations where the thermal input is not supplied by cement kiln or clinker cooler exhaust. Other subpart Y affected facilities located at Portland cement manufacturing plants (*e.g.*, storage systems, conveyors) are also subject to the requirements of subpart Y. Similarly, a coal thermal dryer at an integrated iron or steel manufacturing plant where all of the thermal input is provided by process gases is not regulated under subpart Y, but, rather, under 40 CFR part 60 standards for integrated iron and steel manufacturing plants. Again, the amended emissions limits apply to new, reconstructed, or modified thermal dryers at integrated iron and steel manufacturing plants only in situations where the thermal input is not supplied by process gases. Other subpart Y affected facilities located at integrated iron and steel manufacturing plants also are subject to subpart Y. If an affected facility under subpart Y uses waste-heat or process gases from a process that is subject to emission limits under another NSPS or national emission standard for hazardous air pollutant (NESHAP), the process using the waste-heat or process gases is not subject to requirements under subpart Y, but, rather, is subject to the other applicable NSPS or NESHAP.

This final rule also amends the definition of pneumatic coal-cleaning equipment for units constructed after May 27, 2009, to include pneumatic coal-cleaning equipment cleaning all coal ranks. Finally, the final rule establishes work practice standards that apply to open storage coal piles constructed, reconstructed or modified after May 27, 2009.

B. Emission Limits

This action promulgates emission limits applicable to certain thermal dryers constructed, reconstructed, or modified after April 28, 2008. It also promulgates emission limits for additional pollutants applicable to certain thermal dryers constructed, reconstructed, or modified after May 27, 2009.

Direct-contact thermal dryers that use coal, coal refuse, or residual oil as the dryer heat source and are constructed, reconstructed, or modified after April 28, 2008, are subject to emission limits for PM and opacity. Indirect thermal dryers constructed, reconstructed, or modified after May 27, 2009, are subject to the same PM and opacity limits as direct-contact thermal dryers. Both direct-contact thermal dryers and indirect thermal dryers constructed, reconstructed, or modified after May 27, 2009, are subject to an SO_2 emission limit and a combined NO_X–CO emissions limit. In certain instances, thermal dryers are not subject to the SO_2 and/or NO_X–CO emission limits. Thermal dryers constructed, reconstructed or modified after May 27, 2009, for which all of the thermal input is supplied from a source other than coal, coal refuse, or residual oil (*i.e.*, thermal input is from gaseous fuels such as blast furnace gas, coke oven gas, or natural gas, or distillate oil) are not subject to SO_2 or NO_X–CO emission limits. Indirect thermal dryers constructed, reconstructed, or modified after May 27, 2009, that use residual or waste heat from the combustion of coal, coal refuse, or residual oil also are not subject to the emission limits for SO_2 or NO_X–CO.

Indirect thermal dryers that receive all of their thermal input from a source subject to an SO_2 limit, or NO_X and/or CO limit, under another Part 60 NSPS are not subject to emission limits under subpart Y for those pollutants (*e.g.*, indirect thermal dryers for which the source of heat is subject to a boiler NSPS (subpart Da, Db, or Dc)). In that instance, the furnace (*i.e.*, source of thermal input) and the associated emissions are not considered part of the subpart Y thermal dryer facility. However, if the source of heat is not

subject to another Part 60 NSPS, then the furnace and the associated emissions are part of the subpart Y thermal dryer facility. In the instance where the furnace is part of the affected facility and its exhaust is combined with the thermal dryer exhaust, the combined exhaust contains all of the applicable pollutants (*i.e.*, PM, opacity, SO_2, NO_X, and CO) and all of the subpart Y requirements regarding those emissions from thermal dryers apply. However, in the instance where the furnace is part of the affected facility, but its exhaust is not combined with the dryer exhaust, the furnace exhaust and dryer exhaust are subject to different requirements. The furnace exhaust is subject to emission limits for PM, opacity, SO_2, and NO_X–CO. The dryer exhaust, however, is only subject to the PM and opacity limits because the exhaust does not contain SO_2, NO, and CO.

1. PM and Opacity Limits for Thermal Dryers

Thermal dryers constructed, reconstructed, or modified after April 28, 2008, are subject to emission limits for PM and opacity. The PM and opacity limits in the final rule for new thermal dryers are the same as those proposed in May 2009. EPA determined that thermal dryers undergoing reconstruction could undergo the conversions necessary to also comply with the PM and opacity limits that reflect BDT for new thermal dryers (*i.e.*, fabric filter-controlled recirculation thermal dryers and fabric filter-controlled indirect thermal dryers). Thus, the final rule subjects new and reconstructed thermal dryers to a PM limit of 0.023 grams per dry standard cubic meter (g/dscm)(0.010 grains per dry standard cubic foot (gr/dscf)) and an opacity limit of less than 10 percent. The final rule requires modified thermal dryers to continue to comply with the 1976 rule's PM limit of 0.070 g/dscm (0.031 gr/dscf) and the 1976 rule's opacity limit of less than 20 percent. These limits can be achieved using the technology that EPA determined constitutes BDT for modified thermal dryers (*i.e.*, venturi scrubbers).

2. SO_2, NO_X, and CO Limits for Thermal Dryers

Thermal dryers constructed, reconstructed, or modified after May 27, 2009, must either limit their SO_2 emissions to 85 nanograms per Joule (ng/J) (0.20 pounds per million British thermal units (lb/MMBtu)), or achieve a 90 percent reduction of potential SO_2 emissions and limit their SO_2 emissions to no more than 520 ng/J (1.2 lb/MMBtu). The percent reduction requirement has been revised from the 50 percent requirement proposed in May 2009 to 90 percent in the final rule. In the May 27, 2009, supplemental proposal, EPA concluded that dry sorbent injection into the thermal dryer and spraying caustic onto the coal prior to the thermal dryer were both BDT for SO_2 reduction (74 FR 25310). We also indicated that we were considering an SO_2 percent reduction requirement of between 50 and 90 percent for the final rule (74 FR 25311). We have reassessed the available SO_2 data and believe that the limits established in the final rule are appropriate for new, reconstructed, and modified thermal dryers. Based on our reassessment, we determined that BDT for modified and reconstructed thermal dryers is a wet scrubber with a scrubbing reagent (*e.g.*, an upgraded venturi scrubber with sodium hydroxide or packed bed scrubber with lime). For new thermal dryers, we determined that BDT for controlling SO_2 emissions is the injection of sodium hydroxide directly to the venturi scrubber fluid or injection of a sodium-based sorbent into the combustion gases prior to the drying chamber. All three of these technologies are capable of achieving 90 percent SO_2 reduction.

In the May 27, 2009, supplemental proposal, EPA determined that BDT for controlling NO_X emissions from new, reconstructed, and modified thermal dryers is combustion controls (*e.g.*, low NO_X burners, staged combustion, co-firing with natural gas or liquefied petroleum gas, and flue gas recirculation). BDT for controlling CO emissions was determined to be good combustion practices (*e.g.*, ensuring that there is sufficient oxygen in the combustion zone, maintaining appropriate combustion zone temperature and gas residence time, and conducting proper operation and maintenance of the dryer). For affected thermal dryers that commence construction, reconstruction, or modification after May 27, 2009, the final NO_X–CO emissions limits are the same as those proposed in May 2009. Reconstructed and modified thermal dryers are required to comply with a combined NO_X–CO limit of 430 ng/J (1.0 lb/MMBtu). New thermal dryers are required to comply with a NO_X–CO limit of 280 ng/J (0.65 lb/MMBtu).

3. PM and Opacity Limits for Pneumatic Coal-Cleaning Equipment, Coal Processing and Conveying Equipment, Coal Storage Systems, Transfer and Loading Systems, and Open Storage Piles

The PM and opacity limits in the final rule for pneumatic coal-cleaning equipment are the same as those proposed in the May 2009 supplemental proposal. Pneumatic coal-cleaning equipment, cleaning all coal ranks, constructed, reconstructed, or modified after April 28, 2008, must comply with a PM limit of 0.023 g/dscm (0.010 gr/dscf) and an opacity limit of equal to or less than 5 percent.

For affected coal-handling equipment (coal processing and conveying equipment (including breakers and crushers), coal storage systems, and transfer and loading systems) constructed, reconstructed, or modified after April 28, 2008, that is mechanically vented to the atmosphere, the final rule requires compliance with the PM limit that was proposed in May 2009. That is, mechanically vented coal-handling equipment constructed, reconstructed, or modified after April 28, 2008, must comply with a PM limit of 0.023 g/dscm (0.010 gr/dscf). The final rule also requires affected coal handling equipment constructed, reconstructed, or modified after April 28, 2008, to maintain opacity levels of less than 10 percent. In the May 27, 2009, supplemental proposal, EPA requested comment on whether an opacity limit of less than 10 percent is more appropriate than a limit of 5 percent as proposed in the supplemental action. We also requested comment on whether the 5 percent limit is achievable on a long-term basis and whether the limit provides an adequate compliance margin. As we pointed out in supporting documentation (*see* EPA–HQ–OAR–2008–0260–0083, pp. 3–4), the data used to establish the supplemental proposal's 5 percent opacity level were primarily from initial compliance tests. Upon reconsideration of EPA's data and consideration of public comments and additional supporting data, EPA has determined that an opacity limit of less than 10 percent is more appropriate for all coal handling equipment. An opacity limit of 10 percent will allow for control equipment degradation, adverse conditions, and variability that would not be reflected in initial compliance tests. Although we modified our conclusion regarding the opacity limit achievable by the application of BDT, we did not modify our prior conclusions regarding BDT for coal-handling

equipment. BDT for coal-handling equipment used on subbituminous and lignite coals consists of four technologies—fabric filters, passive enclosure containment systems (PECS), fogging systems, and wet extraction scrubbers. BDT for coal-handling equipment processing bituminous coal is the use of chemical suppressants. All of these emissions reduction measures can control PM emissions equally well. *See* EPA–HQ–OAR–2008–0260–0083, pp. 1–2.

EPA also concluded that if a building in which affected coal processing and conveying equipment (*e.g.*, breakers, crushers, screens, conveying systems), coal storage systems, and transfer system operations are enclosed is found to be in compliance with the subpart Y limits that apply to the affected facilities enclosed in the building, the affected facilities enclosed in that building also are in compliance. Thus, the final rule provides that buildings containing coal processing and conveying equipment, coal storage systems, and transfer system operations constructed, reconstructed, or modified on or before April 28, 2008, must not exhibit 20 percent opacity or greater. Fugitive emissions from buildings that enclose coal processing and conveying equipment, coal storage systems, and coal transfer system operations constructed, reconstructed, or modified after April 28, 2008, must not exhibit opacity of 10 percent or more. For buildings enclosing coal processing and conveying equipment, coal storage systems, and transfer system operations constructed, reconstructed, or modified after April 28, 2008, that discharge emissions from a mechanical vent, emissions must not contain PM in excess of 0.023 g/dscm (0.010 gr/dscf).

4. Open Storage Pile Requirements

EPA's May 27, 2009, supplemental action proposed to establish work practice standards for open storage piles and roadways. EPA determined that it was not feasible to establish opacity or PM limits for these types of affected facilities. At the current time, EPA believes it is difficult and prohibitively expensive to measure actual PM emissions from individual open storage piles or roadways. Further, the size of open storage piles and the mobile nature of coal dust from vehicle tires on roadways currently make the use of Method 9 opacity observations unreasonable in many situations. Based on that determination, we proposed to require owners or operators of open storage piles and roadways associated with coal preparation plants to develop and comply with a fugitive coal dust emissions control plan to control fugitive PM emissions. Commenters pointed out that the Surface Mining Control and Reclamation Act (SMCRA) covers fugitive dust emissions from roads at coal preparation and processing plants at mine sites and requires a fugitive dust plan. EPA believes that coal moving operations, once the coal enters the "coal preparation plant," will be by conveyor rather than by truck. Therefore, we believe that the requirements of SMCRA are sufficient to address air emissions from roadways that may be found within a coal preparation and processing plant at mine sites. For coal preparation and processing plants at end-user facilities, we believe that, again, once the coal enters the "coal preparation plant," coal moving operations will be by conveyor rather than by truck. Thus, EPA has decided not to finalize the proposed requirements for roadways. EPA also proposed to require that the fugitive coal dust emissions control plan include procedures for limiting emissions from all types of "coal processing and conveying equipment" at a coal preparation and processing plant. EPA agrees with commenters that subpart Y should specifically designate each type of affected facility subject to the fugitive dust emissions control plan and, therefore, we are not finalizing that proposed requirement.

A fugitive coal dust emissions control plan is required for open storage piles, which include the equipment used in the loading, unloading and conveying operations of the affected facility, constructed, reconstructed or modified after May 27, 2009. The owner or operator is required to prepare and operate in accordance with a submitted fugitive coal dust emissions control plan that is appropriate for the site conditions. The fugitive coal dust emissions control plan must identify and describe the control measures the owner/operator will use to minimize fugitive coal dust emissions from each open storage pile. The owner or operator is also required to explain how the measures are applicable and appropriate for the site conditions. For open coal storage piles, the fugitive coal dust emissions plan must require that one or more of the following control measures will be used to minimize to the greatest extent practicable fugitive coal dust: locating the source inside a partial enclosure, installing and operating a water spray or fogging system, applying appropriate chemical dust suppression agents on the source (when additional provisions discussed below are met), use of a wind barrier, compaction, or use of a vegetative cover. The owner or operator must select, from the list provided, the control measures that are most appropriate for the site conditions. Where appropriate chemical dust suppression agents are selected by the owner/operator as a control measure to minimize fugitive coal dust emissions, only chemical dust suppressants with Occupational Safety and Health Administration (OSHA)-compliant material safety data sheets (MSDS) are allowed, the MSDS must be included in the fugitive coal dust emissions control plan, and the owner/operator must consider and document in the fugitive coal dust emissions control plan the site-specific impacts associated with the use of such chemical dust suppressants (*e.g.*, water run-off, water quality concerns).

An owner/operator may petition the Administrator requesting approval of a control measure other than those specified above. The petition process established in the final rule is similar to the process used in 40 CFR Part 60, subpart Db, to establish alternative NO_X limits for certain industrial boilers. The petition must demonstrate to the Administrator that the alternate control measure will provide equivalent overall environmental protection or that it is either economically or technically infeasible for the affected facility to use the control measures specified above. The owner/operator must operate in accordance with the plan including the alternative measures and, while operating in accordance with the plan submitted with the petition, is deemed to be in compliance with the fugitive coal dust emissions control plan requirements while the petition is pending. EPA decided to include this petition process in the final rule in response to comments objecting to provisions proposed in the May 2009 supplemental proposal that would have provided for permitting authority approval of the fugitive coal dust emissions control plans and allowed the permitting authorities to approve the use of alternate technologies if it had been determined that the technology provides equivalent overall environmental protection.

Each owner/operator must submit their fugitive coal dust emissions control plan to the Administrator or delegated authority to provide an opportunity for the Administrator or delegated authority to object to the fugitive coal dust emissions control plan. The fugitive coal dust emissions control plan must be submitted to the Administrator or delegated authority prior to the startup date for the affected facility. If an objection is raised, the

owner/operator has 30 days from receipt of the objection to submit a revised fugitive coal dust emissions control plan. The owner/operator must operate in accordance with the revised fugitive coal dust emissions control plan. The Administrator and delegated authority retain the ability to object to the revised fugitive coal dust emissions control plan.

C. Emissions Testing and Monitoring Requirements

Based on our review of public comments submitted in response to the May 27, 2009, supplemental proposal and further analysis, minor revisions were made to certain emissions testing and monitoring requirements included in that supplemental proposal. The testing and monitoring requirements of the final rule are described below. All affected facilities subject to emissions limits are required to conduct initial emissions testing to show compliance with the limits included in the final rule. PM emissions must be measured with EPA Method 5, 5B, or 5D of 40 CFR Part 60, appendix A–4, or EPA Method 17 of 40 CFR Part 60, appendix A–7. EPA Method 6, 6A, or 6C of 40 CFR Part 60, appendix A–4, must be used to measure SO_2 emissions. NO_X and CO emissions must be measured with EPA Method 7 or 7E, and Method 10, respectively, of 40 CFR Part 60, appendix A–4. In addition, CO and NO_X performance testing must be conducted concurrently, or within a 60-minute period. Initial testing for PM emissions is required for coal-handling equipment exhaust that is mechanically vented and for thermal dryer exhaust. Depending on the type of thermal dryer and its fuel type, initial testing for SO_2, NO_X, and CO may also be required. Following initial performance testing, the frequency of subsequent emissions testing is variable. If an affected facility, excluding thermal dryers, has a design controlled potential PM emissions rate, considering controls, of 1.0 Mg (1.1 tons) per year or less, annual performance testing is not required as long as: (1) PM emissions, as determined by the initial performance test, are less than or equal to the applicable PM limit; (2) the manufacturer's recommended maintenance procedures for each control device are followed; and (3) all 6-minute average opacity readings from the most recent Method 9 performance test are equal to or less than half the applicable opacity limit.

In addition, for similar, separate affected facilities using identical control equipment, the Administrator or delegated authority may authorize a single emissions test as adequate demonstration for up to four other similar, separate affected facilities as long as: (1) The most recent performance test for each affected facility shows that performance of each affected facility is 90 percent or less of the applicable emissions limit; (2) the manufacturer's recommended maintenance procedures for each control device are followed; and (3) each affected facility conducts a performance test for each pollutant for which they are subject to a limit at least once every 5 years. Affected facilities that, based on their most recent performance test, emit at a level that is 50 percent or less of an applicable emissions limit are only required to conduct performance testing every 24 months, as opposed to every 12 months. Finally, an owner/operator of an affected facility that has not operated for the 60 calendar days prior to the due date of a performance test is not required to perform the performance test until 30 calendar days after the next operating day.

The final rule requires the use of bag leak detection systems on subpart Y affected facilities with fabric filters that have a design controlled potential PM emissions rate of 25 Mg (28 tons) or more. This requirement applies to affected facilities constructed, reconstructed, or modified after April 28, 2008. For affected facilities with venturi scrubbers, continuous measurement of the pressure loss through the venturi constriction of the scrubber and of the liquid flow rate to the scrubber is required. If the venturi scrubber is used to control SO_2 emissions, pH of the scrubber liquor also must be continuously measured. For affected facilities using packed bed scrubbers with the addition of lime, the liquid flow rate to the scrubber and the scrubber liquor pH must be continuously measured. The final rule does not require continuous measurement of the temperature of the gas stream at the exit of the thermal dryer for affected facilities constructed, reconstructed, or modified after April 28, 2008. In the supplemental proposal, EPA requested comment on the utility of collecting continuous temperature data and determined that the requirement can be eliminated without risk of a significant increase in emissions.

D. Opacity Testing and Monitoring Requirements

Numerous comments were submitted to EPA regarding the opacity testing and monitoring requirements included in the May 27, 2009, supplemental proposal. Commenters objected to the proposed procedures as being unreasonable, burdensome, too complex, and confusing. Based on our review of public comments and further analysis, we modified the proposed requirements where we determined the burden could be reduced without compromising the integrity of the overall testing and monitoring requirements. We also attempted to make the requirements in the final rule less complex than those included in the supplemental proposal. All affected facilities subject to emissions limits are required to conduct initial emissions testing to show compliance with the opacity limits included in the final rule. Opacity must be measured with EPA Method 9 of 40 CFR part 60, appendix A–4. The final rule allows the use of a continuous opacity monitoring system (COMS) as an alternative to all other opacity monitoring requirements. The final rule includes a 60-minute observation period for Method 9 performance testing. The observation period may be decreased from 60 minutes to 30 minutes if, during the initial 30 minutes of the observation of a Method 9 performance test, all the 6-minute averages are less than or equal to half the applicable opacity limit. In the final rule, the frequency of subsequent visible emissions testing is based on the 6-minute average opacity readings from the most recent performance test. Owners/operators of affected facilities where any 6-minute average opacity reading in the most recent Method 9 performance test exceeds half the applicable opacity limit are required to conduct a Method 9 performance test within 90 days of the previous performance test. Owners/operators of affected facilities where all 6-minute average opacity readings in the most recent Method 9 performance test are equal to or less than half the applicable opacity limit are required to conduct a Method 9 performance test within 12 months of the previous performance test. Further, if a Method 9 opacity performance test is conducted concurrently with (or within a 60-minute period of) a Method 5, 5B, or 5D PM performance test for affected sources with wet scrubbers that continuously monitor the specified scrubber parameters, no subsequent Method 9 opacity performance testing is required. The final rule allows simultaneous Method 9 opacity performance testing for up to three emissions points as long as all three emissions points are within a 70-degree viewing sector or angle in front of the observer such that the proper sun position can be maintained

for all three points. If an opacity reading for any one of the three emissions points is within 5 percent opacity from the applicable standard (excluding readings of zero opacity), the observer must stop taking readings for the other two points and continue reading just that single point.

As an alternative to subsequent Method 9 performance testing, the final rule allows owners/operators of affected facilities to elect to conduct monitoring as follows: (1) Monthly visual observations of process and control equipment must be conducted and, if any deficiencies are observed, the necessary maintenance must be performed as expeditiously as possible; and (2) daily walkthrough observations consisting of a single 15-second observation (*i.e.,* visible emissions or no visible emissions) of each affected facility must be conducted and, if any visible emissions are observed, within 24 hours corrective actions must be conducted and the owner/operator must demonstrate that there are no visible emissions. If visible emissions are still observed, a Method 9 performance test must be conducted within 45 operating days to show compliance with the applicable opacity limit. The final rule requires that Method 9 performance testing must be conducted at least once every 5 years for each affected facility complying with this alternative monitoring option. Each observer determining the presence of visible emissions is required to meet the training requirements of Method 22 of appendix A–7 of 40 CFR Part 60. The final rule also allows the use of a digital opacity monitoring system in lieu of subsequent Method 9 performance testing. The Administrator may approve opacity monitoring plans for owners/operators that elect to use the digital opacity monitoring system to detect the presence of visible emissions.

The final rule includes separate opacity testing and monitoring requirements for coal truck dump operations. EPA determined that a different approach for Method 9 opacity performance testing is warranted due to the intermittent nature of coal truck dumping. Coal truck dump operations are subject to the same opacity limits as other coal handling operations. The final rule specifies that compliance with the opacity limit is determined by averaging all Method 9 15-second opacity readings made during the duration of three separate truck dump events. A truck dump event commences when the truck bed begins to elevate and concludes when the truck bed returns to a horizontal position. The final rule requires monthly visual observations of the truck dump equipment and, if any deficiencies are observed, the necessary maintenance must be conducted as expeditiously as possible. Subsequent Method 9 opacity performance testing using the three truck dump procedure is required to be conducted every 90 days.

E. Recordkeeping and Reporting Requirements

The final rule requires that a logbook be maintained by each owner/operator of a coal preparation and processing plant that commences construction, reconstruction, or modification after April 28, 2008. The logbook must include records of subpart Y requirements regarding manufacturers' recommended maintenance procedures for process and control equipment, visual observations of coal-handling equipment, the amount and type of coal processed, the amount of chemical stabilizer or water purchased, the operational status of dust suppressant systems, compliance with a fugitive coal dust emissions control plan, BLDS operation, and measurement of monitoring parameters (*e.g.,* scrubber pressure loss, water supply flow rate, pH of scrubber fluid).

F. Electronic Reporting

The final rule requires owners/operators of affected facilities at coal preparation and processing plants to submit an electronic copy of all performance test reports to an EPA electronic data base (WebFIRE). Data entry requires access to the Internet and is expected to be completed by the stack testing company as part of the work that they are contracted to perform. Submittal to WebFIRE is required as of July 1, 2011. For performance tests not accepted by WebFIRE, owner/operators are required to mail summary results directly to EPA.

G. Additional Amendments

The final rule confirms the subpart Y title change from *Coal Preparation Plants* to *Coal Preparation and Processing Plants.* In addition to revising the definitions for coal, pneumatic coal-cleaning equipment, and thermal dryer as described in section III.A of this preamble, the final rule amends the definition for bituminous coal; adds definitions for anthracite, bag leak detection system, coal refuse, design controlled potential emissions rate, indirect thermal dryer, lignite, mechanical vent, operating day, potential combustion concentration, and subbituminous coal; and deletes the definition for cyclonic flow. The definition of coal refuse in the final rule has been modified to be consistent with the definition of coal refuse in 40 CFR part 60, subpart Da. Also, EPA is not finalizing the April 28, 2008, proposed revision to the definition of coal processing and conveying equipment, but is clarifying that equipment located at the mine face is not considered to be part of the coal preparation plant. In addition, the May 27, 2009, proposed revision to the definition of coal storage system is also not being promulgated. Rather, the final rule adds a definition for open storage pile.

IV. Summary of Significant Comments and Responses

As explained in Section II of this preamble, EPA proposed amendments to the coal preparation plants NSPS on April 28, 2008, (73 FR 22901) and received a total of 42 comments from coal preparation plants, industry trade associations, control technology vendors, environmental groups, and State environmental agencies. After reviewing those comments and considering additional data, EPA decided to publish a supplemental proposal (*see* 74 FR 25304, May 27, 2009) which revised some of the requirements proposed on April 28, 2008. A total of 44 comments regarding the supplemental proposal were received from coal preparation plants, other types of industrial facilities, industry associations, environmental groups, and State environmental agencies. Responses to comments regarding the April 28, 2008, proposal are not discussed in this preamble. In many instances, the May 27, 2009, supplemental proposal either addressed the comment or made revisions that negated the comment. Significant comments received regarding the May 27, 2009, supplemental proposal and EPA's responses to those comments are discussed below. Detailed responses to the comments not included in this preamble, including responses to the comments regarding the April 28, 2008, proposal, are contained in the Summary of Public Comments and Responses document which is included in the docket for this rulemaking.

A. Regulated Pollutants

Comment: Many commenters stated that EPA's authority to promulgate NSPS requires an endangerment finding for the coal preparation plant source category and the pollutant(s) of interest. Because EPA has not made such a finding for SO_2, NO_X, or CO emissions from coal preparation plants, the commenters contend that emissions standards for SO_2, NO_X, or CO

applicable to coal preparation plants under subpart Y cannot be set.

Response: CAA section 111(b)(1)(A) requires the Administrator to publish a list of categories of stationary sources and include a category of sources on that list if he finds that "in his judgment it causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. 7411(b)(1)(A) (CAA section 111(b)(1)(A)). The plain language of section 111(b)(1)(A) provides that such findings are to be made for source categories, not for specific pollutants emitted by the source category. Therefore, once the Administrator determines that the source category causes or contributes significantly to air pollution which may endanger public health or welfare, the Administrator must add the source category to the section 111(b)(1)(A) list and subsequently establish standards of performance for the sources in that source category. Determinations regarding the specific pollutants to be regulated are made, not in the initial endangerment finding, but at the time the performance standards are promulgated. In addition, CAA section 111(b)(1)(B) requires EPA to review and revise, if appropriate, the standards at least every eight years. In conducting that review, EPA has discretion to revisit its original determination regarding which pollutants emitted from the source category should be regulated. Neither the text of the CAA nor subsequent statements of EPA provide any support for the argument that an endangerment finding must be made for specific pollutants or for the argument that the scope of the revised NSPS must be limited to the pollutants (or affected facilities) regulated in the initial NSPS.

The text of section 111(b)(1)(A) provides no support for the argument that section 111 endangerment findings must be made for each pollutant emitted by the source category before that pollutant can be regulated in the NSPS. In contrast, the statutory text calls for a list of "categories of stationary sources." It does not require, at the time of listing, an identification of all the specific pollutants emitted by the source category that may endanger public health or welfare. Instead, it requires only a general determination that emissions from the category cause or contribute to air pollution that may endanger public health or welfare. The endangerment finding is used to identify categories of sources for regulation, not to dictate the substantive content of the required standards of performance. The endangerment finding neither requires regulation of each pollutant emitted by the source category, nor limits EPA's discretion to determine (in the initial regulation or in subsequent revisions) which pollutants should be regulated.

Instead, section 111(b)(1)(B) requires the Administrator, after publishing proposed regulations and providing an opportunity for comment, to promulgate such standards as the Administrator "deems appropriate." The statutory scheme thus provides EPA with significant discretion to determine which pollutant(s) should be regulated under the NSPS. The Agency has long interpreted section 111(b)(1)(B) as providing the Administrator with this flexibility. *See National Lime Assoc.* v. *EPA,* 627 F.2d 416, 426 n.27 (DC Cir. 1980) (explaining reasons for not promulgating standards for NO_X, SO_2 and CO from lime plants); *see also National Assoc. of Clean Air Agencies* v. *EPA,* 489 F.3d 1221, 1228–1230 (DC Cir. 2007) (finding that the "deems appropriate" language in CAA section 231 provides a "delegation of authority" that is "both explicit and extraordinarily broad").

EPA has, in prior NSPS rulemakings, exercised its discretion to identify pollutants for regulation. It has sometimes exercised this discretion to defer regulation of specific pollutants to a later date. *See, e.g.,* 52 FR 36678, 36682 (September 30, 1987) (noting in subpart DDD proposal that "standards development for this industry is focusing initially on limiting emissions of VOC"); 49 FR 2656, 2659 (Jan 20, 1984) (explaining why SO_2 and VOC were the only pollutants in the natural gas production industry selected for regulation under subpart LLL "at this time."); 48 FR 37338, 37340–42 (Aug. 17, 1983) (declining to regulate in subpart AAa, emissions of pollutants for which adequately demonstrated control technology was not currently available). EPA has also exercised this discretion to promulgate, during 8-year review rulemakings, new performance standards for pollutants not previously covered by the NSPS in question. *See, e.g.,* 52 FR 24624, 24710 (July 1, 1987) (considering PM_{10} controls in future rulemakings); 71 FR 9866 (Feb. 27, 2006) (establishing new PM standards for boilers); 73 FR 35838 (June 24, 2008) (adding NO_X limits for fluid catalytic cracking units, NO_X limits for fluid coking units and NO_X limits for process heaters to the refineries NSPS). In addition, EPA has previously noted its disagreement with comments implying that an additional endangerment finding would be required to support regulation of a pollutant not previously regulated in that specific NSPS. *See, e.g.,* 73 FR 35838, 35859 n2 (June 24, 2008).

Further, the argument that EPA must issue a separate endangerment finding before regulating a pollutant not previously regulated in the NSPS for a source category is illogical. Once EPA has determined that a source category causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare emissions from a source category, the recognition that the source has emissions above and beyond those discussed in the original endangerment finding could only serve to strengthen the basis for the endangerment finding for the source category. Further, the listing of the source category is only the first step in the process. Once the finding is made, the statute allows the more detailed analysis of which pollutants are actually emitted and should be regulated to be conducted in the rulemaking process used promulgate and revise the standards for the source category.

Finally, it is worth noting that EPA previously addressed this topic in the context of the subpart Y NSPS for coal preparation and processing plants. Coal preparation plants were listed under section 111(b)(1)(A) on October 24, 1974, pursuant to the Administrator's determination that such plants "may contribute significantly to air pollution which causes or contributes to the endangerment of public health or welfare." 39 FR 37,807 (Oct. 24, 1974). The Background Information Document for the subpart Y standards proposed at that time explains the process to be used for setting NSPS and explicitly notes that "[a]lthough a source category may be selected to be covered by a standard of performance, treatment of some of the pollutants of facilities within that source category may be deferred." Background Information for Standards of Performance: Coal Preparation Plants Volume 1: Proposed Standards at ix.

For these reasons, EPA disagrees with the comment suggesting that EPA cannot set SO_2, NO_X, or CO emissions standards applicable to coal preparation plants under subpart Y.

Comment: One commenter stated that EPA should recognize its obligation to promulgate NSPS for emissions of carbon dioxide (CO_2), nitric oxide (N_2O), and black carbon (a component of PM) from coal preparation and processing plants. The commenter asserts that because these pollutants are the result of incomplete fuel combustion, they are emitted at coal prep plants, particularly by thermal dryers heated by coal or other fossil fuels. Emissions of each pollutant, the

commenter asserts, carries individual and distinct risks and is controlled by different technologies so EPA must fully analyze each pollutant and set separate NSPS for each.

Response: At this time EPA is not aware of any emissions or mitigation data for the pollutants noted by the commenter for this source category. Hence, we lack sufficient information on which to base an NSPS for emissions of CO_2, N_2O, and black carbon from the source category at this time. Rough estimates of CO_2 from this source category suggest that this source category would be among the smaller CO_2-emitting NSPS categories. At this time, we are not making any final determination regarding whether it would be appropriate to set such standards.

In addition, to the extent the comment suggests that EPA should utilize its authority under other provisions of the CAA to require sources to gather and report GHG emissions and to the extent it raises issues not opened for public comment in the supplemental proposal, it is beyond the scope of this rulemaking.

Comment: One commenter asserts that CAA section 111 carries a mandate for EPA to set NSPS for the pollutants emitted by a source. The commenter cites to language in section 111(a)(3) that defines a stationary sources as any building, structure, facility or installation which emits or may emit any air pollution and language in section 111(b)(4) defining a modification as a physical or operational change which increases the amount of any air pollution emitted by the source. In addition, the commenter cites to the Supreme Court's decision in *Massachusetts* v. *EPA,* 549 U.S. 497, 529 (2007) and EPA's April 2009 Proposed Endangerment and Cause or Contribute Findings for Greenhouse Gases (74 FR 18886 (Apr. 24, 2009)).

Response: The Agency has long exercised its discretion to regulate only a subset of the pollutants emitted by a source category or to defer regulation of certain pollutants to a later date. *See e.g., National Lime Assoc.* v. *EPA,* 627 F.2d 416, 426 n.27 (DC Cir. 1980) (explaining reasons for not promulgating standards for NO_X, SO_2, and CO from lime plants); *National Assoc. of Clean Air Agencies* v. *EPA,* 489 F.3d 1221, 1228–1230 (DC Cir. 2007) (finding that the "deems appropriate" language in CAA section 231 provides a "delegation of authority" that is "both explicit and extraordinarily broad"); 52 FR 36678, 36682 (September 30, 1987) (explaining Subpart DDD standards' initial focus on limiting emissions of VOC); 49 FR 2656, 2659 (January 20, 1984) (explaining Subpart LLL regulates only emissions of SO_2 and VOC); 48 FR 37338, 37340–42 (August 17, 1983) (explaining why Subpart AAa does not regulate emissions of pollutants for which adequately demonstrated control technology was not currently available).

B. Applicability and Definitions

Comment: Many commenters stated that EPA proposed to add "processing" to the title of subpart Y and, although EPA indicated in the preamble to the May 27, 2009, supplemental proposal, that it did not intend to change the applicability of subpart Y, the commenters are concerned that EPA has not adequately justified the need to make the change. Subpart Y already defines "processing equipment" as "machinery used to reduce the size of coal or to separate coal from refuse." Despite EPA's stated intentions, commenters believe that the risk exists that EPA, in future applicability interpretations, will determine that additional, non-preparation operations meet the meaning of processing, and will thereby bring them under subpart Y purview. To avoid confusion, the commenters stated that EPA should remove "processing" from the title.

Response: In the preamble to the supplemental proposal, EPA indicated that the proposed title change was for clarification purposes (*i.e.,* to more accurately reflect the affected facilities subject to subpart Y). The affected facilities covered by subpart Y since its 1976 promulgation include both preparation and processing units. We do not intend the title change to have any impact on the extent of EPA's authority to regulate specific affected facilities now or in the future. The final action promulgates the proposed title change "Standards of Performance for Coal Preparation and Processing Plants."

Comment: Many commenters acknowledged that in its May 27, 2009, supplemental action, EPA proposed to amend the definition of "coal" to include "coal refuse" and "petroleum coke." These commenters objected to EPA's proposed inclusion of "coal refuse" because its inclusion further expands the subpart Y applicability with no data specific to "coal refuse" on what constitutes adequately demonstrated technologies and their respective levels of achievable emissions. Specifically, one commenter is concerned that subpart Y's definition of "coal refuse" could create the potential for the unintended application of such definition to the overburden from surface mines or to mine-development waste associated with underground mining. The commenter stated that the final rule must make clear that the definition of "coal refuse" does not apply to these types of operations and suggested using the SMCRA definition instead (Coal refuse is defined as "any waste coal, rock, shale, slurry, culm, gob, boney, slate, clay and related materials, associated with or near a coal seam, which are either brought aboveground or otherwise removed from a coal mine in the process of mining coal or which are separated from coal during the cleaning or preparation operations. The term includes underground development wastes, coal processing wastes, excess spoil, but does not mean overburden from surface mining activities"). In contrast, several other commenters stated either that they support, or that they have no objections to, including "coal refuse" in the definition of "coal" for subpart Y.

Response: EPA is including "coal refuse" in the final rule's definition of "coal" for the purposes of subpart Y because it is handled in the same machinery as other types of coal at coal preparation and processing plants. "Coal refuse" is separately defined, as well as included in the definition of "coal" in other NSPS (*e.g.,* 40 CFR part 60 subparts Da and Db), and its inclusion here provides consistency with other EPA regulations. EPA has modified the definition of "coal refuse" in subpart Y to be consistent with the definition in 40 CFR subpart Da. Given the historical inclusion of "coal refuse" in these other NSPS and the fact that the constituents and emission characteristics of "coal" and "coal refuse" are believed to be the same, EPA has concluded that inclusion of "coal refuse" in subpart Y is appropriate.

Comment: Many commenters objected to EPA extending the applicability of subpart Y to facilities producing petroleum coke by adding "petroleum coke" to the subpart Y definition of "coal". They noted that the emission standards in the May 27, 2009, supplemental proposal appear to have been developed primarily for coal processing plants, and do not seem to reflect the differences between coal and petroleum coke, or contemplate the emissions associated with petroleum coke handling operations. Without more information on these emissions, the commenters contend that it is inappropriate for EPA to broaden the definition of "coal" to include "petroleum coke" in this final rulemaking at this time. However, if "petroleum coke" is included, several commenters recommended petroleum

coke operations that should be specifically exempted from being subject to subpart Y. Reasons cited by commenters include: (1) "Petroleum coke" is a petroleum product that should not be subject to a rule (*i.e.,* NSPS subpart Y) intended to pertain to standards of performance for coal preparation and processing plants; (2) petroleum refining operations that include petroleum coke production are subject to numerous NSPS rules to ensure protection of public health and the environment, to two separate maximum achievable control technology (MACT) rules specific to air emissions from process units, including petroleum coke production, and to the NSR permitting process to ensure compliance with National Ambient Air Quality Standards (NAAQS) for PM; (3) EPA did not provide adequate notice that petroleum coke manufacturing equipment (*e.g.,* refinery coker units) was being considered for new standards; (4) EPA neither gathered or requested data to determine if petroleum coke manufacturing equipment should be included in the affected sources subject to subpart Y; and (5) standards for coal processing and conveying equipment, coal storage systems, and transfer and loading system operations are not suitable for petroleum coke.

Two commenters suggested that EPA change the approach to include end-user petroleum coke processing in the existing NSPS for Coal Preparation and Processing Plants by retaining the existing definition of "coal" and adding "petroleum coke" as a separate material with associated provisions. If EPA expands the source category by including facilities that handle only "petroleum coke" (and not "coal"), the commenters believe it should do so only for end-users of "petroleum coke" used as fuel. Numerous commenters presented arguments that petroleum coke calciners are not same as coal thermal dryers and, therefore, believe it is inappropriate to apply the subpart Y thermal dryer standards to coke calciners. The commenters explained that the purpose and function of a petroleum coke calciner is to fundamentally change the material by rearranging carbon molecules and, thus, it acts as a reactor, not a "dryer". In addition, commenters noted that calciners in the petroleum industry operate at much higher temperatures than typical coal dryers, intuitively would have different emission profiles, and use different methods than coal thermal dryers to control PM emissions.

Response: Based on a review of the comments received and because of the limited amount of currently available data, EPA has decided not to include "petroleum coke" in the subpart Y definition of "coal" at this time. EPA plans on obtaining additional data on petroleum coking activities at petroleum refineries through current actions on the refinery NSPS review (40 CFR part 60 subpart J). In addition, additional data will also be obtained on petroleum coke activities at end-user locations (*e.g.,* coal-fired power plants).

Comment: Several commenters supported EPA's proposal to distinguish between indirect and direct contact thermal dryers. The commenters anticipate that more electric utilities will use indirect contact thermal dryers in the future. Commenters agreed with EPA's decision to exclude indirect thermal dryers from the coal dryer SO_2 and NO_X/CO standards "[i]f the source of heat (the source of combustion or furnace) is subject to a boiler NSPS (subpart Da, Db, or Dc). However, one commenter stated that in the case of one facility, the waste heat being used for the facility's coal dryer does not come from the exhaust gases of a boiler, but rather from the condensing water from steam turbines. In that case, there is no affected source to which the combustion pollutant emission limits can apply. Thus, the commenter agreed that the thermal dryer would only be subject to the PM limit, but not because it is subject to another NSPS. The commenter further stated their belief that subpart Y coal dryer emission limits should not apply to the source of heat for an indirect thermal dryer.

Response: It is EPA's intent to regulate, at this time, emissions from thermal dryers only in circumstances where coal, coal refuse, or residual oil are used to provide thermal input. Thermal dryers that use residual or waste heat from the combustion of these fuels are only subject to the PM and opacity standards. As pointed out by the commenters, indirect thermal dryers for which the source of heat is subject to a boiler NSPS are not subject to the emission limits for SO_2 and NO_X/CO because those pollutants would not be present in the thermal dryer exhaust. In addition, EPA has concluded that affected thermal dryers for which all of the thermal input is supplied by gaseous fuels (*e.g.,* blast furnace gas, coke oven gas, natural gas) or distillate oil also should not be subject to the emission limits for SO_2 and NO_X/CO. Those pollutants are relatively small from these types of thermal dryers and the testing requirements will not result in any emissions reductions. As is the case with the facility described by the commenter, if there is no combustion process providing the heat for the dryer, then there is no practicality in having emission limits for SO_2 and NO_X/CO.

Comment: Several commenters stated that emissions from thermal dryers integrated with in-line coal mills at cement manufacturing plants should not be subject to subpart Y and instead be subject to the standard for the affected facility as part of the cement manufacturing process. According to the commenters, the unique coal processing and handling systems found at Portland cement plants are best addressed by the Portland Cement NSPS (40 CFR part 60, subpart F) and NESHAP (40 CFR part 63, subpart LLL). The commenters requested that the subpart Y definition of "thermal dryer" be revised to read "Thermal dryer does not include drying of coal that occurs intentionally or incidentally in the manufacture of Portland cement through direct or indirect contact with hot gases generated by cement manufacturing process units, such as cement kilns, preheaters, precalciners, or clinker coolers." Commenters explained that this approach would (a) clearly distinguish between separately fired, stand-alone thermal dryers that are located at a cement plant, versus thermal dryers or coal mills that are integrated into a cement manufacturing line, and (b) avoid any potential confusion about incidental drying of coal that occurs in the cement-making process. Reasons presented by commenters to support the requested exemption are summarized below.

- In a 1995 determination, EPA stated that when "gases originate in one affected facility and pass through another affected facility as part of the manufacturing process, EPA applies the standard for the affected facility from which the gases are discharged directly into the atmosphere." [Applicability Determination 9600082 "Alternative Monitoring and Opacity Limit Clarification for San Juan Cement Company," John B. Rasnic (May 12, 1995)]. However, a year later EPA qualified this guidance when it concluded that an in-line raw mill was subject to the 40 CFR part 60, subpart F, kiln standards, stating "This determination clarifies that for dry process Portland cement plants with an "in-line" kiln/raw mill configuration, the raw mill does not exist as a separate affected facility and; hence, the appropriate emission limit is that which applies to the kiln." [Applicability Determination 9600083; "Opacity Limitation for 'In-line' Portland Cement Plants," John B. Rasnic (September 7, 1996)].
- Just as emissions from the in-line raw mill in Applicability Determination

9600083 were subject to 40 CFR Part 60, subpart F, NSPS, PM mass and opacity limitations for cement kilns, so should emissions from an in-line coal mill at a cement plant where kiln gases are used to heat and dry the coal be treated as an extension of the kiln and subject to subpart F NSPS and 40 CFR Part 63, subpart LLL, NESHAP cement kiln PM and opacity limits. This approach is consistent with multiple different applicability determinations stating that kiln exhaust gases are subject to the Portland cement NESHAP (40 CFR part 63, subpart LLL) regardless of whether they are routed through the coal mill prior to discharge to the atmosphere. It is also consistent with the data that EPA has reviewed in establishing the proposed subpart Y limits. In the absence of data related to emissions from in-line coal mills, EPA would not have a rational basis supported by evidence in the record for establishing limits that apply to these unique gas streams.

• As Portland cement plants have striven to increase energy efficiency, a common plant configuration has been to employ kiln exhaust gas or heated gas from the plant's clinker cooler to thermally dry coal before it is combusted. Cement kiln exhaust gas is extremely hot, and one of the primary means of improving energy efficiency has been to route this gas back through the process to extract as much heat as reasonably possible. Likewise, the product leaving the kiln (referred to as clinker) will enter a cooling area where gases are blown through the clinker to accelerate the cooling process. In some plants this heated gas is then used to heat the coal entering the combustion process. Both kilns and clinker coolers are affected facilities under 40 CFR part 60, subpart F, NSPS. The use of waste heat from the kiln or the clinker cooler is highly energy efficient, driving down the combustion emissions, including GHG emissions, from the plant as a whole.

• Some cement plants have stand-alone thermal dryers for coal, where the heat for drying is provided by a dedicated combustion source (*e.g.,* coal or natural gas). Those thermal dryers generally should have similar emissions, and similar possibilities for emissions control, as comparable-size thermal coal dryers at other facilities. But where coal drying is integrated into the cement-making process, through direct or indirect exposure of the coal to heat in exhaust gases from units such as cement kilns, preheater/precalciners, or clinker coolers, the emissions from that coal drying, and the potential for controlling those emissions, is very different from a stand-alone thermal dryer.

• To the extent that subpart Y may apply to coal drying that occurs using waste heat from the manufacture of Portland cement, EPA's assessments of control technology and derivation of emission standards under subpart Y have not taken into account cement-process-related loadings of SO_2, NO_X, and CO. EPA has not shown, for example, that it would be feasible for a cement plant to demonstrate compliance with SO_2 mass limits or percent reduction requirements where exhaust gases from coal drying are combined with cement kiln gases, which include SO_2 from fuel consumption and from raw materials. Similarly, NO_X limits that may be achievable through combustion controls on a standalone thermal dryer may not be achievable in exhaust gases mixed with cement kiln gases containing both fuel NO_X and thermal NO_X from the cement-making process.

• The supplemental proposal would not impose SO_2, NO_X, and CO limits on indirect thermal dryers where the source of the heat is subject to NSPS under 40 CFR Part 60, subpart Da, Db, or Dc. Although EPA has not really explained the basis for that exclusion, it is inferred that EPA believes the BDT determinations associated with the NSPS for the source of heat are more appropriate and should be applied. The same rationale should be applied to thermal drying that is incidental to cement manufacturing, and EPA should exclude exhaust gases that are subject to the 40 CFR part 60, subpart F, NSPS from being subject to the subpart Y SO_2, NO_X, and CO limits.

Response: EPA agrees that in the case of a coal dryer at a cement manufacturing facility where all of the thermal input is supplied by cement kiln exhaust or clinker cooler exhaust, the dryer should be regulated under the appropriate Portland Cement kiln regulations (40 CFR part 60, subpart F, and 40 CFR part 63, subpart LLL). This would also imply that any emissions from the thermal dryer are considered as part of the kiln or clinker cooler emissions. The final rule's emissions limits apply to new, reconstructed, or modified thermal dryers at Portland cement manufacturing plants in situations where the thermal input is not supplied by cement kiln or clinker cooler exhaust. Other subpart Y affected facilities located at Portland cement manufacturing plants (*e.g.,* storage systems, conveyors) also are subject to subpart Y.

Comment: One commenter requested that thermal dryers fired with process gases at integrated iron and steel plants be exempted from the subpart Y emission limits for SO_2 and NO_X/CO. Reasons presented by commenter to support the requested exemption are summarized below.

• The pulverized coal injection systems at some integrated iron and steel plants also burn process gases (*i.e.,* blast furnace gas or coke oven gas) as the primary fuel in thermal dryers. These process gases are valuable substitutes for other sources of purchased energy and are produced on-site. However, they have lower heating values than natural gas and must be consumed on-site to be utilized most effectively, or be flared. As is the case for waste heat, the use of these gases improves overall plant energy efficiency and reduces GHG emissions and should not be discouraged by applying unachievable emission limits when used for thermal drying of coal.

• The use of these process gases for coal drying will not generate any more emissions than if the gases are combusted elsewhere or flared. Instead, if the process gases burned for coal drying were replaced entirely by burning natural gas, emissions (mainly NO_X and CO) from the integrated iron and steel plant would actually increase. Establishing emission limits for thermal dryers using these process gas fuels will only serve to discourage their use.

• The proposed subpart Y standards are based on the assumption that thermal dryers located at traditional mine sites and coal preparation plants are typically fired with coal, but in the examples noted above, other fuels are normally used. At the very least, the final rule should include a provision to allow operators of thermal dryers fired by natural gas, waste heat, or process gases to apply for a variance upon demonstration that emissions of SO_2, NO_X, CO and/or PM are well below the prescribed standards. Upon such a demonstration, monitoring requirements for these pollutants should be reduced or eliminated.

Response: As previously noted, EPA has maintained that coal preparation and processing plants may be found at industrial sites such as those described by the commenter. In the Response to Comments document for the October 24, 1974, proposal, EPA stated "[t]he specific coal processing operations regulated by these standards are affected regardless of whether they are located in coal liquefaction plants, power plants, coke ovens, *etc.*" (*see* "Background Information for Standards of Performance: Coal Preparation Plants; Volume 3: Supplemental Information. January 1976. p. 22). Thus, EPA has not

changed its interpretation. In addition, EPA has made no assumptions as to the source of the heat used in the thermal dryer as the commenter suggests. However, as noted above for Portland cement plants, EPA agrees that in the case of an affected source at an integrated iron and steel manufacturing facility, where the emissions from the thermal dryer would be considered as part of the blast furnace or coke oven emissions, the facility should be regulated under the appropriate steel mill or coke oven NSPS. As previously explained, EPA's intent at this time is to regulate emissions from a thermal dryer only in circumstances where coal, coal refuse, or residual oil are used as thermal input. Thermal dryers that use residual or waste heat from the combustion of these fuels would only be subject to the PM and opacity standards. Indirect thermal dryers for which the source of heat is subject to SO_2, NO_X, and/or CO limits under another 40 CFR part 60 subpart would not be subject to the emission limits for SO_2 and NO_X/CO. In addition, affected thermal dryers for which all of the thermal input is supplied by gaseous fuels (*e.g.,* blast furnace gas, coke oven gas, natural gas) or distillate oil also would not be subject to the emission limits for SO_2 and NO_X/CO.

C. Subcategorization

Comment: Numerous commenters stated that when establishing standards of performance for new stationary sources under the CAA, section 111(b)(2) authorizes the Administrator to "distinguish among classes, types and sizes within categories of new sources." The commenters requested that the final amendments to subpart Y include a distinction between the regulatory requirements for coal preparation plants associated with coal mines (*i.e.,* the "producers") and for coal preparation plants at coal-fired power plants and large industrial sources such as cement manufacturing and coke ovens (*i.e.,* the "users"). The commenters cited the following regulatory requirement and facility characteristics distinctions between coal producers and coal users to support their request.

- Most new coal-fired power plants as well as large industrial coal-fired sources (*i.e.,* the "users") in the future will be major sources of PM emissions and, therefore, be required to use state-of-the-art control technologies (*i.e.,* best available control technology (BACT)). In contrast, surface coal mines with coal preparation facilities as well as stand-alone coal preparation facilities associated with coal mines (*i.e.,* the "producers") are typically minor sources and will not be subject to BACT under the Prevention of Significant Deterioration (PSD) program but rather to control technology requirements of Minor New Source Review (NSR) programs of individual States. Thus, adoption of industry sectors-based subcategorized emission standards for subpart Y should be considered so that a BACT level of control is not mandated as NSPS for "producers."
- Resource requirements to maintain and demonstrate compliance with the subpart Y emission standards is a function of the number of affected facilities at a particular coal preparation plant. Coal preparation plants of "producers" tend to have more sizing, cleaning and overall "handling" operations than the typical preparation plant at a coal-fired "user." Consequently, as a general rule, the total number of affected facilities at a "producer's" coal preparation plant will be greater than the number of such facilities at the preparation plant of a "user." Moreover, a single affected facility associated with coal mining can frequently have multiple points of fugitive emissions. With more affected facilities per source and more emission points per affected facility, preparation plants associated with coal mining generally will have much greater monitoring/recordkeeping/reporting requirements than will its preparation counterparts at coal-fired "user" sources.
- Fugitive dust from surface coal mines is already regulated by U.S. Department of the Interior regulations in 30 CFR Parts 700–899 under authority of SMCRA, and the existing air pollution control requirements imposed on coal mines by SMCRA must be accounted for. Commenters believe that an EPA examination of SMCRA's dust control requirements in the context of possible NSPS regulation of preparation facilities at coal mines would result in a conclusion that concurrent regulation with similar CAA requirements is not appropriate.

Response: The subpart Y NSPS covers coal preparation and processing plants that may be found, as the commenter notes, both at mine sites ("producers") and at industrial sites ("users"). In the Response to Comments document for the October 24, 1974, proposal, EPA stated "[t]he specific coal processing operations regulated by these standards are affected regardless of whether they are located in coal liquefaction plants, power plants, coke ovens, *etc.*" (*See* "Background Information for Standards of Performance: Coal Preparation Plants; Volume 3: Supplemental Information." January 1976. p. 22.)

Commenters' request that EPA create a separate category for coal preparation and processing facilities at "producers" appears to be based on the assertion that these facilities should not be required to install and operate emissions control technologies that are currently in use or will be used at coal preparation and processing facilities at "users." A primary objective of CAA section 111, however, is to require new sources to be built using the best system of emissions reduction that has been adequately demonstrated. Under CAA section 111, EPA is required to set standards of performance (*i.e.,* standards that reflect the degree of emission limitation achievable through the application of the best system of emission reduction). As the Court has noted, "Section 111 looks toward what may fairly be projected for the regulated future, rather than the state of the art at present, since it is addressed to standards for new plants." *Portland Cement,* 486 F.2d at 391. In developing NSPS standards, EPA must identify all technologies in use or being developed for use to determine that the Administrator determinations have been adequately demonstrated. This analysis must take into account the cost of achieving the reductions and any nonair quality health and environmental impacts and energy requirements. This analysis is separate and distinct from any BACT analysis that may be done for an individual plant. Finally, EPA disagrees with the comment to the extent it suggests that EPA should not consider technologies determined to be BACT for an individual plant in its BDT analyses. Control technologies change and can improve over time and EPA does not believe that it would be appropriate for EPA to ignore these developments when evaluating what currently constitutes BDT for this source category.

The commenters point out that preparation plants associated with coal mining generally have more affected facilities per source and more emission points per affected facility. Commenters have not suggested, however, and EPA has no reason to believe, that the types of emissions from coal preparation and processing sources associated with coal mines differ from the types of emissions from those same source types at "user" facilities. They further have not demonstrated, and EPA has no reason to believe, that emission control technologies that are adequately demonstrated for facilities at "user" facilities would not be adequately demonstrated for use at facilities located at mines. Thus, EPA continues to believe it is appropriate to regulate these

sources in the same manner and sees no need to establish subcategories at this point. Further, the comment could be read to suggest that a separate subcategory should be created for facilities at mines because these facilities are subject to differences in the degree of control required by other regulations or because these facilities are currently achieving different levels of control or using different emission control technologies. EPA does not believe it would be appropriate to create a separate subcategory on these bases. Further, these factors do not affect what technologies could be found to be "adequately demonstrated" or the emission reductions available from those technologies.

In addition, the regulation of fugitive dust from surface coal mines under SMCRA by the Department of Interior does not, as commenters suggest, result in a "conclusion that concurrent regulation with similar CAA requirements would not be appropriate."

The October 1974 Background Information Document stated that "Coal preparation" is a segment of the coal industry that encompasses operations between the mining of raw coal and the distribution of product coal. (*See* "Background Information for Standards of Performance: Coal Preparation Plants; Volume 1: Proposed Standards. October 1974. p. 1.) The support document for the April 1981 NSPS review states that "[t]he first step in the coal preparation process is the delivery of ROM [run of mine] coal to the plant site." (*See* "A Review of Standards of Performance for new Stationary Sources—Coal Preparation Plants. December 1980. p. 2–3.)

EPA's Office of Water has included the following definitions in their regulations for the coal mining industry (at 40 CFR 434.11).

(b) The term "active mining area" means the area, on and beneath land, used or disturbed in activity related to the extraction, removal, or recovery of coal from its natural deposits. This term excludes coal preparation plants, coal preparation plant associated areas and post-mining areas.

(e) The term "coal preparation plant" means a facility where coal is subjected to cleaning, concentrating, or other processing or preparation in order to separate coal from its impurities and then is loaded for transit to a consuming facility.

Thus, EPA, in both the air and water offices, has maintained a distinction between the "active mining area" and the "coal preparation plant." The process of "coal preparation" generally involves, among other things, separation of coal from impurities (*i.e.,* "breaking" or "crushing"). As discussed in the response to comment 3.4.1.1.1 in the Response to Comments Document, EPA interprets the "beginning" of the "coal preparation plant" to be the first hopper (*i.e.,* "drop point") for receipt of coal from any form of transportation.

D. Coal Drying Standards

Comment: Two commenters supported EPA's decisions not to set separate limits for fine PM (FPM) (*i.e.,* $PM_{2.5}$ or PM_{10}) or condensable PM (CPM). In contrast, another commenter rejected EPA's rationale presented in the May 27, 2009, supplemental proposal that EPA cannot set limits applicable to PM_{10}, $PM_{2.5}$, and CPM emissions because EPA has insufficient data and lacks a consistent measurement methodology to collect the needed data. The commenter stated that EPA's failure to gather such data does not excuse EPA from a statutory obligation, that FPM and CPM emissions standards can be set pending resolution of any measurement issues by a future date certain, and, should EPA conclude that an inability to accurately measure emissions of FPM and CPM from dryers renders the implementation of FPM or CPM standards of performance infeasible, EPA must impose a design, equipment, work practice, or operational standard, or combination thereof.

Response: EPA stands by the rationale presented in the May 27, 2009, subpart Y supplemental proposal notice. That is, the available PM emissions data for thermal dryers collected by EPA were measured using EPA Method 5 (*see* 40 CFR 60, appendix A–3). For this method, solid FPM is collected isokinetically on a filter media (typically glass or quartz fiber) and is then measured gravimetrically to determine FPM emissions. Method 5, when performed correctly, provides an accurate measurement of total FPM (for PM > 0.3 μ), but does not measure FPM emissions by particle size distribution (*i.e.,* PM_{10} or $PM_{2.5}$), nor does the method measure CPM. EPA is revising existing test methods, EPA Method 201A—Determination of PM_{10} Emissions (Constant Sampling Rate Procedure) and *EPA Method 202—Determination of Condensible Particulate Emissions from Stationary Sources,* to provide test methods that will accurately measure PM_{10}, $PM_{2.5}$, and CPM from stationary sources such as coal thermal dryers. Amendments to these test methods were proposed on March 26, 2009 (*see* 74 FR 12970). The amendments to Method 201A add a particle-sizing device to allow for sampling of $PM_{2.5}$, PM_{10}, or both PM_{10} and $PM_{2.5}$. The amendments to Method 202 revise the sample collection and recovery procedures of the method to provide for more accurate and precise measurement of CPM. Methods 201A and 202 are not yet finalized and sufficient test data using these methods has not yet been collected for coal-fired thermal dryers. For these reasons, EPA is not currently able to determine whether or not it would be appropriate to add separate PM emission limits to subpart Y for $PM_{2.5}$, PM_{10}, or CPM emissions from coal-fired thermal dryers and would not currently be able to establish national standards to address $PM_{2.5}$, PM_{10}, or CPM emissions.

Comment: One commenter disagreed with EPA's rationale for not setting coal dryer VOC standards. Specifically, the commenter disagrees with (1) EPA's decision to not set standards for VOC and CO that reflect use of a gas recirculation thermal dryers, although EPA asserts that VOC and CO emissions would be minimized because new thermal dryers are likely to use a gas recirculation design; (2) EPA's assertion that not setting a standard for VOC is reasonable because by setting an emissions limit that contains a CO emissions rate, the VOC emissions that result from incomplete combustion also are minimized; and (3) EPA's assertions that VOC standards cannot be established because a method of control beyond combustion controls has not been identified and the variability of VOC emissions from the coal bed preclude determination of a standard that would be achievable nationwide.

Response: EPA has discretion to determine which pollutants are appropriate for regulation in a particular NSPS. In this case, for the reasons noted, EPA concluded that it was not appropriate or feasible to establish a standard of performance for VOC emissions from coal preparation and processing plants at this time. This conclusion does not prohibit EPA from establishing such a standard in a future rulemaking. EPA disagrees with the commenter's suggestion that a standard could be based on oxidation of VOC in a recirculation thermal dryer. As noted elsewhere, EPA has concluded that there is no one thermal dryer design that will work in all situations found within the industries utilizing coal preparation and processing plants. Control of VOC emissions through activated carbon absorption or regenerative thermal oxidizers are not utilized on thermal dryers at coal preparation and processing plants; further, EPA did not have other information showing that

these technologies are adequately demonstrated for use on coal preparation and processing plant sources. VOC emissions vary, in part, due to the variability in volatile contents of the coals being processed; absent demonstrated control technology, this variability can not be addressed through add-on technology as it is with variable sulfur contents of coal. Thus, EPA believes its decision not to establish VOC emission limits under subpart Y at this time is appropriate.

Comment: One commenter stated that the proposed standards for coal drying failed to meet the basic legislative requirements of CAA section 111. The commenter presented the following reasons to support the position that for EPA to comply with CAA section 111, EPA must set standards based on the best demonstrated technologies for drying coal not for the thermal drying of coal through the application of heat generated by coal combustion specifically for that purpose.

• CAA section 111 defines "standard of performance" to mean "a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated" [42 U.S.C. 7411(a)(1))].

• Another provision in CAA section 111 provides that standards of performance must represent the best "technological system of continuous emission reduction," *see, e.g.,* 42 U.S.C. 7411(g)(4), which is defined to include "a technological process for production or operation by any source which is inherently low-polluting or nonpolluting" [42 U.S.C. 7411(a)(7)(A)]. This provision further demonstrates that EPA must evaluate mechanical, indirect, and recirculation dryers, as each is inherently low polluting, in comparison to once-through coal-fired thermal dryers.

• CAA section 111 requires "specific and rigorous limits on the amounts of pollutants that may be emitted." *ASARCO, Inc.* v. *EPA,* 578 F.2d 319, 322 (DC Cir. 1978). The legislative history of this requirement confirms Congress's determination that "[t]he maximum use of available means of preventing and controlling air pollution is essential to the elimination of new pollution problems * * *" S. Rep. No. 1196, 91st Cong., 2d Sess. at 16. In revising the standards of performance for coal preparation plants, EPA may not simply codify existing levels of performance.

• Because NSPS apply only to new, modified, or reconstructed sources and must reflect application of the best demonstrated system of reduction, they do not have to be achievable for all types of existing sources. *See Portland Cement,* 486 F.2d at 391. Nor can EPA forego setting limits reflecting the best demonstrated system merely because some sources may prefer a different system, *ASARCO,* 578 F.2d at 322 ("NSPS are designed to force new sources to employ the best demonstrated systems of emission reduction."). The legislative history of CAA section 111 demonstrates that Congress intended for EPA to prescribe standards that override the design preferences of regulated sources: "[T]he emission standards shall provide that sources of such emissions shall be designed and equipped to prevent and control such emissions to the fullest extent compatible with the available technology and economic feasibility. * * * " H.R. Rep. No. 1146, 91st Cong., 2d Sess. at 10 (emphasis added). Thus, EPA's assumption that NSPS must be set at levels lenient enough to accommodate all types of existing dryers is contrary to Congress' plainly expressed intent.

• CAA section 111 "looks toward what may fairly be projected for the regulated future, rather than the state of the art at present. * * *" *Portland Cement Assn* v. *Ruckelshaus,* 486 F.2d 375, 391 (DC Cir. 1973). An "achievable standard is one * * * within the realm of the adequately demonstrated system's efficiency and which, although not at a level that is purely theoretical or experimental, need not necessarily be routinely achieved within the industry prior to its adoption." *Essex Chemical Corporation* v. *Ruckelshaus,* 486 F.2d 427, 433–34 (DC Cir. 1973). Instead of looking toward a future of mechanical dryers and indirect thermal dryers, or even gas-fired recirculation thermal dryers, the proposed standards attempt to lock-in standards that reflect the performance of coal-fired once-through thermal dryers.

• Even assuming for the sake of argument that it is permissible to set a standard for emissions from coal drying that presumes the use of thermal dryers, the proposed rule violates the straightforward intent of Congress. Congress purposefully chose the superlative "best" to describe the system of emissions reductions on which the NSPS were to be based [42 U.S.C. 7411(a)(1)]. Moreover, one of the enumerated purposes of the NSPS was to create incentives for new technology. CAA Conference Report: Statement of Intent; Clarification of Select Provisions, 123 Cong. Rec. 27071 (1977). However, instead of proposing standards based on the performance of the cleanest new coal drying technologies, the proposal sets lax standards and then allows a mix of coal drying technologies to meet those standards.

Response: EPA followed the statutory requirements of CAA section 111 in its review of the existing standard of performance for thermal dryers at coal preparation and processing plants. The review was conducted pursuant to the requirement in section 111(b)(1)(B) that EPA review and revise, if appropriate, the previously promulgated standards of performance. Section 111(b)(1)(B) requires EPA, when revising the standards, to follow the procedure required for the promulgation of standards. Section 111b(1)(B) further requires publication of proposed regulations, an opportunity for written comment, and requires the Administrator to promulgate such standards as she "deems appropriate." The commenter correctly noted that a standard of performance is defined as "a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated." 42 U.S.C. 7411(a)(1). The commenter, however, takes the language from 42 U.S.C. 7411(g)(4) out of context. CAA section 111(g)(4) provides that the Administrator shall revise a standard of performance upon application of the Governor of a State that meets certain criteria. The language quoted by the commenter appears in this section and describes what must be included in the application of the Governor, and does not modify the definition of a standard of performance in section 111(a)(1).

To determine the appropriate level for a particular standard of performance, EPA conducts an analysis to determine what emission rates reflect application of "best demonstrated technology" or BDT. This BDT analysis includes consideration of available emission controls and technologies. In the BDT analysis for controlling PM emissions from coal dryers for this final rule, EPA explicitly considered alternate processes for drying coal as well as add-on emission control technologies. For modified facilities, EPA recognized the limitations that may be associated with

the physical layout of existing dryers. For reconstructed facilities and new facilities, however, we concluded that design options, and alternative replacement technologies, could be taken into account during the reconstruction or construction process. EPA concluded that recirculation thermal dryers and indirect thermal dryers are both adequately demonstrated and readily available technologies for drying coal. It did not restrict its analysis, or the definition of affected facility, to the once-through direct contact thermal dryers covered by the existing NSPS standards for thermal dryers. Contrary to the commenter's assertions, EPA neither presumed the use of existing once-through direct contact thermal dryers nor merely codified existing levels of performance achieved by such dryers. Instead, EPA concluded that BDT for controlling PM emissions for new and reconstructed thermal dryers is fabric filters applied to recirculation thermal dryers and indirect thermal dryers. The PM standards in the final rule are based on these conclusions.

Although mechanical coal drying technologies, because they do not burn fuel, may inherently produce lower air pollutant emissions compared to some thermal drying technologies, they may not be technically applicable, cost-effective, or the most energy efficient for all possible coal drying applications that could be subject to subpart Y. EPA does not, at this time, have data to support a conclusion that standards based on an assumption that mechanical dryers are BDT would be achievable by the industry as a whole (*see National Lime Ass'n* v. *EPA,* 627 F.2d 416, 431 (1980)). Even though the "adequately demonstrated" requirement does not "necessarily impl[y] that any [covered facility] now in existence be able to meet the proposed standards," *Portland Cement,* 486 F.2d at 391, EPA must demonstrate that the standard is, in fact, achievable taking into consideration variables that may affect emissions in different circumstances and at different plants. *National Lime,* 627 F.2d at 433. In fact, the type of coal drying technology used at a given facility is influenced by a variety of factors, including type of facility, coal moisture reduction requirements, availability of waste heat sources at the coal processing location, and drying process energy requirements including electrical power consumption. Mechanical drying techniques are not suitable replacements for thermal dryers under all circumstances. Mechanical drying techniques can remove free moisture adsorbed onto the surface of the coal particles, as well as a portion of the hydroscopic moisture contained by capillary action within microfractures in the coal particles, but are ineffective at removing inherent moisture (and, thus, would only be applicable at preparation plants utilizing coal washing). Some type of thermal energy is required to remove the interstitial and molecular (inherent) moisture from the coal for applications where extremely low moisture content is desirable. Therefore, mechanical drying techniques are not suitable replacements for thermal dryers under all circumstances, and because waste heat is not available at all locations, thermal dryers using waste heat are not a technically possible substitute for thermal dryers in all situations. EPA will continue to follow the development of mechanical drying techniques. To the extent the commenter is suggesting that EPA should require use of a certain technology for drying coal and coal preparation plants, EPA notes that CAA section 111(h), 42 U.S.C. 7411(h)(1) only allows the Administrator to promulgate design, equipment, work practice, or operational standards if "in the judgment of the Administrator, it is not feasible to prescribe or enforce a standard of performance." No such finding has been made here.

In the BDT analysis for controlling SO_2 emissions from coal dryers for the final rule, EPA determined that BDT for modified and reconstructed thermal dryers is a wet scrubber with a scrubbing reagent (*e.g.,* an upgraded venturi scrubber with sodium hydroxide or packed bed scrubber with lime). The information that EPA has indicates that all of the once-through direct contact thermal dryers currently use venturi scrubbers for PM control. Thus, the upgraded venturi scrubber with sodium hydroxide or the packed bed scrubber with lime (would be in addition to the venturi scrubber) would provide SO_2 control, along with additional PM control necessary for reconstructed thermal dryers to meet their PM and opacity limits. For new thermal dryers, we determined that BDT for controlling SO_2 emissions is the injection of sodium hydroxide directly to the venturi scrubber fluid or injection of a sodium-based sorbent into the combustion gases prior to the drying chamber. For a new once-through direct contact thermal dryer, the caustic injection into the scrubber fluid for SO_2 control would be in addition to a high-energy venturi scrubber which is the likely control technology that would be used for PM and opacity control. For a new coal recirculation thermal dryer, sorbent injection into the combustion gases for SO_2 control would be used in conjunction with a fabric filter which is the likely control technology that would be used for PM and opacity control. EPA determined that BDT for controlling NO_X emissions from new, reconstructed, and modified thermal dryers is combustion controls. Combustion controls can be used across the range of thermal dryers currently in use. Combustion controls include low NO_X burners, staged combustion, co-firing with natural gas or liquefied petroleum gas, and flue gas recirculation. BDT for controlling CO emissions was determined to be good combustion practices. Good combustion practices limit the formation of CO (and VOC) by providing sufficient oxygen in the combustion zone such that complete combustion can occur. Maintaining appropriate combustion zone temperature and gas residence time also are good combustion practices, as is proper operation and maintenance of the dryer.

Comment: Several commenters stated that the proposed PM emission limit of 0.010gr/dscf for new coal dryers does not reflect an adequate margin of compliance to the fabric filter test data used and that the proposed limit needs to be less stringent because the test data do not represent a demonstration of the performance of control technology over the life of the facility and over the range of operating conditions that may be encountered at thermal dryers. Therefore, the commenters recommended that the PM emission limit remain at the current NSPS emission rate of 0.031 gr/dscf. Other commenters presented an opposing argument that the proposed PM limit needs to be lower. The commenters asserted that the compliance margin of two to three times applied by EPA to fabric filter test data is unjustified in that EPA has not explained why use of a fabric filter to control PM emissions would require such a large margin of safety, given the demonstrated performance of fabric filters for the subject source as well as similar sources in numerous other industries.

Response: EPA has reviewed the available PM emissions and permit data for thermal dryers; no additional PM data were provided during the public comment period. We believe that the proposed PM limit of 0.023 g/dscm (0.010 gr/dscf) for new thermal dryers is appropriate. We further believe that, in the presence of limited data showing actual emissions, permit information can be useful in determining whether a particular emission limit is achievable

by sources in the source category. EPA has available three emission test data points for fabric filters installed on thermal dryers, including two tests one year apart at one facility. We believe that these three data points provide adequate information on the performance of the technology. However, EPA also has examined the permit data which identifies emission limits agreed upon between State regulators and the regulated community and believe that the emission limits contained in permits constitute limits that could be achieved over the range of operating conditions to be found within the industry. *Nat'l. Lime Ass'n.* v. *EPA,* 627 F.2d 416, 431 (DC Cir. 1980) requires EPA to show that the limit selected is achievable under different conditions at an individual plant and conditions at different plants. EPA believes that basing the emission limit on use of the data points from two facilities, including two data sets from one facility, in conjunction with the permit data, adequately accounts for the variability to be found within the industry. Therefore, the final rule reflects no changes to the proposed PM emission limit for new thermal dryers.

Comment: Two commenters supported the proposal to revise the PM limit for units reconstructed after April 28, 2008, to 0.045 g/dscm (0.020 gr/dscf) and to maintain the existing 1976 rule's opacity limit of less than 20 percent. In contrast, a third commenter disagreed with the proposed PM standard for reconstructed dryers, which is twice as high as the proposed standard for new dryers (0.010 gr/dscf). The commenter stated that EPA must either require reconstructed dryers to meet the same PM standards as new dryers, or explain why such limits do not reflect BDT for reconstructed dryers. The commenter further stated that EPA has not explained why it would not also be feasible to further modify existing dryers, at the time of reconstruction, by converting them to recirculation dryers or by otherwise modifying them to use fabric filters, and that EPA must examine whether a fabric filter is a feasible option for control of PM emissions from reconstructed dryers. Another commenter recommended that the PM emission limitations not be changed from the current NSPS emission rate of 0.031 gr/dscf. The commenter believes that the limited data EPA has cited to justify reducing the limit by a third for reconstructed dryers using the same control technology is insufficient to conclude that thermal dryers with the specified control equipment would, throughout the life of the facility, be able to continuously meet a lower emission limit than the current NSPS provide.

Response: EPA agrees that units undergoing reconstruction as defined in the CAA could undergo the conversions necessary to install BDT for PM emissions control for new thermal dryers and, thus, meet the PM and opacity limits of new facilities. Thus, the regulation has been changed accordingly.

Comment: One commenter stated that information in the supplemental proposal preamble and support documentation show that the SO_2 emissions limits for new and reconstructed coal dryers should be set lower than the proposed level. The commenter explained that the proposal preamble states that "[w]et scrubbers designed specifically for SO_2 control are able to achieve greater than 95 percent reduction." EPA, however, dismisses wet scrubbers from further consideration, as the wet scrubbers currently used on existing thermal dryers are designed for PM control and not specifically for SO_2 controls, and high levels of SO_2 control may be difficult to achieve without redesign of the wet scrubber. The commenter asserted that this is not a valid reason for eliminating a viable technology from consideration, and that wet scrubbers are widely used on similar sources and, as EPA recognizes, routinely achieve greater than 95 percent reduction. Even if EPA ultimately determines that wet scrubbers are not BDT for SO_2 control for some coal dryers, the commenter stated that the subpart Y SO_2 emission limit must be more stringent for those dryers. The commenter cited as support EPA's assertion that sorbent injection controls that use sodium-based agents can meet removal efficiencies of 90 percent.

Response: EPA indicated in the May 27, 2009, supplemental proposal that it was considering an SO_2 percent reduction requirement of between 50 and 90 percent for the final rule (74 FR 25311). EPA has reviewed the available data and believes that a 90 percent removal requirement is appropriate for new, reconstructed, and modified thermal dryers. Affected facilities that meet the alternative SO_2 emissions limit of 85 ng/J (0.20 lb/MMBtu) heat input are not required to meet this requirement.

Comment: Many commenters stated that EPA's proposal to set a combined NO_X and CO emissions limit for coal dryers is inappropriate. Another commenter stated explicitly that separate NO_X and CO emissions limits must be set for coal dryers. Reasons cited by individual commenters include the following.

- A combined NO_X/CO limit enables permitting authorities to trade off higher NO_X emissions for lower CO emissions, and vice versa. EPA's proposed approach of allowing States to trade NO_X and CO emissions at essentially a 1:1 ratio ignores that CO and NO_X are different pollutants that do not have equivalent environmental impacts.
- A combined NO_X/CO limit violates CAA for the reason that the proposed combined limit is based on an assumed CO emissions rate that does not reflect application of the best system of emission reduction. EPA admits that the presumed levels of CO emissions (0.45 lb/MMBtu for modified and reconstructed dryers and 0.25 lb/MMBtu for new dryers) are levels that are already surpassed by nearly all existing industrial boilers and has not explained why industrial boilers would be capable of meeting more stringent CO limits than thermal dryers.
- Test data provided in the docket indicates a wide variation in test results, especially for CO. Test data is almost exclusively based on bituminous coal drying operations, and these data do not support the conclusion that the proposed combined NO_X/CO limit is applicable across all grades of coal.
- Combustion controls currently represent BDT in use by the source category. Going beyond the demonstrated technologies for the source category (*e.g.,* incorporating post combustion control technologies, specifically selective non-catalytic reduction (SNCR) on new thermal dyers) is not required in developing NSPS.
- EPA does not have sufficient data to support the proposed NO_X standards, and EPA has not demonstrated that thermal dryers with different design and function can meet the same limitations as coal-fired boilers. Also, EPA has identified combustion controls that may not be available as the basis for the proposed NO_X standards, especially for existing thermal dryers.

Response: EPA believes that the use of a combined NO_X/CO limit is appropriate because it acknowledges the inherent trade-off between the two pollutants (*i.e.,* a decrease in emissions of one often leads to an increase in emissions of the other). EPA has based the combined NO_X/CO limit on what it believes to be adequate data from thermal dryers at subpart Y facilities; thus, the comparison to industrial boilers is misplaced. In addition, as the Court has noted, "[t]he 'adequately demonstrated' requirement does not imply that any [covered facility] now in

existence be able to meet the proposed standards. CAA section 111 looks toward what may be fairly be projected for the regulated future, rather than the state of the art at present.'' *Portland Cement Ass'n* v. *Ruckelshaus,* 486 F.2d 375, 391 (DC Cir. 1973).

E. Coal Processing and Conveying Equipment, Coal Storage Systems, Transfer and Loading Systems, and Open Storage Piles Standards

Comment: Many commenters acknowledged EPA's decision in the supplemental proposal to add fogging systems and passive enclosure containment systems (PECS) to its list of BDT for coal processing and conveying equipment, but stated that EPA's BDT determination still failed to meet the requirements of CAA § 111. Additional commenters also disagreed with EPA's finding of chemical suppression to be BDT for coal handling equipment processing bituminous coal, stating that EPA's current BDT approach of focusing only on emission control systems with the highest control efficiency is an inappropriate, unjustified departure from its prior technology assessments for coal preparation plants. Commenters stated that EPA's evaluation of technologies for control of fugitive emissions from coal-handling should have included wet suppression. Further, commenters asserted that EPA must explain why it has either rejected or ignored Peabody Energy's compelling comparison of wet suppression costs and chemical suppression costs. The commenters believe that the record demonstrates that cost considerations favor the use of wet suppression instead of chemical suppression for controlling fugitive emissions from preparation facilities at coal mines.

Response: As pointed out by the commenters, EPA has added fogging systems and PECS as technologies representative of BDT for coal-handling equipment processing subbituminous and lignite coals (fabric filters and wet extraction scrubbers also are considered representative of BDT). As noted in the supporting documentation (*see* EPA–HQ–OAR–2008–0260–0083, pp. 1–2), EPA has reviewed our determination of chemical suppressants as BDT for coal-handling equipment processing bituminous coal. However, as also noted in the support document, an owner/operator may use any combination of controls at a particular site as long as the requirements of subpart Y are met. With respect to Peabody Energy's comparison of wet suppression and chemical suppression costs, their estimates indicate that the incremental cost of chemical suppression as compared to wet suppression is $4,400 per ton of PM removed.

Comment: Many commenters stated that the data used by EPA does not demonstrate the continuous achievability of the proposed opacity limit of 5 percent. Commenters further stated that the promulgation of NSPS based upon inadequate proof of achievability would defy the Administrative Procedure Act's mandate against action that is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. *National Lime Ass'n* v. *EPA,* 627 F.2d 416, 430 (DC Cir. 1980).

Response: In the May 27, 2009, supplemental proposal, EPA requested comment on whether an opacity limit of less than 10 percent is more appropriate than the proposed limit of 5 percent. We also requested comment on whether the 5 percent limit is achievable on a long-term basis for all subpart Y coal-handling facilities under all operating conditions and whether the limit provides an adequate compliance margin. As we pointed out in supporting documentation (*see* EPA–HQ–OAR–2008–0260–0083, pp. 3–4), the data used to establish the supplemental proposal's 5 percent opacity level were primarily from initial compliance tests, and the reported highest 6-minute average opacity reading was 5 percent for a recently installed facility. Data for coal handling facilities submitted by commenters in response to the supplemental proposal indicate that 60 percent of the highest 6-minute average opacity readings are less than 10 percent. Upon reconsideration of EPA's data and consideration of the public comments and supporting data, EPA has determined that an opacity limit of less than 10 percent is more appropriate for all coal-handling equipment. An opacity limit of 10 percent will allow for control equipment degradation, adverse conditions, and variability that would not be reflected in initial compliance tests. Thus, the final rule requires coal handling facilities to maintain opacity levels of less than 10 percent.

Comment: Many commenters requested that subpart Y provide the same compliance alternative for affected sources located in enclosed buildings as that provided in 40 CFR part 60, subpart OOO. Under subpart OOO, performance standards and applicable monitoring techniques for the exhaust systems of these buildings have been specified as an appropriate alternative to individual compliance by each affected facility enclosed within the building. Commenters explained that building enclosure of certain coal handling and processing operations at coal preparation plants has become more commonplace throughout the industry for several reasons, including the ability to effectively control emissions and to protect personnel and equipment from the elements. These commenters urged EPA to extend this practical and achievable alternative to subpart Y and recognize within the rule the beneficial control technique of enclosing coal preparation facilities within buildings.

Response: EPA has determined that if a building in which affected coal processing and conveying equipment (*e.g.,* breakers, crushers, screens, conveying systems), coal storage systems, and coal transfer system operations are enclosed is found to be in compliance with the subpart Y limits applicable to the affected facilities enclosed in the building, then the affected facilities enclosed in that building also are in compliance. Because exhaust from a building that encloses affected facilities would be comprised of exhaust from the affected facilities, it follows that in order for the building to be able to meet a specific PM or opacity limit, each facility enclosed in the building also would have to meet that same PM or opacity limit. If the affected facilities enclosed in the building are subject to different emission limits, the affected facilities are deemed in compliance only if the building is in compliance with the most stringent of the limits applicable to the enclosed affected facilities.

Comment: Many commenters stated that EPA does not have the authority to regulate coal storage piles under 40 CFR part 60. Section 60.1 provides that the provisions of 40 CFR part 60 ''apply to the owner or operator of any stationary source which contains an affected facility * * *'' Stationary source is defined in section 60.2, consistent with 42 U.S.C. 7411, as including any building, structure, facility or installation. Commenters asserted that although it is not clear that a coal pile constitutes a building, structure, facility or installation, if it does, under section 60.1 the stationary source must also contain an affected facility. Further, affected facility is defined in section 60.2 as ''with reference to a stationary source, any apparatus to which a standard is applicable.'' According to commenters, this latter definition presents a substantial problem in that if EPA wishes to regulate coal storage piles under 40 CFR part 60 as part of a stationary source, the coal storage piles must be an apparatus. At many facilities which manage coal, commenters explained that coal storage piles are nothing more than what the name

suggests: piles of coal, and these piles often have no walls, no floor surfaces, and no equipment associated with their use. Although the term "apparatus" is an undefined term under 40 CFR part 60, commenters do not believe that a pile of minerals mined from the earth and stored on the earth constitutes an "apparatus" which subjects the pile to regulation under 40 CFR part 60. Further, although the authority may not exist to regulate coal storage piles under 40 CFR 60, commenters contend that this would not leave such storage piles unregulated. In many States, fugitive emissions from coal piles are regulated under State fugitive emissions limitations which are often incorporated into State implementation plans, and the commenters do not challenge those regulations.

Response: EPA disagrees with commenters' assertion that a coal pile cannot be an affected facility under 40 CFR 60. Commenters correctly noted that the term "affected facility" is defined in section 60.2 to mean "with reference to a stationary source, any apparatus to which a standard is applicable." The commenters also correctly note that the term "apparatus" is undefined in 40 CFR part 60, and an agency's interpretation of its own regulation is granted substantial deference (*see, e.g., Auer* v. *Robbins,* 519 U.S. 452, 461, 1997).

The commenters do not offer a definition of "apparatus" but appear to suggest that to be an "apparatus" a coal pile would need to have "walls, floor surfaces, or equipment associated with their use." The commenters, however, offer no support for this assertion, and EPA does not believe such a limited definition of "apparatus" would be reasonable or consistent with the plain English meaning of the word. Further, the Courts stated "In designating what will constitute a facility in each particular industrial context, EPA is guided by a reasoned application of the terms of the statute it is charged to enforce." *ASARCO Inc.* v. *EPA,* 578 F.2d 319, 324 n.17 (1978). In this case, because coal storage piles are significant sources of emissions and are physically located at coal preparation and processing plants, EPA believes it is reasonable in this context, to determine that they are facilities that can be subject to regulation.

The dictionary definition of the word "apparatus" also supports EPA's approach. The word "apparatus" has a very broad meaning and can include tangible items such as equipment, tools and materials as well as intangible items such as activities and functions. The Random House College Dictionary: Revised Edition defines the word "apparatus" as follows:

> 1. A group or aggregate of instruments, machinery, tools, materials, *etc.* intended for a specific use. 2. any complex instrument or machine for a particular purpose. 3. any system of activities, functions *etc.* directed toward a specific goal: the apparatus of government. 4. a group of structurally different organs performing a particular function.

Because a coal pile constitutes "a group or aggregate of * * * materials * * * intended for a specific use," it qualifies as an "apparatus" under the first definition of the word. Furthermore, given the broad meaning of the term "apparatus," EPA believes it would not be reasonable to interpret this term to limit the scope of the definition of "affected facility" to exclude a significant part of the coal preparation and processing plant that may have significant emissions.

In addition, although commenters do not actually argue that a coal pile does not constitute a stationary source because it is not a building, structure, facility, or installation, EPA notes that there can be no doubt that a pile of coal does in fact qualify as a stationary source as that term is defined in 42 U.S.C. 7411 and section 60.2. Stationary source is defined in 42 U.S.C. 7411 as including "any building, structure, facility or installation which emits or may emit any air pollutant." This same definition appears in section 60.2. The terms building, structure, facility, or installation, are not defined although section 60.2 does contain definitions for "affected facility" and "existing facility." In some instances, the regulated affected facility may be a portion or a part of a stationary source, but not the entire source. In other circumstances, however, a stationary source may also be an affected facility. Because, as noted above a coal pile can be an affected facility it necessarily also can be a facility within the definition of stationary source. In addition, the terms installation and structure are very broad and not limited to things that have walls, floor surfaces or dedicated equipment. For these reasons, commenter's assertion that coal piles cannot be regulated under 40 CFR part 60 is without support.

Comment: Several commenters stated that coal piles should not be regulated under subpart Y because of the diverse conditions affecting emissions from coal storage piles that could be encountered at each coal preparation plant site. Among the site-specific factors for open coal storage piles that will vary widely from site to site are the following: ambient temperature, precipitation, meteorology, wind speed, and geography. In addition, commenters stated that fugitive emissions will depend on coal properties and coal rank. Therefore, a uniform NSPS is not appropriate for coal piles and fugitive coal dust emissions from coal piles should be addressed by case-by-case determinations in individual permit proceedings.

Response: EPA does not agree with the commenters that coal piles should not be regulated under subpart Y. Such sources were apparently included in the October 1974 proposed rule (*i.e.,* there was no specific exclusion). A comment was received indicating that no fugitive dust control options were available for open storage piles other than water sprays and that these were not effective on windy days. EPA subsequently excluded open storage piles from regulation in the final rule (January 1976). However, EPA has now identified additional control measures, beyond simple water sprays, that may be utilized on coal piles and that address the concerns noted by commenters. EPA is establishing work practice standards instead of standards of performance for coal piles. Owners/operators are required to develop a fugitive coal dust emissions control plan to control emissions from the coal piles, and the plan requirements established by EPA provide adequate flexibility for an owner/operator to tailor their plan to address site-specific factors.

Comment: Several commenters stated that it is not feasible to establish emission standards for open storage piles or roadways, and if open storage piles are to be regulated by subpart Y then the only appropriate method for controlling PM emissions from such sources is by using work practice standards. Another commenter does not support establishing an opacity limit for open storage piles or roadways and concurred with the proposal to establish work practice standards instead of opacity or PM limits. If an opacity limit is established for storage piles, the commenter stated that it should be limited to stationary open storage piles not including piles of coal that have been loaded into trucks, railcars, and/or ships. An additional commenter disagreed that only work practices are suitable for controlling PM emissions open storage piles (and roadways). The commenter indicated that a 20 percent opacity limitation under subpart Y has been an existing applicable requirement for fugitive dust sources in the coal-handling system for decades, and it has not been proven infeasible to conduct opacity monitoring over all of those years.

Response: As explained in a later response, EPA is not finalizing its proposed requirements for roadways. EPA concurs that, at this time, it is not feasible to prescribe or enforce a standard of performance for open storage coal piles and has therefore promulgated work practice standards, which EPA believes provide the most effective method of limiting emissions from open storage piles. In addition, EPA believes that the size of open storage coal piles currently makes the use of Method 9 opacity observations unreasonable in many situations.

Comment: Many commenters stated concerns about the inherent difficulties in determining when an open storage pile is "reconstructed" or "modified." Commenters contend that there is simply no way that an "increase in the emission rate" of PM or any other pollutant could be measured with any certainty for an open coal storage pile. Unlike other "affected facilities" or plant equipment, commenters explained that open storage piles by their nature fluctuate in size and activity. As the subpart Y amendments were proposed, any time large coal inventory was added to an open storage pile and then reclaimed, subpart Y potentially could be triggered. Commenters stated that if EPA proceeds with the establishment of work practices for coal piles, EPA should provide clarification and guidance as to what constitutes a physical or operational change for an open storage pile through a subsequent rulemaking proposal that would allow public review and comment. Commenters requested that EPA limit the applicability of the subpart Y control requirements for coal storage piles to only new sources.

Response: EPA agrees with the commenters that open storage piles are always changing (*i.e.,* coal is being added and coal is being removed for processing) and, for purposes of subpart Y, we do not consider the routine addition and removal of coal to be a physical change or a change in the method of operation. A change to an open storage pile that requires the source's operating permit be opened for revision may be a modification or reconstruction of the storage pile. Instances where a physical change or change in the method of operation of an open storage pile will result in an increase in emissions would be considered a modification or reconstruction (*e.g.,* increasing the permitted size of the storage pile). Changes to the equipment used in loading, unloading, and conveying operations of open storage piles are among the things that can be assessed in order to determine when an open storage pile has been reconstructed or modified. Thus, in the final rule, EPA defines "open storage pile" to mean "any facility, including storage area, that is not enclosed that is used to store coal, including the equipment used in the loading, unloading, and conveying operations of the facility." The inclusion of a definition for "open storage pile" should provide additional clarification as requested by the commenters. In addition, 40 CFR 60.5 provides that when requested to do so by an owner or operator, the Administrator will make a determination of whether action taken or intended to be taken by such owner or operator constitutes construction (including reconstruction) or modification or the commencement thereof within the meaning of this part.

Comment: Several commenters agreed that piles of coal that have been loaded into trucks, railcars, and/or ships should not be subject to the subpart Y control requirements for open storage piles. In contrast, several other commenters disagreed with EPA's stated rationale for proposing the exclusion. Specifically, commenters provided the following reasons: (1) EPA has not identified any information or data to support its statement that fugitive dust emissions from these sources are not significant; (2) it is not economically infeasible to require covering the coal or chemical encrustation on loaded trucks, railcars, and ships because operators may choose to use these controls to comply with State and local regulations or the desire to minimize the loss of coal while in transit; and (3) EPA did not consider the use of alternate work practice standards already identified as appropriate for open piles, including the use of wet suppression. Commenters further stated that EPA should recognize that the owners/operators of coal preparation plants, as the ones who determine the placement of coal into trucks, railcars, and ships, and as the ones who initiate the use of any appropriate controls, are uniquely situated to take the steps most effective at reducing or limiting fugitive dust emissions from these sources once they leave the facility. Although some of the emissions from piles loaded into trucks, railcars, and ships may occur beyond the boundaries of the coal preparation plant, commenters stated that the extent of these emissions depends on actions taken at the coal preparation plant.

Response: EPA is not addressing at this time emissions from the sources noted by the commenters because we found any such regulation to be impractical to enforce (particularly with regard to interstate shipments). Further, based on available data emissions from these sources while at the coal preparation and processing plant have not been shown to be significant and, at this time, EPA has no data on emissions from such sources while enroute.

Comment: Many commenters requested clarification regarding the plant roadways to which EPA intends subpart Y to apply. Commenters stated that EPA should clarify that "roadways" such as haul roads that do not leave the plant property are not subject to subpart Y. Commenters also stated that EPA needs to clearly define where the coal preparation plant begins and where the coal mine ends, and that subpart Y is applicable only to affected facilities of a coal preparation plant. Other commenters disagreed with EPA's proposal to exclude roadways that do not leave the property (*e.g.,* haul roads at coal mines) from being subject to subpart Y.

Response: As previously noted, EPA has decided not to finalize the work practice standards that were proposed for roadways. Emissions associated with roadways at both the "active mining area" and the "coal preparation plant" are also be subject to regulation under SMCRA. Under the definition of "surface coal mining operations" contained in 30 CFR 70.5 (SMCRA), operations conducted within a coal preparation plant are covered under SMCRA:

> (a) Activities conducted on the surface of lands in connection with a surface coal mine * * * the products of which enter commerce or the operations of which directly or indirectly affect interstate commerce. Such activities include * * * *the cleaning, concentrating, or other processing or preparation of coal. Such activities also include the loading of coal for interstate commerce at or near the mine site* (emphasis added).

Such operations also include roads (under 30 CFR 701.5). 30 CFR 780.15 requires the following:

> (a) For all surface mining activities with projected production rates exceeding 1,000,000 tons of coal per year and located west of the 100th meridian west longitude, the application shall contain an air pollution control plan which includes the following:
>
> (1) An air quality monitoring program to provide sufficient data to evaluate the effectiveness of the fugitive dust control practices proposed under paragraph (a)(2) of this section to comply with Federal and State air quality standards; and
>
> (2) A plan for fugitive dust control practices as required under 30 CFR 816.95.
>
> (b) For all other surface mining activities the application shall contain an air pollution control plan which includes the following:
>
> (1) An air quality monitoring program, if required by the regulatory authority, to

provide sufficient data to evaluate the effectiveness of the fugitive dust control practices under paragraph (b)(2) of this section to comply with applicable Federal and State air quality standards; and

(2) A plan for fugitive dust control practices, as required under 30 CFR 816.95.

30 CFR 816.95(a) specifies:

All exposed surface areas shall be protected and stabilized to effectively control erosion and air pollution attendant to erosion.

30 CFR 816.150 provides some additional requirements:

(b) *Performance standards.* Each road shall be located, designed, constructed, reconstructed, used, maintained, and reclaimed so as to:

(1) Control or prevent erosion, siltation, and the air pollution attendant to erosion, including road dust as well as dust occurring on other exposed surfaces, by measures such as vegetating, watering, using chemical or other dust suppressants, or otherwise stabilizing all exposed surfaces in accordance with current, prudent engineering practices * * *

(e) *Maintenance.* (1) A road shall be maintained to meet the performance standards of this part and any additional criteria specified by the regulatory authority.

Thus, SMCRA covers fugitive dust emissions from roads at coal preparation and processing plants at mine sites and requires a fugitive dust plan and other requirements to control air pollution from such sources (through similar measures as were included in the supplemental proposal for subpart Y). EPA believes that coal moving operations, once the coal enters the "coal preparation plant," will be by conveyor rather than by truck. Therefore, EPA believes that the requirements of SMCRA are sufficient to address air emissions from roadways that may be found within a coal preparation and processing plant at mine sites. For coal preparation plants at end-user facilities, EPA believes that, again, once the coal enters the "coal preparation plant," coal moving operations will be by conveyor rather than by truck. Therefore, EPA has decided not to finalize the proposed requirements for roadways.

Where fugitive coal dust emissions control plan requirements under subpart Y for open storage piles overlap requirements under SMCRA or State regulations, those sources may submit the more stringent of the required monitoring plans to the Administrator or delegated authority as required by 40 CFR 60.254(c).

Comment: One commenter requested that EPA delete the proposed fugitive emission control plan requirements from the final subpart Y amendments for the following reasons: (1) regulated entities have the right to know exactly what requirements apply to their facilities, particularly those applicable to new sources, and the proposed language does not provide any objective basis for determining what might have to be included or how to comply; (2) making fugitive emission control plan requirements subject to negotiation and air regulatory agency approval adds potentially significant delays in getting new sources approved and into operation; (3) fugitive emission control plans to minimize emissions from coal piles and roadways are commonly embodied in State implementation plans and existing air permits for iron and steel plants and coke plants; and (4) subpart Y should not duplicate and should not conflict with existing fugitive emission control requirements that have been in place for many years in the title V operating permits.

Many commenters stated that EPA has failed to properly develop revisions to subpart Y in accordance with established procedures for developing NSPS that specifically designate each type of affected facility subject to proposed standards. The commenters contend that this failure to designate each type of facility appears to be an open-ended and indeterminate expansion of subpart Y. According to commenters, this intent is further reflected in preamble language indicating that proposed procedures for developing a "fugitive dust plan" must include procedures for limiting emissions from "all types" of coal processing and conveying equipment at coal preparation plants (74 FR 25312). The commenters stated that it is unclear what EPA means by "all types" of equipment when "coal processing and conveying equipment" has a well-settled meaning within subpart Y. Further, the commenters noted that the proposed rule amendments do not, but should, make clear that an owner/operator can choose from the methods stated in the rule or an alternative method, if one exists, approved by the permitting authority. As currently proposed, any alternative methods would have to be approved by the Administrator, and the commenters consider such a requirement to be unduly burdensome. Commenters contend that the regulation should acknowledge that fugitive emissions control measures might not be available when temperatures are below freezing, and that prevailing weather conditions may reduce the effectiveness of, or eliminate the need for, a particular control method on a given day.

Response: EPA disagrees that fugitive coal dust emission control plans should not be required by the NSPS. The commenter states that such plans are "commonly" embodied in State implementation plans but does not suggest that they are contained within all such plans. Adding to the NSPS a requirement that sources must control fugitive coal dust emissions from fugitive sources at the facility by operating according to a written fugitive coal dust emissions control establishes a uniform requirement that applies to all sources in the subpart Y source category. The final rule also provides very specific requirements regarding the control measures that must be included in the fugitive coal dust emissions control plans. The fugitive coal dust emissions control plan must identify and describe the control measures the owner/operator will use to minimize fugitive coal dust emissions from each affected facility addressed in the plan. The owner or operator is also required to explain how the measures are applicable and appropriate for the site conditions. The owner/operator may petition the Administrator requesting approval of a control measure other than those specified in the final rule. The petition must either demonstrate that the alternate control measure will provide equivalent overall environmental protection or demonstrate that it is either economically or technically infeasible for the affected facility to use the control measures specifically identified in the final rule. The final rule clarifies that the owner/operator must submit a fugitive coal dust emissions control plan that includes the alternative measures along with the petition and operate in accordance with that plan while the petition is pending. It further clarifies that while operating in accordance with the plan that includes the alternative control measures, the affected facility is considered to be in compliance with the fugitive coal dust emissions control plan requirements while the petition is pending.

EPA has decided to omit, from the rule, the proposed requirement that the fugitive coal dust emissions control plan address "other site-specific sources of fugitive emissions that the Administrator or permitting authority determines need to be included." EPA agrees with the commenters that subpart Y should specifically identify each type of affected facility that must be addressed in fugitive dust emissions control plan. As explained earlier in this preamble, EPA also has decided not to address roadways under subpart Y at

this time. Thus, open storage coal piles are currently the only affected facilities that must be addressed by the plan. As pointed out by the commenters, an owner/operator must either use one of the control measures specifically identified in subpart Y or, alternatively, seek approval from the Administrator to use an alternate control measure. Because the NSPS is a Federal standard, we believe it is appropriate for the Administrator to be the one who makes determinations regarding whether an alternative control measure achieves equivalent overall environmental protection. Weather-related issues such as those noted by the commenter should be addressed in the fugitive coal dust emissions control plan prepared by the owner/operator.

Comment: One commenter stated that the proposed requirements that the permitting authority approve the site-specific fugitive dust would be unnecessary. The better and less burdensome approach is to require owners or operators to submit their fugitive dust controls plans to the permitting authority, and those plans would automatically take effect unless the permitting authority objects to the terms of the plan. Another commenter stated that the proposed requirements do not specify which permitting authority will be required to approve fugitive dust emissions plans under the proposed regulation. It is entirely unclear, for instance, whether fugitive dust emissions plans will be required to be incorporated into a coal preparation plant's title V permit. EPA must clarify these requirements for the preparation and approval of the fugitive dust emissions control plans. At a minimum, the commenter stated that EPA must require that these fugitive dust emission control plans be subject to public notice and comment, whether or not they are incorporated into a plant's title V permit.

Response: The requirement to control fugitive coal dust emissions by operating according to a written fugitive dust emissions control plan is a Federal requirement and is Federally enforceable. The final rule does not require approval of the plans by the Administrator or delegated authority. In addition, the commenter does not identify any provision of CAA section 111 that would require the NSPS itself to establish a notice and comment process for the plans. However, this rule does require the owner/operator to submit the fugitive coal dust emissions control plan to the Administrator or delegated authority to provide an opportunity for the Administrator or delegated authority to object to the fugitive coal dust emissions control plan. The final rule requires the owner/operator to submit the fugitive coal dust emissions control plan to the Administrator or delegated authority before startup of the new, reconstructed of modified facility. If an objection is raised, the owner/operator has 30 days from receipt of the objection to respond with a revised fugitive coal dust emissions control plan. The owner/operator must operate in accordance with the revised fugitive coal dust emissions control plan.

The requirement for the owner/operator to prepare and operate according to a submitted fugitive coal dust emissions control plan that is appropriate for site conditions must be included in the title V operating permit for the source. This and other requirements for title V permits are addressed in 40 CFR part 70.

Finally, to the extent the comment raises issues beyond the scope of the supplemental proposal, EPA has no obligation to respond in this rulemaking.

Comment: Three commenters noted that EPA's proposal requires submittal of the fugitive emissions control plan to the permitting authority 90 days prior to the compliance date. Commenters assumed this means the date for conducting the performance test under section 60.8, which is 60 days after reaching maximum production but not more than 180 days. If EPA finalizes its proposed approach and subjects existing units to fugitive emissions control plans, commenters requested guidance on how the 90-day requirement is applied with respect to the effective date of the final rule and the proposed April 2008 applicability date. The commenters explained that a modified open storage coal pile that is required to submit a fugitive dust plan may be required to comply with that requirement before the rule is effective and, therefore, could not meet the 90-day requirement.

Response: The commenter's statement that some open storage coal piles are required to comply before the rule is effective is not completely accurate. With respect to open storage piles, May 27, 2009, is the date used to determine which sources qualify as "new sources" as that term is defined in CAA section 111(a)(2). The rule requirements for open storage piles apply to any stationary open storage pile sources, the construction or modification of which is commenced after that date. The compliance obligation doesn't arise until the effective date of the revised NSPS rule. However, because CAA section 111(b)(1)(B) provides that standards of performance or revisions thereof shall become effective upon promulgation, all sources that qualify as "new sources" must be constructed in accordance with the regulations. Further because both the requirement that new sources include sources constructed or modified after the date of the proposed regulations and the requirement that the standards become effective upon promulgation are statutory requirements, EPA does not have authority to alter these requirements. The specific situation raised by the commenters is no longer relevant because the final rule does not require approval of the fugitive coal dust emissions control plan.

F. Testing and Monitoring Requirements

Comment: Several commenters stated that the proposed requirements for subsequent PM emissions performance tests after the initial compliance test are either not needed or are too frequent. Commenters suggested that for most units, repeat PM performance testing should be required no more often than every five years. One commenter stated that once a source has established, based on an initial performance test, that a PM control device is properly sized and installed to meet the applicable PM limit, stack testing is not necessary to ensure continued compliance. Rather, compliance can be determined through visible observations using procedures like Method 22 or other operating parameters, like BLDS. Another commenter noted that if EPA ultimately adopts the BLDS requirement; it should recognize that facilities that use such devices are likely to operate in compliance with EPA's standards because deviations would be detected before any noncompliance occurs. According to the commenter, these facilities should, therefore, be exempt from ongoing opacity monitoring requirements, other than the initial and five-year performance tests.

Response: The emissions testing requirements for PM, SO_2, NO_X, and CO accomplish two goals. First, emissions measurements are necessary to directly determine compliance with the applicable emissions limit. Direct measurement will also provide data necessary to verify the accuracy of the annual compliance certifications. The data will also augment the data supporting the regional and national emissions factors and emissions inventories. Second, periodic performance testing will verify the calibration and representativeness of the continuous monitoring system (*e.g.*, BLDS, scrubber pressure drop) and, as necessary, indicate that readjustment is

required. EPA does not believe that these goals can be met with emissions testing for each separate source on a 5-year cycle. EPA has, however, provided a provision that, for affected facilities that emit at 50 percent or less of the applicable standard, repeat performance testing is required every 24 months (as opposed to every 12 months). Also, for well-performing (emitting at 90 percent or less of the applicable standard) similar, separate sources using identical control equipment, the final rule allows a single repeat performance test as adequate demonstration for up to four other similar, separate sources. Under this provision, a performance test for each of these similar affected sources is required to be conducted at at least once every 5 years (*i.e.,* one similar source would be required to conduct repeat performance testing every 12 months).

Comment: Many commenters restated concerns raised in comments on the April 28, 2008, subpart Y amendment proposal about the accuracy and limitations of the Method 9 test method at levels below 10 percent opacity. As long as EPA continues to propose a subpart Y opacity limit of less than 10 percent, commenters contend that EPA must present compelling proof that an opacity standard below 10 percent can be accurately and reliably enforced by Method 9 observations.

Response: We disagree with the implication that measurements made with Method 9 for opacity levels less than 10 percent are inaccurate or not suitable for compliance determinations. Foremost, the data used to establish the applicable opacity limit for the rule were collected using Method 9 in a manner consistent with the directions in the method. It is also worth noting that the method provides no restrictions on the use of the method for applicable limits less than 10 percent opacity. The introduction to the method acknowledges the potential for measurement error in applying Method 9 and, in particular, the greater potential for negative bias than for positive bias if ambient contrasts between background and the emissions plume are less than ideal. In addition, we applied substantial allowance for measurement imprecision in establishing the limits. Thus, we believe that the relevant opacity limits established in the rule are reasonable and that Method 9 measurements may be used to determine compliance with those limits.

Comment: Several commenters supported EPA's proposal to allow the owner/operator of an affected facility to decrease the observation period for a Method 9 performance test from 3 hours to 60 minutes, but suggested EPA consider a 30-minute test. EPA has provided no rationale for requiring a longer observation period in this NSPS than it is requiring under the 40 CFR part 60, subpart OOO, NSPS. One commenter questioned EPA's proposed provision that would allow the performance test observation time reduction only if all 6-minute average opacity readings are less than or equal to 3 percent and all the individual 15-second opacity observations are less than 20 percent during the initial 60 minutes. The commenter also noted that the accuracy of Method 9 readings below 5 percent is very questionable. The commenter believes that a 60-minute test is still unnecessarily long, given the number of emission points and the low expected variability. The commenter noted that when EPA finalized its NSPS for subpart OOO, it required only 30 minutes of Method 9 testing for compliance with the fugitive emissions standard in all cases (section 60.675(b)(3), 74 FR 19313, column 3).

Response: EPA continues to believe that a 60-minute observation period is reasonable and has decided that Method 9 opacity testing for a duration of 60 minutes should be required for all affected sources. However, an owner/operator may decrease the observation period for a Method 9 performance test from 60 minutes to 30 minutes if, during the initial 30 minutes of the performance test, all 6-minute averages are less than or equal to half the applicable opacity limit. This is a significant reduction from the standard 3-hour observation period for Method 9 performance tests. We disagree with the commenters' apparent assumption that subpart Y and subpart OOO are comparable and that the observation period should be the same in both rules. EPA believes that the Method 9 opacity testing observation period required by subpart Y is appropriate for coal preparation and processing operations.

Comment: Many commenters stated concerns about the need for and requirements for EPA's proposal to determine the frequency of repeat Method 9 performance testing for an affected source according to a schedule based on the "maximum 15-second opacity reading" during the most recent Method 9 performance test. According to commenters, that proposal would be incredibly burdensome and unnecessarily stringent for no discernible reason, and EPA provided insufficient justification for significantly increasing the frequency of monitoring. Specific reasons cited by commenters include:

■ Although it is certainly possible for a Method 9 reader to calculate opacities below 5 percent by averaging observations recorded at zero with those recorded at higher opacities (like 5 and 10 percent), the accuracy and precision of Method 9 readings at levels below 5 (even below 10 percent) are questionable at best. Under EPA's proposal, even a small bias in a single observation could make a facility ineligible for use of Method 22, or result in a requirement to repeat a performance test in 7 days, rather than 30 days. Although basing testing frequency and eligibility for alternatives on a source's margin of compliance may be a generally sound concept, EPA has not provided any basis for applying that concept to such small differences in opacity readings (*e.g.,* 3 versus 4 or 5 percent opacity), or to such low opacity levels.

■ EPA's proposal for determining the frequency of Method 9 testing would require extensive tracking, scheduling, and paperwork. Owners/operators would be required to track for each emission point (1) the alternative being used and the basis for eligibility, (2) the results of the required observation, and (3) the deadline for the next test.

■ For each new Method 9 performance test, the owner or operator would need to provide 30 days notice to the State or local regulatory authority and, for Method 9 tests that cannot be conducted on time due to weather conditions, provide notice of rescheduling and report a deviation from applicable testing requirements (potentially subjecting the facility to enforcement).

■ One commenter believes there are no cost savings by using consultants to come out and read Method 9 or Method 22 results. Because of mining regulations, a consultant would need to be accompanied by a certified coal miner, eliminating any cost reduction.

■ The administrative burden and costs imposed, to implement the proposal cannot be justified considering the availability of simpler and more effective options. As with repeat PM performance testing, if the goal is to ensure that controls are maintained and that sources are identified and take action promptly to investigate and correct the cause of any visible emissions, then the same result could be accomplished with a combination of equipment inspection and Method 22 readings.

■ EPA proposed to provide an exemption from the repeat Method 9 performance testing for thermal dryers that continuously monitor scrubber parameters, but only if Method 9

performance tests are conducted concurrently with each PM performance test. One commenter supported the exemption, but questioned why Method 9 performance tests should be required.

Response: The commenters are correct that the incentives to monitor less frequently provided to very well performing facilities will be predicated on demonstrations of very near zero visible emissions. Such conditions are consistent with findings made during the rule development that indicated that some facilities consistently reported no visible emissions. First, as previously explained, the final rule includes an opacity limit of less than 10 percent for coal handling facilities. The final rule includes a number of changes from the supplemental proposal's opacity testing and monitoring requirements. The final rule bases subsequent Method 9 opacity testing frequency on 6-minute average opacity readings from the most recent performance test. As an alternative to subsequent Method 9 opacity testing, the final rule provides an option that includes daily walkthrough observations consisting of a single 15-second observation (visible emissions or no visible emissions) of each affected facility and requires that corrective actions be conducted when any visible emissions are observed. If visible emissions are still observed after corrective actions have been conducted, a Method 9 performance test is required within 45 operating days. EPA agrees that the monitoring provisions of the final rule will increase the recordkeeping and reporting burden to implement the rule. EPA rules require documentation of any measurements and the associated process operating conditions and regulatory compliance requirements; however, we disagree that this rule imposes any additional record keeping or reporting burden specifically in order to provide for the reduced monitoring frequency allowances. The subject provisions do not change those generic requirements. It is also worth noting that the PM and opacity limits are two distinct and separate applicable requirements of this rule. Opacity is an independent applicable requirement that is not necessarily a surrogate of the PM emissions limit or vice versa. Further, there is no potential for enforcement action for a test delayed by weather or other unforeseen conditions (*see* section 60.8(d)).

Comment: Two commenters noted that EPA requested comment on whether requiring an annual average instantaneous opacity from 10 dumps is appropriate as an alternate to use of Method 22 for other affected facilities. The commenters clarified that the control effectiveness is not an annual average and the State of Wyoming Department of Environmental Quality (WDEQ) uses the 10 truck dump approach to evaluate whether BACT is being continuously maintained at any given truck dump. They further explained that the 10-truck evaluation currently in use in Wyoming is not a compliance determination. Rather, if WDEQ finds the 10-truck opacity greater than 20 percent, corrective action is required to return the dump to BACT requirements. The commenters do not support a rule mandating how a permitting authority determines the control effectiveness of truck dumps nor the trigger levels proposed for other coal-handling equipment. The commenters supported including truck dumps as part of the fugitive emissions control plan. Commenters explained that approach would allow the permitting agency to tailor the alternate monitoring to fit their source and type of controls employed. Commenters stated that one option for alternative monitoring would be the control effectiveness test using the 20 percent opacity limit, as determined by taking the maximum instantaneous opacity of fugitive emissions observed from each truck dump activity, averaged for ten trucks or less as determined by the permitting authority. According to commenters, truck dumps are intermittent sources and typically will always show compliance using Method 9. Absent any other EPA methods for evaluating intermittent sources, the commenters support an opacity limit of no greater than 5 percent opacity.

Four commenters stated that EPA misinterpreted the WDEQ method for monitoring truck-dump facilities and expressed the following concerns with applying the WDEQ method for the purpose of determining compliance with some, as yet unknown, opacity standard.

■ The method is neither a Reference Method, nor an Equivalent Method, as defined by the Wyoming Air Quality Standards and Regulations. Furthermore, the existing opacity certification training protocol does not address the observation technique the State of Wyoming is using. The protocol defines a process to designate an appropriate averaging time for 15-second opacity readings taken during the part of the operation in which the largest amount of emissions are expected to occur.

■ An opacity limit based solely on the small amount of time that the truck is dumping should not be comparable to a opacity limit on a continuous point source such as a stack. Opacity read only while the truck is dumping, inappropriately skews the results to read the worse-case scenario and doesn't take into account the time when the emissions are non-existent due to the non-continuous nature of the source.

■ Commenters recommended a better and more reasonable approach to monitoring truck-dump facilities. An initial compliance test using the visual observation protocol provided in Method 9. Compliance with the 15 percent opacity standard would be determined by averaging the 15-second opacity readings made during the duration of three separate truck dump events. Each test would commence when the truck bed begins to elevate and conclude when the truck bed returns to a horizontal position. This would provide a reasonable evaluation of opacity during the actual dumping event, as opposed to the Method 9 protocol that would allow for observations long after the dumping event terminates. Thereafter, an owner/operator would conduct quarterly Method 9 compliance tests consistent with the above three truck-dump protocol. Owners/operators would supplement their quarterly Method 9 compliance testing with monthly visual observations of the physical appearance of the equipment and the requirement to repair any deficiencies found.

One commenter stated that the current standard utilized in Wyoming (6-minute Method 9 readings) has been criticized in the past, but it may be the most representative approach for non-continuous or sporadic emissions sources. The commenter explained that, typically, the 6-minute Method 9 readings have been taken quarterly. The time between truck dumps are times of zero potential emissions from the truck dump control system. According to the commenter, in some ways the 6-minute Method 9 reading is very appropriate because it reflects most activities: the dumping, the coal passing through the hopper, and the periods of time when no activity is occurring. The commenter believes that it is important to adopt an opacity standard that is associated with the methodology as required by Method 9 procedures. The commenter further stated that if EPA wants to modify the existing requirement on truck dumps for Wyoming, an appropriate requirement would be to utilize the 6-minute Method 9 and set the opacity standard at greater than 10 percent. The commenter believes that the standard would likely be appropriate for a variety of truck types (*i.e.* rear and belly dump) and control systems (*i.e.* stilling sheds, baghouses, and water spray bars). Two commenters stated that until the

necessary foundation for possible NSPS regulation can be established for coal unloading, any revision to subpart Y must expressly withdraw the Agency's interpretation of the late-1990s that subpart Y applies to coal unloading at coal preparation and processing plants.

Response: EPA continues to believe it is appropriate to require coal truck dump operations to be subject to the same opacity limit as other coal-handling facilities. Data indicate that the various control measures currently used on truck dump operations are capable of meeting the final rule's opacity limit of less than 10 percent. However, due to the intermittent frequency of coal dumping, EPA has determined that it is inappropriate to require the same testing and monitoring of opacity emissions from coal truck dumps as are required for other affected coal-handling facilities subject to opacity limits. The variability in the number of coal trucks during any given period is likely to render Method 9 opacity testing over a 60-minute period meaningless. EPA disagrees with commenters who believe that opacity read only while the truck is dumping, inappropriately skews the results to read the worse-case scenario because it doesn't take into account the time when the emissions are non-existent due to the non-continuous nature of this truck dump operations. In fact, EPA believes that opacity measurements taken during truck dumping is the appropriate time to conduct Method 9 opacity testing. We agree with other commenters who believe that this approach would provide a reasonable evaluation of opacity during the actual dumping event, as opposed to Method 9 protocol that would allow for observations long after the dumping event terminates. In the supplemental proposal, EPA requested comment on whether requiring an annual average instantaneous opacity from 10 truck dumps is appropriate as an alternate to monitoring required for other affected facilities. After considering the public comments, we have decided to include in the final rule an approach to monitoring truck dump operations that was suggested by a commenter. Owners/operators of all affected facilities would be required to conduct an initial compliance test using Method 9. Compliance with the less than 10 percent opacity standard will be determined by averaging the 15-second opacity readings made during the duration of three separate truck dump events. A truck dump event begins when the truck bed begins to elevate and concludes when the truck bed returns to a horizontal position. The final rule also requires monthly visual observations of the equipment and expeditious maintenance if any deficiencies are observed. Finally, subsequent Method 9 opacity testing using the three-truck dump procedure is required every 90 days.

G. Recordkeeping and Reporting Requirements

Comment: Two commenters stated that they did not object to the proposed reporting requirement for affected owners/operators to be able to enter data from their performance evaluations conducted at their plants to demonstrate compliance with the applicable subpart Y standards electronically into an EPA database (identified as WebFIRE). Numerous other commenters specifically objected to the electronic reporting requirement. Commenters' cite various reasons for opposing the requirement, including (1) the unnecessary burden of electronically reporting test results; (2) uncertainty regarding whether the proposed reporting requirement meets the requirements of the Cross-Media Electronic Reporting Rule (CROMERR), which is codified at 40 CFR Part 3; (3) the lack of sufficient justification for requiring that data be reported electronically, rather than merely standardizing where results are sent and in what form; (4) the lack of any mechanism for sources to confirm the authenticity of data submitted to the Web site for their facility by a stack testing company; (5) the inability of ERT to accept opacity data or continuous monitoring system (CMS) data; and (6) the finalizing of a regulatory requirement based on an "expectation" of WebFIRE and the ERT being operational in early 2011 and of the ERT being CROMERR compliant before 2011 (EPA–HQ–OAR–2005–0031–0284, p. 9). The commenters stated that EPA should proceed with its plans for development of WebFIRE/ERT and allow sources the option to report electronically with those tools when they become available. If WebFIRE does become available in the future and EPA still believes that mandatory electronic reporting through WebFIRE is appropriate, EPA can re-propose the requirement. However, in the meantime, commenters contend that EPA must provide sources the option of continuing to submit reports by mail after 2011, just as EPA did in 40 CFR Part 60, subpart Da (section 60.49Da(v)(4), 74 FR 5072 and 5083, January 28, 2009). Other commenters stated that EPA should develop an electronic data exchange with the State/local/Tribal agencies to get the necessary performance test data. Another commenter stated that by collecting data under CAA section 111, rather than CAA section 114, EPA is overstepping its authority.

Response: The commenters are correct that the Agency does not intend to store visible emissions or CMS operating data used for compliance on WebFIRE. Source owners and testers need not submit visible emissions or CMS data to WebFIRE or any other national database. The source owners must address only those data reporting and record keeping requirements relevant to compliance determinations and certifications (*e.g.*, operating permitting requirements). In this rule, EPA intends that owners/operators submit to WebFIRE pollutant emissions data, particularly those data from performance tests for PM or other pollutants. The purpose of WebFIRE is to be the vehicle for making such data available for use in establishing the most representative emissions factors for use in developing effective national and regional emissions inventories and other purposes. With this provision, the Agency is exercising the authority provided under CAA section 114(a)(1) to have sources collect and submit environmental data needed to implement the CAA.

H. Assessment of Impacts

Comment: One commenter stated that the supplemental proposal continues the same inadequate approach to consideration of the costs and environmental, energy, and economic impacts of amendments to the subpart Y NSPS. The commenter noted that even though the supplemental proposal greatly expanded the coverage of the subpart Y NSPS, both in terms of operations covered and in terms of pollutants regulated, EPA asserted that it will not increase control costs or recordkeeping and reporting costs above those of the April 2008 proposal. The commenter believes that EPA should evaluate the costs and emission reduction benefits of the proposed standards. The commenter explained that because of the definitions of "modification" and "reconstruction" as applied to NSPS, a coal preparation plant at a cement manufacturing facility may be considered "modified" or "reconstructed," and therefore subject to the amended subpart Y, even when the activity that constitutes a "modification" or "reconstruction" results in little or no increase in actual emissions.

Response: EPA has assessed the costs, environmental, energy, and economic impacts associated with the requirements of the final rule. Control

costs, testing and monitoring costs, and recordkeeping and reporting costs have been estimated for each coal preparation and processing operation anticipated to become subject to requirements of the final rule. As previously explained in this preamble, in-line coal mills at Portland cement manufacturing plants are not regulated by subpart Y. Impacts for coal-handling operations that would be regulated by subpart Y and are located at a Portland cement manufacturing plant have been estimated.

Comment: Several comments were received regarding EPA's approach to analyzing the information collection request (ICR) burden of affected owners/operators that would result from the implementation of subpart Y amendments in the supplemental proposal notice. Commenters stated that EPA has grossly underestimated the annual monitoring, reporting, and recordkeeping burden for the effort of the increased monitoring and opacity performance testing for specified affected facilities. The commenters noted that the existing ICR estimates do not take into account the significant additional monitoring requirements contained in the proposed amendments. Commenters believe that EPA's approach to analyzing the ICR burdens associated with the rulemaking is inconsistent with the directives of the Paperwork Reduction Act, and fails to address the actual burdens that will result from the amendments proposed in the supplemental action. Commenters requested that EPA prepare a new ICR that accurately projects the burden associated with the most recently proposed requirements for monitoring, recordkeeping and reporting.

Response: EPA prepared and submitted a revised ICR to the Office of Management and Budget (OMB). The revised ICR addresses all revisions to the subpart Y NSPS made in the final rule—both those proposed in the April 28, 2008, proposal and those proposed in the May 27, 2009, supplemental proposal.

V. Summary of Cost, Environmental, Energy, and Economic Impacts

In setting standards, the CAA requires EPA to consider costs and environmental, energy, and economic impacts. Those impacts are expressed as incremental differences between the impacts of coal preparation and processing facilities complying with the amendments and the current NSPS requirements of subpart Y (*i.e.,* baseline). Impacts are presented for coal preparation and processing plants for which construction, modification, or reconstruction is expected to commence over the 5 years following promulgation of the revised NSPS. EPA estimates that 22 new coal preparation and processing plants will comply with subpart Y in the next 5 years. These new plants are anticipated to consist of coal-handling operations (coal processing and conveying equipment, coal storage systems, and coal transfer and loading systems) and will be built at 2 bituminous mines, 2 subbituminous mines, 1 coke production facility, 6 utility plants, 10 cement manufacturing plants, and 1 industrial site. Conservative assumptions were used in assessing impacts associated with the 22 new plants. For example, emissions from all affected facilities are assumed to be collected and vented through a fabric filter, whereas, owners/operators may opt to use another suitable and less costly control measure. Because a new thermal dryer has not been installed at a bituminous coal mine in the past decade, EPA does not anticipate there will be any new thermal dryers in the next 5 years. Thermal dryers are not, therefore, included in the assessment of economic impacts resulting from the amendments to subpart Y. Nonetheless, we have estimated costs and environmental and energy impacts for 4 model thermal dryers that would result from the amended NSPS in the unlikely event that a new thermal dryer is constructed. Two of the model thermal dryers are direct contact, pulverized bituminous coal-fired dryers (with coal sulfur contents of 1.5 percent and 3.0 percent) at two bituminous mines; one is a natural gas-fired recirculating dryer at an industrial facility; and one is a waste heat-fired indirect dryer at an electric utility power plant. *See* Docket ID No. EPA–HQ–OAR–2008–0260 for details regarding the impacts analyses.

A. What Are the Primary Air Impacts?

EPA estimated PM emissions reductions for coal-handling operations at each type of model coal preparation and processing plant (*i.e.,* at bituminous mines, subbituminous mines, coke production facilities, utility plants, cement manufacturing plants, and industrial sites). We then determined approximate nationwide PM emissions reductions associated with the projected 22 new coal preparation and processing plants by distributing the new plants by site type (*e.g.,* 2 plants at bituminous mines, 2 plants at subbituminous mines, *etc.*). Nationwide PM emissions reduction is estimated to be approximately 7,600 tpy. We also estimated PM, SO_2, NO_X, and CO emissions reductions for each model thermal dryer to demonstrate the pollutant reductions that the NSPS would achieve if a new thermal dryer were built. PM emission reductions are estimated to range from approximately 90 tpy to 14,214 tpy, with the greatest PM reduction coming from the model indirect dryer which, until promulgation of these amendments, has not been subject to subpart Y. SO_2 emission reductions from the model direct contact thermal dryers are estimated to range from 526 tpy to 1,054 tpy, based on coal sulfur contents of 1.5 percent and 3.0 percent, respectively. The estimated NO_X emission reductions of 108 tpy and CO emissions reductions of 19 tpy are the same for both model direct contact thermal dryers. Neither natural gas-fired recirculating dryers nor waste heat-fired indirect dryers are subject to the SO_2, NO_X, or CO emission limits.

B. What Are the Water and Solid Waste Impacts?

EPA estimates that for the 22 coal preparation and processing plants projected to be built, approximately 7,600 tpy of additional solid waste will be generated as a result of operating systems that collect and vent exhaust gases through a fabric filter. There will be no waste water impacts. While EPA believes it is unlikely that any new thermal dryers will be constructed in the next 5 years, we estimate that 30 million-gallons per year of waste water would be generated by each of the model thermal dryers using venturi scrubbers. The solid waste that would be generated by the model thermal dryers using fabric filters is estimated to range from 323 tpy to 14,365 tpy.

C. What Are the Energy Impacts?

EPA estimates that approximately 11,800 megawatt-hours per year (MWh/year) of additional electricity will be required to support the collection of, and venting through a fabric filter, exhaust gases from the 22 new coal preparation and processing plants that are projected to be constructed. While EPA believes it is unlikely that any new thermal dryers will be constructed in the next 5 years, we estimate that 23 MWh/year to 4,200 MWh/year of additional electricity would be required by the control technologies associated with the four model thermal dryers.

D. What Are the Secondary Air Impacts?

Secondary air impacts are direct impacts that result from the increase in electricity use that we estimate may be required to enable facilities to achieve the requirements of a rule. We estimate that the rule's requirements could result in emissions of 1 tpy of PM, 8 tpy of

SO_2, 5 tpy of NO_X, and 1 tpy of CO from the increased electricity useage by the 22 new coal preparation and processing plants that are projected to be constructed. While EPA believes it is unlikely that any new thermal dryers will be constructed in the next 5 years, we estimate that the rule's requirements for thermal dryers could result in emissions of 4 to 680 pounds per year (lb/yr) of PM, 40 to 5,880 lb/yr of SO_2, 20 to 3,780 lb/yr of NO_X, and 4 to 840 lb/yr of CO from the increased electricity usage by the four model thermal dryers.

E. What Are the Cost and Economic Impacts?

EPA estimates that the national total costs for the 22 new coal preparation and processing plants projected to be constructed to comply with requirements of the final rule would be approximately $7.9 million in each of the first 5 years of compliance. This estimate includes the costs of control technology, testing, monitoring, and recordkeeping and reporting. EPA assessed the economic impacts of the amendments to the NSPS for coal preparation and processing plants. An economic impact analysis focuses on changes in market prices and output levels. Both the magnitude of control costs needed to comply with the final rule and the distribution of these costs among affected facilities can have a role in determining how the market will change in response to the rule. The costs to comply with the final rule on a facility basis are all projected to be less than one percent of sales. These small costs are not expected to result in a significant market impact whether they are passed on to the purchaser or absorbed.

While EPA believes it is unlikely that any new thermal dryers will be constructed, these amendments will protect the public health and environment by assuring that appropriate controls will be installed on future new thermal dryers should any be built. We estimate that the total costs for the model thermal dryers to comply with requirements of the final rule could range from $133,000 per year to $1.54 million per year, with the highest total cost representing a direct contact model thermal dryer using coal with a higher sulfur content (*i.e.,* 3 percent) and that would be subject to PM, SO_2, NO_X, and CO emission limits.

The majority of States that have requirements beyond the NSPS already require controls and work practice standards for coal preparation and processing plant operations. In addition, any coal preparation and processing plant that is subject to NSR would have control requirements significantly more stringent than those of the 1976 NSPS. Thus, a benefit of the amendments to subpart Y will be that affected facilities located in States that do not require controls beyond the existing NSPS will be required to comply with emission standards based on current BDT for coal preparation and processing plants.

VI. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review

Under Executive Order (EO) 12866 (58 FR 51735, October 4, 1993), this action is a "significant regulatory action" because it may raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the EO. Accordingly, EPA submitted this action to the 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

The information collection requirements in this rule have been submitted for approval to the OMB under the *Paperwork Reduction Act,* 44 U.S.C. 3501 *et seq.* The information collection requirements are not enforceable until OMB approves them.

The amendments to the existing standards of performance for coal preparation and processing plants add new monitoring, reporting, and recordkeeping requirements. All affected facilities constructed, reconstructed, or modified on or after April 28, 2008, are required to conduct initial performance testing. The amendments include a reduction in Method 9 test duration, and for subsequent Method 9 testing, a provision allowing simultaneous Method 9 testing for up to three emission points. Frequency of subsequent Method 9 testing is based on performance during the most recent test (*i.e.,* subsequent testing is required within 90 days or 12 months of previous test). The amendments also provide an alternative to more frequent subsequent Method 9 testing that consists of monthly visual observations of process and control equipment, daily 15-second observations of each affected facility with a requirement to conduct corrective actions if any visible emissions are observed, and Method 9 testing at least once every 5 years. Separate testing and monitoring requirements are provided for coal truck dump operations. Owners/operators of open storage coal piles constructed on or after May 27, 2009, are required to prepare, and operate in accordance with, a fugitive dust emissions control plan that addresses the types of control measures that will be used to minimize fugitive coal dust emissions from the source's open storage piles. The information generated by the requirements described above will be used by EPA to ensure that any new affected facilities comply with the emission limits and other requirements. Records and reports are necessary to enable EPA or States to identify new affected facilities that may not be in compliance with the requirements. Based on reported information, EPA will decide which units and what records or processes should be inspected. The amendments do not require any notifications or reports beyond those required by the General Provisions. The recordkeeping requirements require only the specific information needed to determine compliance. These recordkeeping and reporting requirements are specifically authorized by CAA section 114 (42 U.S.C. 7414). All information submitted to EPA for which a claim of confidentiality is made will be safeguarded according to EPA policies in 40 CFR Part 2, subpart B, Confidentiality of Business Information.

The nationwide monitoring, reporting, and recordkeeping burden for this collection over the first 3 years of this ICR is estimated to total 27,578 labor-hours at a cost of $2,601,624. The nationwide 3-year average burden is estimated to be 9,193 labor-hours per year and $867,208 per year. Based on 14 respondents, the average burden hours per respondent are estimated to be 657 hours at an estimated cost of $61,943 per respondent. Over the first 3 years of this ICR, the annualized total capital and start-up costs are estimated to be $674,528 and the total operation and maintenance costs are estimated to be $1,151,690. Burden is defined at 5 CFR 1320.3(b).

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. EPA displays OMB control numbers various ways. For example, EPA lists OMB control numbers for EPA's regulations in 40 CFR Part 9, which we amend periodically. Additionally, we may display the OMB control number in another part of the CFR, or in a valid **Federal Register** notice, or by other appropriate means. The OMB control number display will become effective

the earliest of any of the methods authorized in 40 CFR Part 9.

When this ICR is approved by OMB, the Agency will publish a **Federal Register** notice announcing this approval and displaying the OMB control number for the approved information collection requirements contained in this final rule. We will also publish a technical amendment to 40 CFR part 9 in the **Federal Register** to consolidate the display of the OMB control number with other approved information collection requirements.

C. Regulatory Flexibility Act

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

For purposes of assessing the impacts of these final amendments to 40 CFR part 60, subpart Y, on small entities, small entity is defined as: (1) A small business as defined by the Small Business Administration'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; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of this final rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. This final rule will not impose any requirements on small entities. We are not aware of any small entities in the coal preparation and processing regulated industry. The subpart Y standards are applicable to facilities that process (*i.e.*, break, crush, screen, clean, or dry) more than 181 Mg (200 tons) of coal per day.

D. Unfunded Mandates Reform Act

This final rule does not contain a Federal mandate that may result in expenditures of $100 million or more for State, local, and Tribal governments, in the aggregate, or the private sector in any one year. The total annual control, testing and monitoring, and recordkeeping and reporting costs of the final rule at year five is $7.9 million. Thus, this final rule is not subject to the requirements of sections 202 or 205 of UMRA.

This final 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. We are not aware of any coal preparation and processing plants owned by small governments.

E. Executive Order 13132: Federalism

This action does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in EO 13132. These final amendments will not impose substantial direct compliance costs on State or local governments and will not preempt State law. Thus, EO 13132 does not apply to this action.

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

This final action does not have Tribal implications, as specified in Executive Order 13175 (65 FR 67249, November 9, 2000). We are not aware of any coal preparation and processing facilities owned by an Indian Tribe. 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 EO 13045 (62 FR 19885, April 23, 1997) as applying to those regulatory actions that concern health or safety risks, such that the analysis required under section 5–501 of the EO has the potential to influence the regulation. This final action is not subject to EO 13045 because it is based solely on technology performance.

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

This final action is not a "significant energy action" as defined in EO 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. EPA estimates that the requirements in this final action will cause most coal preparation and processing operations that become subject to subpart Y to install new control devices, resulting in approximately 12,400 megawatt-hours per year of additional electricity being used. Given the negligible change in energy consumption resulting from this action, EPA does not expect significant adverse energy effects. Further, we have concluded that this final rule is not likely to have any adverse energy effects because

I. National Technology Transfer Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 ("NTTAA"), Public Law 104–113 (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards (VCS) in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. VCS 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 VCS.

This final rulemaking involves technical standards. EPA has decided to use ASME PTC 19.10–1981, "Flue and Exhaust Gas Analyses," for its manual methods of measuring the oxygen, carbon dioxide, sulfur dioxide or nitrogen dioxide content of the exhaust gas. These parts of ASME PTC 19.10–1981 are acceptable alternatives to EPA Method 3B of appendix A–2 and EPA Methods 6, 6A, and 7 of appendix A–4 of 40 CFR Part 60. This standard is available from the American Society of Mechanical Engineers (ASME), Three Park Avenue, New York, NY 10016–5990.

EPA also has decided to use EPA Methods 1, 1A, 2, 2A, 2C, 2D, 2F, 2G, 3, 3A, 3B, 4, 5, 5B, 5D, 6, 6A, 6C, 7, 7E, 9, 10, 17, and 22 (40 CFR part 60, appendices A–1 through A–7). While the Agency has identified 20 VCS as being potentially applicable, we do not propose to use these standards in this final rulemaking. The use of these VCS would be impractical because they do not meet the objectives of the standards cited in this final rule. *See* the docket of this final rule for the reasons for these determinations on the standards.

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

Executive Order 12898 (59 FR 7629, February 16, 1994) establishes Federal executive policy on environmental justice. Its main provision directs Federal agencies, to the greatest extent practical 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 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 adverse human health or environmental effects on any populations, including any minority or low-income population. The final rule will assure that all new coal preparation and processing plants install appropriate controls to limit health impacts to nearby populations.

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 final rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a "major rule" as defined by 5 U.S.C. 804(2). This final rule will be effective October 8, 2009.

List of Subjects in 40 CFR Part 60

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

Dated: September 25, 2009.

Lisa P. Jackson,

Administrator.

■ For the reasons stated in the preamble, title 40, chapter I, part 60, of the Code of the Federal Regulations is amended as follows:

PART 60—[AMENDED]

■ 1. The authority citation for part 60 continues to read as follows:

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

Subpart A—[Amended]

■ 2. Section 60.17 is amended:
■ a. By revising paragraph (a)(13);
■ b. By removing paragraph (a)(14);
■ c. By redesignating paragraphs (a)(15) through (a)(93) as paragraphs (a)(14) through (a)(92); and
■ d. By revising paragraph (h)(4) to read as follows.

§60.17 Incorporations by Reference.

* * * * *

(a) * * *

(13) ASTM D388–77, 90, 91, 95, 98a, 99 (Reapproved 2004)$^{\varepsilon 1}$, Standard Specification for Classification of Coals by Rank, IBR approved for §§ 60.24(h)(8), 60.41 of subpart D of this part, 60.45(f)(4)(i), 60.45(f)(4)(ii), 60.45(f)(4)(vi), 60.41Da of subpart Da of this part, 60.41b of subpart Db of this part, 60.41c of subpart Dc of this part, 60.251 of subpart Y of this part, and 60.4102.

* * * * *

(h) * * *

(4) ANSI/ASME PTC 19.10–1981, Flue and Exhaust Gas Analyses [part 10, Instruments and Apparatus], IBR approved for § 60.106(e)(2) of subpart J, §§ 60.104a(d)(3), (d)(5), (d)(6), (h)(3), (h)(4), (h)(5), (i)(3), (i)(4), (i)(5), (j)(3), and (j)(4), 60.105a(d)(4), (f)(2), (f)(4), (g)(2), and (g)(4), 60.106a(a)(1)(iii), (a)(2)(iii), (a)(2)(v), (a)(2)(viii), (a)(3)(ii), and (a)(3)(v), and 60.107a(a)(1)(ii), (a)(1)(iv), (a)(2)(ii), (c)(2), (c)(4), and (d)(2) of subpart Ja, § 60.257(b)(3) of subpart Y, tables 1 and 3 of subpart EEEE, tables 2 and 4 of subpart FFFF, table 2 of subpart JJJJ, and §§ 60.4415(a)(2) and 60.4415(a)(3) of subpart KKKK of this part.

* * * * *

Subpart Y—[Amended]

■ 3. Part 60 is amended by revising subpart Y to read as follows:

Sec.

Subpart Y—Standards of Performance for Coal Preparation and Processing Plants

60.250 Applicability and designation of affected facility.
60.251 Definitions.
60.252 Standards for thermal dryers.
60.253 Standards for pneumatic coal-cleaning equipment.
60.254 Standards for coal processing and conveying equipment, coal storage systems, transfer and loading systems, and open storage piles.
60.255 Performance tests and other compliance requirements.
60.256 Continuous monitoring requirements.
60.257 Test methods and procedures.
60.258 Reporting and recordkeeping.

Subpart Y—Standards of Performance for Coal Preparation and Processing Plants

§60.250 Applicability and designation of affected facility.

(a) The provisions of this subpart apply to affected facilities in coal preparation and processing plants that process more than 181 megagrams (Mg) (200 tons) of coal per day.

(b) The provisions in § 60.251, § 60.252(a), § 60.253(a), § 60.254(a), § 60.255(a), and § 60.256(a) of this subpart are applicable to any of the following affected facilities that commenced construction, reconstruction or modification after October 27, 1974, and on or before April 28, 2008: Thermal dryers, pneumatic coal-cleaning equipment (air tables), coal processing and conveying equipment (including breakers and crushers), and coal storage systems, transfer and loading systems.

(c) The provisions in § 60.251, § 60.252(b)(1) and (c), § 60.253(b), § 60.254(b), § 60.255(b) through (h), § 60.256(b) and (c), § 60.257, and § 60.258 of this subpart are applicable to any of the following affected facilities that commenced construction, reconstruction or modification after April 28, 2008, and on or before May 27, 2009: Thermal dryers, pneumatic coal-cleaning equipment (air tables), coal processing and conveying equipment (including breakers and crushers), and coal storage systems, transfer and loading systems.

(d) The provisions in § 60.251, § 60.252(b)(1) through (3), and (c), § 60.253(b), § 60.254(b) and (c), § 60.255(b) through (h), § 60.256(b) and (c), § 60.257, and § 60.258 of this subpart are applicable to any of the following affected facilities that commenced construction, reconstruction or modification after May 27, 2009: Thermal dryers, pneumatic coal-cleaning equipment (air tables), coal processing and conveying equipment (including breakers and crushers), coal storage systems, transfer and loading systems, and open storage piles.

§60.251 Definitions.

As used in this subpart, all terms not defined herein have the meaning given them in the Clean Air Act (Act) and in subpart A of this part.

(a) *Anthracite* means coal that is classified as anthracite according to the American Society of Testing and Materials in ASTM D388 (incorporated by reference, *see* § 60.17).

(b) *Bag leak detection system* means a system that is capable of continuously monitoring relative particulate matter (dust loadings) in the exhaust of a fabric filter to detect bag leaks and other upset conditions. A bag leak detection system includes, but is not limited to, an instrument that operates on triboelectric, light scattering, light transmittance, or other effect to continuously monitor relative particulate matter loadings.

(c) *Bituminous coal* means solid fossil fuel classified as bituminous coal by ASTM D388 (incorporated by reference—*see* § 60.17).

(d) *Coal* means:

(1) For units constructed, reconstructed, or modified on or before May 27, 2009, all solid fossil fuels classified as anthracite, bituminous, subbituminous, or lignite by ASTM D388 (incorporated by reference—*see* § 60.17).

(2) For units constructed, reconstructed, or modified after May 27, 2009, all solid fossil fuels classified as anthracite, bituminous, subbituminous, or lignite by ASTM D388 (incorporated by reference—*see* § 60.17), and coal refuse.

(e) *Coal preparation and processing plant* means any facility (excluding underground mining operations) which prepares coal by one or more of the following processes: breaking, crushing, screening, wet or dry cleaning, and thermal drying.

(f) *Coal processing and conveying equipment* means any machinery used to reduce the size of coal or to separate coal from refuse, and the equipment used to convey coal to or remove coal and refuse from the machinery. This includes, but is not limited to, breakers, crushers, screens, and conveyor belts. Equipment located at the mine face is not considered to be part of the coal preparation and processing plant.

(g) *Coal refuse* means waste products of coal mining, physical coal cleaning, and coal preparation operations (*e.g.* culm, gob, *etc.*) containing coal, matrix material, clay, and other organic and inorganic material.

(h) *Coal storage system* means any facility used to store coal except for open storage piles.

(i) *Design controlled potential PM emissions rate* means the theoretical particulate matter (PM) emissions (Mg) that would result from the operation of a control device at its design emissions rate (grams per dry standard cubic meter (g/dscm)), multiplied by the maximum design flow rate (dry standard cubic meter per minute (dscm/min)), multiplied by 60 (minutes per hour (min/hr)), multiplied by 8,760 (hours per year (hr/yr)), divided by 1,000,000 (megagrams per gram (Mg/g)).

(j) *Indirect thermal dryer* means a thermal dryer that reduces the moisture content of coal through indirect heating of the coal through contact with a heat transfer medium. If the source of heat (the source of combustion or furnace) is subject to another subpart of this part, then the furnace and the associated emissions are not part of the affected facility. However, if the source of heat is not subject to another subpart of this part, then the furnace and the associated emissions are part of the affected facility.

(k) *Lignite* means coal that is classified as lignite A or B according to the American Society of Testing and Materials in ASTM D388 (incorporated by reference, *see* § 60.17).

(l) *Mechanical vent* means any vent that uses a powered mechanical drive (machine) to induce air flow.

(m) *Open storage pile* means any facility, including storage area, that is not enclosed that is used to store coal, including the equipment used in the loading, unloading, and conveying operations of the facility.

(n) *Operating day* means a 24-hour period between 12 midnight and the following midnight during which coal is prepared or processed at any time by the affected facility. It is not necessary that coal be prepared or processed the entire 24-hour period.

(o) *Pneumatic coal-cleaning equipment* means:

(1) For units constructed, reconstructed, or modified on or before May 27, 2009, any facility which classifies bituminous coal by size or separates bituminous coal from refuse by application of air stream(s).

(2) For units constructed, reconstructed, or modified after May 27, 2009, any facility which classifies coal by size or separates coal from refuse by application of air stream(s).

(p) *Potential combustion concentration* means the theoretical emissions (nanograms per joule (ng/J) or pounds per million British thermal units (lb/MMBtu) heat input) that would result from combustion of a fuel in an uncleaned state without emission control systems, as determined using Method 19 of appendix A–7 of this part.

(q) *Subbituminous coal* means coal that is classified as subbituminous A, B, or C according to the American Society of Testing and Materials in ASTM D388 (incorporated by reference, *see* § 60.17).

(r) *Thermal dryer* means:

(1) For units constructed, reconstructed, or modified on or before May 27, 2009, any facility in which the moisture content of bituminous coal is reduced by contact with a heated gas stream which is exhausted to the atmosphere.

(2) For units constructed, reconstructed, or modified after May 27, 2009, any facility in which the moisture content of coal is reduced by either contact with a heated gas stream which is exhausted to the atmosphere or through indirect heating of the coal through contact with a heated heat transfer medium.

(s) *Transfer and loading system* means any facility used to transfer and load coal for shipment.

§ 60.252 Standards for thermal dryers.

(a) On and after the date on which the performance test is conducted or required to be completed under § 60.8, whichever date comes first, an owner or operator of a thermal dryer constructed, reconstructed, or modified on or before April 28, 2008, subject to the provisions of this subpart must meet the requirements in paragraphs (a)(1) and (a)(2) of this section.

(1) The owner or operator shall not cause to be discharged into the atmosphere from the thermal dryer any gases which contain PM in excess of 0.070 g/dscm (0.031 grains per dry standard cubic feet (gr/dscf)); and

(2) The owner or operator shall not cause to be discharged into the atmosphere from the thermal dryer any gases which exhibit 20 percent opacity or greater.

(b) Except as provided in paragraph (c) of this section, on and after the date on which the performance test is conducted or required to be completed under § 60.8, whichever date comes first, an owner or operator of a thermal dryer constructed, reconstructed, or modified after April 28, 2008, subject to the provisions of this subpart must meet the applicable standards for PM and opacity, as specified in paragraph (b)(1) of this section. In addition, and except as provided in paragraph (c) of this section, on and after the date on which the performance test is conducted or required to be completed under § 60.8, whichever date comes first, an owner or operator of a thermal dryer constructed, reconstructed, or modified after May 29, 2009, subject to the provisions of this subpart must also meet the applicable standards for sulfur dioxide (SO_2), and combined nitrogen oxides (NO_X) and carbon monoxide (CO) as specified in paragraphs (b)(2) and (b)(3) of this section.

(1) The owner or operator must meet the requirements for PM emissions in paragraphs (b)(1)(i) through (iii) of this section, as applicable to the affected facility.

(i) For each thermal dryer constructed or reconstructed after April 28, 2008, the owner or operator must meet the requirements of (b)(1)(i)(A) and (b)(1)(i)(B).

(A) The owner or operator must not cause to be discharged into the atmosphere from the thermal dryer any gases that contain PM in excess of 0.023 g/dscm (0.010 grains per dry standard cubic feet (gr/dscf)); and

(B) The owner or operator must not cause to be discharged into the atmosphere from the thermal dryer any gases that exhibit 10 percent opacity or greater.

(ii) For each thermal dryer modified after April 28, 2008, the owner or operator must meet the requirements of paragraphs (b)(1)(ii)(A) and (b)(1)(ii)(B) of this section.

(A) The owner or operator must not cause to be discharged to the atmosphere from the affected facility any gases which contain PM in excess of 0.070 g/dscm (0.031 gr/dscf); and

(B) The owner or operator must not cause to be discharged into the atmosphere from the affected facility any gases which exhibit 20 percent opacity or greater.

(2) Except as provided in paragraph (b)(2)(iii) of this section, for each thermal dryer constructed, reconstructed, or modified after May 27, 2009, the owner or operator must meet the requirements for SO_2 emissions in either paragraph (b)(2)(i) or (b)(2)(ii) of this section.

(i) The owner or operator must not cause to be discharged into the atmosphere from the affected facility any gases that contain SO_2 in excess of 85 ng/J (0.20 lb/MMBtu) heat input; or

(ii) The owner or operator must not cause to be discharged into the atmosphere from the affected facility any gases that either contain SO_2 in excess of 520 ng/J (1.20 lb/MMBtu) heat input or contain SO_2 in excess of 10 percent of the potential combustion concentration (*i.e.,* the facility must achieve at least a 90 percent reduction of the potential combustion concentration and may not exceed a maximum emissions rate of 1.2 lb/MMBtu (520 ng/J)).

(iii) Thermal dryers that receive all of their thermal input from a source other than coal or residual oil, that receive all of their thermal input from a source subject to an SO_2 limit under another subpart of this part, or that use waste heat or residual from the combustion of coal or residual oil as their only thermal input are not subject to the SO_2 limits of this section.

(3) Except as provided in paragraph (b)(3)(iii) of this section, the owner or operator must meet the requirements for combined NO_x and CO emissions in paragraph (b)(3)(i) or (b)(3)(ii) of this section, as applicable to the affected facility.

(i) For each thermal dryer constructed after May 27, 2009, the owner or operator must not cause to be discharged into the atmosphere from the affected facility any gases which contain a combined concentration of NO_X and CO in excess of 280 ng/J (0.65 lb/MMBtu) heat input.

(ii) For each thermal dryer reconstructed or modified after May 27, 2009, the owner or operator must not cause to be discharged into the atmosphere from the affected facility any gases which contain combined concentration of NO_X and CO in excess of 430 ng/J (1.0 lb/MMBtu) heat input.

(iii) Thermal dryers that receive all of their thermal input from a source other than coal or residual oil, that receive all of their thermal input from a source subject to a NO_X limit and/or CO limit under another subpart of this part, or that use waste heat or residual from the combustion of coal or residual oil as their only thermal input, are not subject to the combined NO_X and CO limits of this section.

(c) Thermal dryers receiving all of their thermal input from an affected facility covered under another 40 CFR Part 60 subpart must meet the applicable requirements in that subpart but are not subject to the requirements in this subpart.

§ 60.253 Standards for pneumatic coal-cleaning equipment.

(a) On and after the date on which the performance test is conducted or required to be completed under § 60.8, whichever date comes first, an owner or operator of pneumatic coal-cleaning equipment constructed, reconstructed, or modified on or before April 28, 2008, must meet the requirements of paragraphs (a)(1) and (a)(2) of this section.

(1) The owner or operator must not cause to be discharged into the atmosphere from the pneumatic coal-cleaning equipment any gases that contain PM in excess of 0.040 g/dscm (0.017 gr/dscf); and

(2) The owner or operator must not cause to be discharged into the atmosphere from the pneumatic coal-cleaning equipment any gases that exhibit 10 percent opacity or greater.

(b) On and after the date on which the performance test is conducted or required to be completed under § 60.8, whichever date comes first, an owner or operator of pneumatic coal-cleaning equipment constructed, reconstructed, or modified after April 28, 2008, must meet the requirements in paragraphs (b)(1) and (b)(2) of this section.

(1) The owner of operator must not cause to be discharged into the atmosphere from the pneumatic coal-cleaning equipment any gases that contain PM in excess or 0.023 g/dscm (0.010 gr/dscf); and

(2) The owner or operator must not cause to be discharged into the atmosphere from the pneumatic coal-cleaning equipment any gases that exhibit greater than 5 percent opacity.

§ 60.254 Standards for coal processing and conveying equipment, coal storage systems, transfer and loading systems, and open storage piles.

(a) On and after the date on which the performance test is conducted or required to be completed under § 60.8, whichever date comes first, an owner or operator shall not cause to be discharged into the atmosphere from any coal processing and conveying equipment, coal storage system, or coal transfer and loading system processing coal constructed, reconstructed, or modified on or before April 28, 2008, gases which exhibit 20 percent opacity or greater.

(b) On and after the date on which the performance test is conducted or required to be completed under § 60.8, whichever date comes first, an owner or operator of any coal processing and conveying equipment, coal storage system, or coal transfer and loading system processing coal constructed, reconstructed, or modified after April 28, 2008, must meet the requirements in paragraphs (b)(1) through (3) of this section, as applicable to the affected facility.

(1) Except as provided in paragraph (b)(3) of this section, the owner or operator must not cause to be discharged into the atmosphere from the affected facility any gases which exhibit 10 percent opacity or greater.

(2) The owner or operator must not cause to be discharged into the atmosphere from any mechanical vent on an affected facility gases which contain particulate matter in excess of 0.023 g/dscm (0.010 gr/dscf).

(3) Equipment used in the loading, unloading, and conveying operations of open storage piles are not subject to the opacity limitations of paragraph (b)(1) of this section.

(c) The owner or operator of an open storage pile, which includes the equipment used in the loading, unloading, and conveying operations of the affected facility, constructed, reconstructed, or modified after May 27, 2009, must prepare and operate in

accordance with a submitted fugitive coal dust emissions control plan that is appropriate for the site conditions as specified in paragraphs (c)(1) through (6) of this section.

(1) The fugitive coal dust emissions control plan must identify and describe the control measures the owner or operator will use to minimize fugitive coal dust emissions from each open storage pile.

(2) For open coal storage piles, the fugitive coal dust emissions control plan must require that one or more of the following control measures be used to minimize to the greatest extent practicable fugitive coal dust: Locating the source inside a partial enclosure, installing and operating a water spray or fogging system, applying appropriate chemical dust suppression agents on the source (when the provisions of paragraph (c)(6) of this section are met), use of a wind barrier, compaction, or use of a vegetative cover. The owner or operator must select, for inclusion in the fugitive coal dust emissions control plan, the control measure or measures listed in this paragraph that are most appropriate for site conditions. The plan must also explain how the measure or measures selected are applicable and appropriate for site conditions. In addition, the plan must be revised as needed to reflect any changing conditions at the source.

(3) Any owner or operator of an affected facility that is required to have a fugitive coal dust emissions control plan may petition the Administrator to approve, for inclusion in the plan for the affected facility, alternative control measures other than those specified in paragraph (c)(2) of this section as specified in paragraphs (c)(3)(i) through (iv) of this section.

(i) The petition must include a description of the alternative control measures, a copy of the fugitive coal dust emissions control plan for the affected facility that includes the alternative control measures, and information sufficient for EPA to evaluate the demonstrations required by paragraph (c)(3)(ii) of this section.

(ii) The owner or operator must either demonstrate that the fugitive coal dust emissions control plan that includes the alternate control measures will provide equivalent overall environmental protection or demonstrate that it is either economically or technically infeasible for the affected facility to use the control measures specifically identified in paragraph (c)(2).

(iii) While the petition is pending, the owner or operator must comply with the fugitive coal dust emissions control plan including the alternative control measures submitted with the petition. Operation in accordance with the plan submitted with the petition shall be deemed to constitute compliance with the requirement to operate in accordance with a fugitive coal dust emissions control plan that contains one of the control measures specifically identified in paragraph (c)(2) of this section while the petition is pending.

(iv) If the petition is approved by the Administrator, the alternative control measures will be approved for inclusion in the fugitive coal dust emissions control plan for the affected facility. In lieu of amending this subpart, a letter will be sent to the facility describing the specific control measures approved. The facility shall make any such letters and the applicable fugitive coal dust emissions control plan available to the public. If the Administrator determines it is appropriate, the conditions and requirements of the letter can be reviewed and changed at any point.

(4) The owner or operator must submit the fugitive coal dust emissions control plan to the Administrator or delegated authority as specified in paragraphs (c)(4)(i) and (c)(4)(ii) of this section.

(i) The plan must be submitted to the Administrator or delegated authority prior to startup of the new, reconstructed, or modified affected facility, or 30 days after the effective date of this rule, whichever is later.

(ii) The plan must be revised as needed to reflect any changing conditions at the source. Such revisions must be dated and submitted to the Administrator or delegated authority before a source can operate pursuant to these revisions. The Administrator or delegated authority may also object to such revisions as specified in paragraph (c)(5) of this section.

(5) The Administrator or delegated authority may object to the fugitive coal dust emissions control plan as specified in paragraphs (c)(5)(i) and (c)(5)(ii) of this section.

(i) The Administrator or delegated authority may object to any fugitive coal dust emissions control plan that it has determined does not meet the requirements of paragraphs (c)(1) and (c)(2) of this section.

(ii) If an objection is raised, the owner or operator, within 30 days from receipt of the objection, must submit a revised fugitive coal dust emissions control plan to the Administrator or delegated authority. The owner or operator must operate in accordance with the revised fugitive coal dust emissions control plan. The Administrator or delegated authority retain the right, under paragraph (c)(5) of this section, to object to the revised control plan if it determines the plan does not meet the requirements of paragraphs (c)(1) and (c)(2) of this section.

(6) Where appropriate chemical dust suppression agents are selected by the owner or operator as a control measure to minimize fugitive coal dust emissions, (1) only chemical dust suppressants with Occupational Safety and Health Administration (OSHA)-compliant material safety data sheets (MSDS) are to be allowed; (2) the MSDS must be included in the fugitive coal dust emissions control plan; and (3) the owner or operator must consider and document in the fugitive coal dust emissions control plan the site-specific impacts associated with the use of such chemical dust suppressants.

§ 60.255 Performance tests and other compliance requirements.

(a) An owner or operator of each affected facility that commenced construction, reconstruction, or modification on or before April 28, 2008, must conduct all performance tests required by § 60.8 to demonstrate compliance with the applicable emission standards using the methods identified in § 60.257.

(b) An owner or operator of each affected facility that commenced construction, reconstruction, or modification after April 28, 2008, must conduct performance tests according to the requirements of § 60.8 and the methods identified in § 60.257 to demonstrate compliance with the applicable emissions standards in this subpart as specified in paragraphs (b)(1) and (2) of this section.

(1) For each affected facility subject to a PM, SO_2, or combined NO_X and CO emissions standard, an initial performance test must be performed. Thereafter, a new performance test must be conducted according the requirements in paragraphs (b)(1)(i) through (iii) of this section, as applicable.

(i) If the results of the most recent performance test demonstrate that emissions from the affected facility are greater than 50 percent of the applicable emissions standard, a new performance test must be conducted within 12 calendar months of the date that the previous performance test was required to be completed.

(ii) If the results of the most recent performance test demonstrate that emissions from the affected facility are 50 percent or less of the applicable emissions standard, a new performance test must be conducted within 24 calendar months of the date that the

previous performance test was required to be completed.

(iii) An owner or operator of an affected facility that has not operated for the 60 calendar days prior to the due date of a performance test is not required to perform the subsequent performance test until 30 calendar days after the next operating day.

(2) For each affected facility subject to an opacity standard, an initial performance test must be performed. Thereafter, a new performance test must be conducted according to the requirements in paragraphs (b)(2)(i) through (iii) of this section, as applicable, except as provided for in paragraphs (e) and (f) of this section. Performance test and other compliance requirements for coal truck dump operations are specified in paragraph (h) of this section.

(i) If any 6-minute average opacity reading in the most recent performance test exceeds half the applicable opacity limit, a new performance test must be conducted within 90 operating days of the date that the previous performance test was required to be completed.

(ii) If all 6-minute average opacity readings in the most recent performance test are equal to or less than half the applicable opacity limit, a new performance test must be conducted within 12 calendar months of the date that the previous performance test was required to be completed.

(iii) An owner or operator of an affected facility continuously monitoring scrubber parameters as specified in § 60.256(b)(2) is exempt from the requirements in paragraphs (b)(2)(i) and (ii) if opacity performance tests are conducted concurrently with (or within a 60-minute period of) PM performance tests.

(c) If any affected coal processing and conveying equipment (*e.g.,* breakers, crushers, screens, conveying systems), coal storage systems, or coal transfer and loading systems that commenced construction, reconstruction, or modification after April 28, 2008, are enclosed in a building, and emissions from the building do not exceed any of the standards in § 60.254 that apply to the affected facility, then the facility shall be deemed to be in compliance with such standards.

(d) An owner or operator of an affected facility (other than a thermal dryer) that commenced construction, reconstruction, or modification after April 28, 2008, is subject to a PM emission standard and uses a control device with a design controlled potential PM emissions rate of 1.0 Mg (1.1 tons) per year or less is exempted from the requirements of paragraphs (b)(1)(i) and (ii) of this section provided that the owner or operator meets all of the conditions specified in paragraphs (d)(1) through (3) of this section. This exemption does not apply to thermal dryers.

(1) PM emissions, as determined by the most recent performance test, are less than or equal to the applicable limit,

(2) The control device manufacturer's recommended maintenance procedures are followed, and

(3) All 6-minute average opacity readings from the most recent performance test are equal to or less than half the applicable opacity limit or the monitoring requirements in paragraphs (e) or (f) of this section are followed.

(e) For an owner or operator of a group of up to five of the same type of affected facilities that commenced construction, reconstruction, or modification after April 28, 2008, that are subject to PM emissions standards and use identical control devices, the Administrator or delegated authority may allow the owner or operator to use a single PM performance test for one of the affected control devices to demonstrate that the group of affected facilities is in compliance with the applicable emissions standards provided that the owner or operator meets all of the conditions specified in paragraphs (e)(1) through (3) of this section.

(1) PM emissions from the most recent performance test for each individual affected facility are 90 percent or less of the applicable PM standard;

(2) The manufacturer's recommended maintenance procedures are followed for each control device; and

(3) A performance test is conducted on each affected facility at least once every 5 calendar years.

(f) As an alternative to meeting the requirements in paragraph (b)(2) of this section, an owner or operator of an affected facility that commenced construction, reconstruction, or modification after April 28, 2008, may elect to comply with the requirements in paragraph (f)(1) or (f)(2) of this section.

(1) Monitor visible emissions from each affected facility according to the requirements in paragraphs (f)(1)(i) through (iii) of this section.

(i) Conduct one daily 15-second observation each operating day for each affected facility (during normal operation) when the coal preparation and processing plant is in operation. Each observation must be recorded as either visible emissions observed or no visible emissions observed. Each observer determining the presence of visible emissions must meet the training requirements specified in § 2.3 of Method 22 of appendix A–7 of this part. If visible emissions are observed during any 15-second observation, the owner or operator must adjust the operation of the affected facility and demonstrate within 24 hours that no visible emissions are observed from the affected facility. If visible emissions are observed, a Method 9, of appendix A–4 of this part, performance test must be conducted within 45 operating days.

(ii) Conduct monthly visual observations of all process and control equipment. If any deficiencies are observed, the necessary maintenance must be performed as expeditiously as possible.

(iii) Conduct a performance test using Method 9 of appendix A–4 of this part at least once every 5 calendar years for each affected facility.

(2) Prepare a written site-specific monitoring plan for a digital opacity compliance system for approval by the Administrator or delegated authority. The plan shall require observations of at least one digital image every 15 seconds for 10-minute periods (during normal operation) every operating day. An approvable monitoring plan must include a demonstration that the occurrences of visible emissions are not in excess of 5 percent of the observation period. For reference purposes in preparing the monitoring plan, *see* OAQPS "Determination of Visible Emission Opacity from Stationary Sources Using Computer-Based Photographic Analysis Systems." This document is available from the U.S. Environmental Protection Agency (U.S. EPA); Office of Air Quality and Planning Standards; Sector Policies and Programs Division; Measurement Group (D243–02), Research Triangle Park, NC 27711. This document is also available on the Technology Transfer Network (TTN) under Emission Measurement Center Preliminary Methods. The monitoring plan approved by the Administrator or delegated authority shall be implemented by the owner or operator.

(g) As an alternative to meeting the requirements in paragraph (b)(2) of this section, an owner or operator of an affected facility that commenced construction, reconstruction, or modification after April 28, 2008, subject to a visible emissions standard under this subpart may install, operate, and maintain a continuous opacity monitoring system (COMS). Each COMS used to comply with provisions of this subpart must be installed, calibrated, maintained, and continuously operated

according to the requirements in paragraphs (g)(1) and (2) of this section.

(1) The COMS must meet Performance Specification 1 in 40 CFR part 60, appendix B.

(2) The COMS must comply with the quality assurance requirements in paragraphs (g)(2)(i) through (v) of this section.

(i) The owner or operator must automatically (intrinsic to the opacity monitor) check the zero and upscale (span) calibration drifts at least once daily. For particular COMS, the acceptable range of zero and upscale calibration materials is as defined in the applicable version of Performance Specification 1 in 40 CFR part 60, appendix B.

(ii) The owner or operator must adjust the zero and span whenever the 24-hour zero drift or 24-hour span drift exceeds 4 percent opacity. The COMS must allow for the amount of excess zero and span drift measured at the 24-hour interval checks to be recorded and quantified. The optical surfaces exposed to the effluent gases must be cleaned prior to performing the zero and span drift adjustments, except for systems using automatic zero adjustments. For systems using automatic zero adjustments, the optical surfaces must be cleaned when the cumulative automatic zero compensation exceeds 4 percent opacity.

(iii) The owner or operator must apply a method for producing a simulated zero opacity condition and an upscale (span) opacity condition using a certified neutral density filter or other related technique to produce a known obscuration of the light beam. All procedures applied must provide a system check of the analyzer internal optical surfaces and all electronic circuitry including the lamp and photodetector assembly.

(iv) Except during periods of system breakdowns, repairs, calibration checks, and zero and span adjustments, the COMS must be in continuous operation and must complete a minimum of one cycle of sampling and analyzing for each successive 10-second period and one cycle of data recording for each successive 6-minute period.

(v) The owner or operator must reduce all data from the COMS to 6-minute averages. Six-minute opacity averages must be calculated from 36 or more data points equally spaced over each 6-minute period. Data recorded during periods of system breakdowns, repairs, calibration checks, and zero and span adjustments must not be included in the data averages. An arithmetic or integrated average of all data may be used.

(h) The owner or operator of each affected coal truck dump operation that commenced construction, reconstruction, or modification after April 28, 2008, must meet the requirements specified in paragraphs (h)(1) through (3) of this section.

(1) Conduct an initial performance test using Method 9 of appendix A–4 of this part according to the requirements in paragraphs (h)(1)(i) and(ii).

(i) Opacity readings shall be taken during the duration of three separate truck dump events. Each truck dump event commences when the truck bed begins to elevate and concludes when the truck bed returns to a horizontal position.

(ii) Compliance with the applicable opacity limit is determined by averaging all 15-second opacity readings made during the duration of three separate truck dump events.

(2) Conduct monthly visual observations of all process and control equipment. If any deficiencies are observed, the necessary maintenance must be performed as expeditiously as possible.

(3) Conduct a performance test using Method 9 of appendix A–4 of this part at least once every 5 calendar years for each affected facility.

§ 60.256 Continuous monitoring requirements.

(a) The owner or operator of each affected facility constructed, reconstructed, or modified on or before April 28, 2008, must meet the monitoring requirements specified in paragraphs (a)(1) and (2) of this section, as applicable to the affected facility.

(1) The owner or operator of any thermal dryer shall install, calibrate, maintain, and continuously operate monitoring devices as follows:

(i) A monitoring device for the measurement of the temperature of the gas stream at the exit of the thermal dryer on a continuous basis. The monitoring device is to be certified by the manufacturer to be accurate within ±1.7°C (±3°F).

(ii) For affected facilities that use wet scrubber emission control equipment:

(A) A monitoring device for the continuous measurement of the pressure loss through the venturi constriction of the control equipment. The monitoring device is to be certified by the manufacturer to be accurate within ±1 inch water gauge.

(B) A monitoring device for the continuous measurement of the water supply pressure to the control equipment. The monitoring device is to be certified by the manufacturer to be accurate within ±5 percent of design water supply pressure. The pressure sensor or tap must be located close to the water discharge point. The Administrator shall have discretion to grant requests for approval of alternative monitoring locations.

(2) All monitoring devices under paragraph (a) of this section are to be recalibrated annually in accordance with procedures under § 60.13(b).

(b) The owner or operator of each affected facility constructed, reconstructed, or modified after April 28, 2008, that has one or more mechanical vents must install, calibrate, maintain, and continuously operate the monitoring devices specified in paragraphs (b)(1) through (3) of this section, as applicable to the mechanical vent and any control device installed on the vent.

(1) For mechanical vents with fabric filters (baghouses) with design controlled potential PM emissions rates of 25 Mg (28 tons) per year or more, a bag leak detection system according to the requirements in paragraph (c) of this section.

(2) For mechanical vents with wet scrubbers, monitoring devices according to the requirements in paragraphs (b)(2)(i) through (iv) of this section.

(i) A monitoring device for the continuous measurement of the pressure loss through the venturi constriction of the control equipment. The monitoring device is to be certified by the manufacturer to be accurate within ±1 inch water gauge.

(ii) A monitoring device for the continuous measurement of the water supply flow rate to the control equipment. The monitoring device is to be certified by the manufacturer to be accurate within ±5 percent of design water supply flow rate.

(iii) A monitoring device for the continuous measurement of the pH of the wet scrubber liquid. The monitoring device is to be certified by the manufacturer to be accurate within ±5 percent of design pH.

(iv) An average value for each monitoring parameter must be determined during each performance test. Each monitoring parameter must then be maintained within 10 percent of the value established during the most recent performance test on an operating day average basis.

(3) For mechanical vents with control equipment other than wet scrubbers, a monitoring device for the continuous measurement of the reagent injection flow rate to the control equipment, as applicable. The monitoring device is to be certified by the manufacturer to be accurate within ±5 percent of design injection flow rate. An average reagent

injection flow rate value must be determined during each performance test. The reagent injection flow rate must then be maintained within 10 percent of the value established during the most recent performance test on an operating day average basis.

(c) Each bag leak detection system used to comply with provisions of this subpart must be installed, calibrated, maintained, and continuously operated according to the requirements in paragraphs (c)(1) through (3) of this section.

(1) The bag leak detection system must meet the specifications and requirements in paragraphs (c)(1)(i) through (viii) of this section.

(i) The bag leak detection system must be certified by the manufacturer to be capable of detecting PM emissions at concentrations of 1 milligram per dry standard cubic meter (mg/dscm) (0.00044 grains per actual cubic foot (gr/acf)) or less.

(ii) The bag leak detection system sensor must provide output of relative PM loadings. The owner or operator shall continuously record the output from the bag leak detection system using electronic or other means (*e.g.,* using a strip chart recorder or a data logger).

(iii) The bag leak detection system must be equipped with an alarm system that will sound when the system detects an increase in relative particulate loading over the alarm set point established according to paragraph (c)(1)(iv) of this section, and the alarm must be located such that it can be heard by the appropriate plant personnel.

(iv) In the initial adjustment of the bag leak detection system, the owner or operator must establish, at a minimum, the baseline output by adjusting the sensitivity (range) and the averaging period of the device, the alarm set points, and the alarm delay time.

(v) Following initial adjustment, the owner or operator must not adjust the averaging period, alarm set point, or alarm delay time without approval from the Administrator or delegated authority except as provided in paragraph (c)(2)(vi) of this section.

(vi) Once per quarter, the owner or operator may adjust the sensitivity of the bag leak detection system to account for seasonal effects, including temperature and humidity, according to the procedures identified in the site-specific monitoring plan required by paragraph (c)(2) of this section.

(vii) The owner or operator must install the bag leak detection sensor downstream of the fabric filter.

(viii) Where multiple detectors are required, the system's instrumentation and alarm may be shared among detectors.

(2) The owner or operator must develop and submit to the Administrator or delegated authority for approval a site-specific monitoring plan for each bag leak detection system. This plan must be submitted to the Administrator or delegated authority 30 days prior to startup of the affected facility. The owner or operator must operate and maintain the bag leak detection system according to the site-specific monitoring plan at all times. Each monitoring plan must describe the items in paragraphs (c)(2)(i) through (vi) of this section.

(i) Installation of the bag leak detection system;

(ii) Initial and periodic adjustment of the bag leak detection system, including how the alarm set-point will be established;

(iii) Operation of the bag leak detection system, including quality assurance procedures;

(iv) How the bag leak detection system will be maintained, including a routine maintenance schedule and spare parts inventory list;

(v) How the bag leak detection system output will be recorded and stored; and

(vi) Corrective action procedures as specified in paragraph (c)(3) of this section. In approving the site-specific monitoring plan, the Administrator or delegated authority may allow the owner and operator more than 3 hours to alleviate a specific condition that causes an alarm if the owner or operator identifies in the monitoring plan this specific condition as one that could lead to an alarm, adequately explains why it is not feasible to alleviate this condition within 3 hours of the time the alarm occurs, and demonstrates that the requested time will ensure alleviation of this condition as expeditiously as practicable.

(3) For each bag leak detection system, the owner or operator must initiate procedures to determine the cause of every alarm within 1 hour of the alarm. Except as provided in paragraph (c)(2)(vi) of this section, the owner or operator must alleviate the cause of the alarm within 3 hours of the alarm by taking whatever corrective action(s) are necessary. Corrective actions may include, but are not limited to the following:

(i) Inspecting the fabric filter for air leaks, torn or broken bags or filter media, or any other condition that may cause an increase in PM emissions;

(ii) Sealing off defective bags or filter media;

(iii) Replacing defective bags or filter media or otherwise repairing the control device;

(iv) Sealing off a defective fabric filter compartment;

(v) Cleaning the bag leak detection system probe or otherwise repairing the bag leak detection system; or

(vi) Shutting down the process producing the PM emissions.

§ 60.257 Test methods and procedures.

(a) The owner or operator must determine compliance with the applicable opacity standards as specified in paragraphs (a)(1) through (3) of this section.

(1) Method 9 of appendix A–4 of this part and the procedures in § 60.11 must be used to determine opacity, with the exceptions specified in paragraphs (a)(1)(i) and (ii).

(i) The duration of the Method 9 of appendix A–4 of this part performance test shall be 1 hour (ten 6-minute averages).

(ii) If, during the initial 30 minutes of the observation of a Method 9 of appendix A–4 of this part performance test, all of the 6-minute average opacity readings are less than or equal to half the applicable opacity limit, then the observation period may be reduced from 1 hour to 30 minutes.

(2) To determine opacity for fugitive coal dust emissions sources, the additional requirements specified in paragraphs (a)(2)(i) through (iii) must be used.

(i) The minimum distance between the observer and the emission source shall be 5.0 meters (16 feet), and the sun shall be oriented in the 140-degree sector of the back.

(ii) The observer shall select a position that minimizes interference from other fugitive coal dust emissions sources and make observations such that the line of vision is approximately perpendicular to the plume and wind direction.

(iii) The observer shall make opacity observations at the point of greatest opacity in that portion of the plume where condensed water vapor is not present. Water vapor is not considered a visible emission.

(3) A visible emissions observer may conduct visible emission observations for up to three fugitive, stack, or vent emission points within a 15-second interval if the following conditions specified in paragraphs (a)(3)(i) through (iii) of this section are met.

(i) No more than three emissions points may be read concurrently.

(ii) All three emissions points must be within a 70 degree viewing sector or angle in front of the observer such that

the proper sun position can be maintained for all three points.

(iii) If an opacity reading for any one of the three emissions points is within 5 percent opacity from the applicable standard (excluding readings of zero opacity), then the observer must stop taking readings for the other two points and continue reading just that single point.

(b) The owner or operator must conduct all performance tests required by § 60.8 to demonstrate compliance with the applicable emissions standards specified in § 60.252 according to the requirements in § 60.8 using the applicable test methods and procedures in paragraphs (b)(1) through (8) of this section.

(1) Method 1 or 1A of appendix A–4 of this part shall be used to select sampling port locations and the number of traverse points in each stack or duct. Sampling sites must be located at the outlet of the control device (or at the outlet of the emissions source if no control device is present) prior to any releases to the atmosphere.

(2) Method 2, 2A, 2C, 2D, 2F, or 2G of appendix A–4 of this part shall be used to determine the volumetric flow rate of the stack gas.

(3) Method 3, 3A, or 3B of appendix A–4 of this part shall be used to determine the dry molecular weight of the stack gas. The owner or operator may use ANSI/ASME PTC 19.10–1981, "Flue and Exhaust Gas Analyses (incorporated by reference—*see* § 60.17) as an alternative to Method 3B of appendix A–2 of this part.

(4) Method 4 of appendix A–4 of this part shall be used to determine the moisture content of the stack gas.

(5) Method 5, 5B or 5D of appendix A–4 of this part or Method 17 of appendix A–7 of this part shall be used to determine the PM concentration as follows:

(i) The sampling time and sample volume for each run shall be at least 60 minutes and 0.85 dscm (30 dscf). Sampling shall begin no less than 30 minutes after startup and shall terminate before shutdown procedures begin. A minimum of three valid test runs are needed to comprise a PM performance test.

(ii) Method 5 of appendix A of this part shall be used only to test emissions from affected facilities without wet flue gas desulfurization (FGD) systems.

(iii) Method 5B of appendix A of this part is to be used only after wet FGD systems.

(iv) Method 5D of appendix A–4 of this part shall be used for positive pressure fabric filters and other similar applications (*e.g.,* stub stacks and roof vents).

(v) Method 17 of appendix A–6 of this part may be used at facilities with or without wet scrubber systems provided the stack gas temperature does not exceed a temperature of 160 °C (320 °F). The procedures of sections 8.1 and 11.1 of Method 5B of appendix A–3 of this part may be used in Method 17 of appendix A–6 of this part only if it is used after a wet FGD system. Do not use Method 17 of appendix A–6 of this part after wet FGD systems if the effluent is saturated or laden with water droplets.

(6) Method 6, 6A, or 6C of appendix A–4 of this part shall be used to determine the SO_2 concentration. A minimum of three valid test runs are needed to comprise an SO_2 performance test.

(7) Method 7 or 7E of appendix A–4 of this part shall be used to determine the NO_X concentration. A minimum of three valid test runs are needed to comprise an NO_x performance test.

(8) Method 10 of appendix A–4 of this part shall be used to determine the CO concentration. A minimum of three valid test runs are needed to comprise a CO performance test. CO performance tests are conducted concurrently (or within a 60-minute period) with NO_X performance tests.

§ 60.258 Reporting and recordkeeping.

(a) The owner or operator of a coal preparation and processing plant that commenced construction, reconstruction, or modification after April 28, 2008, shall maintain in a logbook (written or electronic) on-site and make it available upon request. The logbook shall record the following:

(1) The manufacturer's recommended maintenance procedures and the date and time of any maintenance and inspection activities and the results of those activities. Any variance from manufacturer recommendation, if any, shall be noted.

(2) The date and time of periodic coal preparation and processing plant visual observations, noting those sources with visible emissions along with corrective actions taken to reduce visible emissions. Results from the actions shall be noted.

(3) The amount and type of coal processed each calendar month.

(4) The amount of chemical stabilizer or water purchased for use in the coal preparation and processing plant.

(5) Monthly certification that the dust suppressant systems were operational when any coal was processed and that manufacturer's recommendations were followed for all control systems. Any variance from the manufacturer's recommendations, if any, shall be noted.

(6) Monthly certification that the fugitive coal dust emissions control plan was implemented as described. Any variance from the plan, if any, shall be noted. A copy of the applicable fugitive coal dust emissions control plan and any letters from the Administrator providing approval of any alternative control measures shall be maintained with the logbook. Any actions, *e.g.* objections, to the plan and any actions relative to the alternative control measures, *e.g.* approvals, shall be noted in the logbook as well.

(7) For each bag leak detection system, the owner or operator must keep the records specified in paragraphs (a)(7)(i) through (iii) of this section.

(i) Records of the bag leak detection system output;

(ii) Records of bag leak detection system adjustments, including the date and time of the adjustment, the initial bag leak detection system settings, and the final bag leak detection settings; and

(iii) The date and time of all bag leak detection system alarms, the time that procedures to determine the cause of the alarm were initiated, the cause of the alarm, an explanation of the actions taken, the date and time the cause of the alarm was alleviated, and whether the cause of the alarm was alleviated within 3 hours of the alarm.

(8) A copy of any applicable monitoring plan for a digital opacity compliance system and monthly certification that the plan was implemented as described. Any variance from plan, if any, shall be noted.

(9) During a performance test of a wet scrubber, and each operating day thereafter, the owner or operator shall record the measurements of the scrubber pressure loss, water supply flow rate, and pH of the wet scrubber liquid.

(10) During a performance test of control equipment other than a wet scrubber, and each operating day thereafter, the owner or operator shall record the measurements of the reagent injection flow rate, as applicable.

(b) For the purpose of reports required under section 60.7(c), any owner operator subject to the provisions of this subpart also shall report semiannually periods of excess emissions as follow:

(1) The owner or operator of an affected facility with a wet scrubber shall submit semiannual reports to the Administrator or delegated authority of occurrences when the measurements of the scrubber pressure loss, water supply flow rate, or pH of the wet scrubber liquid vary by more than 10 percent

from the average determined during the most recent performance test.

(2) The owner or operator of an affected facility with control equipment other than a wet scrubber shall submit semiannual reports to the Administrator or delegated authority of occurrences when the measurements of the reagent injection flow rate, as applicable, vary by more than 10 percent from the average determined during the most recent performance test.

(3) All 6-minute average opacities that exceed the applicable standard.

(c) The owner or operator of an affected facility shall submit the results of initial performance tests to the Administrator or delegated authority, consistent with the provisions of section 60.8. The owner or operator who elects to comply with the reduced performance testing provisions of sections 60.255(c) or (d) shall include in the performance test report identification of each affected facility that will be subject to the reduced testing. The owner or operator electing to comply with section 60.255(d) shall also include information which demonstrates that the control devices are identical.

(d) After July 1, 2011, within 60 days after the date of completing each performance evaluation conducted to demonstrate compliance with this subpart, the owner or operator of the affected facility must submit the test data to EPA by successfully entering the data electronically into EPA's WebFIRE data base available at *http://cfpub.epa.gov/oarweb/index.cfm?action=fire.main*. For performance tests that cannot be entered into WebFIRE (*i.e.*, Method 9 of appendix A–4 of this part opacity performance tests) the owner or operator of the affected facility must mail a summary copy to United States Environmental Protection Agency; Energy Strategies Group; 109 TW Alexander DR; mail code: D243–01; RTP, NC 27711.

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Part III

Department of the Interior

Fish and Wildlife Service

50 CFR Part 17

Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for the Southwest Alaska Distinct Population Segment of the Northern Sea Otter; Final Rule

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[FWS–R7–ES–2008–0105; 92210–1117–0000–FY08–B4]

RIN 1018–AV92

Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for the Southwest Alaska Distinct Population Segment of the Northern Sea Otter

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), are designating critical habitat for the southwest Alaska Distinct Population Segment (DPS) of the northern sea otter (*Enhydra lutris kenyoni*) under the Endangered Species Act of 1973, as amended (Act). In total, approximately 15,164 square kilometers (km^2) (5,855 square miles (mi^2)) fall within the boundaries of the critical habitat designation. All the critical habitat is located in Alaska.

DATES: This rule becomes effective on November 9, 2009.

ADDRESSES: The final rule and final economic analysis are available for viewing at *http://regulations.gov.* Detailed color maps of areas designated as critical habitat are available for viewing at *http://alaska.fws.gov/fisheries/mmm/seaotters/criticalhabitat.htm.* Supporting documentation we used in preparing this final rule is available for public inspection, by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, Marine Mammals Management Office, U.S. Fish and Wildlife Service, 1011 East Tudor Road, Anchorage, AK 99503; telephone 907/786–3800; facsimile 907/786–3816.

FOR FURTHER INFORMATION CONTACT: Douglas M. Burn, Wildlife Biologist, Marine Mammals Management Office (see **ADDRESSES** section). If you use a telecommunications device for the deaf (TDD), call the Federal Information Relay Service (FIRS) at 800–877–8339.

SUPPLEMENTARY INFORMATION:

Background

It is our intent to discuss only those topics directly relevant to the designation of critical habitat for the southwest Alaska distinct population segment (DPS) of the northern sea otter in this final rule. For more information on the southwest Alaska DPS of the northern sea otter, refer to the final listing rule published in the **Federal Register** on August 9, 2005 (70 FR 46366), the proposed rule to designate critical habitat published in the **Federal Register** on December 16, 2008 (73 FR 76454), and the June 9, 2009 (74 FR 27271), notice of availability of the draft economic analysis (DEA). More detailed information on northern sea otter biology and ecology that is directly relevant to designation of critical habitat is discussed under the Primary Constituent Elements section below.

Previous Federal Actions

We listed the southwest Alaska DPS of the northern sea otter as threatened on August 9, 2005 (70 FR 46366). We considered critical habitat to be prudent, but not determinable, and we therefore did not designate critical habitat for this DPS at the time of listing. When we make a not determinable finding, we must, within 1 year of the publication date of the final listing rule, designate critical habitat, unless we find designation to be not prudent. On December 19, 2006, the Center for Biological Diversity filed suit against the Service for failure to designate critical habitat within the statutory time frame (*Center for Biological Diversity et al.* v. *Kempthorne et al.,* No. 1:06–CV–02151–RMC (D.D.C. 2007)). On April 11, 2007, the U.S. District Court for the District of Columbia entered an order approving a stipulated settlement of the parties requiring the Service on or before November 30, 2008, to submit to the **Federal Register** a determination as to whether designation of critical habitat for the southwest Alaska DPS is prudent, and if so, to publish a proposed rule. We have subsequently reaffirmed that critical habitat for the southwest Alaska DPS of the northern sea otter is prudent, and we published a proposal to designate critical habitat for the southwest Alaska DPS of the northern sea otter in the **Federal Register** on December 16, 2008 (73 FR 76454). We accepted public comments on this proposal for 60 days, ending on February 17, 2009. In response to requests from the public, we published a document (74 FR 21614) reopening the public comment period from May 8, 2009, through July 1, 2009. We also published a notice of availability of the economic analysis of critical habitat designation on June 9, 2009 (74 FR 27271), and extended the public comment period through July 9, 2009. For more information on previous Federal actions concerning the southwest Alaska DPS of the northern sea otter, refer to the final listing rule published in the **Federal Register** on August 9, 2005 (70 FR 46366).

Summary of Comments and Recommendations

We requested written comments from the public during the public comment period on the proposed rule to designate critical habitat for the southwest Alaska DPS of the northern sea otter. During the public comment period, we also contacted appropriate Federal, State, and local agencies; Alaska Native organizations; and other interested parties and invited them to comment on the proposed rule to designate critical habitat for this DPS and the associated draft economic analysis (DEA).

The comment period on the proposed critical habitat rule originally opened December 16, 2008 (73 FR 76454), and closed February 17, 2009. During that time, we received one request for a public hearing. On May 8, 2009, we announced a public hearing, and reopened the public comment period from May 8, 2009, through July 1, 2009 (74 FR 21614). We held a public hearing on June 18, 2009, in Anchorage, Alaska. The public hearing was attended by nine people, and although telephone access was provided toll-free during the hearing, we received no calls. On June 9, 2009, we published a notice of availability of the DEA, and we extended the public comment period through July 9, 2009, to allow interested parties to comment on both the proposed critical habitat rule and the associated DEA (74 FR 27271). From June 9 through July 9, 2009, we also operated a toll-free public comment hotline, which enabled callers to record their public comments, to be later transcribed and entered into the official record. We received no comments on the toll-free hotline.

During the public comment periods, we received 28 sets of public comments directly addressing the proposed designation of critical habitat: 2 from Federal agencies, 1 from a State agency, 1 from a local government, and the remainder from organizations and individuals. At the June 18, 2009, public hearing, we received one comment directly addressing the proposed designation of critical habitat.

Peer Review

In accordance with our policy on peer review published in the **Federal Register** on July 1, 1994 (59 FR 34270), we solicited expert opinions from 10 knowledgeable individuals with scientific expertise that included familiarity with the DPS, the geographic region in which it occurs, and conservation biology principles. We

received responses from two of the peer reviewers. We reviewed all comments received from the peer reviewers and the public for substantive issues and new information regarding critical habitat for the southwest Alaska DPS of the northern sea otter. These comments, which were aggregated by subject matter, are summarized and addressed below and are incorporated into the final rule as appropriate.

Peer Reviewer Comments

Comment 1: One peer reviewer questioned our characterization of how sea otters use various types of kelp habitat, specifically those of the genera *Nereocystis* and *Macrocystis.*

Our Response: We have revised and clarified the discussion in the final rule based on this comment.

Comment 2: One peer review commented that *Alaria fistulosa* (the primary canopy kelp in the Aleutians) is no longer classified as the genus *Alaria,* and stated that it has been re-named *Druehlia fistulosa.*

Our Response: We have revised the final rule based on this comment.

Public Comments

Comments Related to Primary Constituent Elements (PCEs) and Proposed Critical Habitat Areas

Comment 3: Several comments expressed concern that the area defined by the proposed PCEs (described below under "*Primary Constituent Elements*") may not contain sufficient prey resources to support the recovery of the southwest Alaska DPS, and should therefore be expanded in size. One commenter suggested that the seaward boundary should be set at the 30-meter (m) (98.4-feet (ft)) depth contour, but did not provide a justification for this value. Another commenter suggested it should be the 100-m (328.1 ft) depth contour based on the physiological limits of sea otter diving capability. Yet another commenter simply stated that the area of designated critical habitat should be doubled.

Our Response: We agree that the presence of adequate prey resources is important for the conservation of the southwest Alaska DPS. While any of the options suggested by the commenters would include additional foraging areas in the designation of critical habitat, the commenters provide no clear scientific rationale for the specific water depths they suggested. The choice of the 100-m (328.1 ft) depth contour has a biological basis, as it delineates the physiological limits of sea otter diving capabilities. However, information on sea otter diving behavior indicates that the value of sea otter foraging habitat is inversely proportional to water depth. For example, research in southeast Alaska shows that 84 percent of foraging occurs in depths between 2 and 30m (6.6 and 98.4 ft), and female sea otters do the vast majority (85 percent) of their foraging in waters less than 20m (65.6 ft) in depth. Recent research from California suggests these patterns may be similar among populations (Tinker *et al.* 2006, p. 148). Our selection of the 20-m (65.6-ft) depth contour therefore includes the majority of the most important sea otter foraging areas.

The areas defined by the PCEs that we proposed for designation as critical habitat include the intertidal zone, as well as adjacent shallow waters where otters may feed while being relatively protected from marine predators. Sea otters do not appear to be limited by prey availability within the DPS, especially in areas where the population has declined the most, such as the Aleutian archipelago. A thorough analysis indicates that there is limited competition with commercial fishermen for sea otter prey resources throughout the range of the DPS (Funk 2003, p. 2). Because sea otters do not appear food limited, foraging areas that do not also provide shelter from predators (e.g., areas that occur in water depths ranging from 20 to 100m (65.6 to 328.1 ft)) are not identified as a feature essential to the conservation of the sea otter and are therefore not included in this designation.

Comment 4: Critical habitat should not be limited to areas that are currently occupied by sea otters, and should include historically occupied areas as well.

Our Response: With the exception of some relatively small areas on Kodiak Island (included in our proposal), there is virtually no unoccupied habitat within the range of the southwest Alaska DPS. We also note that those areas of Kodiak Island are unoccupied because they had yet to be recolonized following protection by the 1911 Fur Seal Treaty that prohibited commercial fur harvests of sea otters. Lack of occupation by sea otters in this area is not a result of the recent population decline that led to the listing of this DPS as threatened.

The areas defined by the PCEs and proposed for critical habitat are a subset of what we consider to be occupied sea otter habitat and are sufficient to provide for the conservation of the DPS. Sea otter densities are not uniform throughout the set of all possible sea otter habitat, however, and differ both longitudinally and perpendicularly with the shore. While the highest densities appear to occur in shallower waters that are closer to shore, we do not consider sea otter habitat that occurs further seaward than the proposed critical habitat (i.e., waters deeper that 20m (65.6 ft) in depth) to be unoccupied habitat, as otters are still observed there on occasion. We explain our reasoning for why these areas do not meet the definition of critical habitat in our response to Comment 3.

Comment 5: Some areas in the Kodiak and Cook Inlet appear to have been inappropriately excluded from critical habitat designation.

Our Response: We believe that this comment was submitted due to an artifact in one or more of the maps that were published on the Service's Region 7 web site. It is important to distinguish between the PCEs (and their associated criteria such as water depth or distance from the mean high tide line) and the ability to map them. With the exception of areas where the water depth drops off abruptly from shore, the 20-m (65.6-ft) depth contour typically constitutes the seaward extent of critical habitat. We believe that the scale of some of the maps may have given the appearance that areas were excluded from designation as critical habitat, when in reality they were not. In order to alleviate any confusion over the location of critical habitat, we intend to make GIS data layers available to the public once the designation is final.

Comment 6: The Service should consider PCEs related to reproduction and the rearing of offspring.

Our Response: Unlike other species that have identified breeding habitat, sea otters conduct all aspects of their life history in essentially the same places. Mothers with pups often seek shelter from rough seas, and though we did not explicitly address this in the proposed rule, the areas defined by the PCEs include nearshore waters that do provide shelter for mothers with pups. Recent studies using time-depth recorders indicate that female sea otters forage in shallower waters more than males, with the majority of their foraging effort occurring in waters less than 20m (65.6 ft) in depth (Bodkin *et al.* 2004, p. 305). Therefore, the identified PCEs already include areas that are essential for reproduction and the rearing of offspring. We have also expanded our discussion of this subject in this final rule.

Comment 7: Maintaining large habitat patches that can facilitate movement between otter populations is essential to the conservation of this population.

Our Response: With the exception of Unit 4 (Bristol Bay), the critical habitat occurs as contiguous zones around all

islands and mainland Alaska within the range of the southwest Alaska DPS. Movement within any discrete patch of critical habitat is not restricted. We therefore interpret this comment to be addressing the movement between discrete patches, for example, between islands and island groups in Units 1, 2, 3, and 5.

During the course of recolonization of their range during the 20th century, sea otter movements of this kind occurred from occupied islands to unoccupied ones. However, current conditions differ in that the waters around most (if not all) of these islands remain inhabited, but by lower densities of sea otters. We believe, based on the best available information, that recovery can occur with a minimal amount of dispersal between islands. Therefore, designation of large patches of area connecting islands (or island groups) as critical habitat is not essential to the conservation of the DPS.

Comment 8: The offshore waters in Unit 4 should be designated as critical habitat due to their likely importance in fulfilling PCE categories 1 (shallow, rocky areas in waters less than 2m (6.6 ft) in depth) and 2 (waters within 100m (328.1 ft) of the mean high tide line).

Our Response: Although we could apply the criteria for PCEs 1 and 2 to this unit, the area they delineate does not contain the physical and biological features, and therefore would not serve the same function as it does in the other critical habitat units. Rocky substrates and kelp beds are scarce in Unit 4 (Bristol Bay), and we applied these PCEs to the one place where they occur to delineate subunit 4a (Amak Island). Shallow, rocky areas where marine predators are less likely to forage (PCE 1) are scarce throughout the remainder of Unit 4. This commenter correctly noted that because of the bathymetry in Bristol Bay, otters can forage at greater distances from shore. Unlike our survey information from several islands in critical habitat Unit 1 (Western Aleutians), we have no information that indicates that nearshore waters (PCE 2) provide protection or escape from marine predators, which may be due to the lack of PCE 1 in these areas. Therefore, we do not believe the application of PCEs 1 and 2 within Unit 4 would identify features that provide cover and shelter from marine predators, and would be essential to the conservation of the DPS.

Comment 9: It is not clear that the proposed PCEs will provide for range expansion and the conservation of the species.

Our Response: With the exception of some relatively small areas on Kodiak Island, sea otters currently occupy all their former range. Therefore, range expansion will likely not be necessary for the conservation of the southwest Alaska DPS.

Comment 10: The Service should consider combining all proposed "Primary Constituent Elements" (PCEs) instead of using them independently to define critical habitat.

Our Response: Each PCE has its own explicit criterion, and for the purposes of clarity we believe that it is best to list them individually. The individual PCEs laid out in the appropriate quantity and spatial arrangement essential for the conservation of the species define the physical and biological features that are essential for the conservation of the DPS. Although it is not a requirement, most of the areas that were proposed for designation as critical habitat do contain all four PCEs.

Comment 11: The amount of critical habitat is excessive, and the criteria used to designate critical habitat should be narrowed in order to select more discrete areas of critical habitat that are essential to the conservation of the species so that habitat designations are biologically meaningful.

Our Response: As stated in the proposed rule, we determined that the physical and biological features that are essential for the conservation of the southwest Alaska DPS of the northern sea otter are those that provide cover and shelter from marine predators, as well as the prey resources that occur in those areas. We are limited in our understanding of sea otter habitat use and also by our ability to map these features beyond a certain scale. We identified the physical and biological features essential to the conservation of the DPS based on the best scientific information related to sea otter life history requirements. This commenter was particularly concerned with the underlying rationale for PCEs 1 and 2. We note that there is considerable spatial overlap in areas defined by the first three PCEs. For example, all of the areas delineated by PCE 1 (shallow, rocky areas in waters less than 2m (6.6 ft) in depth) and the vast majority of areas delineated by PCE 2 (waters within 100m (328.1 ft) of the mean high tide line) are contained within the area delineated by PCE 3 (kelp forests in waters less than 20m (65.6 ft) in depth). Our rationale for choosing these areas is summarized in the *"Primary Constituent Elements for the Southwest Alaska DPS of the Northern Sea Otter"* section.

Comments Related to Consultation Under Section 7 of the Act

Comment 12: Some activities that may be subject to consultation under section 7 of the Act were omitted from the proposed rule to designate critical habitat for sea otters in southwest Alaska.

Our Response: The proposed rule contained examples of the types of activities that the Service can reasonably expect to consult on under section 7 of the Act, but it was not intended to be a complete list of all possible activities. All Federal agencies have the obligation under section 7 of the Act to consult on actions they conduct, fund, or permit, that may affect a federally listed species or destroy or adversely modify its designated critical habitat. As such, the Service is not limited to consulting on only those activities listed in either the proposed or final rules for designation of critical habitat.

Comment 13: Special management considerations and protections that may result from consultations under section 7 of the Act were omitted from the proposed rule.

Our Response: The special management considerations and protections in the proposed rule were included for example purposes. The specific types of management actions, such as reasonable and prudent measures, will be determined on a case-by-case basis during the process of consulting under section 7 of the Act. The Service is not limited to only those special management considerations and protections listed in either the proposed or final rules for designation of critical habitat.

Comment 14: The designation of critical habitat may result in changes to development projects, including delays and added costs.

Our Response: Since the southwest Alaska DPS of the northern sea otter was listed as threatened in August 2005, all Federal agencies have had the obligation to consult with the Service to ensure that the activities they conduct, fund, or carry out, are not likely to jeopardize the continued existence of the DPS. Numerous consultations in accordance with this obligation have been conducted with multiple Federal agencies, and must be conducted in the future, regardless of whether or not critical habitat is designated. Federal agencies that consult with the Service have the obligation to work within the statutory timelines of section 7 consultations, and plan their activities accordingly to avoid delay. Non-Federal entities that require Federal permits for

development projects should also be aware of the consultation requirement, and factor the time needed for consultations into their plans and schedules. As consultations are already required under the jeopardy standard, the additional consultation standard of destruction or adverse modification of critical habitat are not anticipated to result in significant project delays. Modifications to projects due to critical habitat are not expected to add significant monetary costs (see section on "Economic Analysis" below).

Comment 15: Subsistence harvest of sea otters should be regulated within critical habitat.

Our Response: Subsistence harvest of sea otters from the southwest Alaska DPS is allowable under section 10(e) of the Act and section 101(b) of the Marine Mammal Protection Act (MMPA). Permits are not required under either the Act or the MMPA for Alaska Natives to harvest sea otters for subsistence uses, although hides and skulls must be tagged to fulfill reporting requirements. There is no Federal nexus that would require consultation under section 7 of the Act; therefore, the critical habitat designation would not provide a mechanism to regulate subsistence harvest.

Comment 16: The proposed critical habitat designation does not adequately address the impacts of entanglement in fishing gear.

Our Response: Critical habitat designation is not the appropriate mechanism to address the impacts of sea otter entanglement in fishing gear. The majority of designated critical habitat occurs within State of Alaska waters. Therefore, most of the fisheries that occur within critical habitat are not federally managed. Other regulatory mechanisms to address the issue of entanglement in these fisheries are available under the Act, such as provisions under section 10 of the Act (e.g., Habitat Conservation Plans). For those fisheries that have a Federal nexus, the Service will consult with the National Marine Fisheries Service to determine if the fishery will: (1) Jeopardize the southwest Alaska DPS of the northern sea otter; and (2) adversely modify or destroy their critical habitat.

Comments Requesting Exclusions of Areas From Critical Habitat Designation

Comment 17: The exclusion of developed areas such as harbors and marinas is inappropriate, as these structures may also be used for resting or foraging.

Our Response: This exclusion covers the physical structures that create a harbor or marina, such as piers, docks, jetties, and breakwaters, as they do not contain the necessary PCEs themselves. It is almost certain that harbors and marinas do not contain PCE 3 (kelp forests). The waters contained within harbors and marinas may provide cover and shelter from marine predators, and are therefore not excluded from this designation.

One of these commenters also expressed concern that the exclusion of these areas was the equivalent of a "categorical exclusion" from all section 7 consultation requirements. Regardless of critical habitat designation, the Service has the obligation to consult on activities such as demolition, repair, or construction when a Federal nexus exists. While the structures themselves are not designated as critical habitat, the impacts of these activities will be considered against both the jeopardy standard, and the adverse modification standard for any adjacent designated critical habitat.

Comment 18: Areas immediately surrounding inhabited communities should be excluded from designation as critical habitat for economic purposes. One of these commenters specified that the excluded areas should extend a distance of up to 1.6 kilometers (km) (1 mile (mi)) radius from each inhabited community. Another of these commenters also questioned the benefit to sea otters of including these areas in the critical habitat designation.

Our Response: We believe important benefits exist for designating critical habitat in the vicinity of inhabited communities. Although critical habitat immediately adjacent to inhabited communities constitutes a relatively small proportion of the overall critical habitat designation, the physical and biological features identified by the PCEs provide protection from marine predators comparable to the protection provided by similar features located in areas that are distant from such communities. In addition, we believe that designated critical habitat in the vicinity of inhabited communities has a unique informational benefit that critical habitat in more remote areas does not.

The Final Economic Analysis (FEA) identified the incremental costs associated with designation of critical habitat for the southwest Alaska DPS of the northern sea otter. Given the very small estimated annual costs associated with all consultations due to the critical habitat, and the small estimated costs per consultation expected to be borne by third parties, individual communities in southwest Alaska are not expected to bear significant costs due to critical habitat designation. The FEA estimated that the additional economic impacts expected from designation of critical habitat as proposed would amount to an increase of 1.8 percent above the baseline impacts in the absence of critical habitat designation. Oil spill planning and response activities are expected to bear a majority of these costs. The economic impacts of critical habitat are estimated to be approximately $58,900 per year over the entire range of the DPS assuming a 7 percent discount rate. Of these costs, the FEA estimates that $54,900 of the annual costs (93 percent) will be related to administrative costs of consultations under section 7 of the Act. The majority of these costs for consultations related to water quality, construction, and other activities will be borne by the Service and the Federal action agency. Third parties to these consultations are only expected to bear $513–$875 per consultation in administrative costs related to the incremental costs of critical habitat designation for informal and formal consultations, respectively. The total actual costs to any single community will ultimately depend on the number of activities in that community that are subject to consultation under section 7 of the Act, as well as the complexity of such consultations, that will dictate whether informal or formal consultation is required.

Accordingly, after thorough consideration, we are not exercising our discretion to exclude areas in and around inhabited communities in southwest Alaska from critical habitat designation, due to the insignificant costs estimated to be borne by individual communities as a result of the designation of critical habitat, the important protections the designation of critical habitat near communities will afford the DPS, and the unique educational and informational benefits of designating critical habitat there.

Comment 19: The Department of the Navy requested that areas contiguous to islands in Unit 5 should be excluded from designation as critical habitat due to their national security importance. The areas requested for exclusion are used for a variety of training activities that are considered vital to continued readiness of U.S. Navy forces. The Department of the Navy is concerned that designation of critical habitat in this area "may restrict or prohibit implementation of various training and testing requirements." They further state that the ability to conduct training exercises in these areas "on a short notice basis" is necessary for the Department of the Navy to "achieve its required level of operational readiness."

Our Response: Section 4(b)(2) of the Act allows the Secretary to use his discretion to exclude areas from critical habitat for reasons of national security if the Secretary determines the benefits of such an exclusion exceed the benefits of designating the area as critical habitat. However, this exclusion cannot occur if it will result in the extinction of the species concerned.

We understand the Navy's interest in conducting its training exercises on a short notice basis so as to achieve its required level of operational readiness. We believe, however, that the Navy's goals are not incompatible with the designation of critical habitat for the southwest Alaska DPS of the northern sea otter for a number of reasons. The Navy has, and continues to have, an ongoing obligation to consult with the Service to ensure that the activities they conduct, fund, or carry out are not likely to jeopardize the continued existence of the southwest Alaska DPS of the northern sea otter since it was listed as threatened in August 2005. This obligation to consult exists regardless of whether or not critical habitat for northern sea otter is designated.

The estimated time and costs associated with consideration of sea otter critical habitat is expected to be extremely small. This point is underscored in the FEA, which explains that due to the minimal amount of time critical habitat designation is expected to add to the consultation process, the associated costs are insignificant.

The Service will work with the Navy to consult on their activities under section 7 of the Act efficiently in an attempt to avoid any delays to national security activities. There are additional consultation mechanisms that may be available to further expedite the Navy's consultations and enhance the Navy's ability to conduct training exercises in the areas requested for exclusion on a short-notice basis. One such mechanism is a programmatic consultation, which would consider the impacts of multiple training exercises over multiple years. A programmatic consultation would remove or reduce the need to consult on a case-by-case basis.

In the event that the imminent need arises for an activity that is not covered by an existing programmatic consultation, the Act provides a mechanism for dealing with emergencies (e.g., national defense or security emergencies) that would require expedited consultation (50 CFR 402.05). In these instances, if the proposed activity was determined to be a national defense or security emergency, the Service would work with the Department of the Navy to evaluate the expected impacts to sea otters and their critical habitat, and to develop protective measures during the emergency consultation. The designation of critical habitat is not expected to impact the timing of emergency consultations.

In our consideration of the Navy's request for an exclusion, we wish to emphasize the important role of critical habitat designation in informing Federal, State, and local governments and the public of the importance of critical habitat areas to listed species and the parties' respective consultation obligations under section 7 of the Act.

We also note that designation of critical habitat in this area provides conservation benefits to a substantial portion of the southwest Alaska DPS of the northern sea otter. Results of the most recent aerial survey of the Kodiak archipelago, conducted in 2004, indicate that this area contained approximately 11,000 sea otters at that time, which represents more than 20 percent of the estimated population size for the entire southwest Alaska DPS (USFWS 2008). The area requested for exclusion (3,418 km^2 (1,320 mi^2)) is approximately 23 percent of the total area, and 51 percent of the area of Unit 5. Inclusion of these areas as critical habitat will insure that consultations with the Department of the Navy and other Federal agencies will include both jeopardy and adverse modification analyses for a significant portion of the southwest Alaska DPS.

In short, the Navy has an obligation to consult with the Service on the effects of its military readiness activities on the southwest Alaska DPS of the northern sea otter regardless of the designation of critical habitat in this final rule. As a result, any delays and costs associated with sea otter critical habitat designation are expected to be minimal. Moreover, the Act contains mechanisms that may be applicable to further expedite the Navy's consultations. In light of these considerations, as well as the important protections and educational benefits afforded by the designation of critical habitat for the southwest Alaska DPS of the northern sea otter, the Secretary has decided not to exercise his discretion to exclude the areas requested by the Navy from our critical habitat designation for national security reasons.

Comment 20: Fishing gear, including lines, nets, and anchors associated with commercial sport and subsistence salmon fishing on Kodiak Island and elsewhere in southwest Alaska, should be explicitly excluded from designation as critical habitat.

Our Response: Critical habitat is defined as the physical and biological features that are essential to the conservation of the listed entity, and that may require special management considerations or protections. From this definition, critical habitat designation does not apply to privately owned items such as fishing gear, even when such gear is used in geographic areas designated as critical habitat.

Comment 21: Some of the areas proposed for designation as critical habitat are currently managed by the State of Alaska, and do not meet the second part of the definition of critical habitat as they are already protected and therefore do not require additional special management considerations or protection.

Our Response: We acknowledge that some areas that were proposed for designation as critical habitat geographically overlap with some areas managed by the State of Alaska. The areas managed by the State include those covered by: (1) Alaska Department of Natural Resources (ADNR) Area Plans; and (2) Alaska Department of Fish and Game (ADFG) Special Area designations and plans. Within the range of the southwest Alaska DPS, three ADNR plans (Bristol Bay, Kodiak, and Kenai Peninsula) overlap with portions of proposed critical habitat units 3, 4, and 5. In addition, the easternmost portion of critical habitat unit 2 is included within the geographic coverage of the Bristol Bay plan. Some of the areas proposed for critical habitat are also contained with existing ADFG "Special Areas," such as State game refuges, critical habitat areas, and sanctuaries. Specifically, the Izembek State Refuge intersects with portions of both proposed subunit 4a (Amak Island) and subunit 4b (Izembek Lagoon). The Port Moller State Critical Habitat Area intersects with portions of subunit 4c (Port Moller/Herendeen Bay). And lastly, the Tugidak Island State Critical Habitat Area and the McNeil River Sanctuary intersect with portions of Unit 5 (Kodiak, Kamishak, Alaska Peninsula).

We acknowledge the efforts by the State to provide management protections that benefit listed species and their habitat. However, these areas meet the definition of critical habitat under the Act, which is the habitat essential to the conservation of the species that may require special management considerations or protections. Thus, whether habitat requires additional special management because some protections may already exist for it under State of Alaska law does not determine whether that habitat

meets the definition of "critical" under the Act. In fact, the presence of protections under State law demonstrates that special management considerations or protections may be necessary.

This interpretation of the definition of critical habitat is consistent with the plain language of the Act, and its underlying policies. The Act specifically provides that "all Federal departments and agencies shall utilize their authorities in furtherance of the purposes of this chapter," including the conservation of listed species and their habitat. Alternative State protections, even if they were considered to be equivalent or superior to critical habitat designation for the species' conservation, are not a functional substitute for critical habitat designation.

We have examined the types of protections that exist under State law to assess their effectiveness in protecting sea otter habitat. While ADNR Area Plans and ADFG special areas consider impacts to fish and wildlife resources and their habitat, neither of these types of protections are specifically designed to address sea otter concerns.

Regarding threatened and endangered species, all ADNR Area Plans contain the following guidelines:

> All land use activities will be conducted consistent with state and federal Endangered Species Acts to avoid jeopardizing the continued existence of threatened or endangered species of animals or plants, to provide for their continued use of an area, and to avoid modification or destruction of their habitat. Specific mitigation recommendations should be identified through interagency consultation for any land use activity that potentially affects threatened or endangered species.

Neither the sea otter nor its habitat is protected under the State Endangered Species Act, and thus receive no protections under that statute or the ADNR Area Plans. The protections in the ADNR Area Plans are limited to those provided in the Federal Act. Thus, absent the designation of critical habitat under the Federal Act, no consideration will be afforded for critical habitat under this provision in the ADNR Area Plans.

Although the ADNR plans contain important goals and objectives for the protection of sensitive areas, which may include sea otter habitat, they do not specify criteria for how these objectives will be achieved. The management guidance provided by these plan designations does not contain clear standards to ensure that important sea otter habitat will be effectively protected. We have similar concerns regarding the effectiveness of the ADFG special area protections. In special areas, the primary mechanism for habitat protection is the requirement that a "special area permit" be obtained for many land and water use activities, including construction activities, destruction of vegetation, excavation, dredging, filling, and energy exploration, development, and production (5 AAC 95.420(a)). However, the plans lack measurable criteria for determining whether and how a particular activity subject to a permit application meets the dual goals of maintaining, protecting and enhancing habitat and maintaining public use, and do not provide assurances that the areas will be protected.

Therefore, we conclude that the areas managed by the State of Alaska meet the statutory definition of critical habitat under the Act. We also conclude that the existing management protections for these areas are not a substitute for Federal critical habitat designation. Because of this, and in light of the benefits of critical habitat designation, the Secretary has decided not to exercise his discretion to exclude these areas covered by existing State of Alaska management from our designation of critical habitat for the southwest Alaska DPS of the northern sea otter.

Comment 22: Various areas where human activities occur, including fishing, mining, logging, and oil and gas exploration, development, and production, should be excluded from designation as critical habitat. One commenter specifically requested exclusion of areas in Cook Inlet/Eastern Alaska Peninsula/Kodiak Island identified through the economic analysis as economically important, and two log transfer facilities in Kazakof Bay on Afognak Island.

Our Response: Several commenters expressed concern about the designation of critical habitat in areas of human activities. Although the reason(s) were not explicitly stated, we presume the concern was related to the potential economic impacts that may result from critical habitat designation. As explained above under comment 19, the FEA concluded that the economic impacts of critical habitat including, but not limited to, the activities listed above, is estimated to be approximately $58,900 per year over the range of the entire DPS assuming a 7 percent discount rate. Third parties to section 7 consultations on activities such as those listed above are only expected to bear $513–$875 per consultation in administrative costs related to the incremental costs of critical habitat designation for informal and formal consultations, respectively. Thus, third parties to consultations on activities such as fishing, mining, and logging are not expected to bear any significant costs due to critical habitat designation.

We outline our rationale for why the physical and biological features are considered essential elsewhere in this final rule (see "Primary Constituent Elements"). We also present the benefits of designating critical habitat later in this final rule, such as protections to the species by considering critical habitat in section 7 consultations, and the educational and information benefits of designation (see "Benefits of Designating Critical Habitat"). Therefore, in light of these benefits and the minimal costs to third parties, the Secretary has decided not to exercise his discretion to exclude any areas from critical habitat based on economic reasons.

Comment 23: One commenter requested that Chignik Bay be excluded from critical habitat designation.

Our Response: No supporting information was provided by this commenter. As a result, the Secretary has decided not to exercise his discretion to exclude Chignik Bay for economic reasons (see our response to Comment 22 above) or other relevant factors, and this area has not been excluded from our designation of critical habitat.

Comments Related to the Process of Designating Critical Habitat

Comment 24: The public comment period for the proposed critical habitat designation was too short.

Our Response: The applicable regulations implementing the Act and the Administrative Procedure Act require us to provide 60 days for public review and comment on a proposed rule designating critical habitat. The Service provided 60 days for public comment initially, and subsequently reopened the public comment period to allow additional public comments from May 8 through July 9, 2009. In addition, we held a public hearing on June 18, 2009, in Anchorage, Alaska, and we operated a toll-free public comment hotline from June 9 through July 9, 2009, to enable callers to record their comments, which were later transcribed. We also conducted extensive outreach to notify the public of these additional public comment opportunities. Collectively, therefore, the amount of time provided for public comment from the publication of the proposed rule in December 2008 through July 2009 was effectively greater than 6 months. Given the above, we believe we provided

sufficient time and means for the public to comment on the proposed rule.

Comment 25: The Service should consult directly with communities and Alaska Native Tribes within the proposed critical habitat area.

Our Response: The Service conducted extensive public outreach with organizations, communities, and Alaska Natives within the range of the southwest Alaska DPS of the northern sea otter. We responded to all requests for additional information from various organizations and communities before submitting the proposed rule to designate critical habitat to the **Federal Register**. The Service remains committed to working with Alaska Natives on this and other issues regarding federally listed species and designated critical habitat. Further, as discussed later in this final rule, we have determined that there are no Native Alaskan Tribal lands within the boundaries of this designation of critical habitat for the sea otter.

Comment 26: The Service should hold public hearings in several communities in southwest Alaska.

Our Response: The communities suggested as sites for public hearings are located in relatively remote areas of southwest Alaska. Although we acknowledge the value of face-to-face meetings, the logistical difficulties of holding hearings in these southwest Alaska communities made them impractical. Instead, we used other methods to increase the opportunity for residents to provide comments verbally, as well as in writing. We held one public hearing in Anchorage, Alaska, on June 18, 2009, and provided telephone access for individuals who were unable to attend the hearing in person. We received one comment from attendees and received no calls during the hearing. To increase public access, we also established a toll-free "public comment hotline" that operated for the duration of the reopened public comment period, which occurred from June 9 through July 9, 2009. We received no comments on the public comment hotline. We believe these accommodations provided sufficient time and means for the public to comment on the proposed rule.

Comment 27: The Service should consider all research, not just its own, in the designation of critical habitat.

Our Response: In preparing this critical habitat designation, the Service thoroughly considered any and all relevant information about sea otters and their habitat. The vast majority of research used in the determination of PCEs and critical habitat was from non-Service sources. As such, we believe that we used the best available scientific and commercial information on developing this critical habitat designation. The supporting documentation we used in preparing this rule is available for public inspection (see **ADDRESSES**).

Comments on the Economic Analysis

Comment 28: The Executive Summary should include a description of the difference between baseline and incremental impacts and which is the appropriate consideration of cost under the Act's critical habitat inquiry.

Our Response: Paragraph 6 on page ES–2 of the draft economic analysis defines the baseline and incremental impacts; these definitions are further detailed in Chapter 2. Section 2.1 summarizes the case history describing the reason for providing both categories of impacts, quantifying them separately, in the economic analysis.

Comment 29: Two comments provided on the draft economic analysis state that the analysis needs to quantify the benefits of critical habitat designation. Specifically, one comment argues that the analysis should employ results of work by John Loomis on the economic benefits of southern sea otter protection in California as it is directly relevant. The comment states that the economic analysis is not correct in concluding that the Southwest Alaska DPS does not generate tourism benefit because of the remote nature of the proposed critical habitat area. Although tourism activity may be lower in Alaska habitat than in California habitat, the comment asserts that sea otters in Alaska do provide some tourism benefit that should be quantified. The comment further states that the economic analysis does not attempt to develop estimates of passive use values, noting that beneficiaries include all U.S. citizens who hold existence values for the sea otters. The comment cites a 2000 Land Economics article by Loomis concluding that even small changes in population levels of threatened and endangered species can generate large welfare impacts and that the economic analysis should attempt to construct a range of potential population changes that might result from critical habitat designation, for example, via expert interviews. Another comment notes that potential ancillary economic benefits of critical habitat may stem from the protection of ecosystem services, increasing recreational and wildlife-viewing opportunities, and concurrent conservation of other species.

Our Response: Section 8.2 of the draft economic analysis describes Dr. Loomis' research related to the value of sea otter conservation in California, providing the quantitative results. The Loomis study estimates the tourism and nonmarket economic values per sea otter from an increase in the population of 196 otters expected to result from a translocation program. As detailed in the draft economic analysis, to estimate tourism benefits Loomis transfers a point estimate of benefits of wildlife viewing from a group thesis from the University of Santa Barbara (Aldrich et al., 2001). He adjusts this estimate to narrow the value to the benefits specifically of viewing sea otter using a 1985 Hageman study developed for the National Marine Fisheries Service. Loomis accordingly estimates tourism benefits in Southern California of $13,220 to $69,000 in income and 0.53 to 2.8 jobs per otter. Loomis employs benefits transfer techniques using the Hageman study and a 1996 Loomis and White meta-analysis to determine a range for the non-market value of an increase in sea otter population of 196. The resulting benefit to California households is $2.32 to $5.81 per household.

The draft economic analysis agrees that the Loomis study evidences that real social welfare benefits are associated with expansions in sea otter populations. The Loomis study, however, does not provide an adequate basis to quantify the specific benefits of sea otter critical habitat designation. Regarding the tourism benefits, while the commodities (sea otters) being valued are similar in the Loomis study and the draft economic analysis, the potentially affected populations (Southern California versus Southwest Alaska) are not. The Southern California sea otter population is comparatively significantly more accessible for wildlife viewing. In fact, the Loomis study only applies the estimated per otter tourism benefits in Southern California to those otters determined to be accessible for viewing. While some otter viewing may occur in Southwest Alaska, the remote character of the habitat is not comparable to Southern California habitat. With regard to the nonmarket (e.g., existence and option) values, the Loomis study models a specific policy scenario of otter population changes (increase of 196 otters) to derive per otter value estimates. The potential effect on otter populations of the conservation efforts forecast to occur in the baseline and incremental scenarios of the draft economic analysis is unknown. While the comment suggests surveying experts to determine how critical habitat may affect otter populations in order to estimate a total

nonmarket benefit, Service biologists are not able to project population effects of the regulation.

Finally, neither the Loomis study nor the draft economic analysis provides a quantitative estimate of the total ecosystem service benefits. The Loomis study provides a value per acre for coastal ecosystems of $7,600 per acre citing a 1997 Costanza et al. study. Section 8.3 of the draft economic analysis highlights the potential categories of ecosystem service benefits associated with otter conservation by unit across the proposed critical habitat designation. These benefit categories include improved water quality, aesthetic benefits, regional economic benefits, and improved health of other, coexisting species.

Comment 30: One comment states that the economic analysis is deficient in not at least providing speculative estimates of incremental costs related to the critical habitat designation for oil and gas development projects. The comment highlights the following possible impacts on any oil and gas development that might occur in the area of the proposed designation: Increased costs of permitting oil and gas development projects; delay costs; decreased investment, exploration, and lease sales, resulting in decreased revenue accruing to the State of Alaska; community-level impacts, including loss of jobs, etc.; and natural gas supply issues, resulting in increased costs of natural gas. The commenter believes the draft economic analysis should assess the impact of the need to build in a timing window for seismic exploration, additional restrictions on drilling, seismic surveys, pipeline routes, helicopter overflights, and barging operations. The commenter expressed particular concern about potential oil and gas activity in Unit 4C, Port Moller-Herendeen Bay.

Our Response: Section 4.4 of the economic analysis describes potential impacts of critical habitat for the sea otter on oil and gas activities. As described in the analysis, oil and gas development is reasonably foreseeable within or in offshore areas that may affect critical habitat areas in the future. Experts in the field of oil and gas development in Alaska, however, assert that forecasting any specific scenario predicting the scope and scale of oil and gas development in this area would be speculative. In addition, the Service has not consulted on oil and gas activity as relates to the sea otter. Because the Service has not yet consulted on oil and gas activities associated with sea otters, and because the Service plans to address future planned activities on a case-by-case basis, it is not possible to predict specific conservation efforts for the sea otter at this time. However, the FEA discusses potential project modifications that the Service might request for sea otter based on past examples from consultations involving the Steller's eider, a listed bird species with designated critical habitat that overlaps sea otter critical habitat. From these consultations project modifications have resulted in increased costs to operators rather than limitations on the industry's ability to survey or develop oil and gas resources in critical habitat areas. Past conservation measures have included development of Geographic Response Strategies for an area, hiring an experienced onboard monitor for active vessels and aerial species monitoring.

Comment 31: The State of Alaska describes that the economic analysis should provide a more comprehensive estimate of the incremental costs of critical habitat on a potential offshore-onshore pipeline at Port Moller-Herendeen Bay and of docks and utility corridors on the south side of the Alaska Peninsula. While the specific timing and location of these projects are uncertain, the comment argues the economic analysis should provide an estimated range of potential costs.

Our Response: Chapter 4 of the draft economic analysis discusses the potential for construction and operation of a pipeline to transport oil and/or gas from Bristol Bay and points northward to an outlet on the south side of the Alaska Peninsula, which may include building a pipeline across the Alaska Peninsula. The analysis cites a recent study which estimates that an additional 482.8 km (300 miles) of pipeline will need to be constructed to support the oil and gas industry within the North Aleutian Basin over the next 50 years. The final economic analysis includes discussion of the four potential Trans-Peninsula Transportation Corridors identified in the Bristol Bay Area Plan, one of which may be located at the southern end of the Port Moller-Herendeen Bay critical habitat unit. The analysis also notes that the Bristol Bay Area Plan has identified the Port Moller-Herendeen Bay Area as having "modest" potential for oil and gas development, and that "one possible use for land at the back of Herendeen Bay [is for it] to be used for trans-peninsular transport and associated development." The analysis describes that the State of Alaska has identified the Port Moller-Herendeen Bay area as being a promising area for locating this pipeline.

Specific plans for timing and location of the pipeline do not exist; siting of the pipeline and associated support facilities will depend on where the natural gas resources are located. Thus, the analysis presents information about the potential locations of pipelines within critical habitat, but does not quantify specific impacts of otter conservation on any project.

Comment 32: The State of Alaska notes that the economic analysis presents estimates of potential costs for 3–D seismic surveys in Cook Inlet but that an estimate of costs for similar projects in Bristol Bay would be more informative and likely much higher.

Our Response: As described above and in Chapter 4 of the draft economic analysis, the Service has not consulted on oil and gas activity as it relates to the sea otter. However, the analysis discusses available examples from the one past consultation on seismic surveying involving the Steller's eider. This consultation occurred in Cook Inlet. Thus, no information is currently available to inform an analysis of potential impacts of sea otters on seismic survey activities in Bristol Bay. The final economic analysis now notes the State's assertion that costs for potential, similar projects in Bristol Bay may cost more than the Cook Inlet example due to the comparatively remote nature of Bristol Bay.

Comment 33: The State of Alaska states that economic analysis describes, "a history of opposition to oil and gas development within the region," referencing assumptions made in 1985 regarding oil and gas production in the 1994 to 1999 time frame. However, no production was allowed in that timeframe due to a Presidential moratorium and a Congressional moratorium following the 1989 Exxon Valdez oil spill. Since that time, the Peninsula Borough, Bristol Bay Borough, and Aleutians East Borough signed a Memorandum of Understanding with the State affirming support and cooperation to facilitate responsible oil and gas development in the region.

Our Response: Section 4.4 of the final economic analysis clarifies that recent Memoranda of Understanding have been signed by local residents in support of responsible oil and gas development in the Bristol Bay region.

Comment 34: A comment provided on the draft economic analysis highlights a series of potential transportation projects, generally related to potential future oil and gas development activity, and states that incremental increases in the cost of constructing these projects associated with critical habitat

designation should be considered. Specific projects of concern include the Alaska Peninsula Regional Transportation Corridor, Community Transportation Plans, port and harbor projects, and the three Trans-Peninsula Transportation Corridors identified in the Bristol Bay Area Plan.

Our Response: Section 5.1 of the analysis considers potential impacts to transportation projects, including airports, ports, and harbors. Forecast projects were determined through communication with both the Federal Aviation Administration and Alaska Department of Transportation, along with publicly available transportation plans from these agencies. The final economic analysis incorporates a discussion of the potential transportation projects described in the comment; these transportation projects, however, are largely land-based. For example, the Regional Transportation Corridors and Community Transportation Projects in the Bristol Bay Area Plan, including the Chigniks Road Intertie, are all ground transportation projects. Because these projects do not involve construction in marine waters, it is unclear how they would be affected by otter conservation.

Comment 35: One commenter notes that the draft economic analysis does not quantify impacts to other types of energy projects (e.g., wind, wave, and geothermal projects). The commenter states that the Makah Bay offshore Wave Energy Pilot Project described in the economic analysis could be used to generate an estimate of incremental costs for similar projects in the study area. The comment also mentions that a geothermal project near Naknek is currently being permitted.

Our Response: The economic analysis addresses potential impacts to tidal energy projects in Section 5.1.4. This section includes a discussion of all tidal energy projects that have received a preliminary permit from FERC. Outside of the Naknek project, the comment does not provide new information about specific projects not included in the analysis.

With respect to impacts on wave energy projects, little is known for the critical habitat area. While the Makah Bay Wave Energy Pilot Project discussed in the analysis is suggestive of potential project modifications that could be undertaken to reduce threats to the otter and its habitat, Makah Bay is in Washington State, and conditions are thought to be distinctly different from those being designated as critical habitat in Alaska. Further, no wave energy projects are currently proposed in critical habitat areas.

At this time, there do not appear to be any plans for offshore wind farms within the proposed critical habitat designation. It is therefore likewise uncertain whether and to what extent such projects may occur in the proposed designation.

Finally, Chapter 5 of the final economic analysis is revised to describe the potential for geothermal energy development in critical habitat areas, in particular the proposed Naknek project in the vicinity of Unit 5. As discussed, the Aleutian Islands have a high potential for geothermal energy development. However, similar to future oil and gas development, the location of potential future geothermal projects is unknown at this time. Because no consultations on geothermal projects have occurred for otters, the scope of potential project modifications for the sea otter is also unknown. With respect to the Naknek geothermal project and associated transmission lines, these do not appear to be located near the proposed critical habitat. It is, therefore, unclear how the Naknek project would be affected by the designation.

Other Comments

Comment 36: The proposed rule mischaracterizes the importance of this area to the State and its citizens. The proposed rule states, "The scale of human activities that occur within the proposed critical habitat areas is exceedingly small."

Our Response: The statement from the proposed rule shown above was not intended in any way to diminish the importance of southwest Alaska. Rather, it was included to illustrate that, for the most part, the range of sea otter habitat in southwest Alaska is relatively free from human disturbance. We have clarified this point in this final rule.

Comment 37: One commenter stated that based on their observations of sea otter movements between Kamishak Bay and the Kenai Peninsula, the areas north of Cape Douglas should be excluded from critical habitat designation. This commenter also suggested that sea otters in the Barren Islands also belong to the southcentral Alaska population stock, and this area should also be excluded from critical habitat designation.

Our Response: This comment addresses the discreteness aspect of the DPS justification, which was part of the August 9, 2005, final listing rule (70 FR 46366). We recognize that the issue of sea otter movements across Cook Inlet is not fully clear; however, the best available scientific information indicates that the waters of Cook Inlet are the appropriate boundary between the southwest and southcentral Alaska population stocks of sea otters (Gorbics and Bodkin 2001, p. 636). Additional studies using tagged sea otters, as well as genetic analysis of sea otters from Kamishak Bay, Kachemak Bay, and the Barren Islands, would be helpful in addressing this issue. In the meantime, we are required to designate critical habitat for the southwest Alaska DPS of the northern sea otter, which includes lower western Cook Inlet, north of Cape Douglas, and also the Barren Islands. As such, nearshore marine waters in these areas that contain the identified PCEs are included in our critical habitat designation.

Summary of Changes From the 2008 Proposed Rule

Comments on our December 2008 proposed rule (73 FR 76454) to designate critical habitat varied considerably. While some commenters stated that our proposed designation did not include sufficient area for the conservation of the southwest Alaska DPS of the northern sea otter, they did not provide specific supporting information relative to additional PCEs that would expand the extent of the critical habitat designation. Other commenters stated that our proposed designation encompassed too large an area, and several requested that specific areas be excluded from designation based on economic reasons, on existing management plans that obviate the need for special management considerations or protections, and for national security reasons. We considered these requests for exclusion, and for the reasons explained previously in our responses to public comments, we do not exclude any areas from the final designation.

We refined the GIS data layers used to map critical habitat since the proposed rule was published in December 2008, resulting in slight changes to the size of some units. Other than this slight revision, our final designation of critical habitat is essentially unchanged from what we proposed in December 2008.

Critical Habitat

Critical habitat is defined in section 3 of the Act as:

(1) The specific areas within the geographical area occupied by a species, at the time it is listed in accordance with the Act, on which are found those physical or biological features

(a) Essential to the conservation of the species and

(b) Which may require special management considerations or protection; and

(2) Specific areas outside the geographical area occupied by a species

at the time it is listed, upon a determination that such areas are essential for the conservation of the species.

Conservation, as defined under section 3 of the Act, means the use of all methods and procedures that are necessary to bring any endangered species or threatened species to the point at which the measures provided under the Act are no longer necessary.

Critical habitat receives protection under section 7 of the Act through the prohibition against Federal agencies carrying out, funding, or authorizing the destruction or adverse modification of critical habitat. Section 7 of the Act requires consultation on Federal actions that may affect critical habitat. The designation of critical habitat does not affect land ownership or establish a refuge, wilderness, reserve, preserve, or other conservation area. Such designation does not allow the government or public to access private lands. Such designation does not require implementation of restoration, recovery, or enhancement measures by private landowners. Where the landowner seeks or requests Federal agency funding or authorization for an activity that may affect a listed species or critical habitat, the consultation requirements of section 7 of the Act would apply. However, even in the event of a finding of destruction or adverse modification, the landowner's obligation is not to restore or recover the species, but to implement reasonable and prudent alternatives to avoid destruction or adverse modification of critical habitat.

For inclusion in a critical habitat designation, habitat within the geographical area occupied by the species at the time it was listed must contain the physical and biological features essential to the conservation of the species. Critical habitat designations identify, to the extent known using the best scientific data available, habitat areas that provide essential life cycle needs of the species (areas on which are found the primary constituent elements, as defined at 50 CFR 424.12(b)). Occupied habitat that contains the features essential to the conservation of the species meets the definition of critical habitat only if those features may require special management considerations or protection. Under the Act, we can designate unoccupied areas as critical habitat only when we determine that the best available scientific data demonstrate that the designation of that area is essential to the conservation needs of the species.

Section 4 of the Act requires that we designate critical habitat on the basis of the best scientific and commercial data available. Further, our Policy on Information Standards Under the Endangered Species Act (published in the **Federal Register** on July 1, 1994 (59 FR 34271)), the Information Quality Act (section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Pub. L. 106–554; H.R. 5658)), and our associated Information Quality Guidelines provide criteria, establish procedures, and provide guidance to ensure that our decisions are based on the best scientific data available. They require our biologists, to the extent consistent with the Act and with the use of the best scientific data available, to use primary and original sources of information as the basis for recommendations to designate critical habitat.

When we are determining which areas should be proposed as critical habitat, our primary source of information is generally the information developed during the listing process for the species. Additional information sources may include the recovery plan for the species, articles in peer-reviewed journals, conservation plans developed by States and counties, scientific status surveys and studies, biological assessments, or other unpublished materials and expert opinion or personal knowledge.

Habitat is often dynamic, and species may move from one area to another over time. Furthermore, we recognize that designated critical habitat may not include all of the habitat areas that we may eventually determine, based on scientific data not now available to the Service, are necessary for the recovery of the species. For these reasons, a critical habitat designation does not signal that habitat outside the designated area is unimportant or may not be required for recovery of the species.

Areas that support populations, but are outside the critical habitat designation, will continue to be subject to conservation actions we implement under section 7(a)(1) of the Act and our other wildlife authorities. They are also subject to the regulatory protections afforded by the section 7(a)(2) jeopardy standard, as determined on the basis of the best available scientific information at the time of the agency action. Federally funded or permitted projects affecting listed species outside their designated critical habitat areas may result in jeopardy findings in some cases. Similarly, critical habitat designations made on the basis of the best available information at the time of designation will not control the direction and substance of future recovery plans, habitat conservation plans (HCPs), or other species conservation planning efforts if new information available to these planning efforts calls for a different outcome.

Primary Constituent Elements (PCEs)

In accordance with section 3(5)(A)(i) of the Act and the regulations at 50 CFR 424.12, in determining which areas occupied at the time of listing to propose as critical habitat, we consider areas containing the physical and biological features that are essential to the conservation of the species and may require special management considerations or protection. These features are the specific primary constituent elements (PCEs) laid out in the appropriate quantity and spatial arrangement for the conservation of the species. These include, but are not limited to:

1. Space for individual and population growth and for normal behavior;
2. Food, water, air, light, minerals, or other nutritional or physiological requirements;
3. Cover or shelter;
4. Sites for breeding, reproduction, or rearing (or development) of offspring; and
5. Habitats that are protected from disturbance or are representative of the historical, geographical, and ecological distributions of a species.

We derive the specific primary constituent elements (PCEs) for the southwest Alaska DPS from its biological needs, as described in the Background section of our proposed rule published at 73 FR 76454 on December 16, 2008, and the following information.

Space for Individual and Population Growth and for Normal Behavior

Sea otters exhibit complex movement patterns related to habitat characteristics, social organization, and reproductive biology. It is likely that movements differ among populations depending on whether a population is at or near carrying capacity or has access to unoccupied suitable habitat into which it can expand (Riedman and Estes 1990, p. 58). Most research into sea otter movements has been conducted where unoccupied habitat is available to dispersing animals. Early research in the Aleutian Islands by Kenyon (1969, p. 204) also found that males have larger home ranges than females and described the female sea otter's home range as including 8–16 km (5.0–9.9 mi) of contiguous coastline. Male sea otter home ranges are highly variable. For territorial (breeding) males,

the area defended is smaller than that of a female range, but the territory is not necessarily defended year-round and may include larger scale movements to more productive feeding grounds. Breeding may not occur until a male is older (7–10 years) and in an established population. Little is known about the home range of non-breeding males. In the listed region, where dramatic reduction in numbers have occurred, even less is known about movement patterns and home range sizes (A. Doroff, USFWS, pers. comm. 2008).

At present, sea otters occur throughout nearly all of their former range in southwest Alaska, albeit at considerably lower densities than were present prior to the recent population decline that led to the listing of the DPS. Space for individual and population growth and for normal behavior does not appear to be a limiting factor for this DPS.

Food, Water, Air, Light, Minerals, or Other Nutritional or Physiological Requirements

The sea otter is a generalist predator, known to consume a wide variety of different prey species (Kenyon 1969, p. 110; Riedman and Estes 1990, p. 36; Estes and Bodkin 2002, p. 847). With few exceptions, their prey consist of sessile, or slow-moving, benthic invertebrates such as mollusks, crustaceans, and echinoderms, including sea urchins. Foraging occurs in habitats with rocky and soft sediment substrates between the high intertidal zone to depths slightly in excess of 100 m (328.1 ft). Preferred foraging habitat is generally in depths less than 40 m (131.2 ft) (Riedman and Estes 1990, p. 31), although studies in southeast Alaska have found that some animals forage mostly at depths from 40–80 m (131.2–262.5 ft) (Bodkin *et al.* 2004, p. 318).

The diet of sea otters is usually studied by observing prey items brought to the surface for consumption, and therefore diet composition is usually expressed as a percentage of all identified prey that belong to a particular prey species or type. Although the sea otter is known to prey on a large number of species, only a few tend to predominate in the diet in any particular area. Prey type and size depends on location, habitat type, season, and length of occupation.

Sea otters can be very diverse in their diets. Different habitats offer different types of prey. There are about 200 known prey species for sea otters, but the dominant ones that tend to sustain the population are crab, clam, urchin, and mussel. The predominately soft-sediment habitats of southeast Alaska, Prince William Sound, and Kodiak Island support populations of clams that are the primary prey of sea otters. Throughout most of southeast Alaska, burrowing clams (species of *Saxidomus, Protothaca, Macoma*, and *Mya*) predominate in the sea otter's diet (Kvitek *et al.* 1993, p. 172). They account for more than 50 percent of the identified prey, although urchins (*S. droebachiensis*) and mussels (*Modiolis modiolis, Mytilus* spp., and *Musculus spp.*) can also be important. In Prince William Sound and Kodiak Island, clams account for 34–100 percent of the otter's prey (Calkins 1978, p. 127; Doroff and Bodkin 1994, p. 202; Doroff and DeGange 1994, p. 706). Mussels (*Mytilus trossulus*) apparently become more important for sea otters as a prey base as the length of occupation by sea otters increases, ranging from 0 percent of their prey base at newly occupied sites at Kodiak to 22 percent of their prey base in long-occupied areas (Doroff and DeGange 1994, p. 709). Crabs (*C. magister*) were once important sea otter prey in eastern Prince William Sound, but apparently have been depleted by otter foraging and are no longer eaten in large numbers (Garshelis *et al.* 1986, p. 642). Sea urchins are minor components of the sea otter's diet in Prince William Sound and the Kodiak archipelago. In contrast, the diet in the Aleutian, Commander, and Kuril Islands is dominated by sea urchins and a variety of fin fish (Kenyon 1969, p. 116; Estes *et al.* 1982, p. 250). Sea urchins tend to dominate the diet of low-density sea otter populations, whereas more fishes are consumed in populations near equilibrium density (Estes *et al.* 1982, p. 250). For unknown reasons, fish are rarely consumed by sea otters in regions east of the Aleutian Islands.

As the population has declined in the past 20 years throughout much of the range of the southwest Alaska DPS of the northern sea otter, prey species such as sea urchins have increased in both size and abundance (Estes *et al.* 1998, p. 474). Recent studies of sea otter body condition indicate improved overall health and suggest that limited nutritional resources were not the cause of the observed population decline (Laidre *et al.* 2006, p. 987). Although food, water, air, light, minerals, or other nutritional or physiological requirements do not appear to be a limiting factor, availability of sufficient prey resources and areas in which to forage are essential to the conservation of the DPS.

Cover or Shelter

Estes *et al.* (1998, p. 473) believe the decline of sea otters in southwest Alaska is the result of increased predation, most likely by killer whales (*Orcinus orca*). These authors examined a suite of information and concluded that the recent population decline was likely not due to food limitation, disease, or reduced productivity. Several lines of evidence, including increased frequency of killer whale attacks and significantly higher mortality rates in Kuluk Bay on Adak Island, as compared to Clam Lagoon, a protected area that is inaccessible to killer whales, also support this conclusion (Estes *et al.* 1998, p. 473).

A shift in distribution toward the shoreline has also been observed in the western and central Aleutian Islands, which may allow otters easier escape onto the land. In August 2007, the Service and USGS conducted skiff-based surveys in the Near and Rat Island groups in the western Aleutians. In addition to recording the number and approximate location of every otter sighting, observers also recorded the approximate distance to the nearest shore. The median distance to shore for 811 sea otters observed was 10 m (32.8 ft); 90 percent of all otters observed were within 100 m (328.1 ft) (USFWS unpublished information). Aerial survey data indicate that in some areas, the majority of the remaining sea otter population inhabits sheltered bays and coves, which may also provide protection from marine predators (USFWS unpublished information).

Canopy-forming kelps (including species of *Macrocystis, Druehlia*, and *Nereocystis*) provide resting habitat (Kenyon 1969, p. 57; Riedman and Estes 1990, p. 23), and may also provide protection from marine predators (C. Matkin, personal communication). Kelp forests occur primarily in waters less than 20 m (65.6 ft) in depth (O'Clair and Lindstrom 2000, pp. 41, 57). In addition, killer whales may be less likely to forage in shallow, constricted areas less than 2 m (6.6 ft) in depth (C. Matkin, personal communication).

Based on our understanding of threats to the southwest Alaska DPS, we believe that features that provide protection from marine predators, especially killer whales, are essential to the conservation of the DPS.

Sites for Breeding, Reproduction, or Rearing (or Development) of Offspring

There appears to be a positive relationship between shoreline complexity and sea otter density (Riedman and Estes 1990, p. 23).

Although not obligatory, headlands, coves, and bays appear to offer preferred resting habitat, particularly to females with pups, presumably because they provide protection from high wind and sea conditions. Surveys of sea otters in southwest Alaska do not indicate that pup production is a limiting factor for the DPS (USFWS and USGS unpublished information).

Bodkin *et al.* (2004, p. 305) found that 85 percent of all foraging dives by female sea otters were in waters less than 20 m (65.6 ft) in depth. Although this study was conducted in southeast Alaska, additional studies using time-depth recorders indicate that female sea otters predominantly forage in shallower water than males.

Habitats Protected From Disturbance or Representative of the Historical, Geographical, and Ecological Distributions of the Species

Within the range of the southwest Alaska DPS of the northern sea otter, the vast majority of sea otter habitats is undisturbed, and is representative of the historical, geographical, and ecological distributions of the species. Changes in climatic conditions, due to both "normal" climate variability (Hunt and Stabeno 2005, p. 300) and human activities (Schumacher and Kruse 2005, p. 283), are expected to modify both the physical environment and the biota within the range of the southwest Alaska DPS. It would be expected that climate change would have more impact on sea otters at the southern end of the range, but this expectation should be tempered by the realization that atmospheric changes can influence ecosystems in many complex ways. For example, increased atmospheric carbon dioxide is causing increased ocean acidification, in turn inhibiting the process of calcification in virtually all ocean-dwelling species. It is not clear whether climate change will affect sea otter recovery. Therefore it will be important to monitor these changes and to evaluate them in regard to sea otter ecology and population dynamics.

Primary Constituent Elements for the Southwest Alaska DPS of the Northern Sea Otter

Within the geographical area occupied by the southwest Alaska DPS of the northern sea otter at the time of listing, we must identify the primary constituent elements (PCEs) laid out in the appropriate quantity and spatial arrangement essential to the conservation of the DPS (i.e., the essential physical and biological features) that may require special management considerations or protections.

Based on the above needs and our current knowledge of the life history, biology, and ecology of the species, we have determined that the southwest Alaska DPS of the northern sea otter's PCEs are:

1. Shallow, rocky areas where marine predators are less likely to forage, which are waters less than 2 m (6.6 ft) in depth;
2. Nearshore waters that may provide protection or escape from marine predators, which are those within 100 m (328.1 ft) from the mean high tide line;
3. Kelp forests that provide protection from marine predators, which occur in waters less than 20 m (65.6 ft) in depth; and
4. Prey resources within the areas identified by PCEs 1, 2, and 3 that are present in sufficient quantity and quality to support the energetic requirements of the species.

This final critical habitat designation encompasses those areas containing the PCEs necessary to support one or more of the species' life history functions and laid out in the appropriate quantity and spatial arrangement essential to the conservation of the DPS. All units in this designation contain some or all of the PCEs and support multiple life processes.

Special Management Considerations or Protections

When designating critical habitat, we assess whether the occupied areas contain features that are essential to the conservation of the species and that may require special management considerations or protections. The range of the southwest Alaska DPS of the northern sea otter is sparsely populated by humans. There are only 31 populated communities located within an area that contains approximately 18,000 km (11,184 mi) of coastline. The human population within the range of the DPS is approximately 17,000 persons living in 31 communities (State of Alaska Department of Commerce, Community, and Economic Development Database 2006). As a consequence, the range of the sea otter habitat in southwest Alaska is relatively free of human disturbances. Potential activities that could harm the identified physical and biological features include, but are not limited to, dredging or filling associated with construction of airports, seaports, and harbors; commercial shipping; and oil and gas development and production. The following discussion of these activities is not intended to be a comprehensive list of all potential activities for which the Service may consult under section 7 of the Act, but rather a list of those we believe, based on current available information, are reasonably likely to occur.

Pollution from various potential sources, including oil spills from vessels, or discharges from oil and gas drilling and production, could render areas containing the identified physical and biological features unsuitable for use by sea otters, effectively negating the conservation value of these features. Because of the vulnerabilities to pollution sources, these features may require special management or protection through such measures as placing conditions on Federal permits or authorizations to stimulate special operational restraints, mitigative measures, or technological changes.

The shipping industry transports various types of petroleum products both as fuel and cargo within the range of the southwest Alaska DPS. Information about the types and quantities of both persistent and non-persistent oil has been summarized in a report on vessel traffic within the Aleutians subarea (Nuka Research and Planning Group 2006). Persistent fuels such as #6 bunker oil, bunker C, and IFO 380 have low dissipation and evaporation rates, and will remain on the surface of marine waters or along shorelines much longer than non-persistent fuel such as diesel, gasoline, and aviation fuel. Approximately 3,100 ship voyages occur through the Aleutians each year. Most of these voyages are by bulk and general freight ships (1,300) and container ships (1,200). The median fuel capacity for bulk and general freight ships is 470,000 gallons of persistent fuel oil; for container ships, the median capacity is 1.6 million gallons of persistent fuel oil. In addition, there are about 265 voyages by motor vehicle carriers with an estimated average fuel capacity of 500,000 gallons of persistent fuel oil. There are also approximately 22 voyages by tanker ships transporting about 400 million gallons of refined oil. The figures quoted above are for the Aleutians subarea only, which includes the North Pacific great circle route from the west coast of North America to Asia. Information about shipping traffic that occurs in other parts of the southwest Alaska DPS is not well-documented, though it is presumably on a much smaller scale compared to what occurs through the Aleutians.

Numerous instances of vessel incidents have been documented in the Aleutians over the past 15 years, including loss of maneuverability, grounding, and oil spills (Nuka Research and Planning Group 2006, p.

29). Nearly 500 incidents affecting the seaworthiness of U.S. vessels were reported in the Aleutians from 1990 through July 2006. U.S. vessels reporting incidents were usually smaller than foreign vessels, and were primarily fishing vessels. An additional 48 incidents affecting seaworthiness of foreign vessels were reported between 1991 and July 2006. The bulk grain ship *M/V Selendang Ayu,* which ran aground on Unalaska Island in December 2004, is known to have resulted in the death of two sea otters. The long-term impacts of that spill on sea otter habitat use are not yet known.

Various safeguards have been established since the 1989 *Exxon Valdez* oil spill to minimize the likelihood of another spill of catastrophic proportions in Prince William Sound. Tankers, other vessels, fuel barges, and onshore storage facilities are potential sources of oil and fuel spills that could affect sea otters in the southwest Alaska DPS. A review of the Alaska Department of Environmental Conservation database indicates no crude-oil spills were reported within the range of the southwest Alaska DPS during the 10-year period from July 1, 1995 to June 30, 2005. Of the 520 reported spills of refined products, 82 percent were from vessels; most of these (70 percent) involved quantities smaller than 10 gallons. The majority of vessel spills occurred in the western Aleutian (149), eastern Aleutian (107), and Kodiak, Kamishak, Alaska Peninsula (130) management units. Only 7 spills were reported where the quantity was greater than 5,000 gallons of material. The largest was the *M/V Selendang Ayu,* which spilled 321,052 gallons of IFO 380 fuel and an additional 14,680 gallons of diesel.

In 2008, the U.S. Coast Guard, the State of Alaska, and the National Academies of Science completed the development of a comprehensive risk assessment for the Aleutian Islands (Transportation Research Board of the National Academies 2008, 225 pp.) Although the probability of occurrence of a catastrophic oil spill may be relatively small, the potential for disastrous consequences suggests that measures to prevent or respond to spills may be important to the recovery of the southwest Alaska DPS. The Coast Guard and Maritime Transportation Act of 2004 (H.R. 2443) requires oil-spill contingency plans for vessels over 400 gross tons that call on U.S. ports. In addition to contingency plans for vessels of this size class, the Alaska Department of Environmental Conservation (ADEC) has both a unified spill-response plan as well as 10 subarea plans. The southwest Alaska DPS is covered by the Aleutian, Bristol Bay, Kodiak, and Cook Inlet subarea plans. In addition, ADEC is developing Geographic Response Strategies (GRS) that are designed to be a supplement to the Subarea Contingency Plans for Oil and Hazardous Substances Spills and Releases. The GRS are the current standard for site-specific oil-spill-response planning in Alaska.

The first and primary phase of an oil-spill response is to contain and remove the oil at the scene of the spill or while it is still on the open water, thereby reducing or eliminating impacts on shorelines or sensitive habitats. If some of the spilled oil escapes the first-phase containment and removal, the second, but no less important, phase is to intercept, contain, and remove the oil in the nearshore area. The intent of phase two is the same as phase one: Remove the spilled oil before it affects sensitive environments. If phases one and two are not fully successful, a third phase (GRS) is designed to protect sensitive areas in the path of the oil. The purpose of phase three is to protect selected sensitive areas from the impacts of a spill or to minimize that impact to the maximum extent practical. Critical habitat for the southwest Alaska DPS of the northern sea otter will be incorporated into the GRS system to facilitate this additional level of spill response.

Existing commercial fishing activities, and their target species (which are not considered prey for sea otters), within southwest Alaska primarily occur outside of the critical habitat areas in this rule (Funk 2003, p. 2). With the exception of oil spills from shipwrecks, we do not believe that existing commercial fishing activities in southwest Alaska have the potential to harm the identified physical and biological features for the southwest Alaska DPS of the northern sea otter.

Criteria Used To Identify Critical Habitat

As required by section 4(b) of the Act, we used the best scientific data available in determining areas occupied at the time of listing that contain features essential to the conservation of the southwest Alaska DPS of the northern sea otter, and areas unoccupied at the time of listing that are essential to the conservation of the DPS, or both. In designating critical habitat for the southwest Alaska DPS of the northern sea otter, we reviewed the relevant information available, including peer-reviewed journal articles, unpublished reports, the final listing rule, and unpublished materials (such as survey results and expert opinions). In general, sea otters occupy the vast majority of the available habitat within southwest Alaska. Exceptions include portions of Kodiak Island where otters have yet to recolonize their former range, and there may also be some individual islands in the Aleutian archipelago where otters have disappeared (Doroff *et al.* 2003, p. 58). In general, the range of designated critical habitat encompasses all areas that have been historically occupied by the DPS.

We have reviewed available information that pertains to the habitat requirements of this species including research published in peer-reviewed articles and presented in academic theses and agency reports. We also discussed habitat requirements with members of the southwest Alaska sea otter recovery team at several meetings, as well as through email exchanges. The sea otter recovery team includes representatives from University of Alaska Fairbanks, Fish and Wildlife Service, University of British Columbia, Marine Conservation Alliance, U.S. Geological Survey (USGS), Alaska Veterinary Pathology Services, Defenders of Wildlife, National Marine Fisheries Service, The Alaska SeaLife Center, Alaska Department of Fish and Game, Smithsonian National Zoological Park, The Alaska Sea Otter and Steller Sea Lion Commission, University of California Santa Cruz, University of Alaska Sea Grant Program, and Sand Point, Alaska. Information from these recovery team discussions was fully considered and incorporated as appropriate into this critical habitat designation.

We are designating critical habitat for the southwest Alaska DPS of the northern sea otter in areas that were occupied at the time of listing and contain sufficient PCEs: (1) To support life history functions essential to the conservation of the DPS, and (2) which may require special management considerations or protection. Much of the range of the DPS occurs within the Aleutian archipelago, and although it is possible that otters have disappeared from some of the small islands since the time of listing, we have no information that indicates any portion should be considered unoccupied habitat. As a result, we consider the Aleutian archipelago to be occupied habitat.

Unlike habitats for terrestrial species, some of the various characteristics of sea otter habitat are poorly mapped. Although shoreline boundaries are reasonably well-documented, the bathymetric data for southwest Alaska exist at a variety of spatial resolutions.

Benthic substrate types are also poorly mapped. Other features, such as the distribution and abundance of sea otter prey species, and the spatial extent of kelp beds, may be dynamic over time. This lack of specificity makes it difficult to explicitly identify and map areas that contain the PCEs for this DPS beyond a certain geographic scale.

Areas that provide protection from marine predators are likely the most essential to the conservation of this DPS. Despite the absence of information necessary to map these areas with precision, we can define criteria that will contain the essential PCEs. Kelp forests that provide resting habitat and protection from marine predators occur primarily in waters less than 20 m (65.6 ft) in depth (O'Clair and Lindstrom 2000, pp. 41, 57). In addition to identifying an approximate seaward extent of kelp forests, the 20-m (65.6-ft) depth contour also encompasses the nearshore shallow areas (less than 2 m (6.6 ft)) where marine predators may be less likely to forage. The 20-m (65.6-ft) depth contour also has considerable overlap with the nearshore (less than 100 m (328.1 ft)) areas where otters can escape predators by hauling out on land. Areas of shallow water less than 20 m (65.6 ft) in depth that are not contiguous with the mean high tide line may provide less protection from marine predators. Nearshore marine waters ranging from mean high tide to 20 m (65.6 ft) in water depth or that occur within 100 m (328.1 ft) of the mean high tide line (or both) therefore contain the necessary PCEs for protection from marine predators (Figure 1). Based on numerous studies of sea otter foraging depths, as well as the distribution of the remaining sea otter population in nearshore, shallow water areas, we believe that the areas defined by PCEs 1, 2, and 3 also contain sufficient sea otter prey resources. We have no reason to believe that any of the areas within the critical habitat designation are unable to support the energetic requirements of this species.

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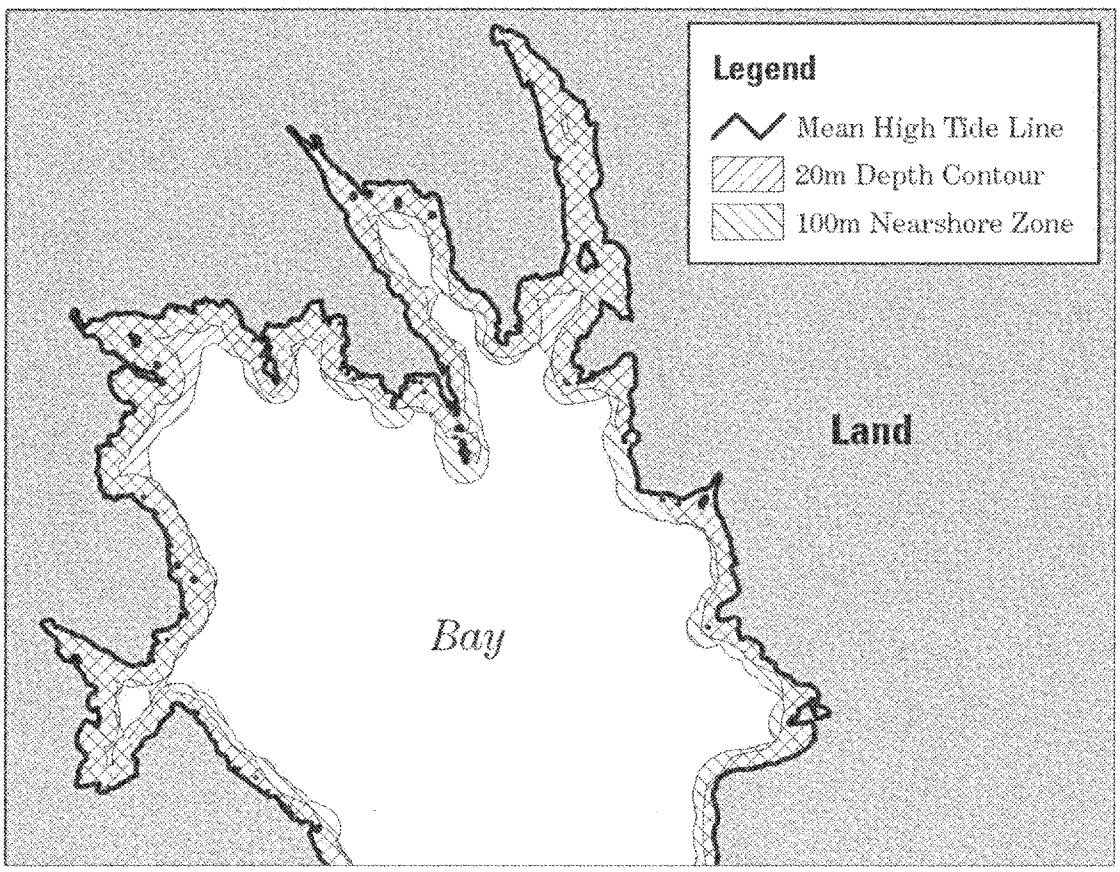

Figure 1. Hatched areas included within either the 20-m (65.6-ft) depth contour or the 100 -m (328.1 -ft) nearshore zone, or both (i.e., where they overlap) are considered critical habitat for the southwest Alaska DPS of the northern sea otter.

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When determining critical habitat boundaries within this final rule, we made every effort to avoid including developed areas that lack PCEs for the southwest Alaska DPS of the northern sea otter. The scale of the map we prepared under the parameters for publication within the Code of Federal Regulations may not reflect the exclusion of such developed areas, such as piers, docks, harbors, marinas, jetties,

and breakwaters. Any such structures inadvertently left inside critical habitat boundaries shown on the map of this final rule have been excluded by text in the final rule and are not designated as critical habitat. Therefore, Federal actions involving these areas would not trigger section 7 consultation with respect to critical habitat and the requirement of no adverse modification unless the specific action would affect the PCEs in the adjacent critical habitat.

Final Critical Habitat Designation

We are designating five units as critical habitat for the southwest Alaska DPS of the northern sea otter. In 2006, the Service convened a Recovery Team to develop a recovery plan for the southwest Alaska DPS of the northern sea otter. As of the publication date of this final rule, the Recovery Team has met six times, and a draft recovery plan is in preparation. As the range of the southwest Alaska DPS of the northern sea otter includes approximately 18,000 km (11,184.7 mi) of coastline, the team has proposed that the DPS be subdivided into 5 management units, based on criteria such as habitat type and population trajectory. In the interest of clarity, we are designating critical habitat units that correspond to the management units proposed by the Recovery Team. Only those areas within each management unit that meet the criteria identified above are being designated as critical habitat–namely, those areas that contain one or more PCEs and may require special management considerations or protection. Detailed, colored maps of areas designated as critical habitat in this final rule are available for viewing at *http://alaska.fws.gov/fisheries/mmm/seaotters/criticalhabitat.htm*. Hard copies of maps can be obtained by contacting the Marine Mammals Management Office (see **ADDRESSES**).

The critical habitat areas we describe below constitute our current best assessment of areas that meet the definition of critical habitat for the DPS. Table 1 shows the occupied units. The 5 units we propose as critical habitat are: (1) Western Aleutian Unit; (2) Eastern Aleutian Unit; (3) South Alaska Peninsula Unit; (4) Bristol Bay Unit; and (5) Kodiak, Kamishak, Alaska Peninsula Unit.

TABLE 1—OCCUPANCY OF NORTHERN SEA OTTERS BY CRITICAL HABITAT UNITS

Unit	Occupied at time of listing?	Currently occupied?	Estimated size of unit in km² (mi²)	State/Federal ownership ratio (percent)
1. Western Aleutian	Yes	Yes	1,551 (599)	100/0
2. Eastern Aleutian	Yes	Yes	832 (321)	100/0
3. South Alaska Peninsula	Yes	Yes	4,946 (1,909)	85/15
4. Bristol Bay	Yes	Yes	1,080 (417)	96/4
4a. Amak Island	Yes	Yes	31 (12)	77/23
4b. Izembek Lagoon	Yes	Yes	337 (130)	100/0
4c. Port Moller/Herendeen Bay	Yes	Yes	712 (275)	94/6
5. Kodiak, Kamishak, Alaska Peninsula	Yes	Yes	6,755 (2,607)	89/11
Total			15,164 (5,853)	90/10

We present brief descriptions of all critical habitat units, and reasons why they meet the definition of critical habitat for the southwest Alaska DPS of the northern sea otter, below. Calculation of areas for units and subunits that include the 20-m (65.6-ft) depth contour as a criterion are approximations estimated from GIS data layers of hydrographic survey data compiled by the National Oceanic and Atmospheric Administration (NOAA), the U.S. Geological Survey, and the Service. Consultations under section 7 of the Act should use the best available bathymetric data on a case-by-case basis. In some instances, these data may be based on other units of measurement (such as feet or fathoms), in which case the bathymetric contour that is closest to 20 m (65.6 ft) should be used. For users of NOAA nautical charts, the 10-fathom (60-ft) depth contour is a suitable approximation for the 20-m (65.6-ft) depth contour.

Although no lands above mean high tide are designated as critical habitat, ownership of lands adjacent to critical habitat may be of interest to readers of this final rule (Table 2).

TABLE 2—OWNERSHIP STATUS OF LANDS ADJACENT TO CRITICAL HABITAT

Unit	Federal (percent)	State (percent)	Private (percent)	Alaska Native (percent)
1. Western Aleutian	80.2	0.0	0.0	19.8
2. Eastern Aleutian	10.2	0.0	0.0	89.8
3. South Alaska Peninsula	21.1	0.4	0.0	78.5
4. Bristol Bay	36.7	41.5	0.0	21.8
4a. Amak Island	100.0	0.0	0.0	0.0
4b. Izembek Lagoon	89.4	0.0	0.0	10.6
4c. Port Moller/Herendeen Bay	4.9	66.1	0.0	29.0
5. Kodiak, Kamishak, Alaska Peninsula	30.2	17.4	0.0	52.4
Total	37.9	8.5	0.0	53.6

Unit 1: Western Aleutian Unit

Unit 1 consists of at least 1,551 km² (599 mi²), collectively, of the nearshore marine waters ranging from the mean high tide line to the 20-m (65.6-ft) depth contour as well as waters occurring within 100 m (328.1 ft) of the mean high tide line. Hydrographic survey data in the vicinity of Atka and Amlia islands is insufficient to delineate the 20-m (65.6-ft) depth contour, so our area

calculation may slightly underestimate the total area of this unit. This unit ranges from Attu Island in the west to Kagamil Island in the east, was occupied at the time of listing, and is currently occupied. The majority (80.2 percent) of the lands bordering this unit are federally owned within the Alaska Maritime National Wildlife Refuge. In addition, all critical habitat within this unit is located within State of Alaska waters (defined as those within 3 mi (4.82 km) of mean high tide).

The Western Aleutian Unit contains all of the PCEs essential for the conservation of the southwest Alaska DPS of the northern sea otter. Special management considerations and protections may be needed to minimize the risk of oil and other hazardous-material spills from commercial shipping within the region and along the northern great circle route.

Unit 2: Eastern Aleutan Unit

Unit 2 consists of an estimated 832 km² (321 mi²), collectively, of the nearshore marine waters ranging from the mean high tide line to the 20-m (65.6-ft) depth contour as well as waters occurring within 100 m (328.1 ft) of the mean high tide line. This unit ranges from Samalga Island in the west to Ugamak Island in the east, was occupied at the time of listing, and is currently occupied. The majority (89.8 percent) of the lands bordering this unit are owned or selected by (but not yet conveyed to) Alaska Natives. In addition, all the critical habitat within this unit is located within State of Alaska waters.

The Eastern Aleutian Unit contains all of the PCEs essential for the conservation of the southwest Alaska DPS of the northern sea otter. Special management considerations and protections may be needed to minimize the risk of oil and other hazardous-material spills from commercial shipping within the region and along the northern great circle route.

Unit 3: South Alaska Peninsula Unit

Unit 3 consists of an estimated 4,946 km² (1,909 mi²), collectively, of the nearshore marine waters ranging from the mean high tide line to the 20-m (65.6-ft) depth contour as well as waters occurring within 100 m (328.1 ft) of the mean high tide line. Available hydrographic survey data for this unit have considerably lower spatial resolution than the other units. This unit ranges from Unimak Island in the west to Castle Cape in the east, was occupied at the time of listing, and is currently occupied. The majority (78.5 percent) of the lands bordering this unit are owned or selected by (but not yet conveyed to) Alaska Natives. The vast majority (85 percent) of the critical habitat within this unit is located within State of Alaska waters.

The South Alaska Peninsula Unit contains all of the PCEs essential for the conservation of the southwest Alaska DPS of the northern sea otter. Special management considerations and protections may be needed to minimize the risk of oil and other hazardous-material spills from commercial shipping within this region and along the northern great circle route.

Unit 4: Bristol Bay Unit

Unit 4 consists of an estimated 1,080 km² (417 mi²) of the nearshore marine environment. This unit is further subdivided into 3 subunits: (4a) Amak Island; (4b) Izembek Lagoon; and (4c) Port Moller/Herendeen Bay. With the exception of Amak Island, the coastline contained within this unit is relatively simple and lacks kelp forests. For most of this unit, the 20-m (65.6-ft) depth contour used as a criterion for critical habitat in other units does not identify features that provide protection from marine predators, and is applicable only to the Amak Island subunit. Other criteria are used to identify the Izembek Lagoon and Port Moller/Herendeen Bay subunits, as described below. All three subunits within the Bristol Bay unit were occupied at the time of listing, and are currently occupied. Additional information about each subunit is included below.

Subunit 4a: Amak Island Subunit

Subunit 4a consists of an estimated 31 km² (12 mi²), collectively, of the nearshore marine waters ranging from the mean high tide line to the 20-m (65.6-ft) depth contour as well as waters occurring within 100 m (328.1 ft) of the mean high tide line. This subunit surrounds Amak Island in Bristol Bay, was occupied at the time of listing, and is currently occupied. Large groups of sea otters have been observed within the kelp forests within this subunit (USFWS unpublished information). All of the lands bordering this subunit are federally owned within the Alaska Maritime National Wildlife Refuge. Most (77 percent) of the critical habitat within this subunit is located within State of Alaska waters, a small portion of which (1.2 km², 0.46 mi²) is also located within the boundaries of the Izembek State Game Refuge.

The Amak Island Subunit contains all of the PCEs essential for the conservation of the southwest Alaska DPS of the northern sea otter. Special management considerations and protections may be needed to minimize the risk of oil and other hazardous-material spills from commercial shipping within Bristol Bay. In addition, offshore oil and gas development are under consideration in the Lease Sale Area 92 in the North Aleutian Basin region immediately offshore from this subunit. An environmental impact statement is in preparation, and will be completed prior to the lease sale. Additional management considerations and protections may be needed to minimize the risk of crude-oil spills associated with oil and gas development and production that may impact this subunit.

Subunit 4b: Izembek Lagoon Subunit

Subunit 4b consists of an estimated 337 km² (130 mi²) of the nearshore marine environment within the Izembek Lagoon and Moffett Lagoon systems. Sea otters are known to frequent the lagoon system and regularly haul out on the islands and sandbars that form the northern boundary of these systems, such as Glen, Operl, and Neumann Islands (USFWS unpublished information). Large numbers of otters have also been observed hauling out along the edges of the sea ice within the lagoon in winter (USFWS unpublished information). This subunit was occupied at the time of listing, and is currently occupied. The majority (89.4 percent) of the lands bordering this subunit are federally owned within the Izembek National Wildlife Refuge. The critical habitat within this subunit is located within State of Alaska waters, most of which (99 percent) is also within the boundaries of the Izembek State Game Refuge.

The Izembek Lagoon Subunit contains some of the PCEs (1, 2 and 4) essential for the conservation of the southwest Alaska DPS of the northern sea otter. Special management considerations and protections may be needed to minimize the risk of oil and other hazardous-material spills from commercial shipping within Bristol Bay. In addition, offshore oil and gas development are under consideration in the Lease Sale Area 92 in the North Aleutian Basin region immediately offshore from this subunit. Additional management considerations and protections may be needed to minimize the risk of crude-oil spills associated with oil and gas development and production that may impact this subunit.

Subunit 4c: Port Moller/Herendeen Bay Subunit

Subunit 4c consists of an estimated 712 km² (275 mi²) of the nearshore marine environment within the Port Moller and Herendeen Bay systems.

This subunit was occupied at the time of listing, and is currently occupied. Aerial surveys conducted in 2000 and 2004, as well as additional reported observations, indicate that these areas may contain several thousand sea otters at any given time (Burn and Doroff 2005, p. 277; USFWS unpublished information). The seaward boundary of this subunit extends from Point Edward on the Alaska Peninsula to the western tip of Walrus Island, and from Wolf Point on the eastern tip of Walrus Island to Entrance Point on the Alaska Peninsula. The majority (66.1 percent) of the lands bordering to this subunit are owned or selected by (but not yet conveyed to) the State of Alaska. Most (94 percent) of the critical habitat within this subunit is located within State of Alaska waters, with a portion (140.8 km^2 (54.4 mi^2)) located within the boundaries of the Port Moller State Critical Habitat Area.

The Port Moller/Herendeen Subunit contains some of the PCEs (1, 2, and 4) essential for the conservation of the southwest Alaska DPS of the northern sea otter. Special management considerations and protections may be needed to minimize the risk of oil and other hazardous-material spills from commercial shipping within Bristol Bay. In addition, offshore oil and gas development are under consideration in the Lease Sale Area 92 in the North Aleutian Basin region immediately offshore from this subunit. Additional management considerations and protections may be needed to minimize the risk of crude-oil spills associated with oil and gas development and production that may impact this subunit.

Unit 5: Kodiak, Kamishak, Alaska Peninsula Unit

Unit 5 consists of an estimated 6,755 km^2 (2,607 mi^2), collectively, of the nearshore marine environment ranging from the mean high tide line to the 20-m (65.6-ft) depth contour as well as waters occurring within 100 m (328.1 ft) of the mean high tide line. Available hydrographic survey data for parts of this unit have considerably lower spatial resolution than the other units. This unit ranges from Castle Cape in the west to Tuxedni Bay in the east, and includes the Kodiak archipelago. This unit was occupied at the time of listing, and is currently occupied. Slightly more than half (52.4 percent) of the lands bordering this unit are either owned or selected by (but not yet conveyed to) Alaska Natives. The majority (89 percent) of the critical habitat within this unit is located within State of Alaska waters, and a small portion (41.0 km^2, 15.8 mi^2) is also located within the boundaries of the Tugidak Island State Critical Habitat Area.

The Kodiak, Kamishak, Alaska Peninsula Unit contains all the PCEs essential for the conservation of the southwest Alaska DPS of the northern sea otter. Special management considerations and protections may be needed to minimize the risk of oil and other hazardous-material spills from commercial shipping within this region.

Effects of Critical Habitat Designation

Section 7 Consultation

Section 7(a)(2) of the Act requires Federal agencies, including the Service, to ensure that actions they fund, authorize, or carry out are not likely to destroy or adversely modify critical habitat. Decisions by the 5th and 9th Circuit Courts of Appeals have invalidated our definition of "destruction or adverse modification" (50 CFR 402.02) (see *Gifford Pinchot Task Force* v. *U.S. Fish and Wildlife Service,* 378 F.3d 1059 (9th Cir. 2004) and *Sierra Club* v. *U.S. Fish and Wildlife Service et al.,* 245 F.3d 434, 442 (5th Cir. 2001)), and we do not rely on this regulatory definition when analyzing whether an action is likely to destroy or adversely modify critical habitat. Under the statutory provisions of the Act, we determine destruction or adverse modification on the basis of whether, with implementation of the proposed Federal action, the affected critical habitat would remain functional (or retain the current ability for the PCEs to be functionally established) to serve its intended conservation role for the species.

In addition, under section 7(a)(4) of the Act, Federal agencies must confer with the Service on any agency action that is likely to result in destruction or adverse modification of critical habitat.

If a species is listed or critical habitat is designated, section 7(a)(2) of the Act requires Federal agencies to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of the species or to destroy or adversely modify its critical habitat. If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency (action agency) must enter into consultation with us. As a result of this consultation, we document compliance with the requirements of section 7(a)(2) through our issuance of:

1. A concurrence letter for Federal actions that may affect, but are not likely to adversely affect, listed species or critical habitat; or

2. A biological opinion for Federal actions that may affect, and are likely to adversely affect, listed species or critical habitat.

When we issue a biological opinion concluding that a project is likely to jeopardize the continued existence of a listed species or destroy or adversely modify critical habitat, we also provide reasonable and prudent alternatives to the project, if any are identifiable. We define "Reasonable and prudent alternatives" at 50 CFR 402.02 as alternative actions identified during consultation that:

- Can be implemented in a manner consistent with the intended purpose of the action,
- Can be implemented consistent with the scope of the Federal agency's legal authority and jurisdiction,
- Are economically and technologically feasible, and
- Would, in the Director's opinion, avoid jeopardizing the continued existence of the listed species or destroying or adversely modifying critical habitat.

Reasonable and prudent alternatives can vary from slight project modifications to extensive redesign or relocation of the project. Costs associated with implementing a reasonable and prudent alternative are similarly variable.

Regulations at 50 CFR 402.16 require Federal agencies to reinitiate consultation on previously reviewed actions in instances where we have listed a new species or subsequently designated critical habitat that may be affected and the Federal agency has retained discretionary involvement or control over the action (or the agency's discretionary involvement or control is authorized by law). Consequently, Federal agencies may sometimes need to request reinitiation of consultation with us on actions for which formal consultation has been completed, if those actions with discretionary involvement or control may affect subsequently listed species or designated critical habitat.

Federal activities that may affect the southwest Alaska DPS of the northern sea otter or its designated critical habitat require section 7 consultation under the Act. Activities on State, Tribal, local, or private lands requiring a Federal permit (such as a permit from the U.S. Army Corps of Engineers under section 404 of the Clean Water Act (33 U.S.C. 1251 *et seq.*) or a permit from us under section 10 of the Act) or involving some other Federal action (such as funding from the Federal Highway Administration, Federal Aviation Administration, or the Federal Emergency Management Agency) are subject to the section 7 consultation process. Federal actions

not affecting listed species or critical habitat, and actions on State, Tribal, local, or private lands that are not federally funded or authorized do not require section 7 consultations.

Application of the "Adverse Modification" Standard

The key factor related to the adverse modification determination is whether, with implementation of the proposed Federal action, the affected critical habitat would continue to serve its intended conservation role for the species, or would retain its current ability for the PCEs to be functionally established. Activities that may destroy or adversely modify critical habitat are those that alter the PCEs to an extent that appreciably reduces the conservation value of critical habitat for the southwest Alaska DPS of the northern sea otter.

Section 4(b)(8) of the Act requires us to briefly evaluate and describe, in any proposed or final regulation that designates critical habitat, activities involving a Federal action that may destroy or adversely modify such habitat, or that may be affected by such designation.

Activities that, when carried out, funded, or authorized by a Federal agency, may affect critical habitat and therefore should result in consultation for the southwest Alaska DPS of the northern sea otter include, but are not limited to:

1. Actions that would directly impact the PCEs that provide protection from marine predators. Such activities could include, but are not limited to, dredging, filling, and construction of docks, seawalls, pipelines, or other structures. Loss of the PCEs could result in increased predation pressure on the remaining sea otter population, and potentially affect the conservation of the DPS.

2. Actions that would reduce the availability of sea otter prey species. Such activities could include, but are not limited to, dredging, filling, construction of docks, seawalls, pipelines, or other structures, and development of new fisheries for sea otter prey species. Otters that are using critical habitat for protection from marine predators must also be able to feed in these areas. Activities that reduce availability of prey may cause otters to forage outside of these protective areas, thus increasing their vulnerability to predators.

3. Actions that would render critical habitat areas unsuitable for use by sea otters. Such activities could include, but are not limited to, human disturbance or pollution from a variety of sources, including discharges from oil and gas drilling and production or spills of crude oil, fuels, or other hazardous materials from vessels, primarily in harbors or other construction ports for marine vessels. While it is not legal to discharge fuel or other hazardous materials, it does happen more often in these areas than in other areas. These activities could displace sea otters from areas that provide protection from marine predators.

Exemptions

Application of Section 4(a)(3) of the Act

The Sikes Act Improvement Act of 1997 (Sikes Act) (16 U.S.C. 670a) required each military installation that includes land and water suitable for the conservation and management of natural resources to complete an integrated natural resources management plan (INRMP) by November 17, 2001. An INRMP integrates implementation of the military mission of the installation with stewardship of the natural resources found on the base. Each INRMP includes:

- An assessment of the ecological needs on the installation, including the need to provide for the conservation of listed species;
- A statement of goals and priorities;
- A detailed description of management actions to be implemented to provide for these ecological needs; and
- A monitoring and adaptive management plan.

Among other things, each INRMP must, to the extent appropriate and applicable, provide for fish and wildlife management; fish and wildlife habitat enhancement or modification; wetland protection, enhancement, and restoration where necessary to support fish and wildlife; and enforcement of applicable natural resource laws.

The National Defense Authorization Act for Fiscal Year 2004 (Pub. L. 108–136) amended the Act to limit areas eligible for designation as critical habitat. Specifically, section 4(a)(3)(B)(i) of the Act (16 U.S.C. 1533(a)(3)(B)(i)) now provides: "The Secretary shall not designate as critical habitat any lands or other geographical areas owned or controlled by the Department of Defense, or designated for its use, that are subject to an integrated natural resources management plan prepared under section 101 of the Sikes Act (16 U.S.C. 670a), if the Secretary determines in writing that such plan provides a benefit to the species for which critical habitat is proposed for designation."

Eareckson Air Station, located on Shemya Island within the western Aleutian unit, has a completed INRMP that was last updated in 2007. This INRMP recognizes the importance of kelp beds to sea otters (U.S. Air Force 2007, p. 39), and notes that the only impacts to kelp may be from occasional barge traffic. In addition to Eareckson, the Air Force has a completed INRMP for 4 inactive sites (Nikolski, Driftwood Bay, Port Moller, and Port Heiden) within the range of the southwest Alaska DPS (U.S. Air Force 2001).

All of these sites were deactivated between 1977 and 1978, and either demolished or removed between 1988 and 1994. Of these, the Port Heiden site is the only one that includes shoreline areas. All critical habitat designated in this rule occurs below the mean high tide line and is therefore not within the boundaries of the Department of Defense facility. Therefore, there are no Department of Defense lands with a completed INRMP within the critical habitat designation.

Exclusions Under Section 4(b)(2) of the Act

Application of Section 4(b)(2) of the Act

Section 4(b)(2) of the Act states that the Secretary must designate and revise critical habitat on the basis of the best available scientific data after taking into consideration the economic impact, national security impact, and any other relevant impact of specifying any particular area as critical habitat. The Secretary may exclude an area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific data available, that the failure to designate such area as critical habitat will result in the extinction of the species. In making that determination, the legislative history is clear that the Secretary has broad discretion regarding which factor(s) to use and how much weight to give to any factor.

In the following sections, we address a number of general issues that are relevant to our analysis under section 4(b)(2) of the Act.

Benefits of Designating Critical Habitat

The process of designating critical habitat as described in the Act requires that the Service identify those areas within the geographical area occupied by the species at the time of listing on which are found the physical or biological features essential to the conservation of the species that may require special management considerations or protection, and those areas outside the geographical area

occupied by the species at the time of listing that are essential for the conservation of the species. In identifying those areas, the Service must consider the recovery needs of the species, such that, on the basis of the best scientific and commercial data available at the time of designation, the features essential to the conservation of the DPS and habitat that is identified, if managed or protected, could provide for the survival and recovery of the DPS.

The identification of areas that contain the features essential to the conservation of the DPS, or are otherwise essential for the conservation of the DPS if outside the geographical area occupied by the DPS at the time of listing, is a benefit resulting from the designation. The critical habitat designation process includes peer review and public comment on the identified physical and biological features and areas, and provides a mechanism to educate landowners, State and local governments, and the public regarding the potential conservation value of an area. This helps focus and promote conservation efforts by other parties by clearly delineating areas of high conservation value for the DPS, and is valuable to land owners and managers in developing conservation management plans for identified areas, as well as for any other identified occupied habitat or suitable habitat that may not be included in the areas the Service identifies as meeting the definition of critical habitat.

In general, critical habitat designation always has educational benefits; however, in some cases, they may be redundant with other educational effects. For example, habitat conservation plans (HCPs) have significant public input and may largely duplicate the educational benefits of a critical habitat designation. There are currently no HCPs in place that cover any areas within this critical habitat designation for the southwest Alaska DPS of the northern sea otter. Including lands in critical habitat also would inform State agencies and local governments about areas that could be conserved under State laws or local ordinances.

The consultation provisions under section 7(a)(2) of the Act constitute the regulatory benefits of critical habitat. As discussed above, Federal agencies must consult with the Service on actions that may affect critical habitat and must avoid destroying or adversely modifying critical habitat. Federal agencies must also consult with us on actions that may affect a listed species and refrain from undertaking actions that are likely to jeopardize the continued existence of such species. The analysis of effects to critical habitat is a separate and different analysis from that of the effects to the species. Therefore, the difference in outcomes of these two analyses represents the regulatory benefit of critical habitat. For some species, and in some locations, the outcome of these analyses will be similar, because effects to habitat will often also result in effects to the species. However, the regulatory standard is different, as the jeopardy analysis investigates the action's impact to survival and recovery of the species, while the adverse modification analysis investigates the action's effects to the designated critical habitat's contribution to conservation. This will, in some instances, lead to different results and different regulatory requirements. Thus, critical habitat designations may provide greater benefits to the recovery of a species than would listing alone.

For the southwest Alaska DPS of the northern sea otter, when consulting under section 7(a)(2) of the Act for activities in designated critical habitat, independent analyses would be made for jeopardy and adverse modification. In consultations on projects where surveys detect high densities of sea otters or low densities of sea otters combined with abundant PCEs, there is not likely to be a quantifiable difference between the jeopardy analysis and the adverse modification analysis as we estimate take for this subspecies in terms of square kilometers of occupied habitat, and the Act requires Federal agencies to minimize the impact of the taking on the DPS that may result from implementation of a proposed action. Furthermore, any upfront modifications made to the project description to minimize the project's impact on the critical habitat designation will also minimize the impacts of the taking of individuals on the DPS as a whole.

There are two limitations to the regulatory effect of critical habitat. First, a consultation is only required where there is a Federal nexus (an action authorized, funded, or carried out by any Federal agency)—if there is no Federal nexus, the critical habitat designation of private lands, by itself, does not restrict actions that may destroy or adversely modify critical habitat. Second, the designation only limits destruction or adverse modification. By its nature, the prohibition on adverse modification is designed to ensure that the conservation role and function of those areas that contain the physical and biological features essential to the conservation of the species, or of unoccupied areas that are essential for the conservation of the species, are not appreciably reduced. Critical habitat designation alone, however, does not require private property owners to undertake specific steps toward recovery of the species.

Once an agency determines that consultation under section 7(a)(2) of the Act is necessary, the process may conclude informally when the Service concurs in writing that the proposed Federal action is not likely to adversely affect the species or critical habitat. However, if we determine through informal consultation that adverse impacts are likely to occur, then formal consultation is initiated. Formal consultation concludes with a biological opinion issued by the Service on whether the proposed Federal action is likely to jeopardize the continued existence of listed species or result in destruction or adverse modification of designated critical habitat.

For critical habitat, a biological opinion that concludes in a determination of no destruction or adverse modification may recommend additional conservation measures to minimize adverse effects to the primary constituent elements, but such measures would be discretionary on the part of the Federal agency. A biological opinion that concludes in a determination of no destruction or adverse modification would not include the implementation of any reasonable and prudent alternative, as these are provided for the proposed Federal action only when our biological opinion results in an adverse modification conclusion.

As stated above, the designation of critical habitat does not require that any management or recovery actions take place on the lands included in the designation. Even in cases where consultation is initiated under section 7(a)(2) of the Act, the end result of consultation is to avoid jeopardy to the species or adverse modification of its critical habitat, but not necessarily to manage critical habitat or institute recovery actions on critical habitat. Conversely, voluntary conservation efforts implemented through management plans institute proactive actions over the lands they encompass and are put in place to remove or reduce known threats to a species or its habitat, therefore implementing recovery actions. We believe that in many instances the regulatory benefit of critical habitat is minimal when compared to the conservation benefit that can be achieved through implementing HCPs under section 10 of the Act or other habitat management plans.

Economic Analysis

In order to consider economic impacts, we conducted an economic analysis to estimate the potential economic effect of the designation. The DEA (dated May 20, 2009) was made available for public review and comment from June 9, 2009, to July 9, 2009 (74 FR 27271). Substantive comments and information received on the DEA are summarized above in the "Public Comments" section and are incorporated into the final analysis, as appropriate. Taking the public comments and any relevant new information into consideration, the Service completed a final economic analysis (FEA) (dated August 6, 2009) of the designation that updates the DEA.

The primary purpose of the economic analysis is to estimate the potential incremental economic impacts associated with the designation of critical habitat for the southwest Alaska DPS of the northern sea otter. The information is intended to assist the Secretary in making decisions about whether the benefits of excluding particular areas from the designation outweigh the benefits of including those areas in the designation. The economic analysis considers the economic efficiency effects that may result from the designation. In the case of habitat conservation, efficiency effects generally reflect the "opportunity costs" associated with the commitment of resources to comply with habitat protection measures (such as lost economic opportunities associated with restrictions on land use). It also addresses how potential economic impacts are likely to be distributed, including an assessment of any local or regional impacts of habitat conservation and the potential effects of conservation activities on government agencies, private businesses, and individuals. The economic analysis measures lost economic efficiency associated with residential and commercial development and public projects and activities, such as economic impacts on water management and transportation projects, Federal lands, small entities, and the energy industry. This information can be used by the Secretary to assess whether the effects of the designation might unduly burden a particular group or economic sector. Finally, the economic analysis looks retrospectively at costs that have been incurred since the date we listed the southwest Alaska DPS of the northern sea otter as threatened on August 9, 2005 (70 FR 46366), and considers those costs that may occur in the years following the designation of critical habitat, with the timeframes for this analysis varying by activity.

The economic analysis focuses on the direct and indirect costs of the rule. However, economic impacts to land use activities can exist in the absence of critical habitat. These impacts may result from, for example, local zoning laws, State and natural resource laws, and enforceable management plans and best management practices applied by other State and Federal agencies. Economic impacts that result from these types of protections are not included in the analysis as they are considered to be part of the regulatory and policy baseline.

The economic analysis examines activities taking place both within and adjacent to the designation. It estimates impacts based on activities that are "reasonably foreseeable" including, but not limited to, activities that are currently authorized, permitted, or funded, or for which proposed plans are currently available to the public. Accordingly, the analysis bases estimates on activities that are likely to occur within a 20-year timeframe, from when the proposed rule became available to the public (73 FR 76454; December 16, 2008). The 20-year timeframe was chosen for the analysis because, as the time horizon for an economic analysis is expanded, the assumptions on which the projected number of projects and cost impacts associated with those projects are based become increasingly speculative.

The primary potential incremental economic impacts attributed to the critical habitat designation are expected to be related to oil spill planning and response (19 percent), marine and coastal construction activities (22 percent), and water quality management (36 percent). The FEA estimates total potential incremental economic impacts in areas designated as critical habitat over the next 20 years to be $668,000 ($58,900 annualized) in present value terms using a 7 percent discount rate (including areas considered for exclusion under section 4(b)(2) of the Act).

The FEA estimates the largest impacts of the critical habitat rule will result from administrative costs of consultation under section 7 of the Act. If the rate of consultations continues into the future at a similar rate and distribution as past consultations, an estimated 600 consultations will occur over the 20-year time frame for the analysis. These costs result from the need to address adverse modification in a consultation that would occur even in the absence of critical habitat. These total additional administrative costs that can be attributed to the designation of critical habitat are estimated to be approximately $623,000 using a 7 percent discount rate, or about $54,900 annualized. These incremental costs represent an increase of 31 percent above the baseline costs associated with consultations that address the jeopardy standard alone.

We have considered and evaluated the potential economic impact of the critical habitat designation under 4(b)(2) of the Act, as identified in the FEA. Based on this evaluation, we believe the economic impacts associated with the designation here are neither significant nor disproportionate. As a result, and in light of the benefits of critical habitat designation discussed previously, we are not excluding any areas from critical habitat based on economic reasons. The final economic analysis is available at *http://www.regulations.gov* or upon request from the Marine Mammals Management Office (see **ADDRESSES**).

Application of Section 4(b)(2)—Impacts to National Security

Under section 4(b)(2) of the Act, we consider whether there are an impacts to national security that may exist from the designation of critical habitat. Section 4(b)(2) allows the Secretary to exclude areas from critical habitat for reasons of national security if the Secretary determines the benefits of such an exclusion exceed the benefits of designating the area as critical habitat. However, this exclusion cannot occur if it will result in the extinction of the species concerned.

The Department of the Navy requested that we exclude approximately 3,418 km^2 (1,320 mi^2) in Unit 5 from designation as critical habitat for national security reasons. After thorough consideration of this request and an analysis of the respective benefits of including these lands and excluding these lands from critical habitat, we have not excluded the requested areas from final designation as critical habitat, as explained above in our response to comment 19.

Exclusions Based on Other Relevant Impacts

Under section 4(b)(2), we consider any other relevant impacts from critical habitat designation, in addition to economic impacts and impacts on national security. We consider a number of factors, including whether landowners have developed any HCPs or other management plans for the area, and whether there are conservation partnerships that would be encouraged by designation of, or exclusion from, critical habitat. In addition, we look at

any tribal issues, and consider the government-to-government relationship of the United States with tribal entities. We also consider any social impacts that might occur because of the designation.

In preparing this final rule, we have determined that there are currently no HCPs, management plans, or conservation partnerships for the southwest Alaska DPS of the northern sea otter, and this final designation does not include any tribal lands. We anticipate no impact to tribal lands, partnerships, or HCPs from this critical habitat designation. Thus, we are not excluding any areas from this final designation based on other relevant impacts.

Accordingly, given the relatively small potential economic effects and other effects of designating critical habitat for the southwest Alaska DPS of the northern sea otter, and the regulatory, educational and informational benefits of critical habitat, we are not excluding any areas from the final designation.

Editorial Change to the Table at 50 CFR 17.11(h)

We also make one editorial change to the northern sea otter's entry in the List of Endangered and Threatened Wildlife at 50 CFR 17.11(h). Specifically, we update the entry to accurately reflect the citation of the special rule for this DPS, which was published on August 15, 2006, at 71 FR 46864. In that final rule, we inadvertently neglected to update the entry to note the special rule at 50 CFR 17.40(p). This editorial change will ensure the entry for the northern sea otter in the List of Endangered and Threatened Wildlife at 50 CFR 17.11(h) is complete and accurate.

Required Determinations

Regulatory Planning and Review—Executive Order 12866

The Office of Management and Budget (OMB) has determined that this final rule is not significant and has not reviewed this final rule under Executive Order 12866 (E.O. 12866). OMB bases its determination upon the following four criteria:

1. Whether the rule will have an annual effect of $100 million or more on the economy or adversely affect an economic sector, productivity, jobs, the environment, or other units of the government.

2. Whether the rule will create inconsistencies with other Federal agencies' actions.

3. Whether the rule will materially affect entitlements, grants, user fees, loan programs, or the rights and obligations of their recipients.

4. Whether the rule raises novel legal or policy issues.

Regulatory Flexibility Act (5 U.S.C. 601 et seq.)

Under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*, as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996), whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effect of the rule on small entities (i.e., small businesses, small organizations, and small government jurisdictions), as described below. However, no regulatory flexibility analysis is required if the head of an agency certifies the rule will not have a significant economic impact on a substantial number of small entities. Based on our FEA of the designation, we provide our analysis for determining whether the designation of critical habitat for the southwest Alaska DPS of the northern sea otter will result in a significant economic impact on a substantial number of small entities.

According to the Small Business Administration, small entities include small organizations, such as independent nonprofit organizations, and small governmental jurisdictions including school boards and city and town governments that serve fewer than 50,000 residents, as well as small businesses (13 CFR 121.201). Small businesses include manufacturing and mining concerns with fewer than 500 employees, wholesale trade entities with fewer than 100 employees, retail and service businesses with less than $5 million in annual sales, general and heavy construction businesses with less than $27.5 million in annual business, special trade contractors with less than $11.5 million in annual business, and agricultural businesses with annual sales less than $750,000. To determine if potential economic impacts to these small entities are significant, we considered the types of activities that might trigger regulatory impacts under this designation, as well as types of project modifications that may result. In general, the term "significant economic impact" is meant to apply to a typical small business firm's business operations.

To determine if the designation of critical habitat for the southwest Alaska DPS of the northern sea otter will affect a substantial number of small entities, we considered the number of small entities affected within particular types of economic activities, such as oil spill planning and response, oil and gas exploration and development, marine and coastal construction activities, and water quality management. Specifically, we identified 12 small entities that may be affected by these activities (3 are in the deep sea freight transportation business, 2 are in the general construction business, 3 are government jurisdictions, and 4 are in the seafood processing business). In estimating the numbers of small entities potentially affected, we considered whether the activities of these entities may entail any Federal involvement. Critical habitat designation will not affect activities that do not have any Federal involvement; designation of critical habitat affects activities conducted, funded, or authorized by Federal agencies.

Once this critical habitat designation takes effect, Federal agencies must consult with us under section 7 of the Act if their activities may affect designated critical habitat. Consultations to avoid the destruction or adverse modification of critical habitat will be incorporated into the existing consultation process.

In order to determine whether it is appropriate for our agency to certify that this rule will not have a significant economic impact on a substantial number of small entities, we considered in the FEA the potential impacts resulting from implementation of conservation actions related to the designation of critical habitat for the southwest Alaska DPS of the northern sea otter on each of the 12 small entities discussed above. As described in Appendix A of the FEA, the potential impacts are likely to be associated with construction, oil spill response activities, and water quality issues. The average annualized incremental impacts to small entities ranges from $2,407 for seafood processors to $4,367 for deep sea freight transporters, applying a 7 percent discount rate. We therefore conclude that costs to small entities will not be significant. Please refer to the FEA for a more detailed discussion of potential economic impacts.

In summary, we have considered whether the designation will result in a significant economic impact on a substantial number of small entities. We have identified 12 small entities that may be impacted by the critical habitat designation. For the above reasons and based on currently available information, we certify that the designation will not have a significant economic impact on a substantial number of small business entities. Therefore, a regulatory flexibility analysis is not required.

Energy Supply, Distribution, or Use—Executive Order 13211

On May 18, 2001, the President issued an Executive Order (E.O. 13211; Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use) on regulations that significantly affect energy supply, distribution, and use. E.O. 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. Offshore oil and gas development are under consideration in the Lease Sale Area 92 in the North Aleutian Basin region immediately offshore from the three subunits of the Bristol Bay critical habitat unit. We do not expect this final rule to significantly affect energy supplies, distribution (including shipping channels), or use because most oil and gas development activities will not overlap with the habitats used by northern sea otters, and we do not expect the activities to cause significant alteration of the PCEs. Any proposed development project likely will have to undergo section 7 consultation to ensure that the actions will not destroy or adversely modify designated critical habitat. Consultations may entail modifications to the project to minimize the potential adverse effects to northern sea otter critical habitat. A spill-response plan will have to be developed to minimize the chance that a spill would have negative effects on sea otters or critical habitat. However, we conduct thousands of consultations every year throughout the United States, and in almost all cases, we are able to accommodate both project and species' needs. We expect that to be the case here. Therefore, this action is not a significant energy action, and no Statement of Energy Effects is required.

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

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*), we make the following findings:

1. This rule will not produce a Federal mandate. In general, a Federal mandate is a provision in legislation, statute, or regulation that would impose an enforceable duty upon State, local, or Tribal governments, or the private sector, and includes both "Federal intergovernmental mandates" and "Federal private sector mandates." These terms are defined in 2 U.S.C. 658(5)–(7). "Federal intergovernmental mandate" includes a regulation that "would impose an enforceable duty upon State, local, or [T]ribal governments" with two exceptions. It excludes "a condition of Federal assistance." It also excludes "a duty arising from participation in a voluntary Federal program," unless the regulation "relates to a then-existing Federal program under which $500,000,000 or more is provided annually to State, local, and [T]ribal governments under entitlement authority," if the provision would "increase the stringency of conditions of assistance" or "place caps upon, or otherwise decrease, the Federal Government's responsibility to provide funding," and the State, local, or Tribal governments "lack authority" to adjust accordingly. At the time of enactment, these entitlement programs were: Medicaid; AFDC work programs; Child Nutrition; Food Stamps; Social Services Block Grants; Vocational Rehabilitation State Grants; Foster Care, Adoption Assistance, and Independent Living; Family Support Welfare Services; and Child Support Enforcement. "Federal private sector mandate" includes a regulation that "would impose an enforceable duty upon the private sector, except (i) a condition of Federal assistance or (ii) a duty arising from participation in a voluntary Federal program."

The designation of critical habitat does not impose a legally binding duty on non-Federal Government entities or private parties. Under the Act, the only regulatory effect is that Federal agencies must ensure that their actions do not destroy or adversely modify critical habitat under section 7. While non-Federal entities that receive Federal funding, assistance, or permits, or that otherwise require approval or authorization from a Federal agency for an action, may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency. Furthermore, to the extent that non-Federal entities are indirectly impacted because they receive Federal assistance or participate in a voluntary Federal aid program, the Unfunded Mandates Reform Act does not apply, nor does critical habitat shift the costs of the large entitlement programs listed above onto State governments.

2. We do not believe that this rule will significantly or uniquely affect small governments because the areas being designated as critical habitat occur within State of Alaska waters. The State of Alaska does not fit the definition of "small governmental jurisdiction." Waters adjacent to Native-owned lands are still owned and managed by the State of Alaska. In most cases, development around Native villages is happening with funding from Federal or State sources (or both). Therefore, a Small Government Agency Plan is not required.

Takings—Executive Order 12630

In accordance with E.O. 12630 (Government Actions and Interference with Constitutionally Protected Private Property Rights), we have analyzed the potential takings implications of designating critical habitat for the southwest Alaska DPS of the northern sea otter in a takings implications assessment. Critical habitat designation does not affect landowner actions that do not require Federal funding or permits, nor does it preclude development of habitat conservation programs or issuance of incidental take permits to permit actions that do require Federal funding or permits to go forward. The takings implications assessment concludes that this designation of critical habitat for the southwest Alaska DPS of the northern sea otter does not pose significant takings implications for lands within or affected by the designation.

Federalism—Executive Order 13132

In accordance with E.O. 13132 (Federalism), this final rule does not have significant Federalism effects. A Federalism assessment is not required. In keeping with Department of the Interior and Department of Commerce policy, we requested information from, and coordinated development of, this critical habitat designation with appropriate State resource agencies in Alaska. The designation of critical habitat in areas currently occupied by the southwest Alaska DPS of the northern sea otter imposes no additional restrictions to those currently in place and, therefore, has little incremental impact on State and local governments and their activities. The designation may have some benefit to these governments because the areas that contain the features essential to the conservation of the species are more clearly defined, and the primary constituent elements of the habitat necessary to the conservation of the species are specifically identified. This information does not alter where and what federally sponsored activities may occur. However, it may assist local governments in long-range planning (rather than having them wait for case-by-case section 7 consultations to occur).

Civil Justice Reform—Executive Order 12988

In accordance with E.O. 12988 (Civil Justice Reform), the Office of the Solicitor has determined that the rule

does not unduly burden the judicial system and that it meets the requirements of sections 3(a) and 3(b)(2) of the Order. We have are designating critical habitat in accordance with the provisions of the Act. This final rule uses standard property descriptions and identifies the primary constituent elements within the designated areas to assist the public in understanding the habitat needs of the southwest Alaska DPS of the northern sea otter.

Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.)

This rule does not contain any new collections of information that require approval by OMB under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). This rule will not impose recordkeeping or reporting requirements on State or local governments, individuals, businesses, or organizations. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

Government-to-Government Relationship With Tribes

In accordance with the President's memorandum of April 29, 1994, Government-to-Government Relations with Native American Tribal Governments (59 FR 22951), E.O. 13175, and the Department of the Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with recognized Federal Tribes on a government-to-government basis. In accordance with Secretarial Order 3206 of June 5, 1997 (American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act), and Secretarial Order 3225 (Endangered Species Act and Subsistence Uses in Alaska), we readily acknowledge our responsibilities to work directly with Alaska Natives in developing programs for healthy ecosystems, to acknowledge that tribal lands are not subject to the same controls as Federal public lands, to remain sensitive to Indian culture, and to make information available to Alaska Natives. As all critical habitat units designated in this final rule occur seaward from the mean high tide line, we have determined that there are no Alaska Native lands occupied at the time of listing that contain the features essential for the conservation of the southwest Alaska DPS of the northern sea otter. Therefore, we have not designated any critical habitat for the southwest Alaska DPS of the northern sea otter on Alaska Native lands.

We do not expect this rule to have any impact on Alaska Native subsistence activities. All subsistence hunting takes place in or on State lands or waters. Unless subsistence hunting is determined to be "materially and negatively impacting the DPS," then harvest would not be regulated.

National Environmental Policy Act (NEPA)

It is our position that, outside the jurisdiction of the Circuit Court of the United States for the Tenth Circuit, we do not need to prepare environmental analyses as defined by NEPA (42 U.S.C. 4321 *et seq.*) in connection with designating critical habitat under the Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244). This assertion was upheld by the Circuit Court of the United States for the Ninth Circuit (*Douglas County* v. *Babbitt*, 48 F.3d 1495 (9th Cir. 1995), cert. denied 516 U.S. 1042 (1996)).

References Cited

A complete list of all references cited in this final rulemaking is available upon request from the Field Supervisor, Marine Mammals Management Office (see **ADDRESSES**).

Author(s)

The primary authors of this package are staff members of the Marine Mammals Management Office (see **ADDRESSES**).

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

Regulation Promulgation

■ Accordingly, we amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

PART 17—[AMENDED]

■ 1. The authority citation for part 17 continues to read as follows:

Authority: 16 U.S.C. 1361–1407; 16 U.S.C. 1531–1544; 16 U.S.C. 4201–4245; Pub. L. 99–625, 100 Stat. 3500; unless otherwise noted.

■ 2. In § 17.11(h), revise the entry for "Otter, northern sea" under "MAMMALS" in the List of Endangered and Threatened Wildlife to read as follows:

§ 17.11 Endangered and threatened wildlife.

* * * * *

(h) * * *

Species		Historic range	Vertebrate population where endangered or threatened	Status	When listed	Critical habitat	Special rules
Common name	Scientific name						
MAMMALS							
*	*	*	*	*	*		*
Otter, northern sea.	*Enhydra lutris kenyoni.*	U.S.A., (AK, WA)	Southwest Alaska, from Attu Island to Western Cook Inlet, including Bristol Bay, the Kodiak Archipelago, and the Barren Islands.	T	764	17.95(a)	17.40(p)
*	*	*	*	*	*		*

■ 3. In § 17.95, amend paragraph (a) by adding an entry for "Northern Sea Otter (*Enhydra lutris kenyoni*), Southwest Alaska Distinct Population Segment," in the same alphabetical order that the species appears in the table at § 17.11(h), to read as follows:

§ 17.95 Critical habitat—fish and wildlife.

(a) *Mammals.*

* * * * *

Northern Sea Otter (*Enhydra lutris kenyoni*), Southwest Alaska Distinct Population Segment:

(1) Critical habitat units are in Alaska, as described below.

(2) The primary constituent elements of critical habitat for the southwest Alaska distinct population segment (DPS) of the northern sea otter are:

(i) Shallow, rocky areas where marine predators are less likely to forage, which are in waters less than 2 m (6.6 ft) in depth;

(ii) Nearshore waters within 100 m (328.1 ft) from the mean high tide line;

(iii) Kelp forests, which occur in waters less than 20 m (65.6 ft) in depth; and

(iv) Prey resources within the areas identified in paragraphs (2)(i), (2)(ii), and (2)(iii) of this entry that are present in sufficient quantity and quality to support the energetic requirements of the species.

(3) Critical habitat does not include manmade structures (including, but not limited to, docks, seawalls, pipelines, or other structures) and the land on which they are located existing within the boundaries on the effective date of this rule.

(4) Critical habitat map units. Boundaries of critical habitat were derived from GIS data layers of hydrographic survey data developed by the National Oceanic and Atmospheric Administration. To estimate the size of each critical habitat unit, the data were projected into Alaska Standard Albers Conical Equal Area on the North American Datum of 1983. Given the large geographic range of this DPS, some two-dimensional areas appear as one-dimensional features at these map scales.

(5) Note: Index map of critical habitat for the southwest Alaska DPS of the northern sea otter follows:

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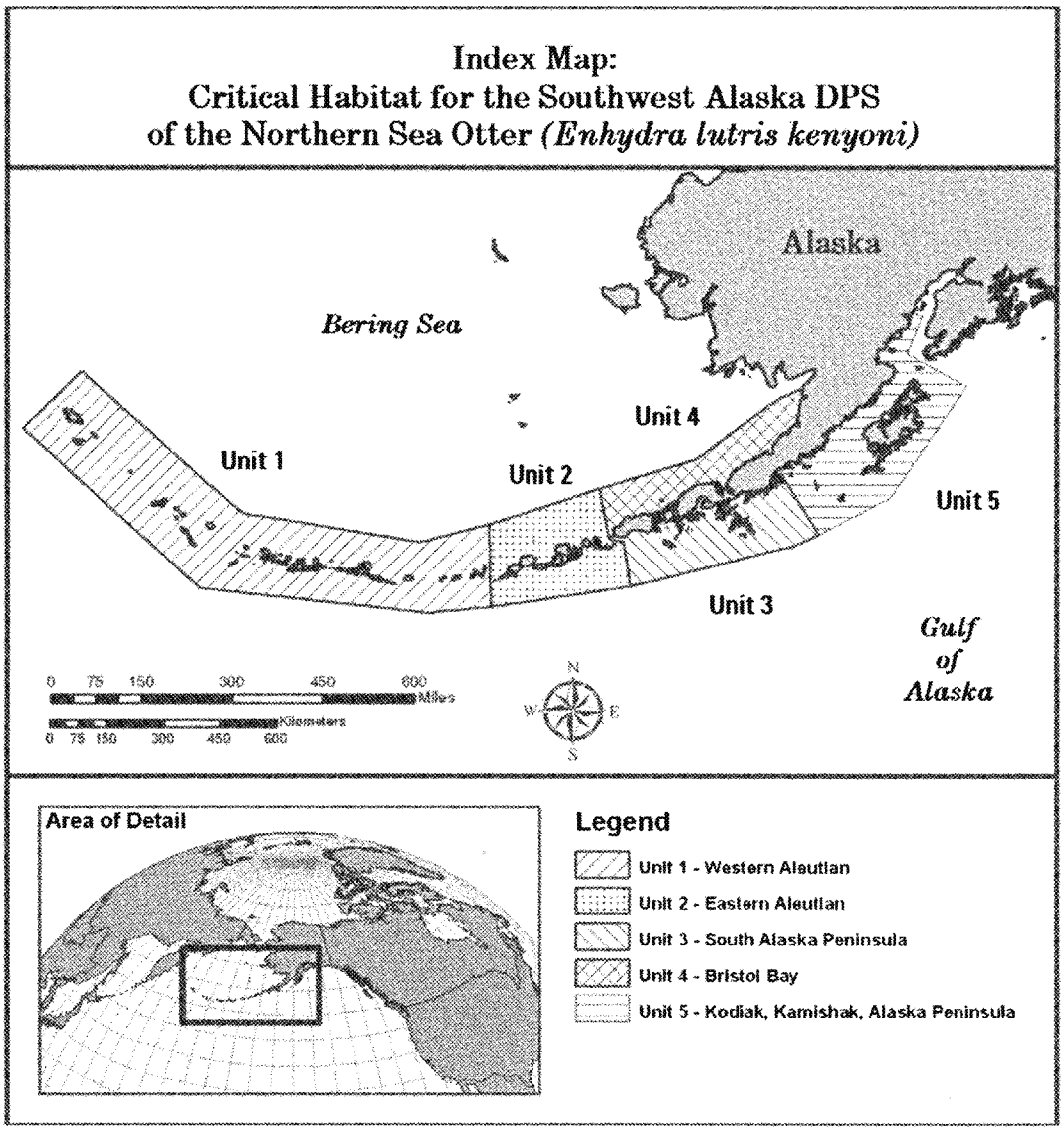

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(6) Unit 1: Western Aleutian. All contiguous waters from the mean high tide line to the 20-m (65.6-ft) depth contour as well as waters within 100 m (328.1 ft) of the mean high tide line that occur adjacent to the following islands: Adak, Agattu, Alaid, Amatignak, Amchitka, Amlia, Amukta, Anagaksik, Asuksak, Atka, Attu, Aziak, Bobrof, Buldir, Carlisle, Chagula, Chuginadak, Chugul, Crone, Davidof, Elf, Gareloi, Great Sitkin, Herbert, Igitkin, Ilak, Kagalaska, Kagamil, Kanaga, Kanu, Kasatochi, Kavalga, Khvostof, Kiska, Koniuji, Little Kiska, Little Sitkin, Little Tanaga, Nizki, Ogliuga, Oglodak, Rat, Sadatanak, Sagchudak, Salt, Seguam, Segula, Semisopochnoi, Shemya, Skagul, Tagadak, Tagalak, Tanaga, Tanaklak, and Ulak.

(7) Unit 2: Eastern Aleutian. All contiguous waters from the mean high tide line to the 20-m (65.6-ft) depth contour as well as waters within 100 m (328.1 ft) of the mean high tide line that occur adjacent to the following islands: Aiktak, Akutan, Amaknak, Arangula, Atka, Avatanak, Baby Islands, Bogoslof, Egg, Hog, Kaligagan, Rootok, Samalga, Sedanka, Tigalda, Ugamak, Umnak, Unalaska, Unalga, and Vsevidof.

(8) Unit 3: South Alaska Peninsula. All contiguous waters from the mean high tide line to the 20-m (65.6-ft) depth contour as well as waters within 100 m (328.1 ft) of the mean high tide line that occur adjacent to the Alaska Peninsula from False Pass (54.242° N, 163.363° W) to Castle Cape (56.242° N, 158.117° W), and adjacent to the following islands: Andronica, Atkins, Big Koniuji, Bird, Brother, Caton, Chankliut, Chernabura, Cherni, Chiachi, Deer, Dolgoi, Egg, Goloi, Guillemot, Inner Iliask, Jacob, Karpof, Korovin, Little Koniuji, Mitrofania, Nagai, Near, Outer Iliask, Paul, Peninsula, Pinusuk, Poperechnoi, Popof, Road, Sanak, Shapka, Simeonof, Spectacle, Spitz, Turner, Ukolnoi, Ukolnoi, Unga, and Unimak Island from Scotch Cap (54.390° N, 164.745° W) to False Pass.

(9) Unit 4: Bristol Bay. This unit contains three subunits:

(i) Subunit 4a: Amak Island. All contiguous waters from the mean high tide line to the 20-m (65.6-ft) depth contour as well as waters within 100 m (328.1 ft) of the mean high tide line that occur adjacent to Amak Island.

(ii) Subunit 4b: Izembek Lagoon. All waters from mean high tide line that occur within the polygon bounded by Glen, Operl, and Neumann Islands to the north and the Alaska Peninsula to the south, and further defined by the following latitude/longitude coordinates: 55.249° N, 162.990° W; 55.255° N, 162.984° W from Cape Glazenap to Glen Island; 55.324° N, 162.901° W; 55.333° N, 162.888° W from Glen Island to Operl Island; 55.409° N, 162.683° W; 55.408°N, 162.621° W from Operl Island to Neumann Island; and 55.447° N, 162.582° W; 55.447° N, 162.577° W from Neumann Island to Moffet Point.

(iii) Subunit 4c: Port Moller/Herendeen Bay. All waters from mean high tide line that occur within the polygon bounded by Walrus Island to the north and the Alaska Peninsula to the south, and further defined by the following latitude/longitude coordinates: 56.000° N, 160.877° W; 56.020° N, 160.854° W from Point Edward to Walrus Island; and 56.020° N, 160.805° W; 55.979° N, 160.584° W from Wolf Point to Entrance Point.

(10) Unit 5: Kodiak, Kamishak, Alaska Peninsula. All contiguous waters from the mean high tide line to the 20-m (65.6-ft) depth contour as well as waters within 100 m (328.1 ft) of the mean high tide line that occur adjacent to the Alaska Peninsula from Castle Cape (56° 14.5' N, 158° 7.0' W) eastward to Cape Douglas (58.852° N, 153.250° W), and northward in Cook Inlet to Redoubt Point (60.285° N, 152.417° W), and adjacent to the following islands: Afognak, Aghik, Aghiyuk, Aiaktalik, Akhiok, Aliksemit, Amook, Anowik, Ashiak, Atkulik, Augustine, Ban, Bare, Bear, Central, Chirikof, Chisik, Chowiet, Dark, David, Derickson, Dry Spruce, Eagle, East Amatuli, East Channel, Garden, Geese, Hartman, Harvester, Hydra, Kak, Kateekuk, Kiliktagik, Kiukpalik, Kodiak, Kumlik, Long, Marmot, Miller, Nakchamik, Ninagiak, Nord, Nordyke, Poltava, Raspberry, Sally, Shaw, Shuyak, Sitkalidak, Sitkanak, Spruce, Sud, Sugarloaf, Suklik, Sundstrom, Sutwick, Takli, Terrace, Tugidak, Twoheaded, Ugak, Ugalushik, Uganik, Unavikshak, Ushagat, West Amatuli, West Augustine, West Channel, Whale, and Woody.

* * * * *

Dated: September 23, 2009.

Jane Lyder,

Acting Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. E9–24087 Filed 10–7–09; 8:45 am]

BILLING CODE 4310–55–P

Federal Register

Thursday,
October 8, 2009

Part IV

Department of the Interior

Fish and Wildlife Service

50 CFR Part 17

Endangered and Threatened Wildlife and Plants; Listing *Lepidium papilliferum* (Slickspot Peppergrass) as a Threatened Species Throughout Its Range; Final Rule

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[RIN 1018-AW34]

[FWS-R1-ES-2008-0096]

[MO 922105-0008-B2]

Endangered and Threatened Wildlife and Plants; Listing *Lepidium papilliferum* (Slickspot Peppergrass) as a Threatened Species Throughout Its Range

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), determine that *Lepidium papilliferum* (slickspot peppergrass), a plant species from southwest Idaho, is a threatened species under the Endangered Species Act of 1973, as amended (Act). This final rule implements the Federal protections provided by the Act for this species. We have determined that critical habitat for *L. papilliferum* is prudent but not determinable at this time.

DATES: This rule becomes effective December 7, 2009. The effective date has been extended to 60 days after publication in the **Federal Register** to allow the U.S. Bureau of Land Management (BLM) to finish conferring with the Service under section 7(a)(4) of the Act on the BLM's issuance of grazing permits within the range of *Lepidium papilliferum*.

ADDRESSES: This final rule is available on the Internet at *http://www.regulations.gov* and also at *http://www.fws.gov/idaho*. Comments and materials received, as well as supporting documentation used in the preparation of this rule, will be available for public inspection, by appointment, during normal business hours at: U.S. Fish and Wildlife Service, Idaho Fish and Wildlife Office, 1387 S. Vinnell Way, Room 368, Boise, ID 83709; by telephone at 208-378-5243; by facsimile at 208-378-5262.

FOR FURTHER INFORMATION CONTACT: Jeff Foss, Field Supervisor, at above address, telephone, and facsimile, or by electronic mail at: *fw1srbocomment@fws.gov*. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 800-877-8339.

SUPPLEMENTARY INFORMATION:

Background

Lepidium papilliferum is a small, flowering plant in the mustard family (Brassicaceae). The plant grows in unique microsite habitats known as slickspots, which are found within the semiarid sagebrush-steppe ecosystem of southwestern Idaho. The species is endemic to this region, known only from the Snake River Plain and its adjacent northern foothills (an area approximately 90 by 25 miles (mi) (145 by 40 kilometers (km)), or 2,250 square miles (mi^2) (5,800 square kilometers (km^2)), with a smaller disjunct population on the Owyhee Plateau (an area of approximately 11 by 12 mi (18 by 19 km), or 132 mi^2 (342 km^2). The restricted distribution of *L. papilliferum* is likely due to its adaptation to the specific conditions within these slickspot habitats. The absence of all perennial plant species from these sites likewise demonstrates the specialization of *L. papilliferum* persisting in the unique conditions provided by slickspots (Fisher *et al.* 1996, p. 16). The primary threat to *L. papilliferum* (as described under *The Present or Threatened Destruction, Modification, or Curtailment of Its Habitat or Range,* below) is the present or threatened destruction, modification, or curtailment of its habitat and range due to the increased frequency and extent of wildfires under a wildfire regime modified and exacerbated by the spread of invasive nonnative plants, particularly nonnative annual grasses such as *Bromus tectorum* (cheatgrass). In addition, even under conservative projections of the consequences of future climate change, the threats posed by wildfire and the invasion of *B. tectorum* are expected to further increase within the foreseeable future. Other threats to the species include competition and displacement by nonnative plant species, development, potential seed predation by harvester ants, and habitat fragmentation and isolation of small populations.

Previous Federal Actions

On July 15, 2002, we proposed to list *Lepidium papilliferum* as endangered (67 FR 46441). On January 12, 2007, we published a document in the **Federal Register** withdrawing that proposed rule (72 FR 1622). For a description of Federal actions concerning *L. papilliferum* prior to the 2007 withdrawal, please refer to that 2007 withdrawal document. The withdrawal of the proposal to list *L. papilliferum* was based on our conclusion that, while its sagebrush-steppe matrix habitat is becoming increasingly degraded, the best available data at the time provided no evidence indicating that this degradation was impacting *L. papilliferum* within its slickspot microsites. Furthermore, we concluded that, although we found that abundance on the Idaho Army National Guard's Orchard Training Area (OTA) had decreased in recent years, the observed rangewide fluctuations in population numbers appeared to be consistent with varying levels of spring rainfall, as expected. On April 6, 2007, Western Watersheds Project filed a lawsuit challenging our decision to withdraw the proposed rule to list *L. papilliferum*. On June 4, 2008, the U.S. District Court for the District of Idaho (Court) reversed the decision to withdraw the proposed rule, with directions that the case be remanded to the Service for further consideration consistent with the Court's opinion (*Western Watersheds Project* v. *Kempthorne,* Case No. CV 07-161-E-MHW (D. Idaho)).

After issuance of the Court's remand order, we published a public notification of the reinstatement of our July 15, 2002, proposed rule to list *Lepidium papilliferum* as endangered and announced the reopening of a public comment period on September 19, 2008 (73 FR 54345). The initial comment period closed on October 20, 2008. After the close of the comment period, new information became available that was relevant to our evaluation. Much of this information was contained in reports based on several independent analyses of the available information regarding *L. papilliferum* population trends on the OTA in southwest Idaho, the rangewide Habitat Integrity and Population (HIP) monitoring, and a recent analysis of *L. papilliferum* data collected on the Inside Desert (Owyhee Plateau) from 2000 to 2002. To ensure that our review of the species' status was complete, we announced another reopening of the comment period on March 17, 2009, for a period of 30 days (74 FR 11342). We posted several documents on *http://www.regulations.gov* for public review and comment, including the additional information and statistical analyses we received after the January 2007 withdrawal notice (72 FR 1622; January 12, 2007). A summary of the comments we received and our responses is provided in this document, following our finding.

Species Information

Description

Lepidium papilliferum is an intricately branched, tap-rooted plant, averaging 2 to 8 inches (in) (5 to 20

centimeters (cm)) high, but occasionally reaching up to 16 in (40 cm) in height. Leaves and stems are covered with fine, soft hairs, and the leaves are divided into linear segments. Flowers are numerous, 0.1 in (3 to 4 millimeters (mm)) in diameter, white, and four petalled. Fruits (siliques) are 0.1 in (3 to 4 mm) across, round in outline, flattened, and two-seeded (Moseley 1994, pp. 3, 4; Holmgren *et al.* 2005, p. 260). The species is monocarpic (it flowers once and then dies) and displays two different life history strategies—an annual form and a biennial form. The annual form reproduces by flowering and setting seed in its first year, and dies within one growing season. The biennial life form initiates growth in the first year as a vegetative rosette, but does not flower and produce seed until the second growing season. Biennial rosettes must survive generally dry summer conditions, and consequently many of the biennial rosettes die before flowering and producing seed. The number of prior-year rosettes is positively correlated with the number of reproductive plants present the following year (ICDC 2008, p. 9; Unnasch 2008, p. 14; Sullivan and Nations 2009, p. 44). The proportion of annuals versus biennials in a population can vary greatly (Meyer *et al.* 2005, p. 15), but in general annuals appear to outnumber biennials (Moseley 1994, p. 12).

Seed Production

Depending on an individual plant's vigor, the effectiveness of its pollination, and whether it is functioning as an annual or a biennial, each *Lepidium papilliferum* plant produces varying numbers of seeds (Quinney 1998, pp. 15, 17). Biennial plants normally produce many more seeds than annual plants (Meyer *et al.* 2005, p. 15). Average seed output for annual plants at the OTA (an Idaho Army National Guard (IDARNG) training area on BLM land) was 125 seeds per plant in 1993 and 46 seeds per plant in 1994. In contrast, seed production of biennials at this site in 1993 and 1994 averaged 787 and 105 seeds per plant, respectively (Meyer *et al.* 2005, p. 16). Based on data collected from a 4–year demography study on the OTA, survivorship of the annual form of *L. papilliferum* was demonstrated to be higher than survivorship of biennials (Meyer *et al.* 2005, p. 16). For example, of the 4,065 plants counted in spring of 1993, a total of 2,503 survived to fruit as annuals, while only 85 survived to fruit as biennials in spring of 1994. Meyer *et al.* (2005, p. 21) hypothesize that the reproductive strategy of *L. papilliferum* is a plastic response, meaning that larger plants will flower and produce seed in their first season, whereas smaller plants that stand less chance of successfully setting seed in their first season will delay reproduction until the following year. The biennial life form is thus maintained, despite the higher risk of mortality.

Like many short-lived plants growing in arid environments, above-ground numbers of *Lepidium papilliferum* individuals can fluctuate widely from one year to the next, depending on seasonal precipitation patterns (Mancuso and Moseley 1998, p. 1; Meyer *et al.* 2005, pp. 4, 12, 15; Palazzo *et al.* 2005, p. 9; Menke and Kaye 2006a, p. 8; Menke and Kaye 2006b, pp. 10, 11; Sullivan and Nations 2009, p. 44). Mancuso and Moseley (1998, p. 1) note that sites with thousands of above-ground plants one year may have none the next, and vice versa. Above-ground plants represent only a portion of the population; the seed bank (a reserve of dormant seeds, generally found in the soil) contributes the other portion, and in many years constitutes the majority of the population (Mancuso and Moseley 1998, p. 1). Seed banks are adaptations for survival in a "risky environment," because they buffer a species from stochastic (random) impacts, such as lack of soil moisture (Baskin and Baskin 2001, p. 160).

Seed Viability and Germination

The seeds of *Lepidium papilliferum* are found primarily within the slickspot microsites where the plants are found (Meyer and Allen 2005, pp. 5, 6). Slickspots, also known as mini-playas or natric (high sodium content) sites, are visually distinct openings in the sagebrush-steppe created by unusual soil conditions characterized by significantly greater sodium and clay content relative to the surrounding area (Moseley 1994, p. 7). The vast majority of *L. papilliferum* seeds in slickspots have been located near the soil surface, with lower numbers of seeds located in deeper soils (Meyer *et al.* 2005, p. 19; Palazzo *et al.* 2005, p. 3). *Lepidium papilliferum* seeds have been found in slickspots even if no above-ground plants are present (Meyer *et al.* 2005, p. 22; Palazzo *et al.* 2005, p. 10). When above-ground plants are present, flowering usually takes place in late April and May, fruit set occurs in June, and the seeds are released in late June or early July. Seeds produced in a given year are dormant for at least a year before any germination takes place. Following this year of dormancy, approximately 6 percent of the initially viable seeds produced in a given year germinate annually (Meyer *et al.* 2005, pp. 17, 18). When combined with an average annual 3 percent loss of seed viability, approximately 9 percent of the original seed cohort per year is lost after the first year. Thus, after 12 years, all seeds in a given cohort will likely have either died or germinated, resulting in a maximum estimated longevity of 12 years for seeds in the seed bank (Meyer *et al.* 2005, p. 18).

Billinge and Robertson (2008, pp. 1005-1006) report that both small and large *Lepidium papilliferum* populations share similar spatial structure, and that spatial structuring within its unique microsite slickspot habitats suggests that both pollen dispersal and seed dispersal are low for this species and occur over short distances (Robertson *et al.* 2006a, p. 3; Billinge and Robertson 2008, pp. 1005-1006). Modeling of dispersal and seed dormancy characteristics of desert annual plants predicts that plants with long-range dispersal will have few dormancy mechanisms and thus quick germination (Venable and Lawlor 1980, p. 272). Contrary to this prediction, however, *L. papilliferum* has delayed germination (Meyer *et al.* 2005, pp. 17-18), and, therefore, according to the model, may not disperse long distances. The primary seed dispersal mechanism for *L. papilliferum* is not known (Robertson and Ulappa 2004, p. 1708), although viable seeds have been found outside of slickspots, indicating that some seed dispersal is occurring beyond slickspot habitat (Palazzo *et al.* 2005, p. 10). Additionally, beginning in mid-July, entire dried-up biennial plants and some larger annual plants have been observed to break off at the base and are blown by the wind (Stillman, pers. obs., as reported in Robertson *et al.* 2006b, p. 44). This tumbleweed-like action may have historically resulted in occasional long-distance seed dispersal (Robertson *et al.* 2006b, p. 44). Ants are not considered to be a likely disperser despite harvesting an average of 32 percent of fruits across six sites (Robertson and White 2007, p. 11).

Lepidium papilliferum seeds located near the soil surface show higher rates of germination and viability (Meyer and Allen 2005, pp. 6-8; Palazzo *et al.* 2005, p. 10) and the greatest seedling emergence success rate (Meyer and Allen 2005, pp. 6-8). Viable seeds were more abundant and had greater germination rates from the upper 2 in (5 cm) of soil (Palazzo *et al.* 2005, pp. 8, 10), while Meyer and Allen (2005, pp. 6-8) observed the upper 0.08 in (2 mm) optimal for germination. Deep burial of

L. papilliferum seeds (average depths greater than 5.5 in (14 cm)) can entomb viable seeds and may preserve them beyond the 12–year period previously assumed as the maximum period of viability for *L. papilliferum* seeds (Meyer and Allen 2005, pp. 6, 9). However, seeds buried at such depth, even if they remain viable, are unlikely to regain the surface for successful germination. The effects of environmental factors such as wildfire on *L. papilliferum* seed dormancy and viability are currently unknown, although *L. papilliferum* abundance is reduced in burned areas (see discussion of Wildfire under **Summary of Factors Affecting the Species**).

Pollination

Lepidium papilliferum is primarily an outcrossing species requiring pollen from separate plants for more successful fruit production and has a low seed set in the absence of insect pollinators (Robertson 2003a, p. 5; Robertson and Klemash 2003, p. 339; Robertson and Ulappa 2004, p. 1707; Billinge and Robertson 2008, pp. 1005-1006). *Lepidium papilliferum* is able to self-pollinate; however, with a selfing rate (rate of self-pollination) of 12 to 18 percent (Billinge 2006, p. 40; Robertson *et al.* 2006a, p. 40). In pollination experiments where researchers moved pollen from one plant to another, fruit production was observed to be higher with pollen from distant sources (4 to 12.4 mi (6.5 to 20 km) distance between patches of plants) compared to fruit production for plants pollinated with pollen from plants within the same patch (246 to 330 feet (ft) (75 to 100 meters (m)) distance within a plant patch) (Robertson and Ulappa 2004, p. 1705; Robertson *et al.* 2006a, p. 3).

Fruits produced from fertilized flowers reach full size approximately 2 weeks after pollination (Robertson and Ulappa 2004, p. 1706). Each fruit typically bears two seeds that drop to the ground when the fruit dehisces (splits open) in midsummer (Billinge and Robertson 2008, p. 1003).

Known *Lepidium papilliferum* insect pollinators include several families of bees (Hymenoptera), including Apidae, Halictidae, Sphecidae, and Vespidae; beetles (Coleoptera), including Dermestidae, Meloidae, and Melyridae; flies (Diptera), including Bombyliidae, Syrphidae, and Tachinidae; and others (Robertson and Klemash 2003, p. 336; Robertson *et al.* 2006b, p. 6). Seed set was not limited by the number of pollinators at any study site (Robertson *et al.* 2004, p. 14). Studies have shown a strong positive correlation between insect diversity and the number of *L. papilliferum* flowering at a site (Robertson and Hannon 2003, p. 8). Measurement of fruit set per visit revealed considerable variability in the effectiveness of pollination by different types of insects, ranging from 0 percent in dermestid beetles to 85 percent in honeybees (Robertson *et al.* 2006b, p. 15).

Genetics

The majority of species in the genus *Lepidium* have a base chromosome count of eight (Mummenhoff *et al.* 2001, p. 2051). Chromosome numbers for pollen mother cells in *L. papilliferum* ranged from 15 to 17 ($n = 15.96 \pm 0.16$; Table 3; Figure 3), confirming that the plant is a tetraploid (has four sets of homologous chromosomes, as opposed to the more usual set of two) (Robertson *et al.* 2006b, p. 38).

The genetics of *Lepidium papilliferum* have been studied using samples collected from areas across the entire range of the species (Stillman *et al.* 2005, pp. 6, 8, 9; Larson *et al.* 2006, p. 14 and Fig. 4; Smith *et al.* in press, pp. 15-16). Genetic exchange can occur either through pollen or seed dispersal. Some researchers consider *L. papilliferum* to be closely related to *L. montanum*, and *L. papilliferum* was originally described as *L. montanum* var. *papilliferum* in 1900 by Louis Henderson. Results of genetic studies comparing *L. papilliferum* with *L. montanum* indicate that *L. papilliferum* forms a monophyletic group or subgroup that is genetically distinct from *L. montanum* (Larson *et al.* 2006, p. 13 and Figs. 4, 8; Smith 2006, pp. 5-7, Fig. 1). A more recent study examining the relationship between *L. montanum, L. papilliferum*, and *L fremontii* found that *L. papilliferum* is considered a sister taxa or closely related to *L. fremontii*, a native mustard of western North America (Smith *et al.* in press, pp. 15-16). Both *L. fremontii* and *L. papilliferum* are morphologically and ecologically distinct from *L. montanum,* and recent analyses reflect that both are monophyletic (organisms that share a common ancestor) with apparently little gene flow between them and *L. montanum* (Smith *et al.* in press, p. 18).

Some genetic differences have been observed between *Lepidium papilliferum* occurring on the Snake River Plain (now separated into the Boise Foothills and Snake River Plain regions) and the Owyhee Plateau. Plants in the Snake River Plain and the Owyhee Plateau populations are separated by a minimum of 44 mi (70 km), which is considered beyond the distance that insect pollinators can travel or that seed dispersal can occur. Sites in the Snake River Plain with fewer numbers of plants (16 to 746 flowering individuals) had less genetic diversity than sites with larger numbers of plants (more than 3,000 flowering individuals) (Robertson *et al.* 2006b, p. 42; Billinge and Robertson 2008, p. 1006), although this correlation between population size and genetic diversity was not evident in the Owyhee Plateau region (Stillman *et al.* 2005, p. 9; Robertson *et al.* 2006b, p. 41). The lowest values for average number of alleles per locus were detected in two of the smallest populations (Seaman's Gulch in the Boise Foothills region and Orchard in the Snake River Plain region); in contrast, the largest number of alleles per locus was detected in the second largest population (Kuna Butte SW in the Snake River Plain) (Robertson *et al.* 2006b, Table 4). Larson *et al.* (2006, p. 14 and Fig. 4) also found geographically well-defined populations of *L. papilliferum* between the Snake River Plain and Owyhee Plateau based on genetics. In contrast to the Stillman *et al.* (2005) study, Larson's findings indicate the possibility of depressed genetic diversity in *L. papilliferum* based on significantly greater average similarity coefficients within collection sites of *L. papilliferum* compared to those of *L. montanum* (Larson *et al.* 2006, p. 13).

In summary, recent genetic studies thus confirm that *Lepidium papilliferum* is a full species distinct from *L. montanum*. The currently accepted taxonomy recognizes *Lepidium papilliferum* (Henderson) A. Nels. and J.F. Macbr. as a full species (Taxonomic Serial No. 53383, Integrated Taxonomic Information System (ITIS), 2009). In addition, populations of *L. papilliferum* in the Owyhee Plateau demonstrate distinctive genetic differences from individuals in the Snake River Plain, likely a reflection of the isolation of these two populations due to limited seed dispersal and the limited range of pollinators, resulting in little current gene flow between them. Finally, there is some evidence that *L. papilliferum* has reduced genetic variability relative to other native species of *Lepidium*, such as *L. montanum*, and that smaller populations of *L. papilliferum* have less genetic diversity than larger populations.

Monitoring of *Lepidium papilliferum* Populations

There are several biological programs designed to monitor populations of *Lepidium papilliferum* over time, and, in some cases, its habitat as well. The primary monitoring programs are

described here to assist in understanding subsequent references to them in this document.

The Idaho Natural Heritage Program (INHP) uses element occurrences (EOs) to broadly describe the distribution of *Lepidium papilliferum* and assigns rankings to each EO based on measures of habitat quality and species abundance. EOs of *L. papilliferum* are defined by grouping occupied slickspots that occur within 1 km (0.6 mi) of each other; all occupied slickspots within a 1 km (0.6 mi) distance of another occupied slickspot are aggregated into a single EO. The definition of a single EO is based on the distance over which individuals of *L. papilliferum* are believed to be capable of genetic exchange through insect-mediated pollination (Colket and Robertson 2006). Due to the nature of their definition, individual EOs may differ greatly in size, based on whether there are many occupied slickspots distributed widely across the landscape relatively close to one another (which would comprise a single, large EO), or whether there are only a few (or even a single) slickspot(s) that occur close together but are relatively isolated from other occupied slickspots (which would comprise a single, small EO).

Each EO is assigned a qualitative rank defined by population size and habitat quality; EO ranks are periodically updated when new ranking information becomes available. Currently, no *Lepidium papilliferum* EOs are ranked A, which is defined as an EO with greater than 1,000 detectable above-ground plants occurring in the best habitat and landscape quality. The habitat quality rank diminishes from the highest of A to the lowest quality of D. An E ranking signifies that at least one plant was observed, but no abundance, habitat, or landscape data are available (Colket *et al.* 2006, p. 4). A rank of F indicates the most recent survey failed to find any *L. papilliferum* plants. A rank of H indicates *L. papilliferum* plants have not been documented at that location since 1970 based on old herbarium records with geographically vague location descriptions, such as a town name. A rank of X indicates *L. papilliferum* plants had been extirpated from that EO, based on agricultural conversion, commercial or residential development, or other documented habitat destruction where *L. papilliferum* plants had been previously recorded. An EO can also be ranked as X if it receives an F rank five times within a 12–year period (Colket *et al.* 2006, p. 4). The current rankings for *L. papilliferum* are reviewed below in the section **Element Occurrences Rangewide**.

The Habitat Integrity Index (HII) program conducted by the Idaho Conservation Data Center (ICDC, now the INHP) was the first rangewide effort aimed at monitoring *Lepidium papilliferum* and its habitat. The HII was initiated in 1998 and ran for 5 years through 2002 (Mancuso and Moseley 1998; Mancuso *et al.* 1998; Mancuso 2000, 2001, 2002, 2003). Although 52 transects were established over the years, a total of 17 transects were sampled during all years of HII monitoring (Mancuso 2003, p. 3); no rangewide monitoring of *L. papilliferum* was conducted in 2003. Monitoring was initially based on a system of transects of varying lengths across the range of *L. papilliferum*, each subjectively located to include 10 slickspots on sites known to contain *L. papilliferum* (summarized in Sullivan and Nations 2009, p. 33; see Mancuso *et al.* 1998 for details). The primary goal of the HII methodology was to assess the overall habitat condition, including attributes associated with the slickspots and the sagebrush-steppe habitat; *L. papilliferum* abundance was assessed categorically (assigned to a range of values) in this program.

In 2004, the HII was replaced by the Habitat Integrity and Population (HIP) monitoring protocol, also implemented by the ICDC. HIP monitoring has been conducted annually since its implementation, thus 5 years of HIP data are now available (through 2008) (ICDC 2008, p. 2; State of Idaho 2008). The HIP protocol was designed to provide data more replicable and specific to the monitoring required for the Candidate Conservation Agreement (CCA) developed by the State of Idaho, BLM, and others in 2003 (State of Idaho *et al.* 2003). HIP presents measures of habitat, disturbance, and plant community attributes at each transect as well as counts of *L. papilliferum* rosettes and reproductive plants observed (with the exception of 2004, which still utilized categorical assessments of plant abundance). Similar to the HII protocol, HIP is based on transects of varying lengths subjectively located to include 10 slickspots along their lengths (see Colket 2005 for details on the HIP methodology); however, the HIP protocol includes a significantly greater number of rangewide transects, having increased from the original 70 established in 2004 to 80 today (ICDC 2008, p. 3).

HIP monitoring has been annually conducted since 2004 and consists of the following procedures: (1) Establish and permanently mark HIP transects; (2) record location information; (3) take photographs; (4) measure population, habitat, and disturbance attributes at selected slickspots; (5) measure plant community attributes; and (6) analyze and describe the results (Colket 2008, p. 3).

The INHP's EO records and the HII–HIP monitoring programs cover the entire range of *Lepidium papilliferum*. In addition, monitoring that has occurred within a subset of the species' range, on the Idaho Army National Guard's Orchard Training Area (OTA), provides particularly important information on the status of *L. papilliferum* due to the long-term nature of the monitoring programs. The sagebrush-steppe on the OTA is considered to be some of the highest-quality habitat remaining within the range of *L. papilliferum*, and the OTA is home to one of the largest and most expansive EOs of the species (Sullivan and Nations 2009, p. 22). Two of the OTA programs have been monitoring the same locations annually (with a few exceptions) since the early 1990s, and hence provide up to 18 years of population data for *L. papilliferum*. These two monitoring programs are known as rough census areas and special-use plots; both are conducted by staff or contractors of the OTA.

The methods of the rough census monitoring areas are presented in Sullivan and Nations 2009 (pp. 28-29). Briefly, the program began in 1990 by monitoring 5 areas but expanded to the current total of 15 rough census areas by 1994; the combined extent of the rough census areas on the OTA is 866.1 ac (350.5 ha). Counts are conducted by technicians who walk across parallel transects 66 ft (20 m) apart and record the total number of *Lepidium papilliferum* individuals observed in any occupied slickspots that are found; reproductive status is not noted. The sizes of the 15 rough census areas differ, ranging from 4.1 ac (1.7 ha) to 138.3 ac (56.0 ha), and not all areas have been monitored in all years; thus, analyses of the data must be standardized by transforming the raw count data to plant density (number of plants per unit area) to account for these differences (Sullivan and Nations 2009, p. 36). Using density as the index of population abundance instead of total counts also allowed for the use of 18 years of rough census data, from 1990 through 2008 (there were no counts in 1999), although only a few of the rough census areas were monitored in the earlier years.

The special-use plots are also located on the OTA. Although called "plots," these are actually a series of 16 belt transects, each containing a single

slickspot (see Sullivan and Nations 2009, pp. 29-33, for details). A stake is centered in the single slickspot, and each year the number of *Lepidium papilliferum* individuals with a 16.4-ft (5-m) radius of that stake (comprising a 32.8-ft (10-m) diameter circle) are counted (additional habitat information is collected from the remainder of the belt transect). *Lepidium papilliferum* abundance estimates for each of the 16 central circular plots has been collected annually each year from 1991 through 2008; thus, 18 years of special-use plot data are available. As all special-use plots were the same size and were surveyed in all years, estimates of abundance are based on reported total counts of individual plants (Sullivan and Nations 2009, p. 37). Beginning in 2000, the special-use plot data distinguished between blooming and nonblooming individuals.

All of these programs provide information regarding the status of *Lepidium papilliferum* and its habitat, and will be referenced throughout this rule. In addition, we reference *L. papilliferum* Management Areas, which are units containing multiple EOs in a particular geographic area with similar land management issues or administrative boundaries as defined in the 2003 CCA (State of Idaho, p. 9). At a larger scale is the *L. papilliferum* (or "LEPA") Consideration Zone, an area also designated by the 2003 CCA and defined as all areas that may or do contain *L. papilliferum* (State of Idaho 2003, p. 21). The LEPA Consideration Zone includes the entire range of the species, including all Management Areas and all EOs.

Ecology and Habitat

The native, semiarid sagebrush-steppe habitat of southwestern Idaho where *Lepidium papilliferum* is found can be divided into two plant associations, each dominated by the shrub *Artemisia tridentata* ssp. *wyomingensis* (Wyoming big sagebrush): *A. tridentata* ssp. *wyomingensis–Achnatherum thurberianum* (formerly *Stipa thurberiana*) (Thurber's needlegrass) and *A. tridentata* ssp. *wyomingensis–Agropyron spicatum* (bluebunch wheatgrass) habitat types (Moseley 1994, p. 9). The perennial bunchgrasses *Poa secunda* (Sandberg's bluegrass) and *Sitanion hysrix* (bottlebrush squirreltail) are commonly found in the understory of these habitats, and the species *Artemisia tridentata* ssp. *tridentata* (basin big sagebrush), *Chrysothamnus nauseosus* (grey rabbitbrush), *Chrysothamnus viridiflorus* (green rabbitbrush), *Eriogonum strictum* (strict buckwheat), *Purshia tridentata* (bitterbrush), and *Tetradymium glabrata* (little-leafed horsebrush) form a lesser component of the shrub community (Moseley 1994, p. 9; Mancuso and Moseley 1998, p. 17). Under relatively undisturbed conditions, the understory is populated by a diversity of perennial bunchgrasses and forbs, including species such as *Achnatherum* (formerly *Oryzopsis) hymenoides* (Indian ricegrass), *Achillea millefolium* (common yarrow), *Phacelia heterophylla* (varileaf phacelia), *Astragalus purshii* (Pursh's milkvetch), *Phlox longifolia* (longleaf phlox), and *Aristida purpurea* var. *longiseta* (purple threeawn) (Moseley 1994, p. 9; Mancuso and Moseley 1998, p. 17; Colket 2005, pp. 2-3). Menke and Kaye (2006a, p. 1) describe high quality matrix habitat conditions for *L. papilliferum* as sagebrush-steppe habitat in late seral condition, and Fisher *et al.* (1996, p. 1) note that "habitat with vigorous *Lepidium* populations has not been recently burned, is not heavily grazed, has an understory of native bunchgrasses, and a well developed microbiotic soil crust." Moseley (1994, p. 4) suggests that *L. papilliferum* serves as an indicator species for the health of the sagebrush-steppe ecosystem in the western Snake River Plain.

The biological soil crust, also known as a microbiotic crust or cryptogamic crust, is one component of quality habitat for *Lepidium papilliferum*. Such crusts are commonly found in semiarid and arid ecosystems, and are formed by living organisms, primarily bryophytes, lichens, algae, and cyanobacteria, that bind together surface soil particles (Moseley 1994, p. 9; Johnston 1997, p. 4). Microbiotic crusts play an important role in stabilizing the soil and preventing erosion, increasing the availability of nitrogen and other nutrients in the soil, and regulating water infiltration and evaporation levels (Johnston 1997, pp. 8-10). In addition, an intact crust appears to aid in preventing the establishment of invasive plants (Brooks and Pyke 2001, p. 4, and references therein; see also Serpe *et al.* 2006, pp. 174, 176). These crusts are sensitive to disturbances that disrupt crust integrity, such as compression due to livestock trampling or off-road-vehicle (ORV) use, and are also subject to damage by fire; recovery from disturbance is possible but occurs very slowly (Johnston 1997, pp. 10-11).

As described earlier, *Lepidium papilliferum* occurs in slickspot habitat microsites scattered within the greater semiarid sagebrush-steppe ecosystem of southwestern Idaho. *Lepidium papilliferum* has infrequently been documented outside of slickspots, on occasion being found on disturbed soils, such as along graded roadsides and badger mounds. These are rare observations and the vast majority of plants documented over the past 19 years of surveys and monitoring for the species are documented within slickspot microsite habitats (USFWS 2006, p. 20). For example, in 2002, a complete census of an 11,070-ac (4,480-ha) area recorded approximately 56,500 slickspots (U.S. Air Force, 2003, p. 15), of which approximately 2,450 (about 4 percent) were occupied by *L. papilliferum* plants (Bashore, pers. comm. 2003, p. 1). Of the approximately 11,300 *L. papilliferum* plants documented during the survey effort, only 11 plants were documented outside of slickspots (U.S. Air Force 2002, in summary attachment of document).

Slickspots are visually distinct openings characterized by soils with high sodium content and distinct clay layers; they tend to be highly reflective and relatively light in color, which makes them easy to detect on the landscape (Fisher *et al.* 1996, p. 3). Slickspots are distinguished from the surrounding sagebrush matrix as having the following characteristics: microsites where water pools when rain falls (Fisher *et al.* 1996, pp. 2, 4), sparse native vegetation, distinct soil layers with a columnar or prismatic structure, higher alkalinity and clay content and natric properties (Fisher *et al.* 1996, pp. 15-16; Meyer and Allen 2005, pp. 3-5, 8; Palazzo *et al.* 2008, p. 378), and reduced levels of organic matter and nutrients due to lower biomass production (Meyer and Quinney 1993, pp. 3, 6; Fisher *et al.* 1996, p. 4). Fisher *et al.* (1996, p. 11) describe slickspots as having a "smooth, panlike surface" that is structureless and slowly permeable when wet, moderately hard and cracked when dry. Although the low permeability of slickspots appears to help hold moisture (Moseley 1994, p. 8), once the thin crust dries, out the survival of *L. papilliferum* seedlings depends on the ability to extend the taproot into the argillic horizon (soil layer with high clay content), to extract moisture from the deeper natric zone (Fisher *et al.* 1996, p. 13).

Slickspots have three primary layers: The surface silt layer, the restrictive layer, and an underlying moist clay layer. Although slickspots can appear homogeneous on the surface, the actual depth of the silt and restrictive layer can vary throughout the slickspot (Meyer and Allen 2005; Tables 9, 10, and 11). The top two layers (surface silt and restrictive) of slickspots are normally very thin; the surface silt layer varies in

thickness from 0.1 to 1.2 in (a few mm to 3 cm) in slickspots known to support *Lepidium papilliferum*, and the restrictive layer varies in thickness from 0.4 to 1.2 in (1 to 3 cm) (Meyer and Allen 2005, p. 3). The rangewide mean surface silt layer depth was 0.31 in (0.78 cm) based on a 2005 study of 769 slickspots of unknown occupancy sampled at 79 transects (Colket 2006, p. 38). Additionally, measurements of the depth of the clay layer next to *L. papilliferum* plants at the Juniper Butte Training Range were taken in 2007 and 2008 to assess if depth of the clay layer could be a significant factor for plant germination. The average depth of the clay layer next to plants measured in 2007 was 2.5 in (6.3 cm), with a range from 1.2 to 4.7 in (3.0 to 12.0 cm) (n=18), and in 2008 was 2.1 in (5.4 cm) with a range from 1.6 to 3.1 in (4.0 to 8.0 cm) (n=16) (CH2MHill 2008a, p. 13). It appears that depth to the clay layer is not as critical to germination at the Juniper Butte Training Range as other factors may be (such as depth to surface of the soil, the timing and amount of moisture, seed bank, and ability of the slickspot to capture and maintain adequate moisture).

It is not known how long slickspots take to form, but it is hypothesized to take several thousands of years (Nettleton and Peterson 1983, p. 193; Seronko 2006). Climate conditions that allowed for the formation of slickspots in southwestern Idaho are thought to have occurred during a wetter Pleistocene period. Holocene additions of wind-carried salts (often loess deposits) produced the natric soils (high in sodium) characteristic of slickspots (Nettleton and Peterson 1983, p. 191; Seronko 2006). It may take several hundred years to alter or lose slickspots through natural climate change or severe natural erosion (Seronko 2006). Some researchers hypothesize that, given current climatic conditions, new slickspots are no longer being created (Nettleton and Peterson 1983, pp. 166, 191, 206). As slickspots appear to have formed during the Pleistocene and new slickspots are not being formed, the loss of a slickspot is apparently a permanent loss.

Some slickspots subjected to light disturbance in the past may apparently be capable of re-forming (Seronko 2006). Disturbances that alter the physical properties of the soil layers, however, such as deep disturbance and the addition of organic matter, may lead to destruction and permanent loss of slickspots. For example, such techniques as deep soil tilling, the addition of organic matter, and addition of gypsum have been recommended for the elimination of slickspots from agricultural lands in Idaho (Peterson 1919, p. 11; Rasmussen *et al.* 1972, p. 142). Slickspot soils are especially susceptible to mechanical disturbances when wet (Rengasmy *et al.* 1984, p. 63; Seronko 2004). Such disturbances disrupt the soil layers important to *Lepidium papilliferum* seed germination and seedling growth, and alter hydrological function. Meyer and Allen (2005, p. 9) suggest that if sufficient time passes following the disturbance of slickspot soil layers, it is possible that the slickspot soil layers may regain their pre-disturbance configuration, yet not support the species. Thus, while the slickspot appears to have regained its former character, some essential component required to sustain the life history requirements of *L. papilliferum* has apparently been lost, or the active seed bank is no longer present.

Most slickspots are between 10 square feet (ft^2) and 20 ft^2 (1 square meter (m^2) and 2 m^2) in size, although some are as large as 110 ft^2 (10 m^2) (Mancuso *et al.* 1998, p. 1). Slickspots cover a relatively small cumulative area within the larger sagebrush-steppe matrix, and only a small percentage of slickspots are known to be occupied by *Lepidium papilliferum*. For example, a 2002 inventory of the 11,070 acre (ac) (4,480 hectare (ha)) Juniper Butte Range on the Owyhee Plateau found approximately 1 percent (109 ac (44 ha)) of the sagebrush-steppe area consisted of slickspot habitat, and of that slickspot habitat, only 4 percent (4 ac (1.6 ha)) was occupied by above-ground *L. papilliferum* plants (U.S. Air Force 2002, p. 9). It is not known why *L. papilliferum* is not found in a greater proportion of slickspot microsites (Fisher *et al.* 1996, p. 15).

The highest monthly temperatures within the range of *Lepidium papilliferum* normally occur in July (approximately in the low 90 degrees Fahrenheit (approximately 33 degrees Celsius)), and lowest monthly temperatures occur in January (approximately in the low 20 degrees Fahrenheit (minus 7 degrees Celsius)). Precipitation tends to fall as rain, primarily in winter and spring (November to May); the lowest rainfall occurs in July and August, with the months of June, September, and October receiving slightly more rainfall than July and August. Average annual precipitation patterns vary within the species' range, and are generally higher in the northern regions (e.g., 11.7 in (29.7 cm) near Boise, 7.4 in (18.8 cm) at the city of Bruneau, and 9.9 in (25.1 cm) at Mountain Home).

Several analyses have shown a positive association between above-ground abundance of *Lepidium papilliferum* and spring precipitation in the same year. Evaluating rangewide HII monitoring data collected over 4 years from 1998 to 2001, Palazzo *et al.* (2005, p. 9) found a positive relationship (p-value less than 0.01) between abundance of above-ground plants and February to June precipitation. Meyer *et al.* (2005, p. 15) found that an increase in February through May precipitation increased the number of *L. papilliferum* seedlings at the OTA based on *L. papilliferum* census and survival data collected from 1993 to 1995. CH2MHill (2007a, p. 14) analyzed data from 2005 to 2007 collected at the Juniper Butte Range in the Owyhee Plateau region and found a positive correlation between spring precipitation and plant numbers. Utilizing HII monitoring data collected from 1998 to 2002, as well as 2004 HIP monitoring data, Menke and Kay (2006a, b) found that March to May precipitation accounted for 99.4 percent of the variation in *L. papilliferum* abundance for the years 1998 to 2001 (2006a, p. 8), and 89 percent for the years 1998 to 2002, and 2004 (2006b, pp. 10-11). These results appear to have been strongly influenced by the data point for 1998, which was an unusually wet spring (Unnasch 2008, p. 16). Because the 1998 HII data represents an outlier with respect to both *L. papilliferum* abundance and precipitation, it largely determines the regression relationship by itself; thus, Menke and Kaye's 2006 conclusion that abundance increases with spring precipitation is not well supported (Sullivan and Nations 2009, p. 140). More recently, however, Sullivan and Nations (2009, pp. 30, 41) analyzed data collected at the OTA over a period of 18 years between 1990 and 2008, and found evidence that both plant density at the rough census areas and plant abundance at special-use plots were positively related to mean monthly precipitation in late winter and spring (January through May). Thus, analysis of this long-term dataset again points to a strong relationship between *L. papilliferum* abundance and spring precipitation. This correlation of abundance with spring rainfall is important, as it at least partially explains annual fluctuations in *L. papilliferum* population numbers.

In contrast, precipitation in the fall or early winter may have a negative effect on *Lepidium papilliferum* abundance the following spring (Meyer *et al.* 2005, p. 15; Sullivan and Nations 2009, p. 39). It has been suggested that this negative

relationship may be the result of prolonged flooding of the slickspot microsites, causing subsequent mortality of overwintering biennial rosettes (Meyer *et al.* 2005, pp. 15-16). This suggestion is supported by the analysis of 9 years of OTA data from the period 2000-2008 that shows a negative association between October to January precipitation and abundance of non-blooming *L. papilliferum* the following spring, although only the relationship with October to December precipitation is statistically significant (Sullivan and Nations 2009, p. 43). For blooming plants, the negative association between October to January precipitation and spring abundance was highly significant (Sullivan and Nations 2009, pp. 43-44).

However, Unnasch (2008, p. 2) found no relationship between precipitation and the abundance of *Lepidium papilliferum* in an analysis of HIP data collected over a 3–year period from 2005 to 2007. Unnasch hypothesized that *L. papilliferum* may manifest threshold effects in germination and that there is a pulse of germination following a requisite amount of rainfall that could lead to a major flush of *L. papilliferum* germination during very wet years. If total rainfall is below that threshold, annual germination is more random (Unnasch 2008, p. 16). Comparing his results to those of Menke and Kaye, Unnasch (2008, p. 15) suggests that the relationship with spring precipitation reported by Menke and Kaye was strongly affected by abundance data from the year 1998, although in turn the relatively short 3–year study period may have influenced Unnasch's study results. Sullivan and Nations (2009, pp. 140, 142) likewise suggested that the exceptionally high precipitation in 1998 likely influenced the results of Menke and Kaye's analysis. However, as described above, Sullivan and Nation's more robust analysis of 18 years of data from the OTA confirmed a positive correlation between spring precipitation and the abundance of *L. papilliferum* (Sullivan and Nations 2009, pp. 40-44). As both annual precipitation and plant abundance are highly variable, the numbers of years included in the data set for evaluation is of great importance in determining the degree of confidence in the outcome of any statistical analysis. For this reason, the Service believes the Sullivan and Nations (2009, pp. 40-44) evaluation of the 18–year dataset from the OTA is the best available data regarding the relationship between precipitation and abundance of *L. papilliferum*.

Recent analyses suggest that temperature also influences the annual abundance of *Lepidium papilliferum*. Although Menke and Kaye (2006b, p. 8) found that minimum and maximum temperatures were not statistically correlated with *L. papilliferum* abundance based on a limited number of years of data, Sullivan and Nations (2009, p. 46-57) used more precise temperature data in concert with the 18–year *L. papilliferum* abundance dataset from the OTA to evaluate the potential interaction between precipitation, temperature, and plant abundance. Their analysis of the data collected between 1990 and 2008 suggests a complex relationship between temperature and precipitation that influences the abundance of *L. papilliferum* on an annual basis. In short, they found that temperature and precipitation interact during the months of October through January such that the lowest density or abundance of *L. papilliferum* in the spring follows a fall or early winter when both precipitation and temperature are low, or both are high. Spring plant density or abundance is greatest following a fall or early winter when either precipitation is high and temperature is low, or precipitation is low and temperature is high (Sullivan and Nations 2009, p. 56). During late winter and spring, analysis of one OTA dataset (the "rough census" areas) suggested that temperature had a negative impact on *L. papilliferum* density, such that density is greater when precipitation is high but temperatures during March through May are lower (Sullivan and Nations 2009, p. 47), whereas the model of the OTA special-use plots suggests only a positive interaction of *L. papilliferum* abundance with precipitation during this time period, with no temperature effect (Sullivan and Nations 2009, p. 47). Sullivan and Nations caution that the limited geographic area within which the interactions of precipitation and temperature were studied limits the ability to extrapolate the observed relationship beyond the bounds of the OTA (Sullivan and Nations 2009, p. 57).

The sparse native vegetation naturally present at slickspots suggests that *Lepidium papilliferum* is more tolerant than surrounding vegetation at surviving in alkaline soils and spring inundation (e.g., Moseley 1994, p. 8, 14; Fisher *et al.* 1996, pp. 11, 16). Plant ecology literature suggests that plants tolerant of stress (e.g., plants that are capable of growing in harsh alkaline soils) are poor competitors (Grime 1977, p. 1185), making *L. papilliferum* a potentially poor competitor with other plants. In recent years, there are increasing observations of nonnative plants encroaching into slickspots, and consistent with theory, the evidence suggests that *L. papilliferum* is not able to successfully compete with these invasive exotics. Sullivan and Nations (2009, p. 111) report an "apparent mutual exclusivity" between nonnative plant species examined and *L. papilliferum* in slickspots. In other words, if plants such as *Bassia prostrata* (prostrate kochia or forage kochia, formerly *Kochia prostrata*) or *Bromus tectorum* are present in a slickspot, *L. papilliferum* is most often reduced in numbers or entirely absent.

Range and Distribution

The range of *Lepidium papilliferum* is restricted to the volcanic plains of southwest Idaho, occurring primarily in the Snake River Plain and its adjacent northern foothills, with a single disjunct a population on the Owyhee Plateau (Figure 1). The plant occurs at elevations ranging from approximately 2,200 ft (670 m) to 5,400 ft (1,645 m) in Ada, Canyon, Gem, Elmore, Payette, and Owyhee Counties (Moseley 1994, pp. 3-9). Based on differences in topography, soil, and relative abundance, we have further divided the extant *Lepidium papilliferum* populations into three physiographic regions: the Boise Foothills, the Snake River Plain, and the Owyhee Plateau. The nature and severity of factors affecting the species also vary between the three physiographic regions for the purposes of analysis. For example, urban and rural development, agriculture, and infrastructure development has been substantial in the sagebrush-steppe habitat of the Boise Foothills and the Snake River Plain regions, while very little of these types of development has occurred within the Owyhee Plateau region. Genetic analyses reveal some separation between the greater Snake River Plain and Owyhee Plateau populations of *L. papilliferum* (Larson *et al.* 2006, p. 14), as might be expected due to their relative isolation. We are not aware of any studies that may have examined the relative genetic differentiation, if any, of the Boise Foothills population from the remainder of the Snake River Plain.

Figure 1. Range of *Lepidium papilliferum* in southwest Idaho, showing its distribution in the three physiographic provinces of the Snake River Plain, Boise Foothills, and Owyhee Plateau.

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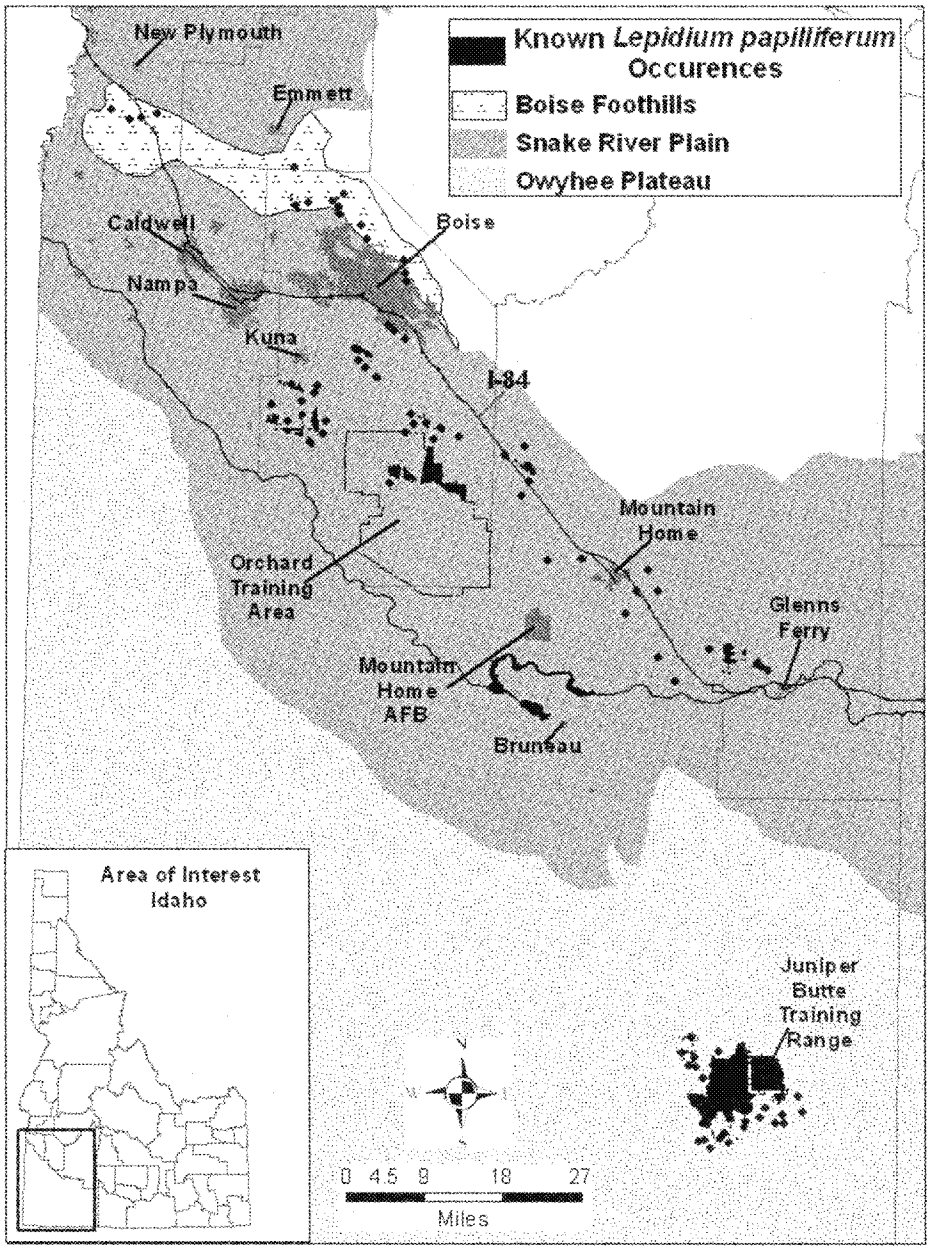

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As of February 2009, there were 80 extant EOs in the three physiographic regions that collectively comprise approximately 15,801 ac (6,394 ha) of total area that is broadly occupied by *Lepidium papilliferum* (Cole 2009b, Threats Table). The area actually occupied by *L. papilliferum* is a small fraction of the total acreage, since slickspots occupy only a small percentage of the landscape, and *L. papilliferum* then occupies only a fraction of those slickspots (see U.S. Air Force 2002, p. 9, for an example). Table 1 presents the distribution and landownership and management information for all *L. papilliferum* EOs, in total and by region.

TABLE 1. DISTRIBUTION AND LAND OWNERSHIP OF *Lepidium papilliferum* ELEMENT OCCURRENCES BY PHYSIOGRAPHIC REGION (COLE 2009B, THREATS TABLE; SULLIVAN AND NATIONS 2009, P. 77).

All areas are estimates, and may not total exactly due to rounding.

Lepidium papilliferum EOs	Number of EOs [percent of total]	Federal ownership in acres (hectares) [percent of total]	State ownership in acres (hectares) [percent of total]	Private ownership in acres (hectares) [percent of total]	Total EO Area (hectares) [percent of total rangewide EO area]
Snake River Plain	43 [54]	12,754 ac (5,160 ha) [98]	55 ac (22 ha) [0.5]	164 ac (66 ha) [1.5]	12,980 ac (5,250 ha) [82]
Boise Foothills	16 [20]	89 ac (36 ha) [48]	0 ac (0 ha) 0	96 ac (39 ha) [52]	185 ac (75 ha) [1.2]
Owyhee Plateau	21 [26]	2,636 ac (1,067 ha) [99.7]	7 ac (3 ha) [0.3]	0 ac (o ha) [0]	2,643 ac (1,070 ha) [16. 8%]
All extant EOs	80 [100]	15,479 ac (6,264 ha) [98.0]	62 ac (25 ha) [0.4]	260 ac (105 ha) [1.6]	15,801 ac (6,394 ha) [100]

The range of *Lepidium papilliferum* was first estimated in 1994 (Moseley 1994, p. 6). Expanded survey efforts in recent years have resulted in an increase in the amount of known occupied habitat, particularly on the Owyhee Plateau and in the Boise Foothill regions. Between 2003 and 2006, 16 new EOs were documented, all within 3 mi (4.8 km) of previously existing EOs: 2 on the Snake River Plain with a total area of 2.7 ac (1 ha), and 14 on the Owyhee Plateau with a total area of 46.6 ac (18 ha) (Colket *et al.* 2006, Tables and Appendix A). Since 2006, additional surveys of previously unsurveyed lands have resulted in the discovery of several new occupied sites. Because most of these newly discovered sites were within 1 km (0.6 mi) of a documented EO, they typically resulted in the expansion or merging of existing EOs rather than the creation of a new EO. For example, in 2007, 2,560 ac (1,036 ha) of BLM land on the Owyhee Plateau were inventoried for *L. papilliferum* just south of the U.S. Air Force's Juniper Butte Training Range. Of the 2,171 slickspots surveyed, 200 (9 percent) were occupied by *L. papilliferum* with a total of 1,059 flowering plants and 214 rosettes (ERO 2007, pp. 1, 7-8), resulting in the expansion of EO 16 (Cole 2009a, p. 38). Surveys conducted in 2008 in the vicinity of the Ada County landfill in the Boise Foothills region revealed nearly 5,000 plants in 75 slickspots (Cole 2008, p. 8), which expanded the size of existing EOs 38 and 65 (Cole 2009a, p. 39). Pre-development surveys conducted during 2007 by URS Corporation (URS) on BLM and private lands in the Boise Foothills region northwest of the City of Eagle detected 43 occupied slickspots out of 187 surveyed, with approximately 17,880 *L. papilliferum* plants (URS 2008, p. 10). These observations expanded the total area of EO 76 (Cole 2009a, p. 39). Finally, additional survey efforts on previously surveyed areas at the OTA resulted in the documentation of 365 new occupied slickspots in 2005, resulting in further expansion of existing EO 27 (URS 2005, pp. 6-7).

Not all potential *Lepidium papilliferum* habitats in southwest Idaho have been surveyed, and it is possible that additional *L. papilliferum* sites may be found outside of areas that are currently known to be occupied. Recent modeling was completed to develop a high-quality, predictive-distribution model of *L. papilliferum* to identify potential habitat (Colket 2008, p. 1). Although surveys were conducted in 2008 in some areas identified as potential, previously unsurveyed habitat, these did not result in any new locations of the species (Colket 2008, pp. 4-6). There have also been searches for *L. papilliferum* in eastern Oregon, but the species has never been found there (Findley 2003, p. 1). We have no historical records indicating that *L. papilliferum* has ever been found anywhere outside of its present range in southwestern Idaho, as described in this rule.

Abundance and Population Trend

Forming a reliable estimate of any trend in the abundance of *Lepidium papilliferum* over time is complicated by multiple factors. For one, since individuals of the species may act as either an annual or a biennial, in any given year there will be varying numbers of plants acting as spring-flowering annuals versus overwintering rosettes. The relative proportions of these two life history forms can fluctuate annually depending on a variety of factors, including precipitation, temperature, and the abundance of rosettes produced the previous year (Unnasch 2008, pp. 14-15; Sullivan and Nations 2009, pp. 43-44, 134-135). Secondly, *L. papilliferum* has a long-lived seed bank, likely as an adaptation to unpredictable conditions, in which years of good rainfall favorable for germination and survival may be followed by periods of drought; a persistent seed bank provides a population buffer against years of poor reproductive potential in such a highly variable environment (Meyer *et al.* 2005, p. 21). Only a small percentage of *L. papilliferum* seeds germinate annually, resulting in an estimated maximum longevity of 12 years for seeds in the seed bank (Meyer *et al* 2005, p. 18). The presence of this persistent seed bank confounds the ability to determine any trend in abundance over time, as the number of above-ground plants that can be counted in any one year represents only a subset of the latent population that is present in the seed bank. In effect, it takes at least 12 years to trace the fate of a single year's cohort of seeds, resulting in a significant lag effect in detecting any real underlying change in total population abundance over the long term.

An additional complicating factor in trying to detect any population trend for *Lepidium papilliferum* is the extreme

variability of annual abundance or density of the plant. As is common for desert annuals, the numbers of *L. papilliferum* can vary dramatically from year to year, depending on environmental conditions. As an example, the total number of plants on the 16 special-use plots at the OTA went from 624 individuals in 1997 to 3,330 plants in 1998, subsequently dropping back down again to 756 plants in 1999; total abundance over the years 1991 through 2008 ranged from a low of 249 plants to 15,236 individuals (Weaver 2008). Some of the great variation in yearly plant numbers is likely due to the relationship between *L. papilliferum* and precipitation, as described above. The annual abundance or density of *L. papilliferum* shows a significant positive association with levels of spring rainfall, roughly from March through May (Meyer *et al.* 2005, p. 15; Palazzo *et al.* 2005, p. 9; Sullivan and Nations 2009, pp. 39-41), and survival of potential biennials is associated with increased summer rainfall (Meyer *et al.* 2005, p. 15). There is also some suggestion that increased winter precipitation may show a negative association with plant abundance, although not all analyses are consistently significant on this point (Meyer *et al.* 2005, pp. 15-16; Sullivan and Nations 2009, pp. 39-41). Temperature also appears to play a role in annual abundance of *L. papilliferum* in concert with precipitation, although the exact nature of the relationship is complex and not well understood (Sullivan and Nations 2009, p. 57). Furthermore, the interaction between temperature, precipitation, and *L. papilliferum* abundance appears to vary regionally between the Boise Foothills, Owyhee Plateau, and Snake River Plain (Sullivan and Nations 2009, pp. 103-104).

Because the population dynamics of *Lepidium papilliferum* are complicated, surrogate methods of monitoring the status of the species, such as monitoring the status of the ecosystem upon which it depends, may be preferable to counts of individual plants. For example, due to the extreme annual fluctuations in annual plant abundance and the complicating nature of the long-lived seed bank for this species, Mancuso and Moseley (1998, p. 1) note that "estimating the number of above-ground plants is by itself not a reliable measure to evaluate population and species viability." As an alternative or supplement to population monitoring, they suggest monitoring the ecological integrity of *L. papilliferum* habitat, essentially using measures of habitat quality and quantity as a surrogate for assessing the status or viability of *L papilliferum*. Habitat monitoring is a recommended method of monitoring annual plants with a long-lived seed bank, where in some years the majority of the plant population is expressed in the seed bank rather than as above-ground plants (Elzinga *et al.* 1998, p. 55). For these reasons, we consider that data regarding the trends in habitat quality and quantity for *L. papilliferum* provide us with information that is equally important, if not more so, than direct counts of individual plants in evaluating the overall status of the species. Trends in habitat quality are discussed in the **Habitat Quality** section of this document, as well as under *The Present or Threatened Destruction, Modification, or Curtailment of Its Habitat or Range* in the **Summary of Threats Affecting the Species** section, below.

From a statistical standpoint, the extreme variability in annual abundance or density estimates greatly reduces the ability to reliably detect a long-term trend in the population without many years of standardized data. The presence of the persistent seed bank adds further uncertainty to the determination of population trend, as 12 years may effectively be considered to represent a single generation of the plant. Relatively short-term analyses of abundance estimates for the purposes of estimating a population trend are thus of limited utility due to the high variance observed in the data (Sullivan and Nations 2009, p. 93). In our evaluation, we weighed the relative quality of the available datasets for discerning population trend in *Lepidium papilliferum* according to the degree of confidence we had in the results of any analyses, given the great degree of variability observed and the multiple factors potentially influencing annual counts of the plant.

Four data sets are available that provide some index or measure of *Lepidium papilliferum* abundance: Rangewide EO records, rangewide HII–HIP transects, rough census data collected on the OTA, and special-use plot data from the OTA. Each of these programs is described in the **Monitoring of *Lepidium papilliferum* Populations** section, above, and the degree to which we relied on the information provided by them is described below.

The INHP records of *Lepidium papilliferum* EOs provide only estimated ranges or categorical estimates of abundance, and are so variable in both size and space over time that we considered these records to be informative in terms of evaluating the current overall condition of the species, but we did not rely on EO records for temporal population trend estimates.

Five years of HII monitoring data (1998 to 2002) and 5 years of HIP monitoring data (2004 to 2008) are available on *Lepidium papilliferum* abundance and habitat condition rangewide. Although the HII–HIP program provides valuable information regarding the relationship between *L. papilliferum* abundance and measures of habitat quality or disturbance, the time series of this data set is considered too short to reliably detect any trend in rangewide population abundance, due to the extreme annual variability in the data (Sullivan and Nations 2009, p. 93).

We consider the best available data regarding *Lepidium papilliferum* abundance to be the long-term datasets from the OTA, including the rough census areas and special-use plots, which provide 18 years of population monitoring information. The relative value of the OTA dataset is supported by the analysis of Sullivan and Nations (2009), a report resulting from our contract with an independent consulting firm to evaluate the available population trend data for *L. papilliferum*, as well as to analyze any information available regarding potential relationships between the abundance of *L. papilliferum* and measures of habitat quality or disturbance. Considering the available data from the HII–HIP monitoring, and the rough census area and special-use plot monitoring from the OTA, Sullivan and Nations considered that the long-term nature of the datasets from the OTA make these data the best available data when attempting to model trends through time (Sullivan and Nations 2009, p. 56). Furthermore, they placed slightly greater confidence in the analyses based on the rough census areas as opposed to the special-use plots, since the special-use plots are in effect a subset of the rough census areas and are based on counts from only a single slickspot, and are therefore subject to greater variability in response to localized impacts (Sullivan and Nations 2009, pp. 55, 96). They also noted that the HII and HIP programs do not yet have sufficient data to determine population trends rangewide (Sullivan and Nations (2009, p. 93). However, they determined that all three programs—rangewide HIP, OTA rough census areas, and OTA special-use plots— track annual changes in *L. papilliferum* abundance similarly, and each can act as an index of abundance. Based on their analysis, they concluded that the trend observed on the OTA may be considered likely representative of

the trend across the entire range of the species (Sullivan and Nations 2009, p. 96).

Analysis of Population Trend

Sullivan and Nations analyzed the data on *Lepidium papilliferum* numbers (density or total abundance) from both the rough census areas and the special-use plots at the OTA, assuming a simple linear trend and using a repeated measures implementation of the general negative binomial regression model to account for the large variances in the data (a statistical technique for determining whether a statistically significant trend exists when using a data set with counts from the same areas every year and large changes in the values between years). The model was not intended to describe the complex pattern in the relative density or abundance of *L. papilliferum* over time, but only to determine whether there is evidence of any overall population trend (Sullivan and Nations 2009, p. 38).

Based on this model, of the two OTA datasets, Sullivan and Nations (2009, pp. 3, 55, 96) considered the rough census data to be slightly more reliable. Their analysis of this rough census data showed a negative trend in density with a slope of -0.086 over the years 1990 to 2008; this trend was statistically significant ($p = 0.0087$, two-sided p-value) (Sullivan and Nations 2009, pp. 38-39). Because plant density was unusually high on a single rough census area, the Study 4 Site, the data were reanalyzed, removing that site as a potentially highly influential data point. The result was a more shallow negative slope (-0.059), but the trend remained statistically significant ($p = 0.0046$) (Sullivan and Nations 2009, p. 39).

Rough census area densities were further regressed against 3–month running averages of precipitation. *Lepidium papilliferum* density was positively associated with mean monthly precipitation in each of the January to March, February to April, and March to May periods, and negatively associated with mean monthly precipitation for the periods October to December, November to January, and December to February; these relationships were all significant at $p < 0.0001$ (Sullivan and Nations 2009, pp. 39-40). These findings are consistent with those of Meyer *et al.* 2005 (pp. 15-16), which reported a positive association between *Lepidium* seedlings recruited and spring precipitation, and a likely negative association with winter precipitation, which is postulated to drown overwintering rosettes.

The analysis of abundance data from the special-use plots on the OTA reveals a similarly negative slope over the years 1991 through 2008, but the results were not statistically significant ($p = 0.2857$) (Sullivan and Nations 2009, p. 4). In other words, based on the count data from the special-use plots, there was not sufficient evidence to conclude that the slope of abundance over time was significantly different from zero. The relationship between abundance and spring precipitation on the special-use plots was similar to that observed on the rough census areas; mean monthly precipitation in January to March, February to April, and March to May were all positively associated with abundance and all were statistically significant ($p < 0.0001$). There was no significant relationship, however, between fall or winter precipitation and *Lepidium papilliferum* abundance on the special-use plots (Sullivan and Nations 2009, p. 41). Using a shorter time-series of data from 2000 to 2008, Sullivan and Nations (2009, pp. 43-44) found that the abundance of blooming plants was positively associated with both the current year's precipitation and the number of rosettes present in the previous year, and that the number of rosettes was negatively associated with precipitation in the prior October to December period.

The researchers concluded that there is "limited evidence for declining populations," because trends on the OTA are negative but only statistically significant for the rough census areas (Sullivan and Nations 2009, pp. 2, 44). In earlier analyses of *Lepidium papilliferum* population HII–HIP data, Menke and Kaye had initially reported a negative rangewide population trend for the periods 1998 through 2002 (Menke and Kaye 2006a) and for 1998 through 2004 (Menke and Kaye 2006b). However, Sullivan and Nations (2009, p. 141) point out that the fact that the HII transects were first monitored during a higher-than-average abundance year in 1998 greatly influenced the interpretation of the short time-series dataset, and suggest that the negative trend in abundance is not supported when abundance in subsequent years is included. Additionally, as described above, the HII–HIP data collection has not yet occurred over a long enough period to allow for reliable trend analyses (Sullivan and Nations 2009, p. 93). In comparing the mean number of *L. papilliferum* per transect resulting from his own analyses of HIP data from 2005 through 2007 with the results reported by Menke and Kaye (2006b), Unnasch (2008, p. 14) suggests that, since 1999, there has been no consistent rangewide population trend for the species.

Although Sullivan and Nations did not attempt to discern a trend in population numbers based on the HIP data, they did compare mean total abundance of *Lepidium papilliferum* per transect between physiographic regions, based on the HIP data from 2004 through 2008. They found that relative abundance was significantly different between regions, being greatest in the Boise Foothills region and lowest on the Owyhee Plateau region; abundance on the Snake River Plain region was intermediate between the other two (Sullivan and Nations 2009, p. 103).

In summary, we have reviewed all of the best available scientific and commercial data available to us to determine whether we can discern a long-term trend in the abundance of *Lepidium papilliferum*. The extreme variability in annual counts of the species makes it difficult to discern a trend in numbers with statistical confidence. For this reason, we place greater confidence in the longest time series of monitoring data available to us, that from the OTA (up to 18 years of data for some rough census areas and all special-use plots). In addition, as described above, Sullivan and Nations suggest that the data from the rough census areas may be considered slightly more reliable than that from the special-use plots (Sullivan and Nations 2009, pp. 3, 55). The long-term data from the OTA, which we considered to be the best available data for attempting to model trends through time in agreement with Sullivan and Nations (2009, pp. 3, 56), suggest that population numbers may be trending downward on the OTA. Although numbers on both the rough census areas and the special-use plots showed a slightly negative slope over time, only the analysis of the rough census areas was statistically significant (Sullivan and Nations 2009, pp. 38-40). We considered this to be relatively limited evidence of a downward trend in the population, given the lack of consistently significant results between the two monitoring programs. Furthermore, the slope is not steep, annual variation in plant numbers continues to be extremely high, and the plant has demonstrated an ability to rebound from low numbers due to the persistent seed bank.

We do recognize, however, that the OTA provides some of the highest quality habitat remaining for *Lepidium papilliferum*. Therefore, we believe it is reasonable to infer that if the population is trending downward there, then conditions are likely worse in the

remainder of the plant's range where habitat conditions are more degraded. This conclusion is supported by the analysis of Sullivan and Nations (2009, p. 96), which suggests that the trends on the OTA, as a general index of abundance, might reasonably be considered representative of trends rangewide (Sullivan and Nations 2009, p. 96). Direct evidence in support of this argument, however, is lacking. In addition, since the abundance of *L. papilliferum* is associated with annual precipitation, we considered whether any trend in precipitation over the same time period for which the rough census areas and special-use plot data were collected might be correlated with the observed negative trend in plant numbers. Assuming a simple linear trend, analogous to the model used by Sullivan and Nations in their analysis of *L. papilliferum* density and abundance at the OTA over time, we found no significant trend in precipitation at the OTA over the years 1991 through 2007 (data were not available for 2008). Although we evaluated total annual precipitation, total and mean winter precipitation, total and mean spring precipitation, and 3–month moving averages across the year, least squares regression did not yield any slopes of precipitation over time that were statistically significant from zero (Zwartjes 2009, p. 1). Any observed negative trend in *L. papilliferum* density or abundance at the OTA thus appears to be independent of any trend in precipitation over the time period of interest.

In weighing all of this information, we conclude that the best available evidence suggests that *Lepidium papilliferum* numbers may be trending downward. The dataset from the rough census areas on the OTA shows a significant downward trend in density over the last 18 years. Furthermore, we believe it is reasonable to infer that this negative trend may be similar or possibly even greater rangewide in areas outside the high quality habitat of the OTA, and this trend appears to be independent of any trend in precipitation. The best available scientific and commercial data therefore suggest that over the past two decades, *L. papilliferum* has likely significantly declined in abundance.

In terms of projecting this trend into the future, however, there are many uncertainties associated with both the data and the model that preclude our ability to do so; these include, but are not limited to: Great annual variability in plant numbers, the confounding influence of the long-lived seed bank, the complications associated with annual variability in both precipitation and temperature, and the inconsistent results between the special-use plots and the rough census areas on the OTA. The evaluation of Sullivan and Nations was based on a simple model of *Lepidium papilliferum* abundance or density as a linear function of time, and intended only to discern whether there was any general trend in the population. The authors acknowledge that the dynamics are complicated, and note their model is not intended to describe (nor explain) the details of the temporal pattern of abundance or density of *L. papilliferum* (Sullivan and Nations 2009, p. 38). In addition, we do not have any models for *L. papilliferum* based on multivariate analyses, which would simultaneously take into account additional variables such as precipitation, to potentially allow for the prediction of abundance or density of *L. papilliferum* over time based on projected conditions. Although the currently available model is helpful in terms of interpreting the population information available to date and indicates that *L. papilliferum* has likely been trending downward, for all of the reasons outlined above, it would be inappropriate to rely on this model to predict any future population trajectory for *L. papilliferum*.

Habitat Quality

As described above under "**Ecology and Habitat**," the natural sagebrush-steppe community that surrounds the slickspot microsites in which *Lepidium papilliferum* occurs is dominated by sagebrush (primarily *Artemisia tridentata* ssp. *wyomingensis*) with a diverse understory of native perennial bunchgrasses and forbs. Historically, fires were relatively infrequent in this ecosystem, likely occurring on the order of every 100 years (Whisenant 1990, p. 4). Data on the plant community and fire history pattern are some of the habitat quality attributes collected as part of *Lepidium papilliferum* HIP monitoring, which has been conducted rangewide since 2004. Results from the 2008 HIP monitoring conducted at 80 HIP transects indicated that over the past 5 years, 14 of the transects (18 percent) that were initially characterized by predominantly native vegetation have undergone overall declines in habitat quality, primarily due to increased nonnative species cover (Colket 2009, pp. 10). Furthermore, this increase in nonnatives was observed not only in the surrounding plant community, but in the slickspots occupied by *L. papilliferum* as well. *Bromus tectorum* was the most common nonnative species in slickspots, followed by *Agropyron cristatum* (crested wheatgrass), *Ceratocephala testiculata,* formerly *Ranunculus testiculatus* (bur buttercup), and *Lepidium perfoliatum* (clasping-leaf pepperweed) (ICDC 2008, p. 9). Noxious or aggressive nonnatives detected in HIP transect slickspots include *Linum perenne* ('Appar' blue flax), *Centaurea cyanus* (garden cornflower), *Bassia prostrata* (prostrate kochia or forage kochia), *Chondrilla juncea* (rush skeletonweed), and *Cardaria draba* (whitetop) (Colket 2009, pp. 8-9).

A review of the rangewide HIP transect data for evidence of fire history reveals that 38 of 80 HIP transects (48 percent) currently show no effects from wildfire and 6 others (7.5 percent) were predominantly unburned. Five transects (6.25 percent) had partially burned (with approximately half of the area unburned), 13 (16.25 percent) were predominantly burned, and 18 (22.5 percent) have completely burned (Colket 2009, Table 5). HIP classifies areas as burned if they are devoid of shrub cover or have patchy shrub cover in areas that exhibit the site capacity to support a healthy sagebrush-steppe community; this may include areas that have recently or historically burned. Four HIP transects were burned in 2007 in the Murphy Complex Fire in the Owyhee Plateau geographic region (Colket 2009, p. 23). Sixty-six of the 80 HIP transects (83 percent) have nearby wildfire effects within 1,640 ft (500 m) (Colket 2009, p. 26). A recent geospatial data analysis evaluating the total *Lepidium papilliferum* EO area affected by wildfire from 1957 to 2007 found that the perimeter of 107 wildfires that had occurred encompassed approximately 11,442 ac (4,509 ha), or 73 percent of the total EO area rangewide (Stoner 2009, p. 48). However, caution should be used in interpreting this geospatial information, as this represents relatively coarse vegetation information that may not reflect that some EOs may be located within remnant unburned islands of sagebrush habitat within fire perimeters.

Several features of slickspots and their surrounding habitat were consistently more degraded in areas that had burned. Slickspots in burned areas had lower soil crust cover and greater exotic (nonnative) species cover, and the total native species cover and shrub cover were consistently lower in burned transects, while total exotic species cover,, including *Bromus tectorum*, was consistently higher in burned transects (Menke and Kaye 2006b, p. 19). Sullivan and Nations (2009, p. 3) found a significantly negative relationship

between the abundance or density of *Lepidium papilliferum* and both the presence of *B. tectorum* and past fire. The positive association between the abundance of *B. tectorum* and fire frequency is well established (Whisenant 1990, p. 6). The complex and positive feedback loop between the encroachment of invasive annual grasses such as *B. tectorum*, increased fire frequency, and decreased integrity of biological soil crusts contributes to the degradation of sagebrush-steppe habitat quality for *L. papilliferum* (for additional details, see the *Modified Wildfire Regime* and *Invasive Nonnative Plant Species* discussions under Factor A of **Summary of Factors Affecting the Species**).

Element Occurrences Rangewide

The EO ranking system utilized by the INHP is described above in the **Monitoring of *Lepidium papilliferum* Populations** section. In brief, occurrences of *Lepidium papilliferum* are ranked based on measures of habitat quality and species abundance. The first EO ranks for *L. papilliferum* were assigned in 1993 (Colket *et al.* 2006, Tables 1-13). In 2006, *L. papilliferum* EO specifications and ranking were updated and revised by the ICDC to apply more consistent EO specifications rangewide (Colket *et al.* 2006, pp. 15-44). Due to the change in methods in 2006, EO rankings assigned before 2006 are not comparable to those assigned after 2006. Currently, EO ranks are more consistently assigned, are useful as an assessment of estimated viability or probability of persistence, and help prioritize conservation planning or actions (NatureServe 2002).

As of February 2009, the INHP has ranked 80 extant EO records for *Lepidium papilliferum* based on habitat quality and abundance (Cole 2009b, Threats Table). In addition, nine EOs are ranked as extirpated or probably extirpated, and seven EOs are considered historical (information is too vague for relocation of the sites). All nine extirpations were formerly verified locations from old herbarium collections (the most recent from 1955) where the habitat is now completely developed or converted to agricultural lands (Colket *et al.* 2006, Table 13). The 80 extant (as of February 2009) EOs represent a reduction in the number of extant EOs (85) known in 2006. However, this reduction in the number of EOs is due to the merging of EOs associated with new locations of plants rather than from the loss of individual EOs. As of February 2009, there are no A-ranked EOs for *L. papilliferum*; the most common EO ranks for *L. papilliferum* rangewide are C and D (Table 2). EO ranks also vary by physiographic region. A little more than one-half of the extant EO area in the Boise Foothills region is ranked as C, which means there are 50 to 399 above-ground plants, low to moderate introduced nonnative plant species cover, and EOs are partially burned. Approximately three-quarters of the total EO area in the Snake River Plain is ranked B, meaning there are 400 to 999 above-ground plants, the native plant community is intact with low introduced nonnative plant species cover, and EOs are largely unburned. The majority of the B-ranked EO acreage rangewide occurs on the Idaho Army National Guard's Orchard Training Area (OTA). The majority of the total EO area in the Owyhee Plateau physiographic region is also ranked B.

EO size can also influence the ranking of an EO as a percentage of total rangewide EO area. For example, one EO (number 27) located on the OTA in the Snake River Plain region has a total area of 7,163 acres (2,899 ha) and accounts for roughly 59 percent of all the area within *Lepidium papilliferum* EOs assigned a B rank throughout the entire range of the species. There are less than 2.2 ac (1 ha) of B-ranked area in the Boise Foothills region, and nearly 2,540 B-ranked ac (1,028 ha) on the Owyhee Plateau. Therefore, according to the EO rankings, the majority of the highest quality remaining habitat for *L. papilliferum* occurs on the Snake River Plain (see Table 2), with most of that occurring within the OTA.

TABLE 2. EXTANT ELEMENT OCCURRENCE (EO) RANKS ACROSS THE ENTIRE RANGE OF *Lepidium papilliferum* (INHP data from February 2009).

Element Occurrence Rank	No. EO's	Hectares	Acres	Percent of Area
Boise Foothills				
B	1	0.84	2.07	1.65
BC	1	1.79	4.41	3.53
C	5	28.34	70.03	56.05
D	6	15.37	37.99	30.40
F	3	4.23	10.46	8.37
TOTAL	**16**	**50.57**	**124.96**	**100.00**
Snake River Plain				
B	5	3,875.14	9,575.47	73.77
BC	1	1.42	3.51	0.03
C	19	935.06	2,310.53	17.80
D	12	350.44	865.94	6.67
D?	1	0.78	1.93	0.01

TABLE 2. EXTANT ELEMENT OCCURRENCE (EO) RANKS ACROSS THE ENTIRE RANGE OF *Lepidium papilliferum*—Continued

(INHP data from February 2009).

Element Occurrence Rank	No. EO's	Hectares	Acres	Percent of Area
F	4	89.82	221.94	1.71
NR	1	0.20	0.48	0.00
TOTAL	**43**	**5,252.86**	**12,979.81**	**100.00**
Owyhee Plateau [1]				
B	5	1,027.50	2,537.00	96.02
C	4	21.85	53.99	2.04
D	5	18.42	45.52	1.72
E	0	0.00	0.00	0.00
F	7	2.36	5.83	0.22
TOTAL	**21**	**1070.13**	**2,644.35**	**100.00**

[1] Note that Sullivan and Nations (2009, pp. 79-81) differed in their overview of extant EOs in the Owyhee Plateau as they presented EO 16 as each of its 27 individual sub-EOs (sub-EOs 700-726). Table 2 combines all Owyhee Plateau sub-EOs into the single EO 16 and also incorporates changes as described in the February 2009 INHP *Lepidium papilliferum* data.

Summary of Factors Affecting the Species

Section 4 of the Act and its implementing regulations (50 CFR 424) set forth the procedures for adding species to the Federal Lists of Endangered and Threatened Wildlife and Plants. A species may be determined to be an endangered or threatened species due to one or more of the five factors described in section 4(a)(1) of the Act: (A) The present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence. Listing actions may be warranted based on any of the above threat factors, singly or in combination. Each of these factors relevant to *Lepidium papilliferum* is discussed below.

A. The Present or Threatened Destruction, Modification, or Curtailment of Its Habitat or Range

Several threat factors are contributing to the destruction, modification, or curtailment of *Lepidium papilliferum*'s habitat or range. The sagebrush-steppe habitat of the Great Basin where *L. papilliferum* occurs is becoming increasingly degraded due to the impacts of multiple threats, including the invasion of nonnative annual grasses, such as *Bromus tectorum*, and increased frequency of fire. As described below, *B. tectorum* can impact *L. papilliferum* directly through competition, but also indirectly by providing continuous fine fuels that contribute to the increased frequency and extent of wildfires. Frequent wildfires have numerous negative consequences in the sagebrush-steppe system, which is adapted to much longer fire-return intervals, ultimately resulting in the conversion of the sagebrush community to nonnative annual grasslands, with associated losses of native species diversity and natural ecological function. Because the modified wildfire regime and invasion of *B. tectorum* create a positive feedback loop, it is difficult to separate out the effects of each of these threat factors independently. We have attempted to do so here, but much of the discussion may overlap due to the inherent synergism between these two threat factors.

In addition to wildfire and nonnative plants, development poses a threat to *Lepidium papilliferum*, both directly through the destruction of populations and loss of slickspot microsites, and indirectly through habitat fragmentation and isolation (discussed separately under Factor E, below). The loss of slickspots is a permanent loss of habitat for *L. papilliferum*, since the species is specialized to occupy these unique microsite habitats that were formed in the Pleistocene, and once lost, slickspots cannot be recreated on the landscape.

Livestock pose a threat to *Lepidium papilliferum*, primarily through mechanical damage to individual plants and slickspot habitats. However, the current livestock management conditions and associated conservation measures address this potential threat such that it does not pose a significant risk to the viability of the species as a whole.

All of these threats have long been recognized as contributing to the ongoing degradation of the sagebrush-steppe ecosystem of southwestern Idaho. However, we have only recently received independent evaluations of the direct relationship between the more significant threats and indicators of population viability specifically for *Lepidium papilliferum*. New evidence suggests that there is a significant negative association between cover of nonnative plant species and wildfire and the abundance of *L. papilliferum*, such that the species appears to be in decline across its range, with adverse impacts continuing and likely increasing into the foreseeable future. Each of the threat factors contributing to the present or threatened destruction, modification, or curtailment of *L. papilliferum*'s habitat or range is assessed in detail below.

Modified Wildfire Regime

Fire was historically infrequent in the desert shrublands of the Great Basin, as

the native plant communities of the native annuals and bunchgrasses did not provide sufficient fine fuels to carry large scale wildfires. The bare spaces between widely spaced shrubs and relatively low fuel loads in such ecosystems as the sagebrush-steppe generally prevented fires from spreading very far, and any fires that did burn were usually restricted to relatively small, isolated patches (Brookes and Pyke 2001, p. 5; Whisenant 1990, pp. 4, 6). Natural fire return intervals in sagebrush-steppe prior to the arrival of European settlers are estimated to have ranged from 60 to 110 years; the estimate for the more xeric *Artemisia tridentata* ssp. *wyomingensis* sagebrush community inhabited by *Lepidium papilliferum* is estimated to have been as long as 100 years (Wright and Bailey 1982, p. 158) and possibly up to 240 years (Baker 2006, p. 181). Beginning in the early 1900s, however, the widespread invasion of nonnative plant species, particularly annual grasses such as *Bromus tectorum* and *Taeniatherum caput-medusae*, has created a bed of continuous fine fuels across the southwest Idaho landscape. The continuous fine fuels provided by these nonnative annual grasses result in more frequent fires due to greater horizontal fuel continuity, increased fuel surface-to-volume ratio, and various properties that facilitate wildfire ignition, such as lower moisture content and thus increased flammability (Whisenant 1990, p. 6; Pellant 1996, p. 3 and references therein; Brooks *et al.* 2004a, p. 679). Nonnative annual grasses also provide for more continuous and uniform fires, burning across extensive areas of the landscape. Native bunchgrasses provide a patchy, discontinuous fuelbed such that fires are not easily carried and tend to burn only in small patches. The continuous fires carried by nonnative annual grasses such as *B. tectorum*, on the other hand, leave few or no patches of unburned vegetation, which can inhibit the post-fire recovery of native sagebrush-steppe vegetation by eliminating seed sources for regrowth of the native species (Whisenant 1990, p. 4; Pyke 2007). *Bromus tectorum*, in particular, apparently alters the soil environment such that it creates a positive feedback loop, enhancing the environment for its own growth and generating conditions conducive to further invasion (Pyke 2007). As *B. tectorum* has become more dominant in the sagebrush-steppe habitat of the Snake River Plain over the past several decades, wildfire frequency intervals have become shortened from the historical average of 60 to 110 years to the current frequency intervals of 5 years or less (Wright and Bailey 1982, p. 158; Billings 1990, pp. 307-308; Whisenant 1990, p. 4; USGS 1999; West and Young 2000, p. 262; Launchbaugh *et al.* 2008, p. 3; Zouhar *et al.* 2008, pp. 40-41).

The dramatic increase in the frequency of wildfires has a particularly negative effect on the native plant community in this region that has historically experienced fire relatively infrequently, and thus is dominated by plants that are not adapted to short fire-return intervals. Many of the native species of the sagebrush-steppe ecosystem are killed outright by wildfires and do not have adaptations such as underground rhizomes for post-fire vegetative regrowth, but must reproduce by seed. As a result, under a regime of increasingly frequent fire, perennial plants tend to be lost from the landscape (Whisenant 1990, p. 9). Sagebrush (*Artemisia* spp.), for example, are easily killed by fire (Baker 2006, p. 178 and references therein; Cooper *et al.* 2007, p. 8; USDA Forest Service Fire Effects Information System 2009). Because they are not adapted to frequent fires, sagebrush does not resprout after burning, as many fire tolerant species do (Young and Evans 1978, pp. 283, 287; Brooks and Pyke 2001, pp. 6-7; USDA Forest Service Fire Effects Information System 2009), but must rely upon seed sources for reestablishment. Natural revegetation requires a nearby remnant seed source, as from an unburned patch of sagebrush, which now rarely occurs because of the more continuous and extensive fires that occur if a *B. tectorum* understory is present (USDA Forest Service Fire Effects Information System 2009). In addition, when fires occur as frequently as every 3 to 5 years, even if seedlings should begin to grow there is not sufficient time for sagebrush to regenerate prior to the next fire cycle. Thus, sagebrush is eliminated from the plant community, which in turn allows for conversion to annual grassland (Whisenant 1990, p. 9; Pyke 2007; USDA Forest Service Fire Effects Information System 2009). The short fire-return intervals now experienced in this region prevent the sagebrush-steppe community from recovering and attaining late seral stage condition, thus eliminating high quality habitat for *L. papilliferum*.

The dramatic increase in frequency and extent of wildfires has contributed to the conversion of vast areas of sagebrush-steppe into invasive annual grasslands (USGS 1999). Since post-fire conditions are favorable for further invasion and establishment of nonnative annual grasses, invasive grasses soon dominate the community, leading to the establishment of an invasive grass-increased fire frequency cycle (Whisenant 1990, p. 4; Brooks and Pyke 2001, p. 5; D'Antonio and Vitousek 1992, pp. 73, 75; Brooks *et al.* 2004a, p. 678). Invasive grasses promote recurrent fires, which in turn convert high diversity native shrublands to low diversity alien grasslands; these grasslands then burn more frequently and expansively across the landscape, creating disturbance conditions that promote the further expansion of the invasive grasses, and so on. This invasive grass-fire cycle has been recognized in Great Basin shrub ecosystems since the 1930s (Brooks and Pyke 2001, p. 5, and references therein). As an example, at the Snake River Birds of Prey National Conservation Area in the Snake River Plain area of southern Idaho, nearly half of the native sagebrush-steppe habitat (a total of 494,211 ac (200,000 ha)) converted to nonnative annual grasslands in less than 10 years by a series of 200 fires (Smith and Collopy 1998, as cited in Brooks and Pyke 2001, p. 7).

The rate of conversion from sagebrush-steppe to annual grasslands continues to accelerate in the Snake River Plain of southwest Idaho (Whisenant 1990, p. 4). As the coverage of *Bromus tectorum* continues to increase in the region, it is reasonable to expect that the extent and frequency of wildfires will likewise continue to increase, given the demonstrated positive feedback cycle between these factors (Whisenant 1990, p. 4; Brooks and Pyke 2001, p. 5; D'Antonio and Vitousek 1992, pp. 73, 75; Brooks *et al.* 2004a, p. 678). Climate change models also project a likely increase in fire frequency within the semiarid Great Basin region inhabited by *Lepidium papilliferum* (see *Climate Change* under Factor E, below).

Wildfire therefore contributes to the continuing invasion and establishment of nonnative annual grasslands within the range of *Lepidium papilliferum*, which in turn further increases the likelihood of more frequent and intense wildfires across the range of the species (Brooks *et al.* 2004a, pp. 677-687). But wildfire's role in promoting the invasion of annual grasses goes beyond its circular positive impact on the fire cycle, as nonnative annual grasses and other nonnative plant species that are likely to invade following fire have numerous other negative effects on *L. papilliferum*, slickspots, and the surrounding sagebrush-steppe ecosystem as well, as described below under *Invasive Nonnative Plant Species*.

Wildfire also damages biological soil crusts, which are important to the sagebrush-steppe ecosystem and slickspots where *Lepidium papilliferum* occur, because the soil crusts stabilize and protect soil surfaces from wind and water erosion, retain soil moisture, discourage annual weed growth, and fix atmospheric nitrogen (Eldridge and Greene 1994 as cited in Belnap *et al.* 2001, p. 4; Johnston 1997, pp. 8-10; Brooks and Pyke 2001, p. 4). Fires can cause severe damage to soil crusts, altering their ecological function and creating an opportunity for invasion by weedy annual plant species (Johnston 1997, p. 10; Brooks and Pyke 2001, p. 4, and references therein). In a statistical analysis of HII and HIP data between 1998 and 2004, burned areas had less soil crust cover and higher nonnative plant cover (Menke and Kaye 2006b, p. 3). In general, *L. papilliferum* abundance is greatest in areas that also have the greatest cover of soil crust (Boise Foothills and Snake River Plain), although the populations in the Owyhee Plateau contrasted in showing a slightly negative (but not statistically significant) relationship with soil crust cover (Sullivan and Nations 2009, p. 135). Fire in the presence of shrubs, particularly sagebrush, tends to be greater in intensity, which decreases the potential for soil crust recovery (Johnston 1997, p. 11); therefore, recovery of these crusts after a fire is less likely in the sagebrush-steppe habitat where *L. papilliferum* occurs. Given the generally positive association between soil crust cover and *L. papilliferum*, the compromised integrity of the microbiotic crust in response to fire likely has a negative impact on *L. papilliferum* as well.

More frequent wildfires also promote soil erosion and consequent sedimentation, as perennial grasses that normally limit erosion are eliminated in arid environments such as the sagebrush-steppe ecosystem (Bunting *et al.* 2003, p. 82). Increased sedimentation can result in a silt layer that is too thick for optimal *Lepidium papilliferum* germination (Meyer and Allen 2005, pp. 6-7). Wind erosion following wildfire can also remove the top silt layer of slickspots, exposing the clay vesicular layer below, as observed at HIP transect 721 following the 2007 Murphy Complex Fire (U.S. BLM 2007, p. 23). However, effects of the loss of the upper slickspot silt layer on *L. papilliferum* are not known.

The threats of wildfire and nonnative invasive species working in concert are considered the predominant factor affecting *Lepidium papilliferum*, particularly its habitat quality. In a statistical analysis of HII data over 5 years between 1998 and 2001, areas that had burned earlier in the study and were left with depleted shrub and soil crust did not recover (Menke and Kaye 2006a, p. iii). Burned areas had less native plant cover, greater nonnative plant cover, increased slickspot perimeter compromise (the slickspot boundaries lose definition), and increased organic debris accumulation (Menke and Kaye 2006a, p. iii). As mentioned above, analysis of additional HII and HIP data from 1998 through 2004 showed that burned areas had less soil crust cover and greater nonnative plant cover (Menke and Kaye 2006b, p. 3). Past wildfires thus appear to have had a lasting negative impact on the plant community surrounding slickspots, including increased nonnative species cover and decreased soil crust cover (Menke and Kaye 2006b, p. 19). Although we recognized wildfire as one of the primary threats affecting the matrix habitat of *L. papilliferum* in our 2007 finding, at that time we did not have any data that directly tied wildfire with a negative impact on the species itself, as would be demonstrated, for example, by a corresponding decline in *L. papilliferum* abundance (72 FR 1622, 1635; January 12, 2007).

As discussed above, several researchers have noted signs of increased habitat degradation for *Lepidium papilliferum*, most notably in terms of exotic species cover and wildfire frequency (e.g., Moseley 1994, p. 23; Menke and Kaye 2006b, p. 19; Colket 2008, pp. 33-34), but only recently have analyses demonstrated a statistically significant negative relationship between the degradation of habitat quality, both within slickspot microsites and in the surrounding sagebrush-steppe matrix, and the abundance of *L. papilliferum*. Sullivan and Nations (2009, pp. 114-118, 137) found a consistent, statistically significant negative correlation between wildfire and the abundance of *L. papilliferum* across its range. Their analysis of 5 years of HIP monitoring data indicated that *L. papilliferum* "abundance was lower within those slickspot (sic) that had previously burned" (Sullivan and Nations 2009, p. 137), and the relationship between *L. papilliferum* abundance and fire is reported as "relatively large and statistically significant," regardless of the age of the fire or the number of past fires (Sullivan and Nations 2009, p. 118). The nature of this relationship was not affected by the number of fires that may have occurred in the past; whether only one fire had occurred or several, the association with decreased abundance of *L. papilliferum* was similar (Sullivan and Nations 2009, p. 118).

The evidence also points to an increase in the geographic extent of wildfire within the range of *Lepidium papilliferum*. Since the 1980s, 59 percent of the total *L. papilliferum* management area acreage rangewide has burned, more than double the acreage burned in the preceding three decades (from the 1950s through 1970s). Based on available information, approximately 11 percent of the total management area burned in the 1950s; 1 percent in the 1960s; 15 percent in the 1970s; 26 percent in the 1980s; 34 percent in the 1990s; and as of 2007, 11 percent in the 2000s (data based on GIS fire data provided by BLM Boise and Twin Falls District; I. Ross 2008, pers. comm. and A. Webb 2008, pers. comm., as cited in Colket 2008, p. 33). Based on the negative relationship observed between fire, *L. papilliferum*, and habitat quality as described above, we conclude that this increase in area burned translates into an increase in the number of *L. papilliferum* populations subjected to the negative impacts of wildfire.

An evaluation of *Lepidium papilliferum* EOs for which habitat information has been documented (79 of 80 EOs) demonstrates that most have experienced the effects of fire. Fifty-five of 79 EOs have been at least partially burned (14 of 16 EOs on the Boise Foothills, 30 of 42 EOs on the Snake River Plain and 11 of 21 EOs on the Owyhee Plateau), and 75 EOs have adjacent landscapes that have at least partially burned (16 of 16 EOs on the Boise Foothills, 39 of 42 EOs on the Snake River Plain, and 20 of 21 EOs on the Owyhee Plateau) (Cole 2009b, Threats Table).

In 2008, 38 of the 80 HIP transects were unburned, 6 were predominantly unburned, 5 approximately half burned and half unburned, 13 were predominantly burned, and 18 were completely burned. Sixty-six HIP transects had been at least partially burned to within 1,500 ft (500 m) (Colket 2009, p. 26). In 2007, the Inside Desert Fire on the Owyhee Plateau burned 2,695 ac (1,041 ha) within Management Area 11, and the Elk Mountain Fire burned 11,868 ac (4,083 ha) within Management Area 11; both fires were part of the 652,016 ac (263,862 ha) Murphy Complex Fire in the Owyhee Plateau region (Colket 2009, p. 65). In 2008, the first year of HIP monitoring following the fire was completed in the four transects (Transects 701, 711, 719, and 721) that burned in the Murphy Complex Fire

(Colket 2009, p. 24). All 10 slickspots at HIP transect 701 had been previously burned before being burned again in 2007. At HIP transect 711, only 1 slickspot had been previously burned, but 9 of its 10 slickspots were burned in the Murphy Complex Fire. HIP transects 719 and 721 were completely unburned high quality big sagebrush habitat before the Murphy Complex Fire burned all 10 slickspots at both HIP transects (Colket 2009, p. 24).

A 2009 geospatial data analysis evaluating the total *Lepidium papilliferum* EO area affected by wildfire from 1957 to 2007 found that 107 wildfires have occurred, the fire perimeters of which included approximately 11,442 ac (4,509 ha), or 73 percent of the total EO area (Stoner 2009, p. 48).

Table 3 shows the evidence of wildfires documented through HIP rangewide transect monitoring in 2008 and includes both recent and historical fires. Wildfire evidence can remain on the landscape for up to 20 years.

TABLE 3. EVIDENCE OF WILDFIRE DOCUMENTED AT HIP TRANSECTS IN 2008 (COLKET 2009, TABLE 5, PP. 50-62).

Physiogeographic Region	Number of HIP transects at least partially burned	Number of HIP transects not burned	Total HIP transects	Adjacent landscapes within 0.31 miles (500 meters) of HIP transects either burned or partially burned
Boise Foothills	7	3	10	10
Snake River Plain	21	26	47	38
Owyhee Plateau	14	9	23	19
TOTAL	**42 (52.5 percent)**	**38 (47.5 percent)**	**80 (100 percent)**	**67 (84 percent)**

The effects of fire disturbance and habitat degradation are evident in some of the earliest photographs of HII and HIP transects, which show habitats lacking shrubs and dominated by *Bromus tectorum*. However, photographs from the early 1990s of transects that had not burned prior to being established were comprised primarily of native *Artemisia tridentata* with a nonnative *B. tectorum* or *Ceratocephala testiculata* understory. As of 2008, 14 of 80 total HIP transects had changed from a higher to a lower habitat quality classification since 2004, or had been partially or completely burned (Colket 2009, pp. 8-9). The photographs demonstrate that many of the transects that burned are now devoid of *A. tridentata* and are instead dominated by *B. tectorum* (Colket 2009, pp. 63-64).

At present, ongoing control efforts may slow the incidence of wildfire in some areas, but are not capable of preventing wildfires across the range of *Lepidium papilliferum*. For example, four established HIP transects on the Owyhee Plateau burned in 2007 in the Inside Desert and Murphy Complex fires, even though wildfire control measures were in place and implemented (Colket 2009, p. 24). In the Snake River Plain region, portions of two EOs (EO 32, EO 26) were burned in 2006 by the Ten York Fire and Cold Fire respectively. No EOs or portions of known EOs are documented to have burned in the Snake River Plain and Boise Foothills regions in 2007 (U.S. BLM 2008a, p. 21). On the OTA, the IDARNG has demonstrated intensive management efforts implemented to suppress wildfire and using wildfire-rehabilitation activities with minimal ground disturbance have been effective in reducing the threat of wildfire and the rate of spread of nonnative invasive species (for additional information, see *Wildfire Management and Post-Wildfire Rehabilitation* section below). However, such intensive management is currently concentrated within *L. papilliferum* EOs and is possible only within a limited range of *L. papilliferum*. This may explain why the highest quality habitat remaining is on the OTA, where the greatest infrastructure is in place to manage and control wildfires.

Summary of Modified Wildfire Regime

The observed increases in frequency and geographic extent of wildfires, the negative consequences for *L. papilliferum* and its habitat associated with the invasion of nonnative grasses and wildfire, the strong positive feedback loop between wildfire and conversion of sagebrush-steppe to annual grasslands, and the lack of effective rangewide control mechanisms all contribute to the current modified wildfire regime being the greatest ongoing threat to *L. papilliferum*'s existence. In addition, the best available data indicates that fire frequency is likely to increase in the foreseeable future due to increases in cover of *B. tectorum* and the projected effects of climate change (see *Invasive Nonnative Plant Species*, below, and also *Climate Change* under Factor E, below). Ongoing habitat loss and degradation is a result of the current wildfire regime, which is interrelated with several other negative factors, including: Increased nonnative species cover, especially annual grasses; increased sedimentation and organic debris accumulation in slickspots, which could alter slickspot function and hinder germination of *L. papilliferum*; the loss of native matrix vegetation, particularly shrubs; decreased native plant species diversity; decreased cover of microbiotic crusts; and habitat fragmentation due to isolation of habitat patches following fire.

Given the observed negative association between the abundance of *Lepidium papilliferum* and the increased frequency of fire, as well as the demonstrated negative impacts of frequent fire on the components that normally provide high quality habitat for *L. papilliferum*, such as late seral stage sagebrush and high microbiotic crust cover, we consider the current wildfire regime to pose a significant threat to *L. papilliferum*. Recurrent fire promotes the continued invasion of nonnative annual grasses and other invasive nonnative plants, along with all of their associated negative effects (see *Invasive Nonnative Plant Species* below). Based on the observed increases in the cover of *Bromus tectorum* throughout the range of the species, the lack of effective control mechanisms, and projections under most climate change models, we expect the degree of this threat will continue and likely increase within the foreseeable future. The significant threat posed by the current modified wildfire regime is pervasive throughout the range of the species.

Invasive Nonnative Plant Species

Invasive nonnative plants have become established in *Lepidium papilliferum* habitats by spreading through natural dispersal (unseeded) or have been intentionally planted as part of revegetation projects (seeded). Invasive nonnative plants can alter multiple attributes of ecosystems, including geomorphology, wildfire regime, hydrology, microclimate, nutrient cycling, and productivity (Dukes and Mooney 2003, pp. 1-35). They can also negatively affect native plants through competitive exclusion, niche displacement, hybridization, and competition for pollinators; examples are widespread among native taxa and ecosystems (D'Antonio and Vitousek 1992, pp. 63-87; Olson 1999, p. 5; Mooney and Cleland 2001, p. 1). Geospatial analyses indicate that approximately 20 percent of the total area of all *L. papilliferum* EOs rangewide is dominated by introduced invasive annual and perennial plant species (Stoner 2009, p. 81), and monitoring of HIP transects rangewide indicates that nonnative plant cover is continuing to increase at a relatively rapid pace (Colket 2008, pp. 1, 3). Although, historically, disturbance of native communities tended to pave the way for invasion by nonnative plants, today nonnative annual plants such as *Bromus tectorum* are so widespread that they have been documented spreading into areas not impacted by disturbance (Piemeisel 1951, p. 71; Tisdale *et al.* 1965, pp. 349-351; Stohlgren *et al.* 1999, p. 45). The known impacts of nonnative plants on *L. papilliferum* are discussed in this section.

One of the characteristics of slickspots is that they are largely devoid of native shrubs, grasses, and forbs, with the exception of *Lepidium papilliferum*; this is one of the features that make slickspots relatively easy to detect on the landscape (Moseley 1994, pp. 8, 14; Fisher *et al.* 1996, pp. 3-4, 11; Colket 2008, p. 1). *Lepidium papilliferum* has adapted to the unique edaphic and hydrological (soil and water) properties of the slickspot microsites that it inhabits, and has thus evolved with little competition from other native plants (Moseley 1994, p. 14). Weedy, nonnative plants have begun to invade these slickspots, however, including *Agropyron cristatum, Bromus tectorum, Lepidium perfoliatum, Ceratocephala testiculata*, and, in some areas, *Bassia prostrata* (Colket 2009, p. 3; Fisher *et al.* 1996, p. 4; Sullivan and Nations 2009, p. 99).

In our January 12, 2007, finding (72 FR 1622), we recognized invasive nonnative plants as one of the primary factors degrading the quality of *L. papilliferum*'s habitat, but at the time we had no evidence demonstrating any negative association between the presence of nonnative plant species and either the abundance of *L. papilliferum* itself or the proportion of *L. papilliferum* in flower. For example, Menke and Kaye (2006b, p. 15) originally reported no correlation between the abundance of *L. papilliferum* and weedy species cover, either within slickspots or in the surrounding matrix vegetation. However, more recent analyses of the additional years of data now available have revealed a significant negative association between the presence of weedy species and the abundance or density of *L. papilliferum*, to the point that *L. papilliferum* may be excluded from slickspots (Sullivan and Nations 2009, pp. 109-112). Although the specific mechanisms are not well understood, some of these plants, such as *A. cristatum* and *B. tectorum*, are strong competitors in this arid environment for such limited resources as moisture, which tends to be concentrated in slickspots (Pyke and Archer 1991, p. 4; Moseley 1994, p. 8; Lesica and DeLuca 1998, p. 4), at least in the subsurface soils (Fisher *et al.* 1996, pp. 13-16). The available information, detailed below, indicates that nonnative plants in both slickspots and the surrounding matrix vegetation are negatively affecting *L. papilliferum*. Furthermore, we now have additional evidence that areas occupied by *L. papilliferum* formerly dominated by native vegetation are experiencing relatively rapid increases in cover of nonnative plant species; for example, Colket (2008, pp. 1, 3) reports that 22 of the 80 HIP transects (28 percent) have shown increases in nonnative plant species cover of 5 percent or more over the last 4 to 5 years. Here we discuss the effects of nonnative plant species on *L. papilliferum* and its habitat, detailing the evidence related to unseeded and seeded nonnative plants separately.

Unseeded Nonnative Invasive Plants

The most common unseeded nonnative annual grasses known to occur in *Lepidium papilliferum*'s habitat include *Bromus tectorum* and *Taeniatherum caput-medusae*. Annual nonnative forbs now commonly associated with slickspots include *Lepidium perfoliatum, Salsola kali* (tumbleweed, also known as Russian thistle), *Sisymbrium altissimum* (tumble mustard, also known as tall tumble mustard), and *Ceratocephala testiculata* (Colket 2009, pp. 8-9).

As discussed under *Modified Wildfire Regime* above, *Bromus tectorum* in particular has become dominant in many sagebrush-steppe habitat areas during the last century due to livestock grazing, agriculture, and wildfire impacts (Pickford 1932, p. 165; Piemeisel 1951, p. 71; Peters and Bunting 1994, p. 34; Vail 1994, pp. 3-4; Brooks and Pyke 2001, pp. 4-6). Vast areas of sagebrush shrublands have been converted to *B. tectorum* in the past century (about 31,000 mi^2 (80,000 km^2) in the Great Basin alone) (Menakis *et al.* 2003, p. 284). Low-elevation sites, which are relatively dry and experience wide variation in soil moisture, appear to be more vulnerable to *B. tectorum* invasion than higher elevation sites with more stable soil moisture. *Bromus tectorum* plants tend to be larger and more fecund in a post-wildfire environment than on unburned sites, potentially leading to subsequent increases in density on burned sites under favorable climatic conditions (Zouhar 2003a, as summarized in Zouhar *et al.* 2008, p. 154). The invasion of nonnative plant species, particularly annual grasses, has had a greater effect on the lower elevation sagebrush shrublands in the Snake River Plain of Idaho that historically experienced less frequent fire than higher elevation sites in the region; the higher elevation sites have higher precipitation and historically had more fine grasses and more frequent wildfires (Gruell 1985, pp. 103-104; Peters and Bunting 1994, p. 33). These lower elevation sagebrush shrublands include the range of *Lepidium papilliferum*. As detailed under *Modified Wildfire Regime*, above, the *B. tectorum*–fire cycle modifies and degrades the native sagebrush-steppe ecosystems on which *L. papilliferum* depends, and recurrent fire prevents the system from achieving the late seral stage condition that characterizes high-quality habitat for the species.

In addition to perpetuating the cycle of increased wildfire within the range of *Lepidium papilliferum*, nonnative plants such as *Bromus tectorum* and *Taeniatherum caput-medusae* can have additional negative impacts on *L. papilliferum* through competition, displacement, and altering the ecological function of slickspots. Invasive grasses can replace native plants such as *L. papilliferum* by outcompeting them for resources, such as soil nutrients or moisture (Brooks and Pyke 2001, p. 6, and references therein). *Bromus tectorum* in particular appears to displace native plants by prolific seed production, early germination, and superior competitive abilities for the

extraction of water and nutrients (Pellant 1996, pp. 3-4; Pyke 2007). In addition, *B. tectorum* is capable of modifying the ecosystems by altering the soil temperatures and soil water distribution (Pellant 1996, p. 4). Evidence that *B. tectorum* is likely displacing *L. papilliferum* is provided by Sullivan and Nations' (2009, p. 135) statistical analyses of *L. papilliferum* abundance and nonnative invasive plant species cover within slickspots. Working with 5 years of HIP data collected from 2004 through 2008, Sullivan and Nations found that the presence of other plants in slickspots, particularly invasive exotics such as *Bassia prostrata* and *Bromus tectorum*, was associated with the almost complete exclusion of *L. papilliferum* from those microsites (Sullivan and Nations 2009, pp. 111-112). Of all the factors considered in their analysis, only the amount of *B. tectorum* in the plant community around slickspots showed a consistent relationship with the abundance of *L. papilliferum* across all three physiographic regions comprising the range of the species, and in all cases this relationship was significantly negative (Sullivan and Nations 2009, pp. 131, 136-137).

In addition to the roughly 3.3 million ac (1.3 million ha) of public lands in the Great Basin already dominated by *Bromus tectorum* (translating to about 5,156 mi^2 or 13,354 km^2), Pellant (1996, p. 1, and references therein) identifies another 76.1 million ac (30.8 million ha, or 119,000 mi^2 (308,210 km^2)) either infested with this nonnative grass or susceptible to invasion by the species, and suggests that the spread of *B. tectorum* could increase in the future due to its adaptability, including the presence of multiple genotypes.

The dominance of *Bromus tectorum* in an area may also be positively related to the density of Owyhee harvester ants (*Pogonomyrmex salinus*), which represent an emerging threat to *Lepidium papilliferum*. The replacement of sagebrush by annual grasses, such as *B. tectorum*, apparently creates conditions favorable to nesting of the native harvester ant, leading to expanded range and density of this potentially important seed predator of *L. papilliferum*. The invasion of *B. tectorum* and other nonnative annual grasses may thus exacerbate the threat posed by seed predation (see Factor C, Disease or Predation, below, for details).

Bradley and Mustard (2006, p. 1146) found that the best indicator for predicting future invasions of *Bromus tectorum* was the proximity to current populations of the grass. Colket (2009, pp. 37-49) reports that 52 of 80 HIP transects (65 percent) had *B. tectorum* cover of 0.5 percent or greater within slickspots in at least 1 year between 2004 and 2008; nearly 95 percent of slickspots had some *B. tectorum* present. If current proximity to *B. tectorum* is an indicator of the likelihood of future invasion by that nonnative species, then *Lepidium papilliferum* is highly vulnerable to future invasion by *B. tectorum* throughout its range. If the invasion of *B. tectorum* continues at the rate witnessed over the last century, an area far in excess of the total range occupied by *L. papilliferum* could be converted to nonnative annual grasslands within the foreseeable future. First introduced around 1889 (Mack 1981, p. 152), *B. tectorum* cover in the Great Basin is now estimated at approximately 30,888 mi^2 (80,000 km^2) (Menakis *et al.* 2003, p. 284), translating into an historical invasion rate of approximately 257 mi^2 (666 km^2) a year over 120 years. If the spread of *B. tectorum* continues at even half of that rate, an area equal in size to the 2,250 mi^2 (5,800 km^2) range of *L. papilliferum* would be invaded by *B. tectorum* in less than 20 years. In addition, climate change models for the Great Basin region also predict climatic conditions that will favor the growth and further spread of *B. tectorum* (see Factor E, *Climate Change*, below).

There is increasing evidence that nonnative plants are invading formerly sparsely vegetated slickspots (Moseley 1994, p. 14), and the presence of these nonnative plants within slickspots is negatively associated with the abundance of *Lepidium papilliferum* (Sullivan and Nations 2009, pp. 109-113). Although Menke and Kaye (2006b, p. 15) found no significant correlation between weedy species cover and either abundance of *L. papilliferum* or proportion of *L. papilliferum* in flower based on a single year of observations (2004), Sullivan and Nations' (2009, p. 135) statistical analyses of plant abundance and nonnative invasive plant species cover within slickspots (based on 5 years of HIP data from 2004 through 2008) indicated that *L. papilliferum* abundance decreased with increased *Bromus tectorum* cover in the Boise Foothills and the Snake River Plain at statistically significant levels. There was no relationship evident on the Owyhee Plateau; however, the authors note that there is little *B. tectorum* in the slickspots in that region. Therefore, the nature of any relationship in that region would be difficult to detect (Sullivan and Nations 2009, p. 135). Although *B. tectorum* is not yet invading slickspots to a great extent in the Owyhee Plateau region, its increasing presence across the landscape is indicative of degraded *L. papilliferum* habitat (Sullivan and Nations 2009, pp. 136-137). Similarly, survey sites on the Owyhee Plateau from 2000 through 2002 with "abundant" weeds (referred to as unseeded nonnative plants) had 26 percent fewer total *L. papilliferum* plants when compared to the least-weedy sites, and more rosettes than flowering plants, indicating proportionally fewer flowering *L. papilliferum* plants (Popovich 2009, p. 26).

Another nonnative annual grass, *Taeniatherum caput-medusae*, overlaps in both distribution and habitat requirements with *Bromus tectorum*. Introduced in the late 1880s, the subsequent rapid spread of *T. caput-medusae*, has caused serious management concerns in the Great Basin because of its vigorous competitive nature and ability to transform native shrub and perennial grass ecosystems to annual grass monocultures, much like *B. tectorum* (USDA Forest Service Fire Effects Information System 2009).. *Taeniatherum caput-medusae* cover increases and rapidly spreads under frequent fires at the expense of native species, and may even replace *B. tectorum* (Hironaka 1994, pp. 89-90; Brooks and Pyke 2001, p. 5; USDA Forest Service Fire Effects Information System 2009). *Taeniatherum caput-medusae* is unpalatable to livestock and has low forage value. When dry, the dead *T. caput-medusae* vegetation decomposes slowly and forms a persistent dense litter on the soil surface. Similar to *B. tectorum*, accumulated *T. caput-medusae* litter enables stand-replacement fires to occur in ecosystems that are not adapted to frequent fire (Brooks and Pyke 2001, p. 5; Norton *et al.* 2007, pp. 2-3; Hironaka 1994, pp. 89-90). Wildfires in *T. caput-medusae*-infested areas usually minimally damage soil surfaces and soil erosion is limited, but enough *T. caput-medusae* seeds typically survive to produce thin, vigorous stands of *T. caput-medusae* plants the following year. Within a few years, stand densities approach pre-fire levels, perpetuating the modified wildfire regime (Hironaka 1994, pp. 89-90; Brooks and Pyke 2001, p. 5; Norton *et al.* 2007, pp. 2-3; Chambers 2008, p. 53). As with *B. tectorum, T. caput-medusae* continues to expand its range in association with increased fire frequency (USDA Forest Service Fire Effects Information System 2009).

Other nonnative invasive species in sagebrush-steppe habitats have the ability to displace native plant species, such as *Lepidium papilliferum*. For example, *Chondrilla juncea* (rush skeletonweed) is an unseeded, nonnative, invasive, perennial plant found in some HIP transect slickspots (Colket 2009, p. 8). In 2008, *C. juncea* was observed during native plant surveys in the Boise Foothills to be widespread and occurring in small, low-density stands (Cole 2008, p. 13). Ongoing recreation-related soil disturbance from pedestrians and cyclists will likely encourage *C. juncea* invasion into *L. papilliferum* sites (Cole 2008, p. 13). *Chondrilla juncea* moves into new areas primarily through wind-transported seed dispersal and root fragment transport, but persists and expands primarily through bud formation on root systems of established plants (Kinter *et al.* 2007, p. 393; USFS 2009). Disturbance to aboveground *C. juncea* plants stimulates formation of root buds, making this invasive plant difficult to control, and potentially allowing this nonnative invasive plant to displace *L. papilliferum*.

Examining the presence of *Bassia prostrata, Bromus tectorum, Agropyron cristatum*, total seeded nonnative plants, total unseeded nonnative plants, and biological crust cover, Sullivan and Nations (2009, p. 109) concluded that "near mutual exclusivity of these plants (excepting biological crust) and slickspot peppergrass is a dominant pattern." Although, historically, few species other than *L. papilliferum* were found in slickspots, nonnative plant species now appear to be displacing *L. papilliferum* from its specialized slickspot microsite habitats. The results from 2008 HIP monitoring revealed that all 80 HIP transects (10 transects on the Boise Foothills, 48 transects on the Snake River Plain and 22 transects on the Owyhee Plateau) monitored within 54 EOs had some nonnative, unseeded plant cover (Colket 2009, Table 4, pp. 37-49). Within some transects, the amount of nonnative plant cover within slickspots was high. For example, within the Boise Foothills, 1 of 10 HIP transects had 85 percent nonnative plant cover and 1 of 10 transects had nonnative plant cover between 25 and 50 percent of the transect. On the Snake River Plain, 2 of 48 transects had nonnative plant cover between 25 and 50 percent of the transect. Unseeded nonnative invasive plant cover was lowest in the Owyhee Plateau, where none of the 22 HIP transects had unseeded nonnative invasive plant cover greater than 10 percent (Colket 2009, Table 4, pp. 37-49). At this point, a minority of transects has a high degree of nonnative plant cover. The evidence indicates, however, that the degree of nonnative plant cover is increasing, and can do so at a relatively rapid rate (because Colket (2008, pp. 1-3) reported increases in nonnative plant species cover of 5 percent or more over the span of 4 to 5 years in 28 percent of the HIP transects formerly dominated by native plant species).

Existing conservation measures designed to reduce the potential adverse effects of nonnative, unseeded species are addressed in three conservation documents (CCA, U.S. Air Force Integrated Natural Resource Management Plan (INRMP), and IDARNG INRMP) that apply to approximately 98 percent of *Lepidium papilliferum*'s occupied range. The CCA includes conservation measures designed to protect remnant blocks of native vegetation, prioritize weed control measures at *L. papilliferum* EOs, develop and implement protective weed control techniques, describe revegetation requirements for disturbed areas, educate the public on nonnative species and their spread, use vehicle wash points and stations, and support research and funding for nonnative species control (State of Idaho *et al.* 2006, pp. 131-132). The military also has a number of ongoing efforts to suppress nonnative species on U.S. Air Force and IDARNG managed lands. All military vehicles entering the IDARNG's OTA from areas more than 50 mi (80.4 km) away are washed at a high-pressure wash-rack facility to prevent weed seed introduction. Small patches of noxious weeds are hand-pulled when they are found by IDARNG staff, and other larger noxious weed sites on the OTA are reported annually to BLM for treatment (IDARNG 2004, p. 67). The U.S. Air Force tries to reduce the impacts of exotic annual species by reseeding disturbed areas with native vegetation to the maximum extent practicable, eradicating noxious weeds prior to their spreading, and requiring the cleaning of U.S. Air Force vehicles and equipment on a wash rack upon return to the base. The U.S. Air Force avoids the use of pesticides within 25 ft (8 m) of slickspots and uses pesticides only if wind conditions are favorable (directed away from the slickspot) to prevent the loss of *L. papilliferum* (U.S. Air Force 2004, pp. R-4, R-5). While these efforts are beneficial, their effectiveness is limited by the challenge of controlling or eliminating invasive nonnative plants from all the sagebrush-steppe ecosystems where *L. papilliferum* occurs, due to the sheer magnitude of the problem, logistical and budgetary limitations, and the still-evolving methodology for restoring these ecosystems to their natural condition (Bunting *et al.* 2003, p. 82; Pyke 2007).

Seeded Nonnative Invasive Plants

Rangeland revegetation projects on public lands in southwest Idaho have included providing forage for livestock, controlling erosion, preventing wildfires, reducing nonnative annual grass density, and rehabilitating watersheds. To meet these revegetation objectives, land managers often plant nonnative species, which can outcompete native species and result in decreased biodiversity (summarized by Harrison *et al.* 1996; Beyers 2004, p. 953). For example, *Agropyron cristatum*, a forage species that was once commonly planted in revegetation projects within the range of *Lepidium papilliferum*, is a strong competitor, and its seedlings are better than some native species at acquiring moisture at low temperatures (Pyke and Archer 1991, p. 4; Lesica and DeLuca 1998, p. 1; Bunting *et al.* 2003, p. 82). We now know that when *A. cristatum* is present in a slickspot, *L. papilliferum* tends to be few in numbers or absent altogether (Sullivan and Nations 2009, p. 109), indicating that *A. cristatum* is likely displacing *L. papilliferum*. *Thinopyrum intermedium* (intermediate wheatgrass, formerly *Agropyron intermedium*) has also been seeded in some southern Idaho rangeland areas, including the Owyhee Plateau region, where it is found in *L. papilliferum* sites on U.S. Air Force (CH2MHill 2008a, p. 5) and BLM lands (ERO Resources Corporation 2008, p. 10; Colket 2009, pp. 37-49). One long-term research study (73 years) conducted in Utah, Idaho, and Nevada found that once established, *T. intermedium* and *Bromus inermis* (smooth brome) dominate a site and suppress not only other herbaceous species, but also *Artemisia* spp. and *Purshia tridentata* (bitterbrush) recruitment (Monson 2002, p. 2). Natural recruitment of native species on the U.S. Air Force's Juniper Butte Range in the Owyhee Plateau region is impeded by establishment of *T. intermedium* (CH2MHill 2008a, p. 17). The introduction of these nonnative plants and consequent displacement of the native species that comprise late seral stage sagebrush habitat contributes to the ongoing degradation and loss of quality habitat for *Lepidium papilliferum*.

In addition to contributing to the degraded condition of *Lepidium papilliferum* habitat in general, the best

available data suggest that there may be a negative relationship between seeded nonnative plant species and the abundance of *L. papilliferum*. Statistical analyses of habitat type and *L. papilliferum* abundance from surveys conducted from 2000 through 2002 in the Owyhee Plateau region indicated that the number of *L. papilliferum* plants per site was three times higher in native sagebrush-steppe habitat areas or burned areas that had not been seeded compared to areas seeded with *Agropyron cristatum* (Popovich 2009, p. 25). Similarly, the density of *L. papilliferum* plants was nearly twice as high in a site dominated by native grasses than in a site that had been seeded with *A. cristatum* on the Owyhee Plateau (Young 2007, p. 28). Rangewide, there was no statistical relationship between *A. cristatum* cover and *L. papilliferum* abundance based on 2004 through 2008 HIP data (Sullivan and Nations 2009, p. 136). Although the data regarding *A. cristatum* in the surrounding plant community thus appear to be somewhat equivocal, the evidence suggests that *A. cristatum* successfully competes with and ultimately displaces *L. papilliferum* once it invades occupied slickspots (Sullivan and Nations 2009, p. 109).

Bassia prostrata is another nonnative species that has been used for rangeland habitat restoration. Abundant numbers of *B. prostrata* plants have been observed (greater than 1,000 plants) in relatively small slickspots, and *B. prostrata* is documented as a direct competitor with *Lepidium papilliferum* in slickspots (DeBolt 2002; Quinney 2005). An evaluation study of the Poen Fire rehabilitation project located in the Snake River Plain region documented the loss of *L. papilliferum* along five monitoring transects, coupled with a dramatic increase in *B. prostrata* over a 6–year period following aerial seeding after the fire (DeBolt 2002). Observations of four slickspots supporting both *L. papilliferum* plants and *B. prostrata* plants in 2000 were void of *L. papilliferum* and dominated by *B. prostrata* in 2005 (Quinney 2005). Sullivan and Nations (2009, pp. 110-112) also found that *L. papilliferum* was absent from slickspots when *B. prostrata* was present; this relationship was particularly strong on the Snake River Plain, which comprises more than 80 percent of the EO area for *L. papilliferum*. These observations all indicate that *B. prostrata* is a strong competitor with *L. papilliferum* in slickspots and is capable of excluding *L. papilliferum* from slickspots within a short period of time.

Although *Bassia prostrata* has not been observed at the HIP transects on the OTA (ICDC 2007b, p. 1), it has been documented on five HIP monitoring transects in the Snake River Plain region at least once between 2004 and 2008. While the majority of these transects have less than 1 percent cover of *B. prostrata*, one transect (19B) is documented as having up to 38.5 percent cover of *B. prostrata* within slickspots (Colket 2009, Table 4, p. 39). In 2006, five new observations of *B. prostrata* occurring within slickspots were documented at four HIP transects in the Snake River Plain region and one HIP transect in the Boise Foothills region, in addition to the three HIP transects located on the Snake River Plain region, where it was previously observed. Four of these five *B. prostrata* observations were in permanently marked slickspots on HIP transects. As *B. prostrata* had not been detected in the general occurrence area or along the vegetation transect before it appeared in the slickspots, this indicates that *B. prostrata* can invade formerly unoccupied slickspots quickly.

Expansion of seeded *B. prostrata* into unseeded areas could be detrimental to *Lepidium papilliferum* and its habitat, due to its rapid growth within slickspots and ability to replace *L. papilliferum* within slickspots (ICDC 2007a, p. 29; see also discussion above). In addition, between 2004 and 2008, *B. prostrata* was documented in the general area around six HIP transects (but not within the slickspots themselves, as above); five of these six observations were first detected in 2008 (Colket 2009, Table 4, pp. 38-46), indicating that this invasive species is quickly moving into areas where it has not been observed before and that currently support *L. papilliferum*. *Bassia prostrata* is also documented to occur in slickspots in areas that had not been seeded with this invasive forb species after the Poen Fire (DeBolt 2002), indicating the species is spreading on its own.

The 2008 HIP monitoring results revealed that, of the 80 HIP transects monitored within 54 EOs, 18 transects had some level of nonnative, seeded plant cover (Colket 2009, Table 4, pp. 37-49). For example, seeded nonnative invasive plant cover was highest on the Owyhee Plateau region, where 4 of 22 transects had nonnative, seeded species cover between 5 and 10 percent and 11 of 22 transects had nonnative, seeded plant cover below 1 percent (Colket 2009, Table 4, pp. 46-49). Nonnative, seeded plant cover is minimal in the remainder of the range of *Lepidium papilliferum*, with the Boise Foothills region only having 3 of 10 HIP transects with nonnative, seeded plant cover in 2008, and the Snake River Plain region having only 4 of 48 transects with nonnative, seeded plant cover in 2008. In general, the documented percentage of nonnative plant cover in the 2008 HIP transect monitoring is attributable to *Agropyron cristatum*, except for one site in the Snake River Plain region that contains 14.1 percent cover in *Bassia prostrata*, down from 38.5 percent cover in 2007 (Colket 2009, p. 39). Approximately 80 percent (9,163 ac (3,708 ha)) of the Juniper Butte Range is dominated by nonnative perennial plant communities as a result of past wildfire rehabilitation efforts (U.S. Air Force 1998, pp. 3-120 to 3-121).

Increases in cover of invasive, nonnative, seeded grass species may also be problematic for *Lepidium papilliferum*. After HIP transect 715 was fenced in 2005, *Agropyron cristatum* cover increased so much that the slickspots were barely visible in 2008 (Colket 2009, p. 23). The number of *L. papilliferum* individuals at HIP transect 715 ranged from 224 to 273 in 2004 and was 286 in 2005, but these numbers dropped to 16, 17, and 10 plants in 2006, 2007, and 2008, respectively. It is unclear whether this decrease in the number of *L. papilliferum* plants is related to the increase in *A. cristatum* cover and associated litter cover in the slickspots (Colket 2009, p. 23).

Although nonnative seed was formerly used extensively for revegetation projects, currently the trend is toward increased use of native seed. Management practices involving the use of nonnative seed vary among the land management agencies. As specified in a Conservation Agreement between the BLM and the Service (U.S. BLM and FWS 2006, p. 17), *Bassia prostrata* is not recommended for rehabilitation projects within the range of *Lepidium papilliferum*, although it may be used as a last resort species for stabilization projects adjacent to *L. papilliferum* habitat. BLM emphasizes the use of native plants, including forbs, in seed mixes and avoids the use of invasive nonnative species when possible (State of Idaho *et al.* 2006, p. 26). In January 2004, the BLM issued an Instruction Memorandum directing employees to comply with CCA requirements for emergency stabilization and wildfire rehabilitation activities (State of Idaho *et al.* 2006, p. 71). Use of native species in extensive wildfire rehabilitation projects varies based on native seed availability and site conditions that may affect seeding success rates. For example, the 2007 Murphy Complex Fire burned a portion of areas occupied by *L. papilliferum* in

the Owyhee Plateau region. Seed mixtures for emergency stabilization and restoration efforts used both native and non-invasive nonnative species; however, BLM did not use any *Agropyron cristatum, B. prostrata*, or *Thinopyrum intermedium* seed in the Murphy Complex Fire restoration effort (U.S. BLM 2008a, p. 1). In contrast, 120 ac (48.6 ha) that burned in the 2005 North Ham Fire, located within Management Area 10 in the Snake River Plain region, was drill-seeded with a nonnative, perennial grass-seed mixture comprised of 50 percent *A. cristatum* and 50 percent *Psathyrostachys juncea* (Russian wildrye) (U.S. BLM 2008a, p. 16). Drill and aerial seedings implemented in 2006 and 2007 in response to the Cold Fire (also in Management Area 10) included both native and nonnative seed mixtures. In some cases, BLM determined post-wildfire seedings using nonnative species were preferable due to their ability to compete successfully with the high density of *Bromus tectorum* present in some *L. papilliferum* MAs (U.S. BLM 2008a, p. 24).

Although the use of native plant species for post-wildfire rehabilitation projects is preferable, there have been ongoing problems with the availability and high cost of native seed (Jirik 1999, p. 110; Brooks and Pyke 2001, p. 9; Zouhar *et al.* 2008, p. 265). In recent years, BLM has been investing more resources in securing native seed and stock reserves through the Great Basin Native Plant Selection and Increase Project and the Great Basin Restoration Initiative. Consequently, more native seed and plant sources are available for ongoing and future restoration efforts for sagebrush-steppe habitat, but more progress is needed to ensure the availability and affordability of native seed for restoration efforts.

The U.S. Air Force and the IDARNG have ongoing efforts to address invasive, nonnative, seeded plants on their managed lands. The U.S. Air Force uses both native and nonnative, non-invasive plant materials and does not use *Bassia prostrata, Thinopyrum intermedium*, or salt-tolerant species such as *Atriplex canescens* (four-wing saltbush) in their restoration and revegetation efforts, with native plants used to the maximum extent practicable and in concert with the military mission for rehabilitation efforts on its lands on the Owyhee Plateau (U.S. Air Force 2004, p. R-4). The IDARNG INRMP for the OTA on the Snake River Plain includes objectives for maintaining and improving *Lepidium papilliferum* habitat and restoring areas damaged by wildfire. The plan specifies that the IDARNG will use native species and broadcast seeding, collecting, and planting small amounts of native seed not commercially available and will monitor the success of seeding efforts (IDARNG 2004, p. 72-73). Since 1991, the IDARNG, using historical records, has restored several areas using native seed and vegetation that was present prior to past wildfires. The IDARNG continues to use restoration methods that avoid or minimize impacts to *L. papilliferum* or its habitat, with an emphasis on maintaining species present in presettlement times (IDARNG 2004, p. 73).

Summary of Invasive Nonnative Plant Species

Invasive nonnative plant species pose a serious and significant threat to *Lepidium papilliferum*, especially when the synergistic effects of nonnative, annual grasses and wildfire are considered. Invasive, nonnative, unseeded species that pose threats to *L. papilliferum* include the annual grasses *Bromus tectorum* and *Taeniatherum caput-medusae* that are rapidly forming monocultures across the southwestern Idaho landscape. Nonnative plant species contribute to increased fire frequency, alter ecological function, outcompete and displace native plant species, and degrade the quality and composition of sagebrush-steppe habitat for *L. papilliferum*. The presence of *B. tectorum* in the surrounding plant community shows a consistently significant negative relationship with the abundance of *L. papilliferum* across all physiographic regions (Sullivan and Nations 2009, pp. 131, 137), and a significant negative relationship with *L. papilliferum* abundance within slickspots in the Snake River Plain and Boise Foothills regions (Sullivan and Nations 2009, p. 112). These results contrast with the information that was available to us at the time of our 2007 finding, which did not indicate any statistically significant relationship between invasive nonnative plants and the abundance of *L. papilliferum*, either in slickspots or in the surrounding plant community (72 FR 1622, p. 1635; January 12, 2007). Additionally, we have increasing evidence that nonnative plants are invading the slickspot microsite habitats of *L. papilliferum* (Colket 2009, Table 4, pp. 37-49) and successfully outcompeting and displacing the species (Grime 1977, p. 1185; DeBolt 2002, in litt; Quinney 2005, in litt; Sullivan and Nations 2009, p. 109). Monitoring of HIP transects shows that *L. papilliferum*-occupied sites that were formerly dominated by native vegetation are showing relatively rapid increases in the cover of nonnative plant species (Colket 2008, p. 1, 33). Regarding *B. tectorum* in particular, vast areas of the Great Basin are already dominated by this nonnative annual grass, and projections are that far greater areas are susceptible to future invasion by this species (Pellant 1996, p. 1). In addition, most climate change models project conditions conducive to the further spread of nonnative grasses such as *B. tectorum* in the Great Basin desert area occupied by *L. papilliferum* in the decades to come (see *Climate Change* under Factor E, below).

Given the observed negative association between the abundance of *Lepidium papilliferum* and invasive nonnative plants both within slickspot microsites and in the surrounding plant community, the demonstrated ability of some nonnative plants to displace *L. papilliferum* from slickspots, and the recognized contribution of nonnative plants such as *Bromus tectorum* to the increased fire frequency that additionally poses a primary threat to the species, we consider invasive nonnative plants to pose a significant threat to *L. papilliferum*. Nonnative grasses such as *B. tectorum* may additionally play a role in increased seed predation that poses a threat to *L. papilliferum* by providing habitat for the expansion of native harvester ant colonies (see Factor C, Disease or Predation, below). Currently, there are no feasible means of controlling the spread of *B. tectorum* or the subsequent increases in wildfire frequency and extent once *B. tectorum* is established on a large scale (Pellant 1996, pp. 13-14; Menakis *et al.* 2003, p. 287; Pyke 2007). The eradication of other invasive nonnative plants poses similar management challenges, and future land management decisions will determine the degree to which seeded nonnative plants may affect *L. papilliferum*. Based on the lack of effective control mechanisms, the demonstrated increases in nonnative plant cover in the range of the species, and the likely increases in cover of *B. tectorum* and other nonnative plant species predicted based on their successful invasive characteristics and models of climate change, we expect the degree of the threat from invasive nonnative plant species to continue and likely increase within the foreseeable future. We consider invasive nonnative plants, in conjunction with the modified wildfire regime, to pose the greatest threat to the viability of *L. papilliferum*. The significant threat posed by invasive nonnative plants is pervasive throughout the range of *L. papilliferum*.

Development

Development, as defined for HIP monitoring purposes, includes buildings, roads, water tanks, utility lines, railroad tracks, and fences (Colket 2009, Appendix A, HIP Protocol, p. 12). Agricultural development is recorded under a separate category. Residential, commercial, and agricultural development prior to 1955 has been reported as the cause for five documented and four probable extirpations of *Lepidium papilliferum* (Colket *et al.* 2006, p. 4). All forms of development can affect *L. papilliferum* and slickspot habitat, whether directly or indirectly, through habitat conversion (resulting in direct loss of individuals and permanent loss of habitat), or through habitat degradation and fragmentation as a result of consequent increased nonnative plant invasions, increased ORV use, increased wildfire, and changes to insect populations (ILPG 1999, pp. 1-3; Robertson and White 2007, pp. 7, 13).

The most direct impact of development is the outright loss of *Lepidium papilliferum* populations due to habitat conversion, such as when habitat occupied by *L. papilliferum* is converted to a residential development or an agricultural field, resulting in the permanent loss of the plant population and the habitat. As mentioned above, development has been documented as the cause of several population extirpations of *L. papilliferum* in the past, and at present, there are 10 approved or proposed development projects located in the Boise Foothills and Snake River Plain regions, all within the LEPA Consideration Zone (an area that contains *Lepidium papilliferum* identified within the CCA) (State of Idaho 2008). These activities include four approved, planned residential communities in Ada County totaling 4,062 ac (1,644 ha), and six other development projects submitted for approval to Ada County totaling 9,831 ac (3,978 ha). This area is in the Boise Foothills, which, although it represents a relatively small geographic extent of *L. papilliferum*'s range, supports the most dense and regionally abundant populations of the species (Sullivan and Nations 2009, p. 103). Several other planned communities on an additional 44,500 ac (18,008 ha) are proposed, but have not yet been submitted for County or other planning agency approval. In addition, large-scale planned communities have been proposed for the southern portion of the Snake River Plain region in Elmore County. These numbers reflect only planned communities which, by definition, are 640 ac (259 ha) or larger and do not include smaller developments, such as subdivisions (State of Idaho 2008). Developments of this nature likely lead to the extirpation of populations through permanent habitat conversion; they may also indirectly impact *L. papilliferum*, as described below. While it is unlikely that all of these planned communities will move forward in the near future due to the current economic climate, the scale of potential future residential and commercial development may impact several of the remaining *L. papilliferum* populations across the range of the species (State of Idaho 2008).

Indirect effects to *Lepidium papilliferum* are a likely consequence of the linear infrastructure associated with urban and residential development. In 2006, utility lines and accompanying roads were documented running through at least four EOs, natural gas pipelines were documented running through two EOs, and existing roads bisect at least six EOs (Colket *et al.* 2006, Appendix C). Additional infrastructure associated with the planned development projects described above is expected.

In addition to direct habitat destruction and associated loss of individual *L. papilliferum* plants, utility corridors and roads may allow increased ORV access, resulting in potential destruction or degradation of slickspots and possible direct mortality of individuals of *L. papilliferum*. They may also increase the chance of nonnative plant invasions (most notably *Bromus tectorum*, as described above), human-ignited wildfires, and contribute to habitat fragmentation and its associated consequences. The effects of these threats are summarized here, and additional details are provided under *Invasive Nonnative Plant Species* and *Current Wildfire Regime*, above, and Factor E, Habitat Fragmentation, below.

Transportation and utility corridors associated with urban and residential development can increase the spread of nonnative invasive plants. Roads appear to create avenues for invasion by *Bromus tectorum*, for example, because there is generally a positive significant association between nonnative, disturbance-tolerant species such as *B. tectorum* and proximity to roads (Forman and Alexander 1998, p. 210; Gelbard and Belnap 2003, pp. 424-425, 430-431; Bradley and Mustard 2006, p. 1142). Bradley and Mustard (2006, p. 1146) found an even stronger association between the presence of *B. tectorum* and power-line corridors, and they suggest that the stronger relationship between *B. tectorum* and recent disturbance (that is, power lines; roads were considered an historical disturbance) suggests that future placement of either roads or power lines would very likely result in invasion by *B. tectorum*.

Increased urban and residential development also increases the probability of human-ignited wildfires, presumably by increasing the area of the urban-wildland interface (e.g., Keeley *et al.* 1999, p. 1829; Romero-Calcerrada *et al.* 2008, pp. 341, 351; Syphard *et al.* 2008, pp. 610-611). Increases in human habitation and activity in the rangelands of southern Idaho have contributed to the increase in wildfire starts in recent years. For example, in the Jarbidge Field Office area of the BLM (Owyhee Plateau region), where 21 of 80 total EOs are found, 43 percent of the wildfires occurring since 1987 were human-caused (Launchbaugh *et al.* 2008, p. 3). Proximity to urban areas and roads can be an important causal factor associated with wildfire ignitions (Kalabokidis *et al.* 2002, p. 6; Brooks *et al.* 2004b, p. 3; Romero-Calcerrada *et al.* 2008, p. 351; Syphard *et al.* 2008, pp. 610-611).

Many of the ongoing and planned developments will require the construction of power, gas, and other transmission lines, as well as new road construction, which will impact and fragment *Lepidium papilliferum* habitats. In addition, several interstate-utility activities within the range of *L. papilliferum* have been proposed, including a new electric transmission line between Boardman, Oregon, and Murphy, Idaho (Boardman Hemingway project); a new transmission line between Casper, Wyoming, and Murphy, Idaho (Gateway West project); and a natural gas pipeline proposed, but currently on hold, that would run from Opal, Wyoming, through southern Idaho and end in Stanfield, Oregon (Sunstone Pipeline project) (State of Idaho 2008). The proposed route of the Gateway West Transmission Line project currently bisects habitat occupied by *L. papilliferum*.

Insect populations may also be affected by development, potentially impacting the primary vector of pollination and genetic exchange for *Lepidium papilliferum*. Insect densities have been documented as being lower in developed areas than in native habitats (Gibbs and Stanton 2001, p. 82; McIntyre and Hostetler 2001, p. 215; Zanette *et al.* 2005, p. 117; Clark *et al.* 2007, p. 333). Changes in native habitat caused by ongoing development or conversion of lands to agriculture may impact insect pollinator populations by removing specific food sources or habitats required for breeding or nesting

(Kearns and Inouye 1997, p. 298; McIntyre and Hostetler 2001, p. 215; Zanette *et al.* 2005, pp. 117-118). Habitat isolation and fragmentation resulting from development may also impact *L. papilliferum* by decreasing pollination from distant sources, possibly resulting in decreased reproductive potential (e.g., lower seed set) and reduced genetic diversity (see *Habitat Fragmentation and Isolation of Small Populations*, under Factor E, below). Reductions in pollinators due to development could thus potentially impact *L. papilliferum* reproductive success as well as contribute to reduced genetic variability, as the plant is dependent on insect pollination for successful reproduction and the transfer of genetic material between populations.

Ongoing and planned residential and urban development currently threaten the long-term viability of *Lepidium papilliferum* occurrences on private land, primarily in the Snake River Plain and Boise Foothills regions (Moseley 1994, p. 20; State of Idaho 2008; Stoner 2009, pp. 13-14, 19-20). All or portions of 12 *L. papilliferum* EOs covering 224 ac (90.7 ha) (1.0 percent of the total area of all EOs - not including EOs managed by cities or counties) occur on private land subject to development. Two of these 12 EOs are smaller than 1 ac (0.4 ha) and are classified as having fair to poor habitat quality (INHP data as of January 14, 2009); therefore, these EOs are particularly vulnerable to extirpation through development. Surveys conducted in 2008 documented that 21 of 80 HIP transects rangewide are located within 213 ft (65 m) of development, and 66 of 80 HIP transects were within 1,640 ft (500 m) of development. Proximity to development carries increased risk of mechanical disturbances (such as from ORV use), increased risk of wildfire ignition and invasion by nonnative plant species, as discussed above, and possibly decreases in the diversity or abundance of pollinators as well as vulnerabilities associated with fragmentation and isolation of small populations, as discussed under Factor E, below.

Summary of Development

Although the threat of development is relatively limited in scope, the impact of development on *Lepidium papilliferum* can be severe, potentially resulting in the direct loss of individuals, and perhaps more importantly, the permanent loss of its slickspot microsite habitats. The destruction of slickspots is of concern due to the finite nature of this limited resource. As described in the Background section, *L. papilliferum* occurs primarily in these specialized slickspot microsites. Slickspots and their unique edaphic and hydrological characteristics are products of the Pleistocene, and they likely cannot be recreated on the landscape once lost. The potential loss of slickspots, particularly those slickspots that are occupied by the species and thus clearly have the ability to provide the requisite conditions to support *L. papilliferum*, is therefore of great concern in terms of providing for the long-term viability of the species. In addition, since not all slickspots have above-ground plants in all years (see **Background** section, above), even the loss of currently unoccupied slickspots may represent the permanent loss of a finite specialized microhabitat that has the potential to support the species. Development additionally has the potential for more indirect impacts to the species, by contributing to increased habitat fragmentation, nonnative plant invasion, human-caused ignition of wildfires, and potential reductions in the population of insect pollinators.

Based on the best available information, past development has eliminated some historical *Lepidium papilliferum* EOs, and planned and proposed future developments threaten several occupied sites in the Snake River Plain and Boise Foothills regions. Most of the recent development has primarily occurred on the Snake River Plain and Boise Foothills regions, which collectively comprise approximately 83 percent of the extent of EOs; development has not been identified as an issue on the Owyhee Plateau (Stoner 2009, pp. 13-14, 19-20). We are aware of 10 approved or proposed development projects planned for these regions (State of Idaho 2008, pp. 3-5), which would affect 13 out of 80 EOs (16 percent of EOs). Though these developments are not certain to occur, they represent the likely location and magnitude of development over the foreseeable future. Development of sagebrush-steppe habitat is of particular concern in the Boise Foothills region, which, although relatively limited in its geographic extent, supports the highest abundance of *L. papilliferum* plants per HIP transect (Sullivan and Nations 2009, pp. 3, 103, 134).

We consider development to be a significant threat within the Boise Foothills and Snake River Plain portions of the range of *Lepidium papilliferum*, as the outcome of this threat is severe where it occurs and likely results in the permanent loss of populations and irreplaceable slickspot microsite habitats. However, this threat is not so imminent or sweeping in scope as to pose an immediate risk of extirpation to the populations of *L. papilliferum* in these regions, nor do we consider the threat of development to be equal to the magnitude and intensity of the primary threats of the modified wildfire regime and invasive nonnative plants. We consider development to pose a significant but lesser threat to the species.

Livestock Use

Livestock use in areas that contain *Lepidium papilliferum* has the potential to result in both positive and negative effects on the species, depending on factors such as stocking rate and season of use. Herbivory by livestock does not appear to be a problem, as *L. papilliferum* seems to be largely unpalatable to anything but insects (see Factor C, Disease or Predation, below). Livestock herbivory of invasive nonnative plants, especially annual grasses such as *Bromus tectorum*, is suggested as one of the potential benefits of livestock use that may contribute to the restoration of the sagebrush-steppe ecosystem (e.g., Pellant 1996, pp. 6, 10, 13). At the same time, livestock use may have negative effects on *L. papilliferum*. Trampling from livestock may result in direct damage or mortality of individual *L. papilliferum* plants, and the mechanical disturbance damages the slickspot soil layers, altering slickspot function and creating conditions conducive to the invasion of weedy nonnative plants.

Trampling damage to individual *L. papilliferum* plants appears to be relatively isolated, and occasional damage or mortality of individual above-ground plants is probably not of much consequence to the species as a whole, because studies and modeling of *L. papilliferum*'s life cycle indicate that the persistence of the plant is largely dependent on the proliferation of the seed bank (Palazzo *et al.* 2005, pp. 2-4, 8-9; Meyer *et al.* 2006, p. 900). If trampling results in the mortality of individual plants prior to seed set, however, that will have a negative impact on the persistence of the seed bank itself by reducing the number of seeds added.

Livestock trampling can also disrupt the soil layers of slickspots, altering slickspot function (Seronko 2004; Colket 2005, p. 34; Meyer *et al.* 2005, pp. 21-22). Trampling when slickspots are dry can lead to mechanical damage to the slickspot soil crust, potentially resulting in the invasion of nonnative plants and altering the hydrologic function of slickspots. In water-saturated slickspot soils, trampling by livestock can break through the restrictive clay layer; this is referred to as penetrating trampling

(State of Idaho *et al.* 2006, p. 9). Trampling that alters the soil structure and the functionality of slickspots (Rengasamy *et al.* 1984, p. 63; Seronko 2004) likely impacts the suitability of these microsites for *L. papilliferum*. Trampling can also negatively affect the seed bank by pushing seeds too deeply into the soil for subsequent successful germination and emergence. Meyer and Allen (2005, pp. 6-8) found that seed emergence success decreased with increasing depth in the soil, from a mean of 54 percent at the shallowest planting depth of 0.1 in (2 mm) to a mean emergence success of 5 percent at 1.2 in (30 mm) planting depth.

Two documented incidents suggest that trampling has the potential to negatively affect *L. papilliferum*, as penetrating livestock-trampling events at sites occupied by *L. papilliferum* were followed by large reductions in plant abundance in subsequent years, in one case going from thousands of plants annually to fewer than 10 plants recurring each year (Robertson 2003b, p. 8; Meyer *et al.* 2005, p. 22). Trampling has been suggested as the likely cause of the ensuing population reductions in these two incidents, but as these were observational reports, it is not known whether other factors may have also acted on these populations. A third incident occurred in 2005 at a HIP transect monitoring in EO 68, in the New Plymouth Management Area of the Boise Foothills region. In this incident, penetrating livestock trampling was observed in 3 of 10 slickspots on the transect to a depth of 3 in (8 cm), but not to the extent that the livestock penetrating-trampling trigger was tripped (the trampling ''trigger'' refers to a threshold for trampling set in the CCA, and is defined as breaking through the restrictive layer under the silt surface area of a slickspot during saturated conditions; State of Idaho *et al.* 2006, p. 9). Since that time, *L. papilliferum* numbers at this transect were substantially reduced, going from between 631 to 1,277 plants observed in 2004 to a total of 9 plants in 2005 and 3 plants in 2006. Similar reductions in plant abundance were not observed in other HIP transects in the New Plymouth MA, indicating that environmental factors shared by these sites were likely not responsible for the observed declines (Colket 2006, pp. 10-11). In 2007 and 2008, *L. papilliferum* numbers in this transect appeared to be slowly increasing (167 plants in 2007 and 224 plants in 2008), but had not reached the levels observed in 2004 prior to the incident (Colket 2009, p. 31).

Penetrating trampling by livestock may have a potentially detrimental effect on *Lepidium papilliferum*; however, these effects appear to be seasonal (most detrimental when soils are wet in the spring) and localized in nature. While we acknowledge that livestock use may have negative impacts on individual slickspots, statistical analyses of monitoring data available at this time have not demonstrated a significant correlation between livestock use and the abundance of *L. papilliferum* on a rangewide basis. In a statistical analysis of HII data from 1998 to 2001, recent livestock use did not appear to have any effect on *Lepidium papilliferum*, slickspot attributes, and plant community attributes (Menke and Kaye 2006a, p. iii). The evidence from this study is not strong, however, as the analysis of grazing impacts were limited to areas that had already been burned and had likely been previously grazed (Menke and Kaye 2006a, pp. 18-19). These researchers recommended additional analysis to confirm their findings (Menke and Kaye 2006a, p. iii). Later statistical analyses using additional years of rangewide HIP data, based on 4 years (2005 to 2008) and 5 years (2004 to 2008) of livestock use, also showed no significant relationships between *L. papilliferum* abundance and penetrating livestock trampling in slickspots (Salo 2009, p. 1; Sullivan and Nations 2009, p. 122), or between *L. papilliferum* abundance and total livestock-print cover or livestock-feces cover in slickspots (Sullivan and Nations 2009, p. 122). Statistical analyses of *L. papilliferum* data from 3 years of surveys on the Owyhee Plateau (2000-2002) showed that sites with low levels of livestock trampling exhibited greater numbers of *L. papilliferum* plants (averaging twice the total number of plants) than sites with high levels of trampling, although these results were statistically significant for only the year 2000. A significant positive relationship was also found between *L. papilliferum* abundance and distance to water and salt stations for use by livestock, with total plant abundance increasing with increasing distance away from water or salt sources (Popovich 2009, pp. 27-28).

A 2–year study designed to examine the relationship between livestock trampling effects and *Lepidium papilliferum* density did not show a significant change in *L. papilliferum* density as a result of the trampling treatment applied. Year-to-year variations in *L. papilliferum* density observed in this 2–year study were attributed to stochastic environmental factors and not trampling events (Young 2007, p. 19). Further research is needed to determine if higher levels of trampling, greater mean hoof print depths, or more frequent trampling treatments may affect *L. papilliferum* abundance (Young 2007, pp. 19-20). The ability to discern any livestock trampling effects was limited since all study areas were grazed 2 to 4 years prior to initiation of the study.

Livestock trampling events most likely to adversely affect *Lepidium papilliferum* usually occur when large numbers of livestock are concentrated on or around slickspots that are saturated with water (Hoffman 2005; Meyer *et al.* 2005, pp. 21-22). Saturated conditions typically exist for short periods each year and may never occur in some (drought) years (Hoffman 2005). Under the CCA, penetrating trampling is monitored to avoid livestock-related impacts to slickspots containing *L. papilliferum*. Penetrating trampling is defined by the CCA as breaking through the restrictive layer (i.e., the middle layer of slickspot soil that supports *L. papilliferum*, as described by Meyer and Allen 2005, p. 3) under the silt surface area of a slickspot during saturated conditions (State of Idaho *et al.* 2006, p. 9). Predicting when soils will be wet in a climate with few and inconsistent precipitation events is difficult. Supplemental salt and watering sites can alter livestock distribution, and depending on location, can increase or decrease trampling of slickspots. As described below, protective measures provided in several of the existing conservation plans for *L. papilliferum* are designed specifically to prevent or minimize the impacts to the species from livestock trampling, particularly during the seasons when slickspot soils are wet and most susceptible to damage.

There are also indirect effects from livestock use that have impacted the sagebrush-steppe ecosystem. Livestock use has been suggested as a contributing factor to the spread of both native and invasive nonnative plant species (e.g., Young *et al.* 1972, pp. 194-201; Hobbs and Huenneke 1992, p. 329; Frost and Launchbaugh 2003, pp. 43-45; Loeser *et al.* 2007, p. 95). The spread of *Bromus tectorum* across portions of the Snake River Plain has been attributed to several causes, including the past practice of intensive livestock use in the late 1800s (Mack 1981, pp. 145-165).

A small number of case studies from western North America suggest that grazing plays an important role in the decrease of native perennial grasses and an increase in dominance by nonnative annual species; however, invasion by nonnative grasses has been found to occur both with and without grazing in

some areas. Today, nonnative annual plants such as *Bromus tectorum* are so widespread that they have been documented spreading into areas not impacted by disturbance (Piemeisel 1951, p. 71; Tisdale *et al.* 1965, pp. 349-351; Stohlgren *et al.* 1999, p. 45); therefore, the absence of livestock use no longer protects the landscape from invasive nonnative weeds (Frost and Launchbaugh 2003, p. 44), at least with respect to *B. tectorum*.

Analysis of 3 years of HII data, from 1999 through 2001, showed no effect of livestock grazing on slickspot perimeter integrity, weedy species density, perennial forb or grass establishment, or organic debris accumulation in slickspots (Menke and Kaye 2006a, p. 10). Cumulative livestock sign (indicators of livestock presence) had a significant negative correlation with exotic grass dominance around slickspots (Menke and Kaye 2006a, p. 11), and with the frequency of slickspots with dense weedy annuals in 2001 (Menke and Kaye 2006a, p. 10). The analysis of grazing effects was limited since the HII data were observational only (no controlled experiments were performed), all areas were likely grazed at some point in the past, and grazing effects could only be observed in habitats that had burned in the past (Menke and Kaye 2006a, p. 18). In addition, there was no significant difference in cover of exotic plant species in slickspots between grazed and ungrazed areas in the 2004 HIP dataset, although soil crust cover was significantly lower in grazed transects (Menke and Kaye 2006b, p. 19). As described above, biological soil crusts are important to the sagebrush-steppe ecosystem and slickspots where *Lepidium papilliferum* occur as they stabilize and protect soil surfaces from wind and water erosion, retain soil moisture, discourage annual weed growth, and fix atmospheric nitrogen (Eldridge and Greene 1994 as cited in Belnap *et al.* 2001, p. 4). Young (2007, p. 19) did not find a significant change in the density of *Bromus tectorum, Ceratocephala testiculata*, and *Lepidium perfoliatum* following the application of a one-time, annual trampling treatment over a 2–year period. Both studies (Menke and Kaye 2006a,b; Young 2007) represent short-term data sets that likely are not capable of reflecting any potential long-term effects to *L. papilliferum* habitat.

The potential benefit of livestock use in reducing wildfire effects through a reduction of fine fuels has generated discussion in recent years (e.g., Pellant 1996; Loeser *et al.* 2007). The introduction of cattle, sheep, and horses to the Great Basin in the 1860s quickly created large ranching operations and grazing pressure. Heavy livestock grazing removed fine fuels and resulted in a substantial reduction in the number of fires and the acres burned. Only 44 fires, burning a total of 11,000 ac (6,875 ha), were reported from 1880 to 1912 in Great Basin rangelands (Miller and Narayanan 2008, p. 9). The number of livestock in Great Basin and sagebrush ecosystems has dropped rapidly since the passage of the Taylor Grazing Act of 1934 (43 USC 315; *http://www.blm.gov/wy/st/en/field_offices/Casper/range/taylor.1.html*, accessed July 23, 2008, as cited in Launchbaugh *et al.* 2008, p. 2). Livestock numbers in Idaho decreased in the 1950s primarily from loss of large sheep operations. Livestock numbers have fluctuated at, or below, this initial decrease through the remainder of the twentieth century, with a steady conversion from sheep to cattle. In the last decade, a substantial decrease in authorized use of livestock grazing on BLM lands in Idaho has been recorded (Launchbaugh *et al.* 2008, p. 2).

With careful management, livestock grazing may potentially be used as a tool to control *B. tectorum* (Frost and Launchbaugh 2003, p. 43) or, at a minimum, retard the rate of invasion (Loeser *et al.* 2007, p. 95). Although the spread of *B. tectorum* has been strongly linked with high-impact grazing, there is some evidence to indicate that grazing at more moderate levels may potentially inhibit the colonization of *B. tectorum* (e.g., Loeser *et al.* 2007, pp. 94-95); the researchers note, however, that experimental study over a longer time period is needed to verify this tentative conclusion. Others, however, have suggested that given the variability in the timing of *B. tectorum* germination and development, and its ability to spread vegetatively, effective control of *B. tectorum* through livestock grazing may be a challenge (Hempy-Mayer and Pyke, 2008, p. 121). While it is difficult to discern the relative importance of grazing, climate, and wildfire in contributing to nonnative plant abundance (D'Antonio *et al.* 1999, as described in Zouhar *et al.* 2008, pp. 23-24), areas with a history of livestock grazing often support a wide variety of nonnative species, especially in areas where nonnatives have been introduced to increase the forage value of rangelands or pastures (Zouhar *et al.* 2008, pp. 23-24).

Following investigations of the 2007 Murphy Wildland Fire Complex, fire-modeling efforts revealed that grazing in grassland vegetation can reduce the surface rate of spread and fire-line intensity to a greater extent than grazing in shrubland vegetation (Launchbaugh *et al.* 2008, pp. 1-2). Under extreme fire conditions (low fuel moisture, high temperatures, and gusty winds), however, grazing applied at moderate utilization levels has limited or negligible effects on fire behavior. When weather and fuel-moisture conditions are less extreme, grazing may reduce the rate of spread and intensity of fires, allowing for patchy burns with low levels of fuel consumption (Launchbaugh *et al.* 2008, pp. 1-2). Some research also indicates that grazed areas have a reduced likelihood of wildfire ignitions, likely by reducing the availability of fine fuels (Romero-Calcerrada *et al.* 2008, p. 351). Launchbaugh *et al.* 2008 (p. 32) state that "changes in grazing management aimed at managing fuel loads are not appropriate for homogeneous application across large landscapes and multiple management units. Such application of grazing across entire landscapes at rates necessary to reduce fuel loads and affect fire behavior, especially under extreme conditions, could have negative effects on livestock production and habitat goals." Targeted grazing to accomplish fuel objectives holds promise, but requires detailed planning that includes clearly defined goals for fuel modification and appropriate monitoring to assess effectiveness (Launchbaugh *et al.* 2008, p. 32).

Existing conservation plans (CCA, U.S. Air Force INRMP, IDARNG INRMP) contain numerous measures to avoid, mitigate, and monitor the effects of livestock use on *Lepidium papilliferum*. Livestock-grazing conservation measures implemented through the State of Idaho CCA and the U.S. Air Force INRMP apply to all Federal and State-managed lands within the occupied range of *Lepidium papilliferum* (98 percent of the acreage). Conservation measures prescribed by the CCA include minimum distances for placement of salt and water troughs away from occurrences of *L. papilliferum*. Several troughs and salt blocks have been moved as a result of these measures (State of Idaho *et al.* 2005; State of Idaho *et al.* 2006, p. 133). The CCA also includes measures to reduce livestock trampling during wet periods, including trailing (moving cattle to, or between, allotments repeatedly on the same path) restrictions (State of Idaho *et al.* 2006, pp. 132-134). High-priority *L. papilliferum* EOs identified in the CCA tend to have more restrictive conservation measures, such as no early spring grazing, fencing to exclude

livestock, and delaying turnout of livestock onto allotments when soils are saturated (State of Idaho *et al.* 2006, pp. 133-134). Delay of turnout is important following a soil-saturating precipitation event in areas containing *L. papilliferum* since it is difficult to avoid trampling effects on saturated slickspot soils. As part of the CCA, high-priority EOs were designated to emphasize protection and restoration of *L. papilliferum* habitats. Criteria for designating these EOs were based on existing habitat quality, geographic location relative to other existing EOs, minimal land-use activities, the absence or presence of resources to address threats, and the need to preserve enough EOs throughout the species' range to prevent extinction in case of a catastrophic event. To protect these high-priority EOs, BLM has shifted the season of livestock use on some allotments from spring to fall, and implemented a deferred-rotation management system on some allotments to protect annual flowering *L. papilliferum* plants from grazing impacts (State of Idaho *et al.* 2006, pp. 133-134).

Under the Juniper Butte Range INRMP, the U.S. Air Force utilizes livestock grazing as the primary means to minimize wildfire risk by reducing the amount of standing grass biomass (U.S. Air Force 2004, pp. 6-37 to 6-39). Livestock use occurs annually for up to 60 days while the Juniper Butte Range is shut down for clean-up and target maintenance. The military training shutdown period lasts a maximum of 60 days within a 90–day period, from April 1 through June 30 (U.S. Air Force 2000, pp. B-18 to B-21). The INRMP avoids livestock turnout onto the range when slickspots are wet in order to reduce trampling impacts to slickspot habitats, and then uses annual monitoring of slickspot soil moisture to determine appropriate livestock turnout dates for the Juniper Butte Range (U.S. Air Force 2000, pp. B-18 to B-21). Additionally, in 2002 the U.S. Air Force established three fenced enclosure areas of 173 ac (70.0 ha), 8 ac (3.2), and 30 ac (12.1 ha), respectively, to preclude all disturbance activities and promote *Lepidium papilliferum* research and seed collection (Binder *in litt.* 2006) compatible with the Air Force mission.

Summary of Livestock Use

Evidence of the direct and indirect potential impacts to *Lepidium papilliferum* and slickspots from livestock use is relatively limited with the data currently available. We recognize the potential for negative impacts to *L. papilliferum* populations and slickspots that may result from seasonal, localized trampling events. However, with the implementation of conservation measures to minimize potential direct and indirect impacts of livestock to *L. papilliferum*, such as restricting livestock access to areas occupied by *L. papilliferum* when slickspot soils are wet and thus most vulnerable to damage, we consider livestock use to be a lesser threat to the species than the primary threats posed by the altered wildfire regime and associated increase in nonnative, invasive plant species within the range of *L. papilliferum*. We acknowledge that current data may not be adequate to detect time-dependent issues associated with livestock use as only 5 years of HIP data are available (Sullivan and Nations 2009, p. 137), and encourage the continued implementation of conservation measures and associated monitoring to ensure potential impacts of livestock trampling to *L. papilliferum* are avoided or minimized. Under current management conditions, we do not consider livestock use to pose a significant threat to *L. papilliferum*.

Wildfire Management and Post-Wildfire Rehabilitation

Some activities associated with wildfire management, including fuel management projects (e.g., greenstrips, prescribed fire), wildfire suppression activities, and post-wildfire rehabilitation, can potentially impact existing *Lepidium papilliferum* occurrences and damage slickspot habitat by mechanical disturbances or by facilitating the establishment of nonnative plant species (ILPG 1999). At the same time, wildfire management and post-wildfire rehabilitation activities have the potential to benefit *L. papilliferum* by reducing the occurrence and extent of wildfire and by revegetating its habitat with native plant species to prevent the encroachment of invasive nonnative grasses and other nonnative plant species, thus reducing two of the most significant threats to the viability of the species.

The direct effects of wildfire management activities may include injury or mortality of individual plants, and possibly damage to or destruction of the seed bank, through mechanical disturbance or direct exposure to herbicides. Indirect effects associated with mechanical disturbance of slickspot soils include an increased probability of establishment of invasive nonnative plants, burial of the seed bank to a depth where seedlings cannot emerge from the soil, and mixing of slickspot soil layers, which affects slickspot function and the suitability of a microsite for successful support of the species.

Drill seeding is a rangeland rehabilitation technique that is often used to restore vegetation after wildfire using a rangeland drill that plants and covers seed simultaneously in furrows. Drill seeding is designed to give the seeds moisture and temperature advantages to enhance their competitive fitness and, consequently, increase their survival rate (Scholten and Bunting 2001, p. 3). Drill seeding has been used on wildfire rehabilitation projects on BLM lands where *Lepidium papilliferum* occurs. It impacts slickspots through mechanical disturbance and introduces other, often nonnative, plant materials. Historically, slickspots were not understood to have any special ecological value, so no attempt was made to avoid them during rehabilitation activities. Although more recent land management actions have established buffers to protect slickspots and *L. papilliferum* from herbicide use, we have no data on how the physical disturbance from past drill seedings has affected *L. papilliferum* habitats. Although drill seeding may have less severe impacts on slickspot habitat than disking the soil, the success of restoring slickspots and *L. papilliferum* plants using drill seeding varies considerably. The benefits of post-fire revegetation to prevent the establishment of *Bromus tectorum* and subsequent recovery of soil surfaces conducive to germination and establishment of native perennial grass and shrub communities may outweigh the impacts from the initial short-term disturbance associated with drill seeding (Young and Allen 1996, pp. 533-534; Bunting *et al.* 2003, pp. 82-85). For further information on the effects of nonnative species used for rehabilitation and restoration efforts in *L. papilliferum* habitats, see the Seeded Nonnative Invasive Plants section above.

Rangewide, disk or drill seeding has occurred on portions of 3 of 16 EOs in the Boise Foothills region, 10 of 43 EOs in the Snake River Plain region, and 9 of 21 EOs on the Owyhee Plateau region (Cole 2009b, Threats Table). The effect of drill seeding is also monitored as part of the rangewide HIP transects monitoring. In 2008, of the 80 *Lepidium papilliferum* transects monitored, 1 transect in the Boise Foothills region, 1 transect in the Snake River Plain region, and 9 transects in the Owyhee Plateau region had evidence of old drill seedings within slickspots (Colket 2009, pp. 66-67). In a 3–year study on the Owyhee Plateau from 2000 through 2002, Popovich (2009, pp. 8, 11) found that unseeded sites supported three

times as many *L. papilliferum* on average as sites that had been seeded. However, it is unclear whether the reduction in *L. papilliferum* numbers at seeded sites is the result of the physical disturbance of slickspot soils associated with drill seeding, competition from the seeded, nonnative invasive grass planted at these sites (*Agropyron cristatum*), or a combination of the two.

In 2006, rangeland emergency stabilization and rehabilitation activities were implemented on the Snake River Plain region in response to seven fires (8,312 ac (5,190 ha)) that burned in 2005, and one fire that burned in 2006 (161 acres (65 ha)). In 2007, rangeland rehabilitation work was implemented for 10 additional wildfires that burned in 2006. The rehabilitation activities included drill seeding utilizing low-impact, no-till drills, herbicide treatment, and aerial seeding (U.S. BLM 2008a, pp. 4, 8, 13, 16). On the Owyhee Plateau, non-ground-disturbing techniques were used following the Murphy Complex Fire for seeding in areas documented to support *Lepidium papilliferum* (U.S. BLM 2008b, Murphy map).

Ground disturbance associated with wildfire control, such as the establishment of fire lines (areas with vegetation removed to break fuel continuity), fire camps, firefighting staging areas, and the use of wildfire-suppression vehicles, can also impact existing *Lepidium papilliferum* occurrences and damage slickspot habitat (ILPG 1999). For example, in 2007, dual-wheel pickup tracks that appeared to have been associated with wildfire suppression efforts in 2006 were observed in 5 slickspots (HIP transect 032 in Management Area 5) during the 2007 HIP transect monitoring in the Snake River Plain region (ICDC 2008, p. 9).

Firefighting crews and their equipment may also indirectly impact *Lepidium papilliferum* through dispersal of invasive-plant propagules (e.g., seeds or vegetative structures) as they travel from other regions to wildfires in southern Idaho, or travel within the local area of the fire. As fire camps are typically set up in large, flat clearings that have been disturbed in the past, these areas often support populations of invasive plants. Propagules of these plants adhere to fire personnel and their equipment, and may be dispersed elsewhere as crews move about (Zouhar *et al.* 2008, p. 273), potentially contributing to nonnative plant invasions in *L. papilliferum* habitat.

The construction of fuel breaks intended to slow the movement of wildfire can benefit *Lepidium papilliferum* by protecting slickspots from burning. However, the construction of fuel breaks may also negatively impact *L. papilliferum* through ground disturbance or the use of native seeded species. Nonnative species (such as *Agropyron cristatum* and *Bassia prostrata*) are planted in fuel breaks as greenstrips. Greenstrips are expected to slow the spread of wildfire as the plants remain green (retain higher fuel moisture so are less flammable) for longer periods than annual plants such as *Bromus tectorum*. Wildfire control lines have been documented in three EOs, one in the Boise Foothills region and two in the Snake River Plain region, although none have documented wildfire control lines within slickspots (Colket *et al.* 2006, Appendix C; ICDC 2008, p. 9; Cole 2009b, Threats Table). In 2004, the Boise District of BLM developed a strategy to assess the feasibility of creating fuel breaks to protect *L. papilliferum*. A field assessment was conducted of over 84,550 ac (22,075 ha) of *L. papilliferum* habitat to identify potential fuel break routes. Nearly 125 mi (78 km) of potential fuel breaks were identified that would utilize existing roads and trails, in areas that could potentially protect up to 10,436 ac (6, 523 ha) containing *L. papilliferum* habitat within the LEPA Consideration Zone. None of these potential fuel breaks have been constructed as of spring 2008. There was one fuel break established in 2006 and 2007 along Interstate 84 from milepost 71 (Mayfield Exit) to milepost 89 (Mountain Home exit) by the Idaho Department of Transportation, a distance of approximately 30 mi (19 km). This fuel break likely reduced the number of wildfires escaping this stretch of Interstate 84, which is a source of frequent fire ignitions threatening several *L. papilliferum* occupied sites located in the Snake River Plain region (U.S. BLM 2008a, p. 20).

Through the 2006 CCA, BLM has implemented conservation measures designed to avoid or minimize impacts to the species from wildfire prevention, wildfire suppression, and post-wildfire, rangeland-rehabilitation activities (State of Idaho *et al.* 2006, Table 5). Rangeland rehabilitation and restoration standard-operating procedures for areas occupied with *Lepidium papilliferum* were first addressed in an Instruction Memorandum in January 2004 (State of Idaho *et al.* 2005, p. 33). Today, the BLM and fire cooperators distribute maps and inform crew members of the location of *L. papilliferum* to maximize wildfire protection in those areas, and to minimize potential impacts from fire-suppression activities (State of Idaho *et al.* 2006, p. 26). One conservation measure of the CCA instructs the BLM to use seeding techniques that minimize soil disturbance, such as no-till drills and rangeland drills equipped with depth bands. Implementation of these measures for rehabilitation and restoration projects have the potential to minimize the impact to *L. papilliferum* and its slickspot habitats (State of Idaho *et al.* 2006, p. 26). The BLM also avoids spraying herbicides within or near known occupied *L. papilliferum* habitat, and conducts pretreatment surveys on at least 5 percent of previously unsurveyed habitat prior to herbicide or ground disturbing treatments associated with emergency wildfire-rehabilitation activities (State of Idaho *et al.* 2006, p. 27). More recently, site-specific conservation measures to avoid or minimize potential impacts to *L. papilliferum* and its slickspot habitat were incorporated as part of a temporary, livestock-control fencing project in response to the Inside Desert Fire (in the Owyhee Plateau region) emergency stabilization and rehabilitation efforts (U.S. BLM 2008b, p. 3).

The U.S. Air Force and IDARNG also have implemented a number of ongoing efforts to minimize the impacts of wildfire-management activities. For example, the U.S. Air Force, like the BLM, uses drill seeders equipped with depth bands to minimize soil disturbance and avoids slickspots to the maximum extent practicable in drill seeding efforts. The U.S. Air Force uses broadcast seeding to the maximum extent practicable consistent with reseeding goals and uses wildfire indices to restrict activities when the wildfire rating hazard is extreme (U.S. Air Force 2004, pp. R-3, R-4). On the OTA, the IDARNG restores wildfire-damaged areas by broadcast seeding native species. As part of their annual training, the IDARNG provides their fire crews with maps of all known *Lepidium papilliferum* occupied habitat, and actively suppresses all wildfires on the OTA. Blading is not permitted in *L. papilliferum* habitat areas on the OTA, and existing roadways serve as fuel breaks and allow for quick access for wildfire management (IDARNG 2004, p. 73). Since 1987, the IDARNG has demonstrated that efforts to suppress wildfire and the use of native species with minimal ground-disturbing activities can be effective in reducing the wildfire threat, as well as in reducing rates of spread of nonnative

invasive species associated with wildfire management activities (IDARNG 2004, p. 73). In 2008, the IDARNG also initiated maintenance on a series of identified fuel breaks on the OTA. These fuel breaks are designed to act as barriers to prevent fires that might be ignited by military-training activities from spreading into adjacent *L. papilliferum* habitat (U.S. BLM 2008a, p. 20).

Summary of Wildfire Management and Post-Wildfire Rehabilitation

Wildfire management may have both positive consequences (the control of wildfires) and negative consequences (the destruction of slickspots or inadvertent introduction of invasive nonnative plants) for *Lepidium papilliferum* and its habitat, depending on how the activity is implemented. The negative consequences of wildfire management and rehabilitation activities appear to be relatively limited in both scope and severity, however, and we do not consider these negative effects to outweigh the positive effects of successful wildfire control, given that we consider frequent wildfires to be one of the primary threats to the species. On balance, wildfire and post-wildfire rehabilitation activities likely improve the status of the species. We therefore do not consider wildfire management or post-wildfire rehabilitation activities to be a significant threat to *L. papilliferum*.

Military Training

Military activities within the range of *Lepidium papilliferum* include ordnance-impact areas, training activities, and military development. Military-training activities occur at, or near, 4 of 80 extant EOs: 3 at the OTA on the Snake River Plain, and a portion of 1 EO at the Juniper Butte Range on the Owyhee Plateau. INRMPs have been developed and implemented for both the Juniper Butte Range and the OTA. The INRMPs provide management direction and conservation measures to address or eliminate the effects from military-training exercises on *L. papilliferum* and its habitat. Both the IDARNG (Quinney 2008; ICDC 2008, p. 21) and the U.S. Air Force (CH2MHill 2008a, pp. 1, 17) conduct annual monitoring to ensure impacts to the species due to training activities are either avoided or minimized. The IDARNG has implemented conservation measures for 18 years on the OTA, which currently supports nearly 60 percent of the highest-quality habitat rangewide (B-ranked, EO 27). This suggests that the conservation measures are effective in maintaining generally intact native plant vegetation and limiting anthropogenic disturbances on the OTA since it contains much of the best remaining habitat for *L. papilliferum* (Sullivan and Nations 2009, p. 91).

Summary of Military Training

The IDARNG and the U.S. Air Force continue to implement conservation efforts to avoid or reduce adverse effects of military training on *Lepidium papilliferum* and its habitat. Since the areas managed by the IDARNG and the U.S. Air Force continue to support some of the highest-quality habitat remaining for *L. papilliferum*, we consider the measures to minimize the impact of military-training exercises on the species and its habitat to have been effective. The IDARNG and U.S. Air Force are committed to continuing the implementation of these conservation measures into the future, through the CCA and their respective INRMPs. The threat of military training is localized in area, and minimal in significance across the range of the species, therefore we do not consider military training to pose a significant threat to *L. papilliferum*.

Recreation

Recreational activities that may affect *Lepidium papilliferum* include hiking, cycling, horseback riding, and the use of ORVs. These activities would be expected to impact the species primarily through mechanical disturbance (e.g., disruption of the slickspot soil layers, resulting in the reduction or loss of slickspot integrity and function) or crushing of individual plants, potentially resulting in injury or mortality. Areas where military training activities occur, such as the Juniper Butte Range and some areas of the OTA, are restricted from recreational activities because of military use.

ORV use has been documented in 22 of the 80 *Lepidium papilliferum* EOs (8 of 16 on the Boise Foothills, 14 of 42 on the Snake River Plain, and none on the Owyhee Plateau) for which habitat information has been collected (Cole 2009b, pp. 1-2). Effects from recreational activities, such as mechanical disturbance of soils from ORV use, are monitored as part of the rangewide HIP monitoring for *L. papilliferum*. ORV tracks were not detected in any EO or Management Area during 2008 HIP monitoring (Colket 2009, p. 9). In 2007, ORV tracks were detected at 2 of the 80 HIP transects sampled (ICDC 2008, p. 9). Dual-wheel truck tracks were also detected at 2 other transects. An earlier analysis of HII transects monitored between 1998-2001, and HIP transects during 2004-2006 indicated that ORV use was detected at only a few transects each year and that impacts appeared to be minimal.

Cycling and pedestrian trails built nearby and through the middle of occupied slickspots in the Boise Foothills are anticipated to impact individual plants and slickspot hydrology through trampling and spread of invasive nonnative plants in EO 38 near the Ada County Landfill (Cole 2008, p. 14). We have no other information to indicate that hiking or horseback riding have resulted in rangewide adverse impacts to *L. papilliferum*.

Summary of Recreation

Although recreational use has the potential for some negative effects on *Lepidium papilliferum*, the evidence indicates that observed impacts to *Lepidium papilliferum* from hiking, cycling, and ORV use have been minimal, and are infrequent and localized. While there is one EO being impacted by cycling and pedestrian trails, there is no information indicating that other recreational activities are impacting the species throughout its range, or that recreational usage within EOs is expected to increase. Recreation does not appear to be a major factor impacting either *L. papilliferum* or its slickspot habitat, therefore we have determined that recreation represents a minor threat to the species.

Conclusion for Factor A

Rationale

Based on the best scientific data currently available, the primary significant threats to *Lepidium papilliferum* are the effects of the modified wildfire regime and invasive nonnative plants, especially *Bromus tectorum*. These threats are impacting the quality and composition of the sagebrush-steppe ecosystem where *L. papilliferum* occurs, and are degrading the species' unique slickspot microsite habitats. These changes are associated with observed, significant decreases in the abundance of *L. papilliferum*. The observed increase in invasive annual grasses such as *B. tectorum* in the Great Basin, which includes the range of *L. papilliferum*, has resulted in increased frequency and extent of wildfires in *L. papilliferum*'s native-sagebrush systems; fires that once naturally occurred every 100 years now occur on the order of every 5 years or less. The frequent return intervals of wildfire prevent the native sagebrush community from regenerating, and the habitat cannot achieve the late seral stage condition that represents high-quality habitat for *L. papilliferum*. The increased

frequency of wildfires also results in the reduction of native plant diversity and species richness, and invasive nonnative plant cover increases in the wake of fire. Not only is this increase in nonnative plants being observed in the surrounding sagebrush matrix, but nonnative plants are increasingly invading the formerly sparsely vegetated slickspots, resulting in competitive exclusion of *L. papilliferum*. The combination of wildfire and nonnative plants additionally impacts slickspots by damaging the microbiotic crust and increasing sedimentation and organic matter, which hinders germination of *L. papilliferum*. Slickspots possess unique edaphic and hydrological properties, and represent a limited habitat resource on the landscape. As *L. papilliferum* is adapted to the specialized properties of slickspots, the degradation of slickspots to the point that they no longer provide the essential functions that support *L. papilliferum* represents a permanent loss of habitat for the species.

We have new information indicating a statistically significant negative association between the abundance of *Lepidium papilliferum* and wildfire, and a significant negative association between *L. papilliferum* abundance and percent cover of *B. tectorum* in the surrounding plant community; these negative associations are consistent throughout the range of the species. Wildfire occurs throughout the range of *L. papilliferum* and has dramatically increased in both frequency and extent, especially where *B. tectorum* is dominant. Furthermore, as *B. tectorum* and other nonnative annual grasses continue to spread and degrade the sagebrush-steppe ecosystem, we expect continued increases in fire frequency and magnitude, with associated negative impacts on *L. papilliferum*. As disturbances such as wildfire remove sagebrush and encourage the spread of nonnative annual grasses, we anticipate that the Owyhee harvester ant will expand into areas occupied by *L. papilliferum*, resulting in an increase in seed predation on *L. papilliferum*, with potential negative consequences for plant reproduction and the maintenance of the persistent seed bank (see Disease and Predation section below). Future development of the sagebrush-steppe habitat also threatens many of the remaining *L. papilliferum* sites, and is of particular concern in the Boise Foothills region, which supports the highest-density populations of *L. papilliferum*. Slickspots are relic Pleistocene formations and possess unique properties that likely cannot be recreated; slickspots lost to development represent a permanent loss of habitat for *L. papilliferum*.

Given the observed negative association between the abundance of *Lepidium papilliferum* and the increased frequency of fire, as well as the demonstrated negative impacts of frequent, recurrent fire on the components that provide high-quality habitat for *L. papilliferum*, such as late seral stage sagebrush and high microbiotic crust cover, we consider the current wildfire regime to pose a significant and primary threat to *L. papilliferum*. Recurrent fire additionally promotes the continued invasion of nonnative annual grasses and other invasive nonnative plants. Given the observed negative association between the abundance of *L. papilliferum* and invasive nonnative plants both within slickspot microsites and in the surrounding plant community, the demonstrated ability of some nonnative plants to displace *L. papilliferum* from slickspots, the potential for nonnative grasses to facilitate the expansion of Owyhee harvester ants and thus increase seed predation on *L. papilliferum*, and the recognized contribution of nonnative plants such as *B. tectorum* to the increased fire frequency that poses a primary threat to the species, we consider invasive nonnative plants to pose a significant and primary threat to *L. papilliferum* as well. Although conservation measures have been implemented in an attempt to protect *L. papilliferum* and its habitat from these threats, at present the challenge of controlling and preventing the further spread of invasive nonnative plants and wildfire is too great for these measures to effectively reduce the degree of threat to the species across its range. Based on the demonstrated increases in nonnative plant cover in areas occupied by *L. papilliferum*, including slickspot microsites, the observed continuing increases in *B. tectorum*, observed increases in the frequency and extent of wildfires through the range of the species, and the lack of effective control mechanisms, we expect the degree of the threat from wildfire and invasive nonnative plant species to continue and likely increase within the foreseeable future.

Development poses a somewhat lesser threat to the species. Although the impact of development can be severe, in that habitat conversion for residential, commercial, or agricultural development most often results in the permanent loss of slickspot habitat, the areas likely to be developed represent a relatively small portion of the species' range. The area most likely to be developed is, however, the area that supports some of the highest-density populations of *Lepidium papilliferum*. Other planned development projects, such as utility rights of way, can impact *L. papilliferum* by facilitating the increase of invasive nonnative plants and increasing the risk of human-caused wildfires, as well as through habitat fragmentation, isolation of populations, and potential reductions in insect pollinators. We consider development to pose a moderate degree of threat to *Lepidium papilliferum*, particularly for those populations in the Boise Foothills and the Snake River Plain physiographic regions.

We additionally considered whether livestock use, wildfire management and post-wildfire rehabilitation, military training, or recreation pose a threat to *Lepidium papilliferum* through the present or threatened destruction, modification, or curtailment of its habitat or range. In the case of livestock use, the best available data indicate that although livestock have the potential to pose a threat to *L. papilliferum*, at present this threat appears to be seasonal and localized in nature. The continued maintenance of implemented conservation measures to protect *L. papilliferum* from inappropriate livestock use will be important in ameliorating the effects of this threat. We do not consider livestock use to pose a significant threat to the species at this time. The effects associated with wildfire management and post-wildfire rehabilitation, military training, and recreation are all positive or relatively minimal, and we do not consider any of these activities to pose a significant threat to *L. papilliferum*.

Determination for Factor A

We have evaluated the best available scientific information on the present or threatened destruction, modification or curtailment of *Lepidium papilliferum*'s habitat or range, and determined that this factor poses a significant threat to the viability of the species throughout its range, such that we anticipate *L. papilliferum* is likely to become an endangered species within the foreseeable future.

B. Overutilization for Commercial, Recreational, Scientific, or Educational Purposes

We have no data indicating that overutilization for commercial, recreational, scientific, or educational purposes is a threat to *Lepidium papilliferum*.

C. Disease or Predation

We have no data indicating that disease poses a threat to *Lepidium*

papilliferum. On the other hand, though insect and mammal herbivory do not appear to pose a threat to *Lepidium papilliferum*, seed predation by the Owyhee harvester ant may become a significant threat to the species.

Insect herbivory of *Lepidium papilliferum* has been evaluated as part of pollinator and reproductive studies the past several years. The most abundant insect herbivore was a chrysomelid beetle, *Phyllotreta* sp., which chews holes in the flower's petals (Leavitt and Robertson 2006, pp. 658-659). *Lepidium papilliferum* flowers suffering damage from *Phyllotreta* (a hole chewed in a single petal) have been documented to set seed at a significantly lower rate than undamaged flowers on the same plant. Overall, herbivory of *L. papilliferum* petals by chrysomelid beetles reduces the effectiveness of insect-mediated pollination, but does not physically inhibit pollination or seed production. The effect of herbivory by chrysomelid beetles appears to be limited in its impact on the species, and we do have not evidence suggesting that it poses a significant threat to *L. papilliferum* at this time.

The Owyhee harvester ant was recently identified as a potentially important seed predator of *Lepidium papilliferum*. A study initiated in 2006 found that following *L. papilliferum*'s flowering season, Owyhee harvester ants remove the mature, seed-bearing fruits and return them to their nests outside of slickspots (Robertson and White 2007, pp. 8-13). The researchers found that harvester ants can remove up to 90 percent of *L. papilliferum* fruits and seeds, either directly from the plant or by scavenging seeds that drop to the ground (Robertson and White 2009, p. 9). Seventy-five percent of slickspots with flowering *L. papilliferum* located within 66 ft (20 m) of a harvester ant nest showed evidence of seed predation; the researchers suggest this is the maximum foraging distance for the Owyhee harvester ant (Robertson and White 2009, p. 10). Slickspots with high densities of flowering *L. papilliferum* were also observed as more likely to show evidence of seed predation than those with low densities (Robertson and White 2007, p. 13). Because harvester ants consume seeds of other plant species as well, most notably *Bromus tectorum, L. papilliferum* seeds are likely an opportunistic food item rather than an essential part of their diet (Robertson and White 2007, p. 12). Owyhee harvester ants have been observed bypassing seeds of *B. tectorum* in favor of *L. papilliferum* seeds (Robertson and White 2009, pers. comm.), but whether the seeds of *L. papilliferum* are preferred or may just be taken based on relatively greater seasonal availability is not yet known (Robertson 2009, pers. comm.).

The Owyhee harvester ant is a species native to Southwest Idaho; therefore, it might be assumed that *Lepidium papilliferum* co-evolved with the ant and has adapted to adjust for the observed levels of seed predation. Evidence suggests, however, that harvester ant colonies were likely not numerous in the intact sagebrush-steppe habitat that has historically surrounded *L. papilliferum* in its slickspot microsites. White and Robertson (2008, p. 3) found that Owyhee harvester ant colonies are uniformly low in number in areas with high sagebrush cover, while densities are highest in the study areas with little sagebrush cover. By contrast, Owyhee harvester ant colonies range from uncommon to very common in areas dominated by annual grasses (Robertson and White 2009, p. 13), which would include *Bromus tectorum*. The study authors suggest that sites dominated by annual grasses but with low harvester ant numbers may represent areas that the ants have yet to colonize, or the habitat is unsuitable for reasons other than vegetation (Robertson and White 2009, p. 13). They further suggest that the observed shift from sagebrush to annual grasses may enable the ants to colonize areas that were historically not suitable for nesting, with potentially negative consequences for *L. papilliferum* (Robertson and White 2009, p. 13).

Since Owyhee harvester ants are more common in disturbed areas with an abundance of *B. tectorum* (White and Robertson 2008, pp. 3-4), this raises a conservation concern for *Lepidium papilliferum*. As landscape disturbances such as wildfire are contributing to the loss or conversion of sagebrush habitats to annual grasslands, and these grasslands are likely to support higher densities of Owyhee harvester ants, these disturbances are likely contributing to an increase in the abundance and distribution of the harvester ants throughout *L. papilliferum*'s geographic range. Furthermore, since these ants have been observed to harvest up to 90 percent of the seeds produced by *L. papilliferum*, increased predation by harvester ants, even at much lower levels than 90 percent, has the potential to significantly depress the reproductive capacity of the plant, as well as diminish the capacity to replenish the species seedbank. However, as this threat was only recently discovered, we have no information indicating what the actual magnitude or severity of this threat might be. In addition, no conservation measures have yet been attempted to ameliorate the threat of seed predation by the Owyhee harvester ant, and the researchers have urged caution in taking such measures until managers have a better understanding of the threat (Robertson and White 2009, p. 14).

The OTA's "Red Tie" population of *Lepidium papilliferum* (EO 27) presents an interesting example of the potential threat posed by Owyhee harvester ants, and their apparent preferred association with grasses. Much of the Red Tie site is currently dominated by sagebrush (*Artemisia tridentata* ssp. *tridentata*), with *L. papilliferum*–occupied slickspots scattered throughout the sagebrush matrix. Currently, there is no evidence of contact between *L. papilliferum* and Owyhee harvester ants throughout most of the site where sagebrush dominates. The exception is at the periphery, where the vegetation transitions from sagebrush to a more open, grassland area. It was at this transition of habitat from sagebrush to grasslands where three active harvester ant colonies were found in 2008 (White and Robertson 2008, p. 4). The authors of this study caution that disturbances such as fire that remove sagebrush and promote the invasion of annual grasses may create conditions that promote the expansion of the harvester ants into areas currently occupied by *L. papilliferum*, resulting in increased seed predation throughout the range of the species (White and Robertson 2008, p. 4). Future HIP monitoring will examine proximity and density of Owyhee harvester ant colonies to *L. papilliferum* transects to track this potential new threat (Colket 2009, pers. comm.).

Herbivory impacts to *Lepidium papilliferum* from large, native ungulates, such as elk, deer, and antelope, have not been observed. Statistical analyses of wild ungulate hoofprint cover in slickspots from 2004-2008 HIP monitoring data showed no relationship with *L. papilliferum* abundance (Sullivan and Nations 2009, p. 122). Sullivan and Nations (2009, p. 122) likewise found no association between the cover of livestock hoof prints and *L. papilliferum* abundance. Domestic cattle are not known to feed upon *L. papilliferum*, and domestic sheep have been observed pulling plants from the ground and spitting them out (Quinney and Weaver 1998, pers. comm.). Herbivory by large ungulates, whether wild or domestic, thus does not appear to pose a threat to *L. papilliferum*.

Summary of Disease or Predation

Herbivory by chrysomelid beetles and by large ungulates, whether wild or domestic, does not appear to pose a significant threat to *Lepidium papilliferum*. Herbivory in the form of seed predation by Owyhee harvester ants, which was only recently discovered, appears to pose a potentially significant threat to the species. In one study, ants were observed to be capable of removing up to 90 percent of *L. papilliferum* fruits or seeds from slickspots within 66 ft (20 m) of a nest (Robertson and White 2009, p. 9). As the ants appear to favor the conditions created by the introduction of annual grasses, and the cover of annual grasses is expanding in *L. papilliferum* habitat, the increase in seed predation as a consequence of harvester ants moving into areas adjacent to occupied slickspots has the potential to significantly impact *L. papilliferum* recruitment and the replenishment of the seed bank. While this may be a minor threat at this point in time, given the projected increase in nonnative annual grasslands within the range of *L. papilliferum* and the apparent positive association between Owyhee harvester ants and grasslands, we believe this has the potential to become a significant threat to *L. papilliferum* in the foreseeable future.

Conclusion for Factor C

Rationale

The effect of seed predation by Owyhee harvester ants is an emerging threat potentially affecting the long-term viability of *Lepidium papilliferum*. In areas where Owyhee harvester ants have become established, *L. papilliferum* could be depleted through lack of seedling recruitment. However, at this point in time we do not yet have enough research to determine whether the seed bank is being negatively affected by seed predation from harvester ants. The fact that harvester ant colonies appear to be found in higher numbers in annual grasslands, which are in turn increasing as the result of increased wildfire and the spread of nonnative grasses such as *Bromus tectorum*, suggests that the degree of this potential threat is likely to increase in the future. Our current understanding of how pervasive harvester ant colonies have become within the range of *L. papilliferum*, and their overall significance on the long-term viability of the species, is limited due to the short-term nature of the study results available thus far. The evidence suggests, however, that significant levels of seed predation associated with increased abundance and range of Owyhee harvester ants has the potential to pose a significant threat to *L. papilliferum* in the foreseeable future. This potential threat is pervasive throughout the range of *L. papilliferum*.

Determination for Factor C

We have evaluated the best available scientific information on the effects of disease or predation on *Lepidium papilliferum*, and determined that this factor poses a significant threat to the viability of the species throughout its range, such that we anticipate that *L. papilliferum* is likely to become an endangered species within the foreseeable future, when we consider this factor in concert with the other factors impacting the species.

D. Inadequacy of Existing Regulatory Mechanisms

Few existing regulatory mechanisms apply to *Lepidium papilliferum*. At the Federal level, *Lepidium papilliferum* is currently categorized as a Type 1 sensitive species by BLM (U.S. BLM 2003, p. 1; Rinkes 2009, pers. comm.). The BLM has regulations that address the need to protect sensitive, candidate, and federally listed species. The BLM is the primary land-management agency implementing conservation efforts for this species, and continues to monitor *L. papilliferum* on the Federal lands it manages.

At the State level, Idaho Code 18-3911 protects a selected list of wildflowers, but *Lepidium papilliferum* is not one of the species listed. The protection allowed under Idaho Code 18-3911 basically makes it unlawful to export or offer for sale plants or parts of plants that are on the list of protected plants. As we have no information indicating that the export or sale of *L. papilliferum* poses a threat to the species, we do not consider the fact that *L. papilliferum* is not protected under Idaho Code 18-3911 to pose a significant threat to the species.

Conclusion for Factor D

Rationale

The inadequacy of existing regulatory mechanisms does not appear to pose a threat to *Lepidium papilliferum*. The BLM manages *L. papilliferum* as a sensitive species, according to that agency's regulations, and continues to implement conservation efforts, as well as monitor the species, on lands under its management. Although the State of Idaho does not extend protections against export or sale to *L. papilliferum* under Idaho Code 18-3911, the lack of protection not appear to pose a significant threat to the species, as we have no information indicating that the species is subject to export or sale. However, we note that Idaho Code 18-3913 provides the Idaho Department of Fish and Game with authority to amend the list of protected wildflowers, so *L. papilliferum* could be protected as specified in Idaho Code 18-3911.

Determination for Factor D

We have evaluated the best available information regarding the potential inadequacy of existing regulatory mechanisms and their effect on *Lepidium papilliferum*, and determined that this factor does not pose a significant threat to the viability of the species.

E. Other Natural or Manmade Factors Affecting Its Continued Existence

Precipitation Patterns

Studies have indicated that the density and abundance of *Lepidium papilliferum* is positively correlated with levels of winter-spring (roughly January to March) precipitation (Palazzo *et al.* 2005, p. 9; Meyer *et al.* 2005, p. 15; Menke and Kaye 2006a, p. 8, 2006b pp. 10-11; CH2MHill 2007a, p. 14; Sullivan and Nations 2009, pp. 40-41), and negatively correlated with fall-winter (roughly October to December) precipitation (Meyer *et al.* 2005, pp. 15-16; Sullivan and Nations 2009, pp. 37-45). To assess the possibility that the negative trend in *L. papilliferum* density observed on the rough census plots at the OTA by Sullivan and Nations (2009, p. 39) may be due, at least in part, to either a corresponding negative trend in spring precipitation or a corresponding positive trend in winter precipitation at the OTA, we performed a least squares linear regression analysis (a statistical method to discern a potentially significant relationship between two variables, in this case whether there was any trend in rainfall over time) on monthly precipitation data available for the years 1991 through 2007 (Zwartjes 2009). Similar to the simple linear model employed by Sullivan and Nations (2009, p. 38) in their analysis to assess whether there was any general, overall trend in population numbers over time, this exercise was intended only to determine whether there might have been any significant general trend in precipitation levels during the time period of interest, not to explain the potentially complex patterns of precipitation over time. According to the results, none of the precipitation parameters utilized (modeled to be consistent with those utilized by Sullivan and Nations 2009)—total annual precipitation, total precipitation for the spring months (analyzed in three

time blocks as the sum of precipitation in February through May, February through June, and March through May), total precipitation for the winter months (October through December), or monthly precipitation based on 3–month moving averages from January to March through December to February — produced results suggesting that any of the precipitation trends over these years were significantly different statistically from a slope of zero (Zwartjes 2009, Figures 1-17, Appendix). Based on this simple model, there does not appear to be any general trend in precipitation over the years 1991 through 2007, either positive or negative, that corresponds with the observed negative trend in *L. papilliferum* density at the OTA over the years 1990 through 2008 as identified by Sullivan and Nations (2009) (Zwartjes 2009, p. 1).

Summary of Precipitation Patterns

The annual abundance of *Lepidium papilliferum* varies annually in concert with the level of precipitation; there appears to be a negative relationship between high winter precipitation and *L. papilliferum* abundance the following spring, and a positive relationship between spring precipitation and *L. papilliferum* abundance. One possible explanation for the observed significant decline in *L. papilliferum* abundance over time at the OTA rough census areas is that there was a similar trend in precipitation over that same time period (a decrease in spring precipitation, an increase in winter precipitation, or both). We did not, however, find any significant trend in precipitation in the same time frame. Thus, any changes in the abundance or density of *L. papilliferum* appear to have occurred independently of any trend in precipitation. Therefore, similar to our 2007 finding, we do not consider the current precipitation pattern to pose an extinction risk to the species.

Habitat Fragmentation and Isolation of Small Populations

Due to its occupancy of patchily distributed slickspots, the habitat of *Lepidium papilliferum* is somewhat naturally fragmented. Fragmentation at a larger scale, however, can pose problems for *L. papilliferum* by creating barriers in the landscape that prevent effective genetic exchange between populations. Seed dispersal for *L. papilliferum* likely occurs only over very short distances; thus, pollinators and pollen dispersal are the primary means for reproductive and genetic exchange between *L. papilliferum* sites (Robertson and Ulappa 2004, pp. 1705, 1708; Stillman *et al.* 2005, pp. 1, 6-8). Research indicates that seeds generated by the pollination of nearby plants have reduced viability, and that *L. papilliferum* seed viability increases as the distance to the contributing pollination source increases (Robertson and Ulappa 2004, pp 1705, 1708). The ability to exchange pollen with distant populations is therefore an advantage for *L. papilliferum*. Barriers or too much distance between slickspots and pollinating insect habitats can reduce the effective range of insects important to *L. papilliferum* pollination (Robertson *et al.* 2004, pp. 2-4). Barriers can include agricultural fields, urban development, and large areas of annual and perennial grass monocultures that do not support diversity and suitable floral resources such as nectar or edible pollen for pollinators. *Lepidium papilliferum* habitats separated by distances greater than the effective range of available pollinating insects are at a genetic disadvantage, and may become vulnerable to the effects of loss of genetic diversity (Stillman *et al.* 2005, pp. 1, 6-8) and a reduction in seed production (Robertson *et al.* 2004, p. 1705). A genetic analysis of *L. papilliferum* suggested that populations in the Snake River Plain and the Owyhee Plateau "may have reduced genetic diversity" (Larson *et al.* 2006, p. 17; note the Boise Foothills were not analyzed separately in this study).

Many of the remaining occurrences of *Lepidium papilliferum*, particularly in the Snake River Plain near urban centers, are restricted to small, remnant patches of suitable sagebrush-steppe habitat. When last surveyed, 31 EOs (37 percent) each had fewer than 50 plants (Colket *et al.* 2006, Tables 1 to 13). Many of these small remnant EOs exist within habitat that is degraded by the factors identified above. Small *L. papilliferum* populations have likely persisted due to their long-lived seed bank, but the potential risk of depletion of each population's seed bank with no new genetic input makes the persistence of these small populations uncertain. Providing suitable habitats and foraging habitats for the species' insect pollinators is important for maintaining *L. papilliferum* genetic diversity. Small populations are vulnerable to relatively minor environmental disturbances such as wildfire, herbicide drift, and nonnative plant invasions (Given 1994, pp. 66-67), and are subject to the loss of genetic diversity from genetic drift and inbreeding (Ellstrand and Elam 1993, pp. 217-237). Populations with lowered genetic diversity are more prone to local extinction (Barrett and Kohn 1991, pp. 4, 28). Smaller populations generally have lower genetic diversity, and lower genetic diversity may in turn lead to even smaller populations by decreasing the species' ability to adapt, thereby increasing the probability of population extinction (Newman and Pilson 1997, p. 360).

Fragmentation (either by development or wildfires) has occurred in 62 of the 79 EOs for which habitat information is known (15 of 16 on the Boise Foothills, 35 of 42 on the Snake River Plain and 12 of 21 on the Owyhee Plateau), and 78 EOs (all except one on the Owyhee Plateau) have fragmentation occurring within 0.31 mi (500 m) of the EOs (Cole 2009b, Threats Table). Additionally, as described above in Factor A, *Development*, several development projects are planned within the occupied range of *Lepidium papilliferum* that would contribute to further large-scale fragmentation of its habitat, potentially resulting in decreased viability of populations through decreased seed production, reduced genetic diversity, and the increased inherent vulnerability of small populations to localized extirpation.

Summary of Habitat Fragmentation and Isolation of Small Populations

Even though *Lepidium papilliferum* occurs in naturally patchy microsite habitats, the increasing degree of fragmentation produced by wildfires and development may result in the separation of populations beyond the distance that its insect pollinators are capable of traveling. Genetic exchange in *L. papilliferum* is achieved through either seed dispersal or insect-mediated pollination, and plants that receive pollen from more distant sources demonstrate greater reproductive success in terms of seed production. As all indications are that seeds are dispersed over only a very small distance and insect pollinators are also limited in their dispersal capabilities, habitat fragmentation and isolation of populations poses a threat to *L. papilliferum* in terms of decreased reproductive success (lower seed set), reduced genetic variability, and greater local extinction risk. For these reasons we consider habitat fragmentation resulting from wildfires and development to pose a moderate degree of threat to *Lepidium papilliferum*. We consider this threat to be significant, but not as severe as the threats posed by the modified wildfire regime and invasive nonnative plant species. The threat of habitat fragmentation and isolation of small populations is pervasive throughout the range of *L. papilliferum*.

Climate Change

The Intergovernmental Panel on Climate Change (IPCC) was established in 1988 by the World Meteorological Organization and the United Nations Environment Program in response to growing concerns about climate change and, in particular, the effects of global warming. Although the extent of warming likely to occur is not known with certainty at this time, the IPCC has concluded that warming of the climate is unequivocal, and that continued greenhouse gas emissions at or above current rates will cause further warming (IPCC 2007, p. 30). Eleven of the 12 years from 1995 through 2006 rank among the 12 warmest years in the instrumental record of global surface temperature since 1850 (ISAB 2007). Climate-change scenarios estimate that the mean air temperature could increase by over 3 degrees Celsius (5.4 degrees Fahrenheit) by 2100 (IPCC 2007, p. 46). The IPCC also projects that there will very likely be regional increases in the frequency of hot extremes, heat waves, and heavy precipitation (IPCC 2007, p. 46), as well as increases in atmospheric carbon dioxide (IPCC 2007, p. 36).

We recognize that there are scientific differences of opinion on many aspects of climate change, including the role of natural variability in climate. In our analysis, we rely primarily on synthesis documents (e.g., IPCC 2007, Karl *et al.* 2009) that present the consensus view of a very large number of experts on climate change from around the world. We have found that these synthesis reports, as well as the scientific papers used in those reports or resulting from those reports, represent the best available scientific information we can use to inform our decision and have relied upon them and provided citation within our analysis. In addition, where possible we have utilized projections specific to the region of interest, the Great Basin, which includes the range of *Lepidium papilliferum*.

Projected climate change and its associated consequences have the potential to affect *Lepidium papilliferum* and may increase its risk of extinction, as the impacts of climate change interact with other stressors such as habitat degradation and loss that are already affecting the species (Karl *et al.* 2009, p. 81). In the Pacific Northwest, regionally averaged temperatures have risen 0.8 degrees Celsius (1.5 degrees Fahrenheit) over the last century (as much as 2 degrees Celsius (4 degrees Fahrenheit) in some areas), and are projected to increase by another 1.5 to 5.5 degrees Celsius (3 to 10 degrees Fahrenheit) over the next 100 years (Mote *et al.* 2003, p. 54; Karl *et al.* 2009, p. 135). Arid regions such as the Great Basin where *L. papilliferum* occurs are likely to become hotter and drier; fire frequency is expected to accelerate, and fires may become larger and more severe (Brown *et al.* 2004, pp. 382-383; Neilson *et al.* 2005, p. 150; Chambers and Pellant 2008, p. 31; Karl *et al.* 2009, p. 83). Under projected future temperature conditions, the cover of sagebrush in the Great Basin region is anticipated to be dramatically reduced (Neilson *et al.* 2005, p. 154). Warmer temperatures and greater concentrations of atmospheric carbon dioxide create conditions favorable to *Bromus tectorum*, as described below, thus continuing the positive feedback cycle between the invasive annual grass and fire frequency that poses a significant threat to *L. papilliferum* (Chambers and Pellant 2008, p. 32; Karl *et al.* 2009, p. 83).

Emissions of carbon dioxide, considered to be the most important anthropogenic greenhouse gas, increased due to human activities by approximately 80 percent between 1970 and 2004 (IPCC 2007, p. 36). Future carbon dioxide emissions from energy use are projected to increase by 40 to 110 percent over the next few decades, between 2000 and 2030 (IPCC 2007, p. 44). An increase in the atmospheric concentration of carbon dioxide has important implications for *Lepidium papilliferum*, beyond those associated with warming temperatures, because higher concentrations of carbon dioxide are favorable for the growth and productivity of *Bromus tectorum* (Smith *et al.* 1987, p. 142; Smith *et al.* 2000, p. 81). Although most plants respond positively to increased carbon dioxide levels, many invasive nonnative plants respond with greater growth rates than native plants, including *B. tectorum* (Smith *et al.* 1987, p. 142; Smith *et al.* 2000, p. 81; Karl *et al.* 2009, p. 83). Laboratory research results illustrated that *B. tectorum* grown at carbon dioxide levels representative of current climatic conditions matured more quickly, produced more seed and greater biomass, and produced significantly more heat per unit biomass when burned than *B. tectorum* grown at "pre-industrial" carbon dioxide levels (Blank *et al.* 2006, pp. 231, 234). These responses to increasing carbon dioxide may have increased the flammability in *B. tectorum* communities during the past century (Ziska *et al.* 2005, as cited in Zouhar *et al.* 2008, p. 30; Blank *et al.* 2006, p. 234).

Field studies likewise demonstrate that *Bromus* species demonstrate significantly higher plant density, biomass, and seed rain (dispersed seeds) at elevated carbon dioxide levels relative to native annuals (Smith *et al.* 2000, pp. 79-81). The researchers conclude that "the results from this study * * * confirm experimentally in an intact ecosystem that elevated carbon dioxide may enhance the invasive success of *Bromus* spp. in arid ecosystems," and suggest that this enhanced success will then expose these areas to accelerated fire cycles (Smith *et al.* 2000, p. 81). Chambers and Pellant (2008, p. 32) also suggest that higher carbon dioxide levels are likely increasing *B. tectorum* fuel loads due to increased productivity, with a resulting increase in fire frequency and extent. Based on the best available information, we therefore expect continuing production of atmospheric carbon dioxide at or above current levels, as predicted, to increase the threat posed to *L. papilliferum* by *B. tectorum* and from more frequent, expansive, and severe wildfires (Smith *et al.* 1987, p. 143; Smith *et al.* 2000, p. 81; Brown *et al.* 2004, p. 384; Neilson *et al.* 2005, pp. 150, 156; Chambers and Pellant 2008, pp. 31-32).

Bradley *et al.* (in press, pp. 1-11) predict that nonnative invasive species in the sagebrush-steppe ecosystem may either expand or contract under climate change, depending on the current and projected future range of a particular invasive plant species. They developed a bioclimatic model for *Bromus tectorum* based on maps of invaded range derived from remote sensing and on the climate variables that best predict species presence, and found that the best predictors of *B. tectorum* occurrence are summer, annual, and spring precipitation, followed by winter temperature (Bradley *et al.*, in press, p. 5). They then used projections of 10 atmosphere-ocean, general-circulation models for the year 2100. Depending primarily on future precipitation conditions, the model predicts *B. tectorum* is likely to shift northwards, leading to expanded risk of *B. tectorum* invasion in Idaho, Montana, and Wyoming, but reduced risk of invasion in southern Nevada and Utah, which currently have large areas dominated by this nonnative grass (Bradley *et al.*, in press, p. 5). Although the authors note that their models also predict some range contractions by *B. tectorum* by 2100, much of southern Idaho where *Lepidium papilliferum* occurs appears to maintain large populations of *B. tectorum* (Figure 4, p. 7). The threat posed to *L. papilliferum* by the greater frequency and geographic extent of wildfires and other associated negative

impacts from the presence of *B. tectorum* is therefore expected to continue into the foreseeable future.

An additional potential threat to *Lepidium papilliferum* resulting from climate change is the predicted change in precipitation patterns. Current projections for the Pacific Northwest region are that precipitation will increase in the winter but decrease in the summer months (Karl *et al.* 2009, p. 135). The survivorship of *L. papilliferum* rosettes to flower the following spring is favored by greater summer precipitation (Meyer *et al.* 2005, p. 15; CH2MHill 2007a, p. 14; Sullivan and Nations 2009, pp. 33, 41), and increased winter precipitation appears to decrease survivorship (Meyer *et al.* 2005, pp. 15-16; Sullivan and Nations 2009, pp. 39, 43-44). As the projected rainfall pattern under climate change would follow the opposite pattern, this alteration in seasonal precipitation could result in decreased survivorship of *L. papilliferum*. Alterations in precipitation patterns, however, are more uncertain than predicted changes in temperature for the Great Basin region (Neilson *et al.* 2005, p. 153).

Summary of Climate Change

The direct, long-term impact from climate change to *Lepidium papilliferum* is yet to be determined. However, as described under Factor A, above, the invasion of *Bromus tectorum* and the associated changes in fire regime currently pose one of the most significant threats to *Lepidium papilliferum*, the sagebrush-steppe ecosystem, and the slickspot habitats where *L. papilliferum* resides. Under current climate-change projections, we anticipate that future climatic conditions will favor further invasion by *B. tectorum*, that fire frequency will continue to increase, and the extent and severity of fires may increase as well. Precipitation patterns may also be altered as a result of climate change, resulting in potential decreased survivorship of *L. papilliferum*, although the projections for future precipitation patterns are less certain. The consequences of climate change, if current projections are realized, are therefore likely to exacerbate the existing primary threats to *L. papilliferum* of frequent wildfire and invasive nonnative plants, particularly *B. tectorum*. As the IPCC projects that the changes to the global climate system in the 21st century will likely be greater than those observed in the 20th century (IPCC 2007, p. 45), we anticipate that these effects will continue and likely increase into the foreseeable future. As there is some degree of uncertainty regarding the potential effects of climate change on *L. papilliferum* specifically, climate change in and of itself was not considered a significant factor in our determination to list *L. papilliferum* as a threatened species. However, we recognize that the severity and scope of the primary threats to *L. papilliferum* of frequent wildfire and *B. tectorum* are likely to magnify depending on the realized outcome of climate change within the foreseeable future; thus, we consider climate change as playing a potentially important supporting role in intensifying the primary current threats to the species.

Conclusion for Factor E

Rationale

Habitat fragmentation that results from wildfires and development may result in the separation of *Lepidium papilliferum* populations beyond the distance that its insect pollinators can travel, and likely limits the ability for seeds to travel between populations as well. Limited genetic exchange due to fragmentation can result in reduced seed production for this species, as well as a loss of genetic diversity. Small, isolated populations with lowered genetic diversity are at increased risk of local extinction. Habitat fragmentation due to wildfires and various forms of development is occurring throughout the range of the species, and is expected to increase in the future. As the insect pollinators of *L. papilliferum* traverse relatively short distances, and evidence suggests that seed dispersal is limited as well, we consider the consequences of limited genetic exchange as a result of habitat fragmentation to pose a significant and moderate degree of threat to *L. papilliferum* throughout its range. Although significant, we do not consider the severity of this threat to reach the level of threat posed to *L. papilliferum* by the primary threats of the modified wildfire regime and invasive nonnative plant species.

Current climate-change models predict future climatic conditions within the range of *Lepidium papilliferum* will favor further invasion by *Bromus tectorum*. These models also project that fire frequency will continue to increase and that the extent and severity of wildfires may increase as well. Thus, the consequences of projected, future climate change, if realized, are likely to further magnify the severity and scope of the primary significant threats to *L. papilliferum*. Due to the uncertainty associated with climate change projections, we do not consider climate change in and of itself to represent a significant threat to *L. papilliferum*. However, we acknowledge that climate change will likely play a potentially important supporting role in intensifying the most significant current threats to the species in the foreseeable future. The projected consequences of climate change would act to exacerbate the primary threats of frequent wildfire and invasive nonnative plant species to *L. papilliferum* throughout its range.

The abundance of *Lepidium papilliferum* is closely associated with levels of rainfall, showing a positive association with high levels of spring precipitation and a negative association with high levels of winter precipitation. We thus considered whether the declining population trend in *L. papilliferum* might be a consequence of a corresponding trend in precipitation. We did not find evidence of any trend in precipitation for *L. papilliferum* for the time period for which we have evidence of the declining trend in density at the OTA; thus, we conclude that any population trend in *L. papilliferum* is independent of any trend in precipitation. Precipitation patterns were therefore not considered to pose a threat to the species.

Determination for Factor E

We have evaluated the best available scientific information on other natural or manmade factors affecting the continued existence of *Lepidium papilliferum*, including precipitation patterns, habitat fragmentation and isolation of small populations, and climate change, and determined that this factor poses a significant threat to the viability of the species throughout its range when considered in concert with Factor A, such that we anticipate that *L. papilliferum* is likely to become an endangered species within the foreseeable future.

Evaluation of Conservation Efforts

In making a determination as to whether any species is an endangered species or a threatened species, Section 4(b)(1)(A) of the Act mandates that the Secretary shall make such determinations "solely on the basis of the best scientific and commercial data available to him after conducting a review of the status of the species and after taking into account those efforts, if any, being made by any State or foreign nation, or any political subdivision of a State or foreign nation, to protect such species." Here, we describe and evaluate those conservation efforts being made by the State of Idaho and other entities to protect *Lepidium papilliferum*; we also consider conservation efforts that are formally

planned but have not yet been implemented, as per the Service's Policy for the Evaluation of Conservation Efforts (68 FR 15100; March 28, 2003). These conservation efforts were briefly described in our earlier evaluation of the threat factors affecting the species. Here we present a single summary of the conservation efforts implemented or planned for the benefit of *L. papilliferum*, which we considered in the course of our listing determination. Any management actions that were only planned at the time of our withdrawal of the proposal to list *Lepidium papilliferum* in 2007 (72 FR 1622; January 12, 2007) but have since been implemented were considered in our evaluation of ongoing conservation efforts in this rule.

Ongoing Conservation Efforts

Currently, there are four formalized plans that contain conservation measures for *Lepidium papilliferum*. The four plans include: (1) the CCA for Slickspot Peppergrass with the State of Idaho, BLM, Idaho Army National Guard, and nongovernmental cooperators (private landowners who also hold livestock grazing permits on BLM lands) (State of Idaho *et al.* 2003, 2006); (2) the Idaho Army National Guard Integrated Natural Resource Management Plan for Gowen Field/ Orchard Training Area (IDARNG 2004); (3) the U.S. Air Force Integrated Natural Resource Management Plan for the Juniper Butte Range (Mountain Home Air Force Base) (U.S. Air Force 2004); and (4) the Conservation Agreement for Slickspot Peppergrass (*Lepidium papilliferum*) at the Boise Airport, Ada County, Idaho (Boise Airport 2003). A fifth plan that expired in October of 2006 is a Conservation Agreement by, and between, Boise City and the U.S. Fish and Wildlife Service for *Allium aasea* (Aase's onion), *Astragalus mulfordiae* (Mulford's milkvetch) and *L. papilliferum* (Hull's Gulch Agreement) (U.S. Fish and Wildlife Service 1996). A new agreement is currently being crafted to update the expired agreement and will include conservation measures for portions of four small *L. papilliferum* EOs in the Boise Foothills region on lands administered by both the City of Boise and Ada County. This new agreement is expected to be completed by September of 2009.

The majority of the individual conservation efforts being implemented for *Lepidium papilliferum* are contained in the State of Idaho CCA, which was originally drafted in 2003, and updated in 2006; it is scheduled to expire in 2013. The CCA represents an important milestone in the cooperative conservation of *Lepidium papilliferum* given its rangewide scope and coordinated management across Federal and State of Idaho managed lands. The CCA includes rangewide efforts that are intended to address the need to: Maintain and enhance *L. papilliferum* habitat; reduce intensity, frequency, and size of natural- and human-caused wildfires; minimize loss of habitat associated with wildfire-suppression activities; reduce the potential for invasion of nonnative plant species from wildfire; minimize the loss of habitat associated with rehabilitation and restoration techniques; minimize the establishment of invasive nonnative species; minimize the degradation or loss of habitat from ORV use; mitigate the negative effects of military training and other associated activities on the OTA; and minimize the impact of ground disturbances caused by livestock penetrating trampling during periods when soils are saturated.

As a signatory of the CCA (State of Idaho *et al.* 2003, 2006), the BLM is the primary land management agency implementing conservation efforts for *Lepidium papilliferum* on their lands. Implementation of the conservation measures in the CCA represents a major commitment on behalf of the BLM, which has management authority for the majority of the range where *L. papilliferum* occurs (i.e., 87 percent of the total EO area (13,470 ac (5,451 ha)) and portions of 69 of the 80 extant EOs). Conservation measures for ongoing activities from the CCA that were appropriate for land-use plan programs were included in an August 22, 2006, Conservation Agreement between the Service and the BLM to avoid or minimize impacts to *L. papilliferum* during the BLM's implementation of existing land-use plans. This Conservation Agreement between Idaho BLM and the Service is scheduled to expire on December 31, 2010, at which time it may be reviewed for renewal or expiration.

Until recently, the CCA also represented an effort by nongovernmental cooperators (private landowners who also hold BLM livestock grazing permits) for the conservation of *Lepidium papilliferum* on private lands. Six Memoranda of Understanding (MOUs) between nongovernmental cooperators and the State of Idaho for conservation of *L. papilliferum* on private lands were in place from 2004 through December 2007. We are not aware that these MOUs have been reissued at this time. The size and habitat condition of *L. papilliferum* locations on these private lands are also unknown to the Service. The MOUs included 17,045 ac (6,898 ha) of private lands; however, less than 2 percent of the currently known area occupied by *L. papilliferum* (260 ac (105 ha)) is documented as occurring on private lands.

Although a majority of the conservation measures identified in the CCA have been implemented to date, relatively few have been determined at this time to be measurably effective for conserving *Lepidium papilliferum*. For example, many of the implemented measures are conducting surveys, monitoring, or providing for public outreach and education, which have limited direct or long-term conservation benefits to the species. With the exception of several conservation efforts implemented at the OTA that have been successful in controlling the effects of wildfire on *L. papilliferum* habitats, many of the remaining conservation efforts and adaptive management provisions identified in the CCA have not been implemented over a long enough period of time to have sufficient certainty they can be effective in reducing threats. Furthermore, the conservation measures identified in the CCA are concentrated on *L. papilliferum* EOs. While this is helpful, the effective control of the most significant threats to *L. papilliferum*, wildfire and invasive nonnative plant species, requires efforts that extend well beyond the boundaries of the EOs, since by their nature these are expansive threats that occur throughout the Great Basin. We recognize the conservation efforts identified in the CCA as having a conservation benefit for *L. papilliferum*, but rangewide their effectiveness in reducing or eliminating the most significant threats has not been demonstrated at this time.

The IDARNG, another signatory to the CCA, also implements conservation efforts for *Lepidium papilliferum* on the OTA through its INRMP (IDARNG 2004, Chapter 4.4.2). The IDARNG's OTA contains 7,213 ac (2,919 ha) of occupied *L. papilliferum* habitat, 7,163 ac (2,899 ha) of which represents some of the highest-quality occupied *L. papilliferum* habitat in the Snake River Plain region. Many of the conservation efforts, such as prohibiting military training activities within areas reserved for conservation of *L. papilliferum*, have been implemented by the IDARNG for more than 18 years and have been demonstrated to be effective in minimizing military training impacts to the species. The INRMP for the OTA expired in September 2008, and is currently being updated (Quinney 2008, pers. comm.).

The U.S. Air Force's INRMP completed in 2004 includes conservation efforts for *Lepidium papilliferum*. The U.S. Air Force manages 2,028 ac (810 ha) of occupied *L. papilliferum* habitat within the Juniper Butte Range in the Owyhee Plateau region. The INRMP contains specific measures developed to minimize the impacts from military training and the associated indirect effects from wildfire, nonnative invasive weeds, and livestock use on *L. papilliferum*. For example, the U.S. Air Force has a number of ongoing efforts to address wildfire suppression on the entire 11,500 ac (4,800 ha) Juniper Butte Range. The U.S. Air Force addresses wildfire prevention through reducing standing fuels and weeds, planting fire-resistant vegetation in areas with a higher potential for ignition sources such as along roads, and using wildfire indices to determine when to restrict military activities when the wildfire hazard rating is extreme (U.S. Air Force 2004, p. 6-55). As a result, the threat from wildfire to *L. papilliferum* associated with U.S. Air Force training activities is expected to be reduced within the Juniper Butte Range. The INRMP that includes the Juniper Butte Range is scheduled to expire in 2009 and is currently being updated (EES 2008).

A Conservation Agreement between the Service and the City of Boise Airport was completed in 2003 for the conservation of two *Lepidium papilliferum* EOs located on the southern portion of Boise Airport lands (Boise Airport 2003). Using the latest Idaho Natural Heritage Program *L. papilliferum* EO ranks, these two EOs include a C-ranked site (2.8 ac (1.2 ha)) and a D-ranked site (0.5 ac (0.2 ha)), with low documented plant numbers and very poor habitat condition (Colket *et al.* 2006, Appendix C). Both EOs included in this Conservation Agreement are also susceptible to impacts from invasive nonnative weeds and wildfire. The primary conservation actions identified in this agreement included the construction of fuel breaks around *L. papilliferum* populations, the preclusion of livestock use, minimizing the use of herbicides, and signing areas to prevent access. We have not received documentation of implementation or effectiveness of the conservation efforts identified in this Conservation Agreement. This agreement is scheduled to expire in December 2015. We acknowledge the positive conservation intent of this agreement, and although the status of the efforts are unknown, even if they were known to be implemented and effective, the area covered by the City of Boise Conservation Agreement is so small that it would have little effect on our ultimate finding in this rule.

Planned Conservation Efforts

Prior to our 2007 withdrawal notice (72 FR 1622; January 12, 2007), we reviewed the available information for all of the individual conservation efforts contained in five conservation plans developed for *Lepidium papilliferum* (State of Idaho CCA, IDARNG INRMP, U.S. Air Force INRMP, Boise Airport CA, and Hull's Gulch Agreement) to evaluate how many were implemented or certain to be implemented in the future; and how many efforts were so effective as to have contributed to the elimination or reduction of one or more threats to the species. Based upon our review at that time, we determined that 373 of the nearly 600 individual conservation efforts identified in the 5 plans were currently implemented and that 35 of these efforts were determined to be both certain to be implemented and effective in reducing threats to *L. papilliferum* or were already known to be implemented and effective in reducing threats to the species. Since that time, we have received additional information from the implementing agencies that describe the status of at least 152 conservation measures included in 3 of the 5 conservation plans (State of Idaho CCA, IDARNG INRMP, and US Air Force INRMP) that were implemented in 2007 and 2008 (CH2MHill 2007a, p. 16; CH2MHill 2007b, pp. 1-6; Quinney 2007 pp.1-3; USBLM 2007, p. 2-4; CH2MHill 2008a, p. 17; CH2MHill 2008b, pp. 1-6; Quinney 2008 pp.1-3; USBLM 2008a, pp. 2-38; USBLM 2008c, pp. 1-15; Colket 2009, pp. 65-72). We have not received specific information regarding conservation measures contained in the Boise Airport conservation agreement that have been implemented, or how effective these measures have been in reducing threats to *L. papilliferum* for 2007 or 2008. The fifth conservation plan, the Hull's Gulch Agreement between Boise City and the Service, expired in October 2006 and has yet to be renewed.

Our latest evaluation of planned future conservation efforts, taking into consideration the most recent information provided by the implementing agencies, again concludes that 35 out of roughly 600 individual management actions identified in the 5 formalized conservation plans for *Lepidium papilliferum* are certain to be implemented and effective. However, these 35 conservation efforts determined to be implemented and effective are from the CCA, Air Force INRMP and OTA INRMP, and are not applicable rangewide. For example, 20 of the 35 conservation efforts are primarily directed at conserving *L. papilliferum* at 1 of 3 EOs located on the OTA. Therefore, these 35 measures would not prevent the species from becoming endangered in the foreseeable future either rangewide or on a significant portion of the species' range. We thus do not consider these 35 actions sufficient to offset the threats posed to *L. papilliferum* across its range by the modified wildfire regime; invasive nonnative plants; development; potential seed predation by harvester ants; and habitat fragmentation and isolation, to the point that we would consider it unlikely that *L. papilliferum* will become endangered within the foreseeable future.

Summary of Ongoing and Planned Conservation Efforts

We recognize the long list of ongoing and proposed conservation efforts by the State of Idaho, IDARNG, U.S. Air Force, and other non-governmental cooperators being put forth to conserve *Lepidium papilliferum*. All parties should be commended for their conservation efforts. Our review of conservation efforts indicates that not all of the measures identified in the conservation plans have been implemented and most have not been demonstrated at this time to effectively reduce or eliminate the most significant threats to the species. Many of these conservation efforts are limited in their ability to effectively reduce the long-term habitat degradation and destruction occurring within the sagebrush-steppe ecosystem and *L. papilliferum* habitats across the range of the species from the effects of a changed wildfire regime and nonnative plant invasions, in addition to other threats. In many cases, effective control measures for these threats are not yet known, financially or technically feasible, or logistically possible to implement on the scale that would be necessary to successfully ameliorate the threat throughout the range of *L. papilliferum*. Although the ongoing conservation efforts demonstrated to be effective are a positive step toward the conservation of *L. papilliferum*, and a few, such as those designed to reduce the impact of ground disturbances caused by livestock when soils are saturated in the spring, described under **Livestock Use**, above, have likely reduced the severity of some threats to the species, on the whole we find that the conservation efforts in place at this

time are not sufficient to offset the degree of threat posed to the species by the modified wildfire regime; invasive nonnative plants; development; potential seed predation by harvester ants; and habitat fragmentation and isolation, to the point that we would consider it unlikely that *L. papilliferum* will become endangered within the foreseeable future.

We have also considered all formally planned conservation efforts, by evaluating the individual conservation efforts contained in five conservation plans developed for *Lepidium papilliferum* to evaluate how many were implemented or certain to be implemented in the future; and how many efforts were so effective as to have contributed to the elimination or reduction of one or more threats to the species. We have no information indicating that there are any new conservation efforts planned for the future that we have not already evaluated in the course of applying our Policy for the Evaluation of Conservation Efforts (68 FR 15100; March 28, 2003) to management actions planned for the benefit of *L. papilliferum*, as described in past actions for this species (69 FR 3094; 72 FR 1622). We recognize the benefit of these planned conservation measures and acknowledge the efforts of the entities engaged in planning these measures for the benefit of *L. papilliferum*. However, as with ongoing conservation efforts, in most cases the measures are simply not logistically feasible for implementation at the scale that would be required to effectively reduce the threats to the species across its range. Based on our most recent evaluation, we conclude that those planned conservations efforts that we consider likely to be implemented and effective are not sufficient to offset the threats posed to *L. papilliferum* by the modified wildfire regime; invasive nonnative plants; development; potential seed predation by harvester ants; and habitat fragmentation and isolation, to the point that we would consider it unlikely that *L. papilliferum* will become endangered within the foreseeable future.

In summary, all ongoing conservation efforts have been considered and evaluated in terms of their effectiveness in ameliorating the threats to *Lepidium papilliferum* as described in this rule. We have additionally considered all formally planned future conservation efforts for the species, and evaluated those efforts in terms of the certainty of their implementation and their potential for effectiveness in ameliorating the threats to *L. papilliferum*. We recognize and acknowledge the efforts of the many entities participating in conservation efforts for the protection of *L. papilliferum*. However, our evaluation of the ongoing and planned conservation efforts for the species concludes that these efforts are not sufficient to offset the threats described in this rule to the point that we consider it unlikely that *L. papilliferum* will become endangered within the foreseeable future.

Finding

We have carefully assessed the best scientific and commercial information available regarding the present and future threats to *Lepidium papilliferum*. This plant is endemic to southwest Idaho and occurs within a limited geographical range that totals approximately 16,000 ac (6,475 ha). The species predominantly occurs in highly specialized and unique microsite habitats called slickspots within the sagebrush-steppe ecosystem. The specialized slickspot habitats were formed during the Pleistocene period and are considered a finite resource; the fact that these slickspots likely cannot be recreated or restored once they have been lost was an important consideration in our evaluation of the threats to *L. papilliferum*. In addition, the species' limited geographical range makes it particularly vulnerable to the many threats affecting its habitat. We have evidence indicating that the finite slickspot habitats of the species are continuing to degrade in quality from a variety of threats. Based on the best scientific data currently available, the primary significant threats to the species are the effects of wildfire and invasive nonnative plants, especially *Bromus tectorum*.

In our 2007 finding (72 FR 1622; January 12, 2007), we concluded: "The best available data for *Lepidium papilliferum* indicate that while the broad scale habitat in which the species exists is degraded, we have no data that correlates this with species abundance." We now have new information indicating a statistically significant negative association between *L. papilliferum* abundance and wildfire, and between *L. papilliferum* abundance and cover of *B. tectorum* in the surrounding plant community; these negative associations are consistent throughout the range of the species. Wildfire occurs throughout the range of *L. papilliferum* and has dramatically increased in both frequency and extent over historical levels, especially where *B. tectorum* is dominant. We expect this trend to continue and possibly increase due to the projected effects of climate change. Furthermore, as *B. tectorum* and other nonnative annual grasses continue to spread and degrade the sagebrush-steppe ecosystem, we expect continued increases in fire frequency and magnitude, with associated negative impacts on *L. papilliferum*.

As wildfire continues to promote the conversion of sagebrush to nonnative annual grasslands, we also anticipate that Owyhee harvester ants will expand into areas occupied by *L. papilliferum*, as the density of harvester ants is negatively associated with sagebrush cover, and they appear to readily colonize grassland habitats that are replacing sagebrush. Seed predation on *L. papilliferum* is thus expected to increase, with negative consequences for plant reproduction and the maintenance of the persistent seed bank.

Additionally, future development threatens many of the remaining *L. papilliferum* occupied sites, primarily in the Snake River Plain and Boise Foothills. Development can result in the permanent loss of slickspot microsite habitats, and contributes to the problems associated with habitat fragmentation and the isolation of small populations. The loss of slickspots, particularly those slickspots occupied by the species and thus clearly providing the requisite conditions to support *L. papilliferum*, is of great concern due to the finite nature of this resource. Habitat fragmentation and isolation potentially reduces the long-term viability of populations by impeding genetic exchange through insect pollination or pollen dispersal, resulting in decreased seed production and possibly reduced genetic diversity.

As with the 2007 finding (72 FR 1622; January 12, 2007), we do not see strong evidence of a steep negative population trend for the species. However, recent analysis of the best available scientific data suggests that *Lepidium papilliferum* numbers may be trending downward, and the dataset from the rough census areas on the OTA, which we consider to be the most reliable, shows a statistically significant downward trend in density over the last 18 years. The evidence suggests this negative trend is independent of any trend in precipitation over the same period of time. The extreme variability in annual abundance makes the detection of any such trend statistically challenging; not all monitoring data have shown consistently significant results, and, as described earlier, there are numerous factors that serve to complicate the confident detection of a population trend in this species. We do now have evidence, however, that the primary threats of wildfire and invasive

nonnative plants, especially *B. tectorum*, are currently acting on the species and its habitat throughout its limited range, and furthermore we now have evidence of a significant negative association between the abundance of *L. papilliferum* and these two threats. Indications are that all of the significant threats to *L. papilliferum* identified in this rule, including development and habitat fragmentation, but especially wildfire and invasive nonnative plants, will continue and likely increase into the foreseeable future. The projected future consequences of climate change, if realized, will further magnify the primary threats posed by wildfire and *B. tectorum*. Furthermore, we conclude from our evaluation of the ongoing and planned conservation efforts for *Lepidium papilliferum* that, despite the best efforts of the State and other management agencies, there is no information leading us to believe that sufficient management tools are currently being implemented that are capable of effectively reducing or ameliorating the primary threats of wildfire and invasive nonnative plants, particularly *B. tectorum,* across the range of *L. papilliferum*, to a point where the species is not likely to become endangered in the foreseeable future. As we can reasonably anticipate the continuation or increase of all of the significant threats to *L. papilliferum* into the foreseeable future, even after accounting for ongoing and planned conservation efforts, and based on the observed significant negative correlation between the primary threats of wildfire and invasive nonnative plants, particularly *B. tectorum*, and the abundance of *L. papilliferum*, we can reasonably infer that the negative consequences of these threats on the species will continue, and, under current conditions, population declines will likely be observed within the foreseeable future to the point at which *L. papilliferum* will become an endangered species.

Section 3 of the Act defines an endangered species as "any species which is in danger of extinction throughout all or a significant portion of its range" and a threatened species as "any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." *Lepidium papilliferum* is currently affected by a variety of threats across its entire geographic range. As we have not yet observed the extirpation of local populations or steep declines in the abundance of the species, we do not believe the status of the species is such that it is presently in danger of extinction. Therefore, we do not believe *L. papilliferum* meets the definition of an endangered species. We additionally considered whether any significant portion of the species' range meets the definition of endangered (see **Significant Portion of the Range Evaluation**, below); however, we could not determine that any significant portion of the species' range is presently in danger of extinction, thus no significant portion of the species range warrants listing as endangered. We can, however, reasonably anticipate the impacts of the threats on *L. papilliferum* rangewide, and we believe those threats acting in combination are likely to result in the species becoming endangered within the foreseeable future. Therefore, we are listing *L. papilliferum* as a threatened species throughout all of its range under the Act.

Significant Portion of the Range (SPR) Evaluation

Section 3 of the Act defines an endangered species as a species in danger of extinction throughout all or a significant portion of its range, and a threatened species as a species that is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.

In our analysis for this final rule, we initially evaluated the status of and threats to the species throughout its entire range. *Lepidium papilliferum* is restricted to a relatively small range in southwestern Idaho. The range of the species has been divided into three physiographic regions, based on differences in topography, soil, and relative abundance of *L. papilliferum*. These three physiographic regions, shown in Figure 1, are the Boise Foothills, Snake River Plain, and Owyhee Plateau. In our evaluation of threats to *L. papilliferum*, we determined that the threats acting on the species may differ in severity to some degree between these physiographic regions, as demonstrated by Sullivan and Nations (2009, Chapter 8, pp. 97-138). On the basis of this evaluation, we determined that the entire species meets the definition of threatened under the Act due to the loss or degradation of its habitat, due primarily to the modified wildfire regime and invasive nonnative plant species. The basis of this determination is captured within the analysis of each of the five listing factors, and the **Finding** immediately preceding this section.

Recognizing the potential differences in the magnitude of threats, we evaluated whether there were any specific areas or populations that may be disproportionately threatened such that they currently meet the definition of an endangered species versus a threatened species. Our evaluation of whether there are any significant portions of *Lepidium papilliferum*'s range (SPR) where listing the species as endangered may be warranted follows.

On March 16, 2007, a formal opinion was issued by the Solicitor of the Department of the Interior, "The Meaning of 'In Danger of Extinction Throughout All or a Significant Portion of Its Range'" (USDI 2007). We have summarized our interpretation of that opinion and the underlying statutory language below.

In determining whether a species is threatened or endangered in a significant portion of its range, we first identify any portions of the range of the species that warrant further consideration. The range of a species can theoretically be divided into portions in an infinite number of ways. However, there is no purpose to analyzing portions of the range that are not reasonably likely to be significant and threatened or endangered. To identify those portions that warrant further consideration, we determine whether there is substantial information indicating that (i) the portions may be significant and (ii) the species may be in danger of extinction there or likely to become so within the foreseeable future. In practice, a key part of this analysis is whether the threats are geographically concentrated in some way. If the threats to the species are essentially uniform throughout its range, no portion is likely to warrant further consideration. Moreover, if any concentration of threats applies only to portions of the range that are unimportant to the conservation of the species, such portions will not warrant further consideration.

If we identify any portions that warrant further consideration, we then determine whether in fact the species is threatened or endangered in any significant portion of its range. Depending on the biology of the species, its range, and the threats it faces, it may be more efficient for the Service to address the significance question first, or the status question first. Thus, if the Service determines that a portion of the range is not significant, the Service need not determine whether the species is threatened or endangered there. Alternatively, if the Service determines that the species is not threatened or endangered in a portion of its range, the Service need not determine if that portion is significant. If the Service determines that both a portion of the range of a species is significant and the

species is threatened or endangered there, the Service will specify that portion of the range as threatened or endangered pursuant to section 4(c)(1) of the Act.

To determine whether any portions of the range of *Lepidium papilliferum* warrant further consideration as possible endangered significant portions of the range, we reviewed the entire supporting record for this final listing determination with respect to the geographic concentration of threats and the significance of portions of the range to the conservation of the species. In this case, we first evaluated whether substantial information indicated (i) the threats are so concentrated in any portion of the species' range that the species may be currently in danger of extinction in that portion; and (ii) if so, whether those portions may be significant to the conservation of the species.

Our rangewide review of the species concluded that *Lepidium papilliferum* is likely to become endangered within the foreseeable future. Therefore, the species meets the definition of threatened under the Act. As described above, to establish whether any areas may warrant further consideration, we reviewed our analysis of the five listing factors to determine whether any of the significant threats identified were so concentrated that some portion of *L. papilliferum*'s range may currently be in danger of extinction. All of the significant threats identified in this rule, the primary threats of modified wildfire regime and invasive nonnative plant species, and the lesser threats of development and habitat fragmentation and isolation, act on the species throughout its range. The threat of development is somewhat greater in the Boise Foothills and Snake River Plain physiographic regions relative to the Owyhee Plateau, but as discussed in our analysis under Factor A, we have no information indicating that this threat is so imminent or disproportionately severe as to place the species in danger of extinction within those physiographic regions at present. In addition, the analysis of Sullivan and Nations (2009) demonstrated that the magnitude of the threats to *L. papilliferum* from some factors, such as individual species of invasive nonnative plants (e.g., *Agropyron cristatum*) may vary to some degree between physiographic regions. However, based on our review of the record, we did not find substantial information indicating that any of the significant threats to the species were so severe or so concentrated as to indicate that some portions of *L. papilliferum*'s range qualify as endangered. As described in our **Finding** above, the threats are such that we anticipate *L. papilliferum* will become endangered within the foreseeable future across its range. However, at present we have no evidence of any recent localized population extirpations, nor is there evidence of any localized precipitous population declines indicating that *L. papilliferum* is currently in danger of extinction in any portion of its range. As a result, while the best scientific data available allows us to make a determination as to the rangewide status of *L. papilliferum*, we have determined that the best available data show that there are no portions of the range in which the threats are so concentrated as to place the species currently in danger of extinction. Because we find that *L. papilliferum* is not endangered in any portion of its range, we need not address the question of whether any portion may be significant.

Peer review

In accordance with our peer review policy published on July 1, 1994 (59 FR 4270), and current Department of the Interior guidance, we solicited seven individuals with scientific expertise on *Lepidium papilliferum*, its habitat, and the geographic region in which the species occurs to provide their expert opinion and to review and interpret available information on the species' status and threats. Four of the seven peer reviewers had previously participated on a May 2006 expert panel of independent scientists convened to evaluate the available data and threats to *L. papilliferum* as part of our 2007 listing determination. Although all seven of the original expert panelists were invited to participate in the current evaluation, not all were available to do so. The peer reviewers were asked for their expert opinion on the best available information by responding to a series of questions posed by the Service regarding *L. papilliferum* population trends, threat factors, and their effects on *L. papilliferum* population viability. We received responses and comments from six of the seven peer reviewers, which are provided in the following summary and incorporated into the final rule as appropriate.

Peer Review Comments and Responses

Population Trend

(1) *Comment*: The peer reviewers differed in their explanation for describing a population trend for *Lepidium papilliferum*. One peer reviewer stated they have "no confidence in any trend data due to small sample size and lack of independence between years," and asserted that there are no data to indicate that the population is in decline. Two peer reviewers agreed that the available information revealed a significant declining trend that was not strong for the years analyzed, but expressed a lack of confidence that this trend could be reliably projected into the future. Another peer reviewer did not see strong evidence for a declining population and believed that viable populations would be maintained over the next 50 years if current conservation efforts continue. One peer reviewer offered that "ultimately, the availability and quality of suitable habitat, not past population trends, will determine *L. papilliferum*'s population trajectory."

Our Response: In our 2007 withdrawal of the proposed rule to list *Lepidium papilliferum* as endangered (72 FR 1622; January 12, 2007), we stated that data on overall population trends for *L. papilliferum* were inconsistent. Since that time we have received and evaluated new information, including independent statistical analyses of long-term plant monitoring data, in an attempt to discern any long-term trend in the abundance of the species. We acknowledge that forming a reliable estimate of trend in the abundance of *L. papilliferum* over time is complicated by multiple factors; however, we are mandated by the Act to use the best available scientific and commercial data in our assessment. Therefore, we have relied upon that data we have determined to be most reliable for the discernment of population trend. As described above in the section **Population Abundance and Trend**, one complicating factor is that individual plants may act as either an annual or a biennial form in any given year, and there can be varying numbers of plants acting as either spring-flowering annuals or overwintering rosettes. The relative proportions of these two life-history forms can fluctuate annually depending on a variety of factors, including precipitation, temperature, and the abundance of rosettes produced the previous year (Unnasch 2008, pp. 14-15; Sullivan and Nations 2009, pp. 43-44, 134-135). Another factor is that *L. papilliferum* has a seed bank with a longevity of approximately 12 years, likely as an adaptation to a highly variable environment. Years of good rainfall favorable for germination and survival may be followed by periods of drought; a persistent seed bank provides a population buffer against years of poor

reproductive performance in a highly variable environment (Meyer *et al.* 2005, p. 21). The tendency of only a small percentage of a single year's seed cohort to germinate in any given year over a 12–year period results in a significant lag effect in detecting any real underlying change in total population abundance over the long term.

Further complications are posed by the extreme annual variability observed in plant numbers. This challenge was recognized by Mancuso and Moseley (1998, p. 1), who noted the difficulty in discerning any real trend in population abundance of above-ground individuals of *Lepidium papilliferum*, since in many years the majority of the population is represented by the seed bank, hence sites that "have thousands of individuals one year may have none the next year." Some of the variability in yearly plant numbers is likely due to the relationship between *L. papilliferum* and precipitation. The annual abundance or density of *L. papilliferum* plants shows a significant positive association with the levels of spring rainfall, roughly from March through May (Meyer *et al.* 2005, p. 15; Palazzo *et al.* 2005, p. 9; Sullivan and Nations 2009, pp. 39-41), and the survival of biennials is associated with increased summer rainfall (Meyer *et al.* 2005, p. 15). In addition, temperature appears to play a role in annual abundance of *L. papilliferum* in concert with precipitation, although the exact nature of that relationship is complex and not well understood (Sullivan and Nations 2009, p. 57).

We contracted with independent consultants to analyze the available population data for *Lepidium papilliferum*, to assist us in determining which datasets represent the best available information and to provide an independent assessment of any population trend in the species, if possible. The resulting report, cited in this document as Sullivan and Nations 2009, was prepared to evaluate monitoring and survey methodologies and conduct statistical analyses on *Lepidium papilliferum* data collected on the OTA since 1990, as well as to analyze the rangewide Habitat Integrity and Population (HIP) monitoring data collected over the past 5 years (see our response to the **State of Idaho Comments**, below, for more information on the Sullivan and Nations 2009 report). This report was made available to the peer reviewers. The evaluation of Sullivan and Nations was based on a simple model of *L. papilliferum* abundance or density as a linear function of time, intended only to discern whether there was any general trend in the population; the authors acknowledge that the dynamics are complicated, and note that their model is not intended to describe (nor explain) the details of the temporal pattern of abundance or density of *L. papilliferum* (Sullivan and Nations 2009, p. 38). The authors concluded that the population data from the rough census monitoring on the OTA represents the most reliable dataset for the species, and that there is "limited evidence for declining populations," in that trends on the OTA are negative but only statistically significant for the rough census areas (Sullivan and Nations 2009, pp. 2, 44).

The extreme variability in annual counts of the species makes it difficult to discern a trend in numbers with statistical confidence; for this reason for the purposes of modeling a trend through time, we place greater confidence in the longest time series of monitoring data available, which is from the OTA (up to 18 years of data for some rough census areas and all special-use plots). This is in agreement with the independent assessment of Sullivan and Nations (2009, pp. 3, 36, 93). In addition, those authors had slightly greater confidence in the data from the rough census areas on the OTA, since they are larger than the special-use plots and have multiple slickspots; therefore, the counts are less susceptible to localized impacts (Sullivan and Nations 2009, p. 55).

Because the OTA data on *Lepidium papilliferum* abundance and density results from a standardized collection effort over a period of nearly 20 years, we consider the information from the OTA to be the best available data with which to detect any general long-term population trend for *L. papilliferum*. The analysis of this dataset from the rough census areas on the OTA shows a statistically significant downward trend in density of *L. papilliferum* over the last 18 years. This trend appears to be independent of any trend in precipitation over the same time period, indicating this decline is occurring due to factors other than precipitation pattern (Zwartjes 2009, p. 1). We therefore conclude that the best available data suggest that *Lepidium papilliferum* numbers are probably trending downward. Furthermore, since this significant downward trend has been detected on the OTA, which represents some of the highest quality habitat remaining for *L. papilliferum*, we believe it is reasonable to infer that this negative trend is similar or possibly even greater rangewide, in areas of lower quality habitat.

We note that one peer reviewer questioned whether a decline in *Lepidium papilliferum* abundance is really occurring, based on high numbers of plants recorded in 2008. Another peer reviewer, however, had little confidence that this one-time observation was indicative of any long-term increasing trend. We note that the increase in numbers of *L. papilliferum* in 2008 is largely based on substantial increases at only 6 out of 80 HIP transects; 66 percent of all *L. papilliferum* counted in 2008 were found at these 6 transects (Colket 2009, p. 26). Furthermore, the plant community where these six transects are located has not been burned, and is dominated by native sagebrush (*Artemisia tridentata*). These six transects therefore represent some of the highest-quality habitat remaining for *L. papilliferum*. Since the increases observed in 2008 were highly localized and occurred in remnant high-quality habitats, and considering that rangewide most *L. papilliferum* occurrences are in degraded habitats and counts tend to be highly variable from year to year, we do not believe it is reasonable to infer that this one-time increase in abundance portends any future rangewide increases in abundance of the species. Please also see "2008 HIP Survey Results" under our response to public comments number 12, below.

Data Quality

(2) *Comment*: One peer reviewer stated that information contained in many of the study reports is based on data that were not collected for specific analysis, but instead represents an analysis that was performed on data whose accuracy is unknown or from small data sets comprised of interdependent data. Another peer reviewer noted the difficulty in comparing different data sets as well as data sets with differing collection methodologies; while another reviewer identified that several of the data sets examined were collected over such short periods (2 to 3 years) that the study results were of limited value. In contrast, another peer reviewer stated that it is important to make conclusions based on available information when unequivocal data is lacking.

Our Response: The Act requires us to make listing decisions based solely on the best scientific and commercial information available at the time the decision is being made (section 4(b)(1)(A)). We thoroughly reviewed and evaluated all available scientific and commercial data for *Lepidium papilliferum* in preparing this final listing determination. We reviewed historical and recent publications, as well as unpublished reports concerning *L. papilliferum* and sagebrush-steppe

habitats of southwestern Idaho. As part of our process, the seven peer reviewers were asked to provide a critical examination of the new scientific information pertaining to *L. papilliferum*. This information included both long-term and recent HII/HIP rangewide survey and monitoring data, the statistical analyses of long-term OTA monitoring data, and the 5 years of available HIP monitoring data completed by an independent consultant. In addition, we received an independent critique of the methodologies of several recent reports or analyses of L. *papilliferum* data (Sullivan and Nations 2009, pp. 139-148), to assist in our assessment of the best available data.

We agree that the differing methodologies and lack of standardization present challenges in evaluating the data relevant to *Lepidium papilliferum*. Furthermore, much of the data are observational in nature; that is, the data were not collected based on controlled experiments, but are primarily based on observations of the relative conditions or abundance of various environmental variables, such as livestock print cover and the relative abundance of *L. papilliferum*. However, as noted above, we have a legal obligation under the Act to make a determination based upon the best scientific and commercial data available at the time; the statute does not provide for additional research, nor does it provide the option of not making a determination. We must therefore evaluate all of the scientific and commercial data before us to determine which data we consider to be the best available. As part of our evaluation, we carefully considered factors such as the time series of data collection, the variability of the data, and standardization of data-collection procedures in weighing the relative value or reliability of study results. We considered all of these factors in considering the relative quality of the data available, and in determining which data to rely upon in our determination. Throughout our review and evaluation, we followed the Service's Information Quality Guidelines (USFWS 2007) to prepare this final determination.

Threats to the Species

(3) *Comment*: The peer reviewers varied in describing which threats they considered to be of primary importance to the population viability of *Lepidium papilliferum*. Three of the six peer reviewers expressed concern regarding the impact of wildfire on *L. papilliferum* and its habitat, while four of six peer reviewers mentioned habitat degradation and loss of the sagebrush-steppe habitat from exotic and invasive nonnative grasses to be of concern or a primary threat. Other threats identified included development (two reviewers), seed predation by harvester ants (two reviewers), and habitat fragmentation (two reviewers). One reviewer identified livestock as a potential threat, one reviewer asserted that there are no good data to suggest that livestock are a threat, and one reviewer suggested that, if managed appropriately, livestock could be utilized to manage the threat of nonnative invasive grasses and the associated increase in fire frequency. One peer reviewer stated that there are few reliable scientific studies to show any cause-and-effect relationships to *L. papilliferum*, and stated that the species continues to exist in areas of supposed threats, including "burned over areas."

Our Response: In making this determination, we evaluated several potential threat factors including the effects of wildfire; invasive nonnative plants; development; seed predation; livestock use; wildfire management; habitat fragmentation and small populations; military training; recreation; and climate change. Of all the threat factors examined, we determined that the modified wildfire regime affecting the species' sagebrush-steppe habitat in combination with the spread of nonnative invasive annual plants such as *Bromus tectorum* and *Taeniatherum caput-medusae* are likely the primary factors affecting abundance and the long-term persistence of *Lepidium papilliferum*. Tightly controlled experiments that demonstrate clear causal relationships between variables examined are rare. Studies that demonstrate a significant or non-significant correlation between variables are prevalent in the scientific literature, and in many cases, depending on factors such as the quality of the data and analysis, constitute the best information available. For example, such analyses have demonstrated a significant negative relationship between the density or abundance of *L. papilliferum* and the occurrence of fire and cover of *B. tectorum* (Sullivan and Nations 2009, pp. 116-118, 130-131, 135-137). Based on this observed significant relationship, we infer that as the occurrence of fire and the cover of *B. tectorum* increase, we will observe a decrease in the density or abundance of *L. papilliferum*. A complete review and evaluation of the threats affecting *L. papilliferum*, including a discussion of our rationale in assessing those threats, is presented in the **Summary of Factors Affecting the Species** section of this rule.

(4) *Comment*: The peer reviewers varied in their estimates of a time period over which they could reliably predict the effects of threats, both individually and synergistically, on the population viability and survival of *Lepidium papilliferum*. One peer reviewer could not "reliably predict the effect of each of the primary threats to the species, based on the data before me since the data does not exist." Another peer reviewer suggested that given current trends in habitat loss and degradation, *Lepidium papilliferum* "is likely at a tipping point in terms of its prospect for survival," and doubted that the species would persist in sustainable numbers beyond the next 50 to 75 years. Most peer reviewers did not project a time period for predicting threat effects or extinction risk, stating that future projections were likely speculative.

Our Response: As described above, the Act requires us to make listing decisions based solely on the best scientific and commercial data available at the time the decision is being made (section 4(b)(1)(A)). Based upon the best scientific and commercial data available, we must make a determination as to whether the species under consideration is in danger of extinction throughout all or a significant portion of its range (endangered), or if the species is likely to become endangered within the foreseeable future throughout all or a significant portion of its range (threatened). We consider the "foreseeable future" to be that period of time over which events can reasonably be anticipated. In considering threats to the species and whether they rise to the level such that listing the species as threatened or endangered is warranted, we assess factors such as the imminence of the threat (is it currently impacting the species, and is it reasonable to expect the threat to continue into the future?), the scope or extent of the threat, the severity of the threat, and the synergistic effects of all threats combined. If we determine that the species is not currently in danger of extinction, then we must determine whether, based upon the nature of the threats, it is reasonable to anticipate that the species may become in danger of extinction within the foreseeable future.

We have identified the present or threatened destruction, modification, or curtailment of *Lepidium papilliferum*'s habitat or range as a threat to the species, based on the observed negative association between the abundance or density of the plant and the current, frequent fire regime and invasion of

Bromus tectorum and other nonnative plants, as well as the direct loss of limited slickspot microsite habitats to development. Predation is an additional threat to the persistence of the species, as seed predation by harvester ants has potentially significant consequences for the plant's seed bank, and the presence of harvester ants appears to be associated with the observed conversion of sagebrush-steppe to nonnative annual grasslands. Habitat fragmentation and isolation resulting from development and associated infrastructure, such as utility lines, contributes to the threats of wildfire and nonnative plant invasion, and may additionally impact *L. papilliferum* by limiting genetic exchange between populations via insect pollination. Climate change may further accelerate the conversion of intact sagebrush-steppe habitat to invasive nonnative annual grasslands, with subsequent associated increases in wildfire frequency and, potentially, harvester ant expansion. These threats are all occurring at present, and based on the evidence before us, we believe it is reasonable to anticipate that the current regime of frequently recurring wildfires, the invasion of nonnative grasses and other plants, development, and the expansion of harvester ants will continue and likely increase into the foreseeable future. Although conservation measures to address some of these threats have been considered and in some cases implemented, effective controls throughout the range of the *L. papilliferum* are simply not available in many cases. For example, it is not anticipated that landscapes dominated by *B. tectorum* can feasibly be restored to intact sagebrush-steppe habitat within the foreseeable future, as restoration of *L. papilliferum*'s native sagebrush-steppe ecosystem is considered one of the greatest restoration challenges in the Great Basin (Bunting *et al.* 2003, pp. 82-84). Moreover, the threats to *L. papilliferum* can reasonably be anticipated to continue or increase. This information, in concert with the observed negative association between these threats and the abundance of the species (in the further context of considerations such as the limited geographic extent of the species' range and the finite nature of its slickspot microhabitats), lead us to the conclusion that it is reasonable to anticipate that *L. papilliferum* is likely to become endangered in the foreseeable future. Based on our assessment of the best scientific and commercial data available regarding the past, present, and future threats faced by the species, we have therefore determined that *L. papilliferum* is a threatened species, as defined by the Act.

Seed Dispersal

(5) *Comment*: One peer reviewer suggested that the seeds of *L. papilliferum* can be widely dispersed by high winds, in addition to potential dispersal by animals. This reviewer stated that the seeds produce mucilage when wet and may likely have been dispersed by clinging to the wool of sheep, citing Rollins 1993, and suggests that *L. papilliferum* is not necessarily so highly specialized in its habitat requirements, but that the current distribution of *L. papilliferum* may be due to the past activities of Basque sheep herders.

Our Response: We acknowledge that the seeds of *Lepidium papilliferum* may occasionally be dispersed by wind. However, the species does not demonstrate any of the usual adaptations to assist in wind dispersal, such as winged seeds, that would indicate wind as the usual mode of dispersal for the species. In the paper cited by the reviewer, Rollins (1993, p. 535) suggests that the seeds of plants in the genus *Lepidium* may potentially be dispersed by sheep; this study was not specific to *L. papilliferum*, but appears to be more relevant to weedy *Lepidium* species of Europe and Asia, such as *L. perfoliatum*. In evaluating whether the present range of *L. papilliferum* may be due to the activities of either wind or Basque sheepherders, we considered both the current knowledge of the range of *L. papilliferum* and the results of recent genetic studies. *Lepidium papilliferum* is endemic to southwest Idaho, and the best available information indicates that there are no populations reported in other States where the Basques from Idaho would have also ranged with their sheep, thus indicating that sheep were likely not the primary vectors for seed dispersal that resulted in the current range of the species. In addition, if wind dispersal defined the range of the species, we would not expect the species to be confined to this limited range in southwest Idaho, as the wind would certainly be capable of carrying seeds beyond the present boundaries within which *L. papilliferum* is found. Finally, genetic studies showing that smaller populations of *L. papilliferum* have reduced genetic variability (Larson *et al.* 2006, p. 17) is not consistent with the theory that the seeds are wind-dispersed, which would provide a consistent source of genetic mixing and reduce the genetic isolation of these small populations, thereby maintaining genetic diversity. We therefore conclude that seed dispersal by wind or sheep is most likely not responsible for the current distribution of *L. papilliferum*, nor are these processes currently occurring at a level that is significant to the life history of the species.

Summary of Public Comments and Recommendations

Since the proposed rule was reinstated by the Court, there have been two public comment periods. During the September 19, 2008, 30–day comment period for the proposed rule, we received a total of seven comment letters in response to our request for new information: two from Federal agencies and five from organizations or individuals. The State of Idaho submitted comments and new information after the close of the comment period. During the March 17, 2009, 30–day comment period, we received 14 comments, including 6 solicited from peer reviewers. Of the public comments, all were received either in written form or through the portal at: *http://www.regulations.gov*.

Two public commenters generally supported the proposed rule to list the species; seven were opposed to the proposed rule, and the remaining were either neutral or provided new information regarding the proposed rule. Comments that provided new information were incorporated into this final determination, or are addressed below. Public comments received were grouped into six general issues, and are addressed in the following summary.

Public Comments

New Information

(6) *Comment*: Several commenters provided new data and information regarding the biology, ecology, life history, and threat factors affecting *Lepidium papilliferum*, and requested it be incorporated into the body of existing information the Service has on the species and be considered by us in making any future listing determinations.

Our Response: We thank the commenters who provided new data and information for our consideration in making this final listing determination. We have considered scientific and commercial information regarding *Lepidium papilliferum* contained in over 100 technical documents, published journal articles, and other general literature documents, including over 50 documents we have received since the January 2007 withdrawal of the proposed rule to list *L. papilliferum* (72 FR 1622; January 12, 2007). The body of available information specific to

L. papilliferum has increased since 2007, including new scientific information regarding the species' biology, ecology, and distribution; habitat quality monitoring; the implementation and effectiveness of ongoing conservation efforts; and information pertaining to threat factors affecting the species. This information was contained in State Agency reports (ICDC 2007a; ICDC 2007b; Quinney 2007; ICDC 2008; IDFG 2008; State of Idaho 2008; Unnasch 2008; Colket 2009; Robertson and White 2009) and other scientific reports and peer-reviewed articles (Billinge and Robertson 2008; Palazzo *et al.* 2008; Smith *et al.* in press). We also considered information contained in population survey and monitoring reports (Boise Airport 2003; Hoffman 2005; ICDC 2007b; Quinney 2007; U.S. Air Force (CH2MHill 2007a,b, 2008a,b); U.S. BLM 2007, 2008a; Cole 2008; Colket 2009). Additionally, to gain a better understanding of existing monitoring data, we contracted with independent consultants to conduct several analyses, including: a statistical analysis on long-term monitoring data collected at the OTA, an analysis of rangewide HIP data, and an assessment of the methodologies of other recent analyses (Sullivan and Nations 2009); a statistical and geospatial analysis of data collected during 2000-2002 field surveys at the Inside Desert of the Owyhee Plateau (Popovich 2009); and a geospatial analysis of wildfire and vegetation types within the range of *L. papilliferum* (Stoner 2009). Finally, in order to assess any potential relationship between abundance or density of *L. papilliferum* and precipitation trends over time, we conducted our own analysis of precipitation patterns at the OTA (Zwartjes 2009). All of the documents were made available to the public and provided to the six peer reviewers.

Appropriate Listing Status of Lepidium papilliferum

(7) *Comment*: One commenter stated that the Service should immediately move to list *Lepidium papilliferum* as endangered and simultaneously designate critical habitat. Conversely, the State of Idaho "remains steadfast in its belief that the species does not warrant this protection" (see State of Idaho comments, below). One other commenter agreed with this position and two commenters indicated that there is inadequate scientific information to make a decision to list *L. papilliferum* at this time, and requested additional studies be completed.

Our Response: Section 4(b)(1)(A) of the Act requires us to make listing decisions based solely on the best scientific and commercial data available. The Service has a legal obligation to make a determination based on the best available data before us at the time the decision is being made; the statute does not provide for additional research, nor does it provide the option of not making a determination. We have thoroughly reviewed all available scientific and commercial data for *Lepidium papilliferum* in preparing this final listing determination. We reviewed historical and recent publications as well as unpublished reports concerning *L. papilliferum* and the sagebrush-steppe habitat where it occurs in southwestern Idaho. In addition, we utilized peer review to provide a more focused, independent examination of the available scientific information and its application to the current status of the species. Finally, we contracted with independent consultants to assist us in analyzing *L. papilliferum* abundance and habitat quality monitoring data. As described in our response to peer review comments above (number 2), as part of our evaluation, we carefully consider the quality and reliability of all data to decide which constitutes the best available data for our consideration in making our final determination.

Our evaluation of the significance of the threat factors across the range of *Lepidium papilliferum* is presented in the **Summary of Factors Affecting the Species** section of this final determination. Additional discussion of our application of the standards of the Act in making our determination is provided in our response to peer review comment number 4, above. *Lepidium papilliferum* is currently affected by threat factors across its entire geographic range. Based on our evaluation, we believe it is reasonable to anticipate that the negative impacts of these threats on *L. papilliferum* rangewide will continue and even increase. Although we consider the impacts of these threats to be foreseeable and likely to result in the species becoming endangered within the foreseeable future, we do not consider *L. papilliferum* to be currently in danger of extinction. Furthermore, while we acknowledge the efforts of the State and other entities to implement conservation measures for the species, the best available information leads us to believe that currently available management tools are not capable of effectively reducing or ameliorating these threats across the range of the species. Based on our assessment of the best scientific and commercial data available regarding the threats faced by the species, we have determined that *L. papilliferum* meets the definition of a threatened species under the Act. We have also determined that designating critical habitat for *L. papilliferum* is prudent but not determinable at this time (see **Critical Habitat Determinability,** below).

Taxonomic Status of Lepidium papilliferum

(8) *Comment*: One commenter suggested that *Lepidium papilliferum* is a local variation of *Lepidium montanum*, and therefore is not a species or subspecies as defined under the Act. Another commenter stated that considerable uncertainty remains regarding the taxonomy of *L. papilliferum* and suggested that the Service conduct a genetic study to resolve any taxonomic disputes.

Our Response: *Lepidium papilliferum* was originally described as *L. montanum* var. *papilliferum* in 1900 by Louis Henderson. It was renamed *L. papilliferum* by Aven Nelson and J. Francis Macbride in 1913 based on its distinctive growth habit, short lifespan, and unusual pubescence (Nelson and Macbride 1913, p. 474). Hitchcock regarded *L. papilliferum* as *L. montanum* var. *papilliferum*, influencing several publications, including Flora of Idaho and Flora of the Pacific Northwest (Hitchcock *et al.* 1964, p. 516; Hitchcock and Cronquist 1973, p. 170; Steele 1981, p. 55; Moseley 1994, p. 2). In a 1993 review of taxa in the mustard family (Brassicaceae), Rollins maintained the species as *L. papilliferum* based on differences in the physical features between the two species such as:

(1) *L. papilliferum* has trichomes (hair-like structures) occurring on the filaments of stamens (the part of flower that produces pollen), but *L. montanum* does not;

(2) All the leaves on *L. papilliferum* are pinnately divided whereas *L. montanum* has some leaves that are not divided;

(3) The shape of the seed capsule (silicle [silique]) of *L. papilliferum* is different from that of *L. montanum*; and

(4) The silicle of *L. papilliferum* has no wings, or even vestiges of wings, at its apex (end of the capsule), unlike that of *L. montanum* (Rollins 1993, p. 578; Moseley 1994, p. 2). A review of the taxonomic status by Lichvar (2002), using classic morphological features and study of herbarium specimens, concluded that *L. papilliferum* has distinct morphological features that warrant species recognition. In addition, Meyer *et al.* (2005, p. 17) describe a

contrast in life history when compared to *L. montanum* regarding seed dormancy and the seed bank. *Lepidium papilliferum* seeds can remain dormant (and viable) and persist in the seed bank for up to 12 years; in contrast, *L. montanum* has largely nondormant seeds (Meyer *et al.* 2005, p. 17). Resolving one commenter's concern, a recent genetic study compared *L. montanum, L. papilliferum, and L. fremontii.* Results of the study indicated that *L. fremontii* and *L. papilliferum* are morphologically and ecologically distinct from *L. montanum,* with apparently little gene flow between *L. fremontii* and *L. papilliferum*, and *L. montanum* (Smith *et al.* in press, p. 18). *Lepidium papilliferum* is recognized as a distinct species by Intermountain Flora (Holmgren *et al.* 2005, p. 259), the U.S. Department of Agriculture's "PLANTS Database" (USDA 2006), and the Biota of North America Project (ITIS 2009). After considering all of this information, we believe that *L. papilliferum* is properly recognized as a full species, separate from *L. montanum.*

The Act requires the Service to use the best scientific data available when making listing determinations under section 4 of the Act. The Act, therefore, does not require the Service to conduct its own studies on species it is considering for protection under the Act, including genetic studies on the taxonomy of those species.

Conservation Agreements

(9) *Comment:* One commenter stated that the 2003 Candidate Conservation Agreement for Slickspot Peppergrass (CCA) by the State of Idaho, BLM, and others "falsely assured" readers that it would protect *Lepidium papilliferum* and its habitat. We also received information from the State of Idaho and the BLM describing ongoing conservation actions they are implementing under the CCA.

Our Response: We strongly support a collaborative conservation effort to address factors affecting species being considered for listing under the Act. Since February 2000, we have worked with numerous agencies and individuals to assess the status of *Lepidium papilliferum* and to identify and implement conservation actions on its behalf. We continue to participate as a technical advisor to an interagency group of biologists and stakeholders to share scientific information and coordinate conservation actions for *L. papilliferum* and its habitat.

In 2006, as part of a previous status review for *Lepidium papilliferum,* we conducted an evaluation of individual conservation efforts contained in five different plans, or conservation strategies, developed for *L. papilliferum.* These five plans were: (1) the 2003 CCA; (2) the Idaho Army National Guard (IARNG) Integrated Natural Resource Management Plan (INRMP) for Gowen Field/Orchard Training Area; (3) the U.S. Air Force INRMP for Mountain Home Air Force Base; (4) the Conservation Agreement by and between the City of Boise and the Service for *Allium aasea* (Aase's onion), *Astragalus mulfordiae* (Mulford's milkvetch) and *L. papilliferum*, also known as the Hull's Gulch Agreement; and (5) the Conservation Agreement for slickspot peppergrass (*Lepidium papilliferum*) at the Boise Airport, Ada County, Idaho.

The majority of the conservation efforts developed on behalf of *Lepidium papilliferum* that we examined are contained in the 2003 State of Idaho CCA, which was updated in 2006. The CCA includes efforts that are intended to address the need to maintain and enhance *L. papilliferum* habitat; reduce the intensity, frequency, and size of natural and human-caused wildfires; reduce the potential for invasion of nonnative plant species from wildfire; minimize the loss of the species' habitat associated with rehabilitation and restoration techniques; minimize the establishment of invasive nonnative species; mitigate the negative effects of military training and other associated activities; and minimize the impact of ground disturbances caused by livestock penetrating trampling during periods when soils are saturated. The IDARNG and U.S. Air Force are also implementing conservation efforts on lands they manage to potentially avoid or reduce adverse effects of military training on *L. papilliferum* and its habitat. For example, the IDARNG has been implementing conservation efforts at the OTA since 1991 that promote the conservation of *L. papilliferum*, while still providing for military training activities. These actions include intensive wildfire suppression efforts, and restricting ground operated military training to areas where the plants are not found. The U.S. Air Force INRMP was modified in 2004 and contains more measures that promote the conservation of *L. papilliferum* than the 2000 version. The current INRMP includes measures developed to minimize the effects of threats such as wildfire, nonnative invasive weeds, and livestock use on *L. papilliferum.* The Boise Airport Conservation Agreement lays out measures to protect and conserve the known occurrences of *L. papilliferum* at the airport, while the Hull's Gulch Conservation Agreement focuses on coordinating and planning activities with the Service in Hull's Gulch in the Boise Foothills.

With the exception of conservation efforts implemented by the IDARNG over the past 18 years, many of the conservation efforts presented in the conservation plans, although laudable, have not been implemented over a period of time long enough for effectiveness to be adequately demonstrated. Similarly, the adaptive management provisions in the 2003 State of Idaho CCA have not been implemented long enough to have sufficient certainty of their effectiveness in addressing the long-term conservation of *L. papilliferum.* We recognize the conservation efforts identified in the conservation plans can have benefits for the species and its habitat, particularly with limiting the effects of wildfire and livestock use. Despite the best intentions, however, many of the measures identified in the conservation plans are limited in their ability to effectively reduce long-term habitat degradation or loss in the sagebrush-steppe ecosystem, including the negative impacts observed on slickspots and *L. papilliferum* associated with that degradation or loss. For example, there is currently no effective control of *Bromus tectorum* available to mitigate its effect on *L. papilliferum* and its synergistic interactions with frequent wildfires to a degree sufficient that we would consider it no longer a threat to the species.

Climate Change

(10) *Comment:* One commenter indicated that the effects of global warming and climate change on the species must be considered in our analyses of potential threats to the species and its habitat.

Our Response: We agree, and have provided a discussion of the potential impacts of climate change on *Lepidium papilliferum* in this rule. In brief, there is compelling scientific evidence that we are living in a time of rapid, worldwide climate change. For example, 11 of the last 12 years evaluated (1995-2006) rank among the 12 warmest years in the instrumental record of global surface temperature (since 1850) (ISAB 2007, p. iii). While the effects of global climate change are uncertain, it has the potential to affect rare plants and their habitats, including *L. papilliferum.* Although the Service cannot identify specific potential effects on the species at this time, some models indicate that climate change may

provide an environment conducive to further conversion of the sagebrush-steppe ecosystem by invasive nonnative annual grasslands, which would have negative consequences for *L. papilliferum*; fire frequency and extent is predicted to increase as well. Although we do not consider climate change to pose a significant threat to *L. papilliferum* in and of itself, we do consider climate change to be a potentially important contributing factor to the primary threats of frequent wildfire and invasive nonnative plants, particularly *B. tectorum*, and especially in regard to our evaluation of the likelihood of the continuation of these threats into the foreseeable future. A complete description of the potential effects from climate change and our evaluation of this threat is found in Factor E of the **Summary of Factors Affecting the Species** discussion.

Livestock Grazing

(11) *Comment*: Two commenters provided information to support the argument that livestock grazing is detrimental to *Lepidium papilliferum*. Four commenters provided comment or new information to support the countering view, indicating that livestock grazing is not detrimental or could be beneficial to the species.

Our Response: Livestock use in areas that contain *Lepidium papilliferum* has the potential to result in either positive or negative effects on the species, depending on a variety of factors such as stocking rates and season of use. The most visible negative effect on *L. papilliferum* and its slickspot habitat is from mechanical disturbance due to trampling, which can affect the fragile soil layers of slickspots and compromise their integrity and function (Seronko 2004; Meyer *et al.* 2005, pp. 21-22). Livestock trampling and compaction of slickspots may also bury seeds to such a depth that germination is no longer possible (Meyer *et al.* 2005, pp. 21-22). We are aware of three incidents where livestock trampling events have apparently resulted in a dramatic decrease in *L. papilliferum* numbers at sites where the plants were formerly abundant, while reduced plant numbers were not observed at similar adjacent sites within the same year (Robertson 2003b, p. 8; Meyer *et al.* 2005, p.22; Colket 2006, pp. 10-11). *Lepidium papilliferum* numbers are slowly recovering at the site in the Boise Foothills (Colket 2009, p. 31), the site at the OTA has shown no apparent recovery over time (Meyer *et al.* 2005, p.22), and the fate of the third site at Glenns Ferry is unknown, as it has not been revisited since the event.

Conversely, it is hypothesized that livestock use, at an appropriate level and season, may reduce the effect of invasive nonnative annual grasses at some *L. papilliferum* sites by reducing fine fuel loads, thereby decreasing the risk of wildfire (e.g., Loeser *et al.* 2007, p. 94, and references therein; Launchbaugh *et al.* 2008; Romero-Calcerrada *et al.* 2008, p. 351). Data limitations currently make it difficult to establish effect thresholds from livestock management activities on *L. papilliferum* and its habitat. There have been adaptive management techniques implemented for livestock use in some areas occupied by *L. papilliferum*, and several recent studies have examined the relationship between livestock trampling effects and *L. papilliferum* abundance (Popovich 2009; Salo 2009; Sullivan and Nations 2009). As described in detail in "*Livestock Use*" under Factor A in the **Summary of Factors Affecting the Species** section, above, we consider the risks associated with livestock use, as currently practiced, to be a lesser threat than other factors that have been demonstrated to adversely impact the species rangewide. We encourage the continued implementation of conservation measures and associated monitoring to ensure potential impacts of livestock trampling to the species are avoided or minimized.

Data Quality and Interpretation

(12) *Comment*: There were several comments regarding the use of available monitoring and survey data in determining the historical and existing distribution, population size, and trend information for *Lepidium papilliferum*. One commenter and one peer reviewer stated that there have been no comprehensive systematic surveys for *L. papilliferum*, and therefore, we do not fully understand the distribution or status of the species. In addition, the peer reviewer indicated that the number of element occurrences has increased between 1998 (45 extant EOs) and 2008 and will continue to increase. One commenter suggested that the data demonstrate a negative population trend for *L. papilliferum;* other commenters suggested the data are inconclusive, and no trend can be determined. Several commenters cited information relating *L. papilliferum* annual abundance to precipitation. One commenter and one peer reviewer stated that the Service's determination that there is evidence of a statistically significant population decline ignores the fact that 2008 was the highest population year on record. Another peer reviewer expressed a lack of confidence that the high number of plants in 2008 portends any long-term increase in the population. One commenter stated that the high *L. papilliferum* numbers documented in 2008 agree with the Service's 2007 conclusion that the overall population trend for the species is inconsistent. Two commenters and one peer reviewer stated that the Service should be transparent in the quality and source of the data used in making our determination.

Our Response: As previously stated, we have reviewed and considered scientific and commercial data contained in numerous technical reports, published journal articles, and other documents. We must base our listing determination for *Lepidium papilliferum* on the best available data regarding the plant's current known population status, the known condition of its habitat, and the current factors affecting the species, along with ongoing conservation efforts, as described in the Summary of Factors Affecting the Species section of this final determination. We acknowledge that uncertainties exist; however, section 4 of the Act mandates that we make a listing determination based on the best scientific and commercial available at the time of our determination.

Our response is grouped by the following topics: Survey efforts, population trends, 2008 HIP survey results, and data quality and transparency.

Survey Efforts: As systematic rangewide surveys have not occurred, we agree that undiscovered sites occupied by *L. papilliferum* likely exist. Inventories for *L. papilliferum* have not been completed on the majority of private lands within its range due to restricted access. However, occupied slickspot sites and EOs discovered since 1998 have not added substantially to our knowledge of where the species exists; these new sites have all been within the known range of the species. For example, an inventory survey on BLM lands in the Owyhee Plateau physiographic region in 2007 documented 200 slickspots containing *L. papilliferum* plants within the known range of the plant (ERO 2008, p. 7). See our response to State of Idaho comments for additional information on potential *L. papilliferum* survey areas based on a recent modeling effort.

Population Trends: Please see our response to peer review comments, number 1, above.

2008 HIP Survey Results: Rangewide, more slickspot peppergrass plants were counted in 2008 than in any other of the 5 years of HIP monitoring (Colket 2009, p. 26). This result was largely based on

substantial increases in the number of slickspot peppergrass plants at only 6 of the 80 HIP transects (008A, 027A, 027D, 066, 067, and 070). Sixty-six percent of all slickspot peppergrass plants counted in 2008 (27,544 out of 41,672 plants) occurred at these 6 HIP transects, which represent only 8 percent of the total number of HIP transects rangewide (Colket 2009, p. 26). Two of the HIP transects with high plant numbers in 2008 (066 and 070) are located in the Boise Foothills physiographic region. The four remaining HIP transects with high plant numbers in 2008 were located on the Snake River Plain physiographic region, with three of these transects being located on the OTA (027A, 027D, 067). We cannot explain why these six transects exhibited such high plant numbers in 2008, but it should be noted that each of these six HIP transects are located in areas where the plant community is unburned and is dominated by the native sagebrush *Artemisia tridentata* (Colket 2009, p. 26). Sites exhibiting these characteristics are considered high quality habitat for *L. papilliferum*.

Data Quality and Transparency: In compiling this document, we tried to present the information in an accurate, clear, complete, and unbiased manner. Given that the data available on this species covered a wide spectrum from peer-reviewed literature to personal communications, we developed this document with the goal of providing a high degree of transparency regarding the source of data. We followed the Service's Information Quality Act Guidelines in developing this document (USFWS 2007. These guidelines provide direction for ensuring and maximizing the quality of information disseminated to the public. The guidelines define quality as an encompassing term that includes utility, objectivity, and integrity. Utility refers to the usefulness of the information to its intended users, including the public. Objectivity includes disseminating information in an accurate, clear, complete, and unbiased manner and ensuring accurate, reliable, and unbiased information. If data and analytic results have been subjected to formal, independent peer review, we generally presume that the information is of acceptable objectivity. Integrity refers to the security of information, i.e., protection of the information from unauthorized access or revision to ensure that the information is not compromised through corruption or falsification. One of our goals in obtaining public comment and peer review of new information available on *Lepidium papilliferum* since January 2007 was to ensure that we were considering the best available data while accurately representing the source of the information. Background information on the taxonomy, distribution, abundance, life history, conservation actions, and needs of *L. papilliferum,* and threats affecting the species, were derived from previous petition findings, previous **Federal Register** notices, Idaho's Natural Heritage Program (formerly Idaho Conservation Data Center) EO records, and other pertinent references from 1897 (when the species was first collected) through April of 2009.

State of Idaho Comments

(13) *Comment:* The State of Idaho requested the Service conduct an independent review of available information, including: a third-party audit of the monitoring and survey information collected by the IDARNG and other researchers at the OTA; re-examine the prior inferences the Service has drawn from available information; apply statistical analysis to the available information; and evaluate whether there are more, currently undiscovered populations.

Our Response: Prior to making our determination in this final rule, the Service has considered all of these issues and conducted the reviews suggested by the State; the results of all of these reviews were made available during the most recent comment period on the proposed rule to list *Lepidium papilliferum*. During the fall of 2008, the Service contracted with independent consultants to evaluate the various monitoring and survey methodologies for *L. papilliferum* and conduct statistical analyses on data collected on the OTA since 1990. The consultants also analyzed the rangewide HIP data collected over the past 5 years to examine any trends in *L. papilliferum* abundance in relation to environmental parameters measured as part of the HIP monitoring. In total, the consultants examined the four ongoing *L. papilliferum* survey programs conducted on the OTA. Three of the survey programs are conducted solely on the OTA, and two of these (rough census and special-use plots) have been implemented at the same locations since the early 1990s. The third program is a block search that looks at both new and previously surveyed areas for unknown populations of *L. papilliferum*. The fourth survey and monitoring program, partially conducted at the OTA, is the rangewide HII and HIP monitoring that has been performed by the INHP since the late 1990s. The results of this independent analysis were reported in a document titled: *Analysis of slickspot peppergrass (Lepidium papilliferum) population trends on Orchard Training Area and Rangewide Implications*, cited here as Sullivan and Nations (2009). The Sullivan and Nations (2009) report, as well as a report on the statistical and geospatial analysis of data collected during the 2000-2002 field surveys at the Inside Desert of the Owyhee Plateau (Popovich 2009), and a contracted geospatial analysis of wildfire and vegetation types within the range of *L. papilliferum* (Stoner 2009), were provided to the six peer reviewers and made available to the public for consideration and evaluation of all best available scientific and commercial data during the second comment period, and the results of these independent reports and reviews were incorporated into this final rule.

In an effort to evaluate the probability that *Lepidium papilliferum* may be found in other areas, the Service requested the INHP develop a model for predicting *L. papilliferum* distribution based on factors such as elevation, soil types, precipitation, and underlying geology (Colket 2008, p. 2). This model identified several potential areas in southwest Idaho with a relatively high probability of supporting *L. papilliferum* in areas outside the known range of the species. Although preliminary surveys of these areas did not result in the discovery of additional *L. papilliferum* sites (Colket 2008, pp. 4-6), we believe that this model can be used as a tool to prioritize areas targeted for future surveys and conservation planning efforts for *L. papilliferum* (Colket 2008, p. 7). Past searches have occurred for this species in Oregon (Findley 2003) and outside of its known range in Idaho (BLM 2000), but the species has never been found in these areas. The BLM is aware of our interest in the possible location of *L. papilliferum* in Oregon, and their botanists continue to look for the species during the course of their surveys (Foss 2009), but to date it has not been found. The best currently available information does not indicate that there has been a significant increase in the known range of *L. papilliferum* since our 2007 decision.

In the past, questions were raised regarding why expanded surveys on the OTA conducted by URS in 2005 recorded higher numbers of *Lepidium papilliferum* than had been previously observed. Sullivan and Nations (2009) were able to clarify that the large number of *L. papilliferum* plants counted by URS likely resulted from a more intensive search effort over a larger area in 2005 compared to what is normally examined during the rough

census or special-use plot monitoring efforts (Sullivan and Nations 2009, p. 2). Although this survey indicated that there were more *L. papilliferum* on the OTA than previously documented, it did not increase the known range of the species.

Available Conservation Measures

Conservation measures provided to species listed as endangered or threatened under the Act include recognition of the status, increased priority for research and conservation funding, recovery actions, requirements for Federal protection, and prohibitions against certain practices. Recognition through listing results in public awareness and conservation by Federal, State, and local agencies, private organizations, and individuals. The listing of *Lepidium papilliferum* will lead to the development of a recovery plan for the species. Under section 6 of the Act, we would be able to grant funds to the State of Idaho for management actions promoting the conservation of *L. papilliferum*. A full discussion of the ongoing conservation actions by Federal, State, and local entities involved with *Lepidium papilliferum* conservation is described elsewhere in this document (see **Evaluation of Conservation Efforts**, above).

The Act requires Federal agencies to implement recovery actions, as well as encourages non-Federal entities to support and carry out recovery goals for listed species. The protection measures required of Federal agencies and the prohibitions against certain activities involving listed plants are discussed, in part, below.

Section 7(a) of the Act, as amended, requires Federal agencies to evaluate their actions with respect to any species that is proposed or listed as endangered or threatened and with respect to its critical habitat, if any is designated or proposed for designation. Regulations implementing this interagency cooperation provision of the Act are codified at 50 CFR Part 402. Section 7(a)(2) requires Federal agencies, including the Service, to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of a listed species or to destroy or adversely modify its critical habitat if any has been designated. If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency must consult with us under the provisions of section 7(a)(2) of the Act.

For *Lepidium papilliferum*, Federal agency actions that may require consultation as described in the preceding paragraph may include actions that would affect slickspot soil integrity or function, individual *L. papilliferum* plants, or the seed bank of the plant. Such actions may include, but are not limited to: soil stabilization and rehabilitation activities; wildfire suppression and rehabilitation activities; construction and maintenance of infrastructure such as roads, electronic transmission lines, radio towers, and buildings; livestock grazing permits and other Federal permitting actions; livestock range improvements by the BLM; or actions undertaken by branches of the Department of Defense, U.S. Army Corps of Engineers, Federal Emergency Management Agency, and the Federal Highways Administration. Section 7 consultation may also be required by the provision of Federal funds to State and private entities through Federal programs such as the Service's Partners for Fish and Wildlife Program and Federal Aid in Wildlife Restoration Program, and a variety of grants administered by the U.S. Department of Agriculture, Natural Resources Conservation Service, the Federal Housing Administration, and the Farm Services Agency. Other activities that may require consultation include military training activities by the Air Force or the Idaho Army National Guard. Federal actions not affecting the species, as well as actions on non-Federal lands that are not federally funded, authorized, or permitted, do not require section 7 consultation, although the latter are still potentially subject to section 9's prohibitions.

The Act and its implementing regulations set forth a series of general prohibitions and exceptions that apply to all threatened plants. All prohibitions of section 9(a)(2) of the Act, implemented by 50 CFR 17.71, apply to both endangered and threatened species. These prohibitions, in part, make it illegal for any person subject to the jurisdiction of the United States to import or export, transport in interstate or foreign commerce in the course of a commercial activity, sell or offer for sale in interstate or foreign commerce, or remove and reduce the species to possession from areas under Federal jurisdiction. In addition, for plants listed as endangered, the Act prohibits the malicious damage or destruction on areas under Federal jurisdiction and the removal, cutting, digging up, or damaging or destroying of such plants in knowing violation of any State law or regulation, including State criminal trespass law. Section 4(d) of the Act allows for the provision of such protection to threatened species through regulation. This protection may apply to this species in the future if regulations are promulgated. Seeds from cultivated specimens of threatened plants are exempt from these prohibitions provided that their containers are marked "Of Cultivated Origin." Certain exceptions to the prohibitions apply to agents of the Service and State conservation agencies.

The Act and 50 CFR 17.72 also provide for the issuance of permits to carry out otherwise prohibited activities involving threatened plants under certain circumstances. Such permits are available for scientific purposes and to enhance the propagation or survival of the species. For threatened plants, permits also are available for botanical or horticultural exhibition, educational purposes, or special purposes consistent with the purposes of the Act. We anticipate that few trade permits will ever be sought or issued for *Lepidium papilliferum* because the species is not in cultivation or common in the wild. Requests for copies of the regulations regarding listed species and inquiries about prohibitions and permits may be addressed to U.S. Fish and Wildlife Service, Endangered Species Permits, 911 NE. 11th Avenue, Portland, OR 97232-4181.

We adopted a policy on July 1, 1994 (59 FR 34272), to identify to the maximum extent practicable at the time a species is listed those activities that would or would not constitute a violation of section 9 of the Act. The intent of this policy is to increase public awareness of the effect of the listing on future and ongoing activities within a species' range. We believe that based upon the best available information, the actions listed below would not result in a violation of section 9 of the Act provided these activities are carried out in accordance with existing regulation and permit requirements:

(1) Activities authorized, funded, or carried out by Federal agencies (e.g., grazing management, agricultural conversions, range management, rodent control, mineral development, road construction, human recreation, pesticide application, controlled burns) and construction/maintenance of facilities (e.g., fences, power lines, pipelines, utility lines) when such activity is conducted according to any reasonable and prudent measures prescribed by the Service in a consultation conducted under section 7 of the Act; and

(2) Casual, dispersed human activities on foot (e.g., bird watching, sightseeing, photography, and hiking).

The actions listed below may potentially result in a violation of

section 9 of the Act; however, possible violations are not limited to these actions alone:

(1) Unauthorized collecting of the species on Federal Lands;

(2) Interstate or foreign commerce and import/export without previously obtaining an appropriate permit.

Permits to conduct activities are available for purposes of scientific research and enhancement of propagation or survival of the species.

Questions regarding whether specific activities, such as changes in land use, will constitute a violation of section 9 should be directed to the Idaho Field Office (see **ADDRESSES** section).

Critical Habitat

Critical habitat is defined in section 3 of the Act as: "(i) The specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 4 of this Act, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and (ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 4 of the Act, upon a determination by the Secretary of the Interior that such areas are essential for the conservation of the species" (16 U.S.C. 1532(5)(A)).

Conservation, as defined under section 3(3) of the Act, means "the use of all methods and procedures which are necessary to bring any endangered or threatened species to the point at which the measures provided under this Act are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking" (16 U.S.C. 1532(3)).

The primary regulatory effect of critical habitat is the requirement, under section 7(a)(2) of the Act, that Federal agencies shall ensure that any action they authorize, fund, or carry out is not likely to result in the destruction or adverse modification of designated critical habitat. Section 7(a)(2) of the Act requires consultation on Federal actions that may affect critical habitat. The designation of critical habitat does not affect land ownership or establish a refuge, wilderness, reserve, preserve, or other conservation area. Such designation does not allow the government or public to access private lands. Such designation does not require implementation of restoration, recovery, or enhancement measures by private landowners. Where a landowner requests Federal agency funding or authorization for an action that may affect a listed species or critical habitat, the consultation requirements of section 7(a)(2) of the Act would apply, but even in the event of a destruction or adverse modification finding, the landowner's obligation is not to restore or recover the species, but to implement reasonable and prudent alternatives to avoid destruction or adverse modification of critical habitat.

For inclusion in a critical habitat designation, the habitat within the geographical area occupied by the species at the time of listing must contain the physical and biological features essential to the conservation of the species, and be included only if those features may require special management considerations or protection. Critical habitat designations identify, to the extent known using the best scientific data available, habitat areas that provide essential life cycle needs of the species (i.e., areas on which are found the primary constituent elements (PCEs) laid out in the appropriate quantity and spatial arrangement for the conservation of the species). Under the Act, we can designate critical habitat in areas outside the geographical area occupied by the species at the time it is listed only when we determine that those areas are essential for the conservation of the species.

Section 4 of the Act requires that we designate critical habitat on the basis of the best scientific and commercial data available. Further, our Policy on Information Standards Under the Endangered Species Act (59 FR 34271; July 1, 1994), the Information Quality Act (section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Pub. L. 106-554; H.R. 5658)), and our associated Information Quality Guidelines issued by the Service, provide criteria, establish procedures, and provide guidance to ensure that our decisions are based on the best scientific data available. They require our biologists, to the extent consistent with the Act and with the use of the best scientific data available, to use primary and original sources of information as the basis for recommendations to designate critical habitat.

When we are determining which areas should be designated as critical habitat, our primary source of information is generally the information developed during the listing process for the species. Additional information sources may include the recovery plan for the species, articles in peer-reviewed journals, conservation plans developed by States and counties, scientific status surveys and studies, biological assessments, or other unpublished materials and expert opinion or personal knowledge.

Prudency Determination

Section 4(a)(3) of the Act, as amended, and implementing regulations (50 CFR 424.12), require that, to the maximum extent prudent and determinable, the Secretary designate critical habitat at the time a species is determined to be endangered or threatened. Our regulations (50 CFR 424.12(a)(1)) state that the designation of critical habitat is not prudent when one or both of the following situations exist: "(i) [t]he species is threatened by taking or other human activity, and identification of critical habitat can be expected to increase the degree of such threat to the species, or ii) [s]uch designation of critical habitat would not be beneficial to the species."

There is no documentation that *Lepidium papilliferum* is threatened by taking or other human activity. In the absence of finding that the designation of critical habitat would increase threats to a species, if there are any benefits to a critical habitat designation, then a prudent finding is warranted. The potential benefits include: (1) Triggering consultation under section 7 of the Act for actions in which there may be a Federal nexus where it would not otherwise occur because, for example, the area is or has become unoccupied or the occupancy is in question; (2) focusing conservation activities on the most essential features and areas; (3) providing educational benefits to State or county governments or private entities; and (4) preventing people from causing inadvertent harm to the species.

The primary regulatory effect of a critical habitat designation is the section 7(a)(2) requirement that Federal agencies refrain from taking any action that destroys or adversely affects critical habitat. At present, the known extant individuals of *Lepidium papilliferum* occur on Federal, State, and private land, and all previously known occurrences have been on Federal, State, and private lands. State and private lands that may be designated as critical habitat in the future for this species may be subject to Federal actions that trigger

the section 7 consultation requirement, such as the granting of Federal monies for conservation projects or the need for Federal permits for projects. Therefore, since we have determined that the designation of critical habitat will not likely increase the degree of threat to the species and may provide some measure of benefit, we find that designation of critical habitat is prudent for *L. papilliferum*.

Critical Habitat Determinability

As stated above, section 4(a)(3) of the Act requires the designation of critical habitat concurrently with the species' listing "to the maximum extent prudent and determinable" (16 U.S.C. 1533(a)(3)). Our regulations at 50 CFR 424.12(a)(2) state that critical habitat is not determinable when one or both of the following situations exist:

(i) Information sufficient to perform required analyses of the impacts of the designation is lacking, or

(ii) The biological needs of the species are not sufficiently well known to permit identification of an area as critical habitat.

When critical habitat is not determinable, the Act provides for an additional year to publish a critical habitat designation (16 U.S.C. 1533(b)(6)(C)(ii)).

In accordance with section 3(5)(A)(i) of the Act and regulations at 50 CFR 424.12, in determining which areas occupied by the species at the time of listing to designate as critical habitat, we consider those physical and biological features essential to the conservation of the species that may require special management considerations or protection. We consider the physical or biological features to be the PCEs laid out in the appropriate quantity and spatial arrangement for the conservation of the species. The PCEs listed at 50 CFR 424.12(b) include, but are not limited to:

(1) Space for individual and population growth and for normal behavior;

(2) Food, water, air, light, minerals, or other nutritional or physiological requirements;

(3) Cover or shelter;

(4) Sites for breeding, reproduction, rearing of offspring, germination, or seed dispersal; and generally

(5) Habitats that are protected from disturbance or are representative of the historic geographical and ecological distributions of a species.

Although we have determined that the designation of critical habitat is prudent for *Lepidium papilliferum*, new and revised information received since the 2007 withdrawal notice (72 FR 1622) has to be evaluated to determine the physical and biological features that may be essential for the conservation of the species in those areas that were occupied at the time of listing, or areas that may be essential to the conservation of the species outside of the area occupied at the time of listing. For example, we have received new information regarding the effects of seed predation indicating that this emerging threat may have a serious impact on the long-term viability of *L. papilliferum*. However, our current understanding of the overall significance of this threat is limited by its recent discovery and having only short-term evaluation results available. We also have new information indicating that competition with nonnative plants in slickspots has a significant impact on the ability of *L. papilliferum* to persist in these specialized microsites. A thoughtful assessment of the designation of critical habitat will require additional time to evaluate the physical and biological features essential to the conservation of the species in light of our new understanding of these emerging threats. Therefore, we find that critical habitat for *L. papilliferum* is not determinable at this time.

Required Determinations

Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*)

This rule does not contain any new collections of information that require approval by Office of Management and Budget (OMB) under the Paperwork Reduction Act. This rule will not impose recordkeeping or reporting requirements on State or local governments, individuals, businesses, or organizations. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

National Environmental Policy Act

We have determined that we do not have to prepare environmental assessments and environmental impact statements, as defined under the authority of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*), in connection with regulations we issued under section 4(a) of the Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244).

References Cited

A complete list of all references cited herein is available on the Internet at *http://www.regulations.gov*. In addition, a complete list of all references cited herein, as well as others, is available upon request from the Idaho Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**).

Authors

The primary authors of this document are staff members of the Idaho Fish and Wildlife Office, U.S. Fish and Wildlife Service (see **ADDRESSES**).

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting, and recordkeeping requirements, Transportation.

Regulation Promulgation

■ Accordingly, we amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as follows:

PART 17—[AMENDED]

■ 1. The authority citation for part 17 continues to read as follows:

Authority: 16 U.S.C. 1361-1407; 16 U.S.C. 1531-1544; 16 U.S.C. 4201-4245; Pub. L. No. 99-625, 100 Stat. 3500; unless otherwise noted.

■ 2. Amend § 17.12(h) by adding the following entry to the List of Endangered and Threatened Plants in alphabetical order under "Flowering Plants":

§ 17.12 Endangered and threatened plants.

* * * * *

(h) * * *

Species		Historic range	Family	Status	When listed	Critical habitat	Special rules
Scientific name	Common name						
FLOWERING PLANTS							
*	*	*	*	*	*	*	

Species		Historic range	Family	Status	When listed	Critical habitat	Special rules
Scientific name	Common name						
Lepidium papilliferum	Slickspot peppergrass	U.S.A. (ID)	Brassicaceae	T	765	NA	NA

* * * * *

Dated: September 24, 2009

Daniel M. Ashe

Deputy Director, Fish and Wildlife Service

[FR Doc. E9–24039 Filed 10–7–09; 8:45 am]

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Federal Register

Thursday,
October 8, 2009

Part V

Department of the Interior

Fish and Wildlife Service

50 CFR Part 17

Endangered and Threatened Wildlife and Plants; Revised Critical Habitat for the Preble's Meadow Jumping Mouse (*Zapus hudsonius preblei*) in Colorado; Proposed Rule

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[FWS-R6-ES-2009-0013] [92210-1117-0000-B4]

RIN 1018-AW45

Endangered and Threatened Wildlife and Plants; Revised Critical Habitat for the Preble's Meadow Jumping Mouse (*Zapus hudsonius preblei*) in Colorado

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), propose to revise designated critical habitat for the Preble's meadow jumping mouse (*Zapus hudsonius preblei*) in Colorado, where it is listed as threatened in a significant portion of the range (SPR) under the Endangered Species Act of 1973, as amended (Act). The proposed revised critical habitat is located in Boulder, Broomfield, Douglas, El Paso, Jefferson, Larimer and Teller Counties in Colorado. Approximately 418 miles (mi) (674 kilometers (km)) of rivers and streams and 39,142 acres (ac) (15,840 hectares (ha)) fall within the boundaries of the proposed revised designation. The proposed revised designation would therefore add 184 mi (298 km) of rivers and streams and 18,462 ac (7,472 ha) to the existing critical habitat designation of 234 mi (376 km) and 20,680 ac (8,368 ha).

DATES: To ensure that we are able to consider your comments and information, we request that you provide them to us by December 7, 2009. We must receive requests for public hearings, in writing, at the address shown in the **FOR FURTHER INFORMATION CONTACT** section by November 23, 2009.

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

- Electronically: Go to the *Federal eRulemaking Portal* at *http://www.regulations.govto* comment on FWS-R6-ES-2009-0013, which is the docket number for this rulemaking.
- U.S. mail or hand-delivery: Public Comments Processing, Attn: [FWS-R6-ES-2009-0013]; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, Suite 222; Arlington, VA 22203.

We will post all comments on *http://www.regulations.gov*. This generally means that we will post any personal information you provide us (see the Public Comments section below for more information).

FOR FURTHER INFORMATION CONTACT: Susan Linner, Field Supervisor, Colorado Ecological Services Office; mailing address P.O. Box 25486, DFC (MS 65412), Denver, CO 80225; telephone 303-236-4773; located at 134 Union Boulevard, Suite 670, Lakewood, CO. If you use a telecommunications device for the deaf (TDD), call the Federal Information Relay Service (FIRS) at 800-877-8339.

SUPPLEMENTARY INFORMATION:

Public Comments

We intend that any final action resulting from this proposal will be based on the best scientific and commercial data available and will be as accurate and as effective as possible. Therefore, we request comments or suggestions on this proposed rule. We particularly seek comments concerning:

(1) The reasons why we should or should not revise the designation of specific habitat as "critical habitat" under section 4 of the Act (16 U.S.C. 1531 *et seq.*).

(2) Specific information on:

- The amount and distribution of Preble's meadow jumping mouse (PMJM) habitat in Colorado,
- Areas occupied at the time of listing and that contain features essential for the conservation of the species that we should include in the revised designation and why,
- Areas not containing features essential for the conservation of the species and why,
- Areas not occupied at the time of listing that are essential to the conservation of the species and why, and
- Areas that require special management consideration and protection and why.

(3) Comments or information that may assist us with identifying or clarifying the primary constituent elements (see section below on **Primary Constituent Elements**).

(4) Land use designations and current or planned activities in the areas proposed as revised critical habitat and their possible impacts on revised critical habitat.

(5) How the proposed boundaries of the revised critical habitat could be refined to more closely circumscribe the riparian and adjacent upland habitats occupied by the Preble's meadow jumping mouse.

(6) Whether our proposed revised designation should be altered in any way to account for the effects of climate change and why.

(7) Whether any specific areas being proposed as revised critical habitat should be excluded under section 4(b)(2) of the Act from the final designation, and whether the benefits of potentially excluding any particular area outweigh the benefits of including that area under section 4(b)(2) of the Act. We are specifically seeking comments from the public on the following lands: those covered by the Douglas County Habitat Conservation Plan (HCP) (Service 2006a) and the potential modification of outward boundaries of proposed critical habitat to conform to Douglas County's Riparian Conservation Zones (RCZs) (streams, adjacent floodplains, and nearby uplands likely to be used as habitat by the PMJM) as mapped for the Douglas County HCP; lands within the Livermore Area HCP (Service 2006b), the Larimer County's Eagle's Nest Open Space HCP (Service 2004b), the Denver Water HCP (Service 2003b), the Struther's Ranch HCP (Service 2003c), and other HCPs; lands within El Paso County (because the county is currently developing a countywide HCP); lands within the proposed Seaman Reservoir expansion footprint; and, lands within the Rocky Flats National Wildlife Refuge (NWR).

(8) Any foreseeable economic, national security, or other potential impacts resulting from the proposed revised designation and, in particular, any impacts on small entities, and the benefits of including or excluding areas that exhibit these impacts.

(9) Whether we could improve or modify our approach to designating revised critical habitat in any way to provide for greater public participation and understanding, or to better accommodate public concerns and comments.

We will revise the economic analysis and environmental assessment that were prepared for the previous designation, and we will provide drafts of the new economic analysis and environmental assessment to the public for review and comment before finalizing this proposal.

Based on the public comments, we may find, during the development of the final rule, that areas proposed are not essential to the conservation of the species, are appropriate for exclusion under section 4(b)(2) of the Act, or are not appropriate for exclusion. In all of these cases, this information will be incorporated into the final revised designation. Further, we may find, as a result of public comments, that areas not proposed also should be designated as revised critical habitat. Final management plans that address the conservation of the PMJM must be submitted to us during the public comment period so that we can take

them into consideration when making our final critical habitat determination.

You may submit your comments and materials concerning this proposed rule by one of the methods listed in the **ADDRESSES** section.

If you submit a comment via *http://www.regulations.gov*, your entire comment, including any personal identifying information, will be posted on the website. If you submit a hardcopy comment that includes personal identifying information, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so. We will post all hardcopy comments on *http://www.regulations.gov*.

Background

We intend to discuss only those topics directly relevant to the designation of critical habitat in this proposed rule. For additional information on the biology of this subspecies, see the May 13, 1998, final rule to list the PMJM as threatened (63 FR 26517); the June 23, 2003, final rule designating critical habitat for the PMJM (68 FR 37275); and the July 10, 2008, final rule to amend the listing for the PMJM to specify over what portion of its range the subspecies is threatened (73 FR 39789).

Species Description

The PMJM is recognized as 1 of 12 subspecies of meadow jumping mouse (*Zapus hudsonius*), a species that ranges from the Pacific Coast of Alaska to the Atlantic Coast and from the northern limit of forests south to New Mexico, Oklahoma, and Georgia (Hafner *et al.* 1981, p. 501; Hall 1981, p. 843; Krutzsch 1954, pp. 420-421). Meadow jumping mice are small rodents with long tails, large hind feet, and long hind legs. Total length of an adult is approximately 7 to 10 inches (187 to 255 millimeters), with the tail comprising 4 to 6 inches (108 to 155 millimeters) of that length (Krutzsch 1954, p. 420; Fitzgerald *et al.* 1994, p. 291). The large hind feet can be one-third again as large as those of other mice of similar size. The PMJM has a distinct, dark, broad stripe on its back that runs from head to tail and is bordered on either side by gray to orange-brown fur. The hair on the back of all jumping mice appears coarse compared to other mice. The underside hair is white and much finer in texture. The tail is bicolored and sparsely furred.

Geographic Range

The PMJM is found along the foothills in southeastern Wyoming, southward along the eastern edge of the Front Range of Colorado to Colorado Springs in El Paso County (Hall 1981, p. 844; Clark and Stromberg 1987, pp. 184-188; Fitzgerald *et al.* 1994, pp. 291-293; Clippenger 2002, pp. 14-15, 20). Knowledge about the current distribution of the PMJM comes from collected specimens and live-trapping locations from both range-wide survey efforts and numerous site-specific survey efforts conducted in Wyoming and Colorado since the mid-1990s.

In Colorado, the distribution of the PMJM forms a band along the Front Range from Wyoming southward to Colorado Springs, with eastern marginal captures in western Weld County, western Elbert County, and north-central El Paso County.

The semi-arid climate in eastern Colorado limits the extent of riparian corridors and restricts the range of the PMJM in this region. The PMJM has not been found on the extreme eastern plains in Colorado. The eastern boundary for the subspecies is likely defined by the dry shortgrass prairie, which may present a barrier to eastward expansion (Beauvais 2001, p. 3).

The western boundary of the PMJM's range in Colorado appears related to elevation along the Front Range. We use 7,600 feet (ft) (2,317 meters (m)) in elevation as the general upper limit of the PMJM's habitat in Colorado (Service 2004a, p. 5). The western jumping mouse (*Zapus princeps*), a separate species from the PMJM, is similar in appearance and can easily be confused with the PMJM. The range of the western jumping mouse in Colorado is generally west of, and at higher elevations than, the range of the PMJM. However, the two species appear to coexist over portions of their range in the Front Range of Colorado (Bohan *et al.* 2005; Schorr *et al.*, 2007). Recent morphological examination of specimens has confirmed the PMJM to an elevation of approximately 7,600 ft (2,317 m) in Colorado (Bohan *et al.*, 2005) and to 7,750 ft (2,360 m) in southeastern Wyoming (Service 2009). For a discussion of the difficulties of differentiating between the PMJM and the western jumping mouse see our July 10, 2008, final rule to amend the listing for the PMJM (73 FR 39789).

Although there is little information on past distribution or abundance of the PMJM, surveys identified various locations where the subspecies was historically present but is now absent (Ryon 1996, pp. 25-26). Since at least 1991, the PMJM has not been found in Denver, Adams, or Arapahoe Counties in Colorado. Its absence in these counties is likely due to urban development, which has altered, reduced, or eliminated riparian habitat (Compton and Hugie 1993, p. 22; Ryon 1996, pp. 29-30).

Ecology and Life History

Much of the current knowledge regarding life history of the meadow jumping mouse comes from studies of the species in the eastern and midwestern United States. The meadow jumping mouse usually has two litters per year, with an average of five young born per litter (Quimby 1951, p. 67; Whitaker 1963, p. 244). Research has not been conducted on the number or size of PMJM litters, but we assume that they are comparable to other subspecies of the meadow jumping mouse. The PMJM is a true hibernator, usually entering hibernation in September or October and emerging the following May, after a potential hibernation period of 7 or 8 months (Whitaker 1963, p. 5; Meaney *et al.* 2003, pp. 618-619). Similar to other subspecies of meadow jumping mouse, the PMJM does not store food, but survives on fat stores accumulated prior to hibernation (Whitaker 1963, p. 241).

Meadow jumping mice are primarily nocturnal or crepuscular (active during twilight), but also may be active during the day. Little is known about social interactions and their significance in the PMJM. While the PMJM's dispersal capabilities are thought to be limited, in one case a PMJM was documented moving as far as 0.7 mi (1.1 km) in 24 hours (Ryon 1999, p. 12), and the PMJM is able to move miles along stream corridors over its lifetime (Schorr 2003, pp. 9-10).

While fecal analyses have provided the best data on the PMJM's diet to date, they overestimate the components of the diet that are less digestible. Based on fecal analyses, the PMJM eats insects; fungus; moss; pollen; *Salix* (willow); *Chenopodium sp.* (lamb's quarters); *Salsola sp.* (Russian thistle); *Helianthus spp.* (sunflower); *Carex spp.* (sedge); *Verbascum sp.* (mullein); *Bromus, Festuca, Poa, Sporobolus,* and *Agropyron spp.* (grasses); *Lesquerella sp.* (bladderpod); *Equisetum spp.* (horsetail); and assorted seeds (Shenk and Eussen 1999, pp. 9, 11; Shenk and Sivert 1999a, pp. 10-11). The diet shifts seasonally; it consists primarily of insects and fungi after emerging from hibernation, shifts to fungi, moss, and pollen during mid-summer (July and August), with insects again added in September (Shenk and Sivert 1999a, pp. 12-13). The shift in diet along with shifts in mouse movements suggests that the PMJM may require specific seasonal diets, perhaps related to the physiological constraints imposed by

hibernation (Shenk and Sivert 1999a, p. 14).

The PMJM has a host of known predators, including the garter snake (*Thamnophis* spp.), prairie rattlesnake (*Crotalus viridus*), bullfrog (*Rana catesbiana*), fox (*Vulpes vulpes* and *Urocyon cinereoargenteus*), house cat (*Felis catus*), long-tailed weasel (*Mustela frenata*), and red-tailed hawk (*Buteo jamaicensis*) (Shenk and Sivert 1999a, p. 13; Schorr 2001, p. 29). Other potential predators include coyote (*Canis latrans*), barn owl (*Tyto alba*), great horned owl (*Bubo virginianus*), screech owl (*Otus spp.*), long-eared owl (*Asio otus*), northern harrier (Circus *cyaneus*), and large predatory fish. Mortality factors of the PMJM include drowning and being hit by vehicles (Schorr 2001, p. 29; Shenk and Sivert 1999a, p. 13). Introduced fauna that occupy riparian habitats may displace or compete with the PMJM. House mice (*Mus musculus*) were common in and adjacent to historic capture sites where the PMJM was no longer found (Ryon 1996, p. 26). Mortality factors known for the meadow jumping mouse, such as starvation, exposure, disease, and insufficient fat stores for hibernation (Whitaker 1963, pp. 225-228) also are likely causes of death in the PMJM subspecies.

Preble's Meadow Jumping Mouse Habitat

Typical habitat for the PMJM is comprised of well-developed riparian vegetation with adjacent, relatively undisturbed grassland communities and a nearby water source (Bakeman 1997, pp. 22-31, 47-48). The PMJM is typically captured in areas with multi-storied cover with an understory of grasses or forbs or a mixture thereof (Bakeman 1997, pp. 22-31, 28-30; Meaney *et al.* 1997, pp. 15-16; Shenk and Eussen 1999, pp. 9-11; Schorr 2001, pp. 23-24). The shrub canopy is often *Salix* spp., although other shrub species may occur (Shenk and Eussen 1999, pp. 9-11).

Although the PMJM commonly uses riparian vegetation immediately adjacent to a stream, other features that provide habitat for the subspecies include seasonal streams (Bakeman 1997, p. 76), low moist areas and dry gulches (Shenk 2004), agricultural ditches (Meaney *et al.* 2003, p. 620), and wet meadows and seeps near streams (Ryon 1996, p. 29).

White and Shenk (2000, pp. 7-8) determined that riparian shrub cover, tree cover, and the amount of open water nearby are good predictors of PMJM densities. Trainor *et al.* (2007, pp. 471-472) found that high-use areas for the PMJM tended to be close to creeks and were positively associated with the percentage of shrubs, grasses, and woody debris. Hydrologic regimes that support PMJM habitat range from large perennial rivers, such as the South Platte River, to small drainages only 3 to 10 ft (1 to 3 m) wide.

Clippenger (2002, pp. 44-45) found that, in Colorado, subshrub cover and plant species richness are higher at most sites where meadow jumping mice are present when compared to sites where they are absent, particularly at distances of 49 to 82 ft (15 to 25 m) from streams. In a study comparing habitats at PMJM capture locations on the Rocky Flats NWR (formerly the Department of Energy's (DOE's) Rocky Flats Environmental Technology Site), Jefferson County, and the U.S. Air Force Academy (Academy) in El Paso County, the Academy sites had lower plant species richness at capture locations but considerably greater numbers of the PMJM (Schorr 2001, p. 26). However, the Academy sites had higher densities of both grasses and shrubs. It is likely that PMJM abundance is not driven by the diversity of plant species alone, but by the density and abundance of riparian vegetation (Schorr 2001, p. 26).

The PMJM has rarely been trapped in uplands adjacent to riparian areas (Dharman 2001, pp. 19-20). However, in detailed studies of PMJM movement patterns using radio-telemetry, the PMJM has been found feeding and resting in adjacent uplands (Shenk and Sivert 1999a, pp. 11-12; Ryon 1999, p. 12; Schorr 2001, pp. 14-15). These studies suggest that the PMJM uses uplands at least as far out as 330 ft (100 m) beyond the 100-year floodplain (Shenk and Sivert 1999b, p. 11; Ryon 1999, p. 12; Schorr 2001, p. 14; Service 2003a, p. 26; Shenk 2004). These upland habitats also assist in maintaining the integrity of riparian habitats by protecting them from disturbance and supporting normal hydrological functions of rivers, streams, and floodplains.

The PMJM constructs day nests composed of grasses, forbs, sedges, rushes, and other available plant material. They may be globular in shape or simply raised mats of litter and are most commonly above ground but also can be below ground. They are typically found under debris at the base of shrubs and trees or in open grasslands (Ryon 2001, p. 377). An individual mouse can have multiple day nests in both riparian and grassland communities (Shenk and Sivert 1999a, pp. 10-12) and may abandon a nest after approximately a week of use (Ryon 2001, p. 377).

Apparent hibernacula (hibernation nests) of the PMJM have been located both within and outside of the 100-year floodplain of streams (Shenk and Sivert 1999a, pp. 12-13; Schorr 2001, pp. 14-15). Those hibernating outside of the 100-year floodplain would likely be less vulnerable to flood-related mortality. Fifteen apparent PMJM hibernacula have been located through radio-telemetry, all within 335 ft (102 m) of a perennial stream bed or intermittent tributary (Shenk and Sivert 1999a, p. 12; Schorr 2001, p. 28; Ruggles *et al.* 2003, p. 19). Apparent hibernacula have been located under *Salix* shrubs, *Prunus virginiana* (chokecherry), *Symphoricarpos albus* (snowberry), *Rhus trilobata* (skunkbrush), *Rhus* spp. (sumac), *Clematis* spp. (clematis), *Populus* spp. (cottonwood), *Quercus gambelii* (Gambel's oak), *Cirsium* spp. (thistle), and *Alyssum* spp. (alyssum) (Shenk and Sivert 1999a, pp. 12-13). At the Academy, four of six apparent hibernacula found by radio-telemetry were located in close proximity to *Salix exigua* (coyote willow) (Schorr 2001, p. 28).

Flooding is a common and natural event in the riparian systems in southeastern Wyoming and along the Front Range of Colorado. This periodic flooding helps create a dense vegetative community by stimulating resprouting from *Salix* shrubs, and allows herbs and grasses to take advantage of newly deposited soil. Fire is also a natural component of the Colorado Front Range, and PMJM habitat naturally waxes and wanes with fire events. Within shrubland and forest, intensive fire may result in adverse impacts to PMJM populations. However, in a review of the effects of grassland fires on small mammals, Kaufman *et al.* (1990, p. 55) found a positive effect of fire on the meadow jumping mouse in one study and no effect of fire on the species in another study.

The tolerance of the PMJM for invasive exotic plant species is not well understood. Whether or not exotic plant species reduce PMJM persistence at a site may be due in large part to whether plants create a monoculture and replace native species. The Preble's Meadow Jumping Mouse Recovery Team (Recovery Team) was particularly concerned about nonnative species such as *Euphorbia esula* (leafy spurge) that may form a monoculture, displacing native vegetation and thus reducing available habitat (Service 2003a, p. 13).

Previous Federal Actions

For information on previous Federal actions concerning the PMJM, refer to the final listing rule published in the **Federal Register** on May 13, 1998 (63 FR 26517), the final rule designating

critical habitat for the PMJM in portions of Colorado and Wyoming published in the **Federal Register** on June 23, 2003 (68 FR 37275), and the final rule to amend the listing for the PMJM to specify over what portion of its range the subspecies is threatened, published in the **Federal Register** on July 10, 2008 (73 FR 39789).

On July 17, 2002, we proposed critical (67 FR 47154) and on June 23, 2003, we published a final rule designating critical habitat for the PMJM. On August 22, 2003, the City of Greeley filed a complaint in the U.S. District Court for the District of Colorado challenging our designation of critical habitat for the PMJM (*City of Greeley, Colorado* v. *United States Fish and Wildlife Service et al.,* Case No. 03–CV–01607–AP). On December 9, 2003, the Mountain States Legal Foundation filed a complaint in the U.S. District Court for the District of Wyoming challenging our 1998 listing of the PMJM and designation of critical habitat for the PMJM (*Mountain States Legal Foundation* v. *Gale E. Norton et al.,* Case No. 03-cv-250-J) that was later expanded that complaint to include our 2008 final determination on the PMJM and transferred it to the U.S. District Court for the District of Colorado (*Mountain States Legal Foundation* v. *Ken Salazar et al.,* Case No. 1:08-cv-2775-JLK). These lawsuits challenged the validity of the information and reasoning we used to designate critical habitat for the PMJM.

On July 20, 2007, we announced that we would review the June 23, 2003, final rule designating critical habitat after questions were raised about the integrity of scientific information we used and whether the decision we made was consistent with the appropriate legal standards (Service 2007a). Based on our review of the previous critical habitat designation, we have determined that it is necessary to revise critical habitat, and this rule proposes those revisions.

On July 10, 2008, we amended the final rule for the PMJM to specify over what portion of its range the subspecies is threatened (73 FR 39789), and determined that the listing of the PMJM is limited to the Significant Portion of the Range (SPR) in Colorado. Upon that determination, all critical habitat designated in 2003 in the State of Wyoming was removed from the regulations of 50 CFR 17.95 for this species.

On April 16, 2009, we reached a settlement agreement with the City of Greeley in which we agreed to reconsider our critical habitat designation for the PMJM. The settlement stipulated that we submit to the **Federal Register** a proposed rule for revised critical habitat by September 30, 2009, and a final rule for revised critical habitat by September 30, 2010 (U.S. District Court, District of Colorado 2009a). On June 16, 2009, an order was issued granting Mountain States Legal Foundation a motion to dismiss their claims on the 1998 listing and 2008 final determination without prejudice, and stayed their challenge to the 2003 critical habitat designation pursuant to the City of Greeley settlement (U.S. District Court, District of Colorado 2009b).

Recovery Planning

Restoring an endangered or threatened species to the point where it is recovered is a primary goal of our endangered species program. To help guide the recovery effort, we prepare recovery plans for listed species native to the United States. Recovery plans describe actions considered necessary for conservation of the species, establish criteria for downlisting or delisting the species, and estimate time and cost for implementing the recovery measures needed.

In early 2000, we established the Recovery Team under section 4(f)(2) of the Act and our cooperative policy on recovery plan participation, a policy intended to involve stakeholders in recovery planning (59 FR 34272, July 1, 1994). Stakeholder involvement in the development of recovery plans helps minimize the social and economic impacts that could be associated with recovery of endangered species. Various stakeholders were represented on the Recovery Team, and other public participation (including oral comments at Recovery Team meetings and written comments on the early drafts of the recovery plan) took place. The Recovery Team prepared a series of drafts of a recovery plan for the PMJM. They identify the criteria for reaching recovery and delisting of the PMJM. Our June 23, 2003, final rule to designate critical habitat (68 FR 37275) cited the draft recovery plan dated March 11, 2003, which we refer to as the Working Draft (Prebles Recovery Team 2003). The 2003 rule and the conservation strategy that supported it were developed incorporating information from the Working Draft. We revised this Working Draft in November 2003 and released it to the public (*http://www.fws.gov/mountain-prairie/species/mammals/preble/Nov2003DraftRecoveryPlan.pdf*). This version is hereafter referred to as the Preliminary Draft Recovery Plan (or Plan) (Service 2003a).

For various reasons, primarily the prolonged evaluation undertaken in response to 2003 petitions to delist the PMJM, a draft recovery plan for the PMJM has not yet been finalized or issued for public comment. However, after inactivity from 2004 to 2009, the Recovery Team was reconvened and has initiated a review and update of the Preliminary Draft Recovery Plan. Recent Recovery Team review has largely reaffirmed the conservation strategies that were the basis of the Preliminary Draft Recovery Plan and that review is considered in this proposal. A draft recovery plan, once completed, will be published in the **Federal Register**, will be available for public comments, and will provide an additional venue for stakeholder and public participation.

However, a final recovery plan is not a regulatory document (recovery plans are advisory documents because there are no specific protections, prohibitions, or requirements afforded to a species solely on the basis of a recovery plan) and does not obligate or commit parties to the actions or determination of the plans. Total disclosure and open communication with the public of our thoughts regarding possible future recovery scenarios are essential parts of recovery planning. Public review, peer review, and stakeholder involvement are also essential aspects of recovery planning, and are required by the Act and by Service policy. For these reasons, decisions we make in designation of critical habitat will not preclude determination or decisions in any aspect of recovery planning. Therefore, determinations of recovery strategies, criteria, or tasks within the recovery plan will not be limited by this proposed revision of critical habitat.

Summary of Proposed Changes to Previously Designated Critical Habitat

The areas identified in this proposed rule constitute a proposed revision from the areas we designated as critical habitat for the PMJM on June 23, 2003 (68 FR 37275) and amended on July 10, 2008 (73 FR 39789). This proposed rule addresses only the PMJM in the SPR in Colorado. The differences include the following:

(1) We propose to include in critical habitat specific areas that were excluded under section 4(b)(2) of the ESA and that were identified in our 2003 critical habitat designation. The 2003 designation of critical habitat for the PMJM in the SPR in Colorado comprises 5 units totaling 234 mi (377 km) of stream corridors. This proposed revision includes 11 units comprising a total of 418 mi (674 km) of stream corridors currently considered essential to the

conservation of the PMJM. The six additional units (Cedar Creek, South Boulder Creek, Rocky Flats NWR, Cherry Creek, West Plum Creek, and Monument Creek) were all proposed as critical habitat in the same or similar form on July 17, 2002 (67 FR 47154), but were not included in the 2003 final designation.

(2) We propose as critical habitat lands addressed in the Denver Water HCP (Service 2003b) that were excluded under section 4(b)(2) of the Act in our 2003 final designation.

(3) In Table 1, we provide a comparison between our 2003 final critical habitat designation and this proposed revised critical habitat rule.

TABLE 1. EXISTING AND PROPOSED CRITICAL HABITAT FOR THE PREBLE'S MEADOW JUMPING MOUSE by Stream Miles (Kilometers) and Acres (Hectares) per Unit.

UNIT	EXISTING	PROPOSED
1. N. Fork, Cache la Poudre River	88 mi (142 km) 8,206 ac (3,321 ha)*	88 mi (142 km) 8,619 ac (3,488 ha)
2. Cache la Poudre River	51 mi (82 km) 4,725 ac (1,912 ha)*	51mi (82 km) 4,944 ac (2,001 ha)
3. Buckhorn Creek	43 mi (69 km)* 3,798 ac (1,537 ha)*	46 mi (73 km) 3,995 ac (1,617 ha)
4. Cedar Creek	0	8 mi (12 km) 668 ac (270 ha)
5. South Boulder Creek	0	8 mi (12 km) 856 ac (347 ha)
6. Rocky Flats NWR	0	13 mi (20 km) 1,108 ac (449 ha)
7. Ralston Creek	8 mi (13 km)* 686 ac (277 ha)*	9 mi (14 km) 809 ac (328 ha)
8. Cherry Creek	0	30 mi (48 km) 2,647 ac (1,071 ha)
9. West Plum Creek	0	94 mi (151 km) 8,724 ac (3,530 ha)
10. Upper South Platte River	44 mi (71 km)** 3,265 ac (1,321 ha)*	35 mi (57 km) 3,353 ac (1,357 ha)
11. Monument Creek	0	39 mi. (62 km) 3,419 ac (1,383 ha)
Total	**234 mi (377 km) 20,680 ac (8,368 ha)**	**418 mi (674 km) 39,142 ac (15,840 ha)**

* Changes from existing to proposed result only from corrected errors (imprecise measurements) from 2003 designated critical habitat totals.
** Changes from existing to proposed due to a significant error in 2003 designated critical habitat totals.

(4) The following is a list of the areas added or enlarged in this proposed revision to critical habitat designation as compared to our 2003 critical habitat designation, and an explanation of why these areas are being considered.

Unit 4: We proposed the Cedar Creek Unit as critical habitat in 2002 based on presence of jumping mice thought to be the PMJM, but excluded it from final designation in 2003 due to lack of confirmed identification to species of those jumping mice captured. We now consider this unit occupied by the PMJM and are proposing it as critical habitat. This determination is based on the elevation (lower than 6,000 ft (1,829 m)) of jumping mouse captures and confirmation of the PMJM elsewhere in this subdrainage (Service 2009). It is consistent with our July 10, 2008, final rule to amend the listing for the PMJM (73 FR 39789).

Units 5, 8, 9, and 11: We proposed these units as critical habitat in 2002 but excluded them from final designation in 2003 based on HCPs under development in Boulder, Douglas, and El Paso Counties. We propose these units as critical habitat in this rule and will review them for possible exclusion, where appropriate, under section 4(b)(2) of the Act for our final designation. This proposal includes small changes from the 2002 proposal to Units 9 and 11, and a more substantial change to Unit 8 based on reevaluation of certain stream reaches.

Unit 6: We proposed this unit on Rocky Flats National Wildlife Refuge (NWR) as critical habitat in 2002 but excluded it from final designation in 2003 based on Federal ownership by the Department of Energy (DOE) and pending transfer of the site to the Service as Rocky Flats NWR. We propose this unit as critical habitat in this rule and will consider it for possible exclusion from our final designation under section 4(b)(2) of the Act.

Units 7 and 10: In our 2003 designation, we excluded small portions of these Units from critical habitat based on the Denver Water HCP under section 4(b)(2) of the Act. The portions we previously excluded we again propose as critical habitat. We will review these specific areas, along with other lands we proposed as critical habitat included in the Denver Water HCP, under section 4(b)(2) of the Act prior to our final designation.

Critical Habitat

Critical habitat is defined in section 3 of the Act as:

(1) The specific areas within the geographical area occupied by a species, at the time it is listed in accordance with the Act, on which are found those physical or biological features:

(a) essential to the conservation of the species and

(b) that may require special management considerations or protection; and

(2) specific areas outside the geographical area occupied by a species at the time it is listed, upon a determination that such areas are essential for the conservation of the species.

Conservation, as defined under section 3 of the Act, means the use of all methods and procedures that are necessary to bring any endangered or threatened species to the point at which the measures provided under the Act are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management, such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, transplantation, and (in the extraordinary case where population pressures within a given ecosystem cannot otherwise be relieved) regulated taking.

Critical habitat receives protection under section 7(a)(2) of the Act through the prohibition against Federal agencies carrying out, funding, or authorizing the destruction or adverse modification of critical habitat. Section 7(a)(2) of the Act requires consultation on Federal actions that may affect critical habitat. The designation of critical habitat does not affect land ownership or establish a refuge, wilderness, reserve, preserve, or other conservation area. Such designation does not allow the government or public to access private lands. Such designation does not require implementation of restoration, recovery, or enhancement measures by private landowners. Where a landowner requests Federal agency funding or authorization for an action that may affect a listed species or critical habitat, the consultation requirements of section 7(a)(2) would apply, but even in the event of a destruction or adverse modification finding, the landowner's obligation is not to restore or recover the species, but to implement reasonable and prudent alternatives to avoid destruction or adverse modification of critical habitat.

For inclusion in a critical habitat designation, the habitat within the geographical area occupied by the species at the time of listing must contain physical and biological features that are essential to the conservation of the species, and be included only if those features may require special management considerations or protection. Critical habitat designations identify, to the extent known using the best scientific data available, habitat areas that provide essential life cycle needs of the species (i.e., areas on which are found the primary constituent elements (PCEs) laid out in the appropriate quantity and spatial arrangement essential to the conservation of the species). Under the Act, we can designate critical habitat in areas outside the geographical area occupied by the species at the time it is listed as critical habitat only when we determine that those areas are essential for the conservation of the species.

Section 4 of the Act requires that we designate critical habitat on the basis of the best scientific and commercial data available. Further, our Policy on Information Standards Under the Act (published in the **Federal Register** on July 1, 1994 (59 FR 34271)), the Information Quality Act (Section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Pub. L. 106–554; H.R. 5658)), and our associated Information Quality Guidelines (Service 2007b) provide criteria, establish procedures, and guidance to ensure that our decisions are based on the best scientific data available. They require our biologists, to the extent consistent with the Act and with the use of the best scientific data available, to use primary and original sources of information as the basis for recommendations to designate critical habitat.

When we are determining which areas should be designated as critical habitat, our primary source of information is generally the information developed during the listing process for the species. Additional information sources may include the recovery plan for the species, articles in peer-reviewed journals, conservation plans developed by States and counties, scientific status surveys and studies, biological assessments, or other unpublished materials and expert opinion or personal knowledge.

Habitat is often dynamic, and species may move from one area to another over time. Furthermore, we recognize that designation of critical habitat may not include all habitat areas that we may eventually determine are necessary for the recovery of the species, based on scientific data not now available. For these reasons, a critical habitat designation does not signal that habitat outside the designated area is unimportant or may not promote the recovery of the species.

Areas that support occurrences, whether they are inside or outside the critical habitat designation, will continue to be subject to conservation actions we implement under section 7(a)(1) of the Act. They also are subject to the regulatory protections afforded by the section 7(a)(2) jeopardy standard, as determined on the basis of the best available scientific information at the time of the agency action. Federally funded or permitted projects affecting listed species, whether inside or outside designated critical habitat areas, may still result in jeopardy findings in some cases. Similarly, critical habitat designations made on the basis of the best available information at the time of designation will not control the direction and substance of future recovery plans, HCPs, or other species conservation planning efforts, if new information available to these planning efforts require a different outcome.

Primary Constituent Elements

In accordance with section 3(5)(A)(i) of the Act and the regulations at 50 CFR 424.12(b), in determining which areas occupied at the time of listing to propose as critical habitat, we consider the physical and biological features that are essential to the conservation of the species to be the PCEs laid out in the appropriate quantity and spatial arrangement for conservation of the species. In general, PCEs include, but are not limited to:

(1) Space for individual and population growth and for normal behavior;

(2) Food, water, air, light, minerals, or other nutritional or physiological requirements;

(3) Cover or shelter;

(4) Sites for breeding, reproduction, or rearing (or development) of offspring; and

(5) Habitats that are protected from disturbance or are representative of the historic, geographical, and ecological distributions of a species.

We derive the PCEs required for the PMJM from its biological needs. The area proposed for designation as revised critical habitat provides riparian and adjacent upland habitat for the PMJM, including those habitat components essential for the biological needs of reproduction, rearing of young, foraging, sheltering, hibernation, dispersal, and genetic exchange. The PMJM is able to live and reproduce in and near riparian areas located within grassland, shrubland, forest, and mixed vegetation

types where dense herbaceous or woody vegetation occurs near the ground level, where available open water normally exists during their active season, and where there are ample upland habitats of sufficient width and quality for foraging, hibernation, and refugia from catastrophic flooding events. While *Salix* (willow) in shrub form is a dominant component in many riparian habitats occupied by the PMJM, the structure of the vegetation appears more important to the PMJM than species composition (Schorr 2001, p. 26).

The PCEs associated with the biological needs of dispersal and genetic exchange also are found in areas that provide connectivity or linkage between or within PMJM populations. These areas may not include the habitat components listed above and may have experienced substantial human alteration or disturbance.

The dynamic ecological processes that create and maintain PMJM habitat also are important PCEs. Habitat components essential to the PMJM are found in and near those areas where past and present geomorphological and hydrological processes have shaped streams, rivers, and floodplains, and have created conditions that support appropriate vegetative communities. PMJM habitat is maintained over time along rivers and streams by a natural flooding regime (or one sufficiently corresponding to a natural regime) that periodically scours riparian vegetation; reworks stream channels, floodplains, and benches; and redistributes sediments such that a pattern of appropriate vegetation is present along river and stream edges, and throughout their floodplains. Periodic disturbance of riparian areas sets back succession and promotes dense, low-growing shrubs and lush herbaceous vegetation favorable to the PMJM. Where flows are controlled to preclude a natural pattern and other disturbance is limited, a less favorable mature successional stage of vegetation dominated by cottonwoods or other trees may develop. The long-term availability of habitat components favored by the PMJM also depends on plant succession and impacts of drought, fires, windstorms, herbivory, and other natural events. In some cases, these naturally occurring ecological processes are modified or are supplanted by human land uses that include manipulation of water flow and of vegetation.

Based on our current knowledge of the life history, biology, and ecology of the PMJM, and the requirements of the habitat to sustain the essential life history functions of the species, we have determined that the PCEs specific to the PMJM are:

(1) Riparian corridors:

(A) Formed and maintained by normal, dynamic, geomorphological, and hydrological processes that create and maintain river and stream channels, floodplains, and floodplain benches and promote patterns of vegetation favorable to the PMJM;

(B) Containing dense, riparian vegetation consisting of grasses, forbs, or shrubs, or any combination thereof, in areas along rivers and streams that normally provide open water through the PMJM's active season; and

(C) Including specific movement corridors that provide connectivity between and within populations. This may include river and stream reaches with minimal vegetative cover or that are armored for erosion control; travel ways beneath bridges, through culverts, along canals and ditches; and other areas that have experienced substantial human alteration or disturbance; and

(2) Additional adjacent floodplain and upland habitat with limited human disturbance (including hayed fields, grazed pasture, other agricultural lands that are not plowed or disked regularly, areas that have been restored after past aggregate extraction, areas supporting recreational trails, and urban–wildland interfaces).

Existing human-created features and structures within the boundaries of the mapped units, such as buildings, roads, parking lots, other paved areas, manicured lawns, other urban and suburban landscaped areas, regularly plowed or disked agricultural areas, and other features not containing any of the PCEs would not be considered critical habitat if this proposal is adopted.

Special Management Considerations or Protection

When designating critical habitat, we assess whether the occupied areas contain the physical and biological features that are essential to the conservation of the species, and whether these features may require special management considerations or protection.

The area proposed for designation as revised critical habitat will require some level of management to address the current and future threats to the physical and biological features essential to the conservation of the PMJM. In all proposed units, special management considerations or protection of the essential features may be required to provide for the sustained function of the riparian corridors on which the PMJM depends.

The PMJM is closely associated with riparian ecosystems that are relatively narrow and represent a small percentage of the landscape. We consider the decline in the extent and quality of PMJM habitat to be the main factor threatening the subspecies (63 FR 26517, May 13, 1998; Hafner *et al.* 1998, pp. 121-123; Shenk 1998, pp. 24-27). Special management considerations and protection may be required to address the threats of habitat alteration, degradation, loss, and fragmentation resulting from urban development, flood control, water development, agriculture, and other human land uses that have adversely impacted PMJM populations. Habitat destruction may affect the PMJM directly or by destroying nest sites, food resources, and hibernation sites; by disrupting behavior; or by forming a barrier to movement.

Criteria Used To Identify Critical Habitat

In this proposed designation of revised critical habitat we have identified specific areas that include only river and stream reaches, and their adjacent floodplains and uplands, that are within the known geographic and elevational range of the PMJM, that contain the features essential to the conservation of the PMJM. Further, the areas included in proposed critical habitat contain at least one of the requisite PCEs, and are currently occupied by the PMJM or provide crucial opportunities for connectivity to facilitate dispersal and genetic exchange.

This proposed critical habitat designation identifies only the appropriate quantity and spatial arrangement of the requisite PCEs that we have determined to be essential to the conservation of the subspecies. We determined that there are more areas currently occupied by the PMJM than are necessary to conserve the subspecies within the SPR in Colorado. We base this on the known occurrence and distribution of the PMJM (Service 2009) and upon the conservation strategy in the Preliminary Draft Recovery Plan, which indicates that when specified criteria are met for a subset of existing populations throughout the range of the PMJM, the subspecies can be delisted (Service 2003a, p. 19). To recover the PMJM to the point where it can be delisted, the Preliminary Draft Recovery Plan identifies the need for a specified number, size, and distribution of wild, self-sustaining PMJM populations across the known range of the PMJM. On the basis of the above criteria, we have chosen a subset of the areas occupied by the PMJM within the SPR in Colorado

that have the physical and biological features essential to the PMJM for inclusion in the proposed critical habitat.

We only consider including unoccupied areas within critical habitat designations if they are essential to the conservation of the species, and we determine that we cannot conserve the species by only including occupied areas in the critical habitat . Because we have determined that the conservation of the PMJM can be achieved through the designation of currently occupied lands, we find that no unoccupied areas are essential at this time. The subspecies was listed primarily due to the threat of impending development to the existing remaining habitat for the species within the Front Range of Colorado. We have determined that recovery of the subspecies can be achieved by protecting a subset of the currently occupied habitat from the threat of development. Recolonization of former parts of the range, while beneficial to the subspecies, is not currently believed to be necessary to conserve the species in the long-term.

In selecting areas of proposed critical habitat, we made an effort to avoid developed areas that are not likely to contribute to PMJM conservation. Our mapping incorporates the best scientific information available, but is limited in scale by our technical capabilities and the time available to us in under our settlement agreement with the City of Greeley (U.S. District Court, District of Colorado 2009a).

Available Information

Our June 23, 2003, final rule designating critical habitat for the PMJM (68 FR 37275) cited the March 11, 2003, Working Draft of a recovery plan for the PMJM (Preble's Recovery Team 2003) and the concepts described within the Working Draft as a source of the best scientific and commercial data available on the PMJM. For this proposal, we rely heavily on the information, concepts, and conservation recommendations contained in the Working Draft and the slightly modified Preliminary Draft Recovery Plan (Service 2003a), as well as the current efforts of the newly formed Recovery Team. We use these as a starting point for identifying those areas for inclusion in critical habitat that contain the requisite PCEs in the appropriate quantity and spatial arrangement that are essential for the conservation of the PMJM. The Preliminary Draft Recovery Plan is based on the work of scientists and stakeholders who met regularly over a period of more than three years. The plan was developed by incorporating principles of conservation biology and all available knowledge regarding the PMJM. Recovery Team meetings were open to the public, and drafts of the Plan were discussed in public meetings held in Colorado and Wyoming. We forwarded a draft of the Preliminary Draft Recovery Plan to species experts for review and their comments (Armstrong 2003; Hafner 2003) were considered prior to the Preliminary Draft Recovery Plan being made available on the Service website.

We also have incorporated all new information received since 2003, including:

- Data in reports submitted by researchers holding recovery permits under section 10(a)(1)(A) of the Act;
- Research published in peer-reviewed articles and presented in academic theses, agency reports, and unpublished data; and
- Various Geographic Information System (GIS) data layers and cover type information, including land ownership information, topographic information, locations of the PMJM obtained from radio-collars, and locations of the PMJM confirmed to species via deoxyribonucleic acid (DNA) analysis, morphological analysis, and other verified records.

We received information from Federal, State, and local governmental agencies, and from academia and private organizations that have collected scientific data on the PMJM.

The Preliminary Draft Recovery Plan identifies specific criteria for reaching recovery and the delisting of the PMJM. An important change since our 2003 designation of critical habitat was the 2008 final rule limiting the listing of the PMJM to the SPR in Colorado. The Preliminary Draft Recovery Plan identified areas as necessary for recovery throughout the range of the PMJM, including areas in Wyoming where the PMJM was listed at the time. Identified areas within the PMJM SPR in Colorado were based on the best available information and continue to reflect our best judgment of what we believe to be necessary for recovery. While elements of the Preliminary Draft Recovery Plan may change prior to finalization of a recovery plan, our recent review of the Preliminary Draft Recovery Plan and the recent Recovery Team review leads us to conclude that the concepts described within it continue to represent the best scientific and commercial data available regarding steps needed for the recovery of the PMJM.

The Preliminary Draft Recovery Plan provides a review of conservation biology theory regarding population viability (Service 2003a, p. 21). To recover the PMJM to the point where it can be delisted, the Preliminary Draft Recovery Plan identifies the need for a specified number, size, and distribution of wild, self-sustaining PMJM populations across the known range of the PMJM. It defines large populations as maintaining 2,500 mice and usually including at least 50 mi (80 km) of rivers and streams. It defines medium populations as maintaining 500 mice and usually including at least 10 mi (16 km) of rivers and streams. The average number of PMJM per stream mile was derived from site-specific studies and used to approximate minimum occupied stream miles required to support recovery populations of appropriate size (Service 2003a, p. 21).

The distribution of these recovery populations is intended both to reduce the risk of multiple PMJM populations being negatively affected by natural or manmade events at any one time, and to preserve the existing genetic variation within the PMJM. The Preliminary Draft Recovery Plan states, "species well-distributed across their historical range are less susceptible to extinction and more likely to reach recovery than species confined to a small portion of their range." The document also states that "spreading the recovery populations across hydrologic units throughout the range of the subspecies also preserves the greatest amount of the remaining genetic variation, and may provide some genetic security to the range-wide population" (Service 2003a, p. 20). The Preliminary Draft Recovery Plan emphasizes the value of retaining disjunct or peripheral populations that may be important to recovery (Lomolino and Channell 1995, p. 481) and may have diverged genetically from more central populations due to isolation, genetic drift, and adaptation to local environments (Lesica and Allendorf 1995, pp. 754-755).

While the Preliminary Draft Recovery Plan addresses the entire range of the PMJM, the SPR in Colorado where the PMJM remains listed includes multiple subdrainages that are addressed individually in the Preliminary Draft Recovery Plan (Figure 1). Within Colorado, the Plan identifies recovery criteria for the two major river drainages where the PMJM occurs (the South Platte River drainage and the Arkansas River drainage), and for each subdrainage judged likely to support the PMJM. In some cases, the Plan identifies recovery criteria for subdrainages where limited trapping has not confirmed the presence of the PMJM. Boundaries of drainages and subdrainages have been mapped by the U.S. Geological Survey

(USGS). For the Preliminary Draft Recovery Plan, 8-digit hydrologic unit (HUC) boundaries were selected to define subdrainages. A total of 13 HUCs in the SPR of PMJM in Colorado are identified in the Plan as occupied or potentially occupied by the PMJM. Ten are identified in the South Platte River drainage and three in the Arkansas River drainage.

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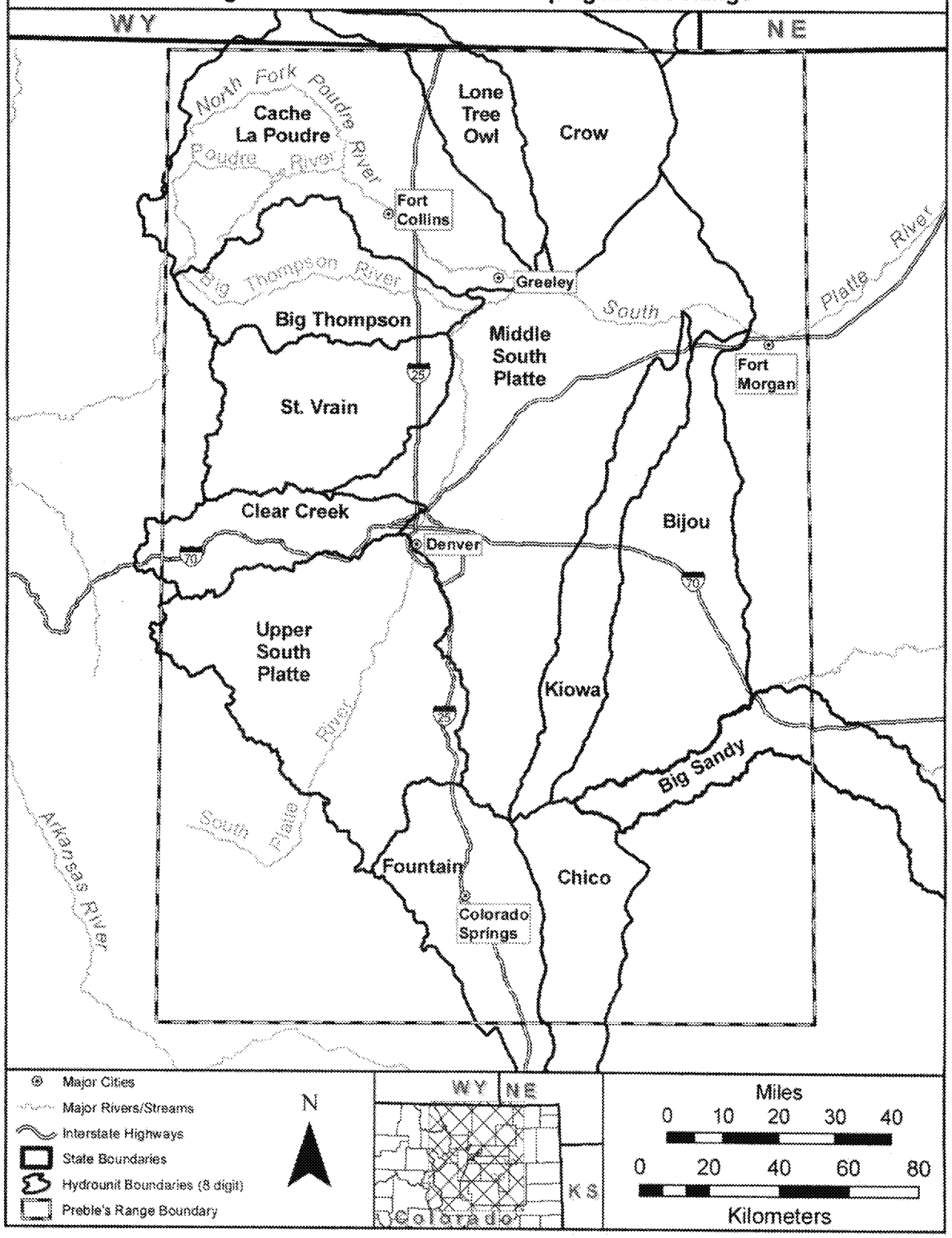
Figure 1: Preble's Meadow Jumping Mouse Range



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One issue recently reviewed by the Recovery Team was whether the conservation strategy that specified the number, size, and distribution of PMJM recovery populations in Colorado remained valid despite the removal of the Wyoming portion of PMJM's range from listing. In Colorado, the strategy is to establish at least three large populations and three medium populations spread over six subdrainages. Recovery of the PMJM would require these populations to be protected from threats. Additionally, the Plan suggests establishing at least three small populations or one medium population in seven other subdrainages, if the PMJM is present. Another issue raised was whether the strategy required modification based on DNA testing that revealed that the PMJM in northern and southern areas of the subspecies' range (Wyoming and Larimer County in Colorado vs. Douglas and El Paso Counties in Colorado) exhibited significant genetic differences (King *et al.* 2006, pp. 4337-4338). The Recovery Team concluded that the previous strategy adequately addresses recovery across the PMJM's range in Colorado (Jackson 2009). The Recovery Team noted that recovery populations were appropriately spread north and south of the Denver metropolitan area, which lies between northern and southern populations examined in the King *et al.* (2006) study (Jackson 2009).

Biological Factors

Presence of the PMJM was determined based largely on the results of trapping surveys, the vast majority of which were conducted in the 11 years since listing under the Act. Consistent with our July 10, 2008, final rule to amend the listing for the PMJM (73 FR 39789), subdrainages judged to be occupied by the PMJM in Colorado include those that: (1) Have recently been documented to support jumping mice identified by genetic or morphological examination as the PMJM; or (2) have recently been documented to support jumping mice not identified to species but occurring at elevations below 6,700 ft (2,050 m), where western jumping mice have infrequently been documented. In our July 17, 2002, proposal (67 FR 47154) and our June 23, 2003, designation of critical habitat (68 FR 37275), we summarized trapping results and means of positive identification for each unit. We have limited discussion in this proposal. See our 2003 rule designating critical habitat and our 2008 final rule to amend the listing for the PMJM for more information on our determinations regarding presence of the PMJM in various subdrainages.

Boundaries of some critical habitat units extend beyond capture locations only to include those reaches that we believe to be occupied by the PMJM based on the best scientific data available regarding capture sites, the known mobility of the PMJM, and the quality and continuity of habitat components along stream reaches. Where appropriate, we include details on the known status of the PMJM within specific subdrainages in the **Proposed Revised Critical Habitat Designation** section of this proposal.

Despite numerous surveys, the PMJM has not been found in the Denver metropolitan area since well before its 1998 listing and is believed to be extirpated from much of the Front Range urban corridor as a result of extensive urban development. The area does not support the spatial arrangement and quantity of requisite PCEs to support PMJM populations, and, as a consequence, we have determined that this area does not contain the features essential to the conservation of the species. Therefore, this area is not included in this proposed critical habitat designation.

Additional Factors Considered

Based on the draft recovery plan , we believe that we can achieve conservation of the PMJM with only a subset of areas currently occupied or containing essential features. To identify the specific subset of areas for inclusion in the proposed critical habitat, we considered several qualitative criteria in addition to the presence of the PCEs. These criteria were used to judge the current status, conservation needs, and probable persistence of the essential features and of PMJM populations in specific areas and included: (1) the quality, continuity, and extent of habitat components present; (2) the presence of lands devoted to conservation (either public lands such as parks, wildlife management areas, and dedicated open space, or private lands under conservation easements); and (3) the landscape context of the site, including the overall degree of current human disturbance and presence, and likelihood of future development based on local planning and zoning.

Where possible, given all other criteria being comparable, and the specific areas meeting the definition of critical habitat under section 3 of the Act (in that they are within the geographical area occupied by the species and contain features essential to the conservation of the species which may require special management considerations or protection), we evaluated land ownership as a selection criterion for inclusion in proposed critical habitat. We first selected Federal lands where effective land management strategies can be employed by Federal agencies to conserve PMJM populations. Federal agencies already have an affirmative conservation mandate under the Act to contribute to the conservation of listed species. Therefore, we find that federally owned lands are more likely to meet the requirements for recovery of the species than private lands that are not subject to the Act's affirmative conservation mandate. However, we cannot depend solely on federally owned lands for proposed critical habitat, as these lands are limited in geographic location, size, and habitat quality within the range of the PMJM. In addition to the federally owned lands, we selected some non-Federal public lands, including lands owned by the State of Colorado and by local governments, and privately owned lands.

This proposed designation of revised critical habitat in Colorado includes six units designed to support three large and three medium PMJM recovery populations, corresponding to those designated in the Preliminary Draft Recovery Plan. While the Preliminary Draft Recovery Plan designates the approximate location of these large and medium recovery populations, it does not delineate specific boundaries. In addition, the Plan identifies seven other HUCs within the PMJM's range in Colorado, where a large or medium recovery population is not designated. In these seven additional HUCs, the Plan suggests establishing three small recovery populations (including at least 3 mi (5 km) of rivers or streams) or one medium recovery population in each, except for those HUCs which, when adequately surveyed, are without an existing PMJM population. The Plan does not identify the locations of recovery populations within these remaining seven HUCs. In this proposed designation of revised critical habitat, we are not proposing critical habitat units corresponding to Plan requirements in all of these remaining seven HUCs. In some, occurrence or distribution of PMJM populations is largely unknown; in others the quality, continuity, and extent of physical and biological features essential to the PMJM are lacking. Designating critical habitat in each of these remaining HUCs is not necessary to provide for the conservation of the subspecies.

The Preliminary Draft Recovery Plan anticipates that, in the future, the locations of these remaining recovery populations will be designated and

specific boundaries of all recovery populations (large, medium, and small) will be delineated by State and local governments, and other interested parties, working in coordination with us. In contrast to the Preliminary Draft Recovery Plan, this proposed revised designation of critical habitat must delineate specific boundaries for all critical habitat areas proposed in order to meet the requirements of the Act and our implementing regulations. As a result, any future recovery plan developed for the PMJM may designate recovery populations or delineate their boundaries in a manner inconsistent with the critical habitat units we propose. This is likely to occur if future information changes our understanding of the distribution of PMJM populations.

In some HUCs identified in the Preliminary Draft Recovery Plan, little is known regarding the status of the PMJM. For example, PMJM has not been confirmed to occur in the Crow Creek, Lone Tree, and Bijou HUCs within the South Platte River drainage in Colorado or the Big Sandy HUC in the Arkansas River drainage. If the PMJM is not present, designation of recovery populations in these HUCs may not be warranted, and these HUCS may be deleted from any future recovery plan. We do not believe that these areas contain features that are essential to the conservation of the species, so we are not proposing critical habitat within these four HUCs. We have determined that we can meet the statutory requirements of critical habitat by proposing a subset of lands that contain the PCEs essential to the conservation of the PMJM.

The conservation strategy employed in the Preliminary Draft Recovery Plan emphasizes the importance of protecting additional PMJM populations beyond those designated as recovery populations, to provide insurance for the PMJM in the event that designated recovery populations cannot be effectively managed or protected as envisioned, or are decimated by rare but uncontrollable events such as catastrophic fires or flooding. The Plan recommends directing recovery efforts toward public lands rather than private lands where possible, and calls upon all Federal agencies to protect and manage for the PMJM wherever it occurs on Federal lands. For this reason, we prioritized inclusion of Federal lands where possible. However, Federal lands alone cannot fully provide for the conservation of the species. Therefore, we included some non-Federal lands when we found those lands contained the PCEs in the appropriate quantity and spatial arrangement to provide the physical and biological features essential to the conservation of the species. We believe that the designation of areas of critical habitat outside of those areas identified for recovery populations on Federal land is essential for the conservation of the PMJM. Should unforeseen events cause the continued decline of PMJM populations throughout its range, PMJM populations and the PCEs on which they depend are more likely to persist and remain viable on Federal lands, where consistent and effective land management strategies can be more easily employed. These additional PMJM populations on Federal lands could serve as substitute recovery populations should designated recovery populations decline or fail to meet recovery goals. In addition, some PMJM populations on Federal lands have been the subject of ongoing research that could prove vital to the conservation of the PMJM. Therefore, in addition to proposing critical habitat for sites consistent with those listed in the Preliminary Draft Recovery Plan, we reviewed other sites of PMJM occurrence, especially Federal lands, and are proposing certain additional units for designation as critical habitat that include the requisite PCEs and are known to support the PMJM.

Based on this conservation strategy, we propose to designate critical habitat preferentially on certain Federal lands that support required PCEs in the appropriate spatial arrangement and quantity and are occupied by the PMJM, where Federal property extends along stream reaches at least 3 mi (5 km). This length corresponds to the minimum size of small recovery populations as defined by the Preliminary Draft Recovery Plan. These areas of proposed critical habitat may include intervening non-Federal lands that in some cases support all PCEs needed by the PMJM or, if fragmented by human development, contain at least one of the PCEs and are at least likely to provide connectivity between areas of PMJM habitat on adjacent Federal lands.

Revisions to the critical habitat designation may be necessary in the future to accommodate shifts in the occupied range of the PMJM. For example, there is potential for impacts to the PMJM and its habitat from currently predicted future climate changes. While specific effects to PMJM are somewhat uncertain, a trend of climate change in the mountains of western North America is expected to decrease snowpack, hasten spring runoff, and reduce summer flows (Intergovernmental Panel on Climate Change 2007, p. 11). Resultant changes to vegetative communities may compel PMJM distribution to shift to higher elevations not currently occupied, but still within the designated boundary of the SPR in Colorado. While effects from climate change may result in an increased PMJM dependence on these areas in the future if lower elevation areas become less habitable, elevations above 7,600 ft (2,317 m) are not known to support the PMJM at this time. The preponderance of lands above 7,600 ft (2,317 m) within subdrainages supporting the PMJM are in Federal ownership.

South Platte River Drainage North of Denver

In the Cache la Poudre HUC, stream reaches that contain requisite PCEs are widespread. We are proposing critical habitat along the lower portions of the North Fork of the Cache la Poudre River and its tributaries, to provide for the large recovery population specified in the Preliminary Draft Recovery Plan. We are also proposing a second area further south in this subdrainage on National Forest System lands along the main stem of the Cache la Poudre River and on selected tributaries. The two proposed units in the lower reaches and subdrainage contain the appropriate spatial arrangement of the requisite PCEs to ensure the conservation of the PMJM. While additional stream reaches that support requisite PCEs are present in the upper reaches of the North Fork of the Cache la Poudre and its tributaries, including Bull Creek, Willow Creek, Mill Creek, and Trail Creek, the PCEs in these reaches are of limited quantity. As a consequence, we are not proposing critical habitat in the upper reaches because we have determined that they do not contain the features essential for the conservation of the species. Therefore, we propose no critical habitat in the upper reaches of the North Fork.

The Preliminary Draft Recovery Plan specifies a medium recovery population on South Boulder Creek within the St. Vrain HUC. Consistent with our 2002 proposal of critical habitat (67 FR 47153), we are including portions of the South Boulder Creek and Spring Creek as proposed critical habitat. Previously, we considered designating critical habitat along the St. Vrain River and adjacent tributaries and ditches between the towns of Hygiene and Lyons. However, we find that the areas along South Boulder Creek that contain the requisite PCEs are preferable to the St. Vrain River area because they are of higher habitat quality, while some of the areas and features along the St. Vrain River are being impacted by aggregate mining and other human development.

We also find only one unit within this general area is necessary to the conservation of the PMJM as outlined in the Preliminary Draft Recovery Plan. Therefore, we are selecting the areas along South Boulder Creek for inclusion in proposed ciritcal habitat instead of the St. Vrain River, due to the quality, quantity, and spatial arrangement of the PCEs and subsequent essential features..

We also considered proposing critical habitat for the PMJM on higher elevations along the North St. Vrain Creek and the Middle St. Vrain Creek. However, since limited trapping efforts targeted at the PMJM have been conducted in these areas and occupancy by the PMJM appears uncertain, we are not proposing critical habitat along these creeks. The lack of presence of the mouse would mean that we would need to determine that these lands are essential to the conservation of the mouse in order to include them in the proposed designation. As stated previously, we determined that we could meet the statutory requirements of critical habitat by designating a subset of the known occupied lands.

Rocky Flats NWR spans portions of the St. Vrain HUC and the Middle South Platte–Cherry Creek HUC. Requisite PCEs are present and the site supports small streams largely unimpacted by human development. Rocky Flats NWR has been a focus of research on the PMJM and monitoring of populations took place for several years when the site was owned by the Department of Energy (DOE) (PTI 1998). We proposed the site as critical habitat in 2002, but excluded in our 2003 final designation of critical habitat based on our section 4(b)(2) analysis that concluded the area did not require special management efforts. We propose the site again as critical habitat and we will again evaluate whether it is appropriate to exclude the site from critical habitat designation under section 4(b)(2) of the Act.

As in our 2003 final designation of critical habitat (68 FR 37275), we are proposing critical habitat in the Big Thompson HUC on Buckhorn Creek and its tributaries consistent to provide for the medium recovery population as advised in the Preliminary Draft Recovery Plan. We are also proposing one additional area as critical habitat that is a tributary to the Big Thompson River, centered on National Forest System lands on portions of Dry Creek and its tributaries. We excluded this area from our 2003 designation of critical habitat in part due to uncertainty regarding identity of the jumping mice present. We know that the area both supports the PMJM and contains the PCEs essential to the conservation of the species.

We also assessed National Forest System lands along the Big Thompson River and Little Thompson River for possible inclusion as critical habitat. Areas along the Big Thompson River and the North Fork of the Big Thompson River that contain the PCEs essential to the conservation of the PMJM are largely in private ownership that are impacted by substantial human development. The remaining protected lands (i.e., USFS holdings) are highly fragmented or are present only as stream reaches near the 7,600 ft (2,317 m) elevation. Requisite PCEs are generally not in the appropriate spatial arrangement and quantity to provide for the conservation of the PMJM. Therefore, we propose no critical habitat on the Big Thompson River, the North Fork of the Big Thompson River, or the Little Thompson River.

The Lone Tree-Owl HUC provides requisite PCEs along limited stream reaches in Colorado. While the Preliminary Draft Recovery Plan (Service 2003a) suggests three small or one medium recovery population in the Lone Tree-Owl HUC if PMJM are present, it is questionable whether the PMJM occurs within this HUC. On July 17, 2002, we proposed two small areas of critical habitat along Lone Tree Creek, one in Wyoming and one in Colorado (67 FR 47154). However, we omitted critical habitat along Lone Tree Creek from our June 23, 2003, designation (68 FR 37275) because, despite the relatively low elevation of the stream, to date the only jumping mice verified to species from Lone Tree Creek are western jumping mice (Service 2009). This corresponds to the pattern in southern Wyoming where, unlike in most of Colorado, western jumping mice are found regularly below 6,700 ft (2,043 m). No further captures of jumping mice have occurred in the Colorado portion of this HUC since our 2003 designation. The lack of presence of PMJM would mean that we would need to determine that these lands are essential to the conservation of the mouse in order to include them in the proposed designation. As stated previously, we determined that we could meet the statutory requirements of critical habitat by designating a subset of the known occupied lands. Therefore, we are not proposing critical habitat in the Lone Tree-Owl HUC.

The Preliminary Draft Recovery Plan suggests three small recovery populations or one medium recovery population in the Crow Creek HUC, if PMJM are present. The Crow Creek HUC has few stream reaches that support requisite PCEs in the appropriate spatial arrangement and quantity to be essential to the conservation of the PMJM within the SPR in Colorado. Further, trapping within this HUC in Colorado has not resulted in captures of jumping mice (Service 2009). The lack of presence of the mouse would mean that we would need to determine that these lands are essential to the conservation of the mouse in order to include them in the proposed designation. As stated previously, we determined that we could meet the statutory requirements of critical habitat by designating a subset of the known occupied lands. Therefore, we are proposing no critical habitat within this HUC.

The Preliminary Draft Recovery Plan suggests three small recovery populations or one medium recovery population in the Clear Creek HUC, if PMJM are present. The PMJM has been confirmed along a segment of Ralston Creek above Ralston Reservoir (Service 2009). We propose critical habitat on this reach similar to that in our 2003 designation of critical habitat. Based on limited occurrence of stream reaches that contain the requisite PCEs and existing human development patterns, we are limiting our proposed designation of critical habitat within the Clear Creek HUC to this single reach.

South Platte River Drainage South of Denver

Within the Upper South Platte HUC, we propose critical habitat along West Plum Creek and its tributaries consistent with the large recovery population called for in the Preliminary Draft Recovery Plan. Based on public comments and information received in 2002, some small changes have been made to the tributaries previously proposed as critical habitat. We are not including portions of one unnamed tributary to West Plum Creek and the upper portion of Metz Canyon because they do not support the features essential to the PMJM.

Consistent with our 2003 final designation of critical habitat within the Upper South Platte HUC, we propose critical habitat on Army Corps of Engineers' lands upstream of Chatfield Reservoir along the South Platte River and on three areas centered on National Forest System land in the Pike–San Isabel National Forest within the South Platte River watershed. The four areas of proposed critical habitat should ensure that a population of the PMJM sufficient for its conservation is maintained in the portion of this HUC upstream of Chatfield Reservoir on the South Platte River and its tributaries. However, we are not proposing to include some

National Forest System lands on some major tributaries of the South Platte River, because the habitat components required by the PMJMdo not contain features essential to the subspecies conservation since they have been degraded by catastrophic fire, flooding, or both. The Buffalo Creek watershed has been highly degraded by fire, followed by flooding, accompanying erosion, and sedimentation. While there is evidence of recovery of the habitat occurring, we conclude that, in the foreseeable future, this area will not develop the essential physical or biological features in the appropriate quantity and spatial arrangement to provide for the conservation of the PMJM; therefore, we are not proposing critical habitat in the Buffalo Creek watershed. The Wigwam Creek area, proposed as a critical habitat subunit in 2002, was not designated as critical habitat in 2003 following intense burning by the 2002 Hayman Fire, and is not being included in this proposal. The area remains degraded, and minimally supports PCEs necessary for the conservation of the PMJM, and we conclude that it is not appropriate to propose critical habitat in the area.

The Preliminary Draft Recovery Plan (Service 2003a) specifies a medium recovery population along Cherry Creek in the Middle South Platte-Cherry Creek HUC. PCEs essential to the conservation of the PMJM in the upper reaches of the Cherry Creek basin appear widespread and there are multiple options as to where we could designate critical habitat for a medium recovery population. Similar to our July 17, 2002, proposal of critical habitat (67 FR 47154), we include portions of Cherry Creek, Lake Gulch, and Upper Lake Gulch as proposed critical habitat because it contains the best spatial arrangement and quanity of requisite PCEs within the HUC. After additional review of the quality, continuity and extent of requisite PCEs; PMJM distribution; conservation potential; and conservation efforts within upper reaches of Cherry Creek and its tributaries, including East Cherry Creek and West Cherry Creek, we are proposing a second subunit of critical habitat on portions of Antelope Creek and Haskel Creek. We believe that this area contains the features essential to the conservation of the PMJM and could serve as an alternate or additional medium recovery population consistent with our recovery strategy.

The Preliminary Draft Recovery Plan suggests either three small populations or one medium population in the Kiowa HUC if PMJM are present. No confirmation of the PMJM existed at the time of 2003 critical habitat designation for this subdrainage, and no critical habitat was designated. Since 2003, PMJM were captured at two sites within the Kiowa (Service 2009). Various stream reaches throughout southern portions of the HUC support some of the PCEs and may support the PMJM. However, we do not believe that the areas contain the PCEs in the appropriate quantity and spatial arrangement. As a consequence, we are not proposing any critical habitat within the HUC.

The Preliminary Draft Recovery Plan suggests either three small populations or one medium population in the Bijou HUC if PMJM are present. While requisite PCEs are present in the Bijou HUC, the limited trapping efforts that have occurred have not resulted in captures of jumping mice (Service 2009); therefore, consistent with our determination that areas not known to be occupied by the PMJM are not essential to its conservation, we are not proposing critical habitat in this HUC.

Arkansas River Drainage

Within the Fountain Creek HUC, the Preliminary Draft Recovery Plan (Service 2003a) specifies a large recovery population along Monument Creek and its tributaries including lands within the U.S. Air Force Academy (Academy). While the Academy lands support the requisite PCEs, a significant PMJM population, and are essential to maintaining this recovery population, we determined that the Academy land merits exemption pursuant to section 4(a)(3) of the Act. We propose critical habitat east and north of the Academy similar to the area we proposed on July 17, 2002 (67 FR 47154), with the addition of one stream reach. In determining boundaries of critical habitat we considered whether documented PMJM populations on some stream reaches remained connected to the larger population present along Monument Creek and its tributaries on the Academy or whether, due to fragmentation caused by past development, they have become permanently isolated.

A significant barrier to PMJM movement is present on Kettle Creek in the form of a large detention basin on the Academy just east of Interstate Highway 25 and accompanying outflow structure that channels creek flow under the highway. We have had discussions with the Academy regarding possible means of improving connectivity between upstream and downstream PMJM populations along this reach. Since improved connectivity may be possible and could prove essential in meeting the recovery criteria in this HUC, we are proposing critical habitat upstream of this reach of Kettle Creek.

Along the upper reaches of Monument Creek, Monument Lake and the dam that forms it create at least a partial barrier to PMJM movement upstream and downstream. Mitigation associated with a project that modified Monument Lake Dam was intended to enhance connectivity for the PMJM through this reach of Monument Creek (Service 2002a). However, the mitigation has thus far not been completed. In addition some reaches upstream from Monument Lake have been significantly altered by human activity. We have not included these upper reaches in our proposed designation because they do not contain the requisite PCEs in an appropriate quantity and spatial arrangement.

The Preliminary Draft Recovery Plan suggests either three small recovery populations or one medium recovery population to meet recovery criteria in both the Chico and the Big Sandy HUCs, if PMJM are present. We did not propose critical habitat in either of these HUCs in 2002 or designate it in 2003. We are not proposing critical habitat in the Chico HUC because the PCEs appear very limited in quantity and spatial arrangement within the subdrainage and, therefore, the area does not contain the features essential to the conservation of the PMJM. Additionally, the PMJM has been found at two locations within the Chico HUC, in apparently marginal habitat along an unnamed tributary of Black Squirrel Creek and at a site in the upper reaches of Black Squirrel Creek that is under development pressure (Service 2009). Subsequent trapping could not relocate the PMJM at the former site. In the Big Sandy HUC, requisite PCEs are limited to a few short reaches and, therefore, the area does not contain the features essential to the conservation of the PMJM. For this reason we are not proposing critical habitat in the Big Sandy HUC. In this location, limited trapping efforts targeted at the PMJM have not confirmed the presence of the PMJM (Service 2009).

Delineation of Critical Habitat Boundaries

We propose revised critical habitat for the PMJM based on the interpretation of multiple sources used during our June 23, 2003, designation of critical habitat (68 FR 37275) and using new information in the preparation of this revised proposed rule. For this proposed rule, we used GIS-based mapping using ESRI ArcGIS software incorporating USGS National Hydrography Dataset

streams along with stream order (by Strahler code), Colorado Department of Transportation roads, U.S. Census Bureau cities, USGS topographic maps, 2005 Farm Service Agency, National Agricultural Inventory Program 1m color imagery, and the COMaP dataset (Theobald *et al.* 2008). We divided lands we are proposing as critical habitat into specific mapping units, i.e., critical habitat units, often corresponding to individual HUCs. For the purposes of this proposed rule, these units are described primarily by latitude and longitude, and by Public Land Survey, Township, Section, and Range, to mark the upstream and the downstream extent of proposed critical habitat along rivers and streams.

As in 2003, we are faced with a decision concerning the outward extent of critical habitat into uplands. Studies suggest that the PMJM uses uplands at least as far out as 330 ft (100 m) beyond the 100-year floodplain (Shenk and Sivert 1999a, p. 11; Ryon 1999, p. 12; Schorr 2001, p. 14; Shenk 2004; Service 2003a, p. 26). Apparent hibernacula have ranged outward to 335 ft (102 m) of a perennial stream bed or intermittent tributary (Ruggles *et al.* 2003, p. 19). We have typically described potential PMJM habitat as extending outward 300 ft (90 m) from the 100-year floodplain of rivers and streams (Service 2004a, p. 5). The Preliminary Draft Recovery Plan (Service 2003a) defines PMJM habitat as the 100-year floodplain plus 330 ft (100 m) outward on both sides, but allows for alternative delineations that provide for all the needs of the PMJM and include the alluvial floodplain, transition slopes, and appropriate upland habitat.

To allow normal behavior and to ensure that the PMJM and the PCEs on which it depends are protected, we believe that the outward extent of critical habitat should at least approximate the outward distances described above in relation to the 100-year floodplain. Unfortunately, floodplains have not been mapped for many streams within the PMJM's range. Where floodplain mapping is available, we have found that it may include local inaccuracies. While alternative delineation of critical habitat based on geomorphology and existing vegetation could accurately portray the presence and extent of required habitat components, we lack an explicit data layer that could support such a delineation of critical habitat.

In 2003, we also considered determining the outward extent of critical habitat based on a distance outward from features such as the stream edge, associated wetlands, or riparian areas. We judged wetlands an inconsistent indicator of habitat extent and found no consistent source of riparian mapping available across the range of the PMJM. We also considered using an outward extent of critical habitat established by a vertical distance above the elevation of the river or stream to approximate the floodplain and adjacent uplands likely to be used by the PMJM. This proved unacceptable over the diverse topography that surrounds stream reaches occupied by the PMJM.

For this proposed revised designation, we maintain consistency with our 2003 designation of critical habitat in delineating the upland extent of critical habitat boundaries as a set distance outward from the river or stream edge (as defined by the ordinary high water mark) varying with the size (order) of a river or stream. We compared known floodplain widths to stream order over a series of sites and approximated average floodplain width for various orders of streams. To that average we added 328 ft (100 m) outward on each side. For example, this analysis determined the average flood plain for streams of order 1 and 2 (the smallest streams) is 33 feet (10 m). Based on this calculation, for streams of order 1 and 2, we propose critical habitat as 361 ft (110 m) outward from the stream edge; for streams of order 3 and 4, we propose critical habitat as 394 ft (120 m) outward from the stream edge; and for stream orders 5 and above (the largest streams and rivers), we propose critical habitat as 459 ft (140 m) outward from the stream edge. While proposed critical habitat will not extend outward to all areas used by individual mice over time, we believe that these corridors of critical habitat ranging from 722 ft (220 m) to 918 ft (280 m) in width (plus the river or stream width) will support the full range of PCEs essential for conservation of PMJM populations in these reaches and should help protect the PMJM and their habitats from secondary impacts of nearby disturbance. Following our July 17, 2002, proposal of critical habitat (67 FR 47154), we received a number of public comments regarding the appropriate outward limits of critical habitat and means of establishing them. However, most comments suggested either standardizing a single outward distance for all rivers and streams, site specific mapping of critical habitat for each reach, or relying on alternative mapping created for HCPs as a surrogate for site-specific mapping of critical habitat. We determined that none of these alternatives were both feasible with the resources available to us and more accurate rangewide than the methodology employed above.

Proposed Revised Critical Habitat Designation

The proposed critical habitat contained within units discussed below constitutes our best evaluation of areas necessary to conserve the PMJM. Table 1 above provides a summary of the length of stream reach with habitat in each unit that is proposed as revised critical habitat. Proposed critical habitat for the PMJM includes approximately 426 mi (686 km) of rivers and streams and 39,835 ac (16,121 ha) of lands in Colorado. Lands proposed as critical habitat are under Federal, State, local government, and private ownership (Table 2). No lands proposed as critical habitat are under tribal ownership. Estimates reflect the total river or stream length and area of lands within critical habitat unit boundaries. Limited areas within these boundaries may not include any of the requisite PCEs. Therefore, excluding certain developed areas or other areas not supporting any of the requisite PCEs, the areas proposed be less than that indicated in Table 2.

TABLE 2. PROPOSED CRITICAL HABITAT ACREAGE FOR THE PREBLE'S MEADOW JUMPING MOUSE IN COLORADO COUNTIES.

by Land Ownership

COUNTY	FEDERAL	STATE	LOCAL GVT	OTHER	TOTAL
Boulder	6 ac (2 ha)		515 ac (208 ha)	351 ac (142 ha)	871 ac (352 ha)
Douglas	3,024 ac (1,224 ha)	762 ac (308 ha)	512 ac (207 ha)	9,599 ac (3,885 ha)	13,896 ac (5,624 ha)

TABLE 2. PROPOSED CRITICAL HABITAT ACREAGE FOR THE PREBLE'S MEADOW JUMPING MOUSE IN COLORADO COUNTIES.—Continued

by Land Ownership

COUNTY	FEDERAL	STATE	LOCAL GVT	OTHER	TOTAL
El Paso	59 ac (24 ha)	0	160 ac (65 ha)	3,199 ac (1,285 ha)	3,419 ac (1,383 ha)
Jefferson/Broomfield*	1,564 ac (633 ha)	195 ac (79 ha)	311 ac (126 ha)	584 ac (236 ha)	2,654 ac (1,074 ha)
Larimer	7,867 ac (3,184 ha)	2,363 ac (956 ha)	187 ac (76 ha)	7,809 ac (3,160 ha)	18,226 ac (7,376 ha)
Teller	77 ac (31 ha)	0	0	0	77 ac (31 ha)
Total	**12,596 ac** (5,097 ha)	**3,319 ac** (1,343 ha)	**1,685 ac** (682 ha)	**21,542 ac** (8,718 ha)	**39,142 ac** (15,840 ha)

*Broomfield County extends minimally on to Rock Flats NWR (Unit 7).

Lands proposed as revised critical habitat are divided into 11 critical habitat units containing all of those PCEs necessary to meet the primary biological needs of the PMJM throughout Colorado where it is listed. Each unit has all of the requisite PCEs present, and, based on the best scientific data available, all are believed to currently support the PMJM. Individual stream reaches designated within each unit contain at least one of the PCEs, and are either believed to be occupied by the PMJM or provide crucial opportunities for connectivity to facilitate dispersal and genetic exchange within the unit.

In proposing critical habitat, we did not include all areas currently occupied by the PMJM. A brief description of each PMJM critical habitat unit is provided below. The units are generally based on geographically distinct river drainages and subdrainages. These units have been subject to, or are threatened by, varying degrees of degradation from human use and development. For these reasons, the essential features within each of the specific areas we are proposing as critical habitat may require special management considerations or protection. Management may include additional measures in addition to those that may already be in place to preserve such areas; to avoid, reduce, or offset human-induced and natural impacts; and to restore such areas following unavoidable adverse impacts, including fire or flooding.

Unit 1: North Fork of the Cache la Poudre River, Larimer, Colorado.

Unit 1 encompasses approximately 8,619 ac (3,488 ha) on 88 mi (142 km) of streams within the North Fork of the Cache la Poudre River watershed. It includes the North Fork of the Cache la Poudre River from Seaman Reservoir upstream to Halligan Reservoir. Major tributaries within the unit include Stonewall Creek, Rabbit Creek (including its North Fork, Middle Fork, and South Fork), and Lone Pine Creek. The unit includes both public and private lands. It includes portions of the Arapaho-Roosevelt National Forest, as well as Lone Pine State Wildlife Area.

The unit is located in the Cache la Poudre HUC and is proposed to address the large recovery population designated for this area in the Preliminary Draft Recovery Plan (Service 2003a). The area remains rural and agricultural with habitat components likely to support relatively high densities of the PMJM. Pressure for expanded development is increasing within the area.

Unit 2: Cache la Poudre River, Larimer County.

Unit 2 encompasses approximately 4,944 ac (2,001 ha) on 51 mi (82 km) of streams within the Cache la Poudre River watershed. It includes the Cache la Poudre River from Poudre Park upstream to the 7,600 ft (2,317 m) elevation (below Rustic). Major tributaries within the unit include Hewlett Gulch, Young Gulch, Skin Gulch, Poverty Gulch, Elkhorn Creek, Pendergrass Creek, and Bennett Creek. The unit is primarily composed of Federal lands of the Arapaho-Roosevelt National Forest, including portions of the Cache la Poudre Wilderness, but includes limited non-Federal lands.

Since this unit is located in the same Cache la Poudre HUC as Unit 1, it is unlikely to serve as an initial recovery population. However, it encompasses a significant area of habitat likely to support a sizeable population of the PMJM. Due to Federal ownership, development pressure is minimal; however, the area is subject to substantial recreational use (rafting, kayaking, fishing) in the Cache la Poudre River corridor. Non-Federal lands include existing development that may limit the habitat components present. Some such reaches may serve the PMJM mostly as connectors between areas containing all necessary PCEs.

Unit 3: Buckhorn Creek, Larimer County.

Unit 3 encompasses approximately 3,995 ac (1,617 ha) on 46 mi (73 km) of streams within the Buckhorn Creek watershed. It includes Buckhorn Creek from just west of Masonville, upstream to the 7,600 ft (2,317 m) elevation. Major tributaries within the unit include Little Bear Gulch, Bear Gulch, Stringtown Gulch, Fish Creek, and Stove Prairie Creek. The unit includes both public and private lands and portions of the Arapaho-Roosevelt National Forest.

The unit is located in the Big Thompson HUC and is proposed to address the medium recovery population called for this area in the Preliminary Draft Recovery Plan (Service 2003a). Pressure for expanded rural development exists on non-Federal lands within the unit.

Unit 4: Cedar Creek, Larimer County.

Unit 4 encompasses approximately 668 ac (270 ha) on 8 mi (12 km) of streams within the Cedar Creek watershed, including Dry Creek and Jug Gulch. Cedar Creek is a tributary of the Big Thompson River and enters the Big Thompson River at Cedar Cove. The unit is centered on Federal lands of the Arapaho-Roosevelt National Forest, but includes some stream reaches on non-Federal lands.

This unit is located in the Big Thompson HUC and, while unlikely to serve as an initial recovery population, it supports a population on mostly Federal lands of the upper Big Thompson River. It is isolated, at least in terms of riparian connection, from the PMJM population on nearby Buckhorn Creek. This site is upstream of The Narrows of the Big Thompson Canyon, a barrier to PMJM movement, while the confluence of the Big Thompson River and Buckhorn Creek is downstream from The Narrows. However, the close proximity of the headwaters of Jug Gulch within this unit to the headwaters of Bear Gulch within the Buckhorn Creek unit suggests that some individual mice may pass between the two populations and thus between the two significant watersheds within this HUC.

Unit 5: South Boulder Creek, Boulder County.

Unit 5 encompasses approximately 856 ac (347 ha) on 8 mi (12 km) of streams within the South Boulder Creek watershed. It includes South Boulder Creek from Baseline Road upstream to Eldorado Springs, and includes the Spring Brook tributary. The unit includes both public and private lands. It includes substantial lands owned by the City of Boulder Open Space and Mountain Parks.

This unit is located in the St. Vrain HUC and is proposed to address the medium recovery population designated for this area in the Preliminary Draft Recovery Plan (Service 2003a). Portions of the area have been the subject of PMJM research funded by the City of Boulder and, in places, high densities of the PMJM have been documented (Meaney *et al.* 2003, pp. 616 - 617). A wide floodplain, complex ditch system, and the irrigation of pastures make habitat within the lower portions of this unit unique. In places, the outward extent of PCEs surpasses the standard distance outward from the stream used to define critical habitat in this designation. Pressure for expanded development is occurring on private lands within the unit. Recreational use of the City of Boulder lands is considerable and may adversely impact the PMJM.

Unit 6: Rocky Flats NWR, Jefferson and Broomfield Counties..

Unit 6 encompasses approximately 1,108 ac (449 ha) on 13 mi (20 km) of streams on the subunits corresponding to the Rock Creek, Woman Creek, and Walnut Creek watersheds. The unit includes only Federal lands on the Rocky Flats NWR.

The Rock Creek subunit is located in the St. Vrain HUC and the Woman Creek and Walnut Creek subunits are in the Middle South Platte-Cherry Creek HUC. Since the unit extends to two HUCs, both of which have designated recovery population elsewhere, this unit is unlikely to serve as an initial recovery population. However, this unit is unique because it is limited entirely to Federal lands and populations on the site have been the subject of the longest continuing research on the PMJM. After cleanup and closure of the DOE's Rocky Flats Environmental Technology Site, the property was transferred to the Service to become part of our National Wildlife Refuge System. Streams within the unit are small and habitat components present do not support a high density of the PMJM. The site presents an opportunity to study small populations and their viability over time.

Unit 7: Ralston Creek, Jefferson County.

Unit 7 encompasses approximately 809 ac (328 ha) on 9 mi (14 km) of streams within the Ralston Creek watershed. It includes Ralston Creek from Ralston Reservoir upstream to the 7,600 ft (2,317 m) elevation. The unit includes both public and private lands including lands in Golden Gate Canyon State Park and White Ranch County Park.

This unit is located in the Clear Creek HUC and we are proposing to designate it as critical habitat to partially address the criteria of three small recovery populations or one medium recovery population called for in this area in the Preliminary Draft Recovery Plan (Service 2003a). The segment of Ralston Creek that passes through the Cotter Corporation's existing Schwartzwalder Mine serves as a connector between areas supporting all PCEs required by the PMJM located upstream and downstream.

Unit 8: Cherry Creek, Douglas County.

Unit 8 encompasses approximately 2,647 ac (1,071 ha) on 30 mi (48 km) of streams within the Cherry Creek watershed. It includes two subunits. The first includes Cherry Creek from the downstream boundary of the Castlewood Canyon State Recreation Area, upstream to its confluence with Lake Gulch. Tributaries within the unit include Lake Gulch and Upper Lake Gulch. It includes portions of the Castlewood Canyon State Recreation Area, as well as Douglas County's recently acquired Green Mountain Ranch property. The second subunit includes Antelope Creek from its confluence with West Cherry Creek upstream and a tributary, Haskel Creek. Both subunits include both public and private lands. These subunits are located in the Middle South Platte-Cherry Creek HUC and address the medium recovery population designated for this area in the Preliminary Draft Recovery Plan (Service 2003a). Some development pressure is occurring from expanding rural development on private lands within these areas.

Unit 9: West Plum Creek, Douglas County.

Unit 9 encompasses approximately 8,724 ac (3,530 ha) on 94 mi (151 km) of streams within the Plum Creek watershed. It includes Plum Creek from Chatfield Reservoir upstream to the confluence with West Plum Creek then continues upstream on West Plum Creek to its headwaters. Major tributaries within the unit include Indian Creek, Jarre Creek, Garber Creek (including North, Middle, and South Garber Creek), Jackson Creek, Spring Creek, Dry Gulch, Bear Creek, Starr Canyon, Gove Creek, and Metz Canyon. The unit is a combination of public and private lands. It includes portions of the Pike-San Isabel National Forest, as well as Chatfield State Recreation Area (Army Corps of Engineers' property), and Colorado Division of Wildlife's Woodhouse Ranch property.

This unit is located in the Upper South Platte HUC, and we propose to designate it as critical habitat to address the large recovery population designated for this area in the Preliminary Draft Recovery Plan (Service 2003a). Aside from a portion of Plum Creek, the area remains rather rural and includes habitat components likely to support relatively high densities of the PMJM. Pressure for expanded suburban and rural development is occurring within the area.

Unit 10: Upper South Platte River, Douglas, Jefferson, and Teller Counties.

Unit 10 encompasses approximately 3,353 ac (1,357 ha) on 35 mi (57 km) of streams within the Platte River watershed. It includes four subunits. The Chatfield Subunit includes a section of the South Platte River upstream of Chatfield Reservoir within Chatfield State Recreation Area (Army Corps of Engineers' property). The Bear Creek Subunit includes Bear Creek and West Bear Creek, tributaries to the South Platte River on National Forest System lands. The South Platte Subunit includes a segment of the South Platte River upstream from Nighthawk, including the tributaries Gunbarrel Creek and Sugar Creek. This subunit is

centered on Federal lands of the Pike-San Isabel National Forest but includes some intervening non-Federal lands. The Trout Creek Subunit includes portions of Trout Creek, a tributary to Horse Creek, and also portions of Eagle Creek, Long Hollow, Fern Creek, Illinois Gulch, and Missouri Gulch. This subunit is centered on Federal lands of the Pike-San Isabel National Forest but includes some intervening non-Federal lands along Trout Creek.

This unit is located in the same Upper South Platte HUC as West Plum Creek, where a large recovery population has been designated and, therefore, is unlikely to serve as an initial recovery population. The unit encompasses four areas of primarily Federal land spread through the drainage, three within the Pike-San Isabel National Forest boundary. Habitat components present and the likely density of PMJM populations vary. The Trout Creek Subunit appears to have high quality PMJM habitat and may provide a continued opportunity to research relationships between the PMJM and the western jumping mouse, both of which have been verified from the same trapping effort in the subunit (Schorr *et al.* 2007).

Unit 11: Monument Creek, El Paso County.

Unit 11 is located in the Arkansas River drainage. It encompasses approximately 3,419 ac (1,383 ha) on 39 mi (62 km) of streams within the Monument Creek watershed. It includes Monument Creek from the confluence of Cottonwood Creek upstream to the southern boundary of the U.S. Air Force Academy and from the northern boundary of the Academy upstream to the dam at Monument Lake. Major tributaries within the unit include Kettle Creek, Black Squirrel Creek, Monument Branch, Middle Tributary, Smith Creek, Jackson Creek, Beaver Creek, Teachout Creek, and Dirty Woman Creek. The unit is primarily on private lands. It includes a small portion of the Pike-San Isabel National Forest.

This unit is located in the Fountain Creek HUC and we are proposing it as critical habitat to address the large recovery population designated for this area in the Preliminary Draft Recovery Plan (Service 2003a). The area is unique in that it represents the only known PMJM population of significant size within the Arkansas River drainage and the southernmost known occurrence of the PMJM. Development pressure is extremely high on some private lands within the unit. Development has resulted in changes in flows from increased stormwater runoff and has affected stream channels and associated riparian systems (Mihlbachler 2007).

Effects of Critical Habitat Designation

Section 7 Consultation

Section 7(a)(2) of the Act requires Federal agencies, including the Service, to ensure that actions they fund, authorize, or carry out are not likely to destroy or adversely modify critical habitat. Decisions by the 5th and 9th Circuit Courts of Appeals have invalidated our definition of "destruction or adverse modification" (50 CFR 402.02) (see *Gifford Pinchot Task Force* v. *U.S. Fish and Wildlife Service*, 378 F. 3d 1059 (9th Cir 2004) and *Sierra Club* v. *U.S. Fish and Wildlife Service et al.*, 245 F.3d 434, 442F (5th Cir 2001)), and we do not rely on this regulatory definition when analyzing whether an action is likely to destroy or adversely modify critical habitat. Under the statutory provisions of the Act, we determine destruction or adverse modification on the basis of whether, with implementation of the proposed Federal action, the affected critical habitat would remain functional (or retain the current ability for the PCEs to be functionally established) to serve its intended conservation role for the species.

Section 7(a)(4) of the Act requires Federal agencies to confer with us on any action that is likely to jeopardize the continued existence of a species proposed for listing or result in destruction or adverse modification of proposed critical habitat. Conference reports provide conservation recommendations to assist the agency in eliminating conflicts that may be caused by the proposed action. We may issue a formal conference report if requested by a Federal agency. Formal conference reports on proposed critical habitat contain an opinion that is prepared according to 50 CFR 402.14, as if we had designated critical habitat. We may adopt the formal conference report as the biological opinion when the critical habitat is designated, if no substantial new information or changes in the action alter the content of the opinion (see 50 CFR 402.10(d)). The conservation recommendations in a conference report or opinion are advisory.

If a species is listed or critical habitat is designated, section 7(a)(2) of the Act requires Federal agencies to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of such a species or to destroy or adversely modify its critical habitat. If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency (action agency) must enter into consultation with us in most cases. As a result of this consultation, we document compliance with the requirements of section 7(a)(2) through our issuance of: (1) A concurrence letter for Federal actions that may affect, but are not likely to adversely affect, listed species or designated critical habitat; or (2) A biological opinion for Federal actions that are likely to adversely affect listed species or designated critical habitat.

An exception to the concurrence process referred to in (1) above occurs in consultations involving National Fire Plan projects. In 2004, the USFS and the Bureau of Land Management (BLM) reached agreements with us to streamline a portion of the section 7 consultation process (BLM 2004, pp. 1–8; USFS 2004, pp. 1–8). The agreements allow the USFS and the BLM the opportunity to make "not likely to adversely affect" determinations for projects implementing the National Fire Plan. Such projects include prescribed fire, mechanical fuels treatments (thinning and removal of fuels to prescribed objectives), emergency stabilization, burned area rehabilitation, road maintenance and operation activities, ecosystem restoration, and culvert replacement actions. The USFS and the BLM must ensure staff are properly trained, and both agencies must submit monitoring reports to us to determine if the procedures are being implemented properly and that effects on endangered species and their habitats are being properly evaluated.

If we issue a biological opinion concluding that a project is likely to jeopardize the continued existence of a listed species or destroy or adversely modify critical habitat, we also provide reasonable and prudent alternatives to the project, if any are identifiable. We define "Reasonable and prudent alternatives" at 50 CFR 402.02 as alternative actions identified during consultation that:

- Can be implemented in a manner consistent with the intended purpose of the action,
- Can be implemented consistent with the scope of the Federal agency's legal authority and jurisdiction,
- Are economically and technologically feasible, and
- Would, in the Director's opinion, avoid jeopardizing the continued existence of the listed species or destroying or adversely modifying its critical habitat.

Reasonable and prudent alternatives can vary from slight project modifications to extensive redesign or

relocation of the project. Costs associated with implementing a reasonable and prudent alternative are similarly variable.

When we issue a biological opinion concluding that a project is not likely to jeopardize a listed species or adversely modify its critical habitat but may result in incidental take of listed animals, we provide an incidental take statement that specifies the impact of such incidental taking on the species. We then define "reasonable and prudent measures" considered necessary or appropriate to minimize the impact of such taking. Reasonable and prudent measures are binding measures the action agency must implement to receive an exemption to the prohibition against take contained in section 9 of the Act. These reasonable and prudent measures are implemented through specific "terms and conditions" that must be followed by the action agency or passed along by the action agency as binding conditions to an applicant. Reasonable and prudent measures, along with the terms and conditions that implement them, cannot alter the basic design, location, scope, duration, or timing of the action under consultation and may involve only minor changes (50 CFR 402.14). We may provide the action agency with additional conservation recommendations, which are advisory and not intended to carry binding legal force.

Regulations at 50 CFR 402.16 require Federal agencies to reinitiate consultation on previously reviewed actions in instances where we have listed a new species or subsequently designated critical habitat that may be affected and the Federal agency has retained discretionary involvement or control over the action (or the agency's discretionary involvement or control is authorized by law). Consequently, Federal agencies may sometimes need to request reinitiation of consultation with us on actions for which formal consultation has been completed, if those actions with discretionary involvement or control may affect subsequently listed species or designated critical habitat.

Federal activities that may affect the PMJM or its designated critical habitat will require section 7 consultation under the Act. Activities on State, tribal, local, or private lands requiring a Federal permit (such as a permit from the U.S. Army Corps of Engineers under section 404 of the Clean Water Act (33 U.S.C. 1251 *et seq.*) or a permit from us under section 10(a)(1)(B) of the Act) or involving some other Federal action (such as funding from the Federal Highway Administration, Federal Aviation Administration, or the Federal Emergency Management Agency) also will be subject to the section 7 consultation process. Federal actions not affecting listed species or critical habitat, and actions on State, tribal, local, or private lands that are not federally funded, authorized, or permitted, do not require section 7 consultations.

The designation of critical habitat does not imply that lands outside of critical habitat do not play an important role in the conservation of the PMJM. Federal actions that may affect areas outside of critical habitat, such as development, agricultural activities, and road construction, are still subject to review under section 7 of the Act if they may affect the PMJM, because Federal agencies must consider both effects to the species and effects to critical habitat independently. The prohibitions of section 9 of the Act applicable to the PMJM under 50 CFR 17.31 also continue to apply both inside and outside of designated critical habitat.

Application of the "Adverse Modification" Standard

The key factor related to the adverse modification determination is whether, with implementation of the proposed Federal action, the affected critical habitat would continue to serve its intended conservation role for the species, or would retain its current ability for the primary constituent element(s) to be functionally established. Activities that may destroy or adversely modify critical habitat are those that alter the physical and biological features to an extent that appreciably reduces the conservation value of critical habitat for the PMJM. Generally, the conservation role of the proposed revised PMJM critical habitat units is to support viable populations.

Section 4(b)(8) of the Act requires us to briefly evaluate and describe in any proposed or final regulation that designates critical habitat those activities involving a Federal action that may destroy or adversely modify such habitat, or that may be affected by such designation.

Activities that, when carried out, funded, or authorized by a Federal agency, may adversely affect critical habitat and, therefore, should result in consultation for the PMJM include, but are not limited to, the following:

(1) Any activity that results in development or alteration of the landscape within a unit, including: land clearing; activities associated with construction for urban and industrial development, roads, bridges, pipelines, or bank stabilization; agricultural activities such as plowing, disking, haying, or intensive grazing; off-road vehicle activity; and mining or drilling of wells.

(2) Any activity that results in changes in the hydrology of the unit, including: construction, operation, and maintenance of levees, dams, berms, and channels; activities associated with flow control, such as releases, diversions, and related operations; irrigation; sediment, sand, or gravel removal; and other activities resulting in the draining or inundation of a unit.

(3) Any sale, exchange, or lease of Federal land that is likely to result in the habitat in a unit being destroyed or appreciably degraded.

(4) Any activity that detrimentally alters natural processes in a unit including the changes to inputs of water, sediment and nutrients, or that significantly and detrimentally alters water quantity in the unit.

(5) Any activity that could lead to the introduction, expansion, or increased density of an exotic plant or animal species that is detrimental to the PMJM and to its habitat.

Federal actions not affecting listed species or critical habitat and actions on non-Federal lands that are not federally funded or permitted do not require section 7 consultation.

Note that the scale of these activities would be a crucial factor in determining whether, in any instance, they would directly or indirectly alter critical habitat to the extent that the value of the critical habitat for the survival and recovery of the PMJM would be appreciably diminished.

Application of Section 4(a)(3) of the Endangered Species Act

The National Defense Authorization Act for Fiscal Year 2004 (Pub. L. 108–136) amended the Act to limit areas eligible for designation as critical habitat. Specifically, section 4(a)(3)(B)(i) of the Act (16 U.S.C. 1533(a)(3)(B)(i)) now provides: "The Secretary shall not designate as critical habitat any lands or other geographical areas owned or controlled by the Department of Defense, or designated for its use, that are subject to an integrated natural resources management plan prepared under section 101 of the Sikes Act (16 U.S.C. 670a), if the Secretary determines in writing that such plan provides a benefit to the species for which critical habitat is proposed for designation."

The Sikes Act of 1997 required each military installation that includes land and water suitable for the conservation and management of natural resources to complete an Integrated Natural Resources Management Plan (INRMP)

by November 17, 2001. An INRMP integrates implementation of the military mission of the installation with stewardship of the natural resources found on the base. Each INRMP includes:

(1) An assessment of the ecological needs on the installation, including the need to provide for the conservation of listed species;

(2) A statement of goals and priorities;

(3) A detailed description of management actions to be implemented to provide for these ecological needs; and

(4) A monitoring and adaptive management plan.

Among other things, each INRMP must, to the extent appropriate and applicable, provide for fish and wildlife management; fish and wildlife habitat enhancement or modification; wetland protection, enhancement, and restoration where necessary to support fish and wildlife; and enforcement of applicable natural resource laws.

We consult with the military on the development and implementation of INRMPs for installations with federally listed species. We analyzed INRMPs developed by military installations that are located within the range of the PMJM and that contain those features essential to the species' conservation for exemption under the authority of section 4(a)(3)(B) of the Act.

U.S. Air Force Academy

The U.S. Air Force Academy (Academy) in El Paso County, Colorado, is the lone Department of Defense property in the area of the proposed revised critical habitat. The Academy has a completed INRMP that contains those features essential to the species' conservation. The Academy has completed an INRMP (U.S. Air Force 1998), a 1999 "Conservation and Management Plan for the Prebles Meadow Jumping Mouse at the U.S. Air Force Academy" (U.S. Air Force 1999), and the Service completed a 2000 programmatic section 7 consultation addressing certain activities at the Academy that may affect the PMJM (Service 2000). The Conservation and Management Plan provides guidance for Air Force management decisions. Following its initial 5–year duration, the Conservation and Management Plan was renewed and extended annually (Linner 2007). The plan was based upon the most current scientific knowledge available at the time that it was developed. Research regarding the PMJM is ongoing at the Academy, and we anticipate that an update to the Conservation and Management Plan will be finalized in 2009.

The Academy's INRMP describes habitats found at the Academy, including habitats used by the PMJM (U.S. Air Force 1998). It addresses management concerns, goals and objectives regarding the PMJM, and describes management actions designed to accomplish those objectives. The INRMP also requires monitoring, evaluation of the plan's effectiveness, and provides for modification of management actions when appropriate. We have reviewed these measures and have concluded that they address the four criteria identified above. As a result, such lands are not included in the proposed designation.

Application of Section 4(b)(2) of the Endangered Species Act

Section 4(b)(2) of the Act states that the Secretary must designate and revise critical habitat on the basis of the best available scientific data after taking into consideration the economic impact, national security impact, and any other relevant impact of specifying any particular area as critical habitat. The Secretary may exclude an area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific data available, that the failure to designate such area as critical habitat will result in the extinction of the species. In making that determination, the statute, as well as the legislative history, is clear that the Secretary has broad discretion regarding which factor(s) to use and how much weight to give to any factor (Department of the Interior, 2008).

We are updating the previous economic analysis of the impacts of the proposed designation of revised critical habitat, which will be available for public review and comment when it is complete. Based on public comment on that document, on the proposed designation itself, and on the information in the revised final economic analysis, the Secretary may exclude from critical habitat additional areas beyond those identified in this assessment under the provisions of section 4(b)(2) of the Act. This also is addressed in our implementing regulations at 50 CFR 424.19.

The National Environmental Policy Act (NEPA) (42 U.S.C. 4321 *et seq.*) analysis we will conduct also may disclose other impacts we may consider in our analysis under section 4(b)(2) of the Act. In considering whether to exclude a particular area from the designation, we must identify the benefits of including the area in the designation, identify the benefits of excluding the area from the designation, and determine whether the benefits of exclusion outweigh the benefits of inclusion. If based on this analysis, we determine that the benefits of exclusion outweigh the benefits of inclusion, then we can exclude the area only if such exclusion would not result in the extinction of the species.

When considering the benefits of inclusion for an area, we consider the additional regulatory benefits that area would receive from the protection from adverse modification or destruction as a result of actions with a Federal nexus, the educational benefits of mapping essential habitat for recovery of the listed species, and any benefits that may result from a designation due to State or Federal laws that may apply to critical habitat.

When considering the benefits of exclusion, we consider, among other things, whether exclusion of a specific area is likely to result in conservation; the continuation, strengthening, or encouragement of partnerships; or implementation of a management plan that provides equal to or more conservation than a critical habitat designation would provide.

In the case of the PMJM, the benefits of critical habitat include public awareness of the PMJM's presence and the importance of habitat protection, and in cases where a Federal action exists, increased habitat protection for the PMJM due to the protection from adverse modification or destruction of critical habitat.

When we evaluate the existence of a conservation plan to consider the benefits of exclusion, we consider a variety of factors, including but not limited to, whether the plan is finalized; how it provides for the conservation of the essential physical and biological features; whether there is a reasonable expectation that the conservation management strategies and actions contained in a management plan will be implemented into the future; whether the conservation strategies in the plan are likely to be effective; and whether the plan contains a monitoring program or adaptive management to ensure that the conservation measures are effective and can be adapted in the future in response to new information.

After evaluating the benefits of inclusion and the benefits of exclusion, we carefully weigh the two sides to determine whether the benefits of exclusion outweigh those of inclusion. If we determine that they do, we then determine whether exclusion would result in extinction. If exclusion of an area from critical habitat would result in

extinction, we will not exclude it from the designation.

Conservation Partnerships on Non-Federal Lands

Most federally listed species in the United States will not recover without cooperation of non-Federal landowners. More than 60 percent of the United States is privately owned (National Wilderness Institute 1995), and at least 80 percent of endangered or threatened species occur either partially or solely on private lands (Crouse *et al.* 2002, p. 720). Stein *et al.* (1995, p. 400) found that only about 12 percent of listed species were found almost exclusively on Federal lands (90 to 100 percent of their known occurrences restricted to Federal lands) and that 50 percent of federally listed species are not known to occur on Federal lands at all.

Given the distribution of listed species with respect to land ownership, conservation of listed species in many parts of the United States is dependent upon working partnerships with a wide variety of entities and the voluntary cooperation of many non-Federal landowners (Wilcove and Chen 1998, p. 1407; Crouse *et al.* 2002, p. 720; James 2002, p. 271). Building partnerships and promoting voluntary cooperation of landowners are essential to understanding the status of species on non-Federal lands, and are necessary to implement recovery actions such as reintroducing listed species, habitat restoration, and habitat protection.

Many non-Federal landowners derive satisfaction from contributing to endangered species recovery. We promote these private-sector efforts through the Department of the Interior's Cooperative Conservation philosophy. Conservation agreements with non-Federal landowners (safe harbor agreements, other conservation agreements, easements, and State and local regulations) enhance species conservation by extending species protections beyond those available through section 7 consultations. In the past decade, we encouraged non-Federal landowners to enter into conservation agreements, based on a view that we can achieve greater species conservation on non-Federal land through such partnerships than we can through regulatory methods (December 2, 1996, 61 FR 63854).

As discussed above, consultation under section 7(a)(2) of the Act, and the duty to avoid jeopardy to a listed species and adverse modification of designated critical habitat, is only triggered where Federal agency action is involved. In the absence of Federal agency action, the primary regulatory restriction applicable to non-Federal landowners is the prohibition against take of listed animal species under section 9 of the Act. In order to take listed animal species where no independent Federal action is involved that would trigger section 7 consultation, a private landowner must obtain an incidental take permit under section 10 of the Act.

However, many private landowners are wary of the possible consequences of encouraging endangered species to their property. Mounting evidence suggests that some regulatory actions by the Federal government, while well-intentioned and required by law, can (under certain circumstances) have unintended negative consequences for the conservation of species on private lands (Wilcove *et al.* 1996, pp. 5-6; Bean 2002, pp. 2-3; Conner and Mathews 2002, pp. 1-2; James 2002, pp. 270-271; Koch 2002, pp. 2-3; Brook *et al.* 2003, pp. 1639-1643). Many landowners fear a decline in their property value due to real or perceived restrictions on land-use options where threatened or endangered species are found. Consequently, harboring endangered species is viewed by many landowners as a liability. This holds true for PMJM presence on private lands in Colorado. This perception results in anti-conservation incentives because maintaining habitats that harbor endangered species represents a risk to future economic opportunities (Main *et al.* 1999, pp. 1264-1265; Brook *et al.* 2003, pp. 1644-1648).

According to some researchers, the designation of critical habitat on private lands significantly reduces the likelihood that landowners will support and carry out conservation actions (Main *et al.* 1999, p. 1263; Bean 2002, p. 2; Brook *et al.* 2003, pp. 1644-1648). The magnitude of this negative outcome is greatly amplified in situations where active management measures (such as reintroduction, fire management, and control of invasive species) are necessary for species conservation (Bean 2002, pp. 3-4). We believe that the judicious exclusion of specific areas of non-federally owned lands from critical habitat designations can contribute to species recovery and provide a superior level of conservation than critical habitat alone.

The purpose of designating critical habitat is to contribute to the conservation of threatened and endangered species and the ecosystems upon which they depend. The outcome of the designation, triggering regulatory requirements for actions funded, authorized, or carried out by Federal agencies under section 7(a)(2) of the Act, can sometimes be counterproductive to its intended purpose on non-Federal lands. Thus the benefits of excluding areas that are covered by partnerships or voluntary conservation efforts can often be high.

Benefits of Excluding Lands with Habitat Conservation Plans

The benefits of excluding lands with approved HCPs from critical habitat designation, such as HCPs that cover the PMJM, include relieving landowners, communities, and counties of any additional regulatory burden that might be imposed as a result of the critical habitat designation. Many HCPs take years to develop, and upon completion, are consistent with the recovery objectives for listed species that are covered within the plan area. Many HCPs also provide conservation benefits to unlisted sensitive species.

A related benefit of excluding lands covered by approved HCPs from critical habitat designation is the unhindered, continued ability it gives us to seek new partnerships with future plan participants, including States, counties, local jurisdictions, conservation organizations, and private landowners, which together can implement conservation actions that we would be unable to accomplish otherwise. The HCPs often cover a wide range of species, including listed plant species and species that are not State and federally listed and would otherwise receive little protection from development. By excluding these lands, we preserve our current partnerships and encourage additional conservation actions in the future.

We also note that permit issuance in association with HCP applications requires consultation under section 7(a)(2) of the Act, which would include the review of the effects of all HCP-covered activities that might adversely impact the species under a jeopardy standard, including possibly significant habitat modification (see definition of "harm" at 50 CFR 17.3), even without the critical habitat designation. In addition, all other Federal actions that may affect the listed species would still require consultation under section 7(a)(2) of the Act, and we would review these actions for possibly significant habitat modification in accordance with the definition of harm referenced above.

The information provided in the previous section applies to the following discussions of potential exclusions under section (4)(b)(2) of the Act. We are considering the exclusion of lands covered by such plans. Portions of the proposed revised critical habitat units and their subunits may warrant

exclusion from the proposed designation of revised critical habitat under section 4(b)(2) of the Act based on the partnerships, management, and protection afforded under these approved and legally operative HCPs. In this revised proposed rule, we are seeking input from the stakeholders in these HCPs and the public as to whether or not we should exclude these areas from the final revised critical habitat designation. We also are asking for public comment on the possible exclusion of proposed critical habitat within the El Paso County HCP planning area; this HCP is currently under development. Below is a brief description of each plan and the lands within the units proposed as revised critical habitat that relate to each plan.

Douglas County Habitat Conservation Plan

On May 11, 2006, we issued a section 10 incidental take permit for the Douglas County HCP (Service 2006a). This permit covers the PMJM. The Douglas County HCP covers specified activities conducted by Douglas County and the Towns of Castle Rock and Parker, on private and non-Federal lands within a Riparian Conservation Zone (RCZ) as mapped by Douglas County. The activities covered by the Douglas County HCP include construction, use, maintenance, and closure of roads, bridges, trails, and recreational facilities; maintenance and repair of existing structures and facilities; emergency activities; habitat improvements that benefit the RCZ; and other necessary County or town public improvements. These activities are subject to conditions and best management practices to minimize impacts to known or potential PMJM habitat.

The RCZ depicts the geographic limits of known or potential PMJM habitat over 283 stream mi (456 km) and over 18,000 ac (7,000 ha) in Douglas County. Impacts to the RCZ associated with the covered activities are mitigated by the permanent protection of portions of the RCZ and the restoration of habitat from temporary impacts. Stream segments totaling 15 mi (24 km) in length and 1,132 ac (458 ha) of the RCZ have been permanently protected as part of the Douglas County HCP. Management plans exist or are in development for these protected properties (Dougherty 2009). In addition, the Douglas County HCP establishes an impact cap of 430 ac (174 ha) of the RCZ. The permanent impacts associated with the covered activities are distributed throughout Douglas County and the RCZ and may permanently affect 308 ac (125 ha) of the RCZ (about 1.6 percent of the RCZ) over the 10-year life of the permit. However, in the period from permit issuance in May 2006, through May 2009, only about 12 ac (5 ha) of impacts have been documented (Dougherty 2009).

A related issue on which we seek comment is the potential modification of outward boundaries of proposed critical habitat within the RCZ to conform to Douglas County's mapped RCZ boundaries. While boundaries of the proposed critical habitat units include standard distances outward from streams (varying based on stream order), the RCZ represents a site-specific attempt to map boundaries of PMJM habitat.

Proposed critical habitat Units 8 and 9 are within the boundaries of the Douglas County HCP; a small amount of non-Federal property in Unit 10 is also within the boundaries of the Douglas County HCP. Protected properties serving as mitigation under the Douglas County HCP that are all or in part within Unit 8 include the Nelson Ranch and Dupont Property; those all or in part within Unit 9 include the Prairie Canyon Ranch, Greenland Ranch, and Lake Gulch Property.

Livermore Area Habitat Conservation Plan

On May 11, 2006, we issued a section 10 incidental take permit for the Livermore Area HCP (Service 2006b). This permit covers the PMJM. The Livermore Area is located in northern Larimer County (Colorado) in the Laramie Foothills, near the Wyoming border. The Livermore Area HCP planning area includes approximately 750 square mi (1,940 square km) and 796 mi (1,282 km) of streams including a PMJM "conservation zone" estimated at approximately 201 mi (324 km) of stream and 21,320 ac (8,570 ha). The HCP cites protection of 71 mi (114 km) of stream, mostly on State lands managed for the conservation of their natural resources, but also on private lands held by The Nature Conservancy and managed for the protection of biodiversity, or on private lands where owners have placed conservation easements on their properties to ensure their protection in perpetuity. It is not clear what proportion of these areas support the PMJM.

Local landowners and public agencies holding land within the boundaries of the Livermore Area HCP may opt for coverage under the HCP and receive incidental take permits for activities consistent with the Livermore Area HCP. The Livermore Area HCP is designed to support current land uses, including ranching and farming. However, inclusion of landowners is optional, and they may choose to pursue land uses inconsistent with those specified in the Livermore Area HCP. Many of the private landowners represent large land holdings that potentially support the PMJM and other sensitive species. These large holdings are managed primarily for ranching and other agricultural uses. Most of the rivers, creeks, and tributaries in the Livermore Area are located on these properties. The Livermore Area HCP includes proposed critical habitat within Unit 1.

Eagle's Nest Open Space Habitat Conservation Plan

We issued Larimer County a section 10 incidental take for an HCP on their Eagle's Nest Open Space (ENOS) property located in the Laramie Foothills region of Larimer County (Service 2004b). This permit covers the PMJM. The ENOS encompasses 755 ac (306 ha) of rolling foothills and steep slopes and includes 1.0 mi (1.6 km) of the North Fork of the Poudre River. There are approximately 264 ac (107 ha) of PMJM habitat on the ENOS HCP. Less than 3 ac (1 ha) can be permanently affected by a river access area and trail under the ENOS HCP.

This area is protected as open space by the Larimer County Open Lands program. The protection and enhancement of wildlife habitat is one of the primary goals on ENOS. The majority of the riparian zone will be managed for PMJM conservation. Habitat restoration and enhancement will be employed to offset impacts to PMJM habitat at a minimum ratio of 1.5:1. The ENOS HCP includes proposed critical habitat in Unit 1.

Denver Water Habitat Conservation Plan

On May 1, 2003, we issued a section 10 incidental take permit to Denver Water for their HCP (Service 2003b). This permit covers the PMJM. Denver Water owns various properties (including easements), facilities, and infrastructure within the PMJM's range. The Denver Water HCP covers the water facilities and infrastructure owned and operated by Denver Water including: the Foothills, Marston, and Moffat treatment plants; 17 pump stations; 29 treated water storage reservoirs; and 2,464 mi (3,968 km) of pipe. The permit area includes approximately 6,000 ac (2,700 ha) of occupied and potential PMJM habitat on Denver Water properties in Boulder, Jefferson, and Douglas Counties. The HCP promotes implementation of applicable best management practices to benefit the

PMJM that avoid, minimize, and eliminate impacts to occupied and potential PMJM habitat. Where impacts occur, Denver Water conducts mitigation as required in the HCP. Denver Water is authorized to take up to 25 ac (10 ha) of occupied and potential habitat through impacts from the covered activities at any one time with a maximum of 75 ac (30 ha) total disturbed over the 30–year term of the HCP. The Denver Water HCP includes proposed critical habitat within Units 5, 6, 9, and 10.

Struther's Ranch Habitat Conservation Plan

We issued a section 10 incidental take permit for the Struthers Ranch residential development consistent with the Struther's Ranch HCP on December 12, 2003 (Service 2003c). This permit covers the PMJM. The site supported approximately 49 ac (20 ha) of PMJM habitat. Approximately 35.5 ac (14.4 ha) of undeveloped land along Black Forest Creek was withdrawn from cattle grazing, returned to a more natural condition, and is maintained as a preserve with conservation measures to restore and enhance vegetation for wildlife.

Flooding has heavily impacted the middle and upper portions of Black Forest Creek. A 1999 flood event inundated the middle fork and deposited a large amount of sand and silt downstream. The HCP is designed to minimize the possibility of future severe flooding events, substantially improve remaining PMJM habitat, and minimize any adverse effects resulting from developed areas nearby. Lands preserved as PMJM habitat are deed-restricted and managed for the PMJM. The deed restriction prohibits any activities that would adversely impact PMJM habitat. The Struther's Ranch HCP includes portions of proposed critical habitat Unit 11.

Other Habitat Conservation Plans

On November 19, 2002, we approved an HCP, and we issued a section 10 incidental take permit covering the PMJM for a single family residence on the Lefever Property in Black Forest, El Paso County (Service 2002b). Under the HCP, 0.561 ac (0.252 ha) of PMJM habitat was permitted to be disturbed and 4.515 ac (1.828 ha) of the property was placed in a conservation easement and deeded to El Paso County to be managed according to specific requirements laid out in the HCP. The permit expires November 19, 2012. The Lefever Property is within proposed critical habitat Unit 11.

On July 23, 2002, we approved an HCP, and we issued a section 10 incidental take permit covering the PMJM for a single family residence on the Dahl Property, Thunderbird Estates, in Colorado Springs, El Paso County (Service 2002c). Under the HCP, 0.15 ac (0.06 ha) of upland PMJM habitat was permitted to be disturbed and 0.5 ac (0.2 ha) of the property was preserved in a native and unmowed condition and enhanced through weed control and *Salix* planting. The take permit expired July 29, 2007; however, preservation of PMJM habitat continues in perpituity. The Dahl Property is within proposed critical habitat Unit 11.

Proposed El Paso County Habitat Conservation Plan

El Paso County, in coordination with the Service, is developing a countywide HCP for the PMJM. We have no assurance as to if, when, or in what form this HCP will be completed and approved, or an incidental take permit under section 10 issued. Any countywide plan would likely cover most or all of the area in proposed critical habitat Unit 11.

Other Properties

For the following properties, currently proposed as critical habitat, we invite comment regarding potential exclusion from revised critical habitat under section 4(b)(2) of the Act.

Rocky Flats National Wildlife Refuge

Rocky Flats NWR is located in Jefferson County and covers approximately 6,262 ac (2,534 ha), of which approximately 5,900 ac (2,388 ha) forms an undeveloped buffer zone around a central formerly industrialized portion. The site was a nuclear industrial facility for the DOE between 1951 and the end of the Cold War. Buildings and other structures at the site have been decommissioned and demolished, and the disturbed areas have been or are undergoing restoration. A programmatic section 7 consultation on cleanup activities was completed by the Service in 2004 (Service 2004c). This consultation addressed removal of manmade structures in and adjacent to PMJM habitat. The site became the Rocky Flats NWR in 2005.

The final Rocky Flats NWR Comprehensive Conservation Plan (CCP) was announced in the **Federal Register** on April 18, 2005 (70 FR 20164). The CCP outlines the management direction and strategies for NWR operations, habitat restoration, and visitor services for a period of 15 years. The CCP provides a vision for the NWR; guidance for management decisions; and the goals, objectives, and strategies to achieve the NWR's vision and purpose. One objective of the CCP is to protect, maintain, and improve approximately 1,000 ac (400 ha) of PMJM habitat on the NWR. All of proposed critical habitat Unit 6 is within Rocky Flats NWR.

Proposed Expansion of the Milton Seaman Reservoir

Portions of critical habitat Unit 1 are within the footprint of the planned expansion area of Milton Seaman Reservoir along the North Fork of the Cache la Poudre River in Larimer County. Expansion under the existing plan would inundate 2.96 mi (4.77 km) within critical habitat designated on June 23, 2003 (68 FR 37275), that also is included in this revised proposal. The proposed reservoir expansion is not planned until about 2029. The City of Greeley, in a letter dated May 20, 2009, outlined its concerns regarding designation of critical habitat in this area and requested exclusion of the area under section 4(2)(b) of the Act (Kolanz, *in litt.*, 2009). The letter contended that the area in question is not essential to the conservation of the species and that designation would create significant financial burden on the City of Greeley. In addition, the letter cited Federal and local cooperation in the development of water resources in the drainage, that impacts from inundation would be offset by mitigation, and that reservoir expansion would not result in extinction of the PMJM.

Economic Analysis

We conducted an analysis of the potential economic impacts of designating critical habitat for the PMJM in 2003 when we designated critical habitat (68 FR 37275; June 23, 2003). We will update that analysis with any new information that may be available in addition to considering the economic impacts on lands that are proposed in this revision but that were not previously proposed. We will announce the availability of the draft economic analysis as soon as it is completed, at which time we will seek public review and comment. At that time, copies of the draft economic analysis will be available on the Internet at *www.regulations.gov*, on the Internet at *http://www.fws.gov/mountain-prairie/species/mammals/Preble/*, or by contacting the Colorado Ecological Services Office directly (see **FOR FURTHER INFORMATION CONTACT**).

Peer Review

In accordance with our joint policy published in the **Federal Register** on

July 1, 1994 (59 FR 34270), we will be obtaining the expert opinions of at least three appropriate independent specialists regarding this proposed rule. The purpose of peer review is to ensure that our proposed designation of revised critical habitat is based on scientifically sound data, assumptions, and analyses. We will invite these peer reviewers to comment during this public comment period on our specific assumptions and conclusions in this proposed designation.

Public Hearings

The Act provides for one or more public hearings on this proposal if we receive any requests for hearings. We must receive your request for a public hearing within 45 days after the date of this **Federal Register** publication. Send your request to the mailing address listed in the **FOR FURTHER INFORMATION CONTACT** section. We will schedule public hearings on this proposal, if any are requested, and announce the dates, times, and places of those hearings, as well as how to obtain reasonable accommodations, in the **Federal Register** and local newspapers at least 15 days before the first hearing.

Required Determinations

Regulatory Planning and Review - Executive Order 12866

The Office of Management and Budget (OMB) has determined that this rule is not significant and has not reviewed this proposed rule under E.O. 12866. The OMB bases its determination upon the following four criteria:

(1) Whether the rule will have an annual effect of $100 million or more on the economy or adversely affect an economic sector, productivity, jobs, the environment, or other units of the government.

(2) Whether the rule will create inconsistencies with other Federal agencies' actions.

(3) Whether the rule will materially affect entitlements, grants, user fees, loan programs, or the rights and obligations of their recipients.

(4) Whether the rule raises novel legal or policy issues.

Regulatory Flexibility Act

Under the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*), as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996), whenever an agency must publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effect of the rule on small entities (i.e., small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of an agency certifies the rule will not have a significant economic impact on a substantial number of small entities. The SBREFA amended the RFA to require Federal agencies to provide a statement of factual basis for certifying that the rule will not have a significant economic impact on a substantial number of small entities.

We conducted a draft analysis of the economic impacts for our previous proposed critical habitat designation and made it available to the public on January 28, 2003 (68 FR 4160). We issued an addendum to the economic analysis on June 3, 2003 (Service 2003d). The costs associated with critical habitat for the PMJM, across the entire area considered for designation (areas later designated or excluded), were primarily a result of the potential effect of critical habitat on residential development (almost 80 percent), followed by transportation, and other activities, including agriculture (Service 2003d, pp. 1-2). We estimated the economic impact to be between $79 and $183 million over the next 10 years (Service 2003d, p. 1). We presented an analysis of the effects of critical habitat on small business and certified that the designation would not have a significant effect on a substantial number of small entities in our June 23, 2003, designation of critical habitat (68 FR 37275).

While we do not believe our revised designation, as proposed in this document, would result in a significant impact on a substantial number of small business entities based on the previous designation, we are initiating new analyses to more thoroughly evaluate potential economic impacts of this revision to critical habitat. Therefore, we defer the RFA finding until completion of the draft economic analysis prepared under section 4(b)(2) of the Act and E.O. 12866. The draft economic analysis will provide the required factual basis for the RFA finding. Upon completion of the draft economic analysis, we will announce its availability in the **Federal Register** and reopen the public comment period for the proposed revised designation. We will include with this announcement, as appropriate, an initial regulatory flexibility analysis or a certification that the rule will not have a significant economic impact on a substantial number of small entities accompanied by the factual basis for that determination. We conclude that deferring the RFA finding until completion of the draft economic analysis is necessary to meet the purposes and requirements of the RFA. Deferring the RFA finding in this manner will ensure that we make a sufficiently informed determination based on adequate economic information and provide the necessary opportunity for public comment.

Unfunded Mandates Reform Act

In accordance with the Unfunded Mandates Reform Act, we make the following findings:

(1) This rule would not produce a Federal mandate. In general, a Federal mandate is a provision in legislation, statute, or regulation that would impose an enforceable duty upon State, local, or tribal governments, or the private sector, and includes both "Federal intergovernmental mandates" and "Federal private sector mandates." These terms are defined in 2 U.S.C. 658(5) – (7). "Federal intergovernmental mandate" includes a regulation that "would impose an enforceable duty upon State, local, or tribal governments," with two exceptions. It excludes "a condition of Federal assistance." It also excludes "a duty arising from participation in a voluntary Federal program," unless the regulation "relates to a then-existing Federal program under which $500,000,000 or more is provided annually to State, local, and tribal governments under entitlement authority," if the provision would "increase the stringency of conditions of assistance" or "place caps upon, or otherwise decrease, the Federal Government's responsibility to provide funding," and the State, local, or tribal governments "lack authority" to adjust accordingly. At the time of enactment, these entitlement programs were: Medicaid; AFDC work programs; Child Nutrition; Food Stamps; Social Services Block Grants; Vocational Rehabilitation State Grants; Foster Care, Adoption Assistance, and Independent Living; Family Support Welfare Services; and Child Support Enforcement. "Federal private sector mandate" includes a regulation that "would impose an enforceable duty upon the private sector, except (i) a condition of Federal assistance or (ii) a duty arising from participation in a voluntary Federal program."

The designation of critical habitat does not impose a legally binding duty on non-Federal government entities or private parties. Under the Act, the only regulatory effect is that Federal agencies must ensure that their actions do not destroy or adversely modify critical habitat under section 7. While non-Federal entities that receive Federal

funding, assistance, permits, or otherwise require approval or authorization from a Federal agency for an action may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency. Furthermore, to the extent that non-Federal entities are indirectly impacted because they receive Federal assistance or participate in a voluntary Federal aid program, the Unfunded Mandates Reform Act would not apply, nor would critical habitat shift the costs of the large entitlement programs listed above onto State governments.

(2) Based in part on an analysis conducted for the 2003 designation of critical habitat and extrapolated to this proposed revised designation, we do not expect this rule to significantly or uniquely affect small governments. Small governments would be affected only to the extent that any programs having Federal funds, permits, or other authorized activities must ensure that their actions will not adversely affect the critical habitat. Therefore, a Small Government Agency Plan is not required. However, as we conduct our economic analysis for the revised rule, we will further evaluate this issue and revise this assessment if appropriate.

Takings – Executive Order 12630

In accordance with E.O. 12630 (Government Actions and Interference with Constitutionally Protected Private Property Rights), we have analyzed the potential takings implications of designating revised critical habitat for the PMJM in a takings implications assessment. The takings implications assessment concludes that this proposed designation of revised critical habitat for the PMJM does not pose significant takings implications for lands within or affected by the proposed designation.

Federalism – Executive Order 13132

In accordance with E.O. 13132, this proposed rule does not have significant Federalism effects. A Federalism assessment is not required. In keeping with Department of the Interior and Department of Commerce policy, we requested information from, and coordinated development of, our 2003 critical habitat designation with appropriate State resource agencies in Colorado and Wyoming. We used the information gathered in that coordination effort in this revised proposal. We believe that the designation of revised critical habitat for the PMJM would have little incremental impact on State and local governments and their activities. The designation of critical habitat in areas currently occupied by the PMJM imposes no additional restrictions to those currently in place and, therefore, has little incremental impact on State and local governments and their activities. The designation may have some benefit to these governments because the areas that contain the physical and biological features essential to the conservation of the species are more clearly defined, and the PCEs necessary to support the life processes of the species are specifically identified. This information does not alter where and what federally sponsored activities may occur. However, it may assist local governments in long-range planning (rather than having them wait for case-by-case consultations under section 7 of the Act to occur).

Civil Justice Reform – Executive Order 12988

In accordance with E.O. 12988, (Civil Justice Reform), the Office of the Solicitor has determined that the rule does not unduly burden the judicial system and that it meets the requirements of sections 3(a) and 3(b)(2) of the Order. We propose designating revised critical habitat in accordance with the provisions of the Act. This proposed rule uses standard property descriptions and identifies the physical and biological features essential to the conservation of the species within the designated areas to assist the public in understanding the habitat needs of the PMJM.

Paperwork Reduction Act of 1995

This rule does not contain any new collections of information that require approval by OMB under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). This rule will not impose recordkeeping or reporting requirements on State or local governments, individuals, businesses, or organizations. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

National Environmental Policy Act

It is our position that, outside the jurisdiction of the Circuit Court of the United States for the Tenth Circuit, we do not need to prepare environmental analyses as defined by NEPA (42 U.S.C. 4321 *et seq.*) in connection with designating critical habitat under the Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244). This position was upheld by the Circuit Court of the United States for the Ninth Circuit (*Douglas County* v. *Babbitt*, 48 F.3d 1495 (9th Cir. Ore. 1995), cert. denied 516 U.S. 1042 (1996)). However, when the range of the species includes States within the tenth circuit, such as that of the PMJM, under the tenth circuit ruling in *Catron County Board of Commissioners* v. *U.S. Fish and Wildlife Service*, 75 F.3d 1429 (10th Cir. 1996), we will undertake a NEPA analysis for revised critical habitat designation and notify the public of the availability of a NEPA document for this proposal.

Clarity of the Rule

We are required by E.O. 12866 and E.O. 12988 and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule we publish must:

(a) Be logically organized;

(b) Use the active voice to address readers directly;

(c) Use clear language rather than jargon;

(d) Be divided into short sections and sentences; and

(e) Use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments by one of the methods listed in the **ADDRESSES** section. To better help us revise the rule, your comments should be as specific as possible. For example, you should tell us the numbers of the sections or paragraphs that are unclearly written, which sections or sentences are too long, the sections where you feel lists or tables would be useful, etc.

Government-to-Government Relationship with Tribes

In accordance with the President's memorandum of April 29, 1994, Government-to-Government Relations with Native American Tribal Governments (59 FR 22951), E.O. 13175, the Department of the Interior's manual at 512 DM 2, and Secretarial Order 3206, we readily acknowledge our responsibility to communicate meaningfully with recognized Federal tribes on a government-to-government basis. In accordance with Secretarial Order 3206 of June 5, 1997 (American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act), we readily acknowledge our responsibilities to work directly with tribes in developing programs for healthy ecosystems, to acknowledge that tribal lands are not subject to the same controls as Federal public lands, to remain sensitive to Indian culture, and to make information available to tribes. Tribal lands in

Colorado are not included in this proposed designation, and the PMJM is not believed to exist on or near tribal lands.

Energy Supply, Distribution, or Use – Executive Order 13211

On May 18, 2001, the President issued E.O. 13211 (Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use) on regulations that significantly affect energy supply, distribution, and use. The E.O. 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. We do not expect this proposed rule to significantly affect energy supplies, distribution, or use based on the economic analysis we completed for the July 17, 2002, proposed PMJM critical habitat rule (67 FR 47154). Therefore, this action is not a significant energy action, and no Statement of Energy Effects is required. However, we will further evaluate this issue as we conduct our economic analysis, and review and revise this assessment as warranted.

References Cited

A complete list of all references cited in this rulemaking is available online at *http://www.fws.gov/mountain-prairie/species/mammals/Preble/*, or upon request from the Field Supervisor, Colorado Ecological Services Office (see FOR FURTHER INFORMATION CONTACT section).

Author(s)

The primary author(s) of this package are the staff members of the Colorado Ecological Services Office.

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

Proposed Regulation Promulgation

Accordingly, for the reasons we have stated in the preamble, we propose to amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations as set forth below:

PART 17—[AMENDED]

1. The authority citation for part 17 continues to read as follows:

Authority: 16 U.S.C. 1361-1407; 16 U.S.C. 1531-1544; 16 U.S.C. 4201-4245; Pub. L. 99-625, 100 Stat. 3500; unless otherwise noted.

2. In § 17.95(a), revise the entry for "Preble's Meadow Jumping Mouse (*Zapus hudsonius preblei*)" to read as follows:

§ 17.95 Critical habitat—fish and wildlife.

(a) *Mammals.*

* * * * *

Preble's Meadow Jumping Mouse (Zapus hudsonius preblei)

(1) Critical habitat units are depicted for Colorado. Maps and descriptions follow.

(2) The primary constituent elements of critical habitat for the Preble's meadow jumping mouse are:

(i) Riparian corridors:

(A) Formed and maintained by normal, dynamic, geomorphological, and hydrological processes that create and maintain river and stream channels, floodplains, and floodplain benches and promote patterns of vegetation favorable to the Preble's meadow jumping mouse;

(B) Containing dense, riparian vegetation consisting of grasses, forbs, or shrubs, or any combination thereof, in areas along rivers and streams that normally provide open water through the Preble's meadow jumping mouse's active season; and

(C) Including specific movement corridors that provide connectivity between and within populations. This may include river and stream reaches with minimal vegetative cover or that are armored for erosion control; travel ways beneath bridges, through culverts, along canals and ditches; and other areas that have experienced substantial human alteration or disturbance; and

(ii) Additional adjacent floodplain and upland habitat with limited human disturbance (including hayed fields, grazed pasture, other agricultural lands that are not plowed or disked regularly, areas that have been restored after past aggregate extraction, areas supporting recreational trails, and urban–wildland interfaces).

(3) Existing features and structures within the boundaries of the mapped units, such as buildings, roads, parking lots, other paved areas, lawns, other urban and suburban landscaped areas, regularly plowed or disked agricultural areas, and other features not containing any of the PCEs are not considered critical habitat.

(4) *Note*: Index map of critical habitat for the Preble's meadow jumping mouse follows:

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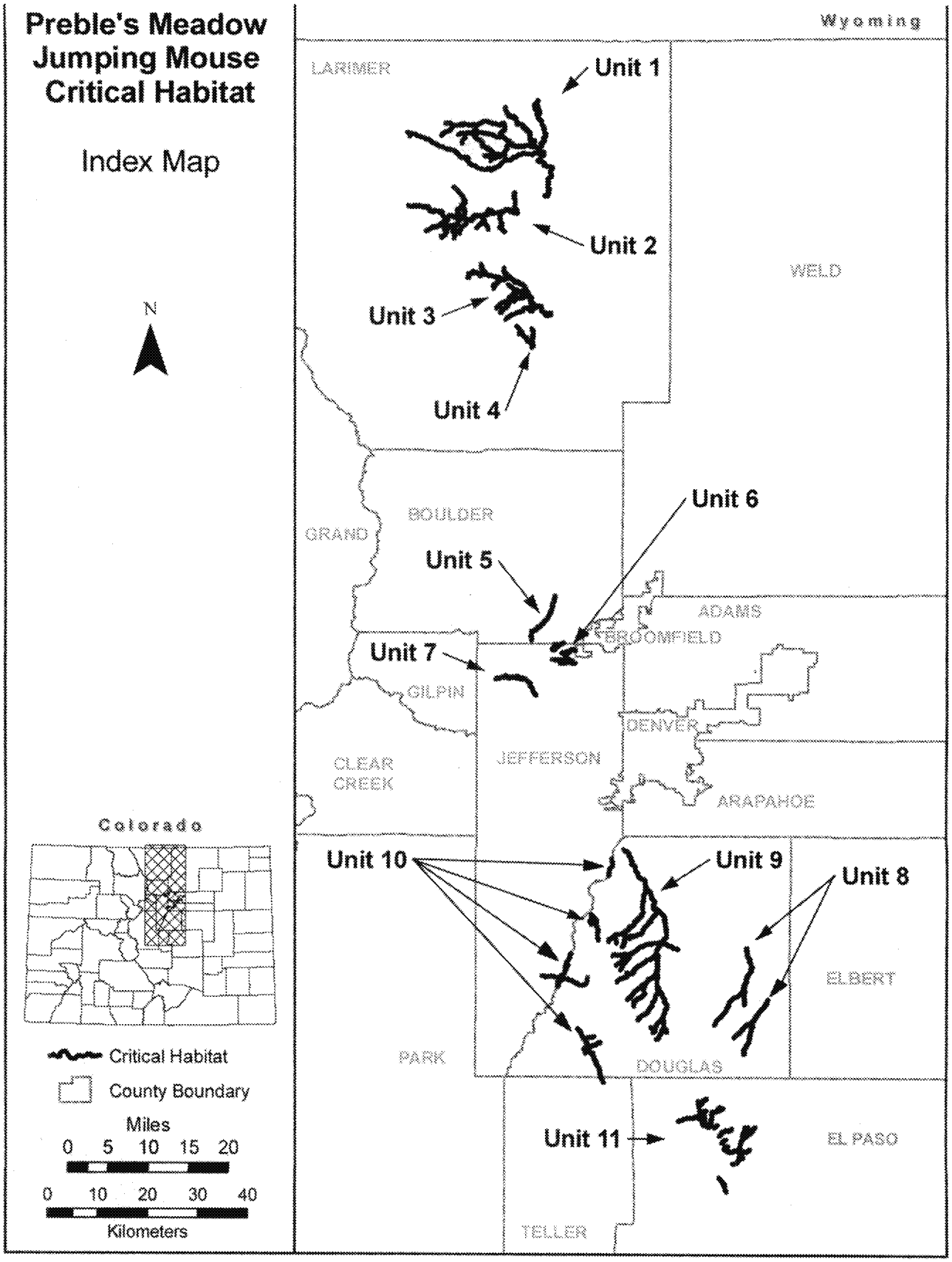

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(5) Map Unit 1: North Fork Cache la Poudre River, Larimer County, Colorado.

(i) This unit consists of 88.3 mi (142.1 km) of streams and rivers. North Fork Cache la Poudre River from Seaman Reservoir (40 43 7N 105 14 32W, T.9N., R.70W., Sec. 28) upstream to Halligan Reservoir spillway (40 52 44N 105 20 15W, T.11N., R.71W., Sec. 34). Includes Lone Pine Creek from its confluence North Fork Cache la Poudre River (40 47 54N 105 15 30W, T.10N., R.70W., Sec. 32) upstream and continuing upstream into North Lone Pine Creek to 7,600 ft (2,317 m) elevation (40 49 58N 105 34 09W, T.10N., R.73W., Sec. 15). Includes Columbine Canyon from its confluence with North Lone Pine Creek (40 49 47N 105 33 31W, T.10N., R.73W., Sec. 15) upstream to 7,600 ft (2,317 m) elevation (40 49 32N 105 33 58W, T.10N., R.73W., Sec. 15). Also includes Stonewall Creek from its confluence with North Fork Cache la Poudre River (40 48 19N 105 15 21W, T.10N., R.70W., Sec. 29) upstream to (40 53 26N 105 15 40W, T.11N., R.70W., Sec. 29). Includes Tenmile Creek from its confluence with Stonewall Creek (40 51 49N 105 15 32W, T.10N., R.70W., Sec. 5) upstream to Red Mountain Road (40 53 00N 105 16 09W, T.11N., R.70W., Sec. 31). Also includes Rabbit Creek from its confluence with North Fork Cache la Poudre River (40 48 30N 105 16 07W, T.10N., R.70W., Sec. 30) upstream to the confluence with North and Middle Forks of Rabbit Creek (40 49 34N 105 20 49W, T.10N., R 71W., Sec. 21). Also includes South Fork Rabbit Creek from its confluence with Rabbit Creek (40 48 39N 105 19 45W, T.10N., R.71W., Sec. 27) upstream to (40 49 39N 105 24 40W, T.10N., R.72W., north boundary Sec. 24). Includes an unnamed tributary from its confluence with South Fork Rabbit Creek (40 47 28N 105 20 47W, T.10N., R.71W., Sec. 33) upstream to (40 47 28N 105 23 12W, T.10N., R.71W., Sec. 31). Which in turn has an unnamed tributary from their confluence at (40 47 17N 105 21 48W, T.10N., R.71W., east boundary Sec. 32) upstream to (40 46 55N 105 22 16W, T.9N., R.71W., Sec. 5). Also includes Middle Fork Rabbit Creek from its confluence with Rabbit Creek (40 49 34N 105 20 49W, T.10N., R 71W., Sec. 21) upstream to 7,600 ft (2,317 m) elevation (40 49 46N 105 26 59W, T.10N., R.72W., Sec. 15). This includes an unnamed tributary from its confluence with Middle Fork Rabbit Creek (40 49 56N 105 25 51W, T.10N., R.72W., Sec. 14) upstream to 7,600 ft (2,317 m) elevation (40 48 48N 105 26 29W, T.10N., R.72W., Sec. 23). This unit includes North Fork Rabbit Creek from its confluence with Rabbit Creek (40 49 34N 105 20 49W, T.10N., R.71W., Sec. 21) upstream to 7,600 ft (2,317 m) elevation (40 49 38N 105 29 19W, T.10N., R.72W., Sec. 17). Includes an unnamed tributary from its confluence with North Fork Rabbit Creek (40 50 45N 105 27 44W, T.10N., R.72W., Sec. 9) upstream to 7,600 ft (2,317 m) elevation (40 50 57N 105 28 46W, T.10N., R.72W., Sec. 9).

(ii) *Note*: Map of Unit 1 follows:

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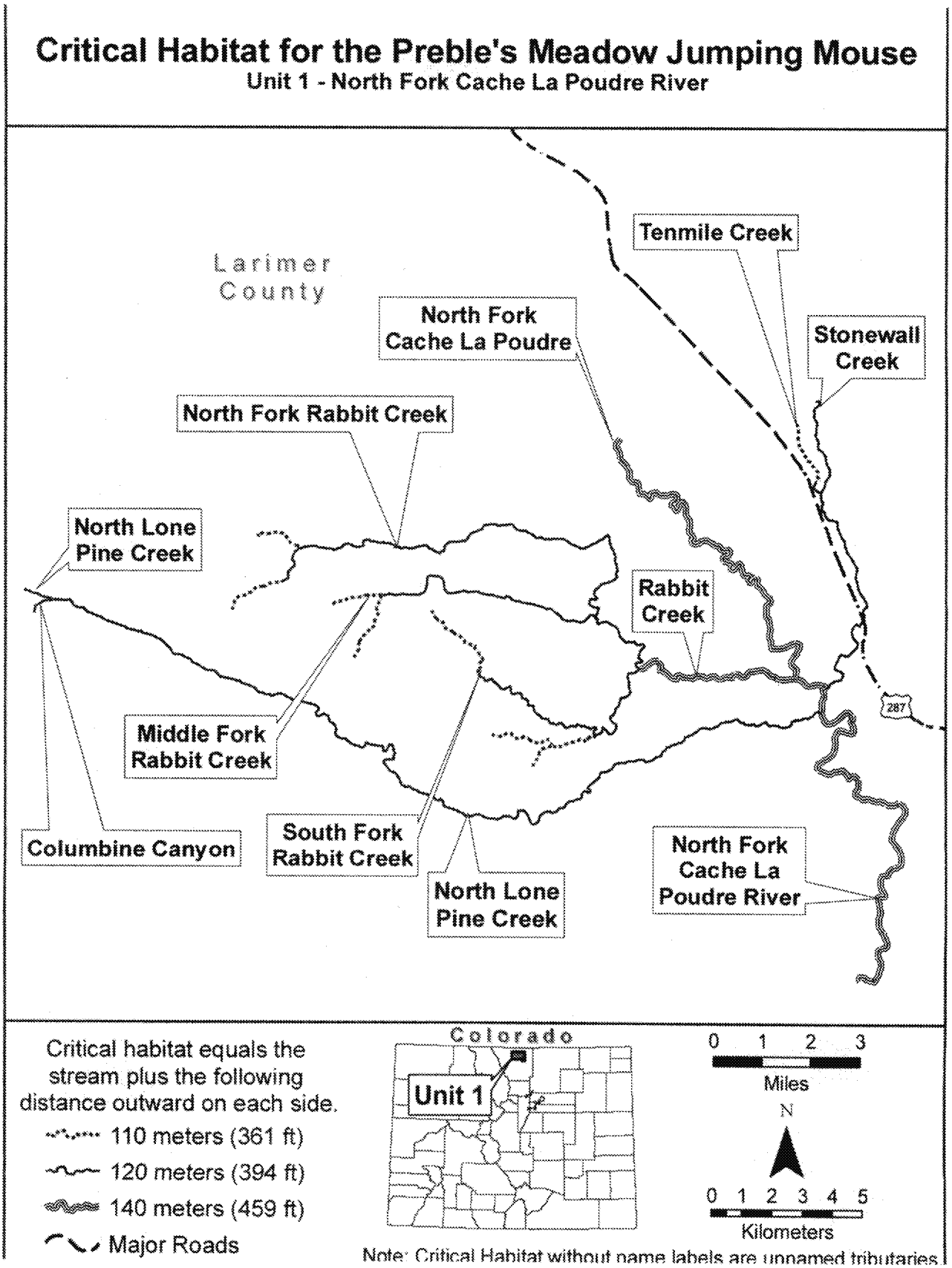

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(6) Map Unit 2: Cache la Poudre River, Larimer County, Colorado.

(i) This unit consists of 50.6 mi (81.5 km) of streams and rivers. Cache la Poudre River from Poudre Park (40 41 16N 10 18 2W, T.8N., R.71W., Sec. 2) upstream to (40 42 02N 105 34 04W, T.9N., R.73W., west boundary Sec. 34). Includes Hewlett Gulch from its confluence with Cache la Poudre River (40 41 16N 105 18 24W, T.8N., R.71W., Sec. 2) upstream to the boundary of Arapahoe-Roosevelt National Forest (40 43 29N 105 18 51W, T.9N., R.71W., Sec. 23). Also includes Young Gulch from its confluence with Cache la Poudre River (40 41 25N 105 20 57W, T.8N., R.71W., Sec. 4) upstream to (40 39 14N 105 20 13W, T.8N., R.71W., south boundary Sec. 15). Also includes an unnamed tributary from its confluence with Cache la Poudre River at Stove Prairie Landing (40 40 58N 105 23 23W, T.8N., R.71W., Sec. 6) upstream to (40 39 31N 105 22 34W, T.8N., R.71W., Sec. 17). Includes Skin Gulch from its confluence with the aforementioned unnamed tributary at (40 40 33N 105 23 16W, T.8N., R.71W., Sec. 7) upstream to (40 39 40N 105 24 16W, T.8N., R.72W., Sec. 13). Unit 2 also includes Poverty Gulch from its confluence with Cache la Poudre River (40 40 28N 105 25 44W, T.8N., R.72W., Sec. 11) upstream to 7,600 ft (2,317 m) elevation (40 39 01N 105 26 40W, T.8N., R.72W., Sec. 22). Also includes Elkhorn Creek from its confluence with Cache la Poudre River (40 41 50N 105 26 24W, T.9N., R.72W., Sec. 34) upstream to (40 44 03N 105 27 34W, T.9N., R.72W., Sec. 21). Also includes South Fork Cache la Poudre River from its confluence with Cache la Poudre River (40 41 11N 105 26 50W, T.8N., R.72W., Sec. 3) upstream to 7,600 ft (2,317 m) elevation (40 38 48N 105 29 22W, T.8N., R.72W., Sec. 20). Includes Pendergrass Creek from its confluence with South Fork Cache la Poudre River (40 39 56N 105 27 30W, T.8N., R.72W., Sec. 15) upstream to 7,600 ft (2,317 m) elevation (40 38 34N 105 27 28W, T.8N., R.72W., Sec. 22). Also included in the unit is Bennett Creek from its confluence with Cache la Poudre River (40 40 26N 105 28 41W, T.8N., R.72W., Sec. 9) upstream to 7,600 ft (2,317 m) elevation (40 39 19N 105 31 29W, T.8N., R.73W., Sec. 13).

(ii) *Note*: Map of Unit 2 follows:

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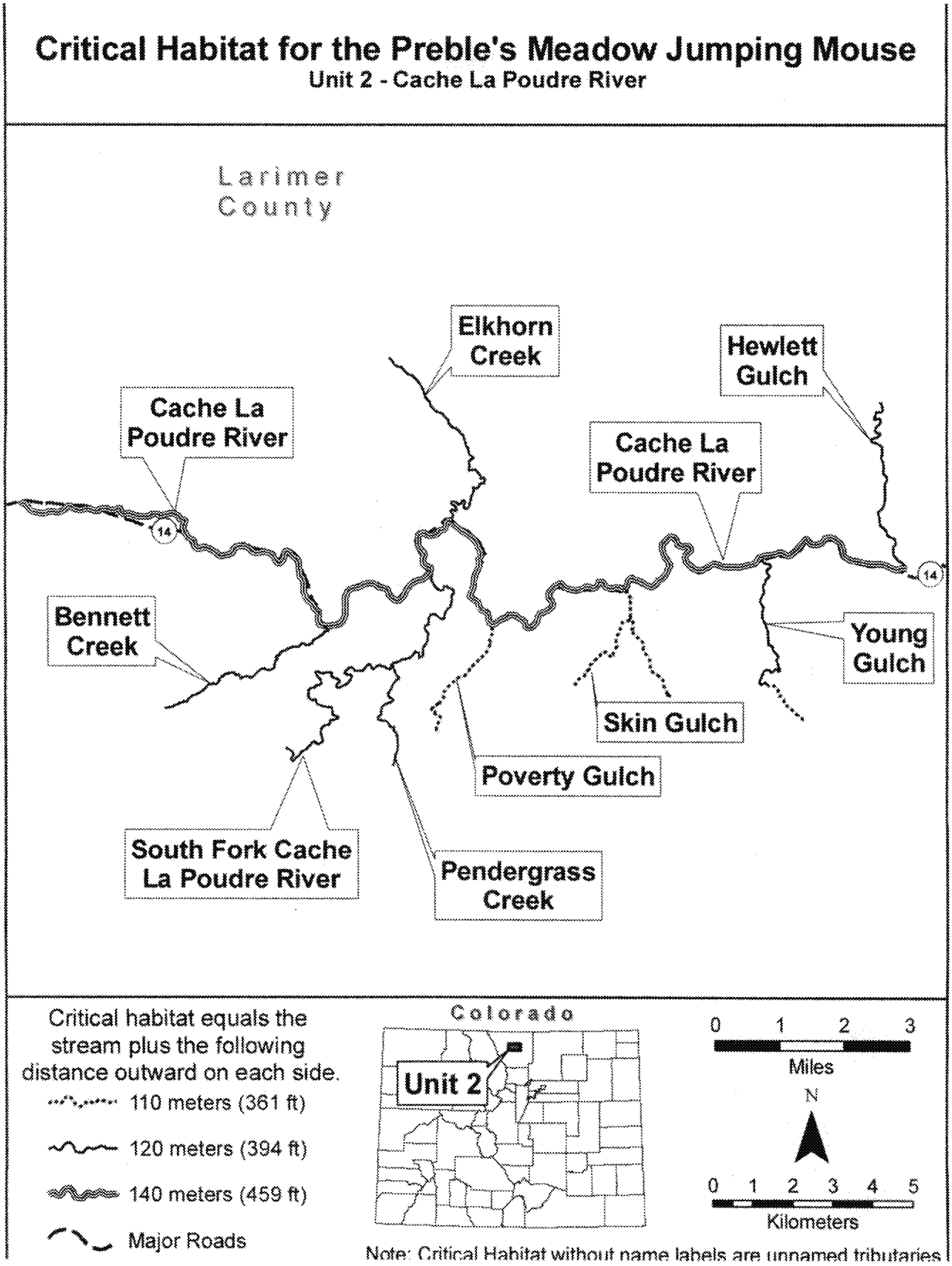

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(7) Map Unit 3: Buckhorn Creek, Larimer County, Colorado.

(i) This unit consists of 45.5 mi (73.2 km) of streams. Buckhorn Creek from (40 30 20N 105 13 39W, T.6N., R.70W., east boundary Sec. 9) upstream to 7,600 ft (2,317 m) elevation (40 34 17N 105 25 31W, T.7N., R.72W., Sec. 14). Includes Little Bear Gulch from its confluence with Buckhorn Creek (40 31 17N 105 15 33W, T.6N., R.70W., Sec. 5) upstream to (40 30 43N 105 16 35W, T.6N., R.70W., Sec. 6). Also includes Bear Gulch from its confluence with Buckhorn Creek (40 31 16N 105 15 52W, T.6N., R.70W., Sec. 5) upstream to 7,600 ft (2,317 m) elevation (40 29 45N 105 20 4W, T.6N., R.71W., Sec. 10). Also includes Stringtown Gulch from its confluence with Buckhorn Creek (40 32 21N 105 16 42W, T.7N., R.70W., Sec. 30) upstream to 7,600 ft (2,317 m) elevation (40 30 30N 105 20 50W, T.6N., R.71W., Sec. 4). Also includes Fish Creek from its confluence with Buckhorn Creek (40 32 48N 105 18 20W, T.7N., R.70W., Sec. 30) upstream to 7,600 ft (2,317 m) elevation (40 30 56N 105 21 20W, T.6N., R.71W., Sec. 4). Includes North Fork Fish Creek from its confluence with Fish Creek (40 32 48N 105 18 20W, T.7N., R.71W., west boundary Sec. 25) upstream and following the first unnamed tributary northwest to (40 33 34N 105 19 45W, T.7N., R.71W., Sec. 22). Also includes Stove Prairie Creek from its confluence with Buckhorn Creek (40 34 16N 105 19 48W, T.7N., R.71W., Sec. 15) upstream to the dirt road crossing at (40 35 22N 105 20 17W, T.7N., R.71W., Sec. 10). Also includes Sheep Creek from its confluence with Buckhorn Creek (40 34 15N 105 20 53W, T.7N., R.71W., Sec. 16) upstream to 7,600 ft (2,317 m) elevation (40 33 08N 105 21 47W, T.7N., R.71W., Sec. 20). Also includes Twin Cabin Gulch from its confluence with Buckhorn Creek (40 34 38N 105 23 13W, T.7N., R.71W., Sec. 18) upstream to 7,600 ft (2,317 m) elevation (40 35 45N 105 23 36W, T.7N., R.71W., Sec. 6).

(ii) *Note*: Map of Units 3 and 4 follows:

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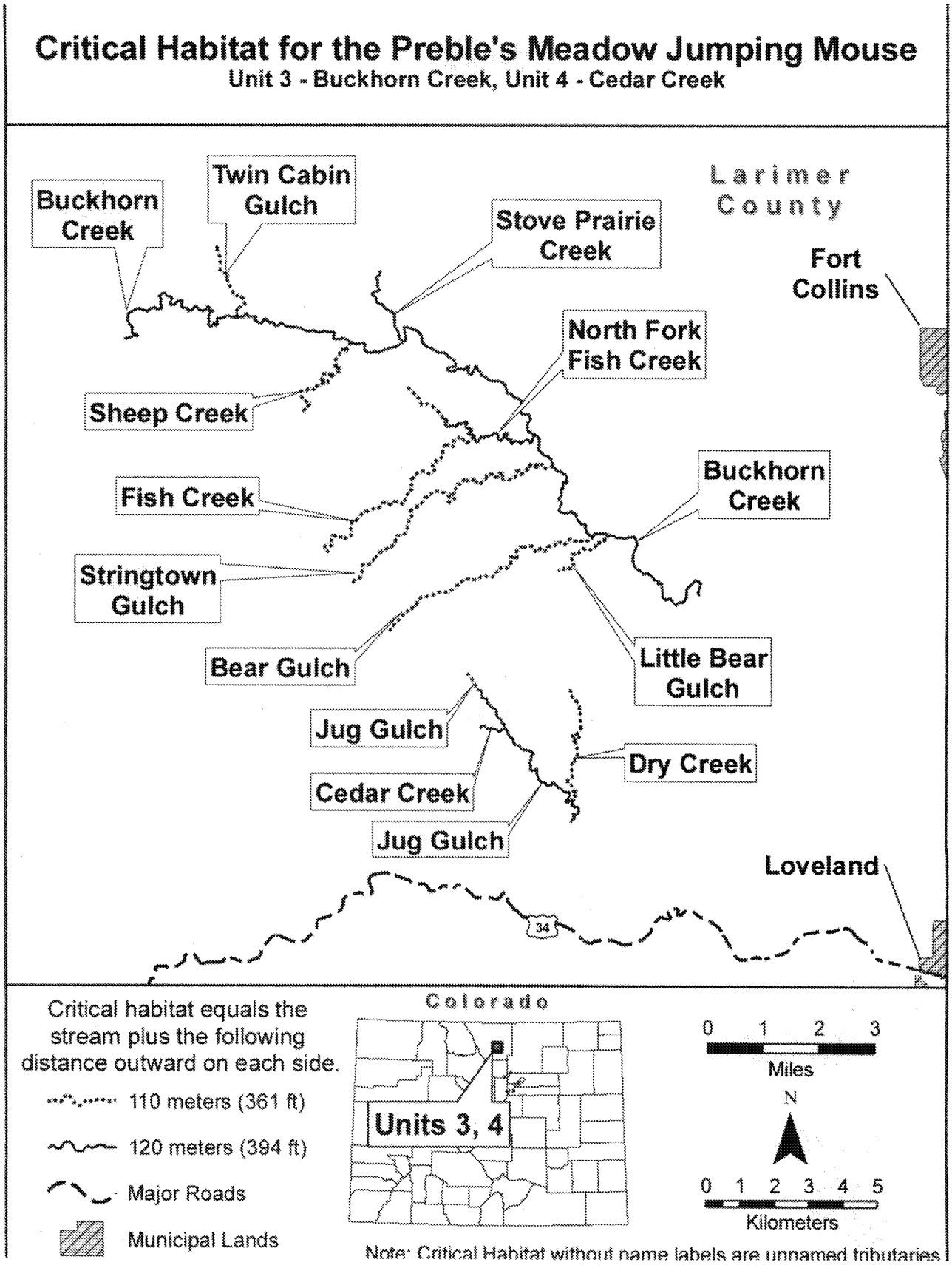

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(8) Unit 4: Cedar Creek, Larimer County, Colorado.

(i) This unit consists of 7.5 mi (12.1 km) of streams. Cedar Creek from the boundary of Federal land (40 26 46N 105 16 17W, T.6N., R.70W., Sec. 31) upstream to the boundary of Federal land (40 28 15N 105 18 11W, T.6N., R.71W., Sec. 24). Includes Dry Creek from its confluence with Cedar Creek (40 27 07N 105 16 16W, T.6N., R.70W., Sec. 30) upstream to the boundary of Federal land (40 28 52N 105 16 21W, T.6N., R.70W., Sec. 18). Also includes Jug Gulch from its confluence with Cedar Creek (40 28 15N 105 17 41W, T.6N., R.71W., Sec. 24) upstream to the boundary of Federal land (40 29 07N 105 18 28W, T.6N., R.71W., Sec. 14).

(ii) *Note*: Map of Unit 4 appears at paragraph (7)(ii) of this entry.

(9) Unit 5: South Boulder Creek, Boulder County, Colorado.

(i) This unit consists of 7.6 mi (12.2 km) of streams. Including South Boulder Creek from Baseline Road (40 0 0N 105 12 54W, T.1S., R.70W., Sec. 3) upstream to near Eldorado Springs, Colorado (39 56 7N 105 16 16W, T.1S., R.70W., Sec. 30). Also Spring Brook from the Community Ditch near Eldorado Springs (39 55 59N 105 16 10W, T.1S., R.70W., Sec. 30) upstream to South Boulder Diversion Canal (39 55 11N 105 16 12W, T.1S., R.70W., Sec. 31).

(ii) *Note*: Map of Units 5, 6, and 7 follows:

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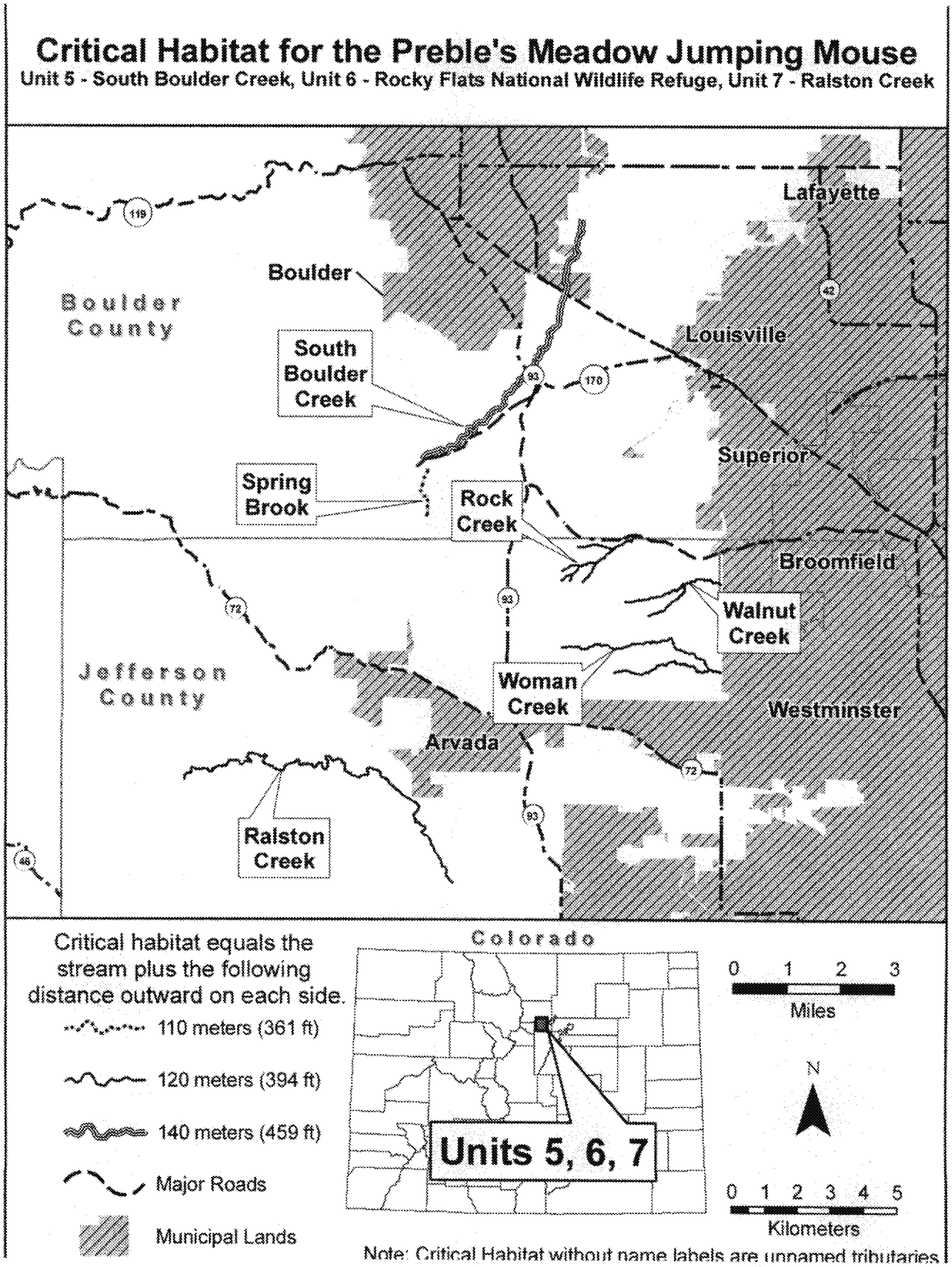

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(10) Unit 6: Rocky Flats NWR and Ralston Creek, Jefferson County and Broomfield Counties, Colorado.

(i) This unit consists of three subunits including 12.5 mi (20.1 km) of streams as follows:

(A) Subunit Woman Creek from Indiana Street (39 52 40N 105 9 55W, T.2S., R.70W., east boundary Sec. 13) upstream to (39 53 3N 105 13 20W, T.2S., R.70W., west boundary Sec. 15). Includes unnamed tributary from confluence with Woman Creek (39 52 43N 105 10 11W, T.2S., R.70W., Sec. 13) upstream to (39 52 39N 105 12 11W, T.2S., R.70W., west boundary Sec. 14).

(B) Subunit Walnut Creek from Indiana Street (39 54 5N 105 9 55W, T.2S., R.70W., east boundary Sec. 1) upstream to (39 53 49N 105 11 59W, T.2S., R.70W., Sec. 11). Includes unnamed tributary from its confluence with Walnut Creek (39 54 6N 105 10 42W, T.2S., R.70W., Sec. 1) upstream to (39 53 35N 105 11 29W, T.2S., R.70W., Sec. 11).

(C) Subunit Rock Creek from State Highway 128 (39 54 53N 105 11 40W, T.1S., R.70W., Sec. 35) upstream to (39 54 17N 105 13 20W, T.2S., R.70W., west boundary Sec. 3). Includes an unnamed tributary from its confluence with Rock Creek (39 54 40N 105 12 11W, T.2S., R.70W., east boundary Sec. 3) upstream to (39 54 42 N 105 13 00W, T.2S., R.70W., Sec. 3). Also includes an unnamed tributary from its confluence with Rock Creek at (39 54 26N 105 12 34W, T.2S., R.70W., Sec. 3) upstream to (39 54 7N 105 12 52W, T.2S., R.70W., Sec. 3). Another unnamed tributary from its confluence with Rock Creek at (39 54 23N 105 12 56W, T.2S., R.70W., Sec. 3) upstream to (39 54 8N 105 13 20W, T.2S., R.70W., west boundary Sec. 3. Another unnamed tributary from its confluence with Rock Creek at (39 54 15N 105 13 5W, T.2S., R.70W., Sec. 3) upstream to (39 54 08N 105 13 09W, T.2S., R.70W., Sec. 3).

(ii) *Note*: Map of Unit 6 appears at paragraph (9)(ii) of this entry.

(11) Unit 7: Ralston Creek, Jefferson County, Colorado.

(i) This unit consists of 8.7 mi (13.9 km) of streams. Ralston Creek from Ralston Reservoir (39 49 12N 105 15 35W, T.3S., R.70W., Sec. 6) upstream into Golden Gate Canyon State Park to 7,600 ft (2,300 m) elevation (39 50 53 105 21 16W, T.2S., R.71W., Sec. 29).

(ii) *Note*: Map of Unit 7 appears at paragraph (9)(ii) of this entry.

(12) Unit 8: Cherry Creek, Douglas County, Colorado.

(i) This unit consists of two subunits including 29.8 mi (47.9 km) of streams as follows:

(A) Subunit Lake Gulch including Cherry Creek from the northern boundary of Castlewood Canyon State Recreation Area (39 21 44N 104 45 39W, T.8S., R.66W., south boundary Sec. 10) upstream to the confluence with Lake Gulch (39 20 24N 104 45 36W, T.8S., R.66W., Sec. 23). Lake Gulch from the aforementioned confluence upstream to (39 15 37N 104 46 05W, T.9S., R.66W., south boundary Sec. 15). Includes Upper Lake Gulch from its confluence with Lake Gulch (39 17 24N 104 46 11W, T.9S., R.66W., Sec. 3) upstream to (39 13 24N 104 50 21W, T.9S., R.67W., mid-point Sec. 36).

(B) Subunit Antelope Creek including Antelope Creek from its confluence with West Cherry Creek (39 16 11N 104 42 49W, T.9S R.65W., S18) upstream to the Franktown Parker Reservoir (39 10 20N 104 46 16W, T.10S R.66W., S22). It also includes Haskel Creek from its confluence with Antelope Creek (39 13 43N, 104 45 5W, T.9S R.66W., S35) upstream to the Haskel Creek Spring Pond at 7,000 ft (2,134 m) elevation (39 11 60N 104 47 40N, T.10S R.66W., S8).

(ii) *Note*: Map of Unit 8 follows:

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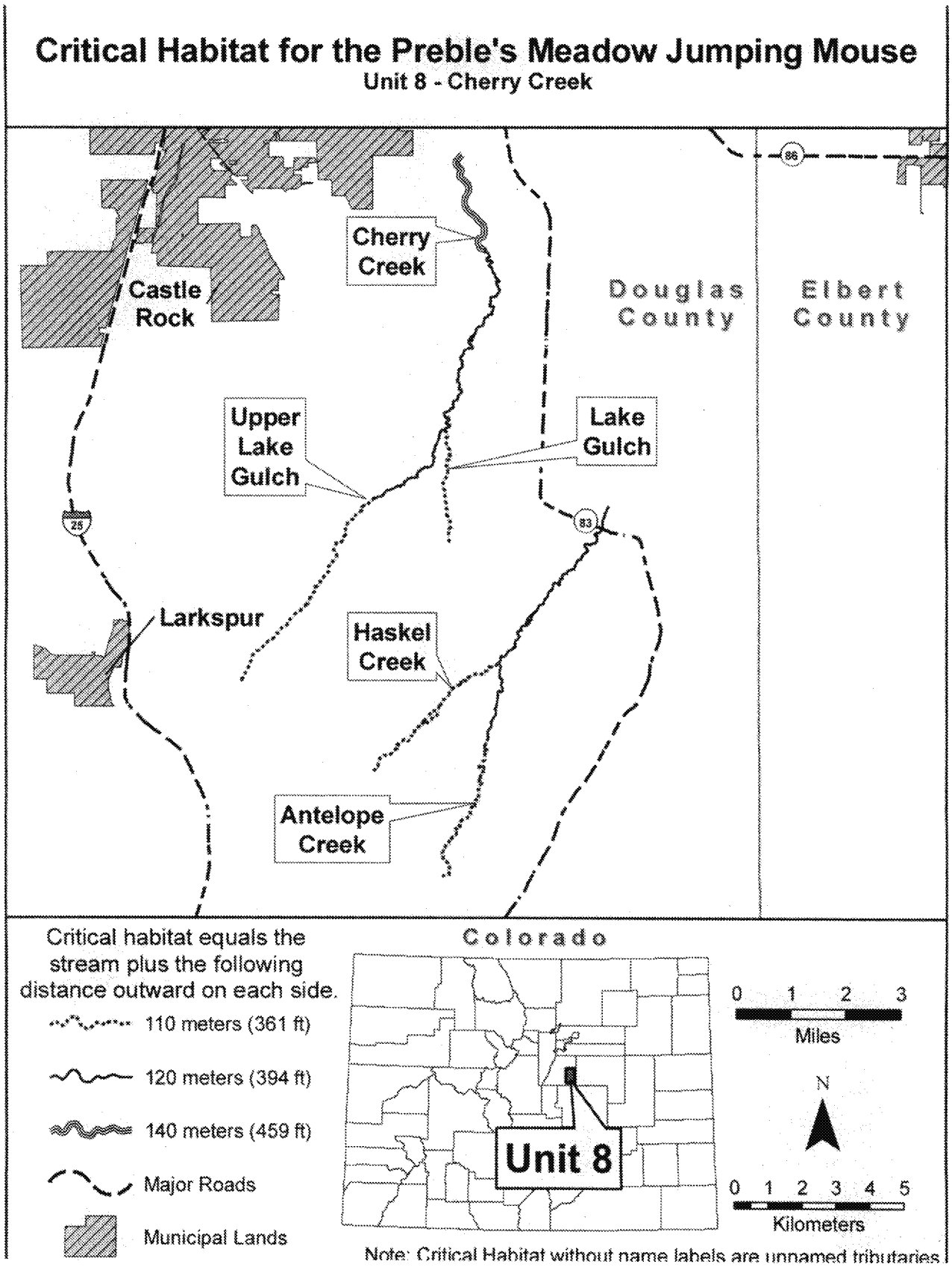

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(13) Unit 9: West Plum Creek, Douglas County, Colorado.

(i) This unit consists of 93.9 mi (151.1 km) of streams. Plum Creek from Chatfield Lake (39 32 35N 105 03 07W, T.6S., R.68W., Sec. 7) upstream to its confluence with West Plum Creek and East Plum Creek (39 25 49N 104 58 8W, T.7S., R.68W., Sec. 23). West Plum Creek from the aforementioned confluence (39 25 49N 104 58 8W, T.7S., R.68W., Sec. 23) upstream to the boundary of Pike-San Isabel National Forest and 7,600 ft (2,317 m) elevation (39 13 07N 104 59 20W, T.9S., R.68W., Sec. 34). Includes Indian Creek from its confluence with Plum Creek (39 28 22N 104 59 57W, T.7S., R.68W., Sec. 4) upstream to Silver State Youth Camp (39 22 24N 105 05 13W, T.8S., R.69W., Sec. 11). Indian Creek includes an unnamed tributary from its confluence with Indian Creek at Pine Nook (39 23 01N 105 04 24W, T.8S., R.69W., Sec. 2) upstream to (39 22 10N 105 04 08W, T.8S., R.69W., Sec. 12). Also includes Jarre Creek from its confluence with Plum Creek (39 25 50N 104 58 15W, T.7S., R.68W., Sec. 23) upstream to 7,600 ft (2,317 m) elevation (39 21 50N 105 03 20W, T.8S., R.69W., Sec. 12). Jarre Creek includes an unnamed tributary from its confluence with Jarre Creek (39 22 58N 105 01 52W, T.8S., R.68W., Sec. 5) upstream to (39 22 44N 105 02 14W, T.8S., R.68W., Sec. 8). Also includes an unnamed tributary from its confluence with West Plum Creek (39 22 20N 104 57 39W, T.8S., R.68W., Sec. 11) upstream to (39 21 33N 104 55 29W, T.8S, R67W., Sec.18). Unit 9 also includes Garber Creek from its confluence with Plum Creek (39 22 10N 104 57 49W, T.8S., R.68W., Sec. 11) upstream to its confluence with South Garber Creek and Middle Garber Creek (39 21 02N 105 02 13W, T.8S., R.68W., Sec. 18). Including South Garber Creek from its confluence with Garber Creek (39 21 02N 105 02 13W, T.8S., R.68W., Sec. 18) upstream to 7,600 ft (2,317 m) elevation (39 19 14N 105 03 13W, T.8S., R.69W., Sec. 25). Including Middle Garber Creek from its confluence with Garber Creek (39 20 55N 105 02 35W, T.8S., R.68W., Sec. 18) upstream to (39 19 48N 105 04 09W, T.8S., R.69W., west boundary Sec. 25). Including North Garber Creek from its confluence with Middle Garber Creek (39 20 55N 105 02 35W, T.8S., R.68W., Sec. 18) upstream to 7,600 ft (2,317 m) elevation (39 20 47N 105 04 37W, T.8S., R.69W., Sec. 23). Includes Jackson Creek from its confluence with Plum Creek (39 21 02N 104 58 30W, T.8S., R.68W., Sec. 14) upstream to 7,600 ft (2,317 m) elevation (39 17 59N 105 03 57W, T.9S., R.69W., Sec. 1). Includes Spring Creek from its confluence with West Plum Creek at (39 19 04N 104 58 26W, T.8S., R.68W., Sec. 35) upstream to (39 15 21N 105 01 40W, T.9S., R.68W., Sec. 20). Including Dry Gulch from its confluence with Spring Creek (39 17 54N 104 59 58W, T.9S., R.68W., Sec. 4) upstream to 7,600 ft (2,317 m) elevation (39 16 07N 105 02 33W, T.9S., R.68W., Sec. 18). Including Bear Creek from its confluence with West Plum Creek (39 17 30N 104 58 25W, T.9S., R.68W., Sec. 2) upstream to 7,600 ft (2,317 m) elevation (39 13 57N 105 06 06W, T.9S., R.68W., Sec. 29). Including Gove Creek from its confluence with West Plum Creek (39 14 07N 104 57 42W, T.9S., R.68W., Sec. 26) upstream to 7,600 ft (2,317 m) elevation (39 11 50N 104 58 32W, T.10S., R.68W., Sec. 11). Includes Merz Canyon stream from its confluence with Gove Creek (39 13 05N 104 57 33W, T.9S., R.68W., Sec. 36) upstream to (39 12 39N 104 57 04 W, T.10S., R.68W., Sec.1). Includes Starr Canyon stream from its confluence with West Plum Creek (39 13 07N 104 58 41W, T.9S., R.68W., Sec. 35) upstream to 7,600 ft (2,317 m) elevation (39 12 32N 104 59 01W, T.10S., R.68W., Sec. 3).

(ii) *Note*: Map of Unit 9 follows:

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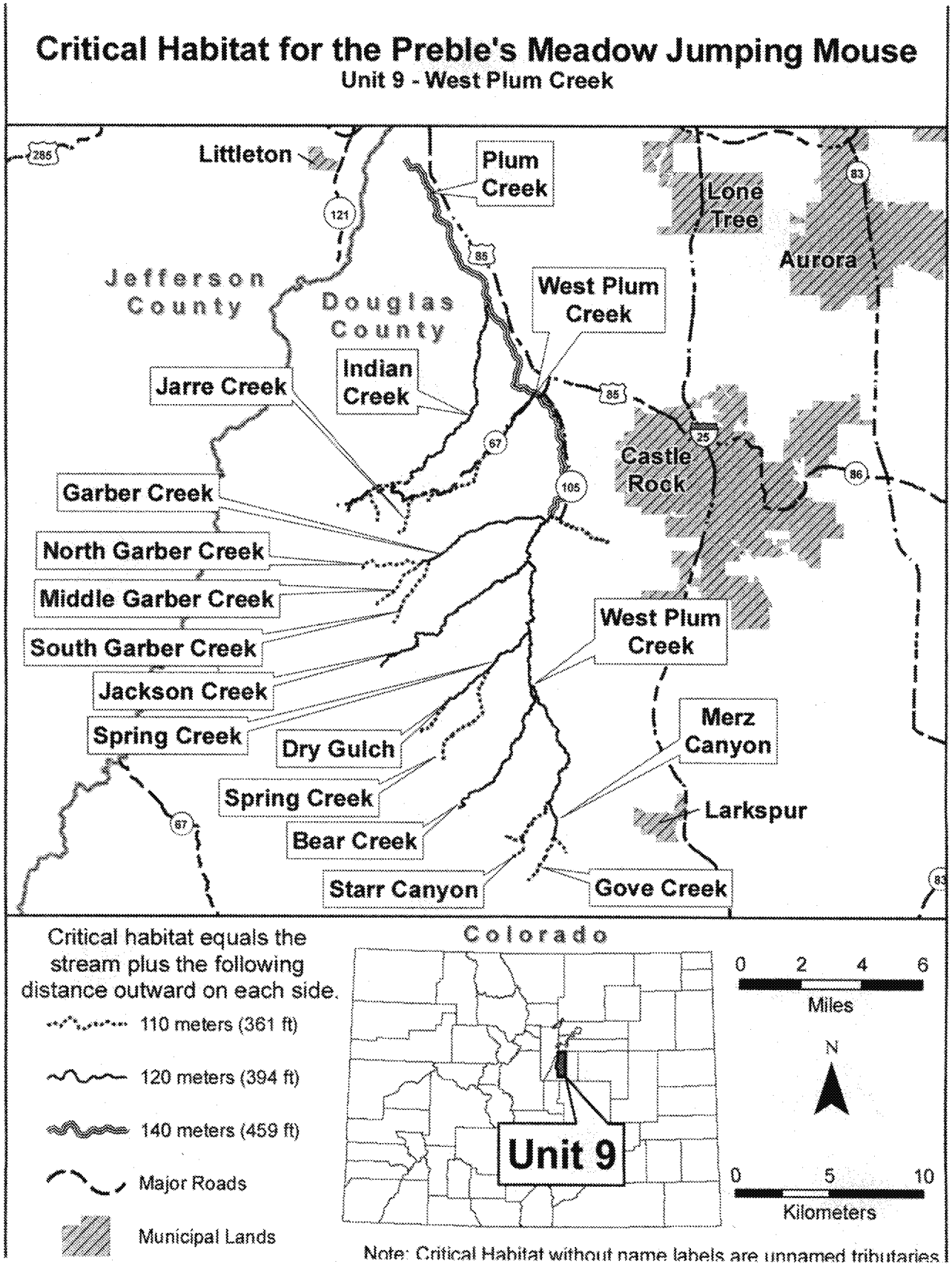

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(14) Unit 10: Upper South Platte River, Douglas, Jefferson, and Teller Counties, Colorado.

(i) This unit consists of four subunits including 35.2 mi (56.6 km) of rivers and streams as follows:

(A) Subunit South Platte River north segment, on the border of Jefferson County and Douglas County from Chatfield Lake (39 31 35N 105 04 49W, T.6S., R.69W., Sec. 14) upstream to the boundary of U.S. Army Corps of Engineers property (39 29 33N 105 05 15W, T.6S., R.69W., south boundary Sec. 26.

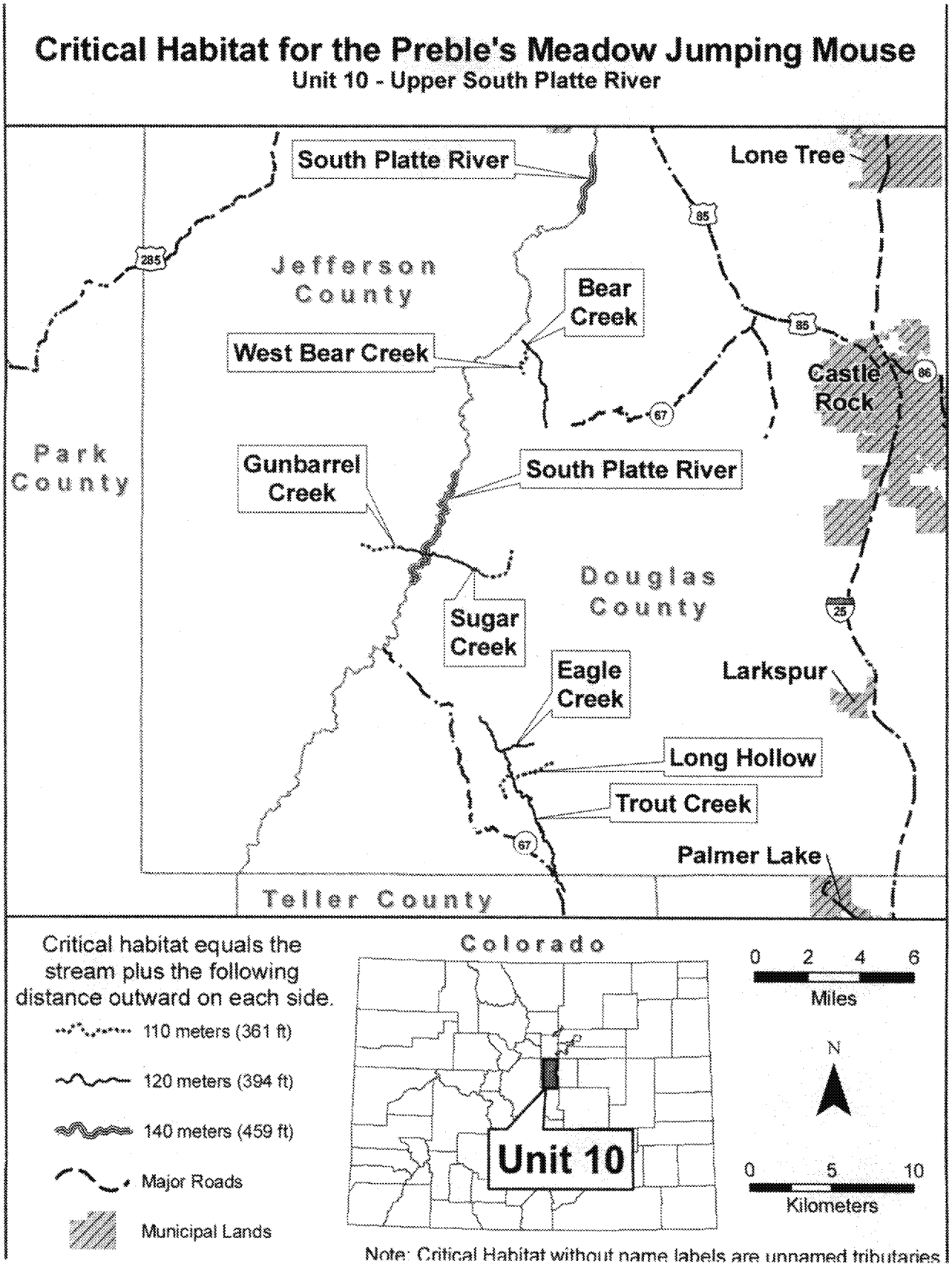
(B) Subunit Bear Creek, Douglas County from Pike–San Isabel National Forest boundary (39 25 27N 105 07 40W, T.7S., R.69W., west boundary Sec. 21) upstream to (39 22 32N 105 06 40W, T.8S., R.69W., south boundary Sec. 4). Includes West Bear Creek from its confluence with Bear Creek (39 25 15N 105 07 30W, T.7S., R.69W., Sec. 21) upstream to a confluence with an unnamed tributary (39 24 17N 105 07 38W, T.7S., R.69W., Sec. 33).

(C) Subunit South Platte River south segment, on the border of Jefferson County and Douglas County from Nighthawk (39 21 05N 105 10 23W, T.8S., R.70W., Sec. 13) upstream to (39 17 27N 105 12 24W, T.9S., R.70W., Sec. 3). Includes Sugar Creek, Douglas County from its confluence with South Platte River at Oxyoke (39 18 22N 105 11 47W, T.8S., R.70W., Sec. 35) upstream to 7,600 ft (2,317 m) elevation (39 18 28N 105 08 07W, T.8S., R.69W., Sec. 32). Includes Gunbarrel Creek, Jefferson County from its confluence with South Platte River at Oxyoke (39 18 22N 105 11 47W, T.8S., R.70W., Sec. 35) upstream to (39 18 41N 105 14 34W, T.8S., R.70W., Sec. 32).

(D) Subunit Trout Creek, Douglas County upstream into Teller County from (39 13 02N 105 09 31W, T.9S., R.69W., Sec. 31) upstream to 7,600 ft (2,317 m) elevation which is 0.8 mi (1.3 km) into Teller County (39 07 13N 105 05 49W, T.11S., R.69W., Sec. 3). Includes Eagle Creek from its confluence with Trout Creek (39 11 52N 105 08 27W, T.10S., R.69W., Sec. 8) upstream to 7,600 ft (2,317 m) elevation (39 12 06N 105 07 12W, T.10S., R.69W., Sec. 9). Also including an unnamed tributary from its confluence with Trout Creek (39 11 07N 105 08 05W, T.10S., R.69W., Sec. 17) upstream to (39 10 18N 105 08 23W, T.10S., R.69W., Sec. 20). Also including Long Hollow from its confluence with Trout Creek (39 10 56N 105 08 01W, T.10S., R.69W., Sec. 17) upstream to 7,600 ft (2,317 m) elevation (39 11 30N 105 06 19W, T.10S., R.69W., Sec. 10).

(ii) *Note*: Map of Unit 10 follows:

BILLING CODE 4310–55–S



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(15) Unit 11: Monument Creek, El Paso County, Colorado.

(i) This unit consists of 38.6 mi (62.0 km) of streams. Monument Creek from its confluence with Cottonwood Creek (38 55 36N 104 48 55W, T.13S., R66W., Sec. 7) upstream to the southern property boundary of the U.S. Air Force Academy (38 57 08N 104 49 49W, T.13S., R.66W., Sec. 6). Then Monument Creek from the northern property boundary of the U.S. Air Force Academy (39 02 31N 104 51 05W, T.12S., R.67W., north boundary Sec. 2) upstream to Monument Lake (39 05 19N 104 52 43W, T.11S., R.67W., Sec. 15). Includes Kettle Creek from the property boundary of the U.S. Air Force Academy (38 58 33N 104 47 55W, T.12S., R.66W., Sec. 29) upstream to its intersection with a road at (39 00 07N 104 45 24W, T.12S., R.66W., east boundary Sec. 15). Which includes an unnamed tributary from its confluence with Kettle Creek (38 59 06N 104 46 55W, T.12S., R.66W., Sec. 21) upstream to (38 59 14N 104 46 19W, T.12S., R.66W., Sec. 22). Also includes Black Squirrel Creek from the property boundary of the U.S. Air Force Academy (39 00 06N 104 49 00W, T.12S., R.66W., Sec. 18) upstream to (39 02 30N 104 44 38W, T.12S., R.66W., north boundary Sec. 2). Including an unnamed tributary from its confluence with Black Squirrel Creek (39 01 19N 104 46 21W, T.12S., R.66W., Sec. 10) upstream to (39 02 30N 104 45 42W, T.12S., R.66W., north boundary Sec. 3). Which includes another unnamed tributary from (39 01 50N 104 46 20W, T.12S., R.66W., Sec. 3) upstream to (39 02 30N 104 46 03W, T.12S., R.66W., north boundary Sec. 3). Also includes an unnamed tributary from the property boundary of the U.S. Air Force Academy (39 00 14N 104 49 3W, T.12S., R.66W., Sec. 18) upstream to 6,700 ft (2,043 m) elevation (39 0 29N 104 48 24W, T.12S., R.66W., Sec. 17). Including an unnamed tributary from (39 0 19N 104 48 55W, T. 12S., R.66W., Sec. 18) upstream to (39 0 30N 104 48 48N, T. 12S., R.66W., Sec. 18). Unit 11 also includes Monument Branch from the property boundary of the U.S. Air Force Academy (39 00 50N 104 49 24W, T.12S., R.66W., Sec. 7) upstream to (39 01 10N 104 48 45W, T.12S., R.66W., east boundary Sec. 7). Also includes Smith Creek from the property boundary of the U.S. Air Force Academy (39 01 36N 104 49 46W, T.12S., R.66W., Sec. 7) upstream to (39 02 24N 104 48 00W, T.12S., R.66W., Sec. 5). Also includes an unnamed tributary from the property boundary of the U.S. Air Force Academy (39 02 30N 104 50 23W, T.12S., R.67W., Sec. 1) upstream to 6,800 ft (2,230 m) elevation (39 02 45N 104 49 57W, T.11S., R.67W., Sec. 36). Also includes Jackson Creek from its confluence with Monument Creek (39 02 33N 104 51 13W, T.11S., R.67W., Sec. 35) upstream to (39 04 30N 104 49 10W, T.11S., R.66W., Sec. 19). Includes an unnamed tributary from its confluence with Jackson Creek (39 04 12N 104 50 05W, T.11S., R.67W., Sec. 25) upstream to Higby Road (39 04 42N 104 49 40W, T.11S., R.66W., Sec. 19). Also includes Beaver Creek from its confluence with Monument Creek (39 02 52N 104 52 02W, T.11S., R.67W., Sec. 35) upstream to 7,600 ft (2,317 m) elevation (39 03 08N 104 55 32W, T.11S., R.67W., Sec. 31). Also includes Teachout Creek from its confluence with Monument Creek (39 03 44N 104 51 53W, T.11S., R.67W., Sec. 26) upstream to Interstate 25 (39 04 19N 104 51 29W, T.11S., R.67W., Sec. 23). Also includes Dirty Woman Creek from its confluence with Monument Creek (39 04 55N 104 52 35W, T.11S., R.67W., Sec 22) upstream to Highway 105 (39 05 35N 104 51 30 W, T.11S., R.67W., Sec 14).

(ii) *Note*: Map of Unit 11 follows:

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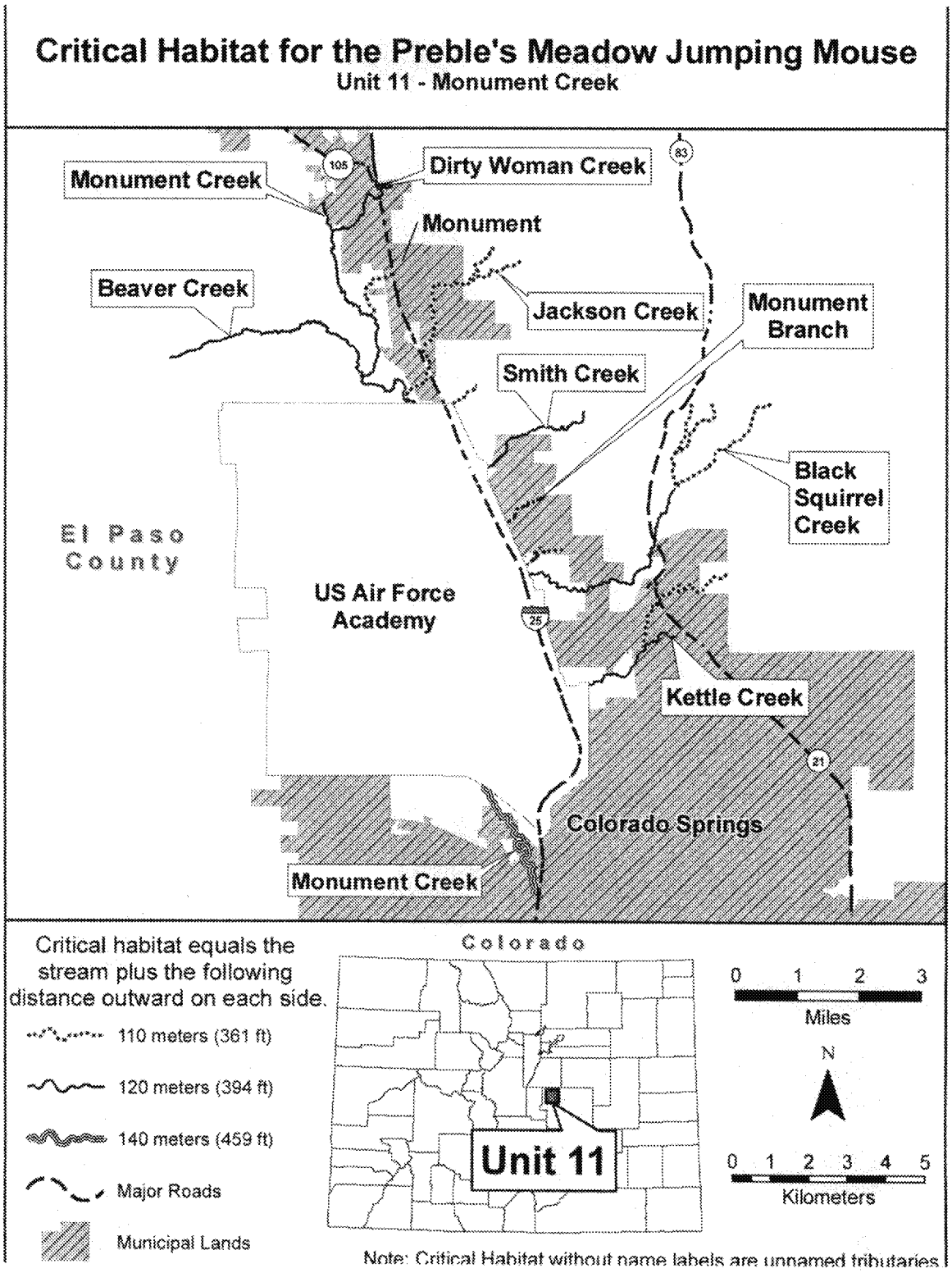

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Dated: September 28, 2009

Thomas L. Strickland

Assistant Secretary for Fish and Wildlife and Parks

[FR Doc. E9–24113 Filed 10–7–09; 8:45 am]

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Federal Register

Thursday,
October 8, 2009

Part VI

Department of the Interior

Fish and Wildlife Service

50 CFR Part 36

Refuge Specific Regulations; Public Use; Kodiak National Wildlife Refuge; Proposed Rule

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 36

[FWS–R7–NSR–2009–0055]
[70133–1265–0000–4A]

RIN 1018–AW15

Refuge Specific Regulations; Public Use; Kodiak National Wildlife Refuge

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), propose to amend our regulations for Kodiak National Wildlife Refuge (NWR) to codify decisions from our 2007 Kodiak NWR Revised Comprehensive Conservation Plan (CCP). We propose to: amend our current seasonal closure of the O'Malley River area to public use within Kodiak National Wildlife Refuge to allow operation of a bear-viewing program; prohibit camping within one-quarter mile of public use cabins and Federal and State administrative facilities on the Kodiak NWR; and prohibit snowmachine use on approximately 4,972 acres of important brown-bear denning habitat in the Den Mountain area. We also propose technical corrections to the authorities section of our regulations. We seek comments from the public on this proposed rule.

DATES: To ensure that we are able to consider your comment on this proposed rule, you must send it on or before December 7, 2009. We must receive requests for public hearings, in writing, at the address shown in the **FOR FURTHER INFORMATION CONTACT** section by November 23, 2009.

ADDRESSES: You may submit comments on our proposed rule content by one of the following methods:

- Federal eRulemaking Portal: *http://www.regulations.gov*. Follow the instructions for submitting comments.
- U.S. mail or hand delivery: Public Comments Processing, Attn: Docket No. FWS–R7–NSR–2009–0055; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, Suite 222; Arlington, VA 22203.

We will not accept e-mail or faxes. We will post all comments on *http://www.regulations.gov*. This generally means that we will post any personal information you provide us (see the "Public Availability of Comments" section below for more information).

FOR FURTHER INFORMATION CONTACT: Brian Glaspell, (907) 487–0248 (phone); (907) 487–2144 (fax).

SUPPLEMENTARY INFORMATION:

Background

Kodiak National Wildlife Refuge was established in 1941 for the purpose of protecting the natural feeding and breeding ranges of brown bears and other wildlife on Uganik and Kodiak Islands. The Alaska National Interest Lands Conservation Act (ANILCA) (16 U.S.C. 3101 *et seq.*; 43 U.S.C. 1602) expanded the purposes of the refuge. It states the purposes for which Kodiak National Wildlife Refuge was "established and shall be managed include:

(i) to conserve fish and wildlife populations and habitats in their natural diversity including, but not limited to, Kodiak brown bears, salmonoids, sea otters, sea lions and other marine mammals and migratory birds;

(ii) to fulfill the international treaty obligations of the United States with respect to fish and wildlife and their habitats;

(iii) to provide, in a manner consistent with the purposes set forth in subparagraphs (i) and (ii), the opportunity for continued subsistence uses by local residents; and

(iv) to ensure, to the maximum extent practicable and in a manner consistent with the purposes set forth in paragraph (i), water quality and necessary water quantity within the refuge."

Kodiak Refuge now encompasses almost 2 million acres in southwestern Alaska, including about two-thirds of Kodiak Island, all of Uganik and Ban Islands, and a portion of Afognak Island. The City of Kodiak, where refuge headquarters are located, is about 250 air miles south of Anchorage and 20 miles northeast of the refuge boundary, on Kodiak Island.

Kodiak Refuge is characterized by a large range of habitats within a relatively small geographic area. Because of this, the refuge supports some of the highest densities of brown bears, nesting bald eagles, and spawning salmon found anywhere in North America. The mountainous interior of Kodiak Island, with several peaks over 4,000 feet in elevation, is covered by lush, dense vegetation during the summer, with alpine vegetation on the highest slopes. No place on the refuge is more than 15 miles from the ocean. Access to the refuge is by float plane and boat. Kodiak Refuge supports runs of five species of Pacific Salmon (Chinook, sockeye, coho, pink, and chum) and steelhead. Rainbow trout, Dolly Varden, and Arctic char are also found in refuge waters.

Kodiak Refuge contains some of the best brown bear habitat in the world, and some of the highest concentrations of brown bears found anywhere, with an estimated population of 3,000 bears. These bears feed on spawning salmon and forage throughout most of the refuge. The Karluk River drainage, including the O'Malley River at its upper end, is one of the most important feeding areas for bears, with as many as 200 bears using the Karluk area from mid-June through the end of September.

Under our regulations implementing ANILCA, all refuge lands in Alaska are open to public recreational activities as long as such activities are conducted in a manner compatible with the purposes for which the refuge was established (50 CFR 36.31). Such recreational activities include, but are not limited to, sightseeing, nature observations and photography, hunting, fishing, boating, camping, hiking, picnicking, and other related activities [50 CFR 36.31(a)].

The National Wildlife Refuge Administration Act of 1966 (16 U.S.C. 668dd–668ee), as amended by the National Wildlife Refuge System Improvement Act of 1997, defines "wildlife-dependent recreation" and "wildlife-dependent recreational use" as "hunting, fishing, wildlife observation and photography, or environmental education and interpretation" [16 U.S.C. 668ee(2)]. We encourage these uses, and they receive emphasis in management of the public use of the refuge.

Proposed Changes

The 2007 Kodiak Refuge Comprehensive Conservation Plan (CCP) addressed four primary issues: protection of bear concentration areas, management of public use cabins, management of camping areas, and management of the O'Malley River area. When we finalize it, this proposed rule would implement actions described in the CCP intended to address these issues.

O'Malley River Area and Proposed Bear Viewing Program:

The O'Malley River is part of the Karluk Lake watershed in the southwestern portion of Kodiak Refuge. Karluk Lake and Karluk River watershed support the largest runs of sockeye salmon on the Kodiak Archipelago. Approximately 20 to 25 percent of these fish spawn in the O'Malley River system. The Karluk Lake drainage also supports one of the highest reported densities of brown bear, with the

highest seasonal concentrations occurring in the O'Malley River area.

Until 1992, the O'Malley River area was open to unregulated public use, including guided and unguided day use and overnight camping. In 1992, after determining that unregulated public use was having unacceptable impacts on feeding bears, Kodiak Refuge established a temporary closure of the O'Malley River area. The closure prohibited all public use and entry, except for participants in a highly structured refuge-sponsored bear-viewing program. The bear-viewing program was a means to allow continued public use while eliminating the unacceptable impacts caused by unregulated activities.

The 1992 Service-run O'Malley River viewing program was successful in reducing human impacts to bears and also proved popular with the public. In 1993, structured O'Malley River bear viewing and the temporary area closure were suspended while a contractor was selected to operate the program in place of the Service. In 1994, the temporary closure was reinstated and the program was successfully operated by a private contractor under a Refuge-issued permit. Although the privately operated viewing program met the Refuge goal of providing public use opportunities while reducing impacts to bears, a challenge to the process used to select the contractor led to cancellation of the program after one season. On July 19, 1995, we issued a permanent regulation, which closed approximately 2,560 acres of the O'Malley River area to all public access, occupancy, and use from June 25 through September 30 [60 FR 37308, July 19, 1995; 50 CFR 36.39(j)]. The O'Malley River area has remained seasonally closed to the public since that time.

During preparation of the 2007 Kodiak Refuge CCP and Environmental Impact Statement, the public expressed significant interest in re-establishing an O'Malley River bear-viewing opportunity. We analyzed the likely impacts of several different viewing program alternatives against the existing seasonal closure. The analysis was greatly facilitated by research conducted in the O'Malley River area during the periods 1991–94 and 2003–04. That research showed that structured bear viewing could occur at O'Malley River, with minimal impacts to bears.

Our final CCP (72 FR 21037; April 27, 2007) calls for us, in cooperation with the Alaska Department of Fish and Game, to develop and implement a bear-viewing program at O'Malley River. The regulation now closing the O'Malley River area to all use on a seasonal basis would need to be modified to allow this use. When finalized, this proposed rule would allow development of the recommended viewing program to proceed.

Public Use Cabin and Camping Area Management:

There are currently seven public use cabins on the Refuge, all remotely located and accessible only by float plane or boat. The CCP allows construction of up to two additional cabins and conversion of administrative cabins and cabins on acquired lands to public use. A permit and $45 per night fee are required to occupy a public use cabin. Permits are available by reservation, and permit holders have exclusive use of reserved cabins and associated facilities (outhouse, meat cache).

Tent camping is unrestricted on most of the Refuge. Camping in close proximity to public use cabins or administrative facilities increases the likelihood of conflict with other users and trespass use of administrative facilities. When finalized, this proposed rule would reduce the likelihood of conflict or trespass by prohibiting camping within one-quarter mile of any State or Federal facility located on Kodiak Refuge lands. The CCP calls for a rule prohibiting camping within one-quarter mile of public use cabins and Federal and State administrative facilities.

Prohibiting Snowmachine Use in Den Mountain Area:

Under our regulations implementing ANILCA, the use of snowmachines (during periods of adequate snow cover and frozen river conditions) for traditional activities and for travel to and from villages and home sites and other valid occupancies is currently allowed (43 CFR 36.11). However, in studies conducted at locations other than Kodiak, snowmachines have been shown to disturb denning bears, sometimes resulting in den abandonment. Of particular concern are adverse impacts on denning females with cubs. If females abandon dens as a result of snowmachine disturbance, newborn cubs are especially threatened.

On Kodiak Island, studies have documented concentrated bear denning, primarily by adult females, within the Den Mountain area of Kodiak Refuge. Den Mountain is located near places traditionally accessed by snowmachine operators along western Kizhuyak Bay. Terrain in the area affords snowmachine operators relatively unfettered access between the bay and mountain when adequate snow cover exists. Under the proposed rule, we would continue to allow appropriate use of snowmachines on most of the Refuge, except for approximately 4,972 acres of accessible and important bear denning habitat on Den Mountain. The CCP calls for a regulation closing this area to snowmachine use.

Technical corrections:

We propose to update the authority citation for the regulation, correct an error in the current regulation, eliminate unneeded references, and conform to current citation format. The revised Statutory Authority citation would read as follows: 16 U.S.C. 460(k) *et seq.*, 742b, 668dd–668ee, 3101 *et seq.*

Request for Comments

You may submit comments and materials on this proposed rule by any one of the methods listed in the **ADDRESSES** section. We will not accept comments sent by e-mail or fax or to an address not listed in the **ADDRESSES** section.

If you submit a comment via http://*www.regulations.gov*, your entire comment—including any personal identifying information—will be posted on the website. If you submit a hardcopy comment that includes personal identifying information, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so. We will post all hardcopy comments on *http://www.regulations.gov.*

Comments and materials we receive, as well as supporting documentation we used in preparing this proposed rule, will be available for public inspection on *http://www.regulations.gov*, or by appointment, during normal business hours, at the U.S Fish and Wildlife Service, Alaska Regional Office, Division of Conservation Planning and Policy, 1011 East Tudor Road, Anchorage, AK 99503.

Public Availability of Comments

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.

Clarity of This Regulation: We are required by Executive Orders 12866 and 12988 and by the Presidential Memorandum of June 1, 1998, to write

all rules in plain language. This means that each rule we publish must:

(a) Be logically organized;

(b) Use the active voice to address readers directly;

(c) Use clear language rather than jargon;

(d) Be divided into short sections and sentences; and

(e) Use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments by one of the methods listed in the **ADDRESSES** section. To better help us revise the rule, your comments should be as specific as possible. For example, you should tell us the numbers of the sections or paragraphs that you find unclear, which sections or sentences are too long, the sections where you feel lists or tables would be useful, etc.

Regulatory Planning and Review (Executive Order (E.O.) 12866)

This document is not a significant rule.

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

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

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

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

Regulatory Flexibility Act

Under the Regulatory Flexibility Act [as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA)], whenever a Federal agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effect of the rule on small entities (i.e., small businesses, small organizations, and small government jurisdictions) (5 U.S.C. 601 *et seq.*). However, no regulatory flexibility analysis is required if the head of an agency certifies that the rule would not have a significant economic impact on a substantial number of small entities. Thus, for a regulatory flexibility analysis to be required, impacts must exceed a threshold for "significant impact" and a threshold for a "substantial number of small entities." See 5 U.S.C. 605(b). SBREFA amended the Regulatory Flexibility Act to require Federal agencies to provide a statement of the factual basis for certifying that a rule would not have a significant economic impact on a substantial number of small entities.

This proposed rule would impact visitor use associated with bear viewing in the O'Malley River area. Modifying the existing O'Malley River closure would create a new, high-quality public recreation opportunity in an area that is otherwise seasonally closed to the public. We estimate an additional 30 to 144 people would visit the Refuge to view bears, generating approximately 120 to 576 additional recreation use-days at the Refuge (assuming an average 4–day visit). These additional recreation use-days represent between 1 and 7 percent of the average recreation use-days on Kodiak Refuge.

Small businesses within the retail trade industry (such as hotels, gas stations, bear-viewing guides, etc.) (NAIC [North American Industry Classification] 44), accommodation and food service establishments (NAIC 72), and air taxi operators (NAIC 48) may benefit from some increased spending generated by additional refuge visitation. Eighty percent of establishments in the Kodiak Island Borough qualify as small businesses. This statistic is similar for retail trade establishments (80 percent), accommodation and food service establishments (67 percent), and transportation establishments (75 percent). Due to the limited bear-viewing season and small number of people (30 to 144 people) who would participate in a bear-viewing program, this proposed rule would have a minimal beneficial effect on these small businesses.

With the small increase in overall visitation anticipated from this proposed rule, it is unlikely that a substantial number of small entities will have more than a small economic effect (benefit) from the increased spending near the Refuge. Therefore, we certify that this rule would not have a significant economic effect on a substantial number of small entities as defined under the Regulatory Flexibility Act. An initial/final Regulatory Flexibility Analysis is not required. Accordingly, a Small Entity Compliance Guide is not required.

Small Business Regulatory Enforcement Fairness Act

This rule is not a major rule under SBREFA [5 U.S.C. 804(2)]. This rule:

a. Does not have an annual effect on the economy of $100 million or more. The additional 30 to 144 visitors participating in bear viewing at Kodiak Island Refuge would generate only a minimal economic impact. Consequently, the benefit of this rule for businesses would not be sufficient to make this a major rule.

b. Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions. We do not expect the minimal increase in bear-viewing opportunities to significantly affect costs or prices in any sector of the economy.

c. Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises. This proposed rule represents only a small proportion of recreational spending by a small number of recreational visitors. Therefore, this rule would have no measurable economic effect on the wildlife-dependent industry, which has annual sales of equipment and travel expenditures of $72 billion nationwide.

Unfunded Mandates Reform Act

This rule does not impose an unfunded mandate on State, local, or tribal governments or the private sector of more than $100 million per year. The rule does not have a significant or unique effect on State local or tribal governments or the private sector. A statement containing the information required by the Unfunded Mandates Reform Act (2 U.S.C. 1531 *et seq.*) is not required.

Takings (E.O. 12630)

Under the criteria in E.O. 12630, this rule does not have significant takings implications. A takings implication assessment is not required.

Federalism (E.O. 13132)

Under the criteria in E.O. 13132, this rule does not have sufficient federalism implications to warrant the preparation of a Federalism summary impact statement. A Federalism summary impact statement is not required.

Civil Justice Reform (E.O. 12988)

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

Consultation and Coordination with Indian Tribal Governments (E.O. 13175)

In accordance with E.O. 13175, we have evaluated possible effects on federally recognized Indian tribes and have determined there are no effects.

Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*)

This rule does not contain any new collections of information that require approval by OMB under the Paperwork Reduction Act. This rule will not impose recordkeeping or reporting requirements on State or local governments, individuals, businesses, or organizations. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

National Environmental Policy Act

This rule constitutes a major Federal action significantly affecting the quality of the human environment. We analyzed this rule in accordance with the criteria of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(C)) (NEPA) and our Departmental Manual part 516 chapter 6, Appendix 1. We prepared a draft Environmental Impact Statement (DEIS) under NEPA, and made it available for comment. Finally, we made our final revised CCP and EIS available for a 30–day comment period beginning September 29, 2006 (71 FR 57560). We announced availability of the Record of Decision for the Final Revised CCP and Environmental Impact Statement on April 27, 2007 (72 FR 21037). To obtain a copy of the CCP/EIS, contact Brian Glaspell (see FOR FURTHER INFORMATION CONTACT).

Data Quality Act

In developing this rule, we did not conduct or use a study, experiment, or survey requiring peer review under the Data Quality Act (Pub. L. 106–554).

Effects on the Energy Supply (E.O. 13211)

This rule is not a significant energy action under the definition in E.O. 13211. A Statement of Energy Effects is not required.

Endangered Species Act Section 7 Consultation

In 2004, a Section 7 consultation under the Endangered Species Act was conducted for the Draft Revised Comprehensive Conservation Plan, Kodiak National Wildlife Refuge. The plan was found to be fully consistent with Section 7 of the Endangered Species Act by the Service and the National Marine Fisheries Service.

Primary Author

Brian Glaspell, Visitor Services Manager, Kodiak National Wildlife, is the primary author of this rulemaking document.

List of Subjects in 50 CFR Part 36

Alaska, Recreation and recreation areas, Reporting and recordkeeping requirements, Wildlife refuges.

For the reasons set out in the preamble, we propose to amend title 50, part 36 of the Code of Federal Regulations as follows:

PART 36—[AMENDED]

1. Revise the authority citation for part 36 to read as follows:

Authority: 16 U.S.C. 460(k) *et seq.*, 668dd-668ee, 3101 *et seq.*

2. Amend §36.39 by revising the first sentence of paragraph (j)(1) and paragraph (j)(2) and adding paragraphs (j)(4) and (j)(5) to read as follows:

§ 36.39 Public use.

* * * * *

(j) * * *

(1) *Seasonal public use closure of the O'Malley River Area.* The area within the Kodiak National Wildlife Refuge described in this paragraph (j)(1) is closed to all public access, occupancy, and use from June 25 through September 30, except for individuals participating in the O'Malley River Bear-Viewing Program. * * *

(2) *Access easement provision.* Notwithstanding any other provision of this paragraph (j), there exists a 25-foot-wide access easement on an existing trail within the Koniag Inc. Regional Native Corporation lands within properties described in paragraph (j)(1) of this section in favor of the United States of America.

* * * * *

(4) *Camping prohibition near facilities.* On lands within Kodiak National Wildlife Refuge, you are prohibited from camping within one-quarter mile of public use cabins and Federal and administrative facilities. An administrative facility means any facility or site administered by the U.S. Fish and Wildlife Service or the State of Alaska for public entry or other administrative purposes, including but not limited to cabins, storage buildings, piers, docks, weirs, refuge offices, visitor centers, and public access and parking sites. Maps of the locations of public use cabins and administrative facilities are available from Refuge Headquarters in Kodiak, Alaska.

(5) *Snowmachine prohibition.* Snowmachines, as defined in §36.2, are prohibited within an approximately 4,972-acre area encompassing Den Mountain and adjacent highlands. The summit of Den Mountain is located within Township 29 South, Range 24 West, Seward Meridian, Alaska. Maps of the closed area are available from Refuge Headquarters in Kodiak, Alaska.

Dated: August 27, 2009

Thomas L. Strickland

Assistant Secretary, Fish and Wildlife and Parks

[FR Doc. E9–23931 Filed 10–7–09; 8:45 am]

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Federal Register

Thursday,
October 8, 2009

Part VII

The President

Executive Order 13514—Federal Leadership in Environmental, Energy, and Economic Performance

Federal Register
Vol. 74, No. 194
Thursday, October 8, 2009

Presidential Documents

Title3—

The President

Executive Order 13514 of October 5, 2009

Federal Leadership in Environmental, Energy, and Economic Performance

By the authority vested in me as President by the Constitution and the laws of the United States of America, and to establish an integrated strategy towards sustainability in the Federal Government and to make reduction of greenhouse gas emissions a priority for Federal agencies, it is hereby ordered as follows:

Section 1. *Policy.* In order to create a clean energy economy that will increase our Nation's prosperity, promote energy security, protect the interests of taxpayers, and safeguard the health of our environment, the Federal Government must lead by example. It is therefore the policy of the United States that Federal agencies shall increase energy efficiency; measure, report, and reduce their greenhouse gas emissions from direct and indirect activities; conserve and protect water resources through efficiency, reuse, and stormwater management; eliminate waste, recycle, and prevent pollution; leverage agency acquisitions to foster markets for sustainable technologies and environmentally preferable materials, products, and services; design, construct, maintain, and operate high performance sustainable buildings in sustainable locations; strengthen the vitality and livability of the communities in which Federal facilities are located; and inform Federal employees about and involve them in the achievement of these goals.

It is further the policy of the United States that to achieve these goals and support their respective missions, agencies shall prioritize actions based on a full accounting of both economic and social benefits and costs and shall drive continuous improvement by annually evaluating performance, extending or expanding projects that have net benefits, and reassessing or discontinuing under-performing projects.

Finally, it is also the policy of the United States that agencies' efforts and outcomes in implementing this order shall be transparent and that agencies shall therefore disclose results associated with the actions taken pursuant to this order on publicly available Federal websites.

Sec. 2. *Goals for Agencies.* In implementing the policy set forth in section 1 of this order, and preparing and implementing the Strategic Sustainability Performance Plan called for in section 8 of this order, the head of each agency shall:

(a) within 90 days of the date of this order, establish and report to the Chair of the Council on Environmental Quality (CEQ Chair) and the Director of the Office of Management and Budget (OMB Director) a percentage reduction target for agency-wide reductions of scope 1 and 2 greenhouse gas emissions in absolute terms by fiscal year 2020, relative to a fiscal year 2008 baseline of the agency's scope 1 and 2 greenhouse gas emissions. Where appropriate, the target shall exclude direct emissions from excluded vehicles and equipment and from electric power produced and sold commercially to other parties in the course of regular business. This target shall be subject to review and approval by the CEQ Chair in consultation with the OMB Director under section 5 of this order. In establishing the target, the agency head shall consider reductions associated with:

(i) reducing energy intensity in agency buildings;

(ii) increasing agency use of renewable energy and implementing renewable energy generation projects on agency property; and
(iii) reducing the use of fossil fuels by:
(A) using low greenhouse gas emitting vehicles including alternative fuel vehicles;
(B) optimizing the number of vehicles in the agency fleet; and
(C) reducing, if the agency operates a fleet of at least 20 motor vehicles, the agency fleet's total consumption of petroleum products by a minimum of 2 percent annually through the end of fiscal year 2020, relative to a baseline of fiscal year 2005;

(b) within 240 days of the date of this order and concurrent with submission of the Strategic Sustainability Performance Plan as described in section 8 of this order, establish and report to the CEQ Chair and the OMB Director a percentage reduction target for reducing agency-wide scope 3 greenhouse gas emissions in absolute terms by fiscal year 2020, relative to a fiscal year 2008 baseline of agency scope 3 emissions. This target shall be subject to review and approval by the CEQ Chair in consultation with the OMB Director under section 5 of this order. In establishing the target, the agency head shall consider reductions associated with:
(i) pursuing opportunities with vendors and contractors to address and incorporate incentives to reduce greenhouse gas emissions (such as changes to manufacturing, utility or delivery services, modes of transportation used, or other changes in supply chain activities);
(ii) implementing strategies and accommodations for transit, travel, training, and conferencing that actively support lower-carbon commuting and travel by agency staff;
(iii) greenhouse gas emission reductions associated with pursuing other relevant goals in this section; and
(iv) developing and implementing innovative policies and practices to address scope 3 greenhouse gas emissions unique to agency operations;

(c) establish and report to the CEQ Chair and OMB Director a comprehensive inventory of absolute greenhouse gas emissions, including scope 1, scope 2, and specified scope 3 emissions (i) within 15 months of the date of this order for fiscal year 2010, and (ii) thereafter, annually at the end of January, for the preceding fiscal year.

(d) improve water use efficiency and management by:
(i) reducing potable water consumption intensity by 2 percent annually through fiscal year 2020, or 26 percent by the end of fiscal year 2020, relative to a baseline of the agency's water consumption in fiscal year 2007, by implementing water management strategies including water-efficient and low-flow fixtures and efficient cooling towers;
(ii) reducing agency industrial, landscaping, and agricultural water consumption by 2 percent annually or 20 percent by the end of fiscal year 2020 relative to a baseline of the agency's industrial, landscaping, and agricultural water consumption in fiscal year 2010;
(iii) consistent with State law, identifying, promoting, and implementing water reuse strategies that reduce potable water consumption; and
(iv) implementing and achieving the objectives identified in the stormwater management guidance referenced in section 14 of this order;

(e) promote pollution prevention and eliminate waste by:
(i) minimizing the generation of waste and pollutants through source reduction;
(ii) diverting at least 50 percent of non-hazardous solid waste, excluding construction and demolition debris, by the end of fiscal year 2015;
(iii) diverting at least 50 percent of construction and demolition materials and debris by the end of fiscal year 2015;
(iv) reducing printing paper use and acquiring uncoated printing and writing paper containing at least 30 percent postconsumer fiber;

(v) reducing and minimizing the quantity of toxic and hazardous chemicals and materials acquired, used, or disposed of;
(vi) increasing diversion of compostable and organic material from the waste stream;
(vii) implementing integrated pest management and other appropriate landscape management practices;
(viii) increasing agency use of acceptable alternative chemicals and processes in keeping with the agency's procurement policies;
(ix) decreasing agency use of chemicals where such decrease will assist the agency in achieving greenhouse gas emission reduction targets under section 2(a) and (b) of this order; and
(x) reporting in accordance with the requirements of sections 301 through 313 of the Emergency Planning and Community Right-to-Know Act of 1986 (42 U.S.C. 11001 *et seq.*);

(f) advance regional and local integrated planning by:
(i) participating in regional transportation planning and recognizing existing community transportation infrastructure;
(ii) aligning Federal policies to increase the effectiveness of local planning for energy choices such as locally generated renewable energy;
(iii) ensuring that planning for new Federal facilities or new leases includes consideration of sites that are pedestrian friendly, near existing employment centers, and accessible to public transit, and emphasizes existing central cities and, in rural communities, existing or planned town centers;
(iv) identifying and analyzing impacts from energy usage and alternative energy sources in all Environmental Impact Statements and Environmental Assessments for proposals for new or expanded Federal facilities under the National Environmental Policy Act of 1969, as amended (42 U.S.C. 4321 *et seq.*); and
(v) coordinating with regional programs for Federal, State, tribal, and local ecosystem, watershed, and environmental management;

(g) implement high performance sustainable Federal building design, construction, operation and management, maintenance, and deconstruction including by:
(i) beginning in 2020 and thereafter, ensuring that all new Federal buildings that enter the planning process are designed to achieve zero-net-energy by 2030;
(ii) ensuring that all new construction, major renovation, or repair and alteration of Federal buildings complies with the *Guiding Principles for Federal Leadership in High Performance and Sustainable Buildings*, (Guiding Principles);
(iii) ensuring that at least 15 percent of the agency's existing buildings (above 5,000 gross square feet) and building leases (above 5,000 gross square feet) meet the Guiding Principles by fiscal year 2015 and that the agency makes annual progress toward 100-percent conformance with the Guiding Principles for its building inventory;
(iv) pursuing cost-effective, innovative strategies, such as highly reflective and vegetated roofs, to minimize consumption of energy, water, and materials;
(v) managing existing building systems to reduce the consumption of energy, water, and materials, and identifying alternatives to renovation that reduce existing assets' deferred maintenance costs;
(vi) when adding assets to the agency's real property inventory, identifying opportunities to consolidate and dispose of existing assets, optimize the performance of the agency's real-property portfolio, and reduce associated environmental impacts; and
(vii) ensuring that rehabilitation of federally owned historic buildings utilizes best practices and technologies in retrofitting to promote long-term viability of the buildings;

(h) advance sustainable acquisition to ensure that 95 percent of new contract actions including task and delivery orders, for products and services with the exception of acquisition of weapon systems, are energy-

efficient (Energy Star or Federal Energy Management Program (FEMP) designated), water-efficient, biobased, environmentally preferable (e.g., Electronic Product Environmental Assessment Tool (EPEAT) certified), non-ozone depleting, contain recycled content, or are non-toxic or less-toxic alternatives, where such products and services meet agency performance requirements;

(i) promote electronics stewardship, in particular by:

(i) ensuring procurement preference for EPEAT-registered electronic products;

(ii) establishing and implementing policies to enable power management, duplex printing, and other energy-efficient or environmentally preferable features on all eligible agency electronic products;

(iii) employing environmentally sound practices with respect to the agency's disposition of all agency excess or surplus electronic products;

(iv) ensuring the procurement of Energy Star and FEMP designated electronic equipment;

(v) implementing best management practices for energy-efficient management of servers and Federal data centers; and

(j) sustain environmental management, including by:

(i) continuing implementation of formal environmental management systems at all appropriate organizational levels; and

(ii) ensuring these formal systems are appropriately implemented and maintained to achieve the performance necessary to meet the goals of this order.

Sec. 3. *Steering Committee on Federal Sustainability.* The OMB Director and the CEQ Chair shall:

(a) establish an interagency Steering Committee (Steering Committee) on Federal Sustainability composed of the Federal Environmental Executive, designated under section 6 of Executive Order 13423 of January 24, 2007, and Agency Senior Sustainability Officers, designated under section 7 of this order, and that shall:

(i) serve in the dual capacity of the Steering Committee on Strengthening FederalEnvironmental, Energy, and Transportation Management designated by the CEQ Chair pursuant to section 4 of Executive Order 13423;

(ii) advise the OMB Director and the CEQ Chair on implementation of this order;

(iii) facilitate the implementation of each agency's Strategic Sustainability Performance Plan; and

(iv) share information and promote progress towards the goals of this order;

(b) enlist the support of other organizations within the Federal Government to assist the Steering Committee in addressing the goals of this order;

(c) establish and disband, as appropriate, interagency subcommittees of the Steering Committee, to assist the Steering Committee in carrying out its responsibilities;

(d) determine appropriate Federal actions to achieve the policy of section 1 and the goals of section 2 of this order;

(e) ensure that Federal agencies are held accountable for conformance with the requirements of this order; and

(f) in coordination with the Department of Energy's Federal Energy Management Program and the Office of the Federal Environmental Executive designated under section 6 of Executive Order 13423, provide guidance and assistance to facilitate the development of agency targets for greenhouse gas emission reductions required under subsections 2(a) and (b) of this order.

Sec. 4. *Additional Duties of the Director of the Office of Management and Budget.* In addition to the duties of the OMB Director specified elsewhere in this order, the OMB Director shall:

(a) review and approve each agency's multi-year Strategic Sustainability Performance Plan under section 8 of this order and each update of the Plan. The Director shall, where feasible, review each agency's Plan concurrently with OMB's review and evaluation of the agency's budget request;

(b) prepare scorecards providing periodic evaluation of Federal agency performance in implementing this order and publish scorecard results on a publicly available website; and

(c) approve and issue instructions to the heads of agencies concerning budget and appropriations matters relating to implementation of this order.

Sec. 5. *Additional Duties of the Chair of the Council on Environmental Quality.* In addition to the duties of the CEQ Chair specified elsewhere in this order, the CEQ Chair shall:

(a) issue guidance for greenhouse gas accounting and reporting required under section 2 of this order;

(b) issue instructions to implement this order, in addition to instructions within the authority of the OMB Director to issue under subsection 4(c) of this order;

(c) review and approve each agency's targets, in consultation with the OMB Director, for agency-wide reductions of greenhouse gas emissions under section 2 of this order;

(d) prepare, in coordination with the OMB Director, streamlined reporting metrics to determine each agency's progress under section 2 of this order;

(e) review and evaluate each agency's multi-year Strategic Sustainability Performance Plan under section 8 of this order and each update of the Plan;

(f) assess agency progress toward achieving the goals and policies of this order, and provide its assessment of the agency's progress to the OMB Director;

(g) within 120 days of the date of this order, provide the President with an aggregate Federal Government-wide target for reducing scope 1 and 2 greenhouse gas emissions in absolute terms by fiscal year 2020 relative to a fiscal year 2008 baseline;

(h) within 270 days of the date of this order, provide the President with an aggregate Federal Government-wide target for reducing scope 3 greenhouse gas emissions in absolute terms by fiscal year 2020 relative to a fiscal year 2008 baseline;

(i) establish and disband, as appropriate, interagency working groups to provide recommendations to the CEQ for areas of Federal agency operational and managerial improvement associated with the goals of this order; and

(j) administer the Presidential leadership awards program, established under subsection 4(c) of Executive Order 13423, to recognize exceptional and outstanding agency performance with respect to achieving the goals of this order and to recognize extraordinary innovation, technologies, and practices employed to achieve the goals of this order.

Sec. 6. *Duties of the Federal Environmental Executive.* The Federal Environmental Executive designated by the President to head the Office of the Federal Environmental Executive, pursuant to section 6 of Executive Order 13423, shall:

(a) identify strategies and tools to assist Federal implementation efforts under this order, including through the sharing of best practices from successful Federal sustainability efforts; and

(b) monitor and advise the CEQ Chair and the OMB Director on the agencies' implementation of this order and their progress in achieving the order's policies and goals.

Sec. 7. *Agency Senior Sustainability Officers.* (a) Within 30 days of the date of this order, the head of each agency shall designate from among

the agency's senior management officials a Senior Sustainability Officer who shall be accountable for agency conformance with the requirements of this order; and shall report such designation to the OMB Director and the CEQ Chair.

(b) The Senior Sustainability Officer for each agency shall perform the functions of the senior agency official designated by the head of each agency pursuant to section 3(d)(i) of Executive Order 13423 and shall be responsible for:

(i) preparing the targets for agency-wide reductions and the inventory of greenhouse gas emissions required under subsections 2(a), (b), and (c) of this order;

(ii) within 240 days of the date of this order, and annually thereafter, preparing and submitting to the CEQ Chair and the OMB Director, for their review and approval, a multi-year Strategic Sustainability Performance Plan (Sustainability Plan or Plan) as described in section 8 of this order;

(iii) preparing and implementing the approved Plan in coordination with appropriate offices and organizations within the agency including the General Counsel, Chief Information Officer, Chief Acquisition Officer, Chief Financial Officer, and Senior Real Property Officers, and in coordination with other agency plans, policies, and activities;

(iv) monitoring the agency's performance and progress in implementing the Plan, and reporting the performance and progress to the CEQ Chair and the OMB Director, on such schedule and in such format as the Chair and the Director may require; and

(v) reporting annually to the head of the agency on the adequacy and effectiveness of the agency's Plan in implementing this order.

Sec. 8. *Agency Strategic Sustainability Performance Plan.* Each agency shall develop, implement, and annually update an integrated Strategic Sustainability Performance Plan that will prioritize agency actions based on lifecycle return on investment. Each agency Plan and update shall be subject to approval by the OMB Director under section 4 of this order. With respect to the period beginning in fiscal year 2011 and continuing through the end of fiscal year 2021, each agency Plan shall:

(a) include a policy statement committing the agency to compliance with environmental and energy statutes, regulations, and Executive Orders;

(b) achieve the sustainability goals and targets, including greenhouse gas reduction targets, established under section 2 of this order;

(c) be integrated into the agency's strategic planning and budget process, including the agency's strategic plan under section 3 of the Government Performance and Results Act of 1993, as amended (5 U.S.C. 306);

(d) identify agency activities, policies, plans, procedures, and practices that are relevant to the agency's implementation of this order, and where necessary, provide for development and implementation of new or revised policies, plans, procedures, and practices;

(e) identify specific agency goals, a schedule, milestones, and approaches for achieving results, and quantifiable metrics for agency implementation of this order;

(f) take into consideration environmental measures as well as economic and social benefits and costs in evaluating projects and activities based on lifecycle return on investment;

(g) outline planned actions to provide information about agency progress and performance with respect to achieving the goals of this order on a publicly available Federal website;

(h) incorporate actions for achieving progress metrics identified by the OMB Director and the CEQ Chair;

(i) evaluate agency climate-change risks and vulnerabilities to manage the effects of climate change on the agency's operations and mission in both the short and long term; and

(j) identify in annual updates opportunities for improvement and evaluation of past performance in order to extend or expand projects that have net lifecycle benefits, and reassess or discontinue under-performing projects.

Sec. 9. *Recommendations for Greenhouse Gas Accounting and Reporting.* The Department of Energy, through its Federal Energy Management Program, and in coordination with the Environmental Protection Agency, the Department of Defense, the General Services Administration, the Department of the Interior, the Department of Commerce, and other agencies as appropriate, shall:

(a) within 180 days of the date of this order develop and provide to the CEQ Chair recommended Federal greenhouse gas reporting and accounting procedures for agencies to use in carrying out their obligations under subsections 2(a), (b), and (c) of this order, including procedures that will ensure that agencies:

(i) accurately and consistently quantify and account for greenhouse gas emissions from all scope 1, 2, and 3 sources, using accepted greenhouse gas accounting and reporting principles, and identify appropriate opportunities to revise the fiscal year 2008 baseline to address significant changes in factors affecting agency emissions such as reorganization and improvements in accuracy of data collection and estimation procedures or other major changes that would otherwise render the initial baseline information unsuitable;

(ii) consider past Federal agency efforts to reduce greenhouse gas emissions; and

(iii) consider and account for sequestration and emissions of greenhouse gases resulting from Federal land management practices;

(b) within 1 year of the date of this order, to ensure consistent and accurate reporting under this section, provide electronic accounting and reporting capability for the Federal greenhouse gas reporting procedures developed under subsection (a) of this section, and to the extent practicable, ensure compatibility between this capability and existing Federal agency reporting systems; and

(c) every 3 years from the date of the CEQ Chair's issuance of the initial version of the reporting guidance, and as otherwise necessary, develop and provide recommendations to the CEQ Chair for revised Federal greenhouse gas reporting procedures for agencies to use in implementing subsections 2(a), (b), and (c) of this order.

Sec. 10. *Recommendations for Sustainable Locations for Federal Facilities.* Within 180 days of the date of this order, the Department of Transportation, in accordance with its Sustainable Partnership Agreement with the Department of Housing and Urban Development and the Environmental Protection Agency, and in coordination with the General Services Administration, the Department of Homeland Security, the Department of Defense, and other agencies as appropriate, shall:

(a) review existing policies and practices associated with site selection for Federal facilities; and

(b) provide recommendations to the CEQ Chair regarding sustainable location strategies for consideration in Sustainability Plans. The recommendations shall be consistent with principles of sustainable development including prioritizing central business district and rural town center locations, prioritizing sites well served by transit, including site design elements that ensure safe and convenient pedestrian access, consideration of transit access and proximity to housing affordable to a wide range of Federal employees, adaptive reuse or renovation of buildings, avoidance of development of sensitive land resources, and evaluation of parking management strategies.

Sec. 11. *Recommendations for Federal Local Transportation Logistics.* Within 180 days of the date of this order, the General Services Administration, in coordination with the Department of Transportation, the Department of

the Treasury, the Department of Energy, the Office of Personnel Management, and other agencies as appropriate, shall review current policies and practices associated with use of public transportation by Federal personnel, Federal shuttle bus and vehicle transportation routes supported by multiple Federal agencies, and use of alternative fuel vehicles in Federal shuttle bus fleets, and shall provide recommendations to the CEQ Chair on how these policies and practices could be revised to support the implementation of this order and the achievement of its policies and goals.

Sec. 12. *Guidance for Federal Fleet Management.* Within 180 days of the date of this order, the Department of Energy, in coordination with the General Services Administration, shall issue guidance on Federal fleet management that addresses the acquisition of alternative fuel vehicles and use of alternative fuels; the use of biodiesel blends in diesel vehicles; the acquisition of electric vehicles for appropriate functions; improvement of fleet fuel economy; the optimizing of fleets to the agency mission; petroleum reduction strategies, such as the acquisition of low greenhouse gas emitting vehicles and the reduction of vehicle miles traveled; and the installation of renewable fuel pumps at Federal fleet fueling centers.

Sec. 13. *Recommendations for Vendor and Contractor Emissions.* Within 180 days of the date of this order, the General Services Administration, in coordination with the Department of Defense, the Environmental Protection Agency, and other agencies as appropriate, shall review and provide recommendations to the CEQ Chair and the Administrator of OMB's Office of Federal Procurement Policy regarding the feasibility of working with the Federal vendor and contractor community to provide information that will assist Federal agencies in tracking and reducing scope 3 greenhouse gas emissions related to the supply of products and services to the Government. These recommendations should consider the potential impacts on the procurement process, and the Federal vendor and contractor community including small businesses and other socioeconomic procurement programs. Recommendations should also explore the feasibility of:

(a) requiring vendors and contractors to register with a voluntary registry or organization for reporting greenhouse gas emissions;

(b) requiring contractors, as part of a new or revised registration under the Central Contractor Registration or other tracking system, to develop and make available its greenhouse gas inventory and description of efforts to mitigate greenhouse gas emissions;

(c) using Federal Government purchasing preferences or other incentives for products manufactured using processes that minimize greenhouse gas emissions; and

(d) other options for encouraging sustainable practices and reducing greenhouse gas emissions.

Sec. 14. *Stormwater Guidance for Federal Facilities.* Within 60 days of the date of this order, the Environmental Protection Agency, in coordination with other Federal agencies as appropriate, shall issue guidance on the implementation of section 438 of the Energy Independence and Security Act of 2007 (42 U.S.C. 17094).

Sec. 15. *Regional Coordination.* Within 180 days of the date of this order, the Federal Environmental Executive shall develop and implement a regional implementation plan to support the goals of this order taking into account energy and environmental priorities of particular regions of the United States.

Sec. 16. *Agency Roles in Support of Federal Adaptation Strategy.* In addition to other roles and responsibilities of agencies with respect to environmental leadership as specified in this order, the agencies shall participate actively in the interagency Climate Change Adaptation Task Force, which is already engaged in developing the domestic and international dimensions of a U.S. strategy for adaptation to climate change, and shall develop approaches through which the policies and practices of the agencies can be made compatible with and reinforce that strategy. Within 1 year of the date of

this order the CEQ Chair shall provide to the President, following consultation with the agencies and the Climate Change Adaptation Task Force, as appropriate, a progress report on agency actions in support of the national adaptation strategy and recommendations for any further such measures as the CEQ Chair may deem necessary.

Sec. 17. *Limitations.* (a) This order shall apply to an agency with respect to the activities, personnel, resources, and facilities of the agency that are located within the United States. The head of an agency may provide that this order shall apply in whole or in part with respect to the activities, personnel, resources, and facilities of the agency that are not located within the United States, if the head of the agency determines that such application is in the interest of the United States.

(b) The head of an agency shall manage activities, personnel, resources, and facilities of the agency that are not located within the United States, and with respect to which the head of the agency has not made a determination under subsection (a) of this section, in a manner consistent with the policy set forth in section 1 of this order to the extent the head of the agency determines practicable.

Sec. 18. *Exemption Authority.*

(a) The Director of National Intelligence may exempt an intelligence activity of the United States, and related personnel, resources, and facilities, from the provisions of this order, other than this subsection and section 20, to the extent the Director determines necessary to protect intelligence sources and methods from unauthorized disclosure.

(b) The head of an agency may exempt law enforcement activities of that agency, and related personnel, resources, and facilities, from the provisions of this order, other than this subsection and section 20, to the extent the head of an agency determines necessary to protect undercover operations from unauthorized disclosure.

(c) (i) The head of an agency may exempt law enforcement, protective, emergency response, or military tactical vehicle fleets of that agency from the provisions of this order, other than this subsection and section 20.

(ii) Heads of agencies shall manage fleets to which paragraph (i) of this subsection refers in a manner consistent with the policy set forth in section 1 of this order to the extent they determine practicable.

(d) The head of an agency may exempt particular agency activities and facilities from the provisions of this order, other than this subsection and section 20, where it is in the interest of national security. If the head of an agency issues an exemption under this section, the agency must notify the CEQ Chair in writing within 30 days of issuance of the exemption under this subsection. To the maximum extent practicable, and without compromising national security, each agency shall strive to comply with the purposes, goals, and implementation steps in this order.

(e) The head of an agency may submit to the President, through the CEQ Chair, a request for an exemption of an agency activity, and related personnel, resources, and facilities, from this order.

Sec. 19. *Definitions.* As used in this order:

(a) "absolute greenhouse gas emissions" means total greenhouse gas emissions without normalization for activity levels and includes any allowable consideration of sequestration;

(b) "agency" means an executive agency as defined in section 105 of title 5, United States Code, excluding the Government Accountability Office;

(c) "alternative fuel vehicle" means vehicles defined by section 301 of the Energy Policy Act of 1992, as amended (42 U.S.C. 13211), and otherwise includes electric fueled vehicles, hybrid electric vehicles, plug-in hybrid electric vehicles, dedicated alternative fuel vehicles, dual fueled alternative

fuel vehicles, qualified fuel cell motor vehicles, advanced lean burn technology motor vehicles, self-propelled vehicles such as bicycles and any other alternative fuel vehicles that are defined by statute;

(d) "construction and demolition materials and debris" means materials and debris generated during construction, renovation, demolition, or dismantling of all structures and buildings and associated infrastructure;

(e) "divert" and "diverting" means redirecting materials that might otherwise be placed in the waste stream to recycling or recovery, excluding diversion to waste-to-energy facilities;

(f) "energy intensity" means energy consumption per square foot of building space, including industrial or laboratory facilities;

(g) "environmental" means environmental aspects of internal agency operations and activities, including those aspects related to energy and transportation functions;

(h) "excluded vehicles and equipment" means any vehicle, vessel, aircraft, or non-road equipment owned or operated by an agency of the Federal Government that is used in:

(i) combat support, combat service support, tactical or relief operations, or training for such operations;

(ii) Federal law enforcement (including protective service and investigation);

(iii) emergency response (including fire and rescue); or

(iv) spaceflight vehicles (including associated ground-support equipment);

(i) "greenhouse gases" means carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride;

(j) "renewable energy" means energy produced by solar, wind, biomass, landfill gas, ocean (including tidal, wave, current, and thermal), geothermal, municipal solid waste, or new hydroelectric generation capacity achieved from increased efficiency or additions of new capacity at an existing hydroelectric project;

(k) "scope 1, 2, and 3" mean;

(i) scope 1: direct greenhouse gas emissions from sources that are owned or controlled by the Federal agency;

(ii) scope 2: direct greenhouse gas emissions resulting from the generation of electricity, heat, or steam purchased by a Federal agency; and

(iii) scope 3: greenhouse gas emissions from sources not owned or directly controlled by a Federal agency but related to agency activities such as vendor supply chains, delivery services, and employee travel and commuting;

(l) "sustainability" and "sustainable" mean to create and maintain conditions, under which humans and nature can exist in productive harmony, that permit fulfilling the social, economic, and other requirements of present and future generations;

(m) "United States" means the fifty States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the United States Virgin Islands, and the Northern Mariana Islands, and associated territorial waters and airspace;

(n) "water consumption intensity" means water consumption per square foot of building space; and

(o) "zero-net-energy building" means a building that is designed, constructed, and operated to require a greatly reduced quantity of energy to operate, meet the balance of energy needs from sources of energy that do not produce greenhouse gases, and therefore result in no net emissions of greenhouse gases and be economically viable.

Sec. 20. *General Provisions.*

(a) This order shall be implemented in a manner consistent with applicable law and subject to the availability of appropriations.

(b) Nothing in this order shall be construed to impair or otherwise affect the functions of the OMB Director relating to budgetary, administrative, or legislative proposals.

(c) This order is intended only to improve the internal management of the Federal Government and is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

THE WHITE HOUSE,
Washington, October 5, 2009.

[FR Doc. E9–24518
Filed 10–7–09; 12:30 pm]
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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON D.C. 20460

JAN 22 1996

MEMORANDUM

SUBJECT: Release of interim Policy an Federal Enforceability of Limitations on Potential to Emit

FROM: John S. Seitz, Director
Office of Air Quality Planning and Standards (MD-10)
Office of Air and Radiation

Robert I Van Heuvelen, Director
Office of Regulatory Enforcement (2241A)
Office of Enforcement and Compliance Assurance

TO: Regional Office Addressees (see below):

The purpose of this memorandum is to notify you that the Agency is today releasing detailed guidance (referred to below as the "Interim Policy") clarifying the immediate impacts of two recent decisions by the U.S. Court of Appeals for the D.C. Circuit regarding EPA regulations requiring federal enforceability of limitations on a source's potential to emit ("PTE") under certain CAA programs. This cover memorandum briefly summarizes the court decisions, and briefly summarizes the immediate impacts of the decisions on current regulations. A more detailed discussion of the impacts of the two court decisions is attached. The policy will remain in place until January 1997, but may be extended if necessary to coincide with the promulgation of revised regulations.

The Court Decisions

In National Mining Association v. EPA, 59 F.3d 1351 (D.C. Cir. 1995), the court addressed hazardous air pollutant programs under section 112. The court found that EPA had not adequately explained why only federally enforceable measures should be considered as limits on a source's potential to emit. Accordingly, the court remanded the section 112 General Provisions regulation to EPA for further proceedings. EPA must either provide a better explanation as to why federal enforceability promotes the effectiveness of state controls, or remove the exclusive federal enforceability requirement. The court did not vacate the section 112 regulations, that is, the court did not declare the regulations null and void. The regulations remain in effect pending completion of new rulemaking.

In Chemical Manufacturers Ass'n v. EPA, No. 89-1514 (D.C. Cir. Sept. 150 1995), the court, in light of National Mining, remanded the PTE definition in the PSD and NSR regulations to EPA. The court also vacated the federal enforceability requirement of the PTE definitions in the PSD and NSR regulations.

Summary of Immediate Impacts of the Court Decisions

EPA plans to propose rulemaking amendments in spring 1996 that would address the federal enforceability issue as it relates to section 112, title V, and Prevention of Significant Deterioration & New Source Review ("PSD/NSR") regulations. Pending this rulemakinq, the immediate impacts are as follows:

Effects on Section 112. Because the court did not vacate the rule, the current part 63 regulations, requiring federal enforceability, remain in effect.

Effects on title V. Although neither court case addressed the title V regulations, industry challenges to the part 70 requirements are pending. Because the federal enforceability provision of the title V regulations are closely related to the regulations addressed in the two decided cases, EPA will ask the court to leave part 70 in place as the rulemaking amendments are being developed.

Effects an PSD/NSR. Because the court vacated the rules, the requirements in the nationwide rules for PSD and major source NSR concerning federal enforceability are not in effect. In many cases, however, individual State rules implementing these programs have been individually approved in the State Implementation Plan (SIP). The court did not vacate any requirements for federal enforceability in these individual State rules, and these requirements remain in place. As discussed in detail in the Interim Policy, the immediate practical impacts an the PSD/NSR programs are not substantial for newly constructed major sources. Greater impacts may exist for existing major sources seeking to avoid review by demonstrating a net emissions decrease.

Effects on January 25, 1995 Transition Policy. The transition policy remains in effect with one change. For sources emitting more than 50% of the major source threshold, and holding State-enforceable limits, EPA is no longer requiring that the source submit a certification to EPA.

Distribution/Further Information

The Regional offices should send this memorandum to States within their jurisdiction. Questions concerning specific issues and cases should be directed to the appropriate Regional office. Regional Office staff may contact Tim Smith of the Integrated Implementation Group at 919-541-4718, Adam Schwartz of the Office of General Counsel at 202-260-7632, or Julie Domike of the Office of Enforcement and Compliance Assurance at 202-564-6577. The document is also available on the technology transfer network (TTN) bulletin board, under "Clean Air Act, Title V, Policy Guidance Memos." (Readers unfamiliar with this bulletin board may obtain access by calling the TTN help line at 919-541-5384).

Attachment

Addressees:

Director, Office of Ecosystem Protection, Region I
Director, Air and Waste Management Division, Region II
Director, Air, Radiation, and Toxics Division, RegionIII
Director, Air, Pesticides, and Toxics Management Division, Region IV
Director, Air and Radiation Division, Region V
Director, Multimedia Planning and Permitting Division,Region VI
Director, Air, RCRA, and TSCA Division, Region VII
Assistant Regional Administrator, Office of Pollution Prevention, State and Tribal Assistance, Region VIII
Director, Air and Toxics Division, Region IX
Director, Office of Air, Region X

Regional Counsels, Regions I-X

Director, Office of Environmental Stewardship, Region I
Director, Division of Enforcement and Compliance Assurance, Region II
Director, Enforcement Coordination Office, Region III
Director, Compliance Assurance and Enforcement Division, Region VI
Director, Enforcement Coordination Office, Region VII
Assistant Regional Administrator, Office of Enforcement, Compliance and Environmental Justice, Region VIII
Enforcement Coordinator, office of Regional Enforcement Coordination, Region IX

EPA INTERIM POLICY ON FEDERAL ENFORCEABILITY REQUIREMENT FOR LIMITATIONS ON POTENTIAL TO EMIT

January 1996

This document provides guidance clarifying the immediate impacts of recent court decisions related to federal enforceability of limitations on a source's potential to emit ("PTE"). in brief, most current regulatory requirements and policies regarding PTE, including the interim policy recognizing state-enforceable limits under section 112 and Title V in some circumstances, remain in affect while EPA conducts expedited rulemaking to address these issues in detail. However, at present, certain netting transactions involving PTE limits under new source review programs may now take place without federal enforceability. Today's guidance will be superseded upon completion of the new rulemaking.

Background

Several important Clean Air Act programs apply to only major sources, i.e., those that "emit or have the potential to emit" amounts exceeding major source thresholds listed in the Act. The EPA has promulgated regulations defining the term "potential to emit" for most of these programs. In particular, five sets of regulations are in place implementing the major source prevention of significant deterioration (PSD) and nonattainment area new source review (NSR) permitting programs (40 CFR 51.166, 40 CFR 52.21, 40 CFR 51.165, Appendix S of 40 CFR Part 51, and 40 CFR 52.24). Regulations governing approvability of state operating permit programs under Title V of the CAA are contained in 40 CFR Part 70, and EPA has proposed regulations implementing a federal operating permits program that are to be promulgated at 40 CFR Part 71. Regulations implementing the requirements of section 112 of the Act related to major sources of hazardous air pollutants are contained in 40 CFR Part 63, subpart A.

For each of the above Clean Air Act programs, the EPA regulations provide that "controls" (i.e., both pollution control equipment and operational restrictions) that limit a source's maximum capacity to emit a pollutant may be considered in determining its potential to exit. Historically, large numbers of new or modified sources that otherwise would be subject to PSD and NSR permitting requirements have limited their PTE in order to obtain "synthetic minor" status and thereby avoid major source requirements. With the advent of operating permit programs under Title V and the MACT program under section 112, many sources that otherwise would be subject to these new requirements under the Clean Air Act Amendments of 1990 also have obtained, or plan to obtain, PTE limits to avoid coverage. For each of these programs, EPA regulations have required that PTE limits be "federally enforceable" in order to be considered in determining PTE.

These federal enforceability requirements were the subject of two recent decisions of the D.C. Circuit Court of Appeals. The first decision, National Mining Association v. EPA, 59 F.3d

1351 (D.C. Cir. July 21, 1995). dealt with the potential to emit definition under the hazardous-air pollutant programs promulgated pursuant to CAA section 112. In this decision the Court implicitly accepted EPA's argument that only "effective" state issued controls should be cognizable in Limiting potential to emit. In addition, the court did not question the validity of current federally enforceable mechanisms in limiting PTE. However, the court found that EPA had not adequately explained why only federally enforceable measures should be considered in assessing the effectiveness of state-issued controls. Accordingly, the Court remanded the section 112 General Provisions regulation to EPA for further proceedings. Thus, EPA must either provide a better explanation as to why federal enforceability promotes the effectiveness of state controls, or remove the exclusive federal enforceability requirement. The court did not vacate the section 112 regulations, and they remain in effect pending completion of EPA rulemaking proceedings in response to the court's remand.

The second decision, Chemical Manufacturers Ass'n v. EPA, No. 89-1514 (D.C. Cir. Sept. 15, 1995), dealt with the potential to emit definition in the PSD and NSR programs. Specifically, this case challenged the June 1989 rulemaking in which the EPA reaffirmed the requirement for federal enforceability of PTE limits taken to avoid major source permitting requirements in these programs. in a briefly worded judgment, the court, in light of National Mining, remanded the PSD and NSR regulations to EPA. In addition, in contrast to its disposition of the section 112 regulations in National Mining, the court in chemical Manufacturers vacated the federal enforceability requirement of the PTE definitions in the PSD and NSR regulations.

In a third set of cases, industry challenges to the federal enforceability requirements in Part 70 are pending before the D.C. Circuit. The Title V cases have not been briefed. However, since the federal enforceability provisions of these Title V regulations are closely related to the regulations addressed in the two decided cases, EPA plans to ask the court to remand the regulations to EPA for further rulemaking, and to leave Part 70 in place during the new rulemaking.

Plans for Rulemaking Amendments

EPA plans to hold discussions with stakeholders and propose rulemaking amendments by spring 1996, and to issue final rules by spring 1997, that would address the court decisions impacting

regulations promulgated pursuant to section 112 and the PSD/NSR regulations. At the same time, EPA will propose a parallel approach to cognizable PTE limits for major sources subject to title V. EPA currently plans to address the following options, after discussions with stakeholders:

(a) An approach that would recognize "effective" State-enforceable limits as an alternative to federally enforceable limits on a source's potential to emit. Under this option, a source whose maximum capacity to emit without pollution controls or operational limitations exceeds relevant major source thresholds may take a State or local limit an its potential to emit. In such circumstances, the source must be able to demonstrate that the State-enforceable limits are (1) enforceable as a practical matter, and (2) being regularly complied with by the facility.

(b) An approach under which the EPA would continue to require federal enforceability of limits on a source's potential to emit. Under this approach, in response to specific issues raised by the court in National Mining, EPA would present further explanation regarding why the federal enforceability requirement promotes effective controls. Under this approach, EPA would propose simplifying changes to the administrat ive provisions of the current federal enforceability regulations.

The remainder of this guidance memorandum addresses the immediate impacts of the court decisions on each of the three programs, in light of the upcoming rulemaking.

Effects on PSD/NSR

EPA interprets the court's decision to vacate the PSD/NSR federal enforceability requirement in the Chemical Manufacturers case as causing an immediate change in how EPA regulations should be read, although EPA expects that the effect of this change will be limited. Specifically, provisions of the definitions of "Potential to emit" and related definitions requiring that physical or operational changes or limitations be "federally enforceable" to be taken into account in determining PSD/NSR applicability, the term "federally enforceable" should now be read to mean "federally enforceable or legally and practicably enforceable by a state or local air pollution control agency."[1]

[1]Both National Mining and Chemical Manufacturers directly addressed only the definition of potential to emit, and not related definitions that also employ the federal enforceability requirement, in particular, those related to netting. (See, e.g. , 40 CFR § 52.21 (b)(3)(vi)(b) providing that an emissions decrease is creditable only

For the reasons discussed below, however, the practical effects of the vacatur will be limited during the period prior to completion of new EPA rulemaking on this issue. During this. interim period, federal enforceability is still required to create "synthetic minor" new and modified sources in most circumstances pending completion of EPA's rulemaking.

First, EPA interprets the order vacating certain provisions of EPA regulations as not affecting the provisions of any current SIP, or of any permit issued under any current SIP. Thus,. previously issued federally enforceable permits, such as permits issued under federally enforceable state-operating permit programs under Title I ("FESOPPs") remain in effect. Likewise, EPA-approved state PSD and NSR SIP rules requiring that all pollution controls or operational restrictions limiting potential to emit be federally enforceable remain in place, even though such provisions may have been based on the now-vacated terms of EPA regulations.[2]

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if it is "federally enforceable.") The court's concerns regarding the adequacy of EPA's rationale, however, appear to extend to these netting provisions; consequently, EPA interprets the vacatur as extending to them as well. Conversely, EPA reads the vacatur as not extending to aspects of the PTE definition other than the federal enforceability provision. Such other aspects (e.g., determining a source's "maximum capacity" to emit in the absence of controls) were not at issue in the litigation and not addressed by the court decisions. In addition, EPA interprets Chemical Manufacturers as not addressing the regulatory requirements for federal enforceability of offsets used to comply with NSR requirements. CAA §173(a) expressly requires that any emissions reductions required as a precondition to the issuance of a nonattainment NSR permit to be "federally enforceable" before the permit may be issued. This requirement is not affected by the court decisions.

[2]The situation is somewhat different in the several states lacking approved PSD program , which are governed instead by the federal PSD program at 40 CFR § 52.21. (In most instances, these states have been delegated authority to issue PSD permits under the federal program pursuant to § 52.21(u).) Since these states do not have an EPA-approved PSD program, their SIPs presumably also lack state rules containing a blanket requirement that new or modified sources use only federally enforceable limits on PTE when seeking synthetic minor status to avoid PSD. Rather, sources in these states have been subject to the federal enforceability requirements of § 52.21. As noted above, Chemical Manufacturers vacated the requirements in § 52.21 that physical or operational changes be "federally enforceable" to be taken

Second, a new or modified source that seeks to lawfully avoid compliance with the "major" source requirements of either PSD or nonattainment NSR by limiting its potential to emit to achieve synthetic minor status must still obtain a general or "Minor" NSR preconstruction permit under section 110(a)(2)(C) of the Act and 40 C.F.R. § 51.160-164. Every SIP contains a minor NSR program that applies generally to new or modified sources of air pollutants,, without regard to whether those sources are "major." Permits under such programs are, like all other SIP measures, federally enforceable. See CAA section 113(b)(1); 40 CFR §52.23.[3] The requirement under section 110(a)(2)(C) to obtain a federally enforceable minor NSR permit was not at issue in the Chemical Manufacturers case, and is unaffected by the court's ruling.

As noted above, the court's action does not affect FESOPPs that many states have adopted as an additional mechanism for avoiding PSD/NSR or for creating an emissions reduction credit that may be tradeable to another source. Permits issued under such programs continue to be valid for purposes of limiting PTE. States are free to submit SIP revisions to remove such provisions in light of the vacatur, and to substitute mechanisms that are legally and practicably enforceable by the state for limiting potential to emit in some circumstances under the PSD/NSR program. However, we expect few states to do so pending the outcome of new EPA rulemaking on the broader federal enforceability issue.

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into account in determining the applicability of PSD to a proposed new source or modification. Accordingly, in states governed by §52.21, a limit that is either "federally enforceable or legally and practicably enforceable by a state or local air pollution control agency" may now be used in determining PSD applicability in some circumstances. The effect of the vacatur in these states is limited, however, because as discussed below, new and modified sources in these states are still subject to the requirement to obtain federally enforceable minor source permits.

[3] Consider, for example, an existing source in a moderate ozone nonattainment area that plans to add a new emissions unit that would have the potential to emit 100 tons per year ("TPY") of VOC if uncontrolled, and would therefore be considered a major modification subject to major NSR requirements, including a requirement to install pollution controls representing LAER that would reduce emissions in this instance by 90%. The source may instead seek to avoid major NSR by installing cheaper controls that reduce emissions by 61% and thereby limit the emissions increase to 39 TPY -- just below the "major" modification threshold. such a source would still need to obtain a minor NSR permit to construct the-new unit, and that permit would be federally enforceable.

Likewise, states conceivably might now seek to reduce the scope of SIP-approved minor NSR programs where they are presently broader than minimum federal requirements (e.g., to no longer cover changes at existing emissions units that reduce emissions to create a netting credit or tradeable emission reduction credit), and to substitute state enforceable mechanisms. Here also, however, EPA does not expect states to seek such changes pending the outcome of EPA rulemaking. In addition, regarding the minimum scope of minor NSR programs, section 110(a)(2)(C) provides that state minor NSR programs must regulate all new or modified sources was necessary" to insure consistency with air quality planning goals. Given the central role of new and modified synthetic minor sources in the overall PSD/NSR regulatory scheme, and the adverse environmental consequences if controls were not effective in limiting PTE, it is unlikely that states would have the legal ability to exclude from such programs transactions that are intrinsic to the avoidance of major NSR permitting requirements.

The principal immediate impact of the vacatur of the PSD/NSR federal enforceability regulations likely will occur in cases involving "netting" exercises at existing sources, where a source seeks to internally offset an emissions increase at a new or modified emissions unit by installing pollution controls or accepting operational limitations at another unit within the plant. For the reasons discussed above, in such cases the new or modified unit would still need to obtain a federally enforceable minor NSR permit. In contrast, the vacatur ordered by the court may allow the unit that is limiting its emissions to rely in some circumstances on controls that are legally and practicably ms enforceable by the state.[4] Note, however, that under the terms of many state minor NSR programs, the unit undergoing an emissions reduction would still need

[4]Consider, for example, an existing source like the one addressed above in Footnote 3, that also plans to install a new unit that would have, the potential to emit 100 tons per year of VOC per year if uncontrolled. In contrast to the earlier example, however, this source plans to avoid major NSR not by controlling the new unit, but instead by installing controls at another emissions unit at the plant whose baseline emissions are 100 TPY that will reduce actual emissions by 61 TPY. The overall result of this netting transaction is the same as in the earlier example: a net emissions increase of 39 TPY at the plant. The new unit would still need to obtain a minor NSR permit, and that permit would still be federally enforceable. In light of the vacatur in Chemical Manufacturers however, the existing unit that is adding controls now may be able to limit its PTE using a state-enforceable permit.

to be included in the minor NSR permit. Also, if the state's SIP has a general requirement that PTE limits be federally enforceable, the unit reducing emissions would still need a federally enforceable limit. Such programs would not be affected by the court's ruling. In sum, the precise impact of the vacatur on PSD/NSR applicability in any state can be definitively established only by reviewing the provisions of a particular SIP.

Effects an Section 112 and Title V.

The National Mining decision did not vacate the current definition of a major source under section 112 program in the General Provisions to Part 63, and neither of the court decisions addressed the definition of a major source for the title V program in 40 CFR part 70. Both of these current definitions, therefore, remain in effect. As discussed above, however, these regulations will be affected by the rulemaking EPA is conducting in response to the court decisions.

EPA today reiterates that independent from the decision in National Mining, current EPA policy already recognizes State-enforceable PTE limits under section 112 and Title V in many circumstances under a transition policy intended to provide for orderly implementation of these new programs under the Clean Air Act Amendments of 1990. This policy is set forth in a memorandum, "Options for Limiting the Potential to Emit (PTE) of a Stationary Source Under Section 112 and Title V of the Clean Air Act" (January 25, 1995). The transition policy is summarized below; as noted, EPA is now making one significant change in that policy in light of National Mining.

In recognition of the absence in some states of suitable federally enforceable mechanisms to limit PTE applicable to sources that might otherwise be subject to section 112 or Title V, EPA's policy provides for the consideration of State enforceable limits as a gap-filling measure during a transition period that extends until January 1997.[5] Under this policy, for the 2-year transition period, restrictions contained in state permits issued to sources that actually emit more than 50 percent, but less than 100 percent, of a relevant major source threshold are treated by EPA as acceptable limits on potential to emit, provided: (a) the permit and the restriction in particular are enforceable as a practical matter; (b) the source owner submits a written certification to EPA accepting EPA and citizen enforcement. In light of National Mining, EPA believes that the certification requirement is no longer appropriate as part

[5] Since PSD and nonattainment NSR are mature programs, minor NSR permits to limit PTE were available in all states well prior to enactment of the Clean Air Act Amendments of 1990. Hence, EPA's transition policy does not extend to those programs.

of this policy. Accordingly, EPA hereby amends the January 1995 transition policy by deleting the certification requirement.

In addition, under the transition policy, sources with consistently low levels of actual emissions relative to major source thresholds can avoid major source requirements even absent any permit or other enforceable limit an PTE. Specifically, the policy provides that sources which maintain their emissions at levels that do not exceed 50 percent of any applicable major source threshold are not treated as major sources and do not need a permit to limit PTE, so long as they maintain adequate records to demonstrate that the 50 percent level is not exceeded.

Under the terms of EPA's transition policy, the transition period is to end in January 1997. In addition, completion of EPA's rulemaking in response to the recent court decisions, which EPA anticipates will occur by early 1997, may render the transition policy unnecessary after that time. However, in conjunction with the rulemaking, EPA will consider whether it is appropriate to extend the transition period beyond January 1997.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Washington, D.C. 20460

JUN 13 1989

MEMORANDUM

SUBJECT: Guidance on Limiting Potential to Emit in New Source Permitting

FROM: Terrell E. Hunt
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Office of Enforcement and Compliance Monitoring

John S. Seitz, Director
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Office of Air Quality Planning and Standards

TO: Addressees

This memorandum transmits the final guidance on conditions in construction permits which can legally limit a source's potential to emit to minor or de minimis levels. We received many helpful comments on the January 24, 1989 draft of this guidance, and have incorporated the comments into the final document wherever possible. A summary of the major changes which have been made to the guidance in response to these comments is provided below.

Several commenters noted that the draft guidance used the term "federally enforceable" to mean both federally enforceable as defined in the new source regulations (40 C.F.R. Sections 52.21(b) (17), 51.165(a) (1) (xiv), 51.166(b) (17)), and enforceable as a practical matter. We have tried to distinguish the places where each term should be used, explained the relationship between the two terms, and indicated that in order to properly restrict potential to emit, limitations must be both federally enforceable as defined in the regulations and practically enforceable.

Some commenters requested that the section on averaging times for production limits be more specific as to when it is appropriate to use limitations which exceed a one month time basis. We have tried to explain why it is not possible to develop generic criteria for making this distinction, and to indicate situations where exceptions to the policy that production and operation limitations not exceed one month may be warranted.

There were some requests for a section on enforcement. We have included a new Section VI which addresses this topic. We also received many good suggestions on the example permit limitations. The section on examples has been substantially reworked to reflect your comments.

Finally, we learned through the comments that in two specific circumstances, short term emission limits are the most useful and reasonable way to restrict and verify limits on potential to emit. These circumstances are: 1) when control equipment is installed but control equipment operating parameters are difficult to measure during enforcement inspections; and 2) in surface coating operations with numerous and unpredictable use of coatings containing varying VOC content, where add-on control equipment is not employed. Therefore, we have made a narrow exception to the flat prohibition on use of emission limits to restrict potential to emit for these specific circumstances, and only when certain additional conditions have been met.

Again, we appreciate the thoughtful comments we have received on this guidance. Please insert this document into your Clean Air Act Compliance/Enforcement Policy Compendium as Item Number H.3. If you have any questions, please contact Judith Katz in the Air Enforcement Division at FTS 382-2843, or Sally Farrell in the Stationary Source Compliance Division at FTS 382-2875.

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DOJ

LIMITING POTENTIAL TO EMIT IN NEW SOURCE PERMITTING

JUNE 13, 1989

AIR ENFORCEMENT DIVISION
OFFICE OF ENFORCEMENT AND COMPLIANCE MONITORING

STATIONARY SOURCE COMPLIANCE DIVISION
OFFICE OF AIR QUALITY PLANNING AND STANDARDS

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2. Sham permits are not allowed by the definition of potential to emit: 40 CFR 52.21(b) (4), 51.165(a) (1) (iii), 51.166(b) (4)

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Limiting Potential to Emit in New Source Permitting

I. Introduction

Whether a new source or modification is major and subject to new source review under Parts C and D of the Clean Air Act is dependent on whether that source or modification has or will have the potential to emit major or significant amounts of a regulated pollutant. Therefore, the definition of "potential to emit" under the new source regulations is extremely important in determining the applicability of new source review to a particular source. The federal regulations define "potential to emit" as:

> the maximum capacity of a stationary source to emit a pollutant under its physical and operational design. Any physical or operational limitation on the capacity of the source to emit a pollutant, including air pollution control equipment and restrictions on hours of operation or on the type or amount of fuel combusted, stored or processed, shall be treated as part of its design if the limitation or the effect it would have on emissions is federally enforceable.

40 C.F.R Sections 52.21(b) (4), 51.165(a) (1) (iii), 51.166(b) (4).

Permit limitations are very significant in determining whether a source is subject to major new source review. This is because they are the easiest and most common way for a source to obtain restrictions on its potential to emit. A permit does not

have to be a major source permit to legally restrict potential emissions. A minor source construction permit issued pursuant to a state program approved by EPA as meeting the requirements of 40 C.F.R. Section 51.160 is federally enforceable. In fact, any permit limitation can legally restrict potential to emit if it meets two criteria: 1) it is federally enforceable as defined by 40 C.F.R. Sections 52.21(b) (17), 51.165(a) (1) (xiv), 51.166(b) (17), i.e., contained in a permit issued pursuant to an EPA-approved permitting program or a permit directly issued by EPA, or has been submitted to EPA as a revision to a State Implementation Plan and approved as such by EPA; and 2) it is enforceable as a practical matter. The second criterion is an implied requirement of the first criterion. A permit requirement may purport to be federally enforceable, but, in reality cannot be federally enforceable if it cannot be enforced as a practical matter.

Non-permit limitations can also legally restrict potential to emit. These limitations include New Source Performance Standards codified at 40 C.F.R. Part 60 and National Emission Standards for Hazardous Air Pollutants codified at 40 C.F.R. Part 61.

The appropriate means of restricting potential to emit through permit conditions has been an issue in recent enforcement cases. Through these cases and through guidance issued by EPA, the Agency has addressed three questions: what types of permit

limitations can legally limit potential to emit; whether long averaging times for production limitations are enforceable as a practical matter; and whether sources may limit potential to emit to minor source levels as a means of circumventing the preconstruction review requirements of major source review.

II. The Louisiana-Pacific Case

In United States v. Louisiana-Pacific Corporation, 682 F. Supp. 1122 (D. Colo. Oct. 30, 1987) and 682 F. Supp. 1141 (D. Colo. March 22, 1988), Judge Alfred Arraj discussed the type of permit restrictions which can be used to limit a source's potential to emit. The Judge concluded that:

> ... not all federally enforceable restrictions are properly considered in the calculation of a source's potential to emit. While restrictions on hours of operation and on the amount of materials combusted or produced are properly included, blanket restrictions on actual emissions are not.

682 F. Supp. at 1133.

The Court held that Louisiana-Pacific's permit conditions which limited carbon monoxide emissions to 78 tons per year and volatile organic compounds to 101.5 tons per year should not be considered in determining "potential to emit" because these blanket emission limits did not reflect the type of permit conditions which restricted operations or production such as limits on hours of operation, fuel consumption, or final product.

The Louisiana-Pacific court was guided in its reasoning by the D.C. Circuit's holding in Alabama Power v. Costle, 636 F. 2d 323 (D.C. Circuit 1979). Before Alabama Power, EPA regulations required potential to emit to be calculated according to a source's maximum uncontrolled emissions. In Alabama Power, the D. C. Circuit remanded those regulations to EPA with instructions that the Agency include the effect of in-place control equipment in defining potential to emit. EPA went beyond the minimum dictates of the D.C. Circuit in promulgating revised regulations in 1980 to include, in addition to control equipment, any federally enforceable physical or operational limitation. The Louisiana-Pacific court found that blanket limits on emissions did not fit within the concept of proper restrictions on potential to emit as set forth by Alabama Power.

Moreover, Judge Arraj found that:

> ...a fundamental distinction can be drawn between the federally enforceable limitations which are expressly included in the definition of potential to emit and (emission) limitations.... Restrictions on hours of operation or on the amount of material which may be combusted or produced ... are, relatively speaking, much easier to "federally enforce." Compliance with such conditions could be easily verified through the testimony of officers, all manner of internal correspondence and accounting, purchasing and production records. In contrast, compliance with blanket restrictions on actual emissions would be virtually impossible to verify or enforce.

Id. Thus, Judge Arraj found that blanket emission limits were not enforceable as a practical matter.

Finally, the Court reasoned that allowing blanket emission limitation to restrict potential to emit would violate the intent of Congress in establishing the Prevention of Significant Deterioration (PSD) program.

III. Types of Limitations that will Restrict Potential to Emit

As an initial matter in this discussion, a few important terms should be defined. Emission limits are restrictions over a given period of time on the amount of a pollutant which may be emitted from a source into the outside air. Production limits are restrictions on the amount of final product which can be manufactured or otherwise produced at a source. Operational limits are all other restrictions on the manner in which a source is run, including hours of operation, amount of raw material consumed, fuel combusted, or conditions which specify that the source must install and maintain add-on controls that operate at a specified emission rate or efficiency. All production and operational limits except for hours of operation are limits on a source's capacity utilization. Potential emissions are defined as the product of a source's emission rate at maximum operating capacity, capacity utilization, and hours of operation.

To appropriately limit potential to emit consistent with the opinion in Louisiana-Pacific, all permits issued pursuant to 40 C.F.R. Sections 51.160, 51.166, 52.21 and 51.165 must contain a

production or operational limitation in addition to the emission limitation in cases where the emission limitation does not reflect the maximum emissions of the source operating at full design capacity without pollution control equipment. Restrictions on production or operation that will limit potential to emit include limitations on quantities of raw materials consumed, fuel combusted, hours of operation, or conditions which specify that the source must install and maintain controls that reduce emissions to a specified emission rate or to a specified efficiency level. Production and operational limits must be stated as conditions that can be enforced independently of one another. For example, restrictions on fuel which relates to both type and amount of fuel combusted should state each as an independent condition in the permit. This is necessary for purposes of practical enforcement so that, if one of the conditions is found to be difficult to monitor for any reason, the other may still be enforced.

When permits contain production or operational limits, they should also have recordkeeping requirements that allow a permitting agency to verify a source's compliance with its limits. For example, permits with limits on hours of operation or amount of final product should require an operating log to be kept in which the hours of operation and the amount of final product produced are recorded. These logs should be available

for inspection should staff of a permitting agency wish to check a source's compliance with the terms of its permit.

When permits require add-on controls operated at a specified efficiency level, permit writers should include, so that the operating efficiency condition is enforceable as a practical matter, those operating parameters and assumptions which the permitting agency depended upon to determine that the control equipment would have a given efficiency.

An emission limitation alone would limit potential to emit only when it reflects the absolute maximum that the source could emit without controls or other operational restrictions. When a permit contains no limits on capacity utilization or hours of operation, the potential to emit calculation should assume operation at maximum design or achievable capacity (whichever is higher) and continuous operation (8760 hours per year).

The particular circumstances of some individual sources make it difficult to state operating parameters for control equipment limits in a manner that is easily enforceable as a practical matter. Therefore, there are two exceptions to the absolute prohibition on using blanket emission limits to restrict potential to emit. If the permitting agency determines that setting operating parameters for control equipment is infeasible in a particular situation, a federally enforceable permit

containing short term emission limits (e.g. lbs per hour) would be sufficient to limit potential to emit, provided that such limits reflect the operation of the control equipment, and the permit includes requirements to install, maintain, and operate a continuous emission monitoring (CEM) system and to retain CEM data, and specifies that CEM data may be used to determine compliance with the emission limit.

Likewise, for volatile organic compound (VOC) surface coating operations where no add-on control is employed but emissions are restricted through limiting VOC contents and quantities of coatings used, emission limits may be used to restrict potential to emit under the following limited circumstances. If the permitting agency determines for a particular surface coating operation that operating and production parameters (e.g. gallons of coating, quantities produced) are not readily limited due to the wide variety of coatings and products and due to the unpredictable nature of the operation, emission limits coupled with a requirement to calculate daily emissions may be used to restrict potential to emit. The source must be required to keep the records necessary for this calculation, including daily quantities and the VOC content of each coating used. Emission limits may be used in this limited circumstance to restrict potential to emit since, in this case, emission limits are more easily enforceable than operating or production limits.

IV. Time Periods For Limiting Production and Operation

As discussed above, a limitation specifically recognized by the regulations as reducing potential to emit is a limitation on production or operation. However, for these limitations to be enforceable as a practical matter, the time over which they extend should be as short term as possible and should generally not exceed one month. This policy was explained in a March 13, 1987 memorandum from John Seitz to Bruce Miller, Region IV. The requirement for a monthly limit prevents the enforcing agency from having to wait for long periods of time to establish a continuing violation before initiating an enforcement action.

EPA recognizes that in some rare situations, it is not reasonable to hold a source to a one month limit. In these cases, a limit spanning a longer time is appropriate if it is a rolling limit. However, the limit should not exceed an annual limit rolled on a monthly basis. EPA cannot now set out all inclusive categories of sources where a production limit longer than a month will be acceptable because every situation that may arise in the future cannot now be anticipated. However, permits where longer rolling limits are used to restrict production should be issued only to sources with substantial and unpredictable annual variation in production, such as emergency

boilers. Rolling limits could be used as well for sources which shut down or curtail operation during part of a year on a regular seasonal cycle, but the permitting authority should first explore the possibility of imposing a month-by-month limit. For example, if a pulp drier is periodically shut down from December to April, the permit could contain a zero hours of operation limit for each of those months, and then the appropriate hourly operation limit for each of the remaining months. Under no circumstances would a production or operation limit expressed on a calendar year annual basis be considered capable of legally restricting potential to emit.

V. Sham Operational Limits

In the past year, several sources have obtained purportedly federally enforceable permits with operating restrictions limiting their potential to emit to minor or de minimis levels for the purpose of allowing them to commence construction prior to receipt of a major source permit. In such cases where EPA can demonstrate an intent to operate the source at major source levels, EPA considers the minor source construction permit void ab initio and will take appropriate enforcement action to prevent the source from constructing or operating without a major source permit.

The following example illustrates the kind of situation addressed in this section: An existing major stationary source proposes to add a 12.5 megawatt electric utility steam generating unit, and applies for a federally enforceable minor source permit which restricts operation at the unit to 240 hours per year. Because the project is designed as a baseload facility, EPA does not believe that the source intends to operate the facility for only 240 hours a year. Further investigation would probably uncover documentation of the source's intent to operate at higher levels than those for which it is permitted.

This situation raises the question of whether a source can lawfully bypass the preconstruction or premodification review requirements of Prevention of Significant Deterioration (PSD) and nonattainment New Source Review by committing to permit conditions which restrict production to a level at which the source does not intend to operate for any extensive time. If, after constructing and commencing operation, the source obtains a relaxation of its original permit conditions prior to exceeding them, does this constitute a violation of the preconstruction review requirements? This section discusses why it is improper to construct a source with a minor source permit when there is intent to operate as a major source, and provides guidelines for identifying these "sham" permits.

A. Permits with conditions that do not reflect a source's planned mode of operation are void ab initio and cannot act to shield the source from the requirement to undergo preconstruction review.

1. Sham permits are not allowed by 40 CFR Section 52.21(r) (4) Section

52.21(r) (4) states:

> At such time that a particular source or modification becomes a major stationary source or major modification solely by virtue of a relaxation in any enforceable limitation which was established after August 7, 1980 on the capacity of the source or modification otherwise to emit a pollutant, such as a restriction on hours of operation, then (PSD) shall apply to the source or modification as though construction had not yet commenced on the source or modification.

When a source that is minor because of operating restrictions in a construction permit later applies for a relaxation of that construction permit which would make the source major, Section 52.21(r) (4) prescribes the methodology for determining best available control technology (BACT). However, it does not foreclose EPA's ability, in addition to the retroactive application of BACT and other requirements of the PSD program, to pursue enforcement where the Agency believes that the initial minor source permit was a sham. EPA will limit its activity to requiring application of 40 CFR 52.21(r) (4) only for the cases where a source legitimately changes a project after finding that the operating restrictions which were taken in good faith cannot be complied with. Whether a source has acted in good faith is a factual question which is answered by available evidence in the particular case.

2. Sham permits are not allowed by the definition of potential to emit:

40 C.F.R. Sections 52.21(b) (4), 51.165(a) (1) (iii), 51.166(b) (4).

The definition of potential to emit enables sources to obtain federally enforceable permits with operational restrictions as a means of limiting emissions to minor source levels. However, implicit in the application of these limitations is the understanding that they comport with the true design and intended operation of the project.

3. Sham permits are not allowed by the Clean Air Act

Parts C and D of the Clean Air Act exhibit Congress's clear intent that new major sources of air pollution be subject to preconstruction review. The purposes for these programs cannot be served without this essential element. Therefore, attempts to expedite construction by securing minor source status through the receipt of operational restrictions from which the source intends to free itself shortly after operation are to be treated as circumvention of the preconstruction review requirements.

B. Guidelines for determining when minor source construction permits are shams.

EPA's determination that a purportedly federally enforceable construction permit is a sham is made based on an evaluation of specific facts and evidence in each individual case. The following are criteria which should be scrutinized when making such a determination:

1. Filing a PSD or nonattainment NSR permit application

If a major source or major modification permit application is filed simultaneously with or at approximately the same time as the minor source construction permit, this is strong evidence of an intent to circumvent the requirements of preconstruction review. Even a major source application filed after the minor source application, but either before operation has commenced or after less than a year of operation should be looked at closely.

2. Applications for funding

Applications for commercial loans or, for public utilities, bond issues, should be scrutinized to see if the source has guaranteed a c ertain level of operation which is higher than that in its construction permit. If the project would not be funded or if it would not be economically viable if operated on an extended basis

(at least a year) at the permitted level of production, this should be considered as evidence of circumvention.

3. Reports on consumer demand and projected production levels.

Stockholder reports, reports to the Securities and Exchange Commission, utility board reports, or business permit applications should be reviewed for projected operation or production levels. Ifreported levels are necessary to meet projected consumer demand but are higher than permitted levels, this is additional evidence of circumvention.

4. Statements of authorized representatives of the source regarding plans for operation.

Statements by representatives of the source to EPA or to state or local permitting agencies about the source's plans for operation can be evidence to show intent to circumvent preconstruction review requirements.

Note that if a determination is made that a permit is a "sham" for one pollutant and, therefore, the source is a major source or major modification, the permit may possibly still contain valid limits on potential to emit for other pollutants.

In such cases, the entire source must still go through new source review, during which, for PSD review, all pollutants for which there is a net significant increase must be analyzed for BACT. In nonattainment new source review, new sources must have LAER determinations only for pollutants for which they are major. Major modifications, however, must have LAER determinations for all nonattainment pollutants emitted in significant amounts. If the valid limits in a partially void minor source construction permit keep certain pollutants below significance levels, then those pollutants would not have to be analyzed for BACT or LAER. However, if a source or modification is determined to be major for PSD or NSR because part of its minor permit is deemed void, it would have to undergo BACT or LAER analysis for all significant pollutants.

VI. Enforcement Procedures

This guidance has discussed permit conditions which will legally restrict potential to emit, shielding a source from the requirement to comply with major new source permitting regulation. Failure by a permitting agency to adhere to these guidelines may result in a permit that does not legally restrict potential to emit, thereby subjecting a source to major new source review. If that source has not gone through preconstruction review, it is a significant violator of the Clean Air Act and is subject to enforcement for constructing or

modifying without a major new source permit.

The enforcement options available to EPA in these situations include administrative action under Sections 167 or 113 (a) (5) of the Act or federal judicial action under Sections 113 (b) (2), 113 (b) (5), 113(c), or 167. Which enforcement option is selected depends on the facts of the particular situation. (See July 15, 1988 guidance on EPA Procedures for Addressing Deficient New Source Permits.)

VII. Examples

The following examples are provided to illustrate the type of permit restrictions which would and would not legally limit potential to emit to less than major source thresholds. These examples are provided for purposes of clarifying the potential to emit and averaging time guidance only. They are not intended to reflect all the permit conditions necessary for a valid permit. Specific test methods, compliance monitoring and recordkeeping and reporting requirements are necessary to make permit limitations enforceable as a practical matter. The use of examples where averaging times are the longest times allowed under EPA policies is not intended to necessarily condone the selection of the longest averaging times; averaging times should in practice be as short as possible.

1. The minor source construction permit for a boiler contains the following restrictions: 250,000 gal fuel/month; 0.8% S fuel; 8000 hours/year.

These conditions are federally enforceable production and operation limits, but do not limit potential to emit because one of them does not meet EPA policies on enforceability as a practical matter. The averaging time for hours of operation, one of the operational limits necessary to restrict emissions to less than 250 tpy, exceeds a monthly or rolling yearly limit. If, instead of 8000 hours/year, the hourly restriction were stated as 666 hours/month, the permit would serve to keep the source a minor source, assuming the permit contains appropriate recordkeeping provisions.

2. A waferboard plant which has the physical capacity to emit over 300 tpy of carbon monoxide in the absence of using specific combustion techniques has the following permit restriction as the sole emission limitation: 249 tpy.

This does not limit potential to emit since an operational or production restriction is necessary for the source to be restricted to 249 tpy. The permit must contain a restriction on hours of operation or capacity utilization which, when multiplied by the maximum emission rate for the CO sources at the plant, results in emissions of 249 tpy. Additionally, while the

emission limit alone cannot restrict potential to emit, the emission limit is unenforceable as a practical matter since it is limited on an annual basis. The permit should contain a short term emission limit (in addition to the annual emission limit), consistent with the compliance period or parameter in the applicable test method for determining compliance.

3. A small scale rock crushing plant that cannot emit more than 240 tpy under maximum operation without controls (including plant-wide particulate emissions from transfer and storage operations) has the following permit restriction as the sole emission limitation: 240 tpy particulate matter.

Since no operational limitations are necessary for the source to emit below 250 tpy, no operational restrictions need be in the permit to limit potential to emit. However, although this is not a major source, the state agency should express the emission limit in this permit as a lb/hour measure or gr/dscf so that it will be enforceable as a practical matter.

4. A plant consisting solely of a small rock crusher has the following permit restrictions: 0.05 lb gr PM/dscf; fabric filter must be employed and maintained at 99% efficiency.

Assuming that maintaining the fabric filter at 99% efficiency will result in emissions of less than 250 tpy, this permit would limit

potential to emit if it also contained either 1) parameters that allowed the permitting agency to verify the fabric filter's operating efficiency or 2) a requirement to install and operate continuous opacity monitors (COMs) and a specification that COM data may be used to verify compliance with emission limits. Note that if this second alternative were adopted, it would not be necessary to require that the fabric filter be maintained at 99% efficiency.

To determine potential to emit, the efficiency rate of the fabric filter would be multiplied by the maximum uncontrolled emission rate, the maximum number of operating hours and maximum throughput capacity since there are no other operating or production limits. However, the efficiency rate of the fabric filter would not be enforceable as a practical matter unless there were an enforceable means to monitor ESP performance on a short term basis. The two alternatives mentioned above would satisfy this requirement.

5. A surface coating operation has the capability of utilizing 15,000 gal coating/month, with the following permit restrictions: 3.0 lb VOC/gal coating minus water; 20.5 tons VOC/month; monthly VOC emissions to be determined from records of the daily volumes of coatings used times the manufacturers specified VOC content.

This does not limit potential to emit since the source has the physical capacity to exceed 250 tpy of VOC, and the permit does not contain a production or an operational limitation. A monthly limit on gallons of coating used which when multiplied by 3.0 lb/gal equates to less than the 250 tpy threshold 13,500 gallons/month), with appropriate recordkeeping, would generally be necessary to limit potential to emit. If, however, the permitting agency determines, due to the wide variety of coatings employed and products produced, that restrictions on operation or production are not practically enforceable, then the above emission limits could restrict potential to emit if there are requirements that the source calculate emissions daily, and keep the appropriate records.

If the source was alternatively to meet the 20.5 ton/month limit by employing add-on controls, the permit would need to contain an operational limit, such as the requirement to install and operate an incinerator at 99% efficiency. A requirement to monitor incinerator efficiency (either directly or indirectly via temperature monitoring for example), and appropriate recordkeeping retirements to verify compliance with each of the permit conditions would also be necessary to make the permit conditions enforceable as a practical matter. Note, however, that in the case where add-on controls are employed, the source may be able to meet a shorter term emission limit than the ton per month figure.

VIII. Conclusion

We hope this guidance will help EPA Regions identify sources which have the potential to emit major amounts of an air pollutant which will subject those sources to the requirements of preconstruction new source review. Every source which is subject to these requirements but has not obtained a major new source permit should be seriously considered for enforcement action.

MEMORANDUM

From: Christian Fellner

To: Coal Preparation NSPS Docket (EPA-HQ-OAR-2008-0260)

Date: April, 2008

Subject: Model Plant Control Costing Estimates for Units Subject to the NSPS for Coal Preparation Plants (40 CFR Part 60, Subpart Y).

Introduction

This memorandum presents the control costs of different control scenarios on 6 model plants chosen to represent the range of different future coal preparation plants (CPP) subject to 40 CFR Part 60, Subpart Y. The costing for controls is based on total PM emissions, PM_{30}. According to AP-42, PM_{10} accounts for approximately 47% of total PM and $PM_{2.5}$ accounts for approximately 7% of total PM emissions.

The emission factors used to determine the uncontrolled rates and the assumed control levels of the various control options have an inherent level of uncertainty and are dicussed in more detauil in the emissions factors memo. The primary assumptions influencing the fabric filter costs are the assumed flow rate, the air to cloth ratio, and the hours of operation. To determine typical sizes of the air flow rates of fabric filters at coal preparation plants EPA reviewed four permits for coal-fired power plants that included the size of the fabric filters. These sizes are presented in Table 1.

Table 1: Typical Air Flow Rates at Coal Preparation Plants

Power Plant	Approximate size of Coal Preparation Plant (ton/hr)	Total Combined Airflow of all Fabric Filters (cfm)	Airflow Rate per Ton of Coal (cf/ton)
Rocky Mountain Power	75	50,000	40,000
Deseret	180	32,000	11,000
Intermountain	1,100	389,500	21,000
Cholla	2,200	153,400	4,200

As seen in Table 1, the air flow rates vary depending on the overall coal preparation plant design. EPA used the range of airflow rates from table 1 as a guide when sizing the required fabric filter sizes for the model coal preparation plants. Due to this uncertainty, we attempted to be conservative in our costing analysis and might have overestimated the incremental costs of fabric filters.

Model Plants

The model plants chosen for this effort are as follows:

- **Model Plant A** – a 1,000 ton/hr capacity coal preparation plant located at an Eastern bituminous underground mine
- **Model Plant B** – a 30 ton/hr coal preparation plant located at an industrial facility
- **Model Plant C** – a 30 ton/hr coal preparation plant located at a Portland cement plant
- **Model Plant D** – a 200 ton/hr coal preparation plant located at an electric utility power plant
- **Model Plant E** – a 200 ton/hr coal preparation plant located at a coke-making facility
- **Model Plant F** – a 2,000 ton/hr coal preparation plant located at a Western subbituminous (Powder River Basin) surface coal mine

Assumptions

We are assuming that all newly constructed CPPs will have enclosures around their crushing, screening, transfer points, coal receiving, loading operations, and conveyors and no enclosure construction costs are included in the analysis. Enclosures are advantageous to protect coal from wind and other weather conditions.

Based on information from vendors of chemical dust suppression systems, we estimated the capital cost of installing all aspects of a chemical dust control system at larger coal receiving facilities as $70,000. Smaller coal receiving operations would have capital costs of $25,000. These costs (in both cases) include all headers, nozzles, chemical feed system, bulk chemical storage tank, and the program logic control (PLC) system to control the amount of chemical mixture applied. Transfer points would require a much smaller chemical dust suppression application system, costing $2,000 in capital costs per installation.

The latency of the chemical dust suppressant is an important design parameter in chemical dust suppression, and when we describe chemical dust suppression, we are costing the application of a surfactant plus a binder, as opposed to just a surfactant. A surfactant controls dust until the coal is dry while the use of a binder in combination with a surfactant binds the dust particles until the coal is crushed or worked. Therefore, we determined the number of chemical dust suppression spray sites at each site depending on whether the coal will be crushed after its initial application. To account for the amount of inherent dust control at other process points in the coal preparation process after chemical application upstream (conveyors and transfer points), we chose a dust control of 85%. The cost per ton of chemical dust suppressant is calculated overall at a coal preparation plant on the total tonnage of coal processed not separately at each application. However, in this analysis, in order to spread out the cost of the chemical amongst multiple chemical application points, a percentage of the total annual cost is borne by each application point (see model plant specific discussions for these percentages). Additional capital and chemical costs are included in each applicable model plant to account for chemically treating open storage piles.

Cost Estimation Procedure

The emissions factors used in this analysis (and their underlying equations, if applicable) are listed in Table 2. All of these emission factors were taken from EPA's AP-42 emission factors, the CHEER study, or the National Pollution Inventory.

Table 2: PM Emission Factors Used for Costing

Operation	Factor
Coal Receiving Facilities	0.014 lb PM per ton coal processed
Coal Pile Storage – Load In	E (lbs/ton) = (k) 0.0032 $((U/5)^{1.3} /(M/2)^{1.4}$
Coal Pile Storage – Load Out	E (lbs/ton) = (k) 0.0032 $((U/5)^{1.3} /(M/2)^{1.4}$
Active Coal Storage Piles – Wind Erosion	8.6 lbs per acre-day
Inactive Coal Storage Piles – Wind Erosion	3.5 lbs per acre-day
Primary Crushing	0.020 lb per ton coal processed
Secondary Crushing	0.060 lb per ton coal processed
Screening	0.10 lb per ton coal processed
Transfer Points	E (lbs/ton) = (k) 0.0032 $((U/5)^{1.3} /(M/2)^{1.4}$
Conveying Operations (per 100 yards)	E (lbs/ton) = (k) 0.0032 $((U/5)^{1.3} /(M/2)^{1.4}$
Product Loading	E (lbs/ton) = (k) 0.0032 $((U/5)^{1.3} /(M/2)^{1.4}$

PM = Total Particulate Matter
E = Emission Factor
k = Particle size multiplier; 0.74 for PM_{30}
U = wind speed in mph
M = Surface moisture content

Assumptions:

- All costs are in 2006 dollars
- Operating labor rate (baghouse): $15.82/hr (based on 2006 Federal Bureau of Labor Statistics)
- Maintenance labor rate ($/hr): Calculated by costing spreadsheet as being equal to 1.1 times the operating labor rate or $17.40/hr
- All baghouses have a 20 year life and are of a common-housing pulse-jet design equipped with fiberglass bags that have a useful life of 2 years
- Baseline control cost for electricity for pumps supplying chemical to suppression system is estimated at 20% of baghouse electricity use for induced draft (ID) fan for the corresponding baghouse
- Power cost: $0.062/kWh (EIA's 2006 cost for electricity used by industrial customers taken from EIA's Average Retail Price of Electricity to Ultimate Customers by End-Use Sector)
- Baseline control cost for maintenance on equipment: 5% of capital cost
- Baseline control cost for capital recovery: 12% of capital cost
- The crushing and screening are done in a single enclosure (i.e., crusher house)
- No additional costs are assumed for storage silos or totally enclosed storage piles as these sources are currently covered by subpart Y and the proposed amendments would not require additional control
- No credit is given for the coal (i.e. product) that is saved for sale or use as a result of controlling losses
- We are also assuming that all PM removal percentages (e.g., fabric filter, chemical dust suppression treatments, and wetted materials) control PM equally across all model plant sizes
- Storage piles are assumed to be coned shaped. Short term pile height is 75% of pile radius and long term pile height is 50% of pile radius

Model Plant A – a 1,000 ton/hr capacity coal preparation plant located at an Eastern bituminous underground mine

In this model plant, the coal is brought by conveyor from the mine and is feed to the crusher house. The crushers crush the coal down to a specific maximum size. The crushed coal is dropped onto a conveyor that deposits it to a screening operation. This screening operation sizes the coal into coarse and fine coal fractions. During the screening operation, the coarse coal fraction is dropped to the heavy media area of the coal preparation plant where further fugitive PM emissions are unlikely. The remaining fine coal fractions precede though a mechanical dewatering processes (used to reduce surface moisture and dry the coal). The processed coal is dropped onto a conveyor that deposits it into the coal stacker which stacks the coal into a short-term coal storage pile. The coal is then transported to a product loader which loads the coal into railcars for delivery.

The assumptions used for this model plant are as follows:

- Mean Wind Speed: 10 MPH[1] (for use in AP-42 fugitive emission factor equation)
- Material Moisture Content:[2] 1.85% (for use in AP-42 fugitive emission factor equation)
- Coal Preparation plant operation: 24 hr/d with 40 hr/yr down time for maintenance (8,720 hr/yr)
- Because the product loading is used only when rail cars are moved into position the loading facility is assumed to operate only 35 percent of the total hours, or 3,052 hr/yr
- Number of transfer points: 2
- No long-term storage pile
- Length of conveyors: 400 yards
- Inlet dust loading (baghouse): 4 gr/ft^3
- Cost of chemical dust suppressant: $0.03/ton
- Baseline option: 60% of the chemical dust suppressant cost is accounted for at the crusher house, 40% of the chemical dust suppressant cost is accounted for at the product loading facility
- Baseline capital cost for product loading chemical dust suppression system is $70,000
- Baseline capital cost for crusher house chemical dust suppression system is $70,000
- Chemical dust suppression maintenance labor costs are as follows:
  - Coal receiving facility (in this plant's case the crusher house): 30 minute/day * 365 d/yr = 182.5 hr/yr, maintenance labor cost $3,176/yr
  - Product loading facility: 30 minutes/week * 52 weeks/yr = 26 hr/yr, maintenance labor cost $452/yr

[1] This is the mean wind speed for most of the eastern half of the U.S. The government's Renewable Resource Data Center (RReDC)/National Renewable Energy Laboratory (NREL) website states 9.9 MPH.

[2] This is essentially the surface moisture content but is not listed as such in AP-42. We are assuming 1.85% for bituminous coals and 1% for PRB coal. While these values will vary, it is important to have a difference between the two types of coal to account for the extra dusting of the PRB coal. Although PRB coal has higher inherent moisture content its surface moisture level is usually lower than Eastern bituminous coal.

Modeled baghouse sizes:

- Crusher house: 25,000 acfm
- Conveyors: 10,000 acfm (miscellaneous extra baghouse)
- Transfer towers: 10,000 acfm (x2)
- Product loading: 100,000 acfm

The emission sources and the control efficiencies chosen for this model plant are shown in Table 3.

Table 3: Emission Sources, Control Strategy, and Control Efficiencies for Model Plant A

Emission Source	Control Strategy	Control Efficiency
Crusher house (coal transfer, primary crushing, secondary crushing, and screening)		
Baseline	Full enclosure with spraying of chemical suppressant	98%
Option A	Full enclosure vented to a baghouse	99%
Transfer points		
Baseline	Full enclosure and inherent chemical latency	85%
Option A	Full enclosure vented to a baghouse	99%
Conveying operations		
Baseline	Partial enclosure and inherent chemical latency	85%
Option A	Full enclosure vented to a baghouse	99%
Product Loading		
Baseline	Full enclosure with spraying of chemical suppressant	97%
Option A	Full enclosure vented to a baghouse.	99%

Model Plant B – a 30 ton/hr coal preparation plant located at an industrial facility (~ 300 MMBtu/hr boiler)

In this model plant, the coal is unloaded in a fully enclosed railcar coal receiving facility and transferred to a short-term coal storage pile. The coal is then transferred into a crusher operation (secondary crushing only), and then the crushed coal is transferred to a screening operation. This correctly-sized coal is then dropped onto a conveyor that deposits it into storage silo(s).

The assumptions used for this model plant are as follows:

- Mean Wind Speed: 10 MPH (for use in AP-42 fugitive emission factor equation)
- Material Moisture Content: 1.85% (for use in AP-42 fugitive emission factor equation)
- Coal Preparation plant operation: 7.8hr/d (2,800hr/yr)
- Because the coal receiving operation uses rail cars it is assumed to operate only 15 percent of the total hours, or 420 hr/yr
- Short-term Storage Pile Acreage: 0.08 acres
- Number of transfer points: 1
- No long-term storage pile
- Length of conveyors: 200 yards
- Inlet dust loading (baghouse): 4 gr/ft^3
- Cost of chemical dust suppressant: $0.03/ton
- Baseline option: 40% of the chemical dust suppressant cost is accounted for at the coal receiving facility and 60% of the chemical dust suppressant cost is accounted for at the crusher house, respectively
- Baseline capital cost for coal receiving chemical dust suppression system: $25,000
- Baseline capital cost for crusher house chemical dust suppression system: $2,000
- Capital cost for stackout short-term coal storage pile chemical dust suppression system: $25,000 (Addition $0.03/ton for additional chemical)
- Chemical dust suppression maintenance labor costs are as follows:
    - Rotary car dump (coal receiving facility): 30 minutes/week * 52 weeks/yr = 26 hr/yr, maintenance labor cost $452/yr
    - Crusher house: 30 minutes/day * 365 d/yr = 182.5 hr/yr, maintenance labor cost $3,176/yr
    - Stackout operation: 1 hr/week * 52 weeks/yr = 52 hr/yr, maintenance labor cost $905/yr

Modeled baghouse sizes:

- Coal receiving: 15,000 acfm
- Crusher house: 5,000 acfm
- Transfer tower: 5,000 acfm
- Conveyors: 5,000 acfm (miscellaneous extra baghouse)

The emission sources and the control efficiencies chosen for this model plant are shown in Table 4.

Table 4: Emission Sources, Control Strategy, and Control Efficiencies for Model Plant B

Emission Source	Control Strategy	Control Efficiency
Coal receiving		
Baseline	Full enclosure with spraying of chemical suppressant	97%
Option A	Full enclosure vented to a baghouse	99%
Crusher house (secondary crushing and screening)		
Baseline	Full enclosure with spraying of chemical suppressant	98%
Option A	Full enclosure vented to a baghouse	99%
Transfer point		
Baseline	Full enclosure and inherent chemical latency	85%
Option A	Full enclosure vented to a baghouse	99%
Conveying operations		
Baseline	Partial enclosure and inherent chemical latency	85%
Option A	Full enclosure vented to a baghouse	99%
Short-term Coal Pile Load In		
Baseline	Inherent chemical latency	85%
Option A	Spraying of chemical suppressant	90%
Short-term Coal Pile Load Out		
Baseline	Inherent chemical latency	85%
Option A	Spraying of chemical suppressant	90%
Active (short-term) Coal Storage Pile		
Baseline	Inherent chemical latency	85%
Option A	Spraying of chemical suppressant	90%

Model Plant C – a 30 ton/hr coal preparation plant located at a Portland cement plant (1 million tons per year of clinker)

In this model plant, the coal is unloaded by truck into a fully-enclosed coal receiving facility. The coal is stored in the same facility and used as needed. The coal is then transported to a crusher operation (secondary crushing only) called a "rock mill." Afterwards, the crushed coal is dropped onto another conveyor that would deposit it to a screening operation. This correctly-sized coal is dropped onto a conveyor that deposits it into storage silo(s).

The assumptions used for this model plant are as follows:

- Mean Wind Speed: 10 MPH (for use in AP-42 fugitive emission factor equation)
- Material Moisture Content: 1.85% (for use in AP-42 fugitive emission factor equation)
- Coal Preparation plant operation: 11.5 hr/d (4,200 hr/yr)
- Because the coal receiving operation uses trucks it is assumed to operate only 60 percent of the total hours, or 2,520 hr/yr
- Short-term Storage Pile Acreage: 0.1 acres
- Number of transfer points: 1
- Bituminous coal-fired Portland Cement Kiln
- The coal receiving facility and the short-term coal storage are the same process
- No open-air short-term coal storage pile
- No long-term storage pile
- Length of conveyors: 100 yards
- Inlet dust loading (baghouse): 4 gr/ft^3
- Cost of chemical dust suppressant applied at drop point(s): $0.03/ton
- Baseline option: 40% of the chemical dust suppressant cost is accounted for at the coal receiving facility and 60% of the chemical dust suppressant cost is accounted for at the crusher house, respectively
- Baseline capital cost for coal receiving chemical dust suppression system: $25,000
- Baseline capital cost for crusher house chemical dust suppression system: $2,000
- Baseline or Option A chemical dust suppression maintenance labor costs are as follows:
    - Truck dump (coal receiving facility): 30 minutes/week * 52 weeks/yr = 26 hr/yr, maintenance labor cost $452/yr
    - Crusher house: 30 minutes/day * 365 d/yr = 182.5 hr/yr, maintenance labor cost $3,176/yr

Modeled baghouse sizes:

- Coal receiving: 5,000 acfm
- Crusher house: 5,000 acfm
- Transfer tower and conveyors: 5,000 acfm

The emission sources and the control efficiencies chosen for this model plant are shown in Table 5.

Table 5: Emission Sources, Control Strategy, and Control Efficiencies for Model Plant C

Emission Source	Control Strategy	Control Efficiency
Coal receiving (truck)		
Baseline	Full enclosure with spraying of chemical suppressant	85%
Option A	Full enclosure vented to a baghouse	93%
Crusher house (secondary crushing and screening)		
Baseline	Full enclosure with spraying of chemical suppressant	98%
Option A	Full enclosure vented to a baghouse	99%
Transfer point and conveying operations		
Baseline	Full enclosure and inherent chemical latency	85%
Option A	Full enclosure vented to a baghouse	99%

Model Plant D – a 200 ton/hr bituminous coal preparation plant located at an electric utility power plant (i.e., ~450 MW conventional coal-fired unit)

In this model plant, the coal is unloaded in a fully-enclosed railcar coal receiving facility. The coal is dumped through a floor-based coal chute and conveyed to a coal stacker which stacks the coal onto a short-term coal storage pile. Some of this short-term coal is dropped onto a conveyor that deposits it onto a long-term storage pile as a buffer against supply interruptions. A reclaimer loads the previously stored coal from the active pile onto a conveyor that deposits it into a crusher operation (secondary crushing only). Afterwards, the crushed coal is dropped onto a conveyor that deposits it into a screening operation. This correctly-sized coal is dropped onto a conveyor that deposits it into storage silo(s).

The assumptions used for this model plant are as follows:

- Mean Wind Speed: 10 MPH (for use in AP-42 fugitive emission factor equation)
- Material Moisture Content: 1.85% (for use in AP-42 fugitive emission factor equation)
- Coal Preparation plant operation: 15.3 hr/d (5,600 hr/yr)
- Because the coal receiving operation uses rail cars it is assumed to operate only 15 percent of the total hours, or 840 hr/yr
- Short-term Storage Pile Acreage: 0.5 acre
- Long-term Storage Pile Acreage: 3 acre
- Number of transfer points: 1
- Length of conveyors: 200 yards
- Inlet dust loading (baghouse): 4 gr/ft^3
- Cost of chemical dust suppressant applied at drop point(s): $0.03/ton
- Baseline option: 40% of the chemical dust suppressant cost is accounted for at the coal receiving facility and 60% of the chemical dust suppressant cost is accounted for at the crusher house, respectively
- Baseline capital cost for coal receiving chemical dust suppression system: $25,000
- Baseline capital cost for crusher house chemical dust suppression system: $25,000
- Capital cost for stackout short-term coal storage pile chemical dust suppression system: $25,000 (Addition $0.03/ton for additional chemical)
- Capital cost for stackout long-term coal storage pile sealant system: $25,000
- Chemical dust suppression maintenance labor costs are as follows:
  - Rotary car dump (coal receiving facility): 30 minutes/week * 52 weeks/yr = 26 hr/yr, maintenance labor cost $452/yr
  - Crusher house: 30 minutes/d * 365 d/yr = 182.5 hr/yr, maintenance labor cost $3,176/yr
  - Stackout operation: 1 hr/week * 52 weeks/yr = 52 hr/yr, maintenance labor cost $905/yr
- Cost of sealant agent: $15/1,000 ft^2 (operators would have to reapply the latex sealant over entire coal pile at a minimum of four times per year)
- Surface area of the 3 acre long-term storage pile is estimated at 146,000 ft^2

Modeled baghouse sizes:

- Coal receiving: 75,000 acfm

- Crusher house: 10,000 acfm
- Transfer towers: 5,000 acfm (x2)
- Conveyors: 5,000 acfm (miscellaneous extra baghouse)

The emission sources and the control efficiencies chosen for this model plant are shown in Table 6.

Table 6. Emission Sources, Control Strategy, and Control Efficiencies for Model Plant D

Emission Source	Control Strategy	Control Efficiency
Coal receiving		
Baseline	Full enclosure with spraying of chemical suppressant	97%
Option A	Full enclosure vented to a baghouse	99%
Crusher house (secondary crushing and screening)		
Baseline	Full enclosure with spraying of chemical suppressant	98%
Option A	Full enclosure vented to a baghouse	99%
Transfer points		
Baseline	Full enclosure and inherent chemical latency	85%
Option A	Full enclosure vented to a baghouse	99%
Conveying operations		
Baseline	Partial enclosure and inherent chemical latency	85%
Option A	Full enclosure vented to a baghouse	99%
Short-term Coal Pile Load In		
Baseline	Inherent chemical latency	85%
Option A	Spraying of chemical suppressant	90%
Short-term Coal Pile Load Out		
Baseline	Inherent chemical latency	85%
Option A	Spraying of chemical suppressant	90%
Active (short-term) Coal Storage Pile		
Baseline	Inherent chemical latency	85%
Option A	Spraying of chemical suppressant	90%
Long-term Coal Pile Load In		
Baseline	Inherent chemical latency	85%
Option A	Spraying chemical additives that encrust the pile	90%
Long-term Coal Pile Load Out		
Baseline	Inherent chemical latency	85%
Option A	Spraying chemical additives that encrust the pile	90%
Inactive (long-term) Coal Storage Pile		
Baseline	Inherent chemical latency	85%
Option A	Spraying chemical additives that encrust the pile	90%

Model Plant E – a 200 ton/hr coal preparation plant located at a coke-making facility (1.1 million tons per year of coke)

In this model plant, the coal is unloaded in a fully enclosed railcar coal receiving facility. The coal is dumped through a floor-based coal chute and conveyed to a coal stacker which stacks the coal onto a short-term coal storage pile. Since the received coal varies in sulfur and ash content (necessary for making good quality coke), most plants use a method of coal blending called "Bed Blending." In this process coal variability is reduced by laying down a ~10 day supply of different coals in horizontal layers which are then reclaimed vertically. To accomplish this, a minimum of two short-term coal piles for each classification of coal are required; one being stockpiled and one being reclaimed (4 separate coal piles). In an alternating sequence the two different coals are reclaimed from their reclaim piles and dropped onto a belt and conveyed to a coal stacker which stacks the coal by layer into a larger fifth coal pile. The blended coal from this fifth bed is then vertically reclaimed and dropped onto a conveyor that deposits it into a crusher operation (secondary crushing only). Afterwards, this crushed coal is dropped onto a conveyor that deposits it into a screening operation. This correctly-sized coal is dropped onto a conveyor that deposits it into storage silo(s).

The assumptions used for this model plant are as follows:

- Mean Wind Speed: 10 MPH (for use in AP-42 fugitive emission factor equation)
- Material Moisture Content: 1.85% (for use in AP-42 fugitive emission factor equation)
- Coal Preparation plant operation: 22.7 hr/d (8,300 hr/yr)
- Because the coal receiving operation uses rail cars it is assumed to operate only 15 percent of the total hours, or 1,245 hr/yr
- Assuming "Bed Blending" is occurring, short-term coal storage pile acreage would be (as an estimate): 6 x 0.5 acres = 3 acres plus 1 x 0.5 acres = 0.5, for a total of 3.5 acres
- Number of short-term storage piles: 7 (six 0.5-acre piles, one 0.5-acre pile)
- Number of transfer points: 1
- No long-term storage pile
- Length of conveyors: 200 yards
- Inlet dust loading (baghouse): 4 gr/ft^3
- Cost of chemical dust suppressant applied at drop point(s): $0.03/ton
- Baseline option: 40% of the chemical dust suppressant cost is accounted for at the coal receiving facility and 60% of the chemical dust suppressant cost is accounted for at the crusher house, respectively
- Baseline capital cost for coal receiving chemical dust suppression system: $25,000
- Baseline capital cost for crusher house chemical dust suppression system: $25,000
- Option A capital cost for stackout short-term coal storage pile chemical dust suppression system: $25,000 per chemically treated coal pile for a total cost of $50,000/yr (i.e., only the first 2 short-term coal piles have chemical dust suppression systems under Option A)
- Chemical dust suppression maintenance labor costs are as follows:
    - Rotary car dump (coal receiving facility): 30 minutes/week * 52 weeks/yr = 26 hr/yr, maintenance labor cost $452/yr
    - Crusher house: 30 minutes/day * 365 d/yr = 182.5 hr/yr, maintenance labor cost $3,176/yr

- Stackout operation: 1 hr/week * 52 weeks/yr = 52 hr/yr, maintenance labor cost $905/yr per chemically treated coal pile for a total cost of $1,810/yr (i.e., only the first 2 short-term coal piles have chemical dust suppression systems under Option A)

Modeled baghouse sizes:

- Coal receiving: 75,000 acfm
- Crusher house: 10,000 acfm
- Transfer tower: 5,000 acfm
- Conveyors: 5,000 acfm (miscellaneous extra baghouse)

The emission sources and the control efficiencies chosen for this model plant are shown in Table 7.

Table 7: Emission Sources, Control Strategy, and Control Efficiencies for Model Plant E

Emission Source	Control Strategy	Control Efficiency
Coal receiving		
Baseline	Full enclosure with spraying of chemical suppressant	97%
Option A	Full enclosure vented to a baghouse	99%
Crusher house (secondary crushing and screening)		
Baseline	Full enclosure with spraying of chemical suppressant	98%
Option A	Full enclosure vented to a baghouse	99%
Transfer points		
Baseline	Full enclosure and inherent chemical latency	85%
Option A	Full enclosure vented to a baghouse	99%
Conveying operations		
Baseline	Partial enclosure and inherent chemical latency	85%
Option A	Full enclosure vented to a baghouse	99%
Short-term Coal Pile Load In		
Baseline	Inherent chemical latency	85%
Option A	Spraying of chemical suppressant	90%
Short-term Coal Pile Load Out		
Baseline	Inherent chemical latency	85%
Option A	spraying of chemical suppressant	90%
Active (short-term) Coal Storage Pile		
Baseline	Inherent chemical latency	85%
Option A	Spraying of chemical suppressant	90%

Model Plant F – a 2,000 ton/hr coal preparation plant located at a Western subbituminous (Powder River Basin) surface coal mine

In this model plant, the coal is brought by truck to a crusher house where it is crushed and screened. After the crusher house, the coal is conveyed to silo(s) prior to being loaded into railcars for delivery.

The assumptions used for this model plant are as follows:

- Mean Wind Speed: 12.5 MPH[3]
- Material Moisture Content: 1%
- Coal Preparation plant operation: 24 hr/d with 40 hr/yr down time for maintenance (8,720 hr/yr)
- Because the crusher house is used only when trucks dump coal its operation is assumed to operate only 90 percent of the total hours, or 7,848 hr/yr
- Because the product loading is used only when rail cars are moved into position the loading facility is assumed to operate only 35 percent of the total hours, or 3,052 hr/yr
- Number of chemical application points: 4 (Vendors recommended 4 application points for sufficient application of chemical dust suppressant to subbituminous coal)
- Number of transfer points: 2
- No short or long-term storage pile
- Coal received by 100 ton trucks
- Length of conveyors: 400 yards
- Inlet dust loading (baghouse): 10 gr/ft^3
- Cost of chemical dust suppressant: $0.065/ton
- Baseline option: 67% of the chemical dust suppressant cost is accounted for at the crusher house, 27% of the chemical dust suppressant cost is accounted for at the product loading facility, and 6% of the chemical dust suppressant cost is accounted for at the transfer points
- Baseline capital cost for product loading chemical dust suppression system is $70,000. This system (used on the baseline option only) chemically coats the surface of the coal being unloaded into the crusher to reduce the fugitive emissions of the coal dumping operation. Since the coal is going directly into the crusher there is no chemical latency effect after this coal dumping operation
- Baseline capital cost for crusher house chemical dust suppression system is $70,000
- Baseline capital cost for transfer point chemical dust suppression system is $2,000
- Chemical dust suppression maintenance labor costs (by potential emission point) are as follows:
    - Coal receiving facility (in this plant's case the crusher house): 30 minute/day * 365 d/yr = 182.5 hr/yr, maintenance labor cost $3,176/yr
    - Transfer points: 10 minutes/day * 365 d/yr = 60.8 hr/yr, maintenance labor cost $1,058/yr

[3] This is the mean wind speed for the Powder River Basin of Wyoming taken from Renewable Resource Data Center (RReDC)/National Renewable Energy Laboratory (NREL) website.

- Product loading facility: 30 minutes/week * 52 weeks/yr = 26 hr/yr, maintenance labor cost $452/yr

Modeled baghouse sizes:

- Crusher house: 25,000 acfm
- Transfer towers: 10,000 acfm (x2)
- Conveyors: 10,000 acfm (miscellaneous extra baghouse)
- Product loading: 150,000 acfm

The emission sources and the control efficiencies chosen for this model plant are shown in Table 8.

Table 8: Emission Sources, Control Strategy, and Control Efficiencies for Model Plant F

Emission Source	Control Strategy	Control Efficiency
Crusher house (coal receiving, primary crushing, and screening)		
Baseline	Full enclosure with spraying of chemical suppressant	85%
Option A	Full enclosure vented to a baghouse	93%
Transfer points		
Baseline	Full enclosure with spraying of chemical suppressant	90%
Option A	Full enclosure vented to a baghouse	99%
Conveying operations		
Baseline	Full enclosure and inherent chemical latency	85%
Option A	Full enclosure vented to a baghouse	99%
Product Loading		
Baseline	Full enclosure with spraying of chemical suppressant	85%
Option A	Full enclosure vented to a baghouse	99%

Results

The cost estimates for the model plants are summarized in Table 9.

Table 9: Summary Table of Preliminary Emission Totals and Costs Associated With Each Control Option at Six Model Plants

Model Plant	Coal Handling Step	Uncontrolled PM (ton/yr)	Control Type	Controlled emissions (ton/yr)	Annualized Cost	$/Ton PM Controlled	Incremental cost difference
1,000 ton/hr coal preparation plant located at an Eastern bituminous underground mine	Crusher House	813	Full enclosure with spraying of chemical suppressant	16.3	$176,060	$221	
			Full enclosure vented to a baghouse baghouse	8.1	$107,349	$133	($8,450)
	Transfer Points (2 drops)	57	Full enclosure and inherent chemical latency	8.5	$0	$0	
			Full enclosure vented to a baghouse baghouse	0.6	$167,792	$2,989	$21,135
	Conveyor	113	Partial enclosure and inherent chemical latency	17.0	$0	$0	
			Full enclosure vented to a baghouse baghouse	1.1	$83,896	$747	$5,284
	Product Loading	28	Full enclosure with spraying of chemical suppressant	0.85	$123,736	$4,499	
			Full enclosure vented to baghouse	0.28	$147,887	$5,268	$42,588
	Overall	1,012	Full enclosure with chemical suppressants	43	$299,796	$309	
			Full enclosure with baghouse	10	$506,925	$506	$6,370
30 ton/hr bituminous coal preparation plant located at an industrial facility (~ 300 MMBtu/hr coal-fired boiler)	Coal Receiving	0.6	Full enclosure with spraying of chemical suppressant	0.02	$5,803	$10,174	
			Full enclosure vented to a baghouse baghouse	0.01	$17,326	$29,763	$979,853
	Crusher House	6.7	Full enclosure with spraying of chemical suppressant	0.13	$5,286	$803	
			Full enclosure vented to a baghouse baghouse	0.07	$30,328	$4,559	$372,637
	Transfer Points (1 drop)	0.3	Full enclosure and inherent chemical latency	0.04	$0	$0	
			Full enclosure vented to a baghouse baghouse	0.003	$30,328	$112,158	$793,119
	Conveyor	0.5	Partial enclosure and inherent chemical latency	0.08	$0	$0	
			Full enclosure vented to a baghouse baghouse	0.005	$30,328	$56,079	$396,560
	Overall	8	Full enclosure with chemical suppressants	0.3	$11,089	$1,412	
			Full enclosure with baghouse	0.1	$108,309	$13,461	$501,972
30 ton/hr bituminous coal preparation plant located at a Portland cement plant (1 million tons of cement per year)	Coal Receiving	0.9	Full enclosure with spraying of chemical suppressant	0.13	$6,492	$8,660	
			Full enclosure vented to a baghouse	0.062	$28,121	$34,283	$306,526
	Crusher House	10.1	Full enclosure with spraying of chemical suppressant	0.20	$6,172	$625	
			Full enclosure vented to a baghouse baghouse	0.10	$40,853	$4,094	$344,063
	Transfer Points (1 drop)	0.4	Full enclosure and inherent chemical latency	0.06	$0	$0	
			Full enclosure vented to a baghouse baghouse	0.004	$40,853	$100,723	$712,253
	Conveyor	0.4	Partial enclosure and inherent chemical latency	0.06	$0	$0	
			Full enclosure vented to a baghouse (combined with transfer point)	0.004	$0	$0	$0
	Overall	12	Full enclosure with chemical suppressants	0.5	$12,664	$1,118	
			Full enclosure with baghouse	0.2	$109,827	$9,459	$339,642
200 ton/hr bituminous coal preparation plant located at an electric utility power plant (~450 MW)	Coal Receiving	7.8	Full enclosure with spraying of chemical suppressant	0.24	$19,534	$2,569	
			Full enclosure vented to a baghouse	0.08	$70,264	$9,053	$323,535
	Crusher House	89.6	Full enclosure with spraying of chemical suppressant	1.79	$28,620	$326	
			Full enclosure vented to a baghouse	0.90	$57,766	$651	$32,529
	Transfer Points (1 drops)	3.6	Full enclosure and inherent chemical latency	0.55	$0	$0	
			Full enclosure vented to a baghouse	0.04	$51,557	$14,300	$101,124
	Conveyor	7.3	Partial enclosure and inherent chemical latency	1.09	$0	$0	
			Full enclosure vented to a baghouse	0.07	$51,557	$7,150	$50,562
	Overall	108	Full enclosure with chemical suppressants	4	$48,154	$460	
			Full enclosure with baghouse	1	$231,145	$2,155	$70,863
200 ton/hr bituminous coal preparation plant located at a coke-making facility (1.1 million tons coke per year)	Coal Receiving	11.6	Full enclosure with spraying of chemical suppressant	0.35	$26,685	$2,368	
			Full enclosurevented to a baghouse	0.12	$79,970	$6,952	$229,281
	Crusher House	132.8	Full enclosure with spraying of chemical suppressant	2.66	$38,838	$298	
			Full enclosurevented to a baghouse	1.33	$79,570	$605	$30,672
	Transfer Points (1 drop)	5.4	Full enclosure and inherent chemical latency	0.81	$0	$0	
			Full enclosurevented to a baghouse	0.05	$95,957	$17,957	$126,984
	Conveyor	10.8	Partial enclosure and inherent chemical latency	1.62	$0	$0	
			Full enclosurevented to a baghouse	0.11	$72,102	$6,747	$47,708
	Overall	161	Full enclosure with chemical suppressants	5	$65,523	$422	
			Full enclosure with baghouse	2	$327,600	$2,060	$68,474
2,000 ton/hr coal preparation plant located at a Western subbituminous (Powder River Basin) surface coal mine	Truck Unloading and Crusher House	1168	Full enclosure with spraying of chemical suppressant	175	$804,965	$810	
			Full enclosure vented to a baghouse	82	$115,136	$106	($7,380)
	Transfer Points (2 drops)	359	Full enclosure with spraying of chemical suppressant	36	$78,043	$242	
			Full enclosure vented to a baghouse	4	$185,353	$522	$3,324
	Conveyor	717	Partial enclosure and inherent chemical latency	108	$0	$0	
			Full enclosure vented to a baghouse	7	$92,677	$131	$923
	Product Loading	179	Full enclosure and spraying of chemical suppressant	5	$337,406	$1,940	
			Full enclosure vented to baghouse	2	$246,431	$1,388	($25,365)
	Overall	2,424	Full enclosure with chemical suppressants	324	$1,220,415	$581	
			Full enclosure with baghouse	94	$639,597	$275	($2,528)

1,000 ton/hr coal preparation plant located at an Eastern bituminous underground mine												
Throughput (ton/h)	1,000	ton/hr										
Throughput (ton/yr)	*8,720,000*	ton/yr	$340,080,000									
Wind Speed	*10*	MPH										
Moisture	*1.85*	%										
particle size multiplier *k*, for PM	*0.74*	unitless										
Short-term Storage Pile Acreage	2	Acre										
Long-term Storage Pile Acreage	0	Acre										
Number of transfer point	2											
Length of conveyor	4	per 100 yards										
Hours of operation	8720	hrs										
							Because of the practice of additionally wetting the coal for coal cleaning at bituminous mines, we used an emission facto of 85% for enclosed processes and 70% for conveyors with partial covers to account for the inherent dust control attributed to coal wetting.					
PM Emission factor (lb/ton)	**Uncontrolled emissions (ton/yr)**	**Emission Source**	**Control Strategy**	**Control Efficiency**	**Controlled emissions (ton/yr)**	**Emissions reduction (ton/yr)**	**Capital Cost**	**Annual Cost**	**$/ton**	**Incremental Cost ($/ton)**	**Total Incremental Cost ($/ton)**	**Chemical latency ($/ton)**
Emission factor taken from CHEER study (p. 13).		***Transfer + Crushing (primary)***										
0.0265	116	Baseline	Full enclosure and wetted material	85%	17.3	98						
0.0265	116	Option A	Full enclosure with spraying of chemical suppressar	98%	2.3	113						
0.0265	116	Option B	Full enclosure vented to a baghouse baghous	99%	1.2	114						
Emission factor taken from CHEER study (p. 15).		***Crushing (secondary)***										
0.06	262	Baseline	Full enclosure and wetted material	85%	39.2	222						
0.06	262	Option A	Full enclosure with spraying of chemical suppressar	98%	5.2	256						
0.06	262	Option B	Full enclosure vented to a baghouse baghous	99%	2.6	259						
Emission factor taken from CHEER study (p. 17).		***Screening***										
0.1	436	Baseline	Full enclosure and wetted material	85%	65.4	371						
0.1	436	Option A	Full enclosure with spraying of chemical suppressar	98%	8.7	427	$70,000	$176,060	$221			$ 187
0.1	436	Option B	Full enclosure vented to a baghouse baghous	99%	4.4	432	$150,787	$107,349	$133	$ (8,450)	$ 5,727	
Emission factor taken from AP-42. Emission factor per 100 yards of conveyor length.		***Conveying operations***										
0.0065	113	Baseline	Partial enclosure and wetted material	70%	34.0	79						
0.0065	113	Option A	Partial enclosure and inherent chemical latency	85%	17.0	96	$0	$0	$0			
0.0065	113	Option B	Full enclosure vented to a baghouse baghous	99%	1.1	112	$142,882	$83,896	$747	$ 5,284		
Emission factor taken from AP-42 and CHEER study. Emission factor per individual transfer point.		***Transfer points***										
0.0065	57	Baseline	Full enclosure and wetted material	85%	8.5	48						
0.0065	57	Option A	Full enclosure and inherent chemical latency	85%	8.5	48	$0	$0	$0			
0.0065	57	Option B	Full enclosure vented to a baghouse baghous	99%	0.6	56	$165,764	$167,792	$2,989	$ 21,135		
Emission factor taken from CHEER study (p. 18).		***Short-term coal pile load in***										
0.0065	28	Baseline	Wetted material	60%	11.3	17						
0.0065	28	Option A	Inherent Chemical Latency	85%	4.3	24						
0.0065	28	Option B	Spraying of chemical suppressant at drop poir	90%	2.8	26						
Emission factor taken from MPI. Units are lb/acre-day.		***Active (short-term) coal storage pile***										
8.6	3	Baseline	Wetted material	60%	1.26	1.9						
8.6	3	Option A	Inherent chemical latency	85%	0.47	2.7	$0	$0	$0			
8.6	3	Option B	Spraying of chemical suppressant at drop poir	90%	0.31	2.8	$0	$0	$0			
Emission factor taken from CHEER study (p. 18).		***Short-term coal pile load out***										
0.0065	28	Baseline	Wetted material	60%	11.3	17						
0.0065	28	Option A	Inherent Chemical Latency	85%	4.3	24						
0.0065	28	Option B	Spraying of chemical suppressant at drop poir	90%	2.8	26						
Emission factor taken from AP-42.		***Product loading (railcar)***										
0.0065	28	Baseline	Full enclosure and wetted material	0%	28.4	0						
0.0065	28	Option A	Full enclosure with spraying of chemical suppressar	97%	0.9	28	$70,000	$123,736	$4,499			
0.0065	28	Option B	Full enclosure vented to baghouse	99%	0.3	28	$426,753	$147,887	$5,268	$ 42,588		
Emission Source	**Control Strategy**	**Control Strategy**			Wetted Material	819		$0	$0			
					Chemical	969		$299,796	$309			
Product loading	**Baseline**	**Option A**			Baghouse	1001		$506,925	$506			
Capacity (acfm)		**150,000**			Incremental, Chemica	150		$299,796	$1,996			
	Full enclosure w/Engineered chute - additional emission reduction based on wetted material	**Full Enclosure w/Engineered chute and vented to baghouse**			Incremental, Baghouse	33		$207,129	$ 6,370			
Operation (hours)	3,052	3,052			PM10	71			$4,246			
					PM2.5	11			$28,510			
Chemical Dust Suppression System												
Cost of chemical suppressant (water included, $0.03/ton) 40% the total chemical suppressant cost (shared with crusher house applicator)					PM10	15			$13,554			
$0.03	$104,640				PM2.5	2			$91,002			
Electricity for pumps (estimated 20% of FF electricity for fan)	$6,744											
Labor	$452											
Maint. On Equipment (5% of capital cost)	$3,500											
Cap. recov. (12% of capital cost)	$8,400											
Total Annual Cost	$123,736											
Total Capital Cost	$70,000											
Baghouse												
Oper. labor		$12,071										
Supv. labor		$1,811										
Maint. labor		$6,639										
Maint. matl.		$6,639										
Electricity		$33,722										
Compr. air		$5,860										
Bag repl.		$9,041										
Dust dispos.		$0										
Overhead		$16,295										
Tax, ins, adm		$17,070										
Cap. recov.		$38,740										
Total Annual Cost		$147,887										
Total Capital Cost		$426,753										
Short-term Coal Pile	**Baseline**	**Option A**										
	TBD	**Total Enclosure**										
Chemical Dust Suppression System												
Cost of chemical suppressant (water included, $0.03/ton												
$0.03												
Electricity for pumps (estimated 20% of FF electricity for fa on coal receiving baghouse)												
Labor												
Maint. On Equipment (5% of capital cost												
Cap. recov. (12% of capital cost)												
Total Annual Cost												
Total Capital Cost												

Crusher House	**Baseline**	**Option A**
Capacity (acfm)		**25,000**
	Full Enclosure w/spraying of chemical suppressant at internal drop points	**Full enclosure w/baghouse**
Operation (hours)	8720	8720
Chemical Dust Suppression System		
Cost of chemical suppressant (water included, $0.03/Lon) 60% the total chemical suppressant cost (shared with crusher house applicator)		
$0.03	$156,960	
Electricity for pumps (estimated 20% of FF electricity for fan)	$4,024	
Labor	$3,176	
Maint. On Equipment (5% of capital cost	$3,500	
Cap. recov. (12% of capital cost)	$8,400	
Total Annual Cost	$176,060	
Total Capital Cost	$70,000	
Baghouse		
Oper. labor		$0
Supv. labor		$0
Maint. labor		$18,968
Maint. matl.		$18,968
Electricity		$20,119
Compr. air		$4,186
Bag repl.		$2,511
Dust dispos.		$0
Overhead		$22,762
Tax,ins.,adm		$6,031
Cap. recov.		$13,805
Total Annual Cost		$107,349
Total Capital Cost		$150,787
Transfer points	**Baseline**	**Option A**
Capacity (acfm)		**11,000**
	Full enclosure - additional emission reduction based on wetted material	**Full enclosure w/baghouse**
Operation (hours)	8720	8720
Baghouse		
Oper. labor		$0
Supv. labor		$0
Maint. labor		$18,968
Maint. matl.		$18,968
Electricity		$9,635
Compr. air		$1,674
Bag repl.		$904
Dust dispos.		$0
Overhead		$22,762
Tax,ins.,adm		$3,315
Cap. recov.		$7,669
Total Annual Cost		$83,896
Total Capital Cost		$82,882
Conveying operations	**Baseline**	**Option A**
Capacity (acfm)		**11,000**
	Partial Enclosure (rain cover) additional emission reduction based on wetted material	**Full enclosure w/baghouse**
Operation (hours)	8720	8720
Baghouse		
Oper. labor		$0
Supv. labor		$0
Maint. labor		$18,968
Maint. matl.		$18,968
Electricity		$9,635
Compr. air		$1,674
Bag repl.		$904
Dust dispos.		$0
Overhead		$22,762
Tax,ins.,adm		$3,315
Cap. recov.		$7,669
Total Annual Cost		$83,896
Cost of covering Conveyor		$60,000
Total Capital Cost		$142,882

30 ton/hr bituminous coal preparation plant located at an industrial facility (~ 300 MMBtu/hr coal-fired boiler)												
Throughput (ton/h)	**30**	ton/hr										
Throughput (ton/yr)	***84,000***	ton/yr	1,411,200	MMBtu steam output at 80% efficiency								
Wind Speed	***10***	MPH	$14,112,000									
Moisture	***1.85***	%										
particle size multiplier (c, for PM)	***0.74***	unitless										
Short-term Storage Pile Acreage	**0.08**	Acre										
Long-term Storage Pile Acreage	**0**	Acre										
Number of transfer points	**1**											
Length of conveyors	**2**	per 100 yards										
Hours of operation	**2800**	hrs										
PM Emission factor (lb/ton)	**Uncontrolled emissions (ton/yr)**	**Emission Source**	**Control Strategy**	**Control Efficiency**	**Controlled emissions (ton/yr)**	**Emissions reduction (ton/yr)**	**Capital Cost**	**Annual Cost**	**$/ton**	**Incremental Cost ($/ton)**	**Total Incremental Cost ($/ton)**	**Chemical latency ($/ton)**
Emission factor taken from CHEER study (p. 13).		***Coal receiving (railcar)***										
0.014	0.59	Baseline	Full enclosure with spraying of chemical suppressant	97%	0.02	0.57	$25,000	$5,803	$10,174			$5,084
0.014	0.59	Option A	Full enclosure vented to a baghouse baghouse	99%	0.01	0.58	$101,992	$17,326	$29,763	$979,853		
Emission factor taken from CHEER study (p. 18).		***Short-term coal pile load in***										
0.0065	0.27	Baseline	Inherent chemical latency	85%	0.04	0.23						
0.0065	0.27	Option A	Spraying of chemical suppressant at drop point	90%	0.03	0.25						
Emission factor taken from CHEER study (p. 19). Units are lb/acre day.		***Active (short-term) coal storage pile***										
8.6	0.13	Baseline	Inherent chemical latency	85%	0.02	0.11	$0	$0	$0			
8.6	0.13	Option A	Spraying of chemical suppressant	90%	0.01	0.11	$25,000	$7,768	$12,847			
Emission factor taken from CHEER study (p. 18).		***Short-term coal pile load out***										
0.0065	0.27	Baseline	Inherent chemical latency	85%	0.04	0.23						
0.0065	0.27	Option A	Spraying of chemical suppressant	90%	0.03	0.25						
Emission factor taken from CHEER study (p. 16).		***Crushing (secondary)***										
0.06	2.5	Baseline	Full enclosure with spraying of chemical suppressant	98%	0.05	2.47						
0.06	2.5	Option A	Full enclosure vented to a baghouse baghouse	99%	0.03	2.49						
Emission factor taken from CHEER study (p. 17).		***Screening***										
0.1	4.2	Baseline	Full enclosure with spraying of chemical suppressant	98%	0.08	4.12	$2,000	$5,286	$803			$726
0.1	4.2	Option A	Full enclosure vented to a baghouse baghouse	99%	0.04	4.16	$65,919	$30,328	$4,559	$372,637	$471,079	
Emission factor taken from AP-42. Emission factor per 100 yards of conveyor length.		***Conveying operations***										
0.0065	0.55	Baseline	Partial enclosure and inherent chemical latency	85%	0.08	0.46	$0	$0	$0			
0.0065	0.55	Option A	Full enclosure vented to a baghouse baghouse	99%	0.01	0.54	$77,919	$30,328	$56,079	$396,560		
Emission factor taken from AP-42 and CHEER study. Emission factor per individual transfer point.		***Transfer points***										
0.0065	0.27	Baseline	Full enclosure and inherent chemical latency	85%	0.04	0.23	$0	$0	$0			
0.0065	0.27	Option A	Full enclosure vented to a baghouse baghouse	99%	0.003	0.27	$65,919	$30,328	$112,158	$793,119		
Emission Source	**Control Strategy**	**Control Strategy**			Chemical	7.9		$ 11,089	$1,412			
					Baghouse	8.0		$ 108,309	$13,461			
Coal receiving	**Baseline**	**Option A**			Incrementa	0.2		$ 97,219	$ 501,972			
Capacity (acfm)		**25,000**										
	Full Enclosure w/internal spraying of chemical suppressant	**Full enclosure w/baghouse**			PM10	4			$3,005			
Operation (hours)	280	280			PM2.5	1			$20,174			
Chemical Dust Suppression System												
Cost of chemical suppressant (water included, $0.03/ton) 40% of the total chemical suppressant cost												
$0.03	$1,008											
Electricity for pumps (estimated 20% of FF electricity for fan on baghouse)	$93											
Labor	$452											
Maint. On Equipment (5% of capital cost)	$1,250											
Cap. recov. (12% of capital cost)	$3,000											
Total Annual Cost	$5,803											
Total Capitol Cost	$25,000											
Baghouse												
Oper. labor		$0										
Supv. labor		$0										
Maint. labor		$609										
Maint. matl.		$609										
Electricity		$464										
Compr. air		$81										
Bag repl.		$1,357										
Dust dispos.		$0										
Overhead		$731										
Tax,ins.,adm		$4,080										
Cap. recov.		$9,396										
Total Annual Cost		$17,326										
Total Capitol Cost		$101,992										
Short-term Coal Pile	**Baseline**	**Option A**										
	No additional control - Inherent chemical latency after coal receiving	**spraying of chemical suppressant at drop point**										
Chemical Dust Suppression System												
Cost of chemical suppressant (water included, $0.03/ton)												
$0.03		$2,520										
Electricity for pumps (estimated 20% of FF electricity for fan on coal receiving baghouse)		$93										
Labor		$905										
Maint. On Equipment (5% of capital cost)		$1,250										
Cap. recov. (12% of capital cost)		$3,000										
Total Annual Cost		$7,768										
Total Capitol Cost		$25,000										
Crusher House	**Baseline**	**Option A**										

Capacity (acfm)		**5,500**
	Full Enclosure w/spraying of chemical suppressant at internal drop points	**Full enclosure w/baghouse**
Operation (hours)	2800	2800
Chemical Dust Suppression System		
Cost of chemical suppressant (water included, $0.03/ton) 60%of the total chemical suppressant cost $0.03	$1,512	
Electricity for pumps (estimated 20% of FF electricity for fan on baghouse)	$258	
Labor	$3,176	
Maint. On Equipment (5% of capital cost)	$100	
Cap. recov. (12% of capital cost)	$240	
Total Annual Cost	$5,286	
Total Capitol Cost	$2,000	
Baghouse		
Oper. labor		$0
Supv. labor		$0
Maint. labor		$6,091
Maint. matl.		$6,091
Electricity		$1,292
Compr. air		$269
Bag repl.		$503
Dust dispos.		$0
Overhead		$7,309
Tax,ins.,adm		$2,637
Cap. recov.		$6,136
Total Annual Cost		$30,328
Total Capitol Cost		$65,919
Transfer points	**Baseline**	**Option A**
Capacity (acfm)		**5,500**
	Full enclosure, Inherent chemical latency after crusher	**Full enclosure w/baghouse**
Operation (hours)	2800	2800
Baghouse		
Oper. labor		$0
Supv. labor		$0
Maint. labor		$6,091
Maint. matl.		$6,091
Electricity		$1,292
Compr. air		$269
Bag repl.		$503
Dust dispos.		$0
Overhead		$7,309
Tax,ins.,adm		$2,637
Cap. recov.		$6,136
Total Annual Cost		$30,328
Total Capitol Cost		$65,919
Conveying operations	**Baseline**	**Option A**
Capacity (acfm)		**5,500**
	Partial enclosure additional emission reduction based on Inherent chemical latency after crusher	**Full enclosure w/baghouse**
Operation (hours)	2800	2800
Baghouse		
Oper. labor		$0
Supv. labor		$0
Maint. labor		$6,091
Maint. matl.		$6,091
Electricity		$1,292
Compr. air		$269
Bag repl.		$503
Dust dispos.		$0
Overhead		$7,309
Tax,ins.,adm		$2,637
Cap. recov.		$6,136
Total Annual Cost		$30,328
Cost of covering Conveyor		$12,000
Total Capitol Cost		$77,919

30 ton/hr bituminous coal preparation plant located at a Portland cement plant (1 million tons of cement per year)

Throughput (ton/h)	**30**	ton/hr	
Throughput (ton/yr)	***126,000***	ton/yr	$85,000,000
Wind Speed	*19*	MPH	
Moisture	*1.85*	%	
particle size multiplier k, for PM)	*0.74*	unitless	
Short-term Storage Pile Acreag	**0.1**	Acre	
Long-term Storage Pile Acreag	**0**	Acre	
Number of transfer point	1		
Length of conveyor	**1**	per 100 yards	
Hours of operation	**4200**	hrs	

PM Emission factor (lb/ton)	Uncontrolled emissions (ton/yr)	Emission Source	Control Strategy	Control Efficiency	Controlled emissions (ton/yr)	Emissions reduction (ton/yr)	Capital Cost	Annual Cost	$/ton	Incremental Cost ($/ton)	Total Incremental Cost ($/ton)	Chemical latency ($/ton)
Emission factor taken from CEEER study (p. 14)		***Coal receiving (by truck)***										
0.014	0.88	Baseline	Full enclosure with spraying of chemical suppressa	89%	0.13	0.75	$25,000	$6,492	$8,660			
0.014	0.88	Option A	Full enclosure vented to a baghous	93%	0.062	0.82	$63,772	$28,121	$34,283	$306,526		
Emission factor taken from CEEER study (p. 16)		***Crushing (secondary)***										
0.06	3.78	Baseline	Full enclosure with spraying of chemical suppressa	98%	0.08	3.70						
0.06	3.78	Option A	Full enclosure vented to a baghouse baghous	99%	0.04	3.74						
Emission factor taken from CEEER study (p. 17)		***Screening***										
0.1	6.30	Baseline	Full enclosure with spraying of chemical suppressa	98%	0.13	6.17	$2,000	$6,172	$625			$584
0.1	6.30	Option A	Full enclosure vented to a baghouse baghous	99%	0.06	6.24	$65,919	$40,853	$4,094	$ 344,063	$350,484	
Emission factor taken from AP-42 and CEEER study. Emission factor per individual transfer point		***Transfer points***										
0.0065	0.41	Baseline	Full enclosure and inherent chemical latenc	89%	0.05	0.35	$0	$0	$0			
0.0065	0.41	Option A	Full enclosure vented to a baghouse baghous	99%	0.004	0.41	$65,919	$40,853	$100,723	$ 712,253		
Emission factor taken from AP-42. Emission factor per 100 yards of conveyor length		***Conveying operations***										
0.0065	0.41	Baseline	Partial enclosure and inherent chemical latenc	89%	0.05	0.35	$0	$0	$0			
0.0065	0.41	Option A	Full enclosure vented to a baghouse (combined with transfer poir	99%	0.004	0.41	$0	$0	$0	$ -		

Emission Source	Control Strategy	Control Strategy
Coal receiving	**Baseline**	**Option A**
Capacity (acfm)		**25,000**
	Full Enclosure w/internal spraying of chemical suppressant	**Full enclosure w/baghouse**
Operation (hours)	2520	2520
Chemical Spray System		
Cost of chemical suppressant (water included, $0.05/ton) 40% of the tot chemical suppressant cost (shared with crusher house application)	$0.05 $1,512	
Electricity for pumps (estimated 20% of PP electricity for fan on baghous	$278	
Labor	$452	
Maint. On Equipment (3% of capital cost	$1,200	
Cap. recov. (12% of capital cost	$3,000	
Total Annual Cos	$6,492	
Total Capital Cost	$25,000	
Baghouse		
Oper. labor		$0
Supv. labor		$0
Maint. labor		$5,482
Maint. mat.		$5,482
Electricity		$1,392
Compr. air		$243
Bag repl.		$452
Dust dumper		$0
Overhead		$6,578
Taxes, adm		$2,557
Cap. recov.		$5,942
Total Annual Cos		$28,121
Total Capital Cost		$63,772
Crusher House	**Baseline**	**Option A**
Capacity (acfm)		**5,500**
	Full Enclosure w/spraying of chemical suppressant at internal drop points	**Full enclosure w/baghouse**
Operation (hours)	4200	4200
Chemical Spray System		
Cost of chemical suppressant (water included, $0.05/ton) 60% of the tot chemical suppressant cost (shared with coal receiving application)	$0.05 $2,268	
Electricity for pumps (estimated 20% of PP electricity for fan on baghous	$388	
Labor	$3,176	
Maint. On Equipment (3% of capital cost	$100	
Cap. recov. (12% of capital cost	$240	
Total Annual Cos	$6,172	
Total Capital Cost	$2,000	
Baghouse		
Oper. labor		$0
Supv. labor		$0
Maint. labor		$9,136
Maint. mat.		$9,136
Electricity		$1,938
Compr. air		$403
Bag repl.		$503
Dust dumper		$0
Overhead		$10,963
Taxes, adm		$2,637
Cap. recov.		$6,136
Total Annual Cos		$40,853
Total Capital Cost		$65,919
Transfer points	**Baseline**	**Option A**
Capacity (acfm)		**5,500**
	Full enclosure, Inherent chemical latency after crusher	**Full enclosure w/baghouse**
Operation (hours)	4200	4200
Baghouse		
Oper. labor		$0
Supv. labor		$0
Maint. labor		$9,136
Maint. mat.		$9,136
Electricity		$1,938
Compr. air		$403
Bag repl.		$503
Dust dumper		$0
Overhead		$10,963
Taxes, adm		$2,637
Cap. recov.		$6,136
Total Annual Cos		$40,853
Total Capital Cost		$65,919
Conveying operations	**Baseline**	**Option A**
Capacity (acfm)		**5,500**

Chemical	11.3	$ 27,000	$ 12,664	$1,118
Baghouse	11.6	$ 195,611	$ 109,827	$9,459
Incremental	0.3	$ 168,611	$ 97,163	$ 339,642
PM10	5			$2,379
PM2.5	9			$15,975

	Partial Enclosure (rain cover) additional emission reduction based on Inherent chemical latency after crusher	Full enclosure w/baghouse
Operation (hours)	4200	4200
Baghouse		
Oper. labor		$0
Supv. labor		$0
Maint. labor		$9,136
Maint. mat'l		$9,136
Electricity		$1,918
Compr. air		$403
Bag repl.		$503
Dust disposal		$0
Overhead		$10,943
Taxes, ins.		$2,657
Cap. recov		$6,136
Total Annual Cost		$40,853
Cost of covering Conveyor		$8,000
Total Capital Cost		$71,919

200 ton/hr bituminous coal preparation plant located at an electric utility power plant (~450 MW)

Throughput (ton/h):	200	ton/hr										
Throughput (ton/yr):	*1,120,000*	ton/yr		23,520,000	MMBtu/yr	2,556,521,739	kWh/yr	$ 153,391,304				
Wind Speed	*10*	MPH				449	MW at 65% capacity					
Moisture	*1.85*	%										
particle size multiplier (k, for PM)	*0.74*	unitless										
Short-term Storage File Acreage	0.5	Acre										
Long-term Storage File Acreage	3	Acre										
Number of transfer points	1											
Length of conveyor:	2	per 100 yards										
Hours of operation	5600	hrs										
PM Emission factor (lb/ton)	**Uncontrolled emissions (ton/yr)**	**Emission Source**	**Control Strategy**	**Control Efficiency**	**Controlled emissions (ton/yr)**	**Emissions reduction (ton/yr)**	**Capital Cost**	**Annual Cost**	**$/ton**	**Incremental Cost ($/ton)**	**Total Incremental Cost ($/ton)**	**Chemical latency ($/ton)**
Emission factor taken from CHEER study (p. 13).		***Coal receiving (railcar)***										
0.014	7.8	Baseline	Full enclosure with spraying of chemical suppressa	97%	0.24	7.60	$25,000	$19,534	$2,569			$877
0.014	7.8	Option A	Full enclosure vented to a baghouse	99%	0.08	7.76	$331,204	$70,264	$9,053	$323,535		
Emission factor taken from CHEER study (p. 18).		***Short-term Coal Pile Load In***										
0.0065	3.6	Baseline	Inherent chemical latency	85%	0.55	3.10						
0.0065	3.6	Option A	Spraying of chemical suppressant at drop poin	90%	0.364	3.28						
Emission factor taken from CHEER study (p. 19). Units are lb/acre-day.		***Active (short-term) Coal Storage Pile***										
8.6	0.78	Baseline	Inherent chemical latency	85%	0.12	0.67	$0	$0	$0			
8.6	0.78	Option A	Spraying of chemical suppressant at drop poin	90%	0.08	0.71	$25,000	$40,147	$5,529			
Emission factor taken from CHEER study (p. 18).		***Short-term Coal Pile Load Out***										
0.0065	3.64	Baseline	Inherent chemical latency	85%	0.55	3.10						
0.0065	3.64	Option A	Spraying of chemical suppressant at drop poin	90%	0.364	3.28						
Emission factor taken from CHEER study (p. 18).		***Long-term Coal Pile Load In***										
0.0065	3.64	Baseline	Inherent chemical latency	85%	0.546	3.10						
0.0065	3.64	Option A	Spraying chemical additives that encrust the pil	90%	0.364	3.28						
Emission factor taken from CHEER study (p. 18). Units are lb/acre-day.		***Inactive (long-term) Coal Storage Pile***										
3.5	1.92	Baseline	Inherent chemical latency	85%	0.29	1.63	$0	$0	$0			
3.5	1.92	Option A	Spraying chemical additives that encrust the pil	90%	0.19	1.72	$25,000	$9,423	$1,138			
Emission factor taken from CHEER study (p. 18).		***Long-term Coal Pile Load Out***										
0.0065	3.64	Baseline	Inherent chemical latency	85%	0.55	3.10						
0.0065	3.64	Option A	Spraying chemical additives that encrust the pil	90%	0.36	3.28						
Emission factor taken from CHEER study (p. 16).		***Crushing (secondary)***										
0.06	33.60	Baseline	Full enclosure with spraying of chemical suppressa	98%	0.67	32.93						
0.06	33.60	Option A	Full enclosure vented to a baghouse	99%	0.34	33.26						
Emission factor taken from CHEER study (p. 17).		***Screening***										
0.1	56.00	Baseline	Full enclosure with spraying of chemical suppressa	98%	1.12	54.88	$25,000	$28,620	$326			$295
0.1	56.00	Option A	Full enclosure vented to a baghouse	99%	0.56	55.44	$87,123	$57,766	$651	$ 32,529	$54,529	
Emission factor taken from AP-42. Emission factor per 100 yards of conveyor length.		***Conveying operations***										
0.0065	7.3	Baseline	Partial enclosure and inherent chemical latenc	85%	1.09	6.19	$0	$0	$0			
0.0065	7.3	Option A	Full enclosure vented to a baghouse	99%	0.07	7.21	$75,772	$51,557	$7,150	$50,562		
Emission factor taken from AP-42 and CHEER study. Emission factor per individual transfer point.		***Transfer points***										
0.0065	3.64	Baseline	Full enclosure and inherent chemical latenc	85%	0.55	3.10	$0	$0	$0			
0.0065	3.64	Option A	Full enclosure vented to a baghouse	99%	0.04	3.61	$63,772	$51,557	$14,300	$101,124		
					Chemical	104.7	$ 50,000	$ 48,154	$460			
					Baghouse	107.3	$ 557,871	$ 231,145	$2,155			
					Incremental	2.6	$ 507,871	$ 182,991	$ 70,883			
					PM10	49			$979			
					PM2.5	7			$6,570			

Emission Source	**Control Strategy**	**Control Strategy**
Coal receiving	**Baseline**	**Option A**
Capacity (acfm)		**150,000**
	Full Enclosure w/internal spraying of chemical suppressant	**Full enclosure w/baghouse**
Operation (hours)	840	840
Chemical Dust Suppression System		
Cost of chemical suppressant (water included, $0.03/ton		
$0.03	$13,440	
Electricity for pumps (estimated 20% of FF electricity for fan on baghouse)	$1,392	
Labor	$452	
Maint. On Equipment (3% of capital cost)	$1,250	
Cap. recov. (12% of capital cost)	$3,000	
Total Annual Cost	$19,534	
Total Capital Cost	$25,000	
Baghouse		
Oper. labor		$3,322
Supv. labor		$498
Maint. labor		$1,827
Maint. matl.		$1,827
Electricity		$6,961
Compr. air		$1,210
Bag repl.		$6,780
Dust dispos		$0
Overhead		$4,485
Tax,ins.,adm		$13,248
Cap. recov.		$30,106
Total Annual Cost		$70,264
Total Capital Cost		$331,204
Short-term Coal Pile	**Baseline**	**Option A**
	No additional control - Inherent chemical latency after coal receiving	**spraying of chemical suppressant at drop point**
Chemical Dust Suppression System		
Cost of chemical suppressant (water included, $0.03/ton		
$0.03		$33,600
Electricity for pumps (estimated 20% of FF electricity for fan on coal receiving baghouse)		$1,392
Labor		$905
Maint. On Equipment (3% of capital cost)		$1,250
Cap. recov. (12% of capital cost)		$3,000
Total Capital Cost		
Total Annual Cost		$40,147
Total Capital Cost		$25,000
Long-term Coal Pile	**Baseline**	**Option A**
Surface area of pile (1000 ft^2)	146,000	ft^2

	No additional control - Inherent chemical latency after coal receiving	Encrusting (sealing) the coal pile
Applications per year (hrs)	22400	22400
Applications per year (events)		4
Encrusting (sealing)		
Cost of Sealant agent ($15/10000 ft^2)		$876
Electricity for pumps (estimated 20% of FF electricity for fan on coal receiving baghouse)		$1,392
Labor		$905
Maint. On Equipment (5% of capital cost)		$1,250
Cap. recov. (20% of capital cost)		$5,000
Total Annual Cost		$9,423
Total Capitol Cost		$25,000

Crusher House	Baseline	Option A
Capacity (acfm)		**15,000**
	Full Enclosure w/spraying of chemical suppressant at internal drop points	**Full enclosure w/baghouse**
Operation (hours)	5600	5600
Chemical Dust Suppression System		
Cost of chemical suppressant (water included, $0.03/ton) $0.03	$20,160	
Electricity for pumps (estimated 20% of FF electricity for fan on baghouse)	$1,034	
Labor	$3,176	
Maint. On Equipment (5% of capital cost	$1,250	
Cap. recov. (12% of capital cost)	$3,000	
Total Annual Cost	$28,620	
Total Capitol Cost	$25,000	
Baghouse		
Oper. labor		$0
Supv. labor		$0
Maint. labor		$12,181
Maint. matl.		$12,181
Electricity		$5,168
Compr. air		$1,075
Bag repl.		$1,005
Dust dispos		$0
Overhead		$14,618
Tax,ins.,adm		$3,485
Cap. recov.		$8,052
Total Annual Cost		$57,766
Total Capitol Cost		$87,123

Transfer points	Baseline	Option A
Capacity (acfm)		**5,500**
	Full enclosure, Inherent chemical latency after crusher	**Full enclosure w/baghouse**
Operation (hours)	5600	5600
Baghouse		
Oper. labor		$0
Supv. labor		$0
Maint. labor		$12,181
Maint. matl		$12,181
Electricity		$3,094
Compr. air		$538
Bag repl.		$452
Dust dispos		$0
Overhead		$14,618
Tax,ins.,adm		$2,551
Cap. recov.		$5,942
Total Annual Cost		$51,557
Total Capitol Cost		$63,772

Conveying operations	Baseline	Option A
Capacity (acfm)		**5,500**
	Partial Enclosure (rain cover) - additional control - based on Inherent chemical latency after crusher	**Full enclosure w/baghouse**
Operation (hours)	5600	5600
Baghouse		
Oper. labor		$0
Supv. labor		$0
Maint. labor		$12,181
Maint. matl		$12,181
Electricity		$3,094
Compr. air		$538
Bag repl.		$452
Dust dispos		$0
Overhead		$14,618
Tax,ins.,adm		$2,551
Cap. recov.		$5,942
Total Annual Cost		$51,557
Cost of covering Conveyor		$12,000
Total Capitol Cost		$75,772

200 ton/hr bituminous coal preparation plant located at a coke-making facility (1.1 million tons coke per year)

Throughput (ton/h)	**200**	ton/hr
Throughput (ton/yr)	***1,660,000***	ton/yr
Wind Speed	***10***	MPH
Moisture	***1.85***	%
particle size multiplier (k, for PM)	***0.74***	unitless
Short-term Storage Pile Acreage	**2.5**	Acre
Long-term Storage Pile Acreage	**0**	Acre
Number of transfer points	**1**	
Length of conveyors	**2**	per 100 yards
Hours of operation	**8300**	hrs

$154,000,000

PM Emission factor (lb/ton)	Uncontrolled emissions (ton/yr)	Emission Source	Control Strategy	Control Efficiency	Controlled emissions (ton/yr)	Emissions reduction (ton/yr)	Capital Cost	Annual Cost	$/ton	Incremental Cost ($/ton)	Total Incremental Cost ($/ton)	Chemical latency ($/ton)
Emission factor taken from CHEEN study (p. 15).		***Coal receiving (railcar)***										
0.014	12	Baseline	Full enclosure with spraying of chemical suppressan	97%	0.35	11.27	$25,000	$26,685	$2,368			$1,122
0.014	12	Option A	Full enclosure vented to a baghouse	99%	0.12	11.50	$331,204	$79,970	$6,952	$225,281		
Emission factor taken from CHEEN study (p. 15).		***Short-term coal pile load in***										
0.0065	54	Baseline	Inherent chemical latency	85%	0.81	4.59						
0.0065	54	Option A	Spraying of chemical suppressant at drop point	90%	0.540	4.86						
Emission factor taken from CHEEN study (p. 15). Units are lb/acre-day.		***Active (short-term) coal storage pile***										
8.6	39	Baseline	Inherent chemical latency	85%	0.59	3.34	$0	$0	$0			
8.6	39	Option A	Spraying of chemical suppressant at drop point	90%	0.39	3.53	$50,000	$62,173	$4,693			
Emission factor taken from CHEEN study (p. 18).		***Short-term coal pile load out***										
0.0065	54	Baseline	Inherent chemical latency	85%	0.81	4.59						
0.0065	54	Option A	Spraying of chemical suppressant at drop point	90%	0.540	4.86						
Emission factor taken from CHEEN study (p. 16).		***Crushing (secondary)***										
0.06	50	Baseline	Full enclosure with spraying of chemical suppressan	98%	1.00	48.80						
0.06	50	Option A	Full enclosure vented to a baghouse	99%	0.50	49.30						
Emission factor taken from CHEEN study (p. 17).		***Screening***										
0.1	83	Baseline	Full enclosure with spraying of chemical suppressan	98%	1.66	81.34	$25,000	$38,858	$298			$270
0.1	83	Option A	Full enclosure vented to a baghouse	99%	0.83	82.17	$87,123	$79,570	$605	$ 30,672	$59,079	
Emission factor taken from AP-42. Emission factor per 100 yards of conveyor length.		***Conveying operations***										
0.0065	11	Baseline	Partial enclosure and inherent chemical latency	85%	1.62	9.18	$0	$0	$0			
0.0065	11	Option A	Full enclosure vented to a baghouse	99%	0.11	10.69	$75,772	$72,102	$6,747	$47,708		
Emission factor taken from AP-42 and CHEEN study. Emission factor per individual transfer point.		***Transfer points***										
0.0065	54	Baseline	Full enclosure and inherent chemical latency	85%	0.81	4.59	$0	$0	$0			
0.0065	54	Option A	Full enclosure vented to a baghouse	99%	0.054	5.34	$241,273	$95,957	$17,957	$126,384		
						165.2	$ 50,000	$ 65,523	$422			
					Chemical	159.0	$ 735,372	$ 527,600	$2,060			
					Baghouse	3.8	$ 685,372	$ 262,077	$ 68,474			
					Incremental							
					PM10	73			$898			
					PM2.5	11			$6,032			

Emission Source	Control Strategy	Control Strategy
Coal receiving	**Baseline**	**Option A**
Capacity (acfm)		**150,000**
	Full Enclosure w/internal spraying o chemical suppressant	**Full enclosure w/baghouse**
Operation (hours	1245	1245
Chemical Dust Suppression System		
Cost of chemical suppressant (water included $0.03/ton)		
$0.03	$19,920	
Electricity for pumps (estimated 20% of EF electricity for fan on baghouse)	$2,063	
Labor	$452	
Maint. On Equipment (3% of capital cost)	$1,250	
Cap. recov. (12% of capital cost)	$3,000	
Total Annual Cost	$26,685	
Total Capital Cost	$25,000	
Baghouse		
Oper. labor		$4,924
Supv. labor		$739
Maint. labor		$2,708
Maint. matl.		$2,708
Electricity		$10,317
Compr. air		$1,793
Bag repl.		$6,780
Dust dispos.		$0
Overhead		$6,647
Tax,ins,adm		$13,248
Cap. recov.		$30,106
Total Annual Cost		$79,970
Total Capital Cost		$331,204
Short-term Coal Pile	**Baseline**	**Option A**
	No additional control - Inherent chemical latency after coal receiving	**spraying of chemical suppressant at drop point**
Chemical Dust Suppression System		
Cost of chemical suppressant ($0.03/ton)		
$0.03		$49,800
Electricity for pumps (estimated 20% of EF electricity for fan, multiplied by 5 based on having 5 coal piles)		$2,063
Labor (multiplied by 5 based on having 5 coal piles)		$1,810
Maint. On Equipment (5% of capital cost)		$2,500
Cap. recov. (12% of capital cost)		$6,000
Total Annual Cost		$62,173
Total Capital Cost		$50,000
Crusher House	**Baseline**	**Option A**
Capacity (acfm)		**15,000**
	Full Enclosure w/spraying of chemical suppressant at internal dro points	**Full enclosure w/baghouse**
Operation (hours	8300	8300
Chemical Dust Suppression System		
Cost of chemical suppressant (water included $0.03/ton)		
$0.03	$29,880	
Electricity for pumps (estimated 20% of EF electricity for fan on baghouse)	$1,532	
Labor	$3,176	
Maint. On Equipment (3% of capital cost)	$1,250	
Cap. recov. (12% of capital cost)	$3,000	
Total Annual Cost	$38,838	
Total Capital Cost	$25,000	
Baghouse		
Oper. labor		$0

Supv. labor			$0
Maint. labor			$18,055
Maint. matl			$18,055
Electricity			$7,660
Compr. air			$1,594
Bag repl.			$1,005
Dust dispos.			$0
Overhead			$21,665
Taxes,adm			$3,485
Cap. recov.			$8,052
Total Annual Cost			$79,570
Total Capital Cost			$87,123
Transfer points	**Baseline**	**Option A**	
Capacity (acfm)			**5,500**
	Full enclosure, Inherent chemica latency after crusher	**Full enclosure w/baghouse**	
Operation (hours	8300		8300
Baghouse			
Oper. labor			$0
Supv. labor			$0
Maint. labor			$18,055
Maint. matl.			$18,055
Electricity			$4,585
Compr. air			$797
Bag repl.			$452
Dust dispos.			$0
Overhead			$21,665
Taxes,adm			$9,651
Cap. recov.			$22,697
Total Annual Cost			$95,957
Total Capital Cost			$241,273
Conveying operations	**Baseline**	**Option A**	
Capacity (acfm)			**5,500**
	Partial enclosure (rain cover) additional emission reduction based on Inherent chemical latency after crusher	**Full enclosure w/baghouse**	
Operation (hours	8300		8300
Baghouse			
Oper. labor			$0
Supv. labor			$0
Maint. labor			$18,055
Maint. matl			$18,055
Electricity			$4,585
Compr. air			$797
Bag repl.			$452
Dust dispos.			$0
Overhead			$21,665
Taxes,adm			$2,551
Cap. recov.			$5,942
Total Annual Cost			$72,102
Cost of covering Conveyor			$12,000
Total Capital Cost			$75,772

2,000 ton/hr coal preparation plant located at a Western subbituminous (Powder River Basin) surface coal mine												
Throughput (ton/h)	**2000**	ton/hr										
Throughput (ton/yr)	***17,440,000***	ton/yr	$ 174,400,000									
Wind Speed	*12.5*	MPH										
Moisture	*1*	%										
particle size multiplier *k*, for PM)	*0.74*	unitless										
Short-term Storage Pile Acreage	**0**	Acre										
Long-term Storage Pile Acreage	**0**	Acre									20	Miles
Number of transfer points	**2**										2	
Length of conveyors	**4**	per 100 yards									30	
Hours of operation	**8720**	hrs										
PM Emission factor (lb/ton)	**Uncontrolled emissions (ton/yr)**	**Emission Source**	**Control Strategy**	**Control Efficiency**	**Controlled Emissions (ton/yr)**	**Emissions reduction (ton/yr)**	**Capital Cost**	**Annual Cost**	**$/ton**	**Incremental Cost ($/ton)**	**Total Incremental Cost ($/ton)**	**Chemical latency ($/ton)**
Emission factor taken from CHEER study (p. 16).		***Unloading (truck) + Crushing (primary) + Screening***										
0.134	1,168		Full enclosure with spraying of chemical suppressan	0.85	175	993	$95,000	$804,965	$810			$502
0.134	1,168		Full enclosure vented to a baghous	0.93	82	1,087	$156,813	$115,136	$106	$ (7,380)		
Emission factor taken from AP-42. Emission factor per 100 yards of conveyor length.		***Conveying operations***										
0.021	717	Baseline	Partial enclosure and inherent chemical latenc	0.85	108	610	$0	$0	$0			
0.021	717	Option A	Full enclosure vented to a baghous	0.99	7	710	$109,069	$92,677	$131	$ 923	$ (3,080)	
Emission factor taken from AP-42 and CHEER study. Emission factor per individual transfer point.		***Transfer points***										
0.021	359	Baseline	Full enclosure with spraying of chemical suppressan	0.90	36	323	$4,000	$78,043	$242			
0.021	359	Option A	Full enclosure vented to a baghous	0.99	4	355	$170,137	$185,353	$522	$ 3,324		
Emission factor taken from AP-42.		***Product Loading***										
0.021	179	Baseline	Full enclosure and spraying of chemical suppressan	0.97	5	174	$70,000	$337,406	$1,940			
0.021	179	Option A	Full enclosure vented to baghous	0.99	2	178	$650,275	$246,431	$1,388	$ (25,365)		
					Chemical	2,100	$ 169,000	$ 1,220,415	$581			
					Baghouse	2,329	$ 1,086,294	$ 639,597	$275			
					Incremental	230	$ 917,294	$ (580,818)	$ (2,526)			
					PM10	987			$1,237			
					PM2.5	147			$8,303			
Coal receiving (truck dumping to crusher)	**Baseline**	**Option A**										
Capacity (acfm)		**25,000**										
	Full Enclosure w/internal spraying of chemical suppressant	**Full enclosure w/baghouse**										
Operation (hours)	7848	7848										
Chemical Spray System												
Cost of chemical suppressant (water cost included, $0.065/ton												
$0.065	$306,072											
Electricity for pumps (estimated 20% of FF electricity for fan on baghouse	$18,982											
Labor	$452											
Maint. On Equipment (5% of capital cost	$1,250											
Cap. recov. (12% of capital cost)	$3,000											
Total Annual Cos	$329,756											
Total Capitol Cost	$25,000											
Emission Source	**Control Strategy**	**Control Strategy**										
Product loading	**Baseline**	**Option A**										
Capacity (acfm)		**150,000**										
	Full Enclosure and chemical spray suppressant at final drop point	**Full Enclosure and vented to baghouse**										
Operation (hours)	3052	3052										
Chemical Dust Suppression Systen												
Cost of chemical suppressant (water cost included, $0.065/ton multiple points												
$0.065	$306,072											
Electricity for pumps (estimated 20% of FF electricity for fan	$18,982											
Labor	$452											
Maint. On Equipment (5% of capital cost	$3,500											
Cap. recov. (12% of capital cost)	$8,400											
Total Annual Cos	$337,406											
Total Capitol Cost	$70,000											
Baghouse												
Oper. labor		$12,071										
Supv. labor		$1,811										
Maint. labor		$6,639										
Maint. matl.		$6,639										
Electricity		$94,911										
Compr. air		$8,790										
Bag repl.		$14,329										
Dust dispos.		$0										
Overhead		$16,295										
Tax,ins.,adm		$26,011										
Cap. recov.		$58,936										
Total Annual Cos		$246,431										
Total Capitol Cost		$650,275										
Crusher House	**Baseline**	**Option A**										
Capacity (acfm)		**25,000**										
	Full Enclosure w/spraying of chemical suppressant at internal drop points	**Full enclosure w/baghouse**										
Operation (hours)	7848	7848										
Chemical Dust Suppression Systen												

Cost of chemical suppressant (water cost included, $9.065/ton multiple points		
30.065	$453,440	
Electricity for pumps (estimated 20% of FF electricity for fan	$6,693	
Labor	$3,176	
Maint. On Equipment (5% of capital cost	$3,500	
Cap. recov. (12% of capital cost)	$8,400	
Total Annual Cos	$475,209	
Total Capitol Cost	$70,000	
Baghouse		
Oper. labor		$0
Supv. labor		$0
Maint. labor		$17,071
Maint. matl.		$17,071
Electricity		$33,466
Compr. air		$3,767
Bag repl.		$2,654
Dust dispos.		$0
Overhead		$20,486
Tax,ins.,adm		$6,273
Cap. recov.		$14,349
Total Annual Cos		$115,136
Total Capitol Cost		$156,813
Transfer points	**Baseline**	**Option A**
Capacity (acfm)		**11,000**
	Full Enclosure w/internal spraying of chemical suppressant	**Full enclosure w/baghouse**
Operation (hours)	8720	8720
		Baghouse cost
Chemical Dust Suppression Systen		
Cost of chemical suppressant (water cost included, $9.065/ton multiple points		
30.065	$34,008	
Electricity for pumps (estimated 20% of FF electricity for fan	$3,616	
Labor	$1,058	
Maint. On Equipment (5% of capital cost	$100	
Cap. recov. (12% of capital cost)	$240	
Total Annual Cos	$39,022	
Total Capitol Cost	$2,000	
Baghouse		
Oper. labor		$0
Supv. labor		$0
Maint. labor		$18,968
Maint. matl.		$18,968
Electricity		$18,078
Compr. air		$1,674
Bag repl.		$956
Dust dispos.		$0
Overhead		$22,762
Tax,ins.,adm		$3,403
Cap. recov.		$7,867
Total Annual Cos		$92,677
Total Capitol Cost		$85,069
Conveying operations	**Baseline**	**Option A**
Capacity (acfm)		**11,000**
	Partial Enclosure (Rain cover) additional emission reduction based on Inherent chemical latency after crusher	**Full enclosure w/baghouse**
Operation (hours)	8720	8720
Baghouse		
Oper. labor		$0
Supv. labor		$0
Maint. labor		$18,968
Maint. matl.		$18,968
Electricity		$18,078
Compr. air		$1,674
Bag repl.		$956
Dust dispos.		$0
Overhead		$22,762
Tax,ins.,adm		$3,403
Cap. recov.		$7,867
Total Annual Cos		$92,677
Cost of covering Conveyor		$24,000
Total Capitol Cost		$109,069
Haul road dust control	**Baseline**	**Option A**
	Water application	**Chemical dust suppressant application**
Operation (hours)	5760	115
Number of trucks	2	2
Cost of spray trucks	$1,120,000	$1,120,000
Fuel (at 17 gal/hr, diesel cost: $2.49 gallon	$243,821	$4,868
Maintenance cost ($5,000/every 250 hours of operation	$115,200	$2,300
Spray equipment hardware cost ($15.50/hr)	$89,280	$1,783
Labor	$91,123	$1,819
Chemical		$200,000
Water (little to no cost [well water normally used]	$0	$0
Cap. recov. (12% of capital cost)	$134,400	$134,400

Total Annual Cos	$673,824	$345,170										
Total Capitol Cost	$1,120,000	$1,120,000										

Standards of Performance for Coal Preparation and Processing Plants (40 CFR 60 subpart Y)

Response to Comments Received on Proposed Amendments (Published April 28, 2008; 73 FR 22901) and Supplemental Proposal (Published May 27, 2009; 74 FR 25304)

U.S. Environmental Protection Agency
Office of Air Quality Planning and Standards
Sector Policies and Programs Division
Research Triangle Park, NC 27711

September 2009

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Acronyms and Abbreviations

BACT	Best Available Control Technology
BLDS	Bag Leak Detector System
BDT	Best Demonstrated Technology
CAA	Clean Air Act
CAM	Compliance Assurance Monitoring
CEMS	Continuous emission monitoring system
CO	Carbon monoxide
COMS	Continuous opacity monitoring system
CPM	Condensable particulate matter
EPA	U.S. Environmental Protection Agency
FPM	Filterable particulate matter
gr/dscf	grains per dry standard cubic foot
Mg	Megagrams
Mg/day	Megagrams per day
ICR	Information Collection Request
MSDS	Material Safety Data Sheets
MSHA	Mine Safety and Health Administration
NAAQS	National Ambient Air Quality Standards
NESHAPS	National Emission Standards for Hazardous Air Pollutants
NFPA	National Fire Protection Association
NSPS	New Source Performance Standards
NO_x	Nitrogen oxides
O&M	Operation and maintenance
OSHA	Occupational Safety and Health Administration
PECS	Passive enclosure containment system
PM	Particulate matter
$PM_{2.5}$	PM with an aerodynamic diameter less than or equal to a nominal 2.5 μ
PM_{10}	PM with an aerodynamic diameter less than or equal to a nominal 10 μ
PSD	Prevention of Significant Deterioration
scfm	Standard cubic feet per minute
SO_2	Sulfur dioxide
SMCRA	Surface Mining Control and Reclamation Act
Subpart OOO	Nonmetallic mineral processing NSPS under 40 CFR 60 subpart OOO
Subpart Y	Coal preparation and processing plants NSPS under 40 CFR 60 subpart Y
ton/day	tons per day

ton/yr	tons per year
μ	micrometers
VOC	Volatile organic compounds
WDEQ	Wyoming Department of Environmental Quality

1.0 INTRODUCTION

The U.S. Environmental Protection Agency (EPA or the Agency) proposed on April 28, 2008 (see 73 FR 22901), amendments to the new source performance standards (NSPS) for coal preparation and processing plants in 40 CFR 60 subpart Y (hereafter referred to in this document as "Subpart Y"). Initially, a 45-day period ending June 12, 2008, was provided for the public to submit comments to EPA regarding the proposed Subpart Y amendments. In response to a request from commenters, EPA extended the public comment period an additional 30 days, and the comment period ended July 12, 2008.

A total of 42 sets of comments were received by EPA regarding the April 28, 2008, proposed Subpart Y amendments. Some of the comment sets were signed or submitted on behalf of multiple commenters. Also, in some cases duplicate comment sets from the same commenter were submitted to the EPA's Air and Radiation Docket. Table 1-1 lists the names of the commenters, the commenters' affiliations, and the Air and Radiation Docket entry number for each of the comment sets submitted to EPA. Some commenters also submitted supplemental information and data to support their comments.

After reviewing and considering the comments on the April 28, 2008, proposed Subpart Y amendments, EPA decided to publish, and request additional public comment on, a supplemental Subpart Y amendment proposal. This supplemental Subpart Y amendment proposal was published on May 27, 2009 (see 74 FR 25304). The supplemental Subpart Y amendment proposal included: 1) revisions to the particulate matter (PM) emissions and opacity limits originally proposed for thermal dryers, pneumatic coal-cleaning equipment, and coal handling equipment (includes coal processing, conveying, storage and transfer operations); 2) revisions expanding the applicability of Subpart Y thermal dryer standards to both direct contact and indirect contact thermal dryers drying all coal ranks; 3) revisions expanding the applicability of Subpart Y pneumatic coal-cleaning equipment standards to cleaning of all coal ranks; 4) a new sulfur dioxide (SO_2) and a new combined nitrogen oxides (NO_X) and carbon monoxide (CO) emissions limit for thermal dryers; 5) revisions to the definition of "coal" to include petroleum coke and coal refuse; 6) addition of new work practice standards to control coal dust emissions from open storage piles and roadways within with coal preparation and processing plants, and 7) revisions to the monitoring requirements.

A total of 44 sets of comments were received by EPA regarding the May 27, 2009, supplemental Subpart Y amendment proposal. Table 1-2 lists the names of the commenters, the commenters' affiliations, and the EPA Office of Air and Radiation Docket entry number for each of the comment sets submitted to EPA regarding the supplemental Subpart Y amendment proposal.

This document presents EPA's response to each substantive comment received by EPA on the proposed amendments to Subpart Y. The comment summaries are grouped by topic in two sections. Section 2 presents responses to the comments received by EPA on the original April 28, 2008, Subpart Y amendment proposal notice. Section 3 presents responses to the comments received by EPA on the May 27, 2009, supplemental Subpart Y amendment proposal notice.

Table 1-1. List of Commenters on Amendments to 40 CFR 60 subpart Y Proposed April 28, 2008 (73 FR 22901)

Docket No. EPA-HQ-OAR-2008-0260	Date Received	Commenter Name and Affiliation
012 (see note a)	May 15, 2008	Erin Chalmers Associate Attorney Sierra Club Timothy Ballo Associate Attorney Earthjustice Joe Lovett Attorney Appalachian Center for Law and the Environment Cindy Rank Mining Committee Chair West Virginia Highlands Conservancy Bill McCabe Environmental Justice Organizer Southern Appalachian Mountain Stewards Vivian Stockman Project Coordinator Ohio Valley Environmental Coalition Mary Anne Hitt Executive Director Appalachian Voices
013	May 20, 2008	Terry L. O'Clair, P.E. Director North Dakota Department of Health Division of Air Quality
014 (see note b)	May 19, 2008	Quilla Earth Miralia, Esq. Executive Director Public Trust Environmental Legal Institute of Florida, Inc.
015 (see note c)	May 23, 2008	Anonymous Public Comment
016	June 2, 2008	Jeffrey Lieberman Private citizen
018	June 12, 2008	Anna M. Schorr Environmental Engineer Corporate Office, Nucor Corporation
019	June 10, 2008	Tim W. Warden President/CEO Engart Dust Extraction Technology A Division of Englo Incorporated
021	July 9, 2008	Sandi Tabor General Counsel Lignite Energy Council
022	July 11, 2008	Robert D. Bessette President Council of Industrial Boiler Owners (CIBO)

Table 1-1. (Continued)

Docket No. EPA-HQ-OAR-2008-0260	Date Received	Commenter Name and Affiliation
023 (see note b)	July 15, 2008	Anonymous Public Comment
024	July 14, 2008	Ronald W. Pircon President and CEO Benetech, Inc
025, 042 (see note d)	July 14, 2008	Stuart Sanderson President The Colorado Mining Association
026	July 14, 2008	Benjamin L. Brandes Director of Air Quality National Mining Association
027, 066 (see note d)	July 14, 2008	Christopher M. Hobson Senior Vice President Southern Company
028, 033	July 15, 2008	Linda Hilbert Consumers Energy Company
029, 054, 067 (see note d)	July 14, 2008	Craig Eckberg NRG Energy Inc.
030	July 14, 2008	Frank W. Rambo and Megan H. Berge Baker Botts, LLP on behalf of Class of '85 Regulatory Response Group
031	July 11, 2008	Joseph D. Friedlander Environmental Manager The North American Coal Corporation
032, 065 (see note d)	July 10, 2008	Beth Goodnough Director of Regulatory Affairs Western Fuels-Wyoming, Inc.
034	July 14, 2008	Shawn Glacken Senior Vice President, Environmental Services Luminant Power (formerly TXU Power)
035, 059 (see note d)	July 14, 2008	F. William Brownell, Craig. S. Harrison, and Lauren E. Freeman Hunton & Williams LLP on behalf of Utility Air Regulatory Group (UARG)
036	July 1, 2008	Beth Goodnough Director of Regulatory Affairs Western Fuels-Wyoming, Inc. on behalf of Dry Fork Mine
037	July 10, 2008	David A. Finley Administrator State of Wyoming, Air Quality Division
038	July 11, 2008	Dean Metcalf Director Xcel Energy
039	July 11, 2008	William L. Boger Environmental Manager Foundation Coal West, Inc
040	July 14, 2008	Stephen F. Smith Executive Director Texas Mining and Reclamation Association
041	July 14, 2008	G. William Kalb TraDet, Inc

Table 1-1. (Continued)

Docket No. EPA-HQ-OAR-2008-0260	Date Received	Commenter Name and Affiliation
043	July 15, 2008	Glen Warrington President Dust Solutions
044	July 14, 2008	Larry Volmer Holland and Hart, LLP on behalf of Newmont Mining Corporation and Newmont USA Limited
045	July 14, 2008	Andrew T. O'Hare VP Regulatory Affairs Portland Cement Association (PCA)
046	July 11, 2008	Gina Rau Environmental Manager Headwaters, Inc
047	July 14, 2008	Abbie S. Krebsbach, Environmental Manager Montana Dakota Utilities Co
048	July 14, 2008	Danny C. Cox Director Engineering and Permitting ICG, LLC
049	July 14, 2008	James C. Ashby Manager, Environmental Affairs Mettiki Coal, LLC
050	July 14, 2008	Ben Brandes Director of Air Quality National Mining Association
051	July 14, 2008	John R. Cline Troutman Sanders LLP on behalf of Peabody Energy Company
052	July 14, 2008	Ursula Kramer, Co-Chair (Tuscon, AZ) Bob Hodanbosi, Co-Chair (Ohio) National Association of Clean Air Agencies (NACAA)
053	July 14, 2008	Alice Edwards Acting Directory, Air Quality Division State of Alaska, Alaska Department of Environmental Conservation
055	July 14, 2008	William Scott Modrall, Sperling, Roehl, Harris, and Sisk, PA On behalf San Juan Coal Company and BHP Navajo Coal Company

Table 1-1. (Continued)

Docket No. EPA-HQ-OAR-2008-0260	Date Received	Commenter Name and Affiliation
056, 068 (see note d)	July 14, 2008	Erin Chalmers Associate Attorney Sierra Club Timothy Ballo Associate Attorney Earthjustice Joe Lovett Attorney Appalachian Center for Law and the Environment Cindy Rank Mining Committee Chair West Virginia Highlands Conservancy Bill McCabe Environmental Justice Organizer Southern Appalachian Mountain Stewards Vivian Stockman Project Coordinator Ohio Valley Environmental Coalition Mary Anne Hitt Executive Director Appalachian Voices
057	July 14, 2008	Mark G. Premo Vice President Chevron Mining Inc
058, 062 (see note d)	July 14, 2008	Monica Williams Environmental Engineer Thunder Basin Coal Company
060	July 14, 2008	Pamela F. Faggert, Vice President and Chief Environmental Officer Dominion Resources Services, Inc.
061	July 18, 2008	James A. (Jim) Murray Private citizen
063	July 8, 2008	Christopher F. Blazek Vice President Marketing Benetech, Inc.
064 (see note e)	June 23, 2008	Joe Murphy Private citizen
069	July 22, 2008	Marion Loomis Executive Director Wyoming Mining Association

Notes:
a. Request for extension of public comment period.
b. Comment is not relevant to the proposed Subpart Y amendments.
c. Comment is incomplete
d. Duplicate copies of same comments entered in docket.
e. Comment was incorrectly posted to the wrong docket and is not relevant to the proposed Subpart Y amendments.

Table 1-2. List of Commenters on Amendments to 40 CFR 60 subpart Y Proposed May 27, 2009 (74 FR 25304)

Docket No. EPA-HQ-OAR-2008-0260	Date Received	Commenter Name and Affiliation
082	May 28, 2009	K. Mathews Private Citizen
084	June 26, 2009	Benjamin L. Brandes Director, Air Quality National Mining Association
085	July 10, 2009	James C. Ashby Manager, Environmental Affairs Mettiki Coal, LLC
086	July 13, 2009	Dennis R. Vaughn Air Quality Specialist San Juan Coal Company Paul Nazaryk Environmental Affairs Coordinator BHP Navajo Coal Company
087	July 13, 2009	Christopher M. Hobson Senior Vice President Research and Environmental Affairs Southern Company
088	July 13, 2009	Phillip M. Gonet President Illinois Coal Association
089	July 13, 2009	Robert D. Bessette President Council of Industrial Boiler Owners (CIBO)
090	July 13, 2009	David Friedman Director Environmental Affairs National Petrochemical and Refiners Association (NPRA)
091	July 13, 2009	Debra J. Jezouit and Megan H. Berge Baker Botts, LLP on behalf of Class of ’85 Regulatory Response Group
092	July 13, 2009	Tim Rust Private Citizen
093	July 13, 2009	Andrew T. O’Hare Vice President of Regulatory Affairs Portland Cement Association (PCA)
094	July 13, 2009	Terry L. Steinert Environmental Compliance Manager Koch Carbon, LLC
095	July 13, 2009	Benjamin L. Brandes Director, Air Quality National Mining Association
096, 097 (Attachment), 125 (Attachment)	July 13, 2009	Peter Morgan Sierra Club and Earthjustice on behalf of Sierra Club, Southern Appalachian Mountain Stewards, Appalachian Center for the Economy and the Environment, Ohio Valley Environmental Coalition, and Appalachian Voices

Table 1-2. (Continued)

Docket No. EPA-HQ-OAR-2008-0260	Date Received	Commenter Name and Affiliation
098	July 13, 2009	Steve McMillen Baker Botts LLP on behalf of Oxbow Calcining LLC, Oxbow Midwest Calcining LLC, and Oxbow Carbon and Minerals LLC
099, 132 (see note a)	July 13, 2009	F. William Brownell, Craig S. Harrison, and Lauren E. Freeman Hunton and Williams LLP on behalf of Utility Air Regulatory Group (UARG)
100, 101 (Attachment), 102 (Attachment), 128 (see note a)	July 13, 2009	Vera Pardee Center for Biological Diversity (CBD)
103	July 13, 2009	Lawrence W. Kavanagh Vice President Environment and Technology American Iron and Steel Institute Bruce A. Steiner President American Coke and Coal Chemicals Institute
104	July 13, 2009	Christopher G. Swanberg Vice President Environmental, Health, and Safety CVR Energy, Incorporated
105	July 13, 2009	Matthew Todd American Petroleum Institute (API)
106	July 13, 2009	Curtis D. Lesslie Director of Environmental Affairs Ash Grove Cement Company
107	July 13, 2009	Stuart Sanderson President The Colorado Mining Association
108	July 13, 2009	Beth Goodnough Director Regulatory Affairs Western Fuels—Wyoming, Incorporated
109	July 13, 2009	Pamela F. Faggert Vice President and Chief Environmental Officer Dominion Resources Services, Incorporated
110	July 13, 2009	Debra Nelson Environmental Engineer Great River Energy
111	July 13, 2009	Kathleen C. Antoine Environmental Director HOVENSA LLC
112	July 13, 2009	Bill K. Caylor President Kentucky Coal Association
113	July 13, 2009	Jeremy Nichols Director, Climate and Energy Program WildEarth Guardians
114	July 13, 2009	Richard Rosvold Manager, Air Quality Environmental Services Department Xcel Energy Services, Inc.

Table 1-2. (Continued)

Docket No. EPA-HQ-OAR-2008-0260	Date Received	Commenter Name and Affiliation
115	July 13, 2009	George Ellis President Pennsylvania Coal Association (PCA)
116	July 13, 2009	Donald McCloskey Director, Environmental Strategy and Policy PSEG Services Corporation on behalf of PSEG Fossil LLC (PSEG Fossil)
117	July 13, 2009	Jessica A. Hall Crowell and Moring LLP on behalf of Peabody Energy Company
118	July 13, 2009	Charles Bennett Environmental Support Marathon Petroleum Company LLC (Marathon)
119	July 13, 2009	Michael G. Cashin Senior Environmental Policy Advisor Minnesota Power (MP) (Allete)
120	July 13, 2009	Farley R. Wood Director, Environmental Compliance Murray Energy Corporation
121	July 13, 2009	James A. Kiger Environmental Manager Oxbow Mining, LLC
122	July 13, 2009	Wendy S. Hutchinson Regulatory Affairs Manager Thunder Basin Coal Company (TBCC)
123	July 13, 2009	Craig S. Campbell Vice President, Environment and Government Affairs Lafarge North America Inc. (Lafarge)
124	July 13, 2009	Marion Loomis Executive Director Wyoming Mining Association (WMA)
126	July 13, 2009	David A. Finley Administrator, Air Quality Division Department of Environmental Quality (WYDEQ)
127	July 13, 2009	Stephen L. Rowland Chief Operating Officer Rain CII Carbon LLC
129 (see note b)	July 24, 2009	F. William Brownell, Craig S. Harrison, and Lauren E. Freeman Hunton and Williams LLP on behalf of Utility Air Regulatory Group (UARG)
130	July 13, 2009	Roel A. Muñoz Environmental Superintendent – Air Programs Houston Refining LP
131[b]	August 5, 2009	Sherry L. Fisher Environmental Policy Advisor Hunton and Williams LLP

Notes:
a. Duplicate copies of same comment entered in the docket.
b. Comment received after comment period ended on July 13, 2009.

2.0 APRIL 28, 2008 SUBPART Y AMENDMENT PROPOSAL

2.1 Decision to Amend Subpart Y

2.1.1 Adequacy of Information Collected for Rulemaking

Comment: One commenter (019) stated that EPA should reconsider amending Subpart Y until EPA has a more detailed understanding of the newer technologies that are currently available to control emissions from coal preparation plants. EPA should look forward to the newer innovative technologies and strive to improve the position of the United States (U.S.) in its environmental awareness and control techniques to further reduce the airborne coal dust emissions. The commenter described enclosures vented to fabric filters as an "old and outdated technology" and indicated that basing standards on the use of this technology is not in the best interest of the citizens of the U.S., especially where the environment is concerned.

Response: Section 111(b)(1)(B) of the Clean Air Act (CAA) provides that the Administrator shall, at least every 8 years, review and, if appropriate, revise the NSPS promulgated for a given source category following the procedures required under section 111. To meet this legislative directive, EPA reviewed the existing NSPS for coal preparation and processing plants in 40 CFR 60 subpart Y, determined that amendments to the rule were appropriate, and published a proposal notice on April 28, 2008 (see 73 FR 22901). In response to comments on that original proposal of Subpart Y amendments, EPA obtained additional information about coal dryer emission control devices and demonstrated control technologies used for reducing fugitive coal dust emissions from various coal-handling operations. This information included more information about the performance and safety of using enclosures vented to fabric filters to control fugitive coal dust emissions, and information about newer control technology applications to coal preparation and processing plants such as fogging systems and passive enclosure containment systems (PECS). Based on this additional information, on May 27, 2009, EPA published a supplemental proposal notice (see 74 FR 25305 and Section 3 of this document) and solicited public comment on revised amendments to Subpart Y. Because more than 8 years have passed since EPA last reviewed the Subpart Y standards, there is no justification for delaying this review of Subpart Y or the revisions to Subpart Y that this review has demonstrated are appropriate.

2.1.2 Adequacy of Best Demonstrated Technology (BDT) Analysis

Comment: Five comments were received (026, 032, 040, 042, and 044) stating reasons the commenters believe that EPA's determination of BDT used to develop the proposed Subpart Y amendments was inadequate. First, EPA's process for determining BDT, as required by CAA section 111, was an abbreviated analysis that failed to follow the fundamental statutory requirements for making such determinations. To compensate for limited emissions test data and related information specific to coal preparation facilities, EPA assumed, without the requisite demonstration, that its alternative data and information were representative of the coal preparation industry throughout the nation. EPA proposed standards of performance without the substantive support necessary to justify those limitations and whether such limitations could be achieved at affected facilities on a consistent basis. Given the analytical flaws and data

deficiencies which characterize this rulemaking, before finalizing any amendments to Subpart Y EPA must: (1) consider all "adequately demonstrated technologies" and their respective levels of "achievable" emissions; (2) determine those "achievable" levels with emissions information that is demonstrated to be "representative" throughout the coal preparation industry; and (3) determine BDT with due consideration of the statutory factors. Commenters stated that a standard of performance is not the maximum degree of emission reduction technologically achievable.

Response: EPA published a supplemental proposal on May 27, 2009, which differs in several respects from the April 28, 2008, proposal addressed by this comment. Among other things, the supplemental proposal includes a revised BDT analysis for coal processing, conveying, storage and transfer systems. It also differs from the original proposal in that it did not propose to require that owners and operators of affected facilities use a specific control technology (e.g., an enclosure vented to a fabric filter or a chemical suppressant) to reduce fugitive emissions from processing, conveying, storage and transfer systems (see 74 FR 25305). Comments on the supplemental proposal are addressed in Section 3 of this document. The amendments to Subpart Y proposed in the supplemental proposal are based on a proposed determination that any of four technologies, including fogging systems and PECS, are adequately demonstrated technologies that may constitute BDT for coal processing, conveying, and storage and transfer systems. The degree of emission limitation achievable through application of each of these control technologies was determined using test data and other information specific to use of the control technologies at existing coal preparation and processing plants. The process used by EPA to identify BDT is explained in the May 27, 2009, supplemental proposal. This process and the resulting determinations are consistent with the statutory requirements of CAA section 111.

2.2 Subpart Y Applicability

2.2.1 Coal Preparation Plant Definition

Comment: One commenter (016) requested that EPA consider amending the definition of "coal preparation plant" to clarify EPA's intention to apply Subpart Y to coal preparation plants located at any type of industrial site that meet the applicability criteria specified in the rule (definition of coal preparation plant, construction/modification date, and throughput threshold). The commenter suggested using the following definition, "Coal preparation plant means any facility (excluding underground mining operations) which prepares coal by one or more of the following processes: breaking, crushing, screening, wet or dry cleaning, and thermal drying *including, but not limited to, facilities found at the following locations: at aboveground coal mining operations, at coal processing operations and at end users of coal at industrial sites"* (Revision to existing definition suggested by commenter shown in italics).

Response: Entities potentially subject to Subpart Y include aboveground coal breaking, crushing, screening, wet or dry cleaning, and thermal drying at coal mine sites as well as industrial sites at which any of these coal processes are conducted. Applicability of Subpart Y to these entities depends on the process coal throughput and the date of process construction, reconstruction, or modification. EPA reviewed the existing Subpart Y definition for the term "coal preparation plant" and decided to revise the title of the term to be "coal preparation and processing plant," but not to change the definition of the term. The existing Subpart Y definition

has been properly interpreted to apply the rule to both the mine and industrial sites intended by EPA to be subject to the rule. As explained in the response to comment 3.8.1, the affected facilities covered by subpart Y since its 1976 promulgation have included both preparation and processing units, and the proposed title change was for clarification purposes (i.e., to more accurately reflect the affected facilities subject to subpart Y). The final action promulgates the proposed title change "Standards of Performance for Coal Preparation and Processing Plants."

2.2.2 Coal Preparation Plant Threshold Throughput

Comment: One commenter (052) supports lowering the applicability of the rule to facilities that process 100 or more tons per day (ton/day), the approximate amount of coal that is transported by one rail car. The commenter stated that the documents in the docket for this rulemaking indicate that EPA's draft proposal initially had requested comment on a lowered applicability threshold, but that the Office of Management and Budget (OMB) requested that it be deleted. The commenter believes that 100 ton/day is a significant quantity of coal and that there is no reason that such an amount should not be subject to regulation under the rule for the benefit of public health and the environment.

Response: As with all regulations developed by the Agency, the April 2008 proposed rulemaking was subject to OMB review as part of the statutory process. At that time, EPA decided to maintain the applicability threshold at 181 Mg/day (200 ton/day). This applicability threshold was established in the final rule (41 FR 2232; January 15, 1976). In the supporting documentation, EPA explained that this threshold effectuated EPA's intent to control coal preparation sources that are significant with respect to emissions (and, thus, comply with the CAA section 111(b)(1)(A) mandate that the categories of sources for which standards were to be developed were to be those which "…cause, or contributes significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare"). EPA does not have any information that facilities of the size noted by the commenter (i.e., 100 ton/day) would utilize the equipment necessary to classify them as "coal preparation and processing plants" (e.g., coal breaking, crushing, screening, wet or dry cleaning, and thermal drying), and, thus, is not changing the applicability threshold at this time. However, EPA will continue to assess the issue.

Comment: One commenter (016) requested that EPA clarify whether the throughput threshold of 181 Mg (200 tons) per day used to determine applicability of a coal preparation plant to Subpart Y is a potential maximum daily processing capacity, an average daily processing capacity or some other equivalent definable term.

Response: The Subpart Y applicability throughput threshold of 181 Mg (200 tons) of coal processed per day is determined based on the rated processing capacity of plant machinery used to break, crush, screen, clean, or dry coal. The equipment coal processing rating is to be calculated assuming that the machinery is operated 24 hours per day. An owner or operator of a coal preparation and processing plant is subject to Subpart Y if any one piece of equipment processing coal at the facility site has the capacity to break, crush, screen, clean, or dry coal at a rate greater than 181 Mg (200 tons) per day assuming 24 hours-per-day operation.

2.2.3 Subpart Y Amendments Applicability Date

Comment: One commenter (039) stated that EPA should consider changing the "effective date" of a rulemaking to the date of promulgation of the final rule. Retroactively applying the new rule to facilities that began construction, reconstruction, or modification after the date the rule was proposed jeopardizes and stymies any work that was in progress at the time of the proposed ruling as well as work planned in the near future.

Response: The intent of the comment applies to the "applicability date" for the Subpart Y amendments rather than the "effective date." The "applicability date" is the date used to determine which new, reconstructed, or modified sources in a given source category are subject to the NSPS for that source category, and is established by a statutory directive in CAA section 111(a)(2) that EPA does not have authority to alter. The definition of "new source" in CAA section 111(a)(2) requires that an NSPS apply to all sources constructed or modified after the publication of proposed regulations. Only affected facilities that are constructed, reconstructed, or modified after April 28, 2008, or May 27, 2009, (the date varies depending on which proposal addressed/revised a specific rule requirement) are subject to the new requirements added to Subpart Y. These dates reflect the dates that the proposal and supplemental proposal were published in the Federal Register (see 73 FR 22901 and 74 FR 25304). The "effective date" is the date used to establish the calendar dates by which the owner or operator of an affected facility must comply with specific rule requirements. The effective date will be established by the date that the final Subpart Y amendments are published in the Federal Register, this date is not retroactive.

2.3 Subpart Y Thermal Dryer Standards

2.3.1 Thermal Dryers Processing Non-Bituminous Coals

Comment: Two commenters (041 and 056) requested that EPA revise the existing Subpart Y definition of "thermal dryer" used to determine the affected sources subject to the rule's control requirements. Commenter 056 requested that EPA expand the existing definition of "thermal dryer" to include equipment that processes non-bituminous coal. The commenter stated that there are existing thermal dryers processing non-bituminous coals and that new thermal dryers processing these coals may be built in the future. The commenter cited several examples of existing applications using thermal dryers to process low-rank coals. Commenter 041 presented background information on the types and application of thermal dryers used for coal preparation in the U.S. The commenter requested that EPA specifically define the types of thermal dryers subject to Subpart Y control requirements.

Response: The existing Subpart Y definition of "thermal dryer" limits the applicability of the rule's control requirements to those thermal dryers processing bituminous coals. The proposed amendments to Subpart Y published in the May 27, 2009, supplemental proposal notice proposed to revise the definition of "thermal dryer" to expand the applicability of the Subpart Y control requirements to direct contact and indirect thermal dryers drying all coal ranks constructed, reconstructed, or modified after May 27, 2009 (see 74 FR 25308-25309 and Section 3 of this document). For thermal dryers that were constructed, reconstructed, or modified on or before May 27, 2009, the existing Subpart Y definition for "thermal dryer" would still apply.

2.3.2 Thermal Dryer BDT Determination

2.3.2.1 Consideration of Alternative Coal Drying Technologies as BDT

Comment: Two comments (035 and 056) were received regarding use of alternative coal drying processes as related to EPA's BDT determination for coal dryers. Commenter 056 stated that EPA provided no factual or legal justification for including standards based on emissions from direct thermal dryers when alternative indirect thermal dryers produce lower emissions and are more cost-effective. The proposed performance standards based on existing controls for direct thermal dryers do not reflect BDT. The determination of BDT for thermal dryers needs to include processes or technologies which are inherently lower polluting. Direct thermal dryers are an outdated method for lowering the moisture content of coal because the process is expensive and energy intensive, and a significant proportion of thermally-dried fines can be lost as wind-borne dust. Direct thermal drying is typically now only used to reduce the cost of transport of moisture over long distances and to avoid handling problems associated with excessive moisture which will freeze in cold climates. Indirect thermal dryers use waste heat from other processes and have lower emissions than direct thermal dryers. Also, new coal preparation plants can use centrifugal-type mechanical dryers which require no combustion-generated heat and are less expensive than thermal dryers. Additional options for dewatering fine coal portions and tailings include the addition of thickeners, flocculants, coagulants, and other chemical additives, along with the use of press, vacuum, and other filters. Commenter 035 stated that thermal dryer designs are being considered in at least one pending power plant permit application where waste heat from the process could be used to partially dry the lignite before combustion, increasing efficiency and slightly reducing CO_2 emissions. Thermal dryers may be used at other locations in the future for low-rank coal applications.

Response: As described in greater detail in the response to comments in Section 3, EPA did consider alternative technologies in its BDT analysis for the 2009 supplemental proposal, recognizing for example that either recirculation or indirect thermal dryers may be available for use at new facilities. Further, in support of the final rule, EPA concluded that recirculation or indirect thermal dryers also may be available for use at reconstructed facilities. Although alternative coal drying technologies such as those noted by the commenters may inherently produce lower air pollutant emissions compared to direct contact once-through thermal drying, these alternative technologies to using a direct contact once-through thermal dryer may not be technically applicable, cost-effective, or the most energy efficient for all possible coal drying applications that could be subject to Subpart Y. The type of coal drying technology used at a given facility is influenced by a variety of factors, including type of facility, coal moisture reduction requirements, availability of waste heat sources at the coal processing location, and drying process energy requirements including electrical power consumption. There are two basic types of moisture in coal, free and inherent. Mechanical drying techniques (centrifuge, vacuum, compression, etc.) and chemical additives can remove free moisture adsorbed onto the surface of the coal particles and a portion of the hydroscopic moisture contained by capillary action within microfractures in the coal particles, but are ineffective at removing inherent moisture (and, thus, would only be applicable at preparation plants utilizing coal washing). Some type of thermal energy is required to remove the interstitial and molecular (inherent) moisture from the coal for applications where extremely low moisture content is desirable. Therefore, mechanical drying techniques are not suitable replacements for thermal dryers under

all circumstances, and because waste heat is not available at all locations, thermal dryers using waste heat are not a technically possible substitute for thermal dryers in all situations.

2.3.2.2 Consideration of Add-on Particulate Matter (PM) Emissions Control Technologies as BDT

Comment: Three comments (035, 041, and 045) were received regarding EPA's determination that fabric filters are BDT for coal dryers. Commenter 035 stated that fabric filters are BDT for a thermal dryer used at a coal-fired power plant. Centrifugal collectors (cyclones) and venturi scrubbers consume an "extraordinary" amount of auxiliary power and would probably not be installed at a coal-fired power plant. Commenter 041 stated that fabric filters are not practical controls for use on fluidized-bed thermal coal dryers processing eastern U.S. coals because of operational and safety considerations. Depending on the specific thermal dryer operation, the fabric filter could be subject to plugging due to dew point considerations. The most significant issue is that the high 17 to 18 percent oxygen content in the dryer exhaust gas combined with the ultra-fine coal makes the fabric filters subject to fires. Commenter 045 stated that fabric filters do not constitute BDT for thermal dryers at bituminous coal processing plants. Emissions from bituminous coal thermal dryers are sufficiently different from dryers used at mineral production facilities and EPA cannot simply assume that the technology is applicable to coal processing plants.

Response: Coal-fired direct contact once-through thermal dryers represent the majority of existing thermal dryers used at coal preparation and processing plants, and most of those dryers use wet scrubbers to control PM emissions. However, no such new dryers have been built in the last decade. Possible replacement technologies for direct contact once-through thermal dryers include indirect thermal dryers and recirculation thermal dryers. In addition, in some circumstances, mechanical dryers may be used (however, as explained above these are not suitable for all applications). Because these replacement technologies are available and because no new direct contact once-thermal dryers have been built in recent years, EPA's BDT analysis for the 2009 supplemental proposal concluded that the control technology and emissions rates from the best-performing existing coal-fired thermal dryers do not necessarily represent BDT for a new thermal dryer. EPA believes that new thermal dryers could be designed as either a coal-fired recirculation thermal dryer or an indirect thermal dryer. EPA concluded that the best adequately demonstrated technology for controlling PM emissions from these types of dryers is a fabric filter. The Amax Coal Company's Belle Ayr subbituminous coal mine in Wyoming uses a recirculation thermal dryer equipped with a fabric filter. One indirect thermal dryer recently installed to dry lignite at the Great River Energy Coal Creek Power Plant in North Dakota uses a fabric filter. The application of fabric filters to control PM emissions at these facilities demonstrates that fabric filters can safely be used for controlling PM emissions from the types of new thermal dryers most likely to be built for coal processing at facilities in the U.S. For these and other reasons explained in the proposal and supplemental proposal, EPA determined that BDT for new coal thermal dryers is a coal-fired recirculation thermal dryer with a fabric filter or an indirect thermal dryer with a fabric filter.

It is important to note that although EPA determined that coal-fired recirculation thermal dryers with fabric filters or indirect thermal dryers with fabric filters are BDT for new thermal dryers, the proposed amendments to Subpart Y published in the May 27, 2009, supplemental proposal

notice (see 74 FR 25309 and Section 3 of this document) do not require the use of a particular control technology. EPA's analysis concluded that a new thermal coal dryer could use a once-through dryer design and achieve the proposed PM emission limit using a high-energy wet scrubber to control PM emissions. High-energy wet scrubbers can be designed and operated to control PM emissions from thermal dryers to equivalent levels achieved by fabric filters. Thus, the PM standards for new thermal dryers established based on the determination that coal-fired recirculation thermal dryers with fabric filters or indirect thermal dryers with fabric filters are BDT, would not prohibit a new coal preparation plant from choosing to build a new direct contact once-through thermal dryer. In the May 27, 2009, supplemental proposal notice, EPA determined that PM limits for modified and reconstructed thermal dryers should be based on direct contact once-through thermal dryers with high-energy wet scrubbers. However, as explained in EPA's response to the previous comment and to comment 3.3.4.4, EPA has since determined that thermal dryers undergoing reconstruction could undergo the conversions necessary to meet the emission limits based on BDT for PM emissions for new thermal dryers and, thus, meet the PM and opacity limits of new facilities. The final rule reflects this decision.

2.3.4 Thermal Dryer PM Emissions Limits

2.3.4.1 Promulgation of PM Emission Limits Based on Fabric Filters as BDT

Comment: Two commenters (039 and 045) stated that EPA's suggestion in the preamble for the proposed Subpart Y amendments that the Agency could directly promulgate emission standards for thermal dryers based on using fabric filters as BDT without formal re-proposal to allow for additional public comment is inconsistent with the CAA and with judicial interpretations of EPA rulemaking authority under CAA section 111, such as Portland Cement Ass'n v. Ruckelshaus.

Response: Proposed amendments to Subpart Y published in the May 27, 2009, supplemental proposal notice included a PM emissions limit for new thermal dryers (i.e., those constructed after April 28, 2008) based on a determination that BDT is a fabric filter-controlled coal-fired recirculation thermal dryer or a fabric filter-controlled indirect thermal dryer. In that supplemental proposal, EPA also determined that PM limits for modified and reconstructed thermal dryers should be based on direct contact once-through thermal dryers with high-energy wet scrubbers. Thus, through the supplemental proposal, EPA did allow for additional public comment consistent with the CAA (see 74 FR 25309 and Section 3 of this document).

2.3.4.2 Establish Separate Emissions Limits for $PM_{2.5}$, PM_{10}, and Condensible PM

Comment: Two commenters (052 and 056) disagreed with EPA's decision not to establish separate PM emission limits for condensible PM, $PM_{2.5}$, or PM_{10} emissions from thermal dryers. Commenter 056 stated that PM from thermal dryers includes products of combustion. Combustion gases contain significant proportions of fine PM, including PM_{10}, $PM_{2.5}$, and condensible PM. EPA has recognized that these are individual pollutants with unique characteristics, health risks, and control technologies. Because PM emissions from thermal dryers contain PM_{10}, $PM_{2.5}$, and condensable PM, and these represent individually determined hazards, separate emission standards for each of these PM fractions should be set. Commenter 052 recommended that EPA amend Subpart Y promptly at a future date once test

methods are available for measuring condensible PM emissions from thermal dryers and other coal preparation processes.

Response: The National Ambient Air Quality Standards (NAAQS) establish ambient standards for two categories of PM based on the aerodynamic diameter of the particles as measured in micrometers (μ). The first PM category is PM with an aerodynamic diameter less than or equal to a nominal 10 μ and is referred to as PM_{10}. The second PM category is PM with an aerodynamic diameter less than or equal to a nominal 2.5 μ and is referred to as $PM_{2.5}$. Depending on the composition of an exhaust gas stream from a process, the PM emitted into the atmosphere can consist of a filterable PM (FPM) fraction and a condensible PM (CPM) fraction. The FPM fraction is composed of solids of varying particle sizes determined by source-specific characteristics (e.g., process type and operating conditions, process input material compositions and properties, and process chemistry). The CPM fraction remains in a gaseous form in the process exhaust stream until it is released into ambient air where it condenses to a solid or liquid form when exposed to atmospheric conditions.

The available PM emissions data for thermal dryers collected by EPA were measured using EPA Method 5 (see 40 CFR part 60, appendix A-3). For this method, solid FPM is collected isokinetically on a filter media (typically glass or quartz fiber) and is then measured gravimetrically to determine FPM emissions. Method 5 uses a probe and out-of-stack filter, both heated to 248±25°F, to prevent condensation of moisture and gaseous compounds. This method, when performed correctly, provides an accurate measurement of total FPM (for PM > 0.3 μ), but does not measure FPM emissions by particle size distribution (i.e., PM_{10} or $PM_{2.5}$) nor does the method measure CPM.

EPA is revising existing test methods, *EPA Method 201A—Determination of PM_{10} Emissions (Constant Sampling Rate Procedure)* and *EPA Method 202—Determination of Condensible Particulate Emissions from Stationary Sources*, to provide test methods that will accurately measure PM_{10}, $PM_{2.5}$, and CPM from stationary sources such as coal thermal dryers. Amendments to these test methods were proposed on March 26, 2009 (74 FR 12970). The amendments to Method 201A add a particle-sizing device to allow for sampling of $PM_{2.5}$, PM_{10}, or both PM_{10} and $PM_{2.5}$. The amendments to Method 202 revise the sample collection and recovery procedures of the method to provide for more accurate and precise measurement of CPM. Until such time that Methods 201A and 202 are finalized and sufficient test data using these methods can be collected for coal thermal dryers, a determination of the need to add separate PM emission limits to Subpart Y for $PM_{2.5}$, PM_{10}, or CPM emissions from coal thermal dryers cannot be made.

2.3.4.3 Selection of Proposed Emission Limit Value

Comment: One commenter (056) stated that the level of the PM emissions limits for thermal dryers must be more stringent. The commenter stated that EPA appears not to have thoroughly reviewed the existing test data, instead limiting its search to those facilities subject to stringent PM permit limits. EPA omitted from consideration the Hawthorne plant test data which reported PM emissions of 0.0092 grains per dry standard cubic foot (gr/dscf), which are less than half of the proposed limit. The most stringent permitted limits are not automatically correlated with the

lowest emission rates, and EPA must review a wider range of data when developing the final limit for PM from direct thermal dryers.

Response: Revised amendments to Subpart Y published in the May 27, 2009, supplemental proposal notice included a PM emissions limit for new thermal dryers (i.e., those constructed after April 28, 2008) based on a determination that BDT is a fabric filter-controlled coal-fired recirculation thermal dryer or a fabric filter-controlled indirect thermal dryer. The PM emissions limit proposed for new thermal dryers was based on performance test data and air permit limits specific to existing coal thermal dryers with fabric filters (see 74 FR 25309 and Section 3 of this document). In the May 27, 2009, supplemental proposal notice, EPA also determined that PM limits for modified and reconstructed thermal dryers should be based on direct contact once-through thermal dryers with high-energy wet scrubbers. However, as previously explained, EPA has since determined that thermal dryers undergoing reconstruction could undergo the conversions necessary to meet the emission limits based on BDT for PM emissions for new thermal dryers (see Section 3 of this document).

2.3.4.4 Continuous Achievability of Proposed Emission Limit Value

Comment: Two commenters (041 and 045) stated that EPA's analysis of the PM emissions data does not support the continuous achievability of the proposed emission limit value by all potentially affected thermal dryers. Commenter 45 stated that EPA is required by Nat'l. Lime Ass'n. v. EPA, 627 F.2d 416, 431 (D.C. Cir. 1980) to set a PM emissions limit level that assures continuous compliance despite process and control equipment variability and anticipated deterioration in performance between regularly scheduled maintenance events. The commenter stated that EPA has recognized this condition for other rulemakings, including in setting emission standards for hazardous air pollutants at new cement kilns burning hazardous waste in 40 CFR part 63 subpart EEE. Commenter 41 stated that the PM emissions data used for selection of the PM emissions level must address the following factors: (1) use of a BDT control configuration that includes both the high energy scrubber and the mist eliminator; (2) operation of the high energy scrubbers at less than 100 percent load; (3) the owner/operator burden of more frequent performance testing that would be required for the proposed emissions limit by existing State regulations (the commenter specifically cited an example for the State of West Virginia); and (4) PM emissions from coal thermal dryers are a function of heat input and evaporative load, and not coal tonnage throughput.

Response: Revised amendments to Subpart Y published in the May 27, 2009, supplemental proposal notice included PM emissions limits for thermal dryers constructed, reconstructed, or modified after April 28, 2008. Although the PM emissions limit for new thermal dryers is based on a determination that BDT is a fabric filter-controlled coal-fired recirculation thermal dryer or a fabric filter-controlled indirect thermal dryer, the proposed level of PM control would be achievable using wet control approaches (see 74 FR 25309 and Section 3 of this document). Further, EPA has data from two facilities, including 2 year's of testing on one fabric filter-controlled unit, indicating that the proposed emission limit is achievable. EPA believes that other factors noted by the commenter have been addressed through the use of a concentration limit format and through the use of different emission limit requirements for new and modified sources. EPA also believes that the performance testing requirements are appropriate.

2.3.4.5 Modified and Reconstructed Sources

Comment: One commenter (041) stated that the proposed PM emissions limit of 0.020 gr/dscf will eliminate the modification/reconstruction of some existing thermal coal dryers for which it is practical to lower PM emissions further but not to the level required by the proposed limit. The commenter stated that in these cases the proposed PM emission limit would be burdensome and counter-productive. In contrast, a second commenter (056) stated that the level of the PM emissions limit for modified sources must be more stringent than the level proposed.

Response: Revised amendments to Subpart Y published in the May 27, 2009, supplemental proposal notice revised the PM emissions limits for thermal dryers and established separate limits for reconstructed and modified thermal dryers (see 74 FR 25309 and Section 3 of this document). As previously explained, EPA has since determined that thermal dryers undergoing reconstruction could undergo the conversions necessary to meet the emission limits based on BDT for PM emissions for new thermal dryers. (see Section 3 of this document).

2.3.5 Thermal Dryer Opacity Limit

Comment: Four comments (045, 056, 041, and 052) were received related to EPA's decision not to revise the existing thermal dryer opacity limit of 20 percent. Commenter 045 agrees with EPA's decision not to revise the opacity limit for thermal dryers. Commenter 056 disagrees with EPA's conclusion that the existing thermal dryer opacity limit of 20 percent is appropriate. The commenter stated that there is, at best, a tenuous correlation between opacity and PM emissions The use of a single source test by EPA cannot be taken as assurance that a 20 percent opacity limit will always, or even the majority of the time, indicate PM emissions at or below the standard. More appropriate approaches include a thorough review of existing opacity test data from thermal dryers, and lowering the opacity limit proportional to the lowering of the PM limit (equivalent to approximately 13 percent opacity, or 15 percent rounding up to the nearest 5 percent increment). Commenter 041 stated that opacity measurements do not account for the emissions of particulate-laden entrained droplets from wet scrubbers and that these droplets contain between 15 to 55 percent of the total PM emissions. Commenter 052 stated that the opacity limits for thermal dryers (and pneumatic coal-cleaning equipment as well) should be replaced with the requirement to use a PM continuous emission monitoring system (CEMS).

Response: Based on a review of additional opacity data for coal thermal dryers following the original Subpart Y proposal, a revised opacity limit of less than 10 percent for new thermal dryers constructed after April 28, 2008, was included in the supplemental Subpart Y proposal (see 74 FR 25309 and Section 3 of this document). The supplemental Subpart Y proposal maintains the existing opacity limit of less than 20 percent for thermal dryers reconstructed or modified after April 28, 2008. As previously explained, EPA has since determined that thermal dryers undergoing reconstruction could undergo the conversions necessary to meet the limits, including the less than 10 percent opacity limit, based on BDT for PM emissions for new thermal dryers (see Section 3 of this document). Compliance with the PM and opacity standards are determined separately and the standards are separately enforced. Further, the PM standard is established at a level which will result in the design, installation and operation of BDT; the opacity standard is established at a level which will require proper continuous operation and maintenance (O&M) of such control systems on a day-to-day basis, but not require a more

efficient or more expensive control system. In addition, opacity is established as an independent enforceable standard. Opacity standards are a necessary supplement to the PM standards because stack tests are expensive, take a long time to schedule, cannot be performed frequently, and are not indicative of continued O&M. PM CEMS are discussed in the response to comment 3.5.4.

2.3.6 Thermal Dryer SO_2 and NOx Emissions Limits

Comment: One commenter (056) stated that EPA must set standards of performance for SO_2 and NO_X based on BDT that can control these pollutants because thermal dryers emit quantities of SO_2 and NO_X that cause or contribute significantly to air pollution which may reasonably be anticipated to endanger public health or welfare. The commenter provided an estimate of SO_2 and NO_X emissions from coal thermal dryers.

Response: Revised amendments to Subpart Y published in the May 27, 2009 supplemental proposal notice added emission standards to reduce SO_2, NO_X, and CO emissions from thermal dryers (see 74 FR 25310-25312 and Section 3 of this document).

2.3.7 Thermal Dryer Volatile Organic Compounds (VOC) Emissions Limit

Comment: One commenter (056) stated that EPA must set standards of performance for emissions of volatile organic compounds (VOC) from thermal dryers because organic components from chemical additives introduced during wet processes, including flotation, may be entrained in the coal and volatilized during drying. The commenter provided an estimate of VOC emissions from coal thermal dryers.

Response: VOC emitted from thermal dryers are a result of both incomplete fuel combustion and volatile matter released from the coal bed as it is heated and dried. Good combustion practices limit the formation of both CO and VOC by providing sufficient oxygen in the combustion zone for complete combustion to occur. Revised amendments to Subpart Y published in the May 27, 2009, supplemental proposal notice added emission standards to reduce CO emissions from thermal dryers based on a determination that good combustion practices constitutes BDT for CO emissions from thermal dryers (see 74 FR 25311 and Section 3 of this document). No technology for control of VOC emissions beyond combustion controls was identified as being used by coal thermal dryers. However, by setting an emissions limit to control CO emissions, VOC emissions that result from incomplete combustion are also reduced. The VOC emissions resulting from volatile matter released from the heated coal bed itself are variable. EPA concluded that a separate VOC emission standard cannot be established that would be achievable for variable coal ranks processed in thermal dryers across the country. Therefore, EPA dids not propose under this action to amend Subpart Y to include a separate VOC emission standard for thermal dryers.

2.3.8 Thermal Dryers with In-line Coal Mills

Comment: One commenter (045) requested that EPA clarify the application of the thermal dryer PM emissions limit to a thermal dryer used with an in-line coal mill. The commenter stated that it is not entirely clear from the language of the proposed Subpart Y amendments

whether the exhaust gases from a bituminous coal thermal dryer that is part of an in-line coal mill are considered to be "exhausted to the atmosphere," as required to meet the definition of "thermal dryer." If a new or modified in-line coal mill were treated as both a thermal dryer and as coal processing and conveying equipment, and if the emissions from that in-line coal mill had to meet the lower PM emissions limit of 0.005 gr/dscf applicable to coal processing and conveying equipment–as opposed to the 0.020 gr/dscf limit for new and modified thermal dryers–then the NSPS would not be based on BDT and the cost of achieving 0.005 gr/dscf would be much greater, if the standard could be achieved at all. The commenter requested that such a configuration be subject to the PM mass emission limits and opacity limits applicable to thermal dryers rather than to coal processing and conveying equipment.

Response: EPA agrees that in the case of a thermal dryer that is part of an in-line coal mill at a Portland cement manufacturing facility where all of the thermal input is supplied by cement kiln exhaust or clinker cooler exhaust, the dryer should be regulated under the appropriate Portland Cement kiln regulations (40 CFR Part 63 subpart LLL and 40 CFR 60 subpart F). Revised amendments to Subpart Y published in the May 27, 2009, supplemental proposal notice made some additional changes to the PM emissions limits for thermal dryers and for coal processing and conveying equipment, coal storage systems, and coal transfer system operations constructed, reconstructed, or modified after April 28, 2008 (see 74 FR 25310-25311, 74 FR 25313-25314, and Section 3 of this document). The final rule contains some further revisions. The amended emissions limits would be applicable to new, reconstructed, or modified thermal dryers at Portland cement manufacturing facilities in situations where the thermal input is not supplied by cement kiln or clinker cooler exhaust. Further discussion is provided in the response to comment 3.3.8.

2.4 Subpart Y Coal Processing, Conveying, Storage and Transfer System Standards

2.4.1 Affected Sources

2.4.1.1 Coal Processing and Conveying Equipment

Comment: One commenter (035) stated that EPA's proposal to revise the definition of "coal processing and conveying equipment" by changing the term "conveyor belts" to "conveying systems" should not be made without explaining and soliciting comment on the significance of the change. Because the absence of a reference to "conveying systems" in the rule was relevant to EPA's prior applicability determinations, this revision could have significant impacts. The commenter would support over-ruling the EPA's prior applicability determinations that focused on only a narrow part of a conveying system rather than the entire system.

Response: EPA intends to maintain the existing Subpart Y definition for the term "coal processing and conveying equipment." The April 28, 2008 Subpart Y proposal and subsequent May 27, 2009 supplemental Subpart Y proposal that included a definition for the term "coal processing and conveying equipment" that substituted the words "conveying systems" in place of "conveyor belts" was an error. EPA intends to maintain the existing definition for "coal processing and conveying equipment" in which coal processing and conveying equipment means "any machinery used to reduce the size of coal or to separate coal from refuse, and the equipment

used to convey coal to or remove coal and refuse from the machinery. This includes, but is not limited to, breakers, crushers, screens, and conveyor belts."

Comment: Two commenters (025 and 040) requested that EPA clarify that Subpart Y performance standards apply only to conveying equipment that is an affected facility. With the exception of a transfer and loading system, other so-called "transfer points" to or from conveying equipment should not be considered to be affected facilities at coal preparation plants.

Response: As discussed in the response to the preceding comment, EPA intends to maintain the existing Subpart Y definition for the term "coal processing and conveying equipment." The potential for coal dust emissions to the atmosphere from machinery conveying coal exists from openings other than those where the coal enters or exits the machinery. All potential fugitive coal dust emission points associated with machinery that meet the definition of "coal processing and conveying equipment" are subject to the applicable Subpart Y control requirements.

2.4.1.2 Coal Unloading Activities

Comment: Four commenters (026, 035, 039, and 040) stated that coal unloading activities should not be subject to Subpart Y requirements. Commenter 026 stated that the definition of transfer and loading as it applies to Subpart Y is not well defined. In contrast, Commenter 056 stated that EPA should require controls for unloading to plant machinery and open piles. Commenters 035 and 040 stated that EPA previously issued an interpretation of Subpart Y (63 FR 53288-53290, October 5, 1998) that concluded that coal unloading, which involves conveying coal to coal plant machinery, is subject to Subpart Y and that any fugitive emissions from coal dumping must be included in a determination of whether a coal preparation plant is a major source subject to Title V permitting requirements. The commenters stated that EPA has not provided any data for the proposed Subpart Y amendments to justify applying the rule's control requirements to unloading activities. The commenters requested that EPA either provide a justification for establishing standards for unloading activities, and allow for comment on such justifications, or that EPA reverse this applicability determination so that unloading activities are not subject to Subpart Y. Commenter 039 disagreed with EPA's determination that truck dumps are affected facilities subject to Subpart Y. At the commenter's facility, trucks discharge coal through a grizzly (a steel grid plate) into a hopper, neither of which is "conveying equipment." This commenter stated that a piece of equipment should not be considered an affected facility simply because conveying may take place further in the process.

Response: The unloading of coal from the trucks, railcars, or barges used to deliver coal to a facility has the potential to generate significant amounts of fugitive coal dust emissions to the atmosphere if effective control measures are not implemented. Thus, these activities remain subject to Subpart Y requirements. In addition, revised amendments to Subpart Y published in the May 27, 2009, supplemental proposal notice establish work practice standards to control fugitive coal dust emissions from open storage piles, including the loading, unloading, and conveying operations of open storage piles (see 74 FR 25312-25313 and Section 3 of this document). EPA believes the amendments made also address the issue of the clarity of the definition of "transfer and loading." Further, EPA utilized data from coal uploading operations in assessing the emission limit for coal unloading operations in the Supplemental Proposal.

2.4.1.3 Coal Storage Piles

Comment: Many comments were received on expanding the applicability of Subpart Y to include open storage piles. One commenter (056) stated that EPA should expand the scope of "coal storage system to" include open storage piles. Open coal storage piles are a significant source of PM emissions for which the commenter believes control technology is available. Wind erosion of open storage piles, which can be exacerbated when heavy machinery is driven over the piles repeatedly, creates significant amounts of PM emissions. Potential control measures include enclosures, wind fences, or other barriers, and wet or chemical suppression. Other commenters (021, 027, 029, 030, 031, 034, 035, 038, and 044) stated that EPA should not expand the scope of "coal storage system" to include open storage piles. Commenters 027 and 035 supported retention of the existing definition of "coal storage system" in Subpart Y and the case-by-case regulation of coal storage piles. Commenters 029, 030 and 038 stated that using the NSPS program to regulate coal storage piles at coal-fired power plants would raise the following regulatory issues: (1) the terms reconstruction and modification are not technically relevant to open storage piles; (2) demonstrating compliance with a PM or opacity limit on a coal pile would be difficult: and (3) because the characteristics of coal, such as moisture content and hardness, can vary significantly based on the source, even within a given subclass, control techniques that work well for coal from one mine may not work as effectively for coal from another mine, making it difficult to assign a general control efficiency for any particular control technique. Commenters 021, 031, and 044 stated that expanding coverage to include open storage piles is unnecessary and would be inconsistent with EPA's regulatory approach with other NSPS source categories. For example, for 40 CFR 60 subpart J for petroleum refineries, open storage of petroleum coke is not considered to be an affected source. Petroleum coke has similar silt and related dusting properties as forms of coal. In addition, PM emission limitations and work practice standards are effectively in place at the State level to address open coal stockpiles on a site-specific basis to meet ambient air quality standards. Redundant regulation on the Federal level is not required.

Response: Revised amendments to Subpart Y published in the May 27, 2009, supplemental proposal notice added work practice standards for controlling fugitive coal dust emissions from open coal storage piles (see 74 FR 25312-25313 and Section 3 of this document).

2.4.1.4 Plant Roads

Comment: One commenter (056) stated that EPA must establish equipment and work practice standards or performance standards based on silt loading to control PM emissions from roads. Potential work practice and equipment standards include use of tire or truck wash systems, vacuum sweeper trucks, and wet suppression and waste flushing.

Response: Revised amendments to Subpart Y published in the May 27, 2009, supplemental proposal notice added work practice standards for controlling fugitive coal dust emissions from on-site plant roadways (see 74 FR 25312-25313 and Section 3 of this document). However, as explained in EPA's response to comment 3.4.6.3.1, EPA has since determined that roads will not be added as affected facilities under these Subpart Y amendments.

2.4.1.5 Coal Hauling Trucks and Railcars

Comment: One commenter (056) stated that EPA should require controls for trucks and trains in the form of covers. Trucks, vehicles, and trains are a large source of particulate emissions due to wind erosion. EPA must regulate rail and truck transport as part of the coal preparation plant standard because they are significant sources of particulate emissions for which control technology is available. Although rail cars and trucks themselves are not "stationary sources" and likely could not be regulated under the NSPS as an independent stationary source, it is the coal preparation plant that is the stationary source, and train cars and trucks are simply one source of emissions among many at this source. Thus, rail and truck traffic that operate at a coal preparation plant facility must be subject to standards of performance.

Response: Revised amendments to Subpart Y published in the May 27, 2009, supplemental proposal notice addressed the control of fugitive coal dust emissions from open piles, including the loading, unloading, and conveying operations of open storage piles by adding work practice standards. At this time, piles of coal that have been loaded into trucks, railcars, and/or ships would not be subject to the fugitive dust emissions control plan (see 74 FR 25312-25313 and Section 3 of this document).

2.4.1.6 Coal Sampling Systems

Comment: Two commenters (034 and 035) requested that coal sampling systems located at coal preparation plants be specifically exempted from Subpart Y. These systems generate low emissions because the systems typically are in enclosed structures, operate at low speeds and throughputs, and operate intermittently. Consequently, the cost of implementing the proposed controls is unreasonably high.

Response: Coal sampling systems at affected facilities have been subject to the existing Subpart Y requirements since they were originally promulgated in 1976. Commenters have not provided specific data demonstrating that the compliance costs associated with coal sampling systems are unreasonably high. In addition, EPA provided alternatives to collection and control of the types of emissions sources described by the commenters (e.g., conveyors, crushers) under the revised amendments to Subpart Y published in the May 27, 2009, supplemental proposal notice. Also, an affected facility enclosed within a building or structure would be considered to be in compliance if the building in which it is enclosed is in compliance with the standard. For these reasons, EPA does not believe it would be appropriate, in this review, to add the exemption requested by commenters.

2.4.1.7 Coal Mine Portable Screens

Comment: One commenter (034) requested that EPA provide an exemption for portable screens used in non-bituminous coal surface coal mines. These screens are used to remove non-coal material at the mine prior to transport of the coal to a power plant.

Response: EPA agrees that the operation noted by the commenter should be considered part of the mining operation and not part of the coal preparation process and, thus, not subject to Subpart

Y (unless breaking or crushing of the coal was to be done in the screens). Clarification has been made in the final rule.

2.4.2 Subcategorization of Standards by Coal Rank

2.4.2.1 Relationship of Coal Rank to Coal Dust Emissions Control

Comment: One commenter (040) stated that the fundamental premise underlying EPA's proposed Subpart Y standards of performance is that coal preparation facilities "handling" non-bituminous coals generate larger amounts of uncontrolled PM emissions than do the same facilities "handling" bituminous coal. Implicit in that premise is the further assumption that coal rank is a surrogate for the surface moisture content of coal. On that basis EPA has concluded that enclosures with fabric filters are cost-effective and, therefore, represent BDT for facilities handling non-bituminous coal, but conversely, chemical suppression is more cost-effective for facilities "handling" bituminous coal and, thus, constitutes BDT for that subcategory of coal preparation. However, although coal rank may be one "predictor" of potential emissions, the uncontrolled emissions from coal preparation facilities are influenced by a variety of different parameters, including not only moisture and coal rank separately, but also other coal characteristics such as silt and ash content, wind speed, climate, and topography. As a result, EPA's generalization of the relationship between coal rank and uncontrolled emissions is too inexact to accurately quantify emissions from any particular coal preparation plant for purposes of Subpart Y regulation. Therefore, until EPA collects sufficient emissions data from coal preparation facilities to better define the levels of representative uncontrolled emissions for the industry, the "rank neutral" standards of performance remain the more appropriate approach for Subpart Y. A second commenter (029) stated that chemical dust suppression is equivalent to bag filter systems, regardless of coal rank.

Response: Revised amendments to Subpart Y published in the May 27, 2009, supplemental proposal notice eliminated separate fugitive dust control requirements for coal processing, conveying, storage and transfer systems depending on the coal rank processed (see 74 FR 25306 and Section 3 of this document). The BDT used as the basis for establishing the final standards for these affected sources is not based on the coal rank processed. The final rule allows affected owners and operators to select from a range of control technologies (including, but not limited to, enclosures with fabric filters, chemical suppressants, fogging systems, and engineered flow transfer equipment) that they determine is applicable and appropriate for controlling fugitive emissions from the ranks of coal processed at their facilities.

2.4.2.2 Coal Rank Subcategorization Inconsistent with Existing Policy

Comment: One commenter (044) stated that to require plants processing non-bituminous coals to vent all emissions through a stack constitutes a fundamental change from EPA's long-standing policies regarding control of fugitive emissions and would require a fundamental redesign of a major segment of the coal preparation industry. This goes beyond EPA's authority under CAA section 111, and requires not only compliance with a standard, but also a specific configuration or reconfiguration of control equipment.

Response: Revised amendments to Subpart Y published in the May 27, 2009, supplemental proposal notice eliminated separate fugitive dust control requirements for coal processing, conveying, storage and transfer systems depending on the coal rank processed (see 74 FR 25306-25307 and Section 3 of this document). Under the final rule, owners and operators of affected facilities processing non-bituminous coals are not required to use enclosures with fabric filters to control fugitive emissions, and, instead, may select the fugitive emissions control measures best suited to their site-specific conditions provided that the selected controls meet the relevant rule requirements.

2.4.2.4 Anthracite Coal

Comment: One commenter (018) stated that there is no justification for classifying anthracite coal with subbituminous coals for purposes of determining BDT for coal processing and conveying equipment, coal storage system, and transfer and loading system PM and opacity limits. It is not clear that anthracite coals, which are typically very hard, share the same characteristics as softer subbituminous and lignite coals for purposes of assessing the impact of wet suppression versus fabric filter controls during the coal processing, conveying, storage, and transfer and loading period. Unlike lignite and similar lower rank coals, anthracite's heating value is unlikely to be significantly affected by the use of water suppression. Application of water and chemical suppressants as BDT for bituminous coals is well supported. Enclosure and venting to a fabric filter is not required for this rank of coal. This commenter agrees with the finding that bituminous coal PM emissions are well controlled by water or chemical dust suppressants and that the added control that may be achieved by full enclosure and venting to a fabric filter is not warranted by the small improvement in removal.

Response: Revised amendments to Subpart Y published in the May 27, 2009, supplemental proposal notice eliminated separate fugitive dust control requirements for coal processing, conveying, storage, and transfer systems depending on the coal rank processed (see 74 FR 25306-25307 and Section 3 of this document). The coal rank processed by an affected facility, whether it be anthracite, bituminous, subbituminous, or lignite, was not used for determining BDT to establish the final standards applicable to coal processing and conveying equipment, coal storage systems, and transfer and loading systems.

2.4.2.4 Blended Coals

Comment: Several commenters (027, 029, and 035) stated concerns regarding the application of the proposed amendments to affected facilities at electric utility power plants handling blends of different coal ranks. Commenter 029 stated that the proposed regulation defines non bituminous coal as any coal other than bituminous coal. Under this definition, facilities using blends of bituminous coal and non-bituminous coals may be classified as non-bituminous coal. Many coal-fired electric utility power plants handle a variety of coal ranks and in some cases blend the different rank coals depending on coal supply market conditions. It would be cost prohibitive to require the modification of the fugitive dust controls for each coal rank. Therefore, this commenter requests that EPA adopt the same requirements for bituminous, non-bituminous, and blended coals. Commenters 027 and 035 stated that different ranks of coal that are blended together often are delivered to the power plant already blended, or are co-mingled in blending operations soon after arriving at the power plant. The commenters suggested that

EPA's BDT determination for coal blends that are primarily, rather than exclusively, bituminous coals on a tonnage basis be enclosures and chemical suppression. EPA has drawn a similar line in other regulatory contexts for coal-fired utility power plants.

Response: Revised amendments to Subpart Y published in the May 27, 2009, supplemental proposal notice eliminated separate fugitive dust control requirements for coal processing, conveying, storage, and transfer systems depending on the coal rank processed (see 74 FR 25306-25307 and Section 3 of this document). Under the final rule, the control requirements for affected facilities at an electric utility power plant (or any other coal preparation and processing plant subject to Subpart Y) are the same regardless of the coal rank processed, including blends of different coal ranks.

2.4.2.5 Impact on Facility Fuel Flexibility

Comment: One commenter (022) stated that Subpart Y should provide for a more flexible definition of facilities using bituminous coal. Because the control requirements are more stringent for coal preparation plants processing coals other than bituminous coal, it is possible that States could write permits limiting plants to bituminous coal only and interpret any change to subbituminous coal as a modification. Conceivably, as little as one delivery of subbituminous coal could be considered a modification. The flexibility to utilize different coal supplies is very important to minimize fuel costs, meet environmental requirements, and deal with coal supply interruptions. The rule as drafted could greatly limit the fuel flexibility of plants.

Response: Revised amendments to Subpart Y published in the May 27, 2009, supplemental proposal notice eliminated separate fugitive dust control requirements for coal processing, conveying, storage, and transfer systems depending on the coal rank processed (see 74 FR 25306-25307 and Section 3 of this document). Under the final rule, the control requirements for affected facilities processing bituminous coals are the same as those for affected facilities processing coals other than bituminous coal. Therefore, the final Subpart Y amendments do not impact flexibility of a facility to use different coal supplies.

2.4.3 BDT Determination

2.4.3.1 Equivalency of Fabric Filter and Chemical Suppression Control Systems

Comment: One commenter (054) stated that either venting to a fabric filter or chemical dust suppression should be considered equivalent fugitive coal dust controls. Facilities should be given the option to choose either chemical dust suppression or fabric filter systems.

Response: EPA reconsidered the BDT determination used to establish standards for coal processing, conveying, storage, and transfer systems. Revised amendments to Subpart Y published in the May 27, 2009, supplemental proposal notice allow affected owners and operators to select from a range of fugitive coal dust control technologies (including, but not limited to, enclosures with fabric filters and chemical suppressants) to control PM emissions from coal processing, conveying, storage, and transfer system operations (see 74 FR 25313-25314 and Section 3 of this document).

2.4.3.2 Consideration of Alternative Coal Dust Control Technologies as BDT

Comment: Many comments were received (013, 021, 030, 031, 032, 035, 036, 039, 040, 043, 044, 051, 063, and 069) regarding the topic that EPA's BDT determination for coal processing, conveying, storage, and transfer systems did not consider control technologies other than fabric filters and chemical suppression that are demonstrated and commercially being used to control PM emissions from coal handing operations. The other control technologies included fogging systems and engineered flow transfer equipment, also termed passive enclosure containment system (PECS). The commenters presented multiple reasons to support their determinations that the use of fogging systems or PECS should be considered by EPA as BDT, and that those technologies are either equivalent or superior in performance and cost-effectiveness to using full enclosures vented to a fabric filter. Commenter 069 stated that the proposed amendments do not reflect current emission control measures permitted as Best Available Control Technology (BACT) at coal preparation plants in Wyoming, and that this will consequently have a profound impact on the coal mining industry, the safety of mine employees, and the State's air quality program. Commenters 013, 032, 040, and 044 stated that fogging systems and PECS presently are used for coal preparation operations, and meet or exceed the performance of fabric filter or chemical dust suppression emission controls. Commenter 051 stated that wet suppression is more effective and cost-effective than chemical suppression. Commenter 032 stated that the Wyoming Department of Environmental Quality (WDEQ) allows coal handling sources to be permitted at 0 lb/hr of PM for areas controlled by fogging systems or PECS. Commenters 013 and 040) stated that PM emissions from fully enclosed lignite conveying, crushing, and transfer equipment in North Dakota are effectively controlled by water fogging systems. The performance of both fogging systems and PECS have proven to be superior to fabric filters for dust control both within the working environment (for Mine Safety and Health Administration [MSHA] rule compliance) and outside the buildings (for EPA and WDEQ rule compliance).

Response: EPA reconsidered the BDT determination used to establish standards for coal processing, conveying, storage, and transfer systems. Based on review of public comments and subsequent analysis, EPA concluded that enclosures with chemical suppression or vented to fabric filters are not the only technology that is BDT for coal processing, conveying, storage, and transfer systems. Depending on facility-specific factors, fabric filters, PECS, fogging systems, and wet extraction scrubbers can effectively control PM emissions to equivalent levels. In addition, fogging systems, PECS, and wet extraction systems often can be implemented at lower costs than fabric filters. Revised amendments to Subpart Y published in the May 27, 2009, supplemental proposal notice eliminated requirements that owners and operators of affected facilities must use a specific control technology (e.g., an enclosure vented to a fabric filter or a chemical suppressant) to reduce fugitive emissions from processing, conveying, storage, and transfer systems (see 74 FR 25313-25314 and Section 3 of this document). The revised standards are based on a BDT determination based on the level of reduction achievable by four technologies, which include fogging systems and PECS. The final rule allows affected owners and operators to select from a range of fugitive coal dust control technologies (including, but not limited to, enclosures with fabric filters, chemical suppressants, fogging systems, PECS) best suited to controlling PM emissions from the operations of coal processing, conveying, storage, and transfer system configurations and operating practices used at a given facility.

2.4.4 Fabric Filters (Baghouses)

2.4.4.1 Fabric Filter Safety

Comment: Many commenters (019, 024, 030, 032, 036, 058, and 069) stated that use of fabric filters at coal preparation plants is unsafe due to the potential for coal fires and explosions. Fabric filters must comply with required MSHA safety standards due to their potential for fires and/or explosions. Subbituminous coal dust can spontaneously combust if it accumulates for long periods of time, or if it is exposed to water or oxygen. Because fabric filters, by design, extract dust and eventually suck it to a collection point where it is recycled back onto the belt, fabric filters often have dust accumulations which do not purge from the dust collection ductwork. The fabric filters accumulate dust, moisture eventually enters the ductwork and fabric filter proper, and the collected coal dust can spontaneously combust and explode. To avoid this potential safety hazard, some coal processing plants are in the process of or have switched from fabric filter dust control to newer technologies that are available in the U.S. such as fogging and PECS for dust control. Commenter 34 stated that fabric filters do little to reduce employee dust exposure.

Response: Fabric filters with proper design, operation, and maintenance are one technology available for controlling fugitive dust emissions at coal preparation and processing plants. The revised amendments in the May 27, 2009, supplemental proposal notice allow an owner or operator, who prefers to do so, to use an alternative control technology rather than using an enclosure vented to a fabric filter (see 74 FR 25313-25314 and Section 3 of this document). EPA believes that this will provide owners/operators with the necessary flexibility to address plant-specific safety concerns.

2.4.4.2 Fabric Filter Performance

Comment: Two commenters (032 and 036) stated that fabric filters are ineffective at controlling dust on a consistent basis. Examples cited by commenters include comments that bag dust sometimes billows out of the explosion vents, performing maintenance on fabric filters results in uncontrolled releases of dust directly from the fabric filter into the environment, bag replacement exposes the maintenance personnel to very fine coal dust and emits large volumes of dust to the environment, and bags freeze up in cold weather and break.

Response: Properly designed, operated, and maintained fabric filters can consistently achieve high levels of PM emissions control over long periods of time . The problems cited by the commenters can readily be avoided with appropriate fabric filter design features for the site-specific conditions and facility personnel following standard good operating and maintenance practices for fabric filters.

2.4.4.3 Fabric Filter Dust Disposal

Comment: One commenter (019) stated that storage and re-handling of collected dust by fabric filters requires the collected dust to be re-deposited back into the material handling process. This extremely fine "float" dust increases airborne dust emissions "downstream" which once again

must be addressed. This becomes very costly for the operator and produces a negative impact to the environment.

Response: Handling of the collected dust in the manner noted by the commenter would be subject to the provisions of Subpart Y.

2.4.5 Conveyor System Enclosures

2.4.5.1 Enclosure Fugitive Dust Emission Points

Comment: One commenter (038) stated that the primary fugitive emission generation points for an enclosed conveyor system are at the drop points rather than along the belt runs. As such, the commenter stated that it should be specified that, for systems that are enclosed, the emission control and monitoring points for coal conveying systems should be relegated to the drop points.

Response: Emission control and monitoring requirements under Subpart Y apply to all openings in an enclosed conveyor system where fugitive coal dust emissions potentially can be released to the atmosphere. However, it is common for sources to monitor emissions only at transfer or drop points on conveyer belts.

2.4.5.2 Enclosure Safety

Comment: Two commenters (027 and 035) stated that an enclosure should serve the purpose of providing a cavity for controlling PM, and an enclosed conveyor is comprised of a conventional belt conveyor, equipped with sideboards and a cover (typically a three-sided enclosure). Each side of the enclosure includes a "skirt" that minimizes and controls the ingestion of ambient air and allows air infiltration. The commenters stated that safety and explosion concerns strongly caution against completely enclosing conveyors handling non-bituminous coals.

Response: Revised amendments to Subpart Y published in the May 27, 2009, supplemental proposal notice would not require that affected sources be mechanically vented (see 74 FR 25313 and Section 3 of this document). Coal handling operations that are not mechanically vented would be subject only to opacity standards. Thus, conveyors handling non-bituminous coals need not be completely enclosed to be in compliance with Subpart Y.

2.4.6 PM Emission Limits

2.4.6.1 Applicability of PM Emission Limits

Comment: Two commenters (021 and 031) stated that PM emissions from fogging systems and PECS cannot be measured using EPA Method 5 and, consequently, sources that use fogging systems and/or PECS should not be subject to the PM grain loading standard.

Response: Revised amendments to Subpart Y published in the May 27, 2009, supplemental proposal notice would establish a new PM emissions limit that would apply only to affected sources that are mechanically vented (see 74 FR 25313 and Section 3 of this document). "Mechanical vent" is defined to mean a vent using a powered mechanical drive (machine) to induce air flow. PECS and fogging systems do not use a powered machine to induce airflow and

would not be subject to the PM emissions limit. For situations where these control technologies are used, only the opacity standard would apply.

2.4.6.2 Fenceline Ambient Air Monitoring of Coal Preparation Facilities

Comment: One commenter (052) stated that the PM size fractions used for the NAAQS ($PM_{2.5}$ and PM_{10}) should be addressed by Subpart Y. The commenter requested that EPA consider fenceline ambient air monitoring of coal preparation facilities to quantify $PM_{2.5}$ and PM_{10} emissions as a requirement under Subpart Y.

Response: CAA section 111 requires new sources to meet emission standards based on BDT. Fenceline ambient air monitoring to quantify pollutant emissions levels would not ensure that BDT-based emission standards are being met on each affected facility within the fenceline (i.e., the fenceline emission could not be apportioned back to each affected facility). As previously explained, amendments to EPA Method 201A were proposed on March 26, 2009 (74 FR 12970). The amendments add a particle-sizing device to allow for sampling of $PM_{2.5}$, PM_{10}, or both PM_{10} and $PM_{2.5}$. Until such time that Method 201A amendments are finalized and sufficient test data using that method can be collected for coal thermal dryers, determinations of the need to add separate $PM_{2.5}$ and/or PM_{10} emission limits to Subpart Y, the BDT for $PM_{2.5}$ and/or PM_{10} emissions, and the appropriate emission limits applicable to coal thermal dryers cannot be made.

2.4.6.3 Condensible PM Emission Limits

Comment: Two commenters (028 and 035) agree that condensible emissions are negligible for coal handling equipment because the ambient operating temperatures are inadequate to volatilize trace elements, and the process conditions will not form trace sulfur, nitrogen, or other species with vapor pressures to enable condensation as PM. For these reasons, the commenter agrees with EPA's decision not to propose a separate NSPS for CPM.

Response: Depending on the composition of an exhaust gas stream from a process, the PM emitted can consist of both a FPM fraction and a CPM fraction. The CPM fraction remains in a gaseous form in the exhaust stream until it is released into the atmosphere where it condenses to a solid form. Current test methods do not reliably measure the CPM fraction from a source. As previously explained, amendments to EPA Method 202 were proposed on March 26, 2009 (74 FR 12970). The amendments to Method 202 revise the sample collection and recovery procedures of the method to provide for more accurate and precise measurement of CPM. Until such time that Method 202 amendments are finalized and sufficient test data using the revised method can be collected for coal thermal dryers, a determination of the need to add a separate PM emissions limit for CPM emissions from coal thermal dryers cannot be made.

2.4.6.4 Selection of Proposed PM Emission Limit Level

Comment: Many commenters (021, 027, 028, 035, 039, 040, and 044) disagreed with the selection of the 0.005 gr/dscf PM emission limit level proposed for coal handling equipment using fabric filters for several reasons. Commenters stated that EPA failed to meet its obligations under the CAA by using emissions data collected for another industry group (nonmetallic mineral processing plants regulated under 40 CFR part 60, subpart OOO) to select

the PM emission limit level for coal preparation plants. CAA section 111 obligates EPA to make its determinations based on sound information that is directly relevant to the industry being affected. EPA has not demonstrated that emissions test data from Subpart OOO facilities are "representative" of "achievable" emission levels for Subpart Y facilities. Furthermore, EPA's use of the Subpart OOO test data to justify PM emission limits for Subpart Y facilities that are lower than the corresponding PM emission limits for Subpart OOO facilities is not justifiable. EPA's own analysis of the data for Subpart OOO leads to a conclusion that 0.010 gr/dscf is an achievable NSPS. The proposed PM emission limit level of 0.0050 gr/dscf for Subpart Y does not reflect BDT. Commenter 021 stated that 0.005 gr/dscf is well below BACT limits currently applied to coal handling processes. No rationale was presented in the proposal justifying an emission limit of 0.005 gr/dscf for point sources of this size. These point sources do not represent a significant contribution to the NAAQS or Class II Prevention of Significant Deterioration (PSD) PM increment and rarely have any modeled impact outside the property boundary of the affected facility.

Response: Revised amendments to Subpart Y published in the May 27, 2009, supplemental proposal notice are based on data from coal preparation and processing plants (see 74 FR 25313 and Section 3 of this document).

2.4.7 Opacity Limits

2.4.7.1 Method 9 Accuracy and Limitations

Comment: Several commenters (028, 034, and 035) stated concerns about use of Method 9 to measure opacity at any level below 10 percent. Commenter 034 stated that because the accuracy of a certified visible emissions observer can be as much as +7.5 percent, the lowest compliance level set should be 10 percent opacity. An action level of 5 percent could be set for taking correction action. Commenters 028 and 035 stated concerns about the use of Method 9 to measure opacity at any level below 10 percent, given Method 9's known measurement bias, and the fact that any visible emissions observed during a Method 9 test must be recorded as 5 percent.

Response: The commenters have misrepresented the discussion in Method 9 about potential for positive bias when applying the method. First, the method states that under the highest contrast conditions when the greatest potential for a positive bias exists, the study showed that 100 percent of the measurements of black smoke were read with a positive error of less than 7.5 percent. Further, the method states that the study showed that 99 percent of the measurements were read with a positive error of less than 5 percent. The statistical results for white smoke measurements are a little different but similar. This means that fewer than 5 out of 100 observers ever showed a positive bias of more than 5 percent, and fewer than 1 in 100 showed more than 7.5 percent positive bias. Under less than high contrast conditions, which are conditions more normally encountered, the potential for positive bias is even less. The study shows that a 95 percent upper confidence interval for the composite data ranges from about +5.4 percent opacity at the 5 percent opacity level to about +1 percent at the 20 percent opacity level. The composite data show a 95 percent confidence range that is negative for opacity greater than 25 percent (i.e., the method under-predicts actual opacity). The study does not support a conclusion that there is a known positive measurement bias when using Method 9. Further, there

is no technical reason not to apply Method 9 for measuring visible emissions less than 5 percent opacity. The opacity standards proposed for Subpart Y are based on 6-minute averages which are made up of a series of individual opacity readings, each in 5 percent increments. However, the resulting averages can be less than 5 percent and even less than a whole number.

2.4.7.2 Selection of Proposed Opacity Limit Level

Comment: Two commenters (028 and 035) stated that the units that EPA has selected as the basis for the proposed opacity limit are not broadly representative of new coal-handling facilities at power plants. The commenters do not believe EPA has sufficiently explained its decision to use a smaller dataset in its Subpart Y proposal than in the Nonmetallic Mineral Processing Plants NSPS (40 CFR 60 subpart OOO) rulemaking, or why EPA chose to ignore the higher opacity levels observed at crushers.

Response: Revised amendments to Subpart Y published in the May 27, 2009, supplemental proposal notice included a revised opacity limit for coal-handing equipment constructed, reconstructed, or modified after April 28, 2008, based on both performance test data and air permit limits specific to existing coal handling equipment (see 74 FR 25314 and Section 3 of this document).

2.4.7.3 Fabric Filters

Comment: One commenter (036) expressed concern that fabric filters cannot achieve the proposed 5 percent opacity limit. The dust control effectiveness of fabric filters is only determined by looking at opacity coming out of the stack, and by stack testing. If the entire fabric filter and its pickup ductwork, the source, as well as the fabric filter purge system, were read by Method 9, (instead of just the fabric filter stack), most fabric filters would not be able to meet the proposed 5 percent opacity. If fabric filters were read while bags are being changed, and while bins are being manually emptied, they wouldn't even meet a 20 percent opacity limit. Also, with fabric filters, plant personnel have to frequently bang on the ductwork to make the dust move, so that it doesn't accumulate and eventually spontaneously combust. If fabric filter stacks were read while the ductwork was being cleaned, the fabric filter would not meet the opacity standard. Fabric filters are difficult to operate in a steady condition due to constantly changing weather conditions, and feedstock conditions.

Response: Revised amendments to Subpart Y published in the May 27, 2009, supplemental proposal notice included a revised opacity limit for coa- handing equipment constructed, reconstructed, or modified after April 28, 2008, based on both performance test data and air permit limits specific to existing coal-handling equipment (see 74 FR 25314 and Section 3 of this document). Opacity data for coal-handing equipment at coal preparation and processing plants indicate that fabric filters can meet the revised limit.

2.4.7.4 Fugitive Emissions Sources

Comment: One commenter (029) stated that EPA should establish a different opacity limit for non-stack fugitive releases. The proposed opacity limit for all affected facilities not installing PM CEMS is 5 percent. This is applicable to both non-stack releases and stack releases. The

commenter notes that 5 percent is exceeding this limit. Visible emissions at a 5 percent limit may be practical for stack releases connected to a bag filter. This may not be practical for non-stack fugitive releases. Also, the commenter stated that 5 percent opacity for fugitive releases in most cases constitutes lower PM mass emissions than a 5 percent opacity for stack releases. This is due to the fact that a much lower flow rate of exhaust air is involved with non-stack fugitive releases. If both types of releases are compared with the same limit, it may be overly restrictive for non-stack fugitive releases. The commenter requests that EPA reconsider the 5 percent opacity limit for fugitive non-stack releases and suggests keeping the existing NSPS limit of 20 percent.

Response: Revised amendments to Subpart Y published in the May 27, 2009, supplemental proposal notice included a revised opacity limit for coal-handling equipment constructed, reconstructed, or modified after April 28, 2008, based on both performance test data and air permit limits specific to existing coal-handling equipment (see 74 FR 25314 and Section 3 of this document). The final rule includes additional revisions based on comments and information submitted regarding the supplemental proposal. Opacity data for coal-handling equipment fugitive non-stack releases at coal preparation and processing plants indicate the revised limit can be met.

2.4.7.5 Coal Storage Silos

Comment: One commenter (036) stated that coal storage silos should be exempt from any opacity standard less than 20 percent. Because silos are an improvement over open stockpile dumping, they should not be overly restricted for opacity. Most of the time the commenter's silos can meet 7 percent opacity when coupled with fogging systems. However, the silos occasionally barely complied with the 20 percent opacity limit when the commenter had utilized fabric filters for dust control.

Response: Coal storage silos continue to be subject to the same opacity standards as all affected coal processing, conveying, storage, and transfer systems. There has been no change with respect to the applicability of Subpart Y to coal storage silos. Revised amendments to Subpart Y published in the May 27, 2009, supplemental proposal notice included a revised opacity limit for coal-handing equipment constructed, reconstructed, or modified after April 28, 2008, based on both performance test data and air permit limits specific to existing coal handling equipment (see 74 FR 25314 and Section 3 of this document). The final rule includes additional revisions based on comments and information submitted regarding the supplemental proposal. Opacity data for coal-handing equipment, including coal storage silos, at coal preparation and processing plants indicate the revised limit can be met.

2.4.8 Work Practice Standards

2.4.8.1 Alternative to Opacity Standards

Comment: A number of commenters (028, 029, 030, 035, and 038) stated that EPA should adopt work practice standards as an alternative to the opacity limit. Effective work practice standards could include minimizing coal drop heights, periodic inspections of enclosures, and performing all necessary preventive maintenance on the equipment. A regulation that presents

options for compliance would allow the facility to determine the most practical method for a given site's individual conditions. Commenter 038 stated that affected facilities using chemical suppression or an equivalent dust control application typically do not emit through a conveyance designed to capture the PM emissions. It is generally not practical to measure the mass of actual PM emissions from these facilities and work practice standards would be more appropriate. A regulation that presents options for compliance allows the facility to determine the most practical method for a given site's individual conditions. Commenters 028 and 035 also stated that in cases when the affected facility also is subject to a PM emissions limit, control system operation monitoring should be allowed as an alternative to the opacity standard itself.

Response: EPA can only establish work practice standards if the Agency demonstrates, consistent with the requirements of CAA section 111(h), that "it is not feasible to prescribe or enforce a standard of performance." This phrase is defined in CAA section 111(h)(2) to require, before promulgation of a work practice standard, a determination that "(A) a pollutant or pollutants cannot be emitted through a conveyance designed and constructed to emit or capture such pollutant, or that any requirement for, or use of, such a conveyance would be inconsistent with an Federal, State, or local law, or (B) the application of measurement methodology to a particular class of sources is not practicable due to technological or economic limitations." To establish a work practice standard, such a determination must be made. Because EPA does not have authority to provide sources the option of complying with an opacity standard or a work practice standard, and affected facilities at coal preparation and processing plants have been subject to opacity standards since the rule's 1976 promulgation, there is no basis for making that determination. In addition, to establish a work practice standard, adequate supporting analyses indicating that compliance with a certain work practice would absolutely guarantee compliance with an opacity standard would be necessary.

2.4.8.2 Coal Storage Piles

Comment: A number of comments (022, 027 029, 030, and 035) were received regarding the control of PM emissions from coal storage piles. Commenters 022, 027, 029, and 030 stated that work practices are more appropriate than opacity limits. Reasons stated by the commenters include determining an opacity limit would very complicated because of the numerous and disparate factors that might influence emissions from any particular pile, such as coal ranks and varieties, pile shapes, throughput rates, and traffic. Commenter 022 stated that at least one company uses dome structures to surround coal storage piles. A typical dome is shaped like an igloo with two doorways at ground level and a small hole at the very top. A stacker-reclaimer is located inside the dome. Coal is stacked around the inner-edge of the dome and can be stacked and reclaimed simultaneously. Conveyors leading to and away from the dome are enclosed in tubes and aspirated. No visible emissions have been observed from the storage dome and both bituminous and subbituminous coals are handled within the dome. Commenter 035 stated that fabric filters should not be BDT for enclosed coal piles.

Response: Revised amendments to Subpart Y published in the May 27, 2009, supplemental proposal notice include open storage piles as an affected facility and require that open storage piles be included in a fugitive dust emissions control plan for the coal preparation and processing plant, but not be subject to an opacity limit (see 74 FR 25312 and Section 3 of this document). The final rule includes the same requirements for open storage piles.

2.4.8.3 Coal Truck Dumps

Comment: Two commenters (037 and 051) stated that control of coal truck dumps with a fabric filter is not practical. Commenter 037 stated that Method 9 opacity testing is not appropriate for truck dumps because truck dumps are intermittent sources and typically will show compliance using Method 9.

Response: The physical size and operation characteristics of rear truck dumps make operation with low instantaneous opacity difficult to achieve. Several western subbituminous mining operations that began operation in the late 1970s and early 1980s originally used enclosures vented to fabric filters to control PM emissions from rear truck dumps. It was the only viable technology at the time. Although PM and opacity emissions from the fabric filter-controlled stack were relatively low, overall PM capture and control were not as high. With the advent of larger coal trucks and stilling sheds, WDEQ has allowed for the replacement of enclosures vented to a fabric filter with stilling sheds. Stilling sheds provide a relatively high level of PM control. However, the coal is dumped rapidly and there are instantaneous periods of high opacity even when the 6-minute opacity measured using Method 9 is low. WDEQ determines if the stilling shed is working properly by averaging the highest instantaneous 15-second opacity of 10 truck dumps. As long as the average instantaneous opacity is less than 20 percent, the stilling shed is determined to be operating properly. The revised amendments to Subpart Y published in the May 27, 2009, supplemental proposal notice requested comment on whether requiring an annual average instantaneous opacity from 10 truck dumps is appropriate as an alternative to the opacity monitoring methods required for other affected facilities (see 74 FR 25318 and Section 3 of this document). The final rule includes specific requirements for monitoring opacity from coal truck dumps.

2.4.9 Modified/Reconstructed Sources

2.4.9.1 Routine Equipment Maintenance and Repair

Comment: Several commenters (021, 026, and 047) stated that routine equipment maintenance, repair, and replacement should not trigger applicability of the Subpart Y requirements to existing sources.

Response: Equipment maintenance, repair, and replacement of parts do not in themselves trigger applicability of the Subpart Y requirements for existing sources. Per the section 60.250 of the rule, "[a]ny affected facility under paragraph (a) of this section that commences construction, reconstruction, or modification after October 24, 1974, is subject to the requirements of this subpart." Modification and reconstruction are determined based upon the definitions in the General Provisions, 40 CFR 60 subpart A. Modification is described in section 60.14, and reconstruction is described in section 60.15.

2.4.9.2 Modified Sources

Comment: Two commenters (028 and 035) stated that in many regions of the U.S. conveyors are weather-protected but not fully enclosed (i.e., they have a top and sides but an open bottom such as half-moon covers over the belt). If modified, such conveyors should not be deemed to be

"enclosed" prior to modification and should be required to meet section 60.252(c)(2)(i) rather than section 60.252(c)(2)(iii). This could be resolved by a formal definition or through clarifying statements in the preamble to the final rule.

Response: Revised amendments to Subpart Y published in the May 27, 2009 supplemental proposal notice would not require that affected sources be mechanically vented (see 74 FR 25313-25314 and Section 3 of this document). Coal-handling operations that are not mechanically vented would be subject only to opacity standards. The final rule maintains this provision.

Comment: One commenter (038) stated that the proposed Subpart Y amendments would require modified sources using subbituminous coal that were previously enclosed to vent to a stack with a fabric filter. Modified sources that were not previously enclosed and are using either bituminous or subbituminous coal are required to install an enclosure and a chemical dust suppression system. In its consideration, EPA acknowledged that "modified" sources could face technical challenges in trying to re-engineer a method for venting to a stack equipped with a fabric filter due to the layout of existing equipment. There are many scenarios in which the modification required to install a stack and fabric filter on an already enclosed source will be just as challenging as if installed on a newly constructed enclosure. EPA is correct in their acknowledgement that sources could face technical challenges in engineering sources with this equipment. However, this assessment is true for both sources with pre-existing enclosures as well as for sources with no pre-existing enclosures. Many existing coal-handling systems have transfer points that are enclosed, but are not vented to the atmosphere. Any dust generated is contained within the structure and settles inside the building. As such, all modified sources affected by this regulation should only be required to be equipped with an enclosure and chemical dust suppression system, regardless of pre-existing conditions. The installation of fabric filter controls should only apply to new sources using subbituminous coal.

Response: Revised amendments to Subpart Y published in the May 27, 2009, supplemental proposal notice do not require affected owners/operators of coal-handling operations to use fabric filters for new, reconstructed, or modified sources. Owners/operators may select from a range of fugitive coal dust control technologies (including but not limited to enclosures with chemical suppressants) to control PM emissions from the operations of coal processing, conveying, storage and transfer systems (see 74 FR 25313-25314 and Section 3 of this document). The final rule retains the range of fugitive coal dust control technologies to control PM emissions from these sources.

2.4.9.3 Reconstructed Sources

Comment: Several commenters (027, 028, and 035) stated the concern that reconstructed conveyors would have difficulties installing enclosures in certain situations such as congested plant site situations. Commenters requested that reconstructed coal processing, conveying, storage and transfer systems be subject to the same requirements as modified plants. Commenter 027 stated that most changes to existing coal processing and conveying equipment, coal storage systems, and coal transfer and loading systems would be routine maintenance, repairs or replacements and would not subject existing facilities to Subpart Y. Moreover, most changes to this type of equipment would not be expected to result in an increase in PM emissions.

However, there may be instances when these types of repairs and replacements (especially with respect to conveyors) could fall within the reconstruction provisions. EPA correctly notes the technical challenges to enclose existing unenclosed facilities that are subsequently modified, and the proposal takes this into account by recognizing chemical suppression (as opposed to enclosure) as BDT. This commenter agrees with this approach for modified sources that were not enclosed before the modification. However, the same technical challenges could apply to reconstructed sources that were not enclosed before reconstruction and the commenter, therefore, requests that EPA consider making BDT the same for reconstructed sources as for modified sources.

Response: Revised amendments to Subpart Y published in the May 27, 2009, supplemental proposal notice do not require affected owners and operators of existing unenclosed coal-handling operations to enclose those operations at the time of reconstruction. Owners/operators of new, reconstructed, or modified sources may select from a range of fugitive coal dust control technologies (including but not limited to enclosures with chemical suppressants) to control PM emissions from the operations of coal processing, conveying, storage and transfer systems (see 74 FR 25313-25314 and Section 3 of this document). The final rule retains the range of fugitive coal dust control technologies to control PM emissions from these sources.

2.4.10 Consistency with Relevant Requirements in Nonmetallic Mineral Processing NSPS

Comment: Four commenters (027, 035, 036, and 040) requested that selected requirements in Subpart Y be consistent with requirements in the Nonmetallic Mineral Processing Plants NSPS (40 CFR part 60, subpart OOO). Commenter 035 stated that EPA should use the same language for Method 9 measurement of fugitive PM emissions for Subpart Y as subpart OOO. The commenter recommended that Subpart Y include procedures for Method 9 measurement of multiple points as allowed in subpart OOO. For affected facilities that are enclosed within a building or structure, the commenter stated that visible emission measurements of openings in the building exterior are sufficient. Commenter 40 stated that given that the nonmetallic mineral processing and coal preparation industries operate some of the same affected facilities whose emissions are controlled by the same technologies, Subpart Y should be revised to include some of the specific provisions that EPA "carved out" for nonmetallic mineral processing over 20 years ago. Specific provisions for inclusion in Subpart Y should consist of equipment replacement, exempt truck dumps, acknowledgment of routine replacements of specific equipment components, reconstruction provision, exemption of specific grizzlies, and buildings that enclose affected facilities. Commenter 036 stated that based on their experience with implementing subpart OOO for the trona mining/sodium carbonate refining industry, the subpart OOO requirements are much more straightforward, easier to understand, and easier for operational staff to determine compliance status, and the same regulatory requirements should be used by EPA for Subpart Y.

Response: Revised amendments to Subpart Y published in the May 27, 2009, supplemental proposal notice are based on information and emissions data specific to coal preparation and processing operations. The revised amendments include procedures for Method 9 measurement of multiple points. For affected facilities that are enclosed within a building or structure, the final amendments to Subpart Y include the option of showing that the building enclosing the affected facility or facilities comply with Subpart Y. An affected facility enclosed within a

building or structure would be considered to be in compliance if the building in which it is enclosed is in compliance with the standard. Similar to subpart OOO, Subpart Y has been in existence for over 20 years, but without the specific provisions that EPA "carved out" for nonmetallic minerals processing. EPA is maintaining that position. Subpart Y is consistent with the statutory directives of CAA section 111 and the General Provisions in 40 CFR part 60, subpart A that are applicable to all NSPS source categories including subpart OOO.

2.5 Subpart Y Implementation Requirements

2.5.1 PM Emissions Performance Testing

2.5.1.1 Need for PM Performance Test

Comment: One commenter (069) stated that measurement of PM mass emissions in part of the coal preparation industry is unnecessary for NSPS purposes because the local authority, on a case-by-case basis, can impose more restrictive requirements as determined by local conditions.

Response: The air emissions standards under Subpart Y are national standards enforced by EPA or by individual States delegated authority by EPA to do so for affected facilities within their jurisdiction. Periodic performance tests are a necessary component to EPA's enforcement and compliance programs to verify that the actual air emission quantities from a given affected facility do not exceed the applicable air pollutant emission limits for the source. Including specific performance test and other requirements in Subpart Y provides a national baseline and ensures that the rule is implemented and enforced consistently at all affected coal preparation and processing plants nationwide.

2.5.1.2 Performance Testing of Small Fabric Filters

Comment: One commenter (021) stated that annual performance tests should not be required on fabric filters (baghouses) that are small and in difficult to reach places.

Response: Revised amendments to Subpart Y published in the May 27, 2009, supplemental proposal notice proposed to exempt an affected facility with a design controlled potential emissions rate of 1.0 Mg (1.1 ton) or less from annual or bi-annual repeat Method 5 performance testing to demonstrate compliance with the applicable Subpart Y emission limit, provided that the design emissions limit is less than or equal to the applicable PM emissions limit, the manufacturers recommended maintenance procedures are followed, and the unit operates with minimal visible emissions (see 74 FR 25314 and Section 3 of this document). Method 5 performance testing to demonstrate compliance with the Subpart Y requirements would not be required for small fabric filters on affected facilities that meet these conditions. The final rule retains this exemption, with minor modifications.

2.5.1.3 PM Performance Test Interval

Comment: Two commenters (029 and 038) stated that the proposed performance test requirements requiring initial PM performance testing and annual testing thereafter for affected facilities subject to a PM limit but without a PM CEMS are unduly burdensome. The

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performance testing requirement should be tailored according to the test results at an affected facility. For instance, some states such as Minnesota and Colorado have a tiered test frequency requirement based on how close to the standard the facility tests. This type of tiered requirement ensures compliance without imposing an unnecessary testing burden. This commenter requests that EPA consider periodic monitoring of the fabric filter opacity using Method 9 as a surrogate to an annual performance testing. If Method 9 observations reflect necessity of performance testing, this can be done within a reasonable time period. Commenter 038 stated that performance testing for these sources should be similar to frequency alternative that is currently allowed for title V operating permit program and tailored according to test results at an affected facility.

Response: Revised amendments to Subpart Y published in the May 27, 2009, supplemental proposal notice would reduce the frequency required for conducting Method 5 performance testing for certain affected sources (see 74 FR 25314 and Section 3 of this document). Under this proposed revision, owners and operators would be required to conduct Method 5 performance testing for those affected sources subject to testing once every 24 months provided that the most recent performance test was 50 percent or less of the applicable PM emissions limit. Further, PM CEMS-specific language is not included in the regulatory text of the revised amendments to Subpart Y. The final rule retains these provisions.

2.5.1.4 Use of Method 17 as Alternative PM Test Method

Comment: Two commenters (028 and 035) requested that EPA include among the options to determine PM concentration the use of Method 17 in 40 CFR 60 Appendix A-6. The commenters stated that this method, which is applicable to source categories where PM concentrations are known to be independent of temperature and water vapor is not present, is more precise than Method 5 at low measurements because the sample recovery process is simpler and less prone to error.

Response: Method 17 is a test method developed by EPA for the determination of PM emissions, where PM concentrations are known to be independent of temperature over the normal range of temperatures characteristic of emissions from a specified source. This method is not applicable to stacks that contain liquid droplets or are saturated with water vapor. Method 17 is applicable to many coal processing, conveying, storage, and transfer systems that are enclosed and vented through a PM control device because the captured stream consists of fugitive coal dust particles suspended in an air stream at or near ambient air temperatures. Revised amendments to Subpart Y published in the May 27, 2009, supplemental proposal notice would add Method 17 as an alternative test method that affected owners and operators may use to measure PM emissions vented through control devices for which the stack temperature does not exceed 160°C (320°F) (see 74 FR 25326 and Section 3 of this document). The final rule allows use of Method 17 to determine PM emissions where gas stream characteristics are appropriate.

2.5.2 Visible Emissions Monitoring

2.5.2.1 Periodic Visible Emissions Monitoring Frequency

Comment: Three comments were received (022, 036, and 056) regarding the necessity and frequency of the proposed periodic visible emissions monitoring requirements. Commenter 056 stated that EPA should require more frequent monitoring for opacity than proposed. Commenter 036 stated that a weekly Method 22 and a quarterly Method 9 average opacity standard for coal crushing, conveying, and transferring facilities is appropriate and adequately to demonstrates compliance. Commenter 022 stated that periodic monitoring should not be required for affected sources for which compliance otherwise has been adequately demonstrated. The proposed monitoring requirements are unnecessarily time consuming. At a typical industrial facility that handles coal, the proposed monitoring requirements could involve as many as six or more separate emission points, most of which would have no visible emissions. An initial compliance demonstration should be adequate, and thereafter, single observations could be made once or twice a week.

Response: Revised amendments to Subpart Y published in the May 27, 2009, supplemental proposal notice include requirements for subsequent Method 9 opacity testing at various frequencies (i.e., within 7, 30, and 120 operating days of the previous test) depending on the maximum 15-second opacity reading in the most recent performance test. As an alternative to subsequent Method 9 performance testing, the revised amendments also provide an option that would allow Method 22 to be used to conduct daily 10-minute observations for affected sources for which the maximum 6-minute opacity reading from their most recent Method 9 performance test was less than or equal to 3 percent. In addition, if an opacity test were conducted concurrently with the PM performance test for units with wet scrubbers that continuously monitor specified scrubber parameters, no subsequent Method 9 opacity testing would be required. Finally, under certain conditions, the revised amendments would allow visible emissions observations using Method 9 for up to three emission points within a 15-second interval. (See 74 FR 25323-25324 and Section 3 of this document.) The final rule includes further revisions to the visible emissions monitoring requirements (see Section 3 of this document).

2.5.2.2 Visible Emissions Monitoring Frequency for Fogging Systems and PECS

Comment: Two commenters (021 and 031) recommended compliance approaches for affected facilities using fogging systems and PECS. For sources that use a PECS or a fogging system, the commenters suggested that a one-time Method 9 opacity test should be conducted at each emission point to demonstrate initial compliance with the opacity standard. The source would then conduct a 6-minute observation using Method 22 for visible emissions on a monthly basis.

Response: Revised amendments to Subpart Y published in the May 27, 2009 supplemental proposal notice include requirements for an initial Method 9 opacity test and subsequent Method 9 opacity testing at various frequencies (i.e., within 7, 30, and 120 operating days of the previous test) depending on the maximum 15-second opacity reading in the most recent performance test. As an alternative to subsequent Method 9 performance testing, the revised amendments also provide an option that would allow Method 22 to be used to conduct daily

10-minute observations for affected sources for which the maximum 6-minute opacity reading from their most recent Method 9 performance test was less than or equal to 3 percent. The final rule includes further revisions to the visible emissions monitoring requirements (see Section 3 of this document).

2.5.2.3 Method 22 Observation Period

Comment: Four commenters (029, 030, 038, and 046) stated that EPA should reduce the proposed Method 22 observation period for facilities using certain work practice standards. Even if EPA does not establish work practice standards or an alternative way to meet opacity requirements for facilities not venting to a stack, it should acknowledge the effectiveness of such efforts in the opacity monitoring requirements. The proposed rule would require a series of three 1-hour observations (during normal operation) at least once per calendar month that the coal-handling facility operates using Method 22. This is an excessive amount of observation time especially if numerous potential emission points are involved. If a facility is following work practice standards, such as minimizing drop heights, periodic inspections of enclosures, and performing all necessary preventive maintenance on equipment, then a less burdensome observation period would be sufficient be considered for these emission sources using Method 22. Commenter 46 recommended changing the visible emissions observation period to 1 hour.

Response: As an alternative to subsequent Method 9 performance testing, the revised amendments to Subpart Y published in the May 27, 2009, supplemental proposal notice provide an option that would allow Method 22 to be used to conduct daily 10-minute observations for affected sources for which the maximum 6-minute opacity reading from their most recent Method 9 performance test was less than or equal to 3 percent (see 74 FR 25324 and Section 3 of this document). The final rule includes further revisions to the visible emissions monitoring requirements (see Section 3 of this document).

2.5.2.4 Method 9 Performance Test Trigger

Comment: Two commenters (028 and 035) stated that the criterion of any visible emissions for a cumulative total of nine minutes over a 3-hour period could trigger follow-up Method 9 testing under circumstances where Method 9 testing over the same 3-hour period would have shown compliance. For these reasons, the commenters stated that the Method 22 criterion EPA has proposed is too stringent and may trigger Method 9 testing when no problem exists. In the event that a Method 9 "performance test" is triggered, the commenter has significant concerns about a source's ability to satisfy the proposed requirement within 24 hours. Under the general provisions, sources are required to provide EPA 30 days notice of any performance test, unless otherwise specified in section 60.8(d). This requirement obviously could not be met under EPA's proposal. . If EPA requires repeat Method 9 testing under any circumstances, EPA will need to provide a waiver of this notice requirement in the subpart or provide an alternative notice requirement that is consistent with the applicable testing deadline. If EPA promulgates a rule requiring repeat Method 9 testing on a specific deadline, EPA would have to provide a waiver for weather conditions and take into account the cost of having an outside contractor potentially on call waiting for the weather to clear. For all of the reasons discussed above, EPA should abandon the idea of an automatic Method 9 trigger and rely instead on repeat Method 22

readings following corrective action or the monitoring of other operating parameters (like proper operation of chemical or wet suppression systems).

Response: As described above, revised amendments to Subpart Y published in the May 27, 2009, supplemental proposal notice revised the conditions under which an affected owner or operator would be required to perform a new Method 9 performance test. The revised Method 22 criterion would provide the options of conducting corrective actions and demonstrating within 24 hours that the source is in compliance with the opacity limit or conducting a new Method 9 performance test within 30 calendar days (see 74 FR 25323-25324 and Section 3 of this document). The company also has the option of having a certified Method 9 "reader" on staff for such observations. The final rule includes further revisions to the visible emissions monitoring requirements, including a provision that repeat Method 9 performance testing would be required within 45 calendar days from the date of the occurrence that results in the repeat performance test. This ensures that the owner or operator has sufficient time to meet the requirement to provide EPA 30 days notice of any performance test.

2.5.2.5 Wet Process Visible Emission Monitoring Exemption

Comment: One commenter (046) recommended exemption of wet processes from visual emissions monitoring emissions requirements.

Response: The commenter appears to be expressing a concern that visual emissions test methods are not effective in monitoring plumes with visible water vapor. Both Method 9 and, by reference, Method 22 provide for measurement of visible emissions when visible water vapor exists. Because one can apply the visible emission measurement methods, EPA disagrees with this comment.

2.5.2.6 Alternative Site-Specific Test Method

Comment: Two commenters (028 and 035) stated concern with EPA's creation in Subpart Y of a separate process for approval of a site-specific alternative to an EPA test method without any analysis or support. Of course, if EPA wants to encourage sources to develop data to validate this method under Method 301 and follow the established procedures for approval of alternatives, EPA can provide that encouragement with a simple statement in the preamble. Without supporting data, this option has no place in this rule.

Response: EPA is not requiring Method 301 validation prior to use of a digital opacity compliance system (digital camera method) because the system measures the opacity of visible emissions in much the same way a Method 9 observer would. Also, EPA Preliminary Test Method 008 (PRE-008), "Determination of Visible Emission Opacity From Stationary Sources Using Computer-Based Photographic Analysis Systems," which has undergone some Method 301 validation testing, includes method-specific validation procedures and acceptance criteria. Thus, we are instead relying on approval of a site-specific monitoring plan that is prepared using PRE-008 for reference purposes. EPA certainly encourages sources to develop data based on use of the digital camera method.

2.5.3 Bag Leak Detection System

2.5.3.1 BLDS Cost Impact

Comment: One commenter (046) stated that the cost of using bag leak detection systems (BLDS) for all fabric filters is excessive.

Response: EPA considered, but decided not to require use of a BLDS at each affected facility using a fabric filter to control emissions. These detectors are useful and effective for early detection of bag leaks; however, the capital costs of a BLDS can be as much as $24,000 and the annualized costs might be as much as $7,000 (including capital recovery). These costs are considered unjustifiably high for smaller fabric filters with low potential emissions at Subpart Y affected facilities. Because potential emissions from a bag leak are more significant for larger fabric filters and because the cost of BLDS would not be significantly different for small or large fabric filters, the revised amendments to Subpart Y published in the May 27, 2009, supplemental proposal notice, as well as the final rule, require a BLDS only for those fabric filters with a design controlled potential PM emissions rate of 25 Mg (28 tons) or more (see 74 FR 25315 and Section 3 of this document for more information). This equates to a fabric filter of approximately 70,000 scfm with a design emissions rate of 0.010 gr/dscf, or 140,000 scfm with a design emissions rate of 0.0050 gr/dscf.

2.5.3.2 BLDS Operation under Adverse Weather

Comment: One commenter (018) stated that EPA should expressly recognize that adverse weather conditions, such as rain, may trigger a BLDS alarm and such condition may persist for longer than 3 hours. This commenter has operated BLDS at several fabric filter facilities in the steel industry. Based upon that experience, the commenter determined that adverse weather conditions, such as heavy rain, may cause the BLDS system to alarm even when there is no defect in the fabric filter system. Depending upon the area, these weather conditions may persist for longer than three hours. EPA should recognize that weather conditions may trigger an alarm and allow an operator to inspect the fabric filter, determine that there are no apparent leaks, torn or broken bags and that the alarm is due to the weather, and wait to resolve the alarm until the adverse weather condition abates.

Response: Revised amendments to Subpart Y published in the May 27, 2009, supplemental proposal notice include a provision that would allow the owner or operator of an affected facility to request more than 3 hours to alleviate a specific condition that causes a BLDS alarm if the owner or operator identifies in their monitoring plan that specific condition as one that could lead to an alarm, explains why it is not feasible to alleviate the condition within 3 hours, and demonstrates that the requested time will ensure alleviation of the condition as expeditiously as practicable.

2.5.4 PM Continuous Emission Monitoring System (CEMS)

Comment: One commenter (056) stated that EPA should require PM CEMS for all thermal dryer and pneumatic coal cleaning equipment stacks. Two commenters (035 and 045) requested that EPA clarify the use of PM CEMS under Subpart Y. Commenter 045 interpreted the

proposed rule to say that a new coal processing and conveying source is only subject to a 5 percent opacity requirement if it does not have a PM CEMS. Section 60.253(g) seems to require opacity monitoring and comparison to a 5 percent opacity criterion for all new coal processing and conveying sources, regardless of whether they have a PM CEMS. Also, sections 60.252(c)(2)(i) and 60.252(d) both refer to sources that do not use a PM CEMS according to the requirements of section 60.253(e). Section 60.253(e) by its terms only applies to thermal dryers and pneumatic coal-cleaning equipment, because it describes requirements for "[e]ach PM CEMS used in lieu of the monitoring requirements in paragraph (c) of this section," i.e. to sources otherwise subject to section 60.253(e). So it literally is impossible for a coal processing and conveying source to be using a PM CEMS according to the requirements of section 60.253(e). The commenter was unable to determine exactly what EPA intended for monitoring requirements and devices.

Response: In the April 28, 2008 proposal notice, EPA did not propose to require the use of PM CEMS but added specific language directly to the regulatory text that allowed owners/ operators to elect to use PM CEMS and provided incentives for them to do so by proposing to eliminate the opacity standard for owners/operators of affected facilities using a PM CEMS. Commenters suggested that by having the specific language directly in the regulatory text, we were encouraging State permitting authorities to require the use of PM CEMS, and that the costs are not justified for this source category. Based on our review of public comments and further analysis, revised amendments to Subpart Y published in the May 27, 2009, supplemental proposal notice removed the PM CEMS-specific language from the rule (see 74 FR 25307 and Section 3 of this document). As noted in the response to comment 3.5.4, we continue to believe that it is not "feasible" to install and operate PM CEMS on subpart Y affected facilities.

2.5.5 Continuous Opacity Monitor System (COMS)

Comment: One commenter (045) stated that most in-line coal mills have a COMS in order to meet the National Emission Standards for Hazardous Air Pollutants (NESHAP) opacity requirement for kiln gases (20 percent). Rather than requiring either a PM CEMS or a BLDS for new thermal dryers and pneumatic coal-cleaning equipment, continuing compliance with the NSPS emission limitations for those processes could be demonstrated with the COMS at little or no incremental expense. Requiring annual performance testing of coal processing and conveying equipment emissions is excessive, in light of the stringent opacity limitation being proposed and the proposed requirement for either a PM CEMS or a BLDS for new thermal dryers and pneumatic coal-cleaning equipment. With those types of provisions for continually monitoring control equipment, conducting an official performance test once every 5 years should be sufficient.

Response: As an alternative to performing Method 9 performance tests, the revised amendments to Subpart Y published in the May 27, 2009, supplemental proposal notice allow an owner or operator of an affected facility subject to a visible emissions standard to install, operate, and maintain a COMS (see 74 FR 25324 and Section 3 of this document). The final rule retains this option.

2.5.6 Recordkeeping

2.5.6.1 General

Comment: One commenter (056) stated that recordkeeping and logbooks should be more thorough to ensure compliance with the rule requirements. The commenter supports the requirement to measure and report amounts of water and chemical stabilizer used each month; however, monitoring and recordkeeping must be more thorough. Facilities should also maintain a daily logbook detailing where, when and how much water and chemical dust suppressant is used, traffic rates and types of vehicles using plant roadways and vehicle activity areas, equipment downtime records, and meteorological conditions relevant to control program requirements (such as wind speed, daily precipitation and relative humidity). Such records are commonly kept at facilities across the country and are necessary to help assure that any work practice or equipment standards are being properly operated.

Response: The revised amendments to Subpart Y published in the May 27, 2009, supplemental proposal notice would require owners or operators of affected facilities to maintain a logbook that includes documentation of recommended maintenance procedures and any maintenance and inspection activities; results of opacity observations and corrective actions taken, if any; the amount and rank of coal processed; the amount of chemical stabilizer or water purchased; monthly certification that dust suppressant systems were operational; monthly certification that the fugitive dust emissions control plan was properly implemented; BLDS output and information pertaining to any BLDS alarms; monthly certification that the monitoring plan for a digital opacity compliance system was properly implemented; and wet scrubber pressure loss and water supply pressure (see 74 FR 25326-25327 and Section 3 of this document). Documentation of this information will provide useful information regarding the overall operation of a coal preparation and processing plant. The final rule includes minor revisions to the monitoring parameters and documentation requirements.

2.5.6.2 Fogging Systems

Comment: Two commenters (032 and 036) stated that the WDEQ requires O&M records to be retained for the fogging systems, and that they be maintained on a scheduled frequency that is dependent upon production throughput. For one commenter's operation, these records are monthly O&M records of the maintenance performed on each fogging system area and the air and water pressure of the system each month, which documents that the system is performing properly. Also, the operators are required to look at each transfer building during each shift when coal is being handled. If a dust problem is seen, they are to investigate and solve the problem immediately (i.e., repair the dust control system). The commenter stated the opinion that the documentation of the air and water pressure readings during monthly O&M checks combined with daily visible emission assessments are adequate to show that the fogging systems have been operating as designed.

Response: The revised amendments to Subpart Y published in the May 27, 2009, supplemental proposal notice would require owners/operators of affected facilities to maintain a logbook that documents recommended maintenance procedures and any maintenance and inspection activities, results of opacity observations and any corrective actions taken, and monthly

certification that dust suppressant systems were operational; all of which would provide an indication of whether a fogging system was operating properly. The final rule retains these requirements.

2.5.6.3 Dust Suppressant System Non-operating Periods

Comment: Two commenters (030 and 038) stated that EPA should change the logbook requirements to acknowledge the valid reasons for not operating dust suppressant systems. Under proposed section 60.255(a)(4), affected facilities must keep a logbook that includes a monthly certification that dust suppressant systems were operational when any coal was processed and that manufacturer recommendations were followed for all control systems. In general, the commenter does not object to this obligation, but stated that in certain limited circumstances there may be legitimate reasons for not operating the dust suppressant systems. For example, in the northern parts of the country, winter temperatures drop to well below freezing. Under those temperatures, many chemical dust suppressants cannot be applied and water addition could constitute a safety hazard and cause operational difficulties. Also precipitation can act to control dust generation naturally. During periods of heavy precipitation additional water application is unnecessary and wasteful. In recognition that circumstances such as freezing temperatures and heavy rain can arise that make dust suppression operations unwise or at least unnecessary, EPA should revise the proposed logbook certification provision to allow facilities to show that a decision to not operate a dust suppressant system was justified.

Response: EPA recognizes that operation of water-based dust suppression systems is not needed during periods of rain or may not be operable when ambient air temperatures are well below 32°F. The final rule allows owners and operators to add a comment to their logbook records to explain periods when the dust suppressant systems were not operated due to ambient conditions (e.g., during periods of subfreezing temperatures or rain).

2.6 Analyses of Cost, Non-air, and Energy Impacts

2.6.1 Adequacy of Cost Analysis

Comment: Four comments were received (019, 025, 032, and 045) regarding the assumptions used for the cost analysis. Commenter 019 stated that the proposed rule does not consider the economic impact of the capital and operating costs of fabric filters compared to the newer technologies that are currently available. The physical size of fabric filters requires the dust collection equipment to be placed further from the dust source, requiring additional ductwork, and structures to mount the equipment. Commenter 032 stated that costs to operate fabric filters in combustible dust environments should include the cost to control indoor dust, costs to resolve fabric filter fire/explosion hazards, costs for fabric filter noise pollution abatement, and cost for vacuum trucks used for cleanup of coal dust collected in fabric filters. Commenter 025 stated that the cost analysis was incomplete and does not contain all control alternatives. Commenter 045 questioned EPA's conclusion that the proposed amendments would have little economic impact.

Response: The supplemental proposal eliminated the requirement for owner/operators of affected facilities processing subbituminous and lignite coals to vent to a control device. The

proposed change from the original proposal is the result of our conclusion that fogging systems and PECS provide equivalent environmental protection as fabric filters at a potentially lower cost. We have further concluded that wet extraction scrubbers could achieve the standards in the supplemental proposal and are a viable alternative to fabric filters. Considering that fabric filters are not the basis for the BDT determination in the supplemental proposal we concluded it was not necessary to re-evaluate the fabric filter costs to determine if they needed to be adjusted. The economic analysis of the proposal indicates that the costs on a facility basis are all projected to be less than one percent of sales and would not significantly impact the coal industry. EPA determined, however, that a revised cost analysis should be prepared in support of the final amendments to subpart Y.

2.6.2 Adequacy of Non-air Impacts and Energy Requirement Analyses

Comment: Two commenters (025 and 044) stated that no analyses of non-air impacts or energy requirements were conducted.

Response: In developing NSPS for a source category, the CAA requires that EPA consider alternative emission control approaches, taking into account the estimated costs and benefits, as well as energy, solid waste, and other effects. The revised amendments to Subpart Y published in the May 27, 2009, supplemental proposal notice requested comment on whether EPA has identified the appropriate alternatives and whether the proposed standards adequately take into consideration the incremental effects in terms of emission reductions, energy, and other effects of these alternatives (see 74 FR 25317 and Section 3 of this document). The energy requirements are taken into account in the costing analysis and the supplemental proposal provided for alternatives to fabric filters with lower energy requirements.

2.7 Relationship of Subpart Y with Other Rules

2.7.1 Part 70 Title V Permits

Comment: One commenter (021) expressed concern that Subpart Y is applicable to coal-handling and storage operations at coal-fired power plants even though these facilities already must comply with 40 CFR part 70, the Title V operating permit program. The title V permit program requires all emission sources in the coal preparation process for fossil fuel-fired generating utilities to be covered under the Compliance Assurance Monitoring (CAM) plan. It also requires that permit emission limits be enforced through the title V operating permit. As such the Subpart Y is redundant when applied to coal-fired power plants, and any such facility that already has an active title V operating permit with an active CAM plan should not be subject to Subpart Y.

Response: Title V generally does not establish emission limits but, rather, requires that all requirements applicable to a specific covered source be included in that source's title V permit. EPA is directed by CAA section 111 to develop and then review and revise, if appropriate, new source category-specific regulations. Further, CAA section 114(a)(3) provides that the Administrator shall require enhanced monitoring of all major stationary sources and that the Administrator may require enhanced monitoring of other sources. 42 U.S.C. 7414(a)(3). This section provides EPA with authority to promulgate the monitoring requirements in this rule. In

addition, in promulgating the Part 64 CAM requirements, EPA explained the limited purpose of Part 64. Specifically, EPA explained that "Part 64 is intended to provide a reasonable means of supplementing existing regulatory provisions . . . . The Agency does not believe that existing monitoring requirements that are more rigorous than part 64 should be reduced or that monitoring imposed in future regulatory actions necessarily should be guided by part 64." EPA also restated its commitment "to developing new emission standards subsequent to the 1990 Amendments with methods specified for directly determining continuous compliance whenever possible." (See 62 FR 54900, 54904, October 22, 1997.) The approach adopted in this rule is consistent with the approach taken by EPA when promulgating the part 64 CAM requirements. It is also consistent with EPA's recognition of the benefits of addressing that such issues and improving monitoring requirements, consistent with the requirements of section 114(a)(3), through rulemaking actions including section 111 rulemakings. Id.

One purpose of title V permitting programs or other rules (e.g., the Part 64 CAM rules) relevant to this issue is to fill monitoring and testing gaps where the underlying rules may be deficient, not replace EPA's rulemaking responsibilities. In fact, the Title V review must assess whether the proposed permit contains monitoring sufficient to reasonably ensure compliance, and to require such monitoring if it does not. In addition, by promulgating national rules with effective monitoring, EPA can assure that such monitoring requirements are applied consistently throughout an affected category of sources. As noted, EPA has an obligation to review, and revise if necessary, NSPS on a regular schedule. Thus, we will be applying a new rule to source categories potentially already subject to monitoring sufficient to assure compliance. We include provisions for monitoring that will be effective for assuring compliance with the new limits and can even apply new monitoring technology (e.g., PM CEMS) if we think it is warranted and feasible. Even if Part 64 does apply to these sources, Part 64 would not apply to monitoring for compliance with any new NSPS rules or to units or processes subject to emissions limits and that use control measures other than add-on control devices. The affected facilities to which subpart Y applies include coal transfer, loading, conveyance, and storage operations that may not involve add-on control devices and to which the CAM rules under Part 64 would not apply.

2.7.2 Nonmetallic Mineral Processing Plants NSPS (40 CFR 60 subpart OOO)

Comment: Several commenters (027, 035, and 038) requested that EPA provide a compliance alternative for owners and operators of affected sources subject to control requirements under both Subpart Y and subpart OOO to be exempted from the control requirements of subpart OOO if they comply instead with the requirements of Subpart Y.

Response: Subpart Y establishes NSPS for coal preparation and processing plants. Subpart OOO establishes NSPS for nonmetallic minerals processing plants. The two NSPS rules apply to separate and distinct source categories. There are no affected facilities subject to both Subpart Y and subpart OOO. However, at some plant locations such as electric utility power plants there may be coal processing affected facilities subject to Subpart Y and limestone processing affected facilities (for the coal-fired boiler flue gas desulfurization systems) subject to subpart OOO. EPA does not have authority to exempt sources from those requirements. However, if EPA has data and analyses demonstrating that compliance with one requirement guarantees compliance with a second requirement, EPA could make a determination that compliance with the first requirement is deemed to satisfy the second requirement. In this instance, the commenter

appears to be asking EPA to make a determination that compliance with Subpart Y would satisfy the requirements of subpart OOO. Even if EPA had data to support such a conclusion, EPA could not make such a finding in this rulemaking. Any findings relating to what is required to satisfy the requirements of subpart OOO could only be made in a separate rulemaking specific to subpart OOO. Amendments to subpart OOO are outside the scope of this rulemaking.

2.7.3 Occupational Safety and Health Administration (OSHA) Rules

Comment: One commenter (035) stated that OSHA Directive CPL 03-00-008 effective March 11, 2008, would require coal preparation plants to maintain a coal dust layer not to exceed 1/32 inch to comply with National Fire Protection Association (NFPA) 654. The commenter is concerned that maintaining a coal dust layer consistent with 1/32 inch standard on flat surfaces would be very difficult with the large amount of air flow that would be needed to vent a fabric filter, and that the interaction of the proposed Subpart Y amendments with NFPA 654 would make fabric filters prohibitively expensive if they had to be built sufficiently large to meet the 1/32 inch level. Preliminary research by the commenter on this issue led to a tentative conclusion that it would be difficult for OSHA to use the 1/32 inch level from NFPA 654 for coal preparation plants at electric utilities. This commenter requested that EPA coordinate with OSHA to confirm this analysis before the rule is finalized.

Response: The OSHA directive actually says that immediate cleaning is warranted if the coal dust accumulation reaches 1/32 inch thickness over at least 5 percent of the surface area including rafters and tops of equipment (section IX. E.3). The purpose of the directive is to eliminate dust accumulation, not to ensure that there is a coal dust layer. EPA believes that complying with the requirements of Subpart Y would do nothing to cause an owner or operator to fail to comply with the OSHA directive but, rather, would help the facility remain in compliance with it. Further, the standards established in the final rule require facilities to meet specific emission rates but do not require any specific control technology (e.g., a fabric filter) to be used.

2.8 Proposed Regulatory Text Clarifications

Comment: One commenter (013) stated that the proposed regulatory text in section 60.252(c)(2)(ii) requiring each new and reconstructed affected facility that processes, conveys, stores, transfers, or loads coal, except those that exclusively process, convey, store, transfer, or load bituminous coal to vent all emissions through a stack and ensure that emissions discharged into the atmosphere from the affected facility do not contain PM in excess of 0.011 g/dscm (0.0050 gr/dscf) is contrary to the text in the preamble at II.B (73 FR 22903). The proposed wording does not restrict the applicability of the PM standard to only that equipment that is enclosed. The commenter stated that the regulatory text is not clear that the emission standards applies to the constructed, reconstructed and modified equipment listed only if that equipment is fully enclosed. Also, the text is not clear concerning whether or not constructed, reconstructed and modified equipment must be made fully enclosed to comply. The commenter requested that EPA clarify the rule requirements in the final rule concerning these points. To remove uncertainty, the commenter suggested defining enclosed as "fully enclosed."

Response: Specific proposed regulatory text cited by commenters was not included in the revised amendments regulatory text published in the May 27, 2009, supplemental Subpart Y proposal (see 74 FR 25304). The revised amendments to Subpart Y apply the PM emissions limit for coal processing and conveying equipment, coal storage systems, and coal transfer system operations to those affected sources that are mechanically vented. Ventilation systems can be used with either partial or full enclosures. The final rule similarly applies the PM emissions limit to those affected sources that are mechanically vented.

Comment: One commenter (018) requested that EPA clarify the term "a stack" used for proposed regulatory text in section 60.252(c)(2)(ii) to mean that emissions should pass through a stack and not that all emissions must pass through the same stack. The commenter interprets EPA's discussion in the preamble to allow use of multiple stacks and control devices, where appropriate. Multiple stacks may be required in some configurations where a single stack is too distant from part of the facility to provide effective capture and evacuation.

Response: Specific proposed regulatory text cited by commenters was not included in the revised amendments regulatory text published in the May 27, 2009, supplemental Subpart Y proposal (see 74 FR 25304). The revised amendments' regulatory text does not use the term "stack" in the context of specifying the emission points subject to PM emission limits for affected coal processing and conveying equipment, coal storage systems, and coal transfer system operations. Similarly, the final rule does not use the term "stack" in that context.

Comment: One commenter (040) stated that the proposed regulatory text in sections 60.252(c)(2)(ii) and (iii) (73 FR 22911) is overly complex and unnecessarily confusing. The language suggests a scope of Subpart Y applicability far greater than the originally designated affected facilities that EPA has proposed not to change (73 FR 22903). The commenter requested that EPA revise the regulatory text to be unequivocally clear that the subject performance standard applies only to affected facilities handling non-bituminous coals.

Response: Specific proposed regulatory text cited by commenters was not included in the revised amendments regulatory text published in the May 27, 2009, supplemental Subpart Y proposal (see 74 FR 25304). The revised amendments to Subpart Y eliminated separate fugitive dust control requirements for coal processing, conveying, storage and transfer systems depending on the coal rank processed (see 74 FR 25306 -25307and Section 3 of this document). The final rule retained the elimination of separate fugitive dust control requirements depending on coal rank.

3.0 MAY 27, 2009 SUPPLEMENTAL SUBPART Y AMENDMENT PROPOSAL

3.1 Subpart Y Applicability

3.1.1 Regulated Pollutants

3.1.1.1 SO_2, NO_x or CO Endangerment Finding

Comment: Many commenters (085, 088, 095, 107, 112, 115, 117, and 120) stated that EPA's authority to promulgate NSPS requires an endangerment finding for the coal preparation plant source category and the pollutant(s) of interest. EPA has not made such a finding for SO_2 NO_X, or CO from coal preparation plants, and therefore cannot set SO_2, NO_X, or CO emissions standards applicable to coal preparation plants under Subpart Y. Another commenter (100) stated that EPA has correctly recognized its obligation to promulgate NSPS for SO_2, NO_X, and CO as required by the CAA.

Response: CAA section 111(b)(1)(A) requires the Administrator to publish a list of categories of stationary sources and include a category of sources on that list if he finds that "in his judgment it causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare." 42 USC 7411(b)(1)(A). The plain language of section 111(b)(1)(A) provides that such findings are to be made for source categories, not for specific pollutants emitted by the source category. Therefore, once the Administrator determines that the source category causes of contributes significantly to air pollution which may endanger public health or welfare, the Administrator must add the source category to the section 111(b)(1)(A) list and subsequently establish standards of performance for the sources in that source category. Determinations regarding the specific pollutants to be regulated are made, not in the initial endangerment finding, but in the at the time the performance standards are promulgated. In addition, section 111(b)(1)(B) requires EPA to review and revise, if appropriate, the standards at least every eight years. In conducting that review, EPA has discretion to revisit its original determination regarding which pollutants emitted from the source category should be regulated. Neither the text of the CAA nor subsequent statements of EPA provide any support for the argument that an endangerment finding must be made for specific pollutants or for the argument that the scope of the revised NSPS must be limited to the pollutants (or affected facilities) regulated in the initial NSPS.

The text of CAA section 111(b)(1)(A) provides no support for the argument that section 111 endangerment findings must be made for each pollutant emitted by the source category before that pollutant can be regulated in the NSPS. In contrast, the statutory text calls for a list of "categories of stationary sources." It does not require, at the time of listing, an identification of all the specific pollutants emitted by the source category that may endanger public health or welfare. Instead, it requires only a general determination that emissions from the category cause or contribute to air pollution that may endanger public health or welfare. The endangerment finding is used to identify categories of sources for regulation, not to dictate the substantive content of the required standards of performance. The endangerment finding neither requires regulation of each pollutant emitted by the source category, nor limits EPA's discretion to

determine (in the initial regulation or in subsequent revisions) which pollutants should be regulated.

Instead, CAA section 111(b)(1)(B) requires the Administrator, after publishing proposed regulations and providing an opportunity for comment, to promulgate such standards as the Administrator "deems appropriate." The statutory scheme thus provides EPA with significant discretion to determine which pollutant(s) should be regulated under the NSPS. The Agency has long interpreted section 111(b)(1)(B) as providing the Administrator with this flexibility. See National Lime Assoc. v. EPA, 627 F.2d 416, 426 n.27 (D.C. Cir. 1980) (explaining reasons for not promulgating standards for NO_X, SO_2 and CO from lime plants); see also National Assoc. of Clean Air Agencies v. EPA, 489 F.3d 1221, 1228-1230 (D.C. Cir. 2007) (finding that the "deems appropriate" language in CAA section 231 provides a "delegation of authority" that is "both explicit and extraordinarily broad").

EPA has, in prior NSPS rulemakings, exercised its discretion to identify pollutants for regulation. It has sometimes exercised this discretion to defer regulation of specific pollutants to a later date. See, e.g., 52 FR 36678, 36682 (September 30, 1987)(noting in Subpart DDD proposal that "standards development for this industry is focusing initially on limiting emissions of VOC");; 49 FR 2656, 2659 (Jan 20, 1984) (explaining why SO_2 and VOC were the only pollutants in the natural gas production industry selected for regulation under Subpart LLL "at this time."); 48 FR 37338, 37340-42 (Aug. 17, 1983) (declining to regulate in Subpart AAa, emissions of pollutants for which adequately demonstrated control technology was not currently available). EPA has also exercised this discretion to promulgate, during 8-year review rulemakings, new performance standards for pollutants not previously covered by the NSPS in question. See, e.g., 52 FR 24624, 24710 (July 1, 1987) (considering PM_{10} controls in future rulemakings); 71 FR 9866 (Feb. 27, 2006) (establishing new PM standards for boilers); 73 FR 35838 (June 24, 2008) (adding NO_X limits for fluid catalytic cracking units, NO_X limits for fluid coking units and NO_X limits for process heaters to the refineries NSPS). In addition, EPA has previously noted its disagreement with comments implying that an additional endangerment finding would be required to support regulation of a pollutant not previously regulated in that specific NSPS. See, e.g., 73 FR 35838, 35859 n2 (June 24, 2008).

Further, the argument that EPA must issue a separate endangerment finding before regulating a pollutant not previously regulated in the NSPS for a source category is illogical. Once EPA has determined that a source category causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare emissions from a source category, the recognition that the source has emissions above and beyond those discussed in the original endangerment finding could only serve to strengthen the basis for the endangerment finding for the source category. Further, the listing of the source category is only the first step in the process. Once the finding is made, the statute allows the more detailed analysis of which pollutants are actually emitted and should be regulated to be conducted in rulemaking process used promulgate and revise the standards for the source category.

Finally, it is worth noting that EPA previously addressed this topic in the context of the Subpart Y NSPS for coal preparation and processing plants. Coal preparation plants were listed under CAA section 111(b)(1)(A) on October 24 1974, pursuant to the Administrator's determination that such plants "may contribute significantly to air pollution which causes or contributes to the

endangerment of public health or welfare." 39 FR 37,807 (Oct. 24, 1974). The Background Information Document for the Subpart Y standards proposed at that time explains the process to be used for setting NSPS and explicitly notes that "[a]lthough a source category may be selected to be covered by a standard of performance, treatment of some of the pollutants of facilities within that source category may be deferred." Background Information for Standards of Performance: Coal Preparation Plants Volume 1: Proposed Standards at ix.

For these reasons, EPA disagrees with the comment suggesting that EPA cannot set SO_2, NO_X, or CO emissions standards applicable to coal preparation and processing plants under Subpart Y. EPA agrees with the comment saying it was proper for EPA to revise the Subpart Y NSPS to include standards for SO_2, NO_X, and CO as appropriate.

3.1.1.2 Standards for Greenhouse Gas Emissions

Comment: One commenter stated that EPA should recognize its obligation to promulgate NSPS for emissions of carbon dioxide (CO_2), nitric oxide (N_2O), and black carbon (a component of PM) from coal preparation and processing plants. The commenter asserts that because these pollutants are the result of incomplete fuel combustion, they are emitted at coal prep plants, particularly by thermal dryers heated by coal or other fossil fuels. Emissions of each pollutant, the commenter asserts, carries individual and distinct risks and is controlled by different technologies so EPA must fully analyze each pollutant and set separate NSPS for each.

Response: At this time EPA is not aware of any emissions or mitigation data for the pollutants noted by the commenter for this source category. Hence, we lack sufficient information on which to base an NSPS for emissions of CO_2, N_2O, and black carbon from the source category at this time. Rough estimates of CO_2 from this source category suggest that this source category would be among the smaller CO_2-emitting NSPS categories. At this time, we are not making any final determination regarding whether it would be appropriate to set such standards.

In addition, to the extent the comment suggests that EPA should utilize its authority under other provisions of the CAA to require sources to gather and report GHG emissions and to the extent it raises issues not opened for public comment in the supplemental proposal, it is beyond the scope of this rulemaking.

Comment: One commenter asserts that CAA section 111 carries a mandate for EPA to set NSPS for the pollutants emitted by a source. The commenter cites to language in section 111(a)(3) that defines a stationary sources as any building, structure, facility or installation which emits or may emit *any* air pollution and language in section 111(b)(4) defining a modification as a physical or operational change which increases the amount of *any* air pollution emitted by the source. In addition, the commenter cites to the Supreme Court's decision in Massachusetts v. EPA, 549 U.S. 497, 529 (2007) and EPA's April 2009 Proposed Endangerment and Cause or Contribute Findings for Greenhouse Gases" (74 FR 18886 (Apr. 24, 2009)).

Response: The Agency has long exercised its discretion to regulate only a subset of the pollutants emitted by a source category or to defer regulation of certain pollutants to a later date. See e.g., National Lime Assoc. v. EPA, 627 F.2d 416, 426 n.27 (D.C. Cir. 1980) (explaining reasons for not promulgating standards for NO_X, SO_2, and CO from lime plants); National

Assoc. of Clean Air Agencies v. EPA, 489 F.3d 1221, 1228-1230 (D.C. Cir. 2007) (finding that the "deems appropriate" language in CAA section 231 provides a "delegation of authority" that is "both explicit and extraordinarily broad"); 52 FR 36678, 36682 (September 30, 1987) (explaining Subpart DDD standards' initial focus on limiting emissions of VOC); 49 FR 2656, 2659 (January 20, 1984) (explaining Subpart LLL regulates only emissions of SO_2 and VOC); 48 FR 37338, 37340-42 (August 17, 1983) (explaining why Subpart AAa does not regulate emissions of pollutants for which adequately demonstrated control technology was not currently available).

3.1.2 Addition of Coal Refuse to Definition of "Coal"

Comment: Many commenters (085, 088, 089, 095, 107, 112, 115, and 117) stated that EPA has proposed to amend the definition of "coal" to include "coal refuse and petroleum coke." These commenters object to EPA's inclusion of "coal refuse" because it further expands the Subpart Y applicability with no data specific to coal refuse on what constitute adequately demonstrated technologies and their respective levels of achievable emissions. Commenter 89 is concerned that this definition of coal refuse could create the potential for the unintended application of such definition to the overburden from surface mines or to mine-development waste associated with underground mining. Commenter 089 states that the final rule must make clear that the definition of coal refuse does not apply to these types of operations and suggests using the SMCRA definition instead (Coal refuse is defined as "any waste coal, rock, shale, slurry, culm, gob, boney, slate, clay and related materials, associated with or near a coal seam, which are either brought aboveground or otherwise removed from a coal mine in the process of mining coal or which are separated from coal during the cleaning or preparation operations. The term includes underground development wastes, coal processing wastes, excess spoil, but does not mean overburden from surface mining activities"). Commenter 089 believes that this definition would be a more appropriate definition of coal refuse for EPA to include in the final rule, because the definition limits the application of coal refuse to surface coal mining operations.

In contrast, several other commenters (087, 099, 119, and 126) stated either they support or that they have no objections to including coal refuse in the definition of "coal" for Subpart Y.

Response: EPA is including "coal refuse" in the final rule's definition of "coal" for the purposes of subpart Y because it is handled in the same machinery as other types of coal at coal preparation and processing plants. "Coal refuse" is separately defined, as well as included in the definition of "coal" in other NSPS (e.g., 40 CFR 60 subparts Da and Db), and its inclusion here provides consistency with other EPA regulations. EPA has modified the definition of "coal refuse" in subpart Y to be consistent with the definition in 40 CFR 60 subpart Da. Given the historical inclusion of "coal refuse" in these other NSPS and the fact that the constituents and emission characteristics of "coal" and "coal refuse" are believed to be the same, EPA has concluded that inclusion of "coal refuse" in subpart Y is appropriate.

3.1.3 Subpart Y Amendments Applicability Dates

Comment: One commenter (093) stated while in some cases EPA is proposing that new or more-stringent requirements first proposed in the Supplemental Proposal only apply to facilities constructed, reconstructed, or modified after the May 27, 2009, publication date of the

Supplemental Proposal, in other cases EPA is proposing that those new or more-stringent requirements apply to any facility constructed, reconstructed, or modified after the April 28, 2008, proposal of amended Subpart Y NSPS. Given that it was over a year between the April 28, 2008, proposal and EPA's publication of the Supplemental Proposal, this commenter believes it is unreasonable for EPA to apply any of the more-stringent portions of the Supplemental Proposal to any facility that commenced construction, reconstruction, or modification prior to May 27, 2009.

Response: CAA Section 111(a)(2) defines a "new source" as "any stationary source, the construction of modification of which is commenced after the publication of regulations (or, if earlier, proposed regulations) prescribing a standard of performance under this section which will be applicable to such source. Thus, requirements that were proposed for the first time in the May 27, 2009 proposal will apply only to sources constructed, reconstructed, or modified after May 27, 2009. However, standards or amendments to existing standards that were proposed for the first time in the April 28, 208 proposal, regardless of whether the final standard is more or less stringent than that originally proposed, apply to all sources constructed, reconstructed or modified after April 28, 2008.

3.1.4 Affected Facilities - General

Comment: One commenter (096) stated that the Supplemental Proposal includes revisions to the earlier proposed standards that are consistent with EPA's mandate under Section 111 of the CAA that EPA publish standards of performance for categories of "stationary sources . . . that cause[], or contribute[] significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare," 42 U.S.C. §7411(b)(1). These proposed revisions make it more likely that the NSPS will address the most significant emissions sources within coal prep plants. EPA is correct to provide standards of performance for additional affected facilities including pneumatic coal-cleaning equipment cleaning all coal ranks, both direct and indirect dryers drying all coal ranks, open storage piles (including the loading, unloading, and conveying operations of open storage piles), and roads associated with coal preparation plants constructed after May 27, 2009.

Response: EPA appreciates the commenter's support of its basic approach. See Section 3.4 of this document for discussion of roads.

Comment: One commenter (094) stated that EPA should clarify that subpart Y controls apply to coal-handling operations only to the extent that coal is being managed in the coal preparation plant portion at an owner or operator's site, and that subpart Y does not apply to coal that is managed on-site but not within the coal preparation plant. The commenter provided examples of situations to support their comment.

Response: The provisions of subpart Y apply only to those facilities meeting the applicability provisions specified in section 60.250 and the definition of "coal preparation and processing plant" in section 60.251.

3.1.5 Affected Facilities at Existing Coal Preparation Plants

Comment: One commenter (103) understands it is EPA's intention that the proposed amendments to subpart Y would apply only to those individual affected facilities at an existing coal preparation plant that qualify as being a new, modified, or reconstructed source. In other words, if a specific unit (e.g., a thermal dryer or a transfer and loading system) qualifies as a new, modified, or reconstructed affected facility, the amended Subpart Y requirements are not triggered for other existing coal preparation and processing facilities at the plant that remain unchanged. The commenter requests that this interpretation be clarified in the text of the regulation.

Response: The applicability provisions in subpart Y and the NSPS General Provisions in 40 CFR 60 subpart A govern applicability determinations for affected facilities at coal preparation and processing plants. These provisions provide that applicability is determined for each individual facility and not for the source as a whole, and confirm the commenters' understanding that a determination that a specific affected facility is subject to the amended subpart Y requirements does not automatically cause other facilities at the source to become subject to the amended subpart Y requirements. Specifically, section 60.14(a) provides, among other things, that "any existing facility" shall become an affected facility for each pollutant to which a standard applies . . . " In addition, section 60.14(c) provides that "The addition of an affected facility to a stationary source as an expansion to that source or as a replacement for an existing facility shall not by itself bring within the applicability of this part any other facility within that source."

3.2 Subpart Y Subcategorization

Comment: Many commenters (085, 088, 095, 107, 112, 120, and 115) stated that when establishing standards of performance for new stationary sources under the CAA §111(b)(2) authorizes the Administrator to "distinguish among classes, types and sizes within categories of new sources." For several reasons the commenters requested that final amendments to Subpart Y include a distinction between the regulatory requirements for coal preparation plants associated with coal mines, i.e., the "producers," and for coal preparation plants at coal-fired power plants and large industrial sources such as cement manufacturing and coke ovens, i.e., the "users." The commenters cited the following regulatory requirement and facility characteristics distinctions between coal producers and coal users to support their request.

- Most new coal-fired power plants as well as large industrial coal-fired sources in the future will be major sources of PM emissions. Consequently, those new major sources will necessarily be required to use state-of-the-art control technologies, i.e., BACT. In contrast to the coal-fired major sources, i.e., the "users," surface coal mines with coal preparation facilities as well as standalone coal preparation facilities associated with coal mines, i.e., the "producers," are typically minor sources. Consequently, new coal preparation plants at these mine locations will not be subject to BACT under the PSD program but rather to control technology requirements of Minor NSR programs of individual states. EPA should consider adoption of industry sectors based subcategorized emission standards for Subpart Y so that a BACT level of control is not mandated as NSPS for "producers."

- Resource requirements to maintain and demonstrate compliance with the Subpart Y emission standards is a function of the number of affected facilities at a particular coal preparation plant. Coal preparation plants of "producers" tend to have more sizing, cleaning and overall "handling" operations than the typical preparation plant at a coal-fired "user." Consequently, as a general rule, the total number of affected facilities at a "producer's" coal preparation plant will be greater (and could be several times greater) than the number of such facilities at the preparation plant of a "user." For example, it is not uncommon for a preparation plant associated with coal mining to have 20-25 individual facilities. Moreover, coal preparation facilities at new coal-fired power plants are frequently enclosed to accommodate a capture-and-control system to satisfy a BACT level of control. On the other hand, many new preparation facilities associated with coal mining are expected to rely on wet suppression for particulate control, and many will continue to be "out in the open," i.e., only partially enclosed or else unenclosed. As a consequence of that latter design configuration, a single affected facility associated with coal mining can frequently have multiple points of fugitive emissions. With more affected facilities per source and more emission points per affected facility, preparation plants associated with coal mining generally will have much greater monitoring/recordkeeping/reporting requirements than will its preparation counterparts at coal-fired "user" sources. A "one-size-fits-all" opacity monitoring requirement under Subpart Y could be highly inequitable for preparation plants associated with coal mines.
- Fugitive dust from surface coal mines is already regulated by U.S. Department of Interior (DOI) regulations in 30 C.F.R. Parts 700-899 under authority of the Surface Mining Control and Reclamation Act (SMCRA). EPA must account for the existing air pollution control requirements imposed on coal mines by the SMCRA. EPA has examined the effects of such SMCRA-based controls in the past and found that concurrent regulation with similar CAA requirements would not be appropriate. The commenter believes that EPA's examination of those SMCRA dust control requirements today in the context of possible NSPS regulation of preparation facilities at coal mines would result in a similar conclusion. In short, the longstanding SMCRA regulatory program applicable to preparation facilities associated with coal mines constitutes a compelling reason for regulating such new "producer" facilities under NSPS differently from those types of new facilities at coal-fired "user" source.

Response: The subpart Y NSPS covers coal preparation and processing plants that may be found, as the commenter notes, both at mine sites ("producers") and at industrial sites ("users"). In the Response to Comments document for the October 24, 1974, proposal, EPA stated "[t]he specific coal processing operations regulated by these standards are affected regardless of whether they are located in coal liquefaction plants, power plants, coke ovens, etc." (See "Background Information for Standards of Performance: Coal Preparation Plants; Volume 3: Supplemental Information. January 1976. p. 22.)

Commenters' request that EPA create a separate category for coal preparation and processing facilities at "producers" appears to be based on the assertion that these facilities should not be required to install and operate emissions control technologies that are currently in use or will be used at coal preparation and processing facilities at "users." A primary objective of CAA section 111, however, is to require new sources to be built using the best system of emissions reduction that has been adequately demonstrated. Under CAA section 111, EPA is required to set standards of performance (i.e., standards that reflect the degree of emission

limitation achievable through the application of the best system of emission reduction). As the Court has noted, "Section 111 looks toward what may fairly be projected for the regulated future, rather than the state of the art at present, since it is addressed to standards for new plants." Portland Cement, 486 F.2d at 391. In developing NSPS standards, EPA must identify all technologies in use or being developed for use to determine that the Administrator determines have been adequately demonstrated. This analysis must take into account the cost of achieving the reductions and any nonair quality health and environmental impacts and energy requirements. This analysis is separate and distinct from any BACT analysis that may be done for an individual plant. Finally, EPA disagrees with the comment to the extent it suggests that EPA should not consider technologies determined to be BACT for an individual plant in its BDT analyses. Control technologies change and can improve over time and EPA does not believe that it would be appropriate for EPA to ignore these developments when evaluating what currently constitutes BDT for this source category.

The commenters point out that preparation plants associated with coal mining generally have more affected facilities per source and more emission points per affected facility. Commenters have not suggested, however, and EPA has no reason to believe, that the types of emissions from coal preparation and processing sources associated with coal mines differ from the types of emissions from those same source types at "user" facilities. They further have not demonstrated, and EPA has no reason to believe, that emission control technologies that are adequately demonstrated for facilities at "user" facilities would not be adequately demonstrated for use at facilities located at mines. Thus, EPA continues to believe it is appropriate to regulate these sources in the same manner and sees no need to establish subcategories at this point. Further, the comment could be read to suggest that a separate subcategory should be created for facilities at mines because these facilities are subject to differences in the degree of control required by other regulations or because these facilities are currently achieving different levels of control or using different emission control technologies. EPA does not believe it would be appropriate to create a separate subcategory on these bases. Further, these factors do not affect what technologies could be found to be "adequately demonstrated" or the emission reductions available from those technologies.

In addition, the regulation of fugitive dust from surface coal mines under SMCRA by the Department of Interior does not, as commenters suggest, result in a "conclusion that concurrent regulation with similar CAA requirements would not be appropriate."

The October 1974 Background Information Document stated that "Coal preparation" is a segment of the coal industry that encompasses operations between the mining of raw coal and the distribution of product coal. (See "Background Information for Standards of Performance: Coal Preparation Plants; Volume 1: Proposed Standards. October 1974. p. 1.) The support document for the April 1981 NSPS review states that "[t]he first step in the coal preparation process is the delivery of ROM [run of mine] coal to the plant site." (See "A Review of Standards of Performance for new Stationary Sources – Coal Preparation Plants. December 1980. p. 2-3.)

EPA's Office of Water has included the following definitions in their regulations for the coal mining industry (at 40 CFR 434.11).

(b) The term "active mining area" means the area, on and beneath land, used or disturbed in activity related to the extraction, removal, or recovery of coal from its natural deposits. This term excludes coal preparation plants, coal preparation plant associated areas and post-mining areas.

(e) The term "coal preparation plant" means a facility where coal is subjected to cleaning, concentrating, or other processing or preparation in order to separate coal from its impurities and then is loaded for transit to a consuming facility.

Thus, EPA, in both the air and water offices, has maintained a distinction between the "active mining area" and the "coal preparation plant." The process of "coal preparation" generally involves, among other things, separation of coal from impurities (i.e., "breaking" or "crushing"). As discussed in the response to comment 3.4.1.1.1 in the Response to Comments Document, EPA interprets the "beginning" of the "coal preparation plant" to be the first hopper (i.e., "drop point") for receipt of coal from any form of transportation.

3.3 Subpart Y Coal Drying Standards

3.3.1 Affected Coal Dryers

3.3.1.1 Indirect Thermal Coal Dryers

Comment: Several commenters (087, 099, 119, and 110) support EPA's proposal to distinguish between indirect and direct contact thermal dryers. The commenter anticipates that more electric utilities will use indirect contact thermal dryers in the future. Commenters agree with EPA's decision to exclude indirect thermal dryers from the coal dryer SO_2 and NO_X/CO standards "[i]f the source of heat (the source of combustion or furnace) is subject to a boiler NSPS (subpart Da, Db, or Dc). However, one commenter (110) states that in the case of the Great River Energy facility, the waste heat being used for the facility's coal dryer does not come from the exhaust gases of a boiler but rather from the condensing water from steam turbines. In this case, there is no affected facility in which the combustion pollutant emission limits can apply. GRE agrees that the thermal dryers at CCS are only subject to the PM limit, but not because they are subject to another NSPS. Emissions from the Great River Energy facility's Unit 1 and 2 boilers are not increased as a result of the coal dryer project. Subpart Y coal dryer emission limits should not apply to the source of heat for an indirect thermal dryer.

Response: It is EPA's intent to regulate emissions from thermal dryers only in circumstances where coal, coal refuse, or residual oil are used as thermal input. Thermal dryers that use residual or waste heat from the combustion of these fuels would only be subject to the PM and opacity standards. As pointed out by the commenters, indirect thermal dryers for which the source of heat is subject to a boiler NSPS would not be subject to the emission limits for SO_2 and NO_X/CO because those pollutants would not be present in the thermal dryer exhaust. In addition, EPA has concluded that affected thermal dryers for which all of the thermal input is supplied by gaseous fuels (e.g., blast furnace gas, coke oven gas, natural gas) or distillate oil also would not be subject to the emission limits for SO_2 and NO_X/CO. Those pollutants would be relatively small from these types of thermal dryers and the testing requirements would not result

in any emissions reductions. As is the case with the facility described by the commenter, if there is no combustion process providing the heat for the dryer, then there would be no practicality in having emission limits for SO_2 and NO_X/CO. The regulatory text has been modified to clarify these points.

3.3.1.2 Fluidized-bed Thermal Coal Dryers

Comment: One commenter (110) suggests that fluidized bed coal dryers can, as a secondary function, classify coal by size. Although classification occurs in the fluidized bed dryer it would not occur but for the fluidized bed technology used to dry the coal. The commenter requests the rule be clarified to prevent a fluidized-bed dryer being considered pneumatic coal-cleaning equipment. The commenter suggested regulatory revisions to Subpart Y.

Response: EPA concurs with the commenter that the primary function of a fluidized bed coal dryer is to dry the coal. As such, fluidized bed coal dryers are appropriately regulated as thermal dryers and, therefore, subject to the Subpart Y requirements for thermal dryers.

3.3.1.3 New Coal Dryer Projections

Comment: Several commenter (085, 088, 095, 107, 112, 115, 120) stated that EPA explains in the preamble that it is deciding to expand Subpart Y applicability to other types of thermal dryers in large part because subbituminous and lignite "upgrading" will become more common. There is nothing in the record; however, to support that projection of such a trend in the coal mining industry, other than a generic comment from the public. The only process identified in the docket that indicates such "upgrading" relates to a demonstration facility that faces significant other obstacles, including spontaneous combustion and excessive dusting.

Response: Although cited as one reason why EPA thought it was appropriate to establish standards that apply to direct contact and indirect thermal dryers drying all coal ranks at this time, potential non-bituminous coal "upgrading" was not the only basis for that decision. Other reasons supporting EPA's decision, as explained in the preamble to the supplemental proposal (74 FR 25309, May 27, 2009), include (1) the control technologies commonly used on thermal dryers (i.e., venturi scrubbers and fabric filters) control PM equally well regardless of the source of PM; and (2) thermal dryers using similar control technologies can achieve comparable emissions rates. EPA continues to believe that, regardless of the number of "upgrading" projects projected, it is appropriate to regulate direct contact and indirect thermal dryers drying all coal ranks.

3.3.2 <u>Coal Drying BDT Determination</u>

3.3.2.1 BDT Analysis for Coal Drying

Comment: One commenter (096) stated that the proposed standards for coal drying fail to meet the basic legislative requirements of CAA section 111. The commenter presented the following reasons to support the position that for EPA to comply with CAA section 111 EPA must set standards based on the best demonstrated technologies for drying coal not to the thermal drying

of coal through the application of heat generated by coal combustion specifically for that purpose.

- CAA section 111 defines "standard of performance" to mean "a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated" [42 U.S.C. §7411(a)(1))].
- Another provision in CAA section 111 provides that standards of performance must represent the best "technological system of continuous emission reduction," see, e.g., 42 U.S.C. § 7411(g)(4), which is defined to include "a technological process for production or operation by any source which is inherently low-polluting or nonpolluting" [42 U.S.C. §7411(a)(7)(A)]. This provision further demonstrates that EPA must evaluate mechanical, indirect, and recirculation dryers, as each is inherently low polluting, in comparison to once-through coal-fired thermal dryers. In sum, EPA must evaluate whether certain dryer systems yield reductions in emissions. If those systems, for example, mechanical dryers, are less polluting, they constitute presumptive BDT.
- CAA section 111 requires "specific and rigorous limits on the amounts of pollutants that may be emitted." ASARCO, Inc. v. EPA, 578 F.2d 319, 322 (D.C. Cir. 1978). The legislative history of this requirement confirms Congress's determination that "[t]he maximum use of available means of preventing and controlling air pollution is essential to the elimination of new pollution problems…" S. Rep. No. 1196, 91st Cong., 2d Sess. at 16. In revising the standards of performance for coal preparation plants, EPA may not simply codify existing levels of performance.
- Because NSPS apply only to new, modified, or reconstructed sources and must reflect application of the best demonstrated system of reduction, they do not have to be achievable for all types of existing sources. See Portland Cement, 486 F.2d at 391. Nor can EPA forego setting limits reflecting the best demonstrated system merely because some sources may prefer a different system, ASARCO, 578 F.2d at 322 ("NSPS are designed to force new sources to employ the best demonstrated systems of emission reduction."). The legislative history of section 111 demonstrates that Congress intended for EPA to prescribe standards that override the design preferences of regulated sources: "[T]he emission standards shall provide that sources of such emissions shall be designed and equipped to prevent and control such emissions to the fullest extent compatible with the available technology and economic feasibility . . . ." H.R. Rep. No. 1146, 91st Cong., 2d Sess. at 10 (emphasis added). Thus, EPA's assumption that NSPS must be set at levels lenient enough to accommodate all types of existing dryers is contrary to Congress' plainly expressed intent.
- CAA section 111 "looks toward what may fairly be projected for the regulated future, rather than the state of the art at present. . . ." Portland Cement Assn v. Ruckelshaus, 486 F.2d 375, 391 (D.C. Cir. 1973). An "achievable standard is one . . . within the realm of the adequately demonstrated system's efficiency and which, although not at a level that is purely theoretical or experimental, need not necessarily be routinely achieved within the industry prior to its adoption." Essex Chemical Corporation v. Ruckelshaus, 486 F.2d 427, 433-34 (D.C. Cir. 1973). Instead of looking toward a future of mechanical dryers and indirect thermal dryers,

or even gas-fired recirculation thermal dryers, the proposed standards attempt to lock-in standards that reflect the performance of coal-fired once-through thermal dryers.

- Even assuming for the sake of argument that it is permissible to set a standard for emissions from coal drying that presumes the use of thermal dryers, the proposed rule violates the straightforward intent of Congress. Congress purposefully chose the superlative "best" to describe the system of emissions reductions on which the NSPS were to be based [42 U.S.C. §7411(a)(1)]. Moreover, one of the enumerated purposes of the NSPS was to create incentives for new technology. CAA Conference Report: Statement of Intent; Clarification of Select Provisions, 123 Cong. Rec. 27071 (1977). However, instead of proposing standards based on the performance of the cleanest new coal drying technologies, the proposal sets lax standards and then allows a mix of coal drying technologies to meet those standards.

Response: EPA followed the statutory requirements of CAA section 111 in its review of the existing standard of performance for thermal dryers at coal preparation and processing plants. The review was conducted pursuant to the requirement in section 111(b)(1)(B) that EPA review and revise, if appropriate, the previously promulgated standards of performance. Section 111(b)(1)(B) requires EPA, when revising the standards, to follow the procedure required for the promulgation of standards. Section 111 b(1)(B) further requires publication of proposed regulations, an opportunity for written comment, and requires the Administrator to promulgate such standards as she "deems appropriate." The commenter correctly noted that a standard of performance is defined as "a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated." 42 U.S.C. 7411(a)(1). The commenter, however, takes the language from 42 U.S.C 7411(g)(4) out of context. CAA section 111(g)(4) provides that the Administrator shall revise a standard of performance upon application of the Governor of a State that meets certain criteria. The language quoted by the commenter appears in this section and describes what must be included in the application of the Governor, and does not modify the definition of a standard of performance in section 111(a)(1).

To determine the appropriate level for a particular standard of performance, EPA conducts an analysis to determine what emission rates reflect application of "best demonstrated technology" or BDT. This BDT analysis includes consideration of available emission controls and technologies. In the BDT analysis for controlling PM emissions from coal dryers for this final rule, EPA explicitly considered alternate processes for drying coal as well as add-on emission control technologies. For modified facilities, EPA recognized the limitations that may be associated with the physical layout of existing dryers. For reconstructed facilities and new facilities, however, we concluded that design options, and alternative replacement technologies, could be taken into account during the reconstruction or construction process. EPA concluded that recirculation thermal dryers and indirect thermal dryers are both adequately demonstrated and readily available technologies for drying coal. It did not restrict its analysis, or the definition of affected facility, to the once-through direct contact thermal dryers covered by the existing NSPS standards for thermal dryers. Contrary to the commenter's assertions, EPA neither presumed the use of existing once-through direct contact thermal dryers nor merely codified existing levels of performance achieved by such dryers. Instead, EPA concluded that BDT for

controlling PM emissions for new and reconstructed thermal dryers is fabric filters applied to recirculation thermal dryers and indirect thermal dryers. The PM standards in the final rule are based on these conclusions.

Although mechanical coal drying technologies, because they do not burn fuel, may inherently produce lower air pollutant emissions compared to some thermal drying technologies, they may not be technically applicable, cost-effective, or the most energy efficient for all possible coal drying applications that could be subject to Subpart Y. EPA does not, at this time, have data to support a conclusion that standards based on an assumption that mechanical dryers are BDT would be achievable by the industry as a whole (see National Lime Ass'n v. EPA, 627 F.2d 416, 431 (1980)). Even though the "adequately demonstrated" requirement does not "necessarily impl[y] that any [covered facility] now in existence be able to meet the proposed standards," Portland Cement, 486 F.2d at 391, EPA must demonstrate that the standard is, in fact, achievable taking into consideration variables that may affect emissions in different circumstances and at different plants. National Lime, 627 F.2d at 433. In fact, the type of coal drying technology used at a given facility is influenced by a variety of factors, including type of facility, coal moisture reduction requirements, availability of waste heat sources at the coal processing location, and drying process energy requirements including electrical power consumption. Mechanical drying techniques are not suitable replacements for thermal dryers under all circumstances. Mechanical drying techniques can remove free moisture adsorbed onto the surface of the coal particles, as well as a portion of the hydroscopic moisture contained by capillary action within microfractures in the coal particles, but are ineffective at removing inherent moisture (and, thus, would only be applicable at preparation plants utilizing coal washing). Some type of thermal energy is required to remove the interstitial and molecular (inherent) moisture from the coal for applications where extremely low moisture content is desirable. Therefore, mechanical drying techniques are not suitable replacements for thermal dryers under all circumstances, and because waste heat is not available at all locations, thermal dryers using waste heat are not a technically possible substitute for thermal dryers in all situations. EPA will continue to follow the development of mechanical drying techniques. To the extent the commenter is suggesting that EPA should require use of a certain technology for drying coal and coal preparation plants, EPA notes that CAA section 111(h), 42 U.S.C. 7411(h)(1) only allows the Administrator to promulgate design, equipment, work practice, or operational standards if "in the judgment of the Administrator, it is not feasible to prescribe or enforce a standard of performance." No such finding has been made here.

In the BDT analysis for controlling SO_2 emissions from coal dryers for the final rule, EPA determined that BDT for modified and reconstructed thermal dryers is a wet scrubber with a scrubbing reagent (e.g., an upgraded venturi scrubber with sodium hydroxide or packed bed scrubber with lime). The information that EPA has indicates that all of the once-through direct contact thermal dryers currently use venturi scrubbers for PM control. Thus, the upgraded venturi scrubber with sodium hydroxide or packed bed scrubber with lime (would be in addition to the venturi scrubber) would provide SO_2 control, along with additional PM control necessary for reconstructed thermal dryers to meet their PM and opacity limits. For new thermal dryers, we determined that BDT for controlling SO_2 emissions is the injection of sodium hydroxide directly to the venturi scrubber fluid or injection of a sodium-based sorbent into the combustion gases prior to the drying chamber. For a new once-through direct contact thermal dryer, the

caustic injection into the scrubber fluid for SO_2 control would be in addition to a high-energy venturi scrubber which is the likely control technology that would be used for PM and opacity control. For a new coal recirculation thermal dryer, sorbent injection into the combustion gases for SO_2 control would be used in conjunction with a fabric filter which is the likely control technology that would be used for PM and opacity control. EPA determined that BDT for controlling NO_X emissions from new, reconstructed, and modified thermal dryers is combustion controls. Combustion controls can be used across the range of thermal dryers currently in use. Combustion controls include low NO_X burners, staged combustion, co-firing with natural gas or liquefied petroleum gas, and flue gas recirculation. BDT for controlling CO emissions was determined to be good combustion practices. Good combustion practices limit the formation of CO (and VOC) by providing sufficient oxygen in the combustion zone such that complete combustion can occur. Maintaining appropriate combustion zone temperature and gas residence time also are good combustion practices, as is proper operation and maintenance of the dryer.

3.3.2.2 BDT for Coal Drying

Comment: Two commenters (096 and 100) stated that for the purpose of setting standards of performance for coal dryer emissions EPA should select those coal drying technologies with inherently lower air pollutant emissions as BDT. Statements about adequately demonstrated coal drying technologies made by the commenters included:

- US DOE recognizes that thermal dryers are an outdated method of lowering the moisture content of coal (100).
- Full analysis and recognition of the global warming effects of greenhouse pollutants and their costs will inevitably result in a finding that thermal dryers heated by burning coal or any other means of fuel combustion, can no longer be an acceptable method of drying coal under any circumstances (100).
- Mechanical coal dryers do not burn fuel and are inherently less polluting than other types of coal dryers and, therefore, should be considered to be BDT for coal drying (096 and 100).
- Even if EPA concludes that the thermal drying of coal is necessary at certain coal preparation plants, there is a preferred order for the available coal drying technologies. Indirect thermal dryers that use heated exhaust gases generated from other processes represent the least polluting alternative. A second-best solution would be recirculation thermal dryers that combust natural gas to supply the heat source (096).

Response: As explained in the response to comment 3.1.1.2, at this time EPA is not aware of any emissions or mitigation data for the pollutants noted by the commenter for this source category. As such, we lack sufficient information on which to base an NSPS for emissions of CO_2, N_2O, and black carbon from the source category at this time. Based on rough estimates of CO_2 emissions from this source category (developed using generic emission factors), EPA believes that this source category would be among the smaller GHG-emitting NSPS categories. However, should information received from this source category as a result of the proposed GHG Mandatory Reporting Rule indicate that it is a more significant source of GHG, then EPA will consider whether to revisit the issue. At this time, we are not making any final determination regarding whether it would be appropriate to set such standards in the future once this information is obtained and assessed.

See response to comment 3.3.2.1.

In addition, EPA disagrees with commenters' conclusion that BDT for all coal drying processes should be mechanical coal dryers. EPA does not, at this time, have data to support a conclusion that standards based on an assumption that mechanical dryers are BDT would be achievable by the industry as a whole (see National Lime Ass'n v. EPA, 627 F.2d 416, 431 (1980)). Even though the "adequately demonstrated" requirement does not "necessarily impl[y] that any [covered facility] now in existence be able to meet the proposed standards," Portland Cement, 486 F.2d at 391, EPA must demonstrate that the standard is, in fact, achievable taking into consideration variables that may affect emissions in different circumstances and at different plants. National Lime, 627 F.2d at 433.

As explained in the response to comment 2.3.2.1, although mechanical coal drying technologies, because they do not burn fuel, may inherently produce lower air pollutant emissions compared to some thermal drying technologies, they may not be technically applicable, cost-effective, or the most energy efficient for all possible coal drying applications that could be subject to Subpart Y. The type of coal drying technology used at a given facility is influenced by a variety of factors, including type of facility, coal moisture reduction requirements, availability of waste heat sources at the coal processing location, and drying process energy requirements including electrical power consumption. As noted earlier, mechanical drying techniques are not suitable replacements for thermal dryers under all circumstances.

Finally, to the extent the commenter is suggesting that EPA should require use of a certain technology for drying coal and coal preparation plants, EPA notes that CAA section 111(h), 42 U.S.C. 7411(h)(1) only allows the Administrator to promulgate design, equipment, work practice, or operational standards if "in the judgment of the Administrator, it is not feasible to prescribe or enforce a standard of performance." No such finding has been made here.

3.3.3 Coal Dryer Emission Limits Standards Format

Comment: One commenter (093) stated that the supplemental proposal does not specify how source operators are to determine compliance with the proposed SO_2, and combined NO_X,/CO emissions limits, which are expressed in units of mass per million Btu (MMBtu) heat input. The test methods specified in the proposed Subpart Y amendments measure pollutant concentration in the stack gases, not an emission rate per MMBtu. For thermal drying of coal that occurs as part of the cement manufacturing process, this determination is very problematic. Where coal is dried by waste heat from cement-making processes such as the cement kiln, preheater/precalciner, or clinker cooler, it is not possible to characterize the heat input to the coal-drying portion of the process simply by calculating a fuel factor from the amount of fuel introduced somewhere upstream in the cement-making process.

Response: As noted in the response to comment 3.3.8, EPA agrees that in the case of a coal dryer at a cement manufacturing facility where all of the thermal input is supplied by cement kiln exhaust or clinker cooler exhaust, the dryer should be regulated under the appropriate Portland Cement kiln regulations (40 CFR Part 63 subpart LLL and 40 CFR 60 subpart F).) The regulatory text in section 60.252 (Standards for thermal dryers) has been revised to clarify this.

3.3.4 Coal Dryer PM Emission Limits

3.3.4.1 Filterable PM (FPM) and Condensable PM (CPM) Standards

Comment: Two commenters (093 and 123) supported EPA's decisions not to set separate limits for FPM (i.e., $PM_{2.5}$ or PM_{10}) or CPM standards. In contrast, another commenter (096) rejected EPA's rationale presented in the May 27, 2009, Subpart Y supplemental proposal notice that EPA cannot limits applicable to PM_{10}, $PM_{2.5}$, and CPM emissions because EPA has insufficient data and lacks a consistent measurement methodology to collect the needed data. The commenter states EPA must set FPM and CPM standards for coal dryers for the reasons summarized below.

- Air permit for two facilities that include PM emissions limits for both FPM and CPM. Are included as part of the comment submittal.
- Assuming *arguendo* that EPA does lack data necessary to set FPM and CPM standards, EPA's failure to gather such data does not excuse EPA from a statutory obligation. See Lamie v. U.S. Trustee, 540 U.S. 526, 534 (2004) ("[When the statute's language is plain, the sole function of the courts - at least where the disposition required by the text is not absurd– is to enforce it according to its terms."). See also CKRC v. EPA, 255 F.3d 855, 865 (D.C. Cir. 2001) (EPA may not avoid statutory requirement by claiming that it lacks information).
- FPM and CPM emissions standard can be set, pending resolution of any measurement issues by a future date certain.
- FPM data can be collected using the existing Method 202 with specific options required (e.g., nitrogen gas bubbling) to eliminate any uncertainty.
- CAA section 111 requires EPA, in the event that measurement is infeasible, to specify "a design, equipment, work practice, or operational standard, or combination thereof, which reflects the best technological system of continuous emission reduction which (taking into consideration the cost of achieving such emission reduction, and any non-air quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated" (42 U.S.C. § 7411(h)(1)).
- Should EPA conclude that inability to accurately measure emissions of FPM and CPM from dryers renders the implementation of FPM or CPM standards of performance infeasible, EPA must impose requirements pursuant to 42 U.S.C. § 7411(h)(1). See 42 U.S.C. § 7411(h)(2)(B) (a design, equipment, work practice, or operational standard, or combination thereof to be required when measurement of emissions is not practicable). The CPM emissions can be controlled by selecting a low sulfur coal, injecting sorbents such as trona, or using a wet electrostatic precipitator. Earlier comments provided by the commenter detail several approaches that EPA could take in requiring dryers to install and operate emissions control devices that have been shown to be effective in limiting these emissions.

Response: EPA stands by the rationale presented in the May 27, 2009, subpart Y supplemental proposal notice. That is, the available PM emissions data for thermal dryers collected by EPA were measured using EPA Method 5 (see 40 CFR 60, appendix A-3). For this method, solid FPM is collected isokinetically on a filter media (typically glass or quartz fiber) and is then measured gravimetrically to determine FPM emissions. Method 5, when performed correctly,

provides an accurate measurement of total FPM (for PM > 0.3 μ), but does not measure FPM emissions by particle size distribution (i.e., PM_{10} or $PM_{2.5}$), nor does the method measure CPM. EPA is revising existing test methods, *EPA Method 201A–Determination of PM_{10} Emissions (Constant Sampling Rate Procedure)* and *EPA Method 202–Determination of Condensible Particulate Emissions from Stationary Sources*, to provide test methods that will accurately measure PM_{10}, $PM_{2.5}$, and CPM from stationary sources such as coal thermal dryers. Amendments to these test methods were proposed on March 26, 2009 (see 74 FR 12970). The amendments to Method 201A add a particle-sizing device to allow for sampling of $PM_{2.5}$, PM_{10}, or both PM_{10} and $PM_{2.5}$. The amendments to Method 202 revise the sample collection and recovery procedures of the method to provide for more accurate and precise measurement of CPM. Methods 201A and 202 are not yet finalized and sufficient test data using these methods has not yet been collected for coal-fired thermal dryers. For these reasons, EPA is not currently able to determine whether or not it would be appropriate to add separate PM emission limits to Subpart Y for $PM_{2.5}$, PM_{10}, or CPM emissions from coal-fired thermal dryers and would not currently be able to establish national standards to address $PM_{2.5}$, PM_{10}, or CPM emissions.

3.3.4.2 PM Control Technology Terminology

Comment: One commenter (096) stated that it is unclear from the record whether the use of the term "wet scrubbing" for reconstructed thermal coal dryers means use of venturi scrubbers.

Response: With respect to the reconstructed thermal dryer discussion in the preamble to the supplemental proposal, the term "wet scrubbing" does not refer specifically to venturi scrubbers, but, rather, generally to wet scrubbing technologies (e.g., venturi scrubbers, impingement tray towers, packed bed towers). Venturi scrubbers are included in the preamble discussion regarding control technology that would be capable of achieving the proposed PM emission limit for new thermal dryers (74 FR 25309).

3.3.4.3 New Coal Dryer PM Emission Limit "Margin of Compliance"

Comment: Several commenters (093, 096, 100, and 123) stated that the proposed PM emission limit of 0.010gr/dscf for new coal dryers does not reflect an adequate margin of compliance to the fabric filter test data used. Commenters (093 and 123) stated the proposed limit needs to be less stringent because the test data do not represent a demonstration of the performance of control technology over the life of the facility and over the range of operating conditions that may be encountered at thermal dryers. Nor does the fact that a few thermal dryer State permits contain limitations of 0.01 gr/dscf make that limit demonstrated and appropriate for NSPS. Therefore, the commenter recommends that the PM emission limit remain at the current NSPS emission rate of 0.031 gr/dscf. Commenters 096 and 100 presents an opposing argument that the proposed a PM limit needs to be lower because the compliance margin of two to three times applied by EPA to fabric filter test data is unjustified on the record. EPA has not explained why use of a fabric filter to control PM emissions would require such a large margin of safety, given the demonstrated performance of fabric filters for the subject source as well as similar sources in numerous other industries, such as cement plants and steel mills. Any reduction in the stringency of the proposed PM standard for new thermal dryers to facilitate multiple compliance

paths would be contrary to the CAA requirement that standards of performance reflect "application of the best system of emission reduction" (42 U.S.C. § 7411(a)(1)).

Response: EPA has reviewed the available PM emissions and permit data for thermal dryers; no additional PM data were provided during the public comment period. We believe that the proposed PM limit of 0.023 g/dscm (0.010 gr/dscf) for new thermal dryers is appropriate. We further believe that, in the presence of limited data showing actual emissions, permit information can be useful in determining whether a particular emission limit is achievable by sources in the source category. EPA has available three emission test data points for fabric filters installed on thermal dryers, including two tests one year apart at one facility. We believe that these three data points provide adequate information on the performance of the technology. However, EPA also has examined the permit data which identifies emission limits agreed upon between State regulators and the regulated community and believe that the emission limits contained in permits constitute limits that could be achieved over the range of operating conditions to be found within the industry. Nat'l. Lime Ass'n. v. EPA, 627 F.2d 416, 431 (D.C. Cir. 1980) requires EPA to show that the limit selected is achievable under different conditions at an individual plant and conditions at different plants. EPA believes that basing the emission limit on use of the data points from two facilities, including two data sets from one facility, in conjunction with the permit data, adequately accounts for the variability to be found within the industry. Therefore, the final rule reflects no changes to the proposed PM emission limit for new thermal dryers.

3.3.4.4 Reconstructed Coal Dryer PM Emission Limits

Comment: Two commenters (085 and 117) support the proposal to revise the PM limit for units reconstructed after April 28, 2008, to 0.045 g/dscm (0.020 gr/dscf) and to maintain the existing 1976 rule's opacity limit of less than 20 percent. In contrast, another commenter (096) disagrees with the proposed PM standard for reconstructed dryers which is twice as high as the standard for new dryers (0.010 gr/dscf). The commenter states that EPA must either require reconstructed dryers to meet the same PM standards as new dryers, or explain why such limits do not reflect BDT for reconstructed dryers. EPA has not explained why it would not also be feasible to further modify existing dryers, at the time of reconstruction, by converting them to recirculation dryers or by otherwise modifying them to use fabric filters. EPA must examine whether a fabric filter is a feasible option for control of PM emissions from reconstructed dryers. Commenter 123 recommends that the PM emission limitations not be changed from the current NSPS emission rate of 0,031 gr/dscf. The limited data EPA has cited to justify reducing the limit by a third for reconstructed dryers using the same control technology is insufficient to conclude that thermal dryers with the specified control equipment would, throughout the life of the facility, be able continuously to meet a lower emission limit than the current NSPS provide.

Response: EPA agrees that units undergoing reconstruction as defined in the CAA could undergo the conversions necessary to install BDT for PM emissions for new thermal dryers and, thus, meet the proposed PM and opacity limits of new facilities. Thus, the regulation has been changed to reflect this decision.

3.3.4.5 Modified Coal Dryer PM Emission Limits

Comment: Several commenters (085, 093, and 117) support the proposal to maintain for units modified after April 28, 2008, the existing 1976 rule's PM limit of 0.070 g/dscm (0.031 gr/dscf) and the existing 1976 rule's opacity limit of less than 20 percent. The lower PM mass emissions limitation that EPA previously proposed was more stringent than emissions data from some facilities with fabric filters would support. They also agree with EPA's proposal to retain, for both modified and reconstructed thermal dryers, the 20 percent opacity limit in the existing Subpart Y NSPS. As EPA noted, the data that EPA reviewed suggested that thermal dryers with the identified technology basis for the NSPS can have 20 percent opacity emissions and still comply with PM mass emission limits (73 FR 22904).

Response: EPA appreciates the commenters' support of the proposed emission limits for modified sources. However, as noted in the previous response, EPA is changing the limits for PM and opacity for reconstructed sources to be the same as those for new sources.

3.3.5 Coal Dryer SO_2 Emission Limit

3.3.5.1 BDT Determination Cost Analysis

Comment: One commenter (096) disagreed with the cost analysis approach used by EPA for determining coal dryer BDT for SO_2 emissions control. EPA rejected the use of a wet scrubber as BDT as not cost-effective, based on an incremental cost-effectiveness value of $5,000 per ton of SO_2 removed (74 FR 25310). The commenter presented the following reasons why the incremental cost-effectiveness cost analysis used by EPA to obtain this conclusion was flawed.

- Incremental cost-effectiveness analysis alone does not yield an accurate or consistent accounting of a control technology's actual cost; EPA's own Environmental Appeals Board has rejected such an approach as inappropriate. In re General Motors, Inc., 10 E.A.D. 360, 371 (EAB 2002) ("undue focus on incremental cost-effectiveness can give an impression that the cost of a control alternative is unreasonably high, when, in fact, the cost-effectiveness, in terms of dollars per total ton removed is well within the normal range of acceptable BACT costs.") . To rationally consider the cost impacts of requiring a wet scrubber for control of SO_2 emissions, EPA must consider the cost of the device with respect to the full amount of SO_2 that it will remove.
- Even if it were permissible to rely on an incremental cost-effectiveness cost analysis of control technologies, EPA's analysis of this factor does not comport with the requirements of reasoned decision-making. There is no indication in the proposal of what criteria EPA used in determining whether any particular cost-effectiveness level is justified. For example, EPA believes that a cost of $5,000 per ton of SO_2 removed is not cost effective (74 FR 25310); but, the proposed rule provides no explanation of why this is so, nor any explanation of why EPA also believes that an incremental cost of $3, 25311). For example, EPA has not explained what value EPA attaches to the harm caused by each ton of SO_2 emitted, a factor that would be relevant to the determination of whether a given control technology is cost effective.

- Cost-effectiveness analysis used for coal drying is at odds with prior EPA practice. EPA has historically used a threshold of $10,000/ton of pollutant removed in a wide range of rulemakings to identify cost effective technologies based on average cost-effectiveness. Further, incremental cost-effectiveness significance thresholds are typically substantially higher than average cost-effectiveness thresholds. A control that is per se cost-effective based on total cost in dollars per ton cannot be eliminated based on incremental cost-effectiveness.

Response: The practice of looking at incremental emissions reductions that are capable of being achieved through use of the "next best" control technology or improvements to an existing technology, along with the incremental costs associated with the technology or improvements, is one method of assessing cost-effectiveness. As noted by the commenter, EPA used that method in its cost analysis for BDT for controlling SO_2 emissions from thermal dryers. However, as pointed out in our response to comment 3.3.5.3, EPA has reassessed the available SO_2 data and believes that a 90 percent removal value is appropriate for new, reconstructed, and modified thermal dryers. As explained in the response to comment 3.3.2.1, based on our reassessment, we also determined that BDT for modified and reconstructed thermal dryers is a wet scrubber with a scrubbing reagent (e.g., an upgraded venturi scrubber with sodium hydroxide or packed bed scrubber with lime). For new thermal dryers, we determined that BDT for controlling SO_2 emissions is the injection of sodium hydroxide directly to the venturi scrubber fluid or injection of a sodium-based sorbent into the combustion gases prior to the drying chamber. All three of these technologies are capable of achieving 90 percent SO_2 reduction.

3.3.5.2 BDT Determination Control Technology Options

Comment: One commenter (096) stated that EPA assumed as a starting point for its analysis that any SO_2 control would be located downstream of a fabric filter (for new units) or would involve modifications to an existing wet scrubber system designed for PM control. EPA did not evaluate all feasible methods to control SO_2 emissions. Dry scrubbers are widely used to control SO_2 emissions from other coal combustion sources. A dry scrubber includes a downstream fabric filter and would obviate the need for a separate PM control device. Further, a dry scrubber could be used downstream of an existing wet scrubber designed for PM control.

Response: EPA considered, and discussed in the supporting documentation (see EPA-HQ-OAR-2008-0260-0080, p. 7), the use of a dry scrubber as suggested by the commenter. An affected facility would be free to utilize any technology desired as long as the emission limits were achieved.

Comment: One commenter (093) stated that one of the two technologies EPA has identified to meet the SO_2 limit for modified, reconstructed, and new thermal dryers, sorbent injection, requires a design that includes injection locations and sufficient residence time, which can be incorporated into "a new thermal dryer." Under 40 CFR 60.15, a thermal dryer may be considered "modified" when there is only a relatively small capital investment that causes a statistically significant increase in SO_2 emissions. "Modification," therefore, does not create an opportunity to incorporate absorbent injection sites and residence time into an existing thermal dryer, and "reconstruction" may not either. For anything other than a new unit, then, the only technology EPA has identified as meeting the proposed SO_2 limits is "spraying caustic on the

coal prior to the drying chamber." Yet EPA acknowledges that it does not have data demonstrating this control technology: "The caustic approach is presently used at one facility, and the salt produced is removed by the PM control device. We do not have detailed information on the contribution of each mechanism on overall control. However, if we assume…" (74 FR 25,310). This is an insufficient basis for EPA to impose emission limits on thermal dryers at all, and certainly not to impose emission limits on a range of designs that may be incorporated into cement plants.

Response: EPA also identified caustic injection into a wet scrubber as a technology for reducing SO_2 emissions (see EPA-HQ-OAR-2008-0260-0080, p. 7). EPA believes that this technology is applicable to new, reconstructed, and modified facilities. See the response to comment 3.3.8 for a discussion of the applicability of Subpart Y to Portland cement plants.

3.3.5.3 SO_2 Emission Limit Levels

Comment: One commenter (096) stated that information in the proposal preamble and support documentation show that the SO_2 emissions limits for new and reconstructed coal dryers should be set lower than the proposed level. The selection of the SO_2 emission limits for coal dryers must be reconsidered specifically to analyze separate standards for new, reconstructed, and modified affected sources. Reasons presented by the commenter for setting lower SO_2 emissions limits are:

- Proposal preamble states that "[w]et scrubbers designed specifically for SO_2 control are able to achieve greater than 95 percent reduction." This is confirmed in the Thermal Dryer Memorandum, page 7, but EPA dismisses wet scrubbers from further consideration, as the wet scrubbers currently used on existing thermal dryers are designed for PM control and not specifically for SO_2 controls and high levels of SO_2 control may be difficult to achieve without redesign of the wet scrubber (74 FR 25310). This is not a valid reason for eliminating a viable technology from consideration, especially for a new or a reconstructed coal dryer. Wet scrubbers are widely used on similar sources and, as EPA recognizes, routinely achieve greater than 95 percent reduction. Therefore, EPA may not ignore the possibility of installing wet scrubbers for SO_2 control, particularly for new or reconstructed coal dryers. It would be arbitrary and capricious for EPA to adopt a 50 percent control option in the face of a clearly superior technology that is rejected without analysis.
- Even if EPA ultimately determines that wet scrubbers are not BDT for SO_2 control for at least some coal dyers, the Subpart Y SO_2 emission limit must be more stringent for those dryers. EPA projects that using a caustic spray for SO_2 control will achieve approximately a 50 percent reduction in SO_2 emissions (74 FR 25310). In contrast, EPA notes that sorbent injection controls that use sodium-based agents can meet removal efficiencies of 90 percent (74 FR 25310). Given that sorbent injection is capable of significantly higher removal efficiencies, it is arbitrary and capricious for EPA to assert that dry sorbent injection and spraying caustic on the coal prior to drying are both BDT for SO_2 reduction from new, modified, and reconstructed thermal dryers. The results obtained are not equivalent, and "dumbing-down" the removal efficiency of the superior technology to preserve multiple compliance pathways for industry violates the plain language of the CAA, which requires

standards of performance reflecting application of the "best system of emission reduction" (42 U.S.C. § 7411(a)(1)).

Response: EPA indicated in the May 27, 2009, supplemental proposal that it was considering an SO_2 percent reduction requirement of between 50 and 90 percent for the final rule (74 FR 25311). EPA has reviewed the available data and believes that a 90 percent removal value is appropriate for new, reconstructed, and modified thermal dryers.

3.3.6 Coal Dryer Combined NO_X/CO Emission Limit

Comment: Many commenters (093, 096, 085, 095, 115, and 117) stated that EPA proposal to set a combined NO_X and CO emissions limit for coal dryers is inappropriate. Commenters presented different reasons summarized below to support this conclusion. One commenter (096) stated explicitly that separate NO_X and CO emissions limits must be set for coal dryers. Reasons cited by individual commenters are:

- A combined NO_X/CO limit enables permitting authorities to trade off higher NO_X emissions for lower CO emissions, and vice versa. EPA asserts that this approach is a way to "provide additional compliance strategy options for the regulated community, while still providing an equivalent level of environmental protection" (74 FR 25311). However, this statement, and EPA's proposed approach of allowing states to trade NO_X and CO emissions at essentially a 1:1 ratio, ignores that CO and NO_X are different pollutants that do not have equivalent environmental impacts. For example, through their larger role in the formation of ozone, NO_X emissions may have a significantly broader impact than CO emissions, the harmful impacts of which may be much more localized. NO_x emissions also contribute to acid rain that may occur long distances from the permitted source. For example, without such a backstop requirement, states may elect to implement more aggressive limits for CO than for NO_x. Because NO_X emissions may cause significant harm farther from the source, there could be a perverse incentive for states to ask sources to ratchet down CO emissions at the expense of higher NO_X emissions, which would inhibit downwind efforts to reduce ozone pollution and acid rain.
- A combined NO_X/CO limit violates CAA for the reason that the proposed combined limit is based on an assumed CO emissions rate that does not "reflect the degree of emission limitation achievable through the application of the best system of emission reduction" (42 U.S.C. §7411(a)(1). EPA admits that the presumed levels of CO emissions (0.45 lb/MMBtu for modified and reconstructed dryers and 0.25 lb/MMBtu for new dryers) are levels that are already surpassed by nearly all existing industrial boilers. EPA's data on these sources "indicate that 92 percent of existing small coal-fired boilers are achieving a rate of . . . 0.25 lb/MMBtu . . . and 98 percent are achieving a rate of . . . 0.45 lb/MMBtu" (74 FR 25312). EPA has not explained why industrial boilers would be capable of meeting more stringent CO limits than thermal dryers.
- Test data provided in the docket indicates a wide variation in test results, especially for CO. Test data is almost exclusively based on bituminous coal drying operations. These data do not support the conclusion that the proposed combined NO_X/CO limit is applicable across all grades of coal. One commenter (085) provided a review of the data cited by EPA.

- Combustion controls currently represent BDT in use by the source category. Going beyond the demonstrated technologies for the source category (e.g., incorporating post combustion control technologies, specifically selective non-catalytic reduction (SNCR) on new thermal dyers) is not required in developing NSPS. Other regulatory programs exist for advancing control technologies.
- Commenter 093 does not believe that EPA has sufficient data to support the proposed NO_X standards, especially for existing, modified or reconstructed, thermal dryers, and EPA has not demonstrated that thermal dryers, with different design and function, can meet the same limitations as coal-fired boilers. EPA has identified combustion controls that may not be available as the basis for the proposed NO_X standards, especially for existing thermal dryers.

Response: EPA has concluded that the use of a combined NO_X/CO limit is appropriate because it acknowledges the inherent trade-off between the two pollutants (i.e., a decrease in emissions of one often leads to an increase in emissions of the other). This approach provides flexibility to State environmental agencies to minimize the particular pollutant of concern to lessen the overall environmental and health impacts of the two pollutants. Individual separate limits could reduce the flexibility required to minimize overall health and environmental impacts. EPA has based the combined NO_X/CO limit on what it believes to be adequate data from thermal dryers at subpart Y facilities; thus, the comparison to industrial boilers is misplaced. In addition, as the Court has noted, "[t]he 'adequately demonstrated' requirement does not imply that any [covered facility] now in existence be able to meet the proposed standards. CAA section 111 looks toward what may be fairly be projected for the regulated future, rather than the state of the art at present." Portland Cement Ass'n v. Ruckenshaus, 486 F.2d 375, 391 (D.C. Cir. 1973).

3.3.7 Coal Dryer VOC Emissions Limit

Comment: One commenter (096) disagrees with EPA's rationale for not setting coal dryer VOC standards for the reasons summarized below.

- EPA asserts that "VOC and CO emissions would be minimized" because new thermal dryers would "likely use a gas recirculation design" (74 FR 25312); but, this language only demonstrates that EPA has not fulfilled its statutory obligation. If gas recirculation thermal dryers are effective at reducing VOC and CO, then EPA must set standards of performance for VOC and CO, which, at minimum, reflect the use of a gas recirculation thermal dryer.
- EPA asserts that not setting a standard for VOC is reasonable because "by setting an emissions limit that contains a CO emissions rate, we are minimizing the VOC emissions that result from incomplete combustion" (74 FR 25312). However, the proposed combined NOx and CO standard provides no assurance that VOC emissions will be minimized because CO emissions are just one component of the combined NO_x and CO standard. Dryers could meet the combined standard by tailoring combustion controls to minimize NO_x emissions, which would result in high levels of both CO and VOC emissions. Further, there is no demonstration on the record that there is any relationship between CO and VOC emissions.
- EPA asserts that omitting standards for VOC is acceptable because EPA "ha[s] not identified a method for control of VOC emissions beyond combustion controls" (74 FR 25312). VOC can be controlled by a number of methods, including activated carbon absorption and a regenerative thermal oxidizer.

- EPA explained that it could not set a standard for VOC emissions that "would be achievable for variable coal types across the country" because the VOC emissions from the coal bed itself are variable (74 FR 25312). However, even if the extent of coal bed VOC emissions vary across the country that does not excuse EPA from adopting a standard of performance to limit VOC emissions. For example, EPA could adopt a standard for VOC removal efficiency that is based on oxidation of VOC in a recirculation thermal dryer. In this rulemaking, EPA has proposed SO_2 standards for dryers that are based in part on removal efficiency, but EPA has not explained why it has not proposed a similar approach for VOC emissions. The sulfur content of coals also vary widely across the country, from less than 1 lb/MMBtu for some western coals to over 8 lb/MMBtu for some eastern coals. This did not impede EPA from setting an SO_2 standard.

Response: EPA has discretion to determine which pollutants are appropriate for regulation in a particular NSPS. In this case, for the reasons noted, EPA concluded that it was not appropriate or feasible to establish a standard of performance for VOC emissions from coal preparation and processing plants at this time. This conclusion does not prohibit EPA from establishing such a standard in a future rulemaking. EPA disagrees with the commenter's suggestion that a standard could be based on oxidation of VOC in a recirculation thermal dryer. As noted elsewhere, EPA has concluded that there is no one thermal dryer design that will work in all situations found within the industries utilizing coal preparation and processing plants. Control of VOC emissions through activated carbon absorption or regenerative thermal oxidizers are not utilized on thermal dryers at coal preparation and processing plants; further, EPA did not have other information showing that these technologies are adequately demonstrated for use on coal preparation and processing plant sources. VOC emissions vary, in part, due to the variability in volatile contents of the coals being processed; absent demonstrated control technology, this variability can not be addressed through add-on technology as it is with variable sulfur contents of coal. Thus, EPA believes its decision not to establish VOC emission limits under Subpart Y at this time is appropriate.

3.3.8 Applicability to Coal Dryers at Cement Manufacturing Plants

Comment: Several commenters (093, 106, and 123) stated that emissions from thermal dryers integrated with in-line coal mills at cement manufacturing plants should not be subject to subpart Y and instead be subject to the standard for the affected facility as part of the manufacturing process. The unique coal processing and handling systems found at Portland cement plants are best addressed by the Portland Cement NSPS (40 CFR 60 subpart F) and NESHAP (40 CFR 63 subpart LLL). The commenters requested that the Subpart Y definition of "thermal dryer" in be revised to read "Thermal dryer does not include drying of coal that occurs intentionally or incidentally in the manufacture of Portland cement through direct or indirect contact with hot gases generated by cement manufacturing process units, such as cement kilns, preheaters, precalciners, or clinker coolers." This approach would both (a) clearly distinguish between separately fired, standalone thermal dryers that are located at a cement plant, versus thermal dryers or coal mills that are integrated into a cement manufacturing line, and (b) avoid any potential confusion about incidental drying of coal that occurs in the cement-making process. Reasons presented by commenters to support the requested exemption are summarized below:

- In a 1995 determination, EPA stated that when "gases originate in one affected facility and pass through another affected facility as part of the manufacturing process, EPA applies the standard for the affected facility from which the gases are discharged directly into the atmosphere." [Applicability Determination 9600082 "Alternative Monitoring and Opacity Limit Clarification for San Juan Cement Company," John B. Rasnic (May 12, 1995)]. However, a year later EPA qualified this guidance when it concluded that an in-line raw mill was subject to the subpart F kiln standards stating: This determination clarifies that for dry process Portland cement plants with an "in-line" kiln/raw mill configuration, the raw mill does not exist as a separate affected facility and; hence, the appropriate emission limit is that which applies to the kiln. [Applicability Determination 9600083; "Opacity Limitation for 'In-line' Portland Cement Plants," John B. Rasnic (September 7, 1996)].
- Just as emissions from the in-line raw mill in Applicability Determination 9600083 were subject to NSPS subpart F PM mass and opacity limitations for cement kilns, so should emissions from an in-line coal mill at a cement plant where kiln gases are used to heat and dry the coal be treated as an extension of the kiln and subject to subpart F NSPS and subpart LLL NESHAP cement kiln PM and opacity limits. This approach is consistent with multiple different applicability determinations provided to Ash Grove by EPA stating that kiln exhaust gases are subject to the Portland cement NESHAP (LLL) regardless of whether they are routed through the coal mill prior to discharge to the atmosphere. See, e.g. Letter from Donald Toensing (EPA Region 7) to Roger Behrns (Ash Grove Louisville), September 18, 2002. It is also consistent with the data that EPA has reviewed in establishing the proposed Subpart Y limits. In the absence of data related to emissions from in-line coal mills, EPA would not have a rational basis supported by evidence in the record for establishing limits that apply to these unique gas streams.
- As Portland cement plants have striven to increase energy efficiency, a common plant configuration has been to employ kiln exhaust gas or heated gas from the plant's clinker cooler to thermally dry coal before it is combusted. Cement kiln exhaust gas is extremely hot and one of the primary means of improving energy efficiency has been to route this gas back through the process to extract as much heat as reasonably possible. Likewise, the product leaving the kiln (referred to as clinker) will enter a cooling area where gases are blown through the clinker to accelerate the cooling process. In some plants this heated gas is then used to heat the coal entering the combustion process. Both kilns and clinker coolers are affected facilities under subpart F NSPS. This use of waste heat from the kiln or the clinker cooler is highly energy efficient, driving down the combustion emissions, including greenhouse gas emissions, from the plant as a whole.
- Some cement plants have standalone thermal dryers for coal, where the heat for drying is provided by a dedicated combustion source, e.g., coal or natural gas. Those thermal dryers generally should have similar emissions, and similar possibilities for emissions control, as comparable-size thermal coal dryers at other facilities. But where coal drying is integrated into the cement-making process, through direct or indirect exposure of the coal to heat in exhaust gases from units such as cement kilns, preheater/precalciners, or clinker coolers, the emissions from that coal drying, and the potential for controlling those emissions, is very different from a standalone thermal dryer.

- To the extent that Subpart Y may apply to coal drying that occurs using waste heat from the manufacture of Portland cement, EPA's assessments of control technology and derivation of emission standards under Subpart Y have not taken into account cement-process-related loadings of SO_2, NO_X, and CO. EPA has not shown, for example, that it would be feasible for a cement plant to demonstrate compliance with SO_2 mass limits or percent reduction requirements where exhaust gases from coal drying are combined with cement kiln gases, which include SO_2 from fuel consumption and from raw materials. Similarly, NO_X limits that may be achievable through combustion controls on a standalone thermal dryer may not be achievable in exhaust gases mixed with cement kiln gases containing both fuel NO_X and thermal NO_X from the cement-making process.
- The supplemental proposal would not impose SO_2, NO_X, and CO limits on indirect thermal dryers where the source of the heat is subject to either NSPS under subpart Da, Db, or Dc. Although EPA has not really explained the basis for that exclusion, it is inferred that EPA believes the BDT determinations associated with the NSPS for the source of heat are more appropriate and should be applied. The same rationale should be applied to thermal drying that is incidental to cement manufacturing, and EPA should exclude exhaust gases that are subject to the subpart F NSPS from being subject to the subpart Y SO_2, NOx, and CO limits.

Response: EPA agrees that in the case of a coal dryer at a cement manufacturing facility where all of the thermal input is supplied by cement kiln exhaust or clinker cooler exhaust, the dryer should be regulated under the appropriate Portland Cement kiln regulations (40 CFR Part 60, subpart F, and 40 CFR Part 63, subpart LLL). This would also imply that any emissions from the thermal dryer are considered as part of the kiln or clinker cooler emissions. The final rule's emissions limits apply to new, reconstructed, or modified thermal dryers at Portland cement manufacturing plants in situations where the thermal input is not supplied by cement kiln or clinker cooler exhaust. Other Subpart Y affected facilities located at Portland cement manufacturing plants (e.g., storage systems, conveyors) also are subject to Subpart Y.

3.3.9 Applicability to Coal Dryers at Steel Manufacturing Plants

Comment: One commenter (103) requested that thermal dryers fired with process gases at integrated iron and steel plants be exempted from the Subpart Y emission limits for SO_2, NO_X and CO. Reasons presented by commenter to support the requested exemption are summarized below.

- The pulverized coal injection systems at some integrated iron and steel plants also burn process gases (i.e., blast furnace gas or coke oven gas) as the primary fuel in thermal dryers. These process gases are valuable substitutes for other sources of purchased energy and are produced on-site. However, they have lower heating values than natural gas and must be consumed on-site to be utilized most effectively or be flared. As is the case for waste heat, the use of these gases improves overall plant energy efficiency and reduces greenhouse gas emissions and should not be discouraged by applying unachievable emission limits when used for thermal drying of coal.
- The use of these process gases for coal drying will not generate any more emissions than if the gases are combusted elsewhere or flared. Instead, if the process gases burned for coal drying was replaced entirely burning natural gas, emissions (mainly NO_X and CO) from the

integrated iron and steel plant would actually increase. Establishing emission limits for thermal dryers using these process gas fuels will only serve to discourage their use.

- The proposed standards are based on the assumption that thermal dryers located at traditional mine sites and coal preparation plants are typically fired with coal, but in the examples noted above, other fuels are normally used. At the very least, the rule should include a provision to allow operators of thermal dryers fired by natural gas, waste heat, or process gases to apply for a variance upon demonstration that emissions of SO_2, NO_X, CO and/or PM are well below the prescribed standards. Upon such a demonstration, monitoring requirements for these pollutants should be reduced or eliminated.

Response: As noted in the response to comment 3.2, EPA has maintained that coal preparation and processing plants may be found at industrial sites such as those described by the commenter. In the Response to Comments document for the October 24, 1974, proposal, EPA stated "[t]he specific coal processing operations regulated by these standards are affected regardless of whether they are located in coal liquefaction plants, power plants, coke ovens, etc." (see "Background Information for Standards of Performance: Coal Preparation Plants; Volume 3: Supplemental Information. January 1976. p. 22). Thus, EPA has not changed its interpretation. In addition, EPA has made no assumptions as to the source of the heat used in the thermal dryer as the commenter suggests. However, as noted above for Portland cement plants, EPA agrees that in the case of an affected source at an integrated iron and steel manufacturing facility, where the emissions from the thermal dryer would be considered as part of the blast furnace or coke oven emissions, the facility should be regulated under the appropriate steel mill or coke oven NSPS. As previously explained, EPA's intent at this time is to regulate emissions from a thermal dryer only in circumstances where coal, coal refuse, or residual oil are used as thermal input. Thermal dryers that use residual or waste heat from the combustion of these fuels would only be subject to the PM and opacity standards. Indirect thermal dryers for which the source of heat is subject to SO_2, NO_X, and/or CO limits under another 40 CFR part 60 subpart would not be subject to the emission limits for SO_2 and NO_X/CO. In addition, affected thermal dryers for which all of the thermal input is supplied by gaseous fuels (e.g., blast furnace gas, coke oven gas, natural gas) or distillate oil also would not be subject to the emission limits for SO_2 and NO_X/CO.

3.4 Subpart Y Coal Processing, Conveying, Storage and Transfer System Standards

3.4.1 Affected Sources

3.4.1.1 Coal Unloading Activities - Subpart Y Proposal Contrary to EPA Policy

Comment: Many commenters (085, 086, 088, 095, 107, 108, 112, 115, 117, and 120) stated that Subpart Y should not be applicable to coal unloading activities because of previous EPA applicability determinations and current EPA policy. Commenters disagree with EPA's rationale for its proposal to amend Subpart Y to include coal unloading activities. EPA concluded that coal unloading, in general, and truck dumps, in particular, are NSPS affected facilities at coal preparation plants based on (1) an "exceptionally strained" interpretation of the term "conveying equipment," (2) a guidance manual for agency inspection of coal unloading at coal preparation plants, and (3) a document that did not specifically address coal unloading but nevertheless

assumed that activity was regulated by Subpart Y. Review of the record shows evidence that EPA never intended for coal unloading activities to be an affected facility at coal preparation plants when Subpart Y was promulgated. Specific EPA determinations cited by commenters concerning EPA's intentions for regulating coal unloading activities under Subpart Y include the following.

- In 1980, EPA's first review of Subpart Y concluded that that coal unloading was not a Subpart Y affected facility.
- In 1995, EPA Region VIII advised the Wyoming Department of Environmental Quality that "truck coal dump operations are not affected facilities subject to the NSPS Subpart Y regulations."
- In 1998, EPA Headquarters published an interpretative ruling in the Federal Register stating that "coal unloading that involves conveying coal to plant machinery is regulated under Subpart Y" (63 FR 53288, dated October 05, 1998). EPA Headquarters "use[d] the term "coal unloading" to encompass "coal truck dumping" and "coal truck unloading" as well as dumping or unloading from trains, barges, mine cars, and conveyors." EPA explained its reasoning behind that 1998 interpretation, as follows: section 60.251(g) defines "coal processing and conveying equipment" as "any machinery used to reduce the size of coal to or remove coal and refuse from the machinery. This includes, but is not limited to, breakers, crushers, screens, and conveyor belts." The key phrases are "the equipment used to convey coal to . . . machinery" and "but not limited to." Although the equipment involved in coal unloading varies from plant to plant (the definition is written broadly enough to accommodate the differences), what is important is that the equipment performs the function of conveying. It should be noted that if the coal is unloaded for the purpose of storage, then the unloading activity is not an affected facility under Subpart Y. The coal must be directly unloaded into receiving equipment, such as a hopper, to be subject to the provisions of Subpart Y (63 FR 53289).
- Subpart OOO explicitly excludes truck dumping from NSPS control requirements (section 60.672(d)). Subpart OOO was just recently revised, 74 FR 19294 (April 28, 2009), and it continues to contain that NSPS-exclusion for truck dumping. Thus, in the absence of (1) representative data for achievable levels of controlled emissions from coal unloading and (2) associated documentation that the costs of such controls are reasonable, the obvious inference is that coal unloading should also remain excluded from NSPS.

Response: As commenters noted, in 1998 EPA issued an interpretative ruling that states that "coal unloading" operations (which include both truck and rail car dumping) are regulated under subpart Y. This interpretative ruling has not been changed in the intervening years and, thus, remains in effect. In the interpretative ruling, EPA concluded

> ...that coal unloading that involves conveying coal to plant machinery fits within the definition of "coal processing and conveying equipment." 40 CFR 60.251(g) defines "coal processing and conveying equipment" as "any machinery used to reduce the size of coal or to separate coal from refuse, and the equipment used to convey coal to or remove coal and refuse from the machinery. This includes, but is not limited to, breakers, crushers, screens, and conveyor belts." The key phrases are "the equipment used to convey coal to * * * machinery" and "but is not limited to." While the "equipment"

> involved in coal unloading varies from plant to plant (the definition is written broadly enough to accommodate the differences), what is important is that the equipment perform the function of conveying...The coal must be directly unloaded into receiving equipment, such as a hopper, to be subject to the provisions of NSPS Subpart Y. (see 63 FR 53288.)

Thus, EPA interprets coal unloading into the first hopper "downstream" from any form of transportation to be the beginning of the "coal preparation plant."

As the standards under Subpart Y are based on data obtained from subject facilities, the comparisons with subpart OOO have no meaning. As discussed below in response to comment 3.4.2.1, the central question is whether the standard set in this rule is appropriate not whether a standard set in a different rule was appropriate. Much of commenters' reasoning is based upon past applicability determinations that said unloading were not subject to Subpart Y. Such determinations were based on interpretations of the current rule language at the time. Thus, the determinations do not speak to Agency intent or policy regarding whether such regulation would be appropriate. Further, as noted, they were superseded by the 1998 interpretation, which was published in the Federal Register.

3.4.1.2 Coal Storage Piles

3.4.1.2.1 Authority to Regulate Coal Storage Piles under Subpart Y

Comment: Many commenters (086, 091, 094, 110, 114, and 117) stated that EPA does not have the authority to regulate coal storage piles under 40 CFR 60. Section 60.1 provides that the provisions of 40 CFR 60 "apply to the owner or operator of any stationary source which contains an affected facility... ." Stationary source is defined in section 60.2, consistent with 42 USC 7411, as including any building, structure, facility or installation. Although it is not clear that a coal pile constitutes a building, structure, facility or installation, if it does, under section 60.1 the stationary source must also contain an affected facility. Affected facility is defined in section 60.2 as "with reference to a stationary source, any apparatus to which a standard is applicable." This latter definition presents a substantial problem. If EPA wishes to regulate coal storage piles under 40 CFR 60 as part of a stationary source, the coal storage piles must be an apparatus. At many facilities which manage coal, coal storage piles are nothing more than what the name suggests: piles of coal. These piles often have no walls, no floor surfaces, and no equipment associated with their use. Although the term "apparatus" is an undefined term under 40 CFR 60, we do not believe that a pile of minerals mined from the earth and stored on the earth constitutes an "apparatus" which subjects the pile to regulation under 40 CFR 60. Although the authority may not exist to regulate coal storage piles under 40 CFR 60, this would not leave such storage piles unregulated. In many states, fugitive emissions from coal piles are regulated under State fugitive emissions limitations which are often incorporated into state implementation plans, and we do not challenge those regulations in this rulemaking.

Response: EPA disagrees with commenters' assertion that a coal pile cannot be an affected facility under 40 CFR 60. Commenters correctly noted that the term "affected facility" is defined in section 60.2 to mean "with reference to a stationary source, any apparatus to which a standard is applicable." The commenters also correctly note that the term "apparatus" is

undefined in 40 CFR 60, and an agency's interpretation of its own regulation is granted substantial deference (see, e.g., Auer v. Robbins, 519 U.S. 452, 461, 1997).

The commenters do not offer a definition of "apparatus" but appear to suggest that to be an "apparatus" a coal pile would need to have "walls, floor surfaces, or equipment associated with their use." The commenters, however, offer no support for this assertion, and EPA does not believe such a limited definition of "apparatus" would be reasonable or consistent with the plain English meaning of the word. Further, the Courts stated "In designating what will constitute a facility in each particular industrial context, EPA is guided by a reasoned application of the terms of the statute it is charged to enforce." ASARCO Inc. v. EPA, 578 F.2d 319, 324 n.17 (1978). In this case, because coal storage piles are significant sources of emissions and are physically located at coal preparation and processing plants, EPA believes it is reasonable in this context, to determine that they are facilities that can be subject to regulation.

The dictionary definition of the word "apparatus" also supports EPA's approach. The word "apparatus" has a very broad meaning and can include tangible items such as equipment, tools and materials as well as intangible items such as activities and functions. The Random House College Dictionary: Revised Edition defines the word "apparatus" as follows:

> 1. a group or aggregate of instruments, machinery, tools, materials, etc. intended for a specific use. 2. any complex instrument or machine for a particular purpose. 3. any system of activities, functions etc directed toward a specific goal: the apparatus of government. 4. a group of structurally different organs performing a particular function.

Because a coal pile constitutes "a group or aggregate of . . . materials . . . intended for a specific use," it qualifies as an "apparatus" under the first definition of the word. Furthermore, given the broad meaning of the term "apparatus," EPA believes it would not be reasonable to interpret this term to limit the scope of the definition of "affected facility" to exclude a significant part of the coal preparation and processing plant that may have significant emissions.

In addition, although commenters do not actually argue that a coal pile does not constitute a stationary source because it is not a building, structure, facility, or installation, EPA notes that there can be no doubt that a pile of coal does in fact qualify as a stationary source as that term is defined in 42 USC 7411 and section 60.2. Stationary source is defined in 42 USC 7411 as including "any building, structure, facility or installation which emits or may emit any air pollutant." This same definition appears in section 60.2. The terms building, structure, facility, or installation, are not defined although section 60.2 does contain definitions for "affected facility" and "existing facility." In some instances, the regulated affected facility may be a portion or a part of a stationary source, but not the entire source. In other circumstances, however, a stationary source may also be an affected facility. Because, as noted above a coal pile can be an affected facility it necessarily also can be a facility within the definition of stationary source. In addition, the terms installation and structure are very broad and not limited to things that have walls, floor surfaces or dedicated equipment. For these reasons, commenter's assertion that coal piles cannot be regulated under 40 CFR 60 is without support.

3.4.1.2.2 Site-specific Coal Pile Emission Characteristics

Comment: Several commenters (091, 099, 109, 117, and 119) stated that coal piles should not be regulated under Subpart Y because of the diverse conditions affecting emissions from coal storage piles that could be encountered at each coal preparation plant site. Among the site-specific factors for open coal storage piles that will vary widely from site to site are the following: ambient temperature, precipitation, meteorology, wind speed, and geography. Therefore, a uniform NSPS is not be appropriate for coal piles and that fugitive coal dust emissions from coal piles should be addressed by case-by-case determinations in individual permit proceedings. In addition, as EPA has recognized in its initial proposal, and as we have discussed above, fugitive emissions will depend on coal properties and coal rank.

Response: EPA does not agree with the commenters that coal piles should not be regulated under subpart Y. Such sources were apparently included in the October 1974 proposed rule (i.e., there was no specific exclusion). A comment was received indicating that no fugitive dust control options were available for open storage piles other than water sprays and that these were not effective on windy days. EPA subsequently excluded open storage piles from regulation in the final rule (January 1976). However, EPA has now identified additional control measures, beyond simple water sprays, that may be utilized on coal piles and that address the concerns noted by commenters. EPA is establishing work practice standards instead of standards of performance for coal piles. Owners/operators are required to develop a fugitive coal dust emissions control plan to control emissions from the coal piles, and the plan requirements established by EPA provide adequate flexibility for an owner/operator to tailor their plan to address site-specific factors.

Comment: One commenter (109) stated that EPA should limit the inclusion of coal storage piles and roadways to new sources. The variety of methods that EPA has proposed to be included in a fugitive dust plan (including wet or chemical suppression, fogging, sweeping, etc) are workable and are in fact being required in many cases by state-level permitting authorities for new facilities.

Response: As explained in the response to comment 3.4.1.3, EPA is withdrawing its proposed requirements for roadways based on its determination that the requirements of SMCRA are sufficient to address air emissions from roadways that may be found within a coal preparation and processing plant at mine sites. EPA believes that coal moving operations, once the coal enters the "coal preparation plant," whether located at a mine sit or at end-user facilities, will be by conveyor rather than by truck. Also, as explained in the response to comment 3.4.7.1, EPA agrees with the commenters that open storage piles are always changing and, for purposes of subpart Y, we do not consider the routine addition and removal of coal to be a physical change or a change in the method of operation. However, changes to the equipment used in loading, unloading, and conveying operations of open storage piles are among the things that can be assessed in order to determine when an open storage pile has been reconstructed or modified. Thus, in the final rule, EPA defines "open storage pile" to mean "any facility, including storage area, that is not enclosed that is used to store coal, including the equipment used in the loading, unloading, and conveying operations of the facility."

3.4.1.2.3 Inclusion of Open Storage Piles in Definition of "Coal Storage System"

Comment: Several commenters (087, 099, and 119) stated that inclusion of open storage piles in the proposed definition of "coal storage system" creates implementation problems and uncertainty. EPA could instead create a new affected facility for open coal storage piles which should be defined, and amend proposed section 60.254 to include the specific work practice standards that apply *only* to open storage piles.

- The proposed regulatory language can be read to require open storage piles to comply with the 5 percent opacity limit. The proposed 5 percent opacity standard in proposed section 60.254(b)(1), applies to "any coal processing and conveying equipment, *coal storage system*, or coal transfer and loading system processing coal constructed, reconstructed, or modified after April 28, 2008 . . . ." (proposed section 60.254(b). As proposed in section 60.251 *coal storage system* means "any facility used to store coal," and section 60.254 fails to exempt open coal storage piles from the opacity standard.
- EPA should clarify what "unit" means in the context of coal storage piles. Are all coal storage piles within a power plant a single "unit?" Are short-term and long-term coal storage piles separate "units?" Are two adjacent mounds of coal deemed to be separate "units?" How much space or differentiation between adjacent coal piles would constitute them being deemed to be more than a single "unit?"
- The preamble states that because EPA is proposing to include open storage piles as an affected facility, the loading, unloading, and conveying operations of open storage piles would be included in the fugitive dust emissions control plan, but not subject to opacity limit. However, the definition of "coal storage system" does not include loading, unloading and conveying operations. EPA must clarify in the final rules whether those activities must be included in the plan.

Response: As explained eslewhere, EPA is promulgating a work practice standard instead of a standard of performance for coal piles. As noted by the commenter, the preamble to the supplemental proposal states that the loading, unloading, and conveying operations of open storage piles also would be covered under the fugitive dust emissions control plan, but not subject to an opacity limit (74 FR 25312). The regulatory text has been revised to make it clear that open storage piles and associated loading, unloading, and conveying operations are required to be addressed under a fugitive coal dust emissions control plan and are not subject to opacity limits. Each storage pile, whether short-term or long-term, is considered an affected facility under Subpart Y. Individual open coal storage piles ("affected facilities") would be defined as having a separate stacking system, regardless of the space between the piles.

3.4.1.2.4 Coal Piles Loaded in Trucks, Railcars, and Ships

Comment: Several commenters (087, 099, 119, and 126) agree that piles of coal that have been loaded into trucks, railcars, and/or ships should not be subject to the Subpart Y control requirements for open storage piles. In contrast, several other commenters (096, 100, and 113) disagree with EPA's stated rationale for proposing this exclusion. One commenter (096) provided the following reasons: 1) EPA has not identified any information or data to its statement that fugitive dust emissions from these sources are not significant, 2) it is not

economically infeasible to require cover the coal or chemical encrustation on loaded trucks, railcars, and ships because operators may choose to use these controls to comply with state and local regulations or the desire to minimize the loss of coal while in transit, and 3) EPA did not consider the use of alternate work practice standards already identified as appropriate for open piles, including the use of wet suppression. EPA should recognize that the owners and operators of coal preparation plants–as the ones who determine the placement of coal into trucks, railcars, and ships, and as the ones who initiate the use of any appropriate controls–are uniquely situated to take the steps most effective at reducing or limiting fugitive dust emissions from these sources once they leave the facility. Although some of the emissions from piles loaded into trucks, railcars, and ships may occur beyond the boundaries of the coal preparation plant, the extent of these emissions depends on actions taken at the coal preparation plant. Accordingly, these emissions are directly traceable to the coal preparation plants and responsibility should rest with the owners and operators of these plants. The alternative–refusing to assign responsibility of these emissions to any party–is unacceptable and inconsistent with EPA's mandate to protect the public health and welfare.

Response: EPA is not addressing at this time emissions from the sources noted by the commenters because we found any such regulation to be impractical to enforce (particularly with regard to interstate shipments). Further, based on available data emissions from these sources while at the coal preparation and processing plant have not been shown to be significant and, at this time, EPA has no data on emissions from such sources while enroute.

3.4.1.3 Coal Preparation Plant Roadways

Comment: Many commenters (082, 085, 086, 087, 088, 093, 095, 107, 109, 112, 114, 115, 120, 123, and 126) requested clarification regarding the plant roadways to which EPA intends Subpart Y to apply. EPA does not clearly explain what it means for a roadway to be "associated" with a preparation plant. Nor does EPA define the term "haul road." EPA should clarify that "roadways" such as haul roads that do not leave the plant property are not subject to Subpart Y. EPA needs to clearly define where the coal preparation plant begins and where the coal mine ends. Subpart Y is applicable only to affected facilities of a coal preparation plant. EPA should clarify that no facilities at a coal mine, even if the mine is contiguous to the property of the preparation plant, are covered under the provisions of Subpart Y. EPA must clearly define the term "haul roads" and should not, regulate under Subpart Y any roadways outside of the preparation plant. Other commenters (096 and 113) disagree with EPA's proposal to exclude roadways that do not leave the property (e.g., haul roads at coal mines) from being subject to Subpart Y for the following reasons with specific examples cited: (1) road wetting can be accomplished in a manner that is easy to adjust with the re-routing of haul roads, including the use of water trucks and temporary sprayers; (2) certain coal preparation plants are already required to abate dust on their internal haul roads; (3) some states currently impose dust suppression requirements on all roads associated with coal preparation plants.

Response: As noted in the response to Comment 3.2 above, EPA, in both the air and water offices, has historically maintained the concept that activities undertaken at or near the active mine face ("active mining area") would not be part of the "coal preparation plant" and that "coal preparation" involves separation of coal from impurities (i.e., "breaking" or "crushing"). As discussed in the response to the comment in section 3.4.1.1.1 above, EPA interprets the

"beginning" of the "coal preparation plant" to be the first hopper (i.e., "drop point") for receipt of coal from any form of transportation. Thus, any haul roads between the "active mining area" and the first hopper of the "coal preparation plant" would not be subject to Subpart Y; rather they would be subject to the requirements of SMCRA or the specific State. Similarly, roads occurring after the coal has been loaded for distribution would not be subject to Subpart Y.

Under the definition of "surface coal mining operations" contained in 30 CFR 70.5 (SMCRA), operations conducted within a coal preparation plant are covered under SMCRA:

> (a) Activities conducted on the surface of lands in connection with a surface coal mine…the products of which enter commerce or the operations of which directly or indirectly affect interstate commerce. Such activities include…*the cleaning, concentrating, or other processing or preparation of coal. Such activities also include the loading of coal for interstate commerce at or near the mine site* (emphasis added).

Such operations also include roads (under 30 CFR 701.5). 30 CFR 780.15 requires the following:

> (a) For all surface mining activities with projected production rates exceeding 1,000,000 tons of coal per year and located west of the 100th meridian west longitude, the application shall contain an air pollution control plan which includes the following:
> (1) An air quality monitoring program to provide sufficient data to evaluate the effectiveness of the fugitive dust control practices proposed under paragraph (a)(2) of this section to comply with Federal and State air quality standards; and
> (2) A plan for fugitive dust control practices as required under 30 CFR 816.95.
> (b) For all other surface mining activities the application shall contain an air pollution control plan which includes the following:
> (1) An air quality monitoring program, if required by the regulatory authority, to provide sufficient data to evaluate the effectiveness of the fugitive dust control practices under paragraph (b)(2) of this section to comply with applicable Federal and State air quality standards; and
> (2) A plan for fugitive dust control practices, as required under 30 CFR 816.95.

30 CFR 816.95(a) specifies:

> All exposed surface areas shall be protected and stabilized to effectively control erosion and air pollution attendant to erosion.
>
> 30 CFR 816.150 provides some additional requirements:
>
> (b) *Performance standards*. Each road shall be located, designed, constructed, reconstructed, used, maintained, and reclaimed so as to:
> (1) Control or prevent erosion, siltation, and the air pollution attendant to erosion, including road dust as well as dust occurring on other exposed surfaces, by

> measures such as vegetating, watering, using chemical or other dust suppressants, or otherwise stabilizing all exposed surfaces in accordance with current, prudent engineering practices…
> (e) *Maintenance*. (1) A road shall be maintained to meet the performance standards of this part and any additional criteria specified by the regulatory authority.

Thus, SMCRA covers fugitive dust emissions from roads at coal preparation and processing plants at mine sites and requires a fugitive dust plan and other requirements to control air pollution from such sources (through similar measures as were included in the supplemental proposal for Subpart Y). EPA believes that coal moving operations, once the coal enters the "coal preparation plant," will be by conveyor rather than by truck. Therefore, EPA believes that the requirements of SMCRA are sufficient to address air emissions from roadways that may be found within a coal preparation and processing plant at mine sites. For coal preparation and processing plants at end-user facilities, EPA believes that, again, once the coal enters the "coal preparation plant," coal moving operations will be by conveyor rather than by truck. Therefore, EPA is withdrawing its proposed requirements for roadways.

Where fugitive coal dust emissions control plan requirements under Subpart Y for open storage piles overlap requirements under SMCRA or State regulations, those sources may submit the more stringent of the required monitoring plans to the Administrator or delegated authority as required by the final rule.

3.4.1.4 Coal Sampling Systems

Comment: Many commenters (085, 088, 095, 107, 112, 115, and 120) requested that coal sampling systems located at coal preparation plants be specifically exempted from Subpart Y. Coal sampling systems obtain representative samples of coal as delivered. Generally, the sampler cuts across a conveyor belt through a falling stream of coal at a transfer point on an interval determined by time or weight of coal on the conveyor. The cut is transferred to a small crusher and the size of the sample is reduced by a series of riffling devices. The remaining coal from a cut is transported back onto the main conveyor. To protect coal sampling system equipment at coal processing plants from the weather, such equipment is typically is located in a building or structure, or otherwise covered on all sides. Very little dust is generated by coal sampling systems because the conveyors, crushers and rifflers in the system operate at low velocity, the system as a whole operates intermittently, and the throughput is low.

Response: As explained in the response to comment 2.4.1.6, coal sampling systems at affected facilities have been subject to the existing Subpart Y requirements since they were originally promulgated in 1976. Also, an affected facility enclosed within a building or structure would be considered to be in compliance if the building in which it is enclosed is in compliance with the standard. For these reasons, EPA does not believe it would be appropriate, in this review, to add the exemption requested by commenters.

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3.4.2 Relationship of Subpart Y Requirements to Other Rules

3.4.2.1 NonMetallic Mineral Processing NSPS (40 CFR 60 subpart OOO)

Comment: Many commenters (085, 088, 095, 107, 112, 115, and 120) stated that because of the inherent similarities in the basic characteristics of facilities used for coal preparation and for nonmetallic mineral processing, and recognizing the common use of the same technologies to control PM emissions from same types of facilities the overall format and requirements for control of PM emissions from coal processing in Subpart Y should be consistent with the relevant requirements under subpart OOO for control of PM emissions from nonmetallic mineral processing. One commenter (095) presented a list of the specific provision citations from subpart OOO that the commenters believe are relevant and should also be adopted for coal preparation plants subject to the Subpart Y amendments. Reasons presented by the commenters are summarized below.

- Coal is a nonmetallic mineral.
- Subpart OOO and Subpart Y regulate the same types of processing equipment and operations.
- Even though the magnitudes of the PM emissions from subpart OOO facilities may not be equivalent to levels of PM emissions from comparable Subpart Y facilities, the origins of those emissions are the same at both types of facilities and the controls of those emissions employ the same technologies.
- Predominant type of fugitive emissions controls at both Subpart Y and subpart OOO facilities is wet suppression.
- The emissions data base used by EPA to support development of standards for subpart OOO is extensive while the emissions data supporting Subpart Y is very limited.

Response: As the Courts have explained, "the Administrator is not required to present affirmative justifications for different standards in different industries. Inter-industry comparisons of this kind are not generally required, or even productive; and they were not contemplated by Congress in this Act. The essential question is whether the mandated standards can be met by a particular industry for which they are set, and this can typically be decided on the basis of information concerning that industry alone. . . . It would be unmanageable if, in reviewing the [challenged] standards, the court should have to consider whether or not there was a mistake in [a different source category's] standard . . . . " Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 389 (D.C. Cir. 1973).

The standards established in this rulemaking are based on data regarding emissions and control technologies applied to Subpart Y facilities while the subpart OOO rule was based on data from subpart OOO facilities. The fact that the similar types of processing equipment and operations are used by the two source categories does not mean that the emissions from the source categories are comparable. In fact, commenters objected to EPA's use of subpart OOO data to develop the Subpart Y amendments proposed on April 28, 2008. They argued that EPA did not demonstrate that use of subpart OOO data were representative of the coal preparation industry. Further, the commenters characterized that proposed rulemaking as having analytical flaws and data deficiencies. The May 27, 2009 supplemental proposal was based on data and information

for coal preparation and processing operations. When conducting a BDT analysis, EPA considers many factors unique to the source category including the specific materials involved, the control technologies employed, the emission levels achieved, and the cost of controls. For these and other reasons, the standards established for one source category may differ from those established for a different source category.

3.4.2.2 Surface Mining Control and Reclamation Act (SMCRA)

Comment: Two commenters (095 and 117) stated that EPA's proposed Subpart Y fugitive dust control requirements as applied to surface coal mines are duplicative of existing regulatory programs. In particular, under SMCRA, coal mine operators must control fugitive dust through a plan submitted as part of the SMCRA permitting process. Requirements under SMCRA provides the U.S. DOI authority to require mine operators to "stabilize and protect all surface areas ... to effectively control erosion and attendant air and water pollution." §SIS(b)(4), 30 U.S.C. §126S(b)(4) (1988); see also §SIS(b)(l7), 30 U.S.C. §126S(b)(l7) (1988). Under this authority, DOI has promulgated extensive regulations, requiring, for example, that all surface coal mining permit applications include a plan for fugitive dust control and an air quality monitoring program to evaluate its effectiveness. 30 CFR §780.1S (1990). In addition, haul roads must be located, designed, constructed, used, maintained, and reclaimed so as to "[c]ontrol or prevent erosion ... , including road dust as well as dust occurring on other exposed surfaces, by measures such as vegetating, watering, using chemicals or other dust suppressants." Id. §816.1S0(b)(I).

Response: As noted above in the response to comment 3.4.1.3, it is not EPA's intent to regulate sources prior to the "coal preparation plant" itself. Further, EPA is withdrawing its requirements for roadways. Where requirements for open storage piles overlap, those sources may submit the more stringent of the required monitoring plans to the Administrator or delegated authority as required by the final rule.

3.4.3 BDT Determination

Comment: Many commenters (085, 088, 099, 107, 112, 115, 119, and 120) acknowledged EPA's decision in the supplemental proposal to add fogging systems and passive enclosure dust containment systems to its list of BDT for coal processing and conveying equipment, but stated that EPA's BDT determination still failed to meet the requirements of CAA § 111. Additional commenters (095 and 117) also disagreed with EPA's finding of chemical suppression to be BDT for coal handling equipment processing bituminous coal, stating that EPA's current BDT approach of focusing only on emission control systems with the highest control efficiency is an inappropriate, unjustified departure from its prior technology assessments for coal preparation plants. EPA's evaluation of technologies for control of fugitive emissions from coal-handling should have included wet suppression. Further, EPA must explain why it has either rejected or ignored Peabody Energy's compelling comparison of wet suppression costs and chemical suppression costs. We are unaware of any other credible comparison of those respective costs having been submitted to EPA. Consequently, the record demonstrates that cost considerations favor the use of wet suppression instead of chemical suppression for controlling fugitive emissions from preparation facilities at coal mines.

Response: As pointed out by the commenters, EPA has added fogging systems and PECS as technologies representative of BDT for coal-handling equipment processing subbituminous and lignite coals (fabric filters and wet extraction scrubbers also are considered representative of BDT). As noted in the supporting documentation (see EPA-HQ-OAR-2008-0260-0083, pp. 1-2), EPA has reviewed our determination of chemical suppressants as BDT for coal-handling equipment processing bituminous coal. However, as also noted in the support document, an owner/operator may use any combination of controls at a particular site as long as the requirements of subpart Y are met. With respect to Peabody Energy's comparison of wet suppression and chemical suppression costs, their estimates indicate that the incremental cost of chemical suppression as compared to wet suppression is $4,400 per ton of PM removed.

3.4.4 PM Emission Limits

3.4.4.1 Applicability of PM Emission Limits

Comment: Several commenters (099, 107, 119, and 115) support of EPA's decision to limit applicability of the PM emission limit to mechanically vented coal handling equipment.

Response: EPA appreciates the commenters' support of its approach.

3.4.4.2 Selection of Proposed PM Emission Limit Level

Comment: Many commenters (093, 099, 107, 115, 117, 123, and 119) support EPA's decision to increase the PM emission limit for mechanically vented coal handling equipment to 0.010 gr/dscf in the supplemental proposal. In response to the EPA's request in the supplemental proposal notice for additional comment on a PM standard between 0.0090 gr/dscf and 0.011 gr/dscf, one commenter (099) stated that EPA's analysis in a memorandum for the subpart OOO rule (using essentially the identical data base) concluded that a PM level of 0.010 gr/dscf would be achieved only 86 percent of the time. Only a few months ago EPA finalized a PM NSPS of 0.014 gr/dscf in the subpart OOO rule). Given EPA's data and conclusions, any additional revisions to the PM emission limit level should result in a higher PM limit, not lower one. In contrast, one commenter (113) stated that the proposed PM limit should be at the level proposed in the original Subpart Y amendment proposal of 0.011 g/dscm. This limit is feasible, and it will be easy for operators to meet them if the coal-handling system is entirely enclosed. The PM limit should apply regardless of whether the coal-handling system is vented. If the system is entirely enclosed, then it should not be difficult for the operator to meet the PM limit. If, however, there is a crack in the enclosure or an operator fails to install a proper enclosure, the PM limit and monitoring will catch that error and prevent potential excess emissions.

Response: The PM emission limit of 0.023 g/dscm; 0.010 gr/dscf for mechanically vented coal-handling equipment is supported by the data obtained from coal preparation and processing plants and is applicable only to vented sources. Sources that are not vented would not be subject to the mass PM limit, only the opacity limits.

3.4.5 Opacity Standards

3.4.5.1 Opacity Standards for Open Storage Piles and Roadways

Comment: Many commenters (085, 086, 087, 088, 091, 093, 095, 098, 099, 107, 109, 112, 115, 116, 119, 123, and 120) stated that establishing opacity standards for open coal storage piles and roadways would be impractical and unnecessary. In contrast, one commenter (096) states coal storage piles can be enclosed and the captured fugitive dust then vented to a fabric filter (see Section 3.4.6.2) from which the emissions are vented from a stack allowing opacity readings to be performed. Therefore, opacity standards for coal storage piles can be established. Reasons cited by individual commenters for not establishing opacity standards for these sources include:

- Fugitive dust from open storage piles and roadways are already regulated under SMCRA by US Office of Surface Mining so duplicative regulations under Subpart Y are unnecessary.
- PM emissions from coal piles are already subject to state fugitive dust regulations (whether applicable to storage piles in general or coal piles in particular) and, in many cases, State air permits. There is no rationale for imposing fugitive dust control requirements on coal storage piles and roadways because they are already controlled by existing-source regulations and do not present significantly different opportunities for work practice controls than do existing coal storage piles and roadways. (093 and 123)
- The nature of fugitive dust from open storage piles and roadways does not lend them to application of the Method 9 test procedure requiring 6-minute average opacity readings.
- Determining a reasonable opacity limit would be very complicated because of the numerous and disparate factors that might influence emissions from any particular pile, such as coal types and varieties, pile shapes, pile compaction, throughput rates, and traffic.
- By the very nature of open storage piles, activity is intermittent and during times when activities such as stacking or reclaiming are being done, fugitive emissions will likely be greater than 5 percent.
- It is difficult and extremely expensive to measure actual PM emissions from individual open storage piles and many States require affected facilities to hire consultants to conduct Method 9 opacity testing. Hiring consultants to perform opacity observations is not cost effective given the size of open storage piles, which constantly fluctuate in volume and shape, and the steep fees charged by such consultants.
- The EPA Visible Emissions Field Manual for Method 9 training admits that opacity observations from open storage piles are very difficult to perform, and it is not practical to perform them for compliance on a regular basis.

Response: As explained in the response to comment 3.4.1.3, SMCRA covers fugitive dust emissions from activities conducted on the surface of lands in connection with a surface coal mine and requires a fugitive dust plan and other requirements to control air pollution from such sources. Further, EPA believes that coal moving operations, once the coal enters the "coal preparation plant," will be by conveyor rather than by truck and, therefore, that the requirements of SMCRA are sufficient to address air emissions from roadways that may be found within a coal preparation plant at mine sites. For coal preparation plants at end-user facilities, EPA believes that, again, once the coal enters the "coal preparation plant," coal moving operations

will be by conveyor rather than by truck. Thus, EPA is withdrawing its proposed requirements for roadways.

Where fugitive dust emissions control plan requirements under Subpart Y for open storage piles overlap requirements under SMCRA or State regulations, those sources may submit the more stringent of the required monitoring plans as required by the final rule.

With respect to monitoring the effectiveness of fugitive dust control measures used on open storage piles, EPA supports its previous determination that the size of open storage piles makes the use of Method 9 opacity observations unreasonable in many situations. For this reason, EPA has concluded that it is not feasible to prescribe or enforce a standard of performance and that work practice standards are appropriate.

3.4.5.2 Proposed Opacity Limit Level

3.4.5.2.1 Insufficient Representative Data

Comment: Many commenters (085, 086, 088, 095, 107, 112, 115, 116, and 120) stated that EPA has insufficient representative data of achievable, controlled emissions to set an appropriate opacity standard. With the lone exception of a single 3-hour Method 9 test of a rotary car dumper, not at a preparation plant but at a marine terminal, the background information documents for Subpart Y development contain no data specific to fugitive emissions from coal unloading. EPA cannot credibly argue that opacity data from a single Method 9 test of a rotary car dumper satisfies the CAA section 111 mandate for obtaining data on representative levels of achievable, controlled emissions from coal unloading. EPA cannot defend the imposition of an emissions standard on a facility for which EPA has no representative emissions information. One commenter (095) submitted with their comments additional data from recently performed Method 9 observations of visible emissions from a number of different coal preparation plants around the country, and that EPA did not properly evaluate wet suppression. The commenters state that these data are more representative of achievable emissions from coal preparation and support setting a higher opacity limit under Subpart Y for coal-handling operations at coal preparation plants.

Response: EPA disagrees with the commenters about the quantity of available data. A review of the data set used indicates that there are a number of unloading operations included (and not at marine terminals) [PM/Opacity memorandum, May 2009]. A review of Commenter 095's submitted data indicates support for the opacity level established.

3.4.5.2.2 Continuous Achievability of Opacity Limit

Comment: Many commenters (084, 085, 086, 088, 095, 099, 107, 112, 115, 119, and 120) stated the data used by EPA does not demonstrate the continuous achievability of the proposed opacity limit. The promulgation of NSPS based upon inadequate proof of achievability would defy the Administrative Procedure Act's mandate against action that is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. National Lime Ass'n v. EPA, 627 F.2d 416, 430 (D.C. Cir. 1980).

Response: I n the May 27, 2009, supplemental proposal, EPA requested comment on whether an opacity limit of less than 10 percent is more appropriate than the proposed limit of 5 percent. We also requested comment on whether the 5 percent limit is achievable on a long-term basis for all Subpart Y coal-handling facilities under all operating conditions and whether the limit provides an adequate compliance margin. As we pointed out in supporting documentation (see EPA-HQ-OAR-2008-0260-0083, pp. 3-4), the data used to establish the supplemental proposal's 5 percent opacity level were primarily from initial compliance tests, and the reported highest 6-minute average opacity reading was 5 percent for a recently installed facility. Data for coal-handling facilities submitted by commenters in response to the supplemental proposal indicate that 60 percent of the highest 6-minute average opacity readings are less than 10 percent. Upon reconsideration of EPA's data and consideration of the public comments and supporting data, EPA has determined that an opacity limit of less than 10 percent is more appropriate for all coal-handling equipment. An opacity limit of 10 percent will allow for control equipment degradation, adverse conditions, and variability that would not be reflected in initial compliance tests. Thus, the final rule requires coal handling facilities to maintain opacity levels of less than 10 percent.

3.4.5.2.3 Selection of Proposed Opacity Limit Level

Comment: One commenter (126) stated that the WDEQ requires PECs and fogging systems to be operated and maintained so the system enclosures exhibit no visible emissions as determined by Method 22. The WDEQ's experience with fabric filters and wet extraction scrubbers shows similar performance levels can be achieved through a well maintained system. Therefore, commenter supports an opacity limit of no greater than 5 percent. A second commenter (113) stated that the proposed opacity limit should have been kept at the level proposed in April 2008 of "less than 5 percent." This limit is feasible, and it will be easy for operators to meet it if the coal-handling system is entirely enclosed. Commenter 117 agrees that PECs and fogging systems are as effective as fabric filters for controlling PM emissions and thus also constitute BDT for coal processing and conveying equipment, coal storage systems, and transfer and loading systems. In contrast, many other commenters (084, 085, 088, 089, 093, 094, 095, 099, 107, 112, 115, 116, 117, 119, 120, 123, and 121) stated that proposed opacity standard of no greater than 5 percent is unreasonably stringent and not supported by the data set used by EPA used to set the proposed level. Reasons cited by individual commenters include:

- EPA's data set includes opacity observations of emissions from coal preparation at 15 different coal mines from various State environmental agencies. EPA acknowledged that because most States regulate such visible emissions based on the use of Method 22, actual Method 9 tests are not required on a regular basis. As a result, EPA recognizes that "the data we collected were primarily from initial performance tests." That very limited nature of EPA's opacity data from coal preparation facilities at coal mines calls into question the propriety of basing the proposed 5 percent opacity standard on that data.
- EPA's data set only addresses a very narrow segment of different types of facilities' operations and emissions characteristics throughout the industry.
- EPA's data set measured visible emissions cannot be matched with a specific control technology EPA has determined to be BDT.

- EPA's data set does not demonstrate "achievable emissions" from "adequately demonstrated technologies" at coal preparation facilities.
- Because the accuracy of Method 9 visual observations is considered to be ±7.5 percent, it is scientifically unsupportable for EPA to select a 5 percent opacity level because most reported the Method 9 performance test results were 5 percent or less.
- EPA has not considered the reasons why 9 percent of the tests in the data set demonstrated opacity above 5 percent. Commenter 094 believes that wind conditions can dramatically affect opacity readings at certain facilities, and that these conditions are a function of local meteorological conditions, not of factors that can be reasonably controlled by the facility operator. The data set that EPA used does not appear to have evaluated whether wind conditions at certain sites made compliance with a 5 percent limit unfeasible, or whether the sites evaluated consisted of locations with wind speeds that were representative of industry wide performance for coal-handling operations.
- Several commenters stated an opacity limit such "as less than 10 percent" is more appropriate to reflect demonstrated performance over the long-term (vs. initial performance tests) and over the range of operating conditions that may occur considering the highly varied conditions (*e.g.*, wind, moisture, local geography) that are present at the various affected facilities throughout the U.S. (093, 099, and 119)
- One commenter the opacity limit should be maintained at the existing standard of less than 20 percent opacity. Existing facilities are required to meet the initial 20 percent opacity standard at initial compliance testing prior to final permit approvals. Subsequent maintenance records document that control equipment remain in place and continue functioning according to the design. Initial Method 9 testing and equipment maintenance is required to protect air resources for those emissions not collected and vented. There appears to be no demonstrable reason to reduce the current and highly effective opacity standards and practices already in place within the coal industry. (121)

Response: As explained in the response to comment 3.4.5.2.3, EPA has reevaluated the data used to establish the supplemental proposal's opacity limit, as well as assessed information submitted in response to the supplemental proposal, and has determined that a standard of less than 10 percent opacity more appropriately represents a level that reflects the variability associated with long-term operation and site-specific operating conditions. Thus, the final rule requires coal-handling facilities to maintain opacity levels of less than 10 percent. With respect to the commenter's statement regarding the accuracy of Method 9 visual observations being ±7.5 percent, EPA's response to comment 2.4.7.1 explains that the commenters have misrepresented the discussion in Method 9 about potential for positive bias when applying the method. The study does not support a conclusion that there is a known positive measurement bias when using Method 9.

Comment: Two commenters (099 and 119) state that the commenters' support for fugitive opacity limits of 7 percent (for facilities other than crushers) and 12 percent (for crushers) in the subpart OOO NSPS rulemaking was because EPA provided a longer averaging period for demonstrating compliance (i.e., the average of five 6-minute averages) which helps to compensate for any bias that might exist in the Method 9 observations. Commenter 099 urges EPA to adopt such an approach in the Subpart Y rule.

Response: As previously explained, EPA has reevaluated the data used to establish the opacity limit, as well as assessed information submitted in response to the supplemental proposal, and has determined that a standard of less than 10 percent opacity for coal-handling facilities, including crushers, more appropriately represents a level that reflects the variability associated with long-term operation and site-specific operating conditions.

3.4.5.2.4 Alternative to Opacity Limit

Comment: Two commenters (099 and 119) recommended that EPA not use an opacity standard in Subpart Y for the affected sources and instead require a repeat of the proposed Method 22 observation followed by corrective action. This approach is discussed in more detail in the comments submitted by the commenter on the original Subpart Y amendment proposal which are incorporated by reference by the commenter.

Response: Subpart Y directs EPA to set "standards of performance" for the source category except in certain circumstances where it is infeasible to do so. A standard of performance is a standard for emissions of air pollutants which reflects the degree of emission limitation achievable with adequately demonstrated technologies. EPA does not have information to support a determination that the standard proposed by the commenter would qualify as a standard of performance as that term is defined in section 111(a)(1). Further, as a general matter, EPA believes that rules should be written to include clearly defined limits that are sufficiently enforceable. Corrective action plans or quality improvement plans are not readily enforceable when they provide no simple line between compliance and noncompliance, and allow excessive emissions without any deterrence for those emissions beyond a corrective action requirement. A clear limit such as an opacity limit provides an incentive for the source to take corrective action to avoid the violation prior to, as opposed to after, its occurrence. Further, the opacity limit provides a readily identifiable limit to allow for enforcement where necessary, and results in quantification of the emissions levels so that the source and the Agency can assure the public of the environmental performance of regulated facilities. As such, EPA is retaining the opacity standards.

3.4.6 PM Emissions Controls and Work Practice Standards

3.4.6.1 Coal Conveyors

Comment: Two commenters (114 and 117) stated that that coal conveyors do not need to be fully enclosed, full enclosures are required only at the conveyor belt transfer or drop points.

- Coal preparation facilities located at coal-fired power plants differ dramatically from those co-located at mines, and thus what might work at a power plant may not be appropriate for larger, integrated facilities. Unlike conveyors at typical coal-fired power plants, conveyors at coal preparation plants receiving coal from coal mines often move coal for substantial distances, sometimes for miles, and they have particularly large capacity. Under these conditions, it would be unreasonable to require conveyors to be fully enclosed and vented through a stack (and hence under pressure). Not only would such a requirement raise practicality and safety concerns by increasing the potential for coal dust and methane gas to

accumulate in dangerous concentrations, but it would create myriad inspection and maintenance difficulties. For these reasons only transfer points are typically enclosed (117).

- A covered conveyer belt is not going to have any fugitive emissions along the belt runs. The only points where fugitive emissions can be created are at the drop points. As such, it should be specified that, for systems that are enclosed, the emission control and monitoring points for coal conveying equipment should be limited to the material drop points (114).

Response: The April 2008 proposal proposed to require conveyers to be fully enclosed, but the supplemental proposal did not. The standard of performance established in the final rule applies to the entire conveyor. However, it is common for sources to monitor emissions only at transfer or drop points on conveyer belts.

3.4.6.2 Coal Storage Piles

3.4.6.2.1 Work Practice Standards

Comment: Several commenters (089, 091 and 121) stated that it is not feasible to establish emission standards for open storage piles or roadways, and if open storage piles are to be regulated by Subpart Y then the only appropriate method for controlling PM emissions from such sources is by using work practice standards. A third commenter (126) does not support establishing an opacity limit for open storage piles or roadways and concurs with the proposal to establish work practice standards instead of opacity or PM limits. If an opacity limit is established for storage piles, it should be limited to stationary open storage piles not including piles of coal that have been loaded into trucks, railcars, and/or ships. Another commenter (113) disagrees that only work practices are suitable for controlling PM emissions open storage piles (and roadways). The 20 percent opacity limitation under Subpart Y has been an existing applicable requirement for fugitive dust sources in the coal-handling system for decades. It was not proven infeasible to conduct opacity monitoring over all of those years. A more detailed explanation of why opacity monitoring for these fugitive dust sources cannot be conducted would be very helpful.

Response: As explained elsewhere in this document, EPA is withdrawing its proposed requirements for roadways. EPA concurs that it is not feasible to prescribe or enforce a standard of performance for open storage coal piles and has therefore promulgated work practice standards, which EPA believes provide the most effective method of limiting emissions from open storage piles. In addition, EPA believes that the size of open storage coal piles makes the use of Method 9 opacity observations unreasonable in many situations.

Comment: One commenter (096) recommended that if EPA declines to promulgate standards of performance for coal storage piles, the work practice standard for open piles must be revised to include guidance on the effective use of wet suppression.

Response: EPA believes that it is inappropriate to go into the level of detail suggested by the commenter. Rather, EPA believes that the subpart Y requirement is sufficiently detailed as written.

3.4.6.2.2 Enclosure of Coal Storage Piles

Comment: One commenter (096) states it is entirely feasible for fugitive dust from coal storage piles to be emitted through a conveyance designed and constructed to emit or capture that fugitive dust. Coal storage piles can be enclosed and their fugitive dust emissions vented to a fabric filter where those emissions can be captured and measured. The commenter references their comments on the original Subpart Y amendment proposal for a list of facilities around the country that are currently utilizing enclosures for coal and coke piles, as well as a discussion of the economic costs and benefits of enclosing piles. In contrast, another commenter (099) stated that power plants typically have both short-term and long-term storage piles which are vastly different in size. Cost and practical considerations in controlling dust from short- and long-term coal piles will vary considerably. Long-term piles can be massive, and may range from 40 acres to over 80 acres in size. The expense of a partial enclosure at such a coal storage pile would be "enormous" according to the commenter.

Commenter 129 disagrees with Commenter 096 regarding requiring open coal piles to be enclosed and vented to control emissions. Commenter 129 states that EPA has ample facts in the record to reject the contention that all storage piles should be covered and vented to a fabric filter because long-term piles can become massive and the cost to cover and control emissions for these massive piles can become quite enormous. Commenter 129 refers to the cost estimates submitted by a third commenter (033) concerning the building of a coal silo for short-term coal storage use and Commenter 129 states that these costs are far beyond what is considered reasonable cost under CAA section 111. Commenter 129 also points out that building domes at the port of Los Angeles Terminal to hold coal before moving it to barges for transport to Asia also exceeds reasonable costs under CAA section 111. They also stated that other examples given by Commenter 096 do not support enclosing coal piles for long-term storage.

Response: EPA continues to believe that the cost of requiring open coal storage piles to be enclosed is unreasonable and thus has not determined that complete enclosures with fabric filters constitute adequately demonstrated control technologies for open storage piles at this time.

3.4.6.3 Coal Preparation Plant Roadways

3.4.6.3.1 Coal Haul Road Exemption

Comment: Two commenters (096 and 113) disagree with the proposal to exclude "roadways that do not leave the property (e.g., haul roads at coal mines)" from this requirement (74 FR 25313). The only reason given for this exclusion is the particular impracticality of, for example, paving roadways that are frequently rerouted (74 FR 25313). The proposal offers no explanation for why wetting the road surface would pose a "particular impracticality" to facility operators, even given that internal haul roads are frequently rerouted. Furthermore, road wetting can be accomplished in a manner that is easy to adjust with the re-routing of haul roads, including the use of water trucks and temporary sprayers. EPA's rationale also statement is contradicted by the fugitive dust control requirements already included in the title V permits for certain coal preparation plant facilities, and by State regulations that apply to all road types. The commenter cited examples of several title V permits and State regulation requiring implementation of roadway-specific fugitive dust control work practice at coal preparation plants. Commenter 113

states that the final rule should describe the O&M of each open storage pile practice [enclosure, chemical suppressants (including encrusting agents), wet suppression, a wind barrier, or a vegetative cover to control emissions], and operation and maintenance for roadway practices (pave the roads, wet the road surface, sweep up excess coal dust, or install tire washes to remove entrained dust to control PM emissions.)

Response: As discussed in the responses to comments 3.4.1.1.1 and 3.4.1.3 above, EPA's intent under this action was only to cover operations on the premises of the coal preparation and processing plant and, thus, not roadways that lead to the first hopper or from the loadout operations. In addition, as previously explained, further review of the SMCRA regulations and the comments received has led EPA to withdraw its proposal to regulate roadways on the contiguous coal preparation and processing site. EPA will continue to assess the need for regulation of roads beyond the contiguous coal preparation and processing site.

EPA disagrees that the final rule should describe the O&M of each open storage pile practice. One reason for requiring approval of the fugitive coal dust emissions control plan is to ensure that whatever control measure is selected by an owner/operator, including its operation and maintenance, is appropriate considering the site-specific conditions.

3.4.6.3.2 Truck Washes

Comment: One commenter (096) stated that the issue of entrained dust is not limited to truck tires. The work practice standards for roadways "require the owner/operator to pave the roads, wet the road surface, sweep up excess coal dust, or install tire washes to remove entrained dust to control PM emissions" (74 FR 25313). Subpart Y must be amended to require the installation of "truck washes" as opposed to merely "tire washes." Truck washes clean the entire truck body, including the undercarriage and other areas where mud and dust may collect. Limiting the standard to only tire washes would not adequately address the dust entrainment problem.

Response: As noted elsewhere, EPA is withdrawing its proposed requirements for roadways to be included in the Subpart Y fugitive coal dust emissions control plan as it believes that these sources are adequately covered under the requirements of SMCRA. EPA believes that such emissions as the commenter notes would also be covered under the required SMCRA fugitive dust plan.

3.4.6.3.3 Weather-Related Exemptions

Comment: One commenter (114) suggested that the rule should acknowledge that the listed control methods for haul roads may not be available when temperatures are below freezing. In addition, prevailing weather conditions may reduce the effectiveness of, or eliminate the need for, a particular control method on a given day.

Response: As noted elsewhere, EPA is withdrawing its proposed requirements for roadways. However, with respect to open storage piles, section 60.254 of Subpart Y specifies that the fugitive coal dust emissions control plan must describe the control measures the owner/operator will use to minimize fugitive emissions from each source addressed in the plan, and explain how the measures are applicable and appropriate for the site conditions. Weather-related issues such

as those noted by the commenter thus can be addressed in the fugitive coal dust emissions control plan.

3.4.6.4 Coal Truck Dumps

Comment: Two commenters (117 and 124) support-the use of stilling sheds as BDT for truck dumps. Truck dumps using stilling shed technology control fugitive coal dust more effectively than those using baghouses. The WDEQ considers stilling sheds effective enough to constitute BACT. Therefore, if EPA decides to establish truck dump standards, despite the foregoing concerns, the commenter requests that EPA make a finding that stilling sheds constitute BDT for truck dumps. Another commenter (122) stated that many coal mines utilize stilling sheds; however, there are some truck dump control systems that utilize baghouses or water spray bars and their data is presented here as well. Regardless of the method, these truck dump control systems are rated to control 50-85 percent of the fugitive emissions from truck dumping. It should be noted that some mines operate belly dump trucks, for which no safe stilling shed design is available.

Commenter 126 stated that the truck dumps are proposed to be regulated as a point source and the commenter does not consider it appropriate to regulate a truck dump in the same manner as a baghouse or PEC. The PSD rules define fugitive emissions as those which could not reasonably pass through a stack, chimney, vent, or other functionally equivalent opening. With haul truck capacities of 400 tons, it is not reasonable to assume that the emissions could be routed through a stack. Commenter suggests that truck dumps be regulated as fugitive sources.

Response: EPA continues to believe it is appropriate to require coal truck dump operations, whether unloading coal into a hopper, onto an open storage pile, or elsewhere, to be subject to the same opacity limit as other coal-handling facilities. As previously explained, an owner/operator may use any control measure that enables them to meet the opacity limit. Data indicate that the various control measures currently used on truck dump operations (e.g., baghouses, water sprays, stilling sheds) are capable of meeting the final rule's opacity limit of less than 10 percent. However, as explained in the response to comment 3.5.3.2, EPA has determined that separate testing and monitoring requirements are appropriate for coal truck dumps.

3.4.6.5 Affected Facilities in Enclosed Buildings

Comment: Many commenters (085, 088, 095, 107, 112, 115, and 120) requested that Subpart Y provide the same compliance alternative for affected sources located in enclosed building stated provided in subpart OOO. Under subpart OOO performance standards and applicable monitoring techniques for the exhaust systems of these buildings have been specified as an appropriate alternative to individual compliance by each affected facility enclosed within the building. Building enclosure of certain coal-handling and processing operations at coal preparation plants has become more commonplace throughout the industry for several reasons, including the ability to effectively control emissions and to protect personnel and equipment from the elements. These commenters urge EPA to extend this practical and achievable alternative to Subpart Y and recognize within the rule the beneficial control technique of enclosing coal preparation facilities within buildings.

Response: EPA has determined that if a building in which affected coal processing and conveying equipment (e.g., breakers, crushers, screens, conveying systems), coal storage systems, and coal transfer system operations are enclosed is found to be in compliance with Subpart Y limits then the affected facilities enclosed in that building also are in compliance. Because exhaust from a building that encloses affected facilities would be comprised of exhaust from the affected facilities, it follows that in order for the building to be able to meet a specific opacity limit, each facility enclosed in the building also would have to meet that same opacity limit. That is, for coal processing and conveying equipment, coal storage systems, and transfer and loading systems constructed, reconstructed, or modified on or before April 28, 2008, fugitive emissions from the building openings must not exhibit 20 percent opacity or greater. Fugitive emissions from buildings that enclose coal processing and conveying equipment, coal storage systems, and transfer and loading systems constructed, reconstructed, or modified after April 28, 2008, must not exhibit opacity of 10 percent or more. For buildings enclosing coal processing and conveying equipment, coal storage systems, and transfer and loading systems constructed, reconstructed, or modified after April 28, 2008, that discharge emissions from a mechanical vent, emissions must not contain PM in excess of 0.023 g/dscm (0.010 gr/dscf).

3.4.6.6 Site-Specific Fugitive Emission Control Plan

3.4.6.6.1 Need for Plan in Subpart Y

Comment: One commenter (103) requested that EPA delete the proposed fugitive emission control plan requirements from the final Subpart Y amendments for the following reasons:

- Regulated entities have the right to know exactly what requirements apply to their facilities, particularly those applicable to new sources, and the proposed language does not provide any objective basis for determining what might have to be included or how to comply.
- Making fugitive emission control plan requirements these subject to negotiation and air regulatory agency approval adds potentially significant delays in getting new sources approved and into operation.
- Fugitive emission control plans to minimize emissions from coal piles and roadways are commonly embodied in state implementation plans and existing air permits for iron and steel plants and coke plants.
- Subpart Y should not duplicate and should not conflict with existing fugitive emission control requirements that have been in place for many years in the title V operating permits for individual plants. Affected sources should be exempt from NSPS fugitive emission control requirements if covered by an applicable fugitive emission control plan referenced in a Title V permit.

Response: EPA disagrees that fugitive coal dust emission control plans should not be required by the NSPS. The commenter states that such plans are "commonly" embodied in State implementation plans but does not suggest that they are contained within all such plans. Adding to the NSPS a requirement that sources must control fugitive coal dust emissions from fugitive sources at the facility by operating according to a written fugitive coal dust emissions control establishes a uniform requirement that applies to all sources in the Subpart Y source category. The final rule also provides very specific requirements regarding the control measures that must

be included in the fugitive coal dust emissions control plans. The fugitive coal dust emissions control plan must identify and describe the control measures the owner/operator will use to minimize fugitive coal dust emissions from each affected facility addressed in the plan. The owner or operator is also required to explain how the measures are applicable and appropriate for the site conditions.

The owner/operator may petition the Administrator requesting approval of a control measure other than those specified in the final rule. The petition must either demonstrate that the alternate control measure will provide equivalent overall environmental protection or demonstrate that it is either economically or technically infeasible for the affected facility to use the control measures specifically identified in the final rule. The final rule clarifies that the owner/operator must submit a fugitive coal dust emissions control plan that includes the alternative measures along with the petition and operate in accordance with that plan while the petition is pending. It further clarifies that while operating in accordance with the plan that includes the alternative control measures, the affected facility is considered to be in compliance with the fugitive coal dust emissions control plan requirements while the petition is pending.

3.4.6.6.2 Plan Requirements

Comment: Many commenters (085, 087, 088, 095, 099, 107, 112, 114, 115, 117, 119, 120, and 121) stated that EPA's proposal for owners/operators to develop a fugitive dust emissions control plan for open storage piles, roadways, and other site-specific sources of fugitive emissions is not clear with respect to the affected sources and information owners and operators are required to include in their written fugitive emissions control plans.

- EPA has failed to properly develop revisions to Subpart Y in accordance with established procedures for developing NSPS that specifically designate each type of affected facility subject to proposed standards. EPA needs to clarify what exactly what affected sources are intended to be addressed by the plan. The requirement for a plan seems to be an attempt by EPA to apply standards to any and all facilities and activities at a coal preparation plant. Additionally, this appears to be an open-ended and indeterminate expansion of Subpart Y. This intent is further reflected in preamble language indicating that proposed procedures for developing a "fugitive dust plan" must include procedures for limiting emissions from "all types" of coal processing and conveying equipment at coal preparation plants (74 FR 25312). It is unclear what EPA means by "all types" of equipment when "coal processing and conveying equipment" has a well-settled meaning within Subpart Y.
- EPA appears to be using inappropriate terminology, at times referring to a "fugitive dust emissions control plan" and alternatively referring to a "fugitive dust plan." Fugitive process emissions are not the same as fugitive dust, or non-process emissions.
- EPA intent is unclear of what information owners and operators are required to include in their written fugitive emissions control plans.
- Proposed rule amendment does not, but should, make clear that an owner or operator can choose from the methods stated in the rule or an alternative method, if one exists, approved by the permitting authority. As currently proposed, any alternative methods would have to be approved by the Administrator. Such a requirement would be unduly burdensome.

- 60.254(b)(3) discusses the need for a fugitive emissions control plan for fugitive sources "at the facility." The use of the term "facility" is inconsistent with its meaning throughout the remainder of the rule and the historical use of the term in this subpart. Applicability is determined on a unit-by-unit basis. Haul roads have not been identified as an "affected facility" per the existing definition under the NSPS. Consequently, EPA needs to rewrite this section in order to remove the confusion generated by the ambiguous wording.
- 60.254(b)(3)(ii) requires the fugitive emissions control plan to specify one or more of several listed control methods for open storage piles and haul roads. The regulation should acknowledge that these measures might not be available when temperatures are below freezing and that prevailing weather conditions may reduce the effectiveness of, or eliminate the need for, a particular control method on a given day.
- It is confusing and unclear as to what roads to be included in plan. Is it all roads associated with the facility, , or is it roads associated only with the footprint of the coal-handling facility and used in the coal-handling itself. All facility roadways are handled in accordance with SMCRA requirements and permits and it would appear that there is no need to duplicate existing regulatory requirements with another layer of oversight. Further, ramps and roadways directly associated with a coal-handling facility often are not defined as "roads" per se; rather, like the structures and buildings, they are simply part of the "facility."

Response: EPA has decided to omit, from the rule, the proposed requirement that the fugitive coal dust emissions control plan address "other site-specific sources of fugitive emissions that the Administrator or permitting authority determines need to be included." EPA agrees with the commenters that Subpart Y should specifically identify each type of affected facility that must be addressed in the fugitive coal dust emissions control plan. As explained earlier in this preamble, EPA also has decided not to address roadways under Subpart Y at this time. Thus, open storage coal piles are currently the only affected facilities that must be addressed by the plan. As pointed out by the commenters, an owner/operator must either use one of the control measures specifically identified in subpart Y or, alternatively, seek approval from the Administrator to use an alternate control measure. Because the NSPS is a Federal standard, we believe it is appropriate for the Administrator to be the one who makes determinations regarding whether an alternative control measure achieves equivalent overall environmental protection. Weather-related issues such as those noted by the commenter should be addressed in the fugitive coal dust emissions control plan prepared by the owner/operator.

The regulatory text in Subpart Y has been revised such that use of the terms "facility "and "fugitive dust emissions control plan" are consistent throughout the rule.

3.4.6.6.3 Plan Implementation

Comment: One commenter (117) stated that the proposed requirements that the permitting authority approve the site-specific fugitive dust plan would be unnecessary. The better and less burdensome approach is to require owners/operators to submit their fugitive dust controls plans to the permitting authority, and those plans would automatically take effect unless the permitting authority objects to the terms of the plan. Another commenter (096) stated that the proposed requirements do not specify which permitting authority will be required to approve fugitive dust emissions plans under the proposed regulation. It is entirely unclear, for instance, whether

fugitive dust emissions plans will be required to be incorporated into a coal preparation plant's title V permit. EPA must clarify these requirements for the preparation and approval of the fugitive dust emissions control plans. At a minimum, the commenter stated that EPA must require that these fugitive dust emission control plans be subject to public notice and comment, whether or not they are incorporated into a plant's title V permit.

Response: The requirement to control fugitive coal dust emissions by operating according to a written fugitive dust emissions control plan is a Federal requirement and is Federally enforceable. The final rule does not require approval of the plans by the Administrator or delegated authority. In addition, the commenter does not identify any provision of CAA section 111 that would require the NSPS itself to establish a notice and comment process for the plans. However, this rule does require the owner/operator to submit the fugitive coal dust emissions control plan to the Administrator or delegated authority to provide an opportunity for the Administrator or delegated authority to object to the fugitive coal dust emissions control plan. The final rule requires the owner/operator to submit the fugitive coal dust emissions control plan to the Administrator or delegated authority before startup of the new, reconstructed of modified facility. If an objection is raised, the owner/operator has 30 days from receipt of the objection to respond with a revised fugitive coal dust emissions control plan. The owner/operator must operate in accordance with the revised fugitive coal dust emissions control plan.

The requirement for the owner/operator to prepare and operate according to a submitted fugitive coal dust emissions control plan that is appropriate for site conditions must be included in the title V operating permit for the source. This and other requirements for title V permits are addressed in 40 CFR part 70.

Finally, to the extent the comment raises issues beyond the scope of the supplemental proposal, EPA has no obligation to respond in this rulemaking.

3.4.6.6.4 Plan Submittal Date

Comment: Three commenters (087, 099, and 119) stated that EPA's proposal requires submittal of the fugitive emissions control plan to the permitting authority 90 days prior to the compliance date. Commenters assume this means the date for conducting the performance test under section 60.8, which is 60 days after reaching maximum production but not more than 180 days. If EPA finalizes its proposed approach and subjects existing units to fugitive emissions control plans, commenters request guidance on how the 90-day requirement is applied with respect to the effective date of the final rule and the proposed April 2008 applicability date. A modified open coal storage pile that is required to submit a fugitive dust plan may be required to comply before the rule is effective and therefore could not meet the 90-day requirement. The 90-day requirement also is difficult to meet with the provision giving the permitting authority discretion to decide what site-specific sources must be covered by the plan. An affected owner/operator would not know what to put in the plan.

Response: The commenter's statement that some open storage coal piles are required to comply before the rule is effective is not completely accurate. With respect to open storage piles, May 27, 2009, is the date used to determine which sources qualify as "new sources" as that term is defined in CAA section 111(a)(2). The rule requirements for open storage piles apply to any

stationary open storage pile sources, the construction or modification of which is commenced after that date. The compliance obligation doesn't arise until the effective date of the revised NSPS rule. However, because CAA section 111(b)(1)(B) provides that standards of performance or revisions thereof shall become effective upon promulgation, all sources that qualify as "new sources" must be constructed in accordance with the regulations. Further because both the requirement that new sources include sources constructed or modified after the date of the proposed regulations and the requirement that the standards become effective upon promulgation are statutory requirements, EPA does not have authority to alter these requirements. The specific situation raised by the commenters is no longer relevant because the final rule does not require approval of the fugitive coal dust emissions control plan.

3.4.7 Reconstructed and Modified Sources

3.4.7.1 Coal Storage Piles

Comment: Many commenters (087, 094, 099, 103, 105, 109, 114, 117, and 119) stated concerns about the inherent difficulties in determining when an open storage pile is "reconstructed" or "modified." There is simply no way that an "increase in the emission rate" of PM or any other pollutant could be measured with any certainty for an open coal storage pile (or roadway). Unlike other "affected facilities" or plant equipment, open storage piles by their nature fluctuate in size and activity. As the Subpart Y amendments are proposed, any time large coal inventory was added to an open storage pile and then reclaimed, Subpart Y potentially could be triggered. If EPA proceeds with the establishment of work practices for coal piles, EPA should provide clarification and guidance as to what constitutes a physical or operational change for an open storage pile or roadway through a subsequent rulemaking proposal that would allow public review and comment. Commenters requested that EPA limit the applicability of the Subpart Y control requirements for coal storage piles to only new sources.

Response: EPA agrees with the commenters that open storage piles are always changing (i.e., coal is being added and coal is being removed for processing) and, for purposes of subpart Y, we do not consider the routine addition and removal of coal to be a physical change or a change in the method of operation. A change to an open storage pile that requires the source's operating permit be opened for revision may be a modification or reconstruction of the storage pile. Instances where a physical change or change in the method of operation of an open storage pile will result in an increase in emissions would be considered a modification or reconstruction (e.g., increasing the permitted size of the storage pile). Changes to the equipment used in loading, unloading, and conveying operations of open storage piles are among the things that can be assessed in order to determine when an open storage pile has been reconstructed or modified. Thus, in the final rule, EPA defines "open storage pile" to mean "any facility, including storage area, that is not enclosed that is used to store coal, including the equipment used in the loading, unloading, and conveying operations of the facility." The inclusion of a definition for "open storage pile" should provide additional clarification as requested by the commenters. In addition, 40 CFR 60.5 provides that when requested to do so by an owner/operator, the Administrator will make a determination of whether action taken or intended to be taken by such owner/operator constitutes construction (including reconstruction) or modification or the commencement thereof within the meaning of this part.

3.4.7.2 Coal Preparation Plant Roadways

Comment: Many commenters (087, 094, 099, 103, 109, 114, 117, and 119) stated that there are inherent difficulties in determining when a plant roadway is "reconstructed" or "modified" and therefore requested that EPA limit the applicability of the Subpart Y control requirements for plant roadways only to new sources. Activities on power plant roadways (onsite haul roads) can include realignment, scraping, grading and paving. Furthermore, the dynamic nature of these types of activities makes it very difficult to determine what would constitute a modification or reconstruction of a haul road. If EPA proceeds with the establishment of work practices for plant roadways, EPA should provide clarification and guidance as to what constitutes a physical or operational change for a roadway through a subsequent rulemaking proposal that would allow public review and comment.

Response: As noted elsewhere, EPA is withdrawing its proposal to regulate roadways under Subpart Y, believing that the requirements of SMCRA are sufficient. However, EPA will continue to assess the issue.

3.5 Subpart Y Testing and Monitoring Requirements

3.5.1 PM Emissions Testing

3.5.1.1 PM Performance Test Frequency

Comment: Several commenters (087, 099, 119, and 117) stated that the proposed requirements for subsequent PM emissions performance test after the initial compliance test are either not needed or require too frequent testing resulting in unnecessary testing.

- For most units, repeat PM performance testing should be required no more often than every five years.
- One commenter stated that once a source has established based on an initial performance test that a PM control device is properly sized and installed to meet the applicable PM limit, stack testing is not necessary to ensure continued compliance. Compliance can be determined through visible observations using procedures like Method 22 or other operating parameters, like BLDS. The recent revisions to subpart OOO, EPA agreed and required no repeat PM performance testing for facilities performing ongoing monitoring under section 60.674 (e.g., those facilities using BLDS, monitoring scrubber parameters, or performing quarterly Method 22 observations).
- One commenter (117) noted that if EPA ultimately adopts the BLDS requirement; it should recognize that facilities that use such devices are likely to operate in compliance with EPA's proposed standards because deviations would be detected before any noncompliance occurs. These facilities should, therefore, be exempt from ongoing opacity monitoring requirements, other than the initial and five-year performance tests. This would be consistent with the approach EPA adopted for the electric arc furnace NSPS under 40 CFR 60 subparts AA and AAa.

Response: The emissions testing requirements for PM, SO_2, NO_X, and CO accomplish two goals. First, emissions measurements are necessary to directly determine compliance with the

applicable emissions limit. Direct measurement will also provide data necessary to verify the accuracy of the annual compliance certifications. The data will also augment the data supporting the regional and national emissions factors and emissions inventories. Second, periodic performance testing will verify the calibration and representativeness of the continuous monitoring system (e.g., BLDS, scrubber pressure drop) and, as necessary, indicate that readjustment is required. EPA does not believe that these goals can be met with emissions testing for each separate source on a 5-year cycle. EPA has, however, provided a provision that, for affected facilities that emit at 50 percent or less of the applicable standard, repeat performance testing is required every 24 months (as opposed to every 12 months). Also, for well-performing (emitting at 90 percent or less of the applicable standard) similar, separate sources using identical control equipment, the final rule allows a single repeat performance test as adequate demonstration for up to four other similar, separate sources. Under this provision, a performance test for each of these similar affected sources is required to be conducted at at least once every 5 years (i.e., one similar source would be required to conduct repeat performance testing every 12 months).

3.5.1.2 Small Fabric Filters PM Performance Test Exemption

Comment: Several commenters (087, 099, 119, and 117) stated that implementation of the proposed provision exempting small fabric filters from PM performance tests may be hindered by the same difficulties regarding calculation of the "design controlled potential PM emissions rate," and conditioning the exemption on use of COMS or qualification for use of the Method 22 alternative is either unnecessary or unreasonable. In light of these problems, EPA should reconsider its approach and, consistent with subpart OOO, utilize ongoing monitoring and corrective action requirements, rather than repeat performance testing, to assure compliance. EPA and states would retain authority under section 60.8 to require performance testing at individual facilities on a case-by-case basis in response to audits of the facility or its monitoring reports.

Response: As explained in response to one of the comments in 3.5.1.5 below, the final rule does not contain any provisions that require the alternative monitoring the commenter refers to (i.e., digital opacity monitoring system or COMS). The final rule does continue to base one of its provisions regarding the frequency of subsequent emissions performance testing on "design controlled potential PM emissions rate" (Mg/year). The final rule includes a definition of the term "design controlled potential PM emissions rate

3.5.1.3 Performance Test Delay for Non-operating Affected Sources

Comment: Several commenters (087, 099, and 119) suggested a revision to the proposed provision authorizing a delay in PM performance testing for any facility that "has not operated for the 60 calendar days prior to the due date of a performance test." Although the commenters support the proposed relief, they suggest that EPA instead allow a grace period for any unit that "is shutdown and not operating" on the due date. This more flexible language would prevent the need for submission of a waiver request for a unit that is unexpectedly shut down prior to testing and would avoid the inequity of denying relief to a unit that might operate only briefly in the 60 days before the due date, but not a sufficient time to complete testing.

Response: EPA believes it is inappropriate to allow a delay in PM performance testing for "any unit that is shutdown and not operating on the due date of the performance test." Because there can be various reasons for a unit to be shutdown and not operating at the time a performance test is required, EPA considers it imprudent to provide a general waiver allowing a delay in testing for these units. In order to consider the merits of each situation, EPA believes it is appropriate to require case-by-case waiver requests for situations where an affected facility is shutdown and not operating on the due date of the performance test, with the exception of affected facilities that have not operated for the 60 calendar days prior to the performance test due date.

3.5.1.4 Use of Method 17 as Alternative PM Test Method

Comment: Several commenters (087, 099, and 119) support EPA's proposal allow use of Method 17 of Appendix A-6 to determine PM concentration for the purpose of complying with subpart Y.

Response: EPA appreciates the commenters' support of its approach.

3.5.1.5 Performance Testing of Multiple Similar Affected Facilities

Comment: One commenter (113) disagrees with the proposal to allow a performance test at one facility to count for an adequate demonstration of performance at "up to four other similar, separate affected facilities." This is flawed because different facilities will be operated differently in different jurisdictions. Each facility may have conditions unique to that facility that could result in performance variations. Also, an operator may operate facilities in different States to a different degree of compliance with CAA title V permit terms and conditions because some States are less effective at enforcing permits than are other States.

Response: The commenter has misinterpreted section 60.255(d) of the supplemental proposal. The term "affected facilities" refers to affected "sources" at the same plant (e.g., five conveyor transfer points that are identically controlled and vented). The provision does not apply to affected sources across plant sites, even if those sources are identical. Section 60.255(d) includes additional conditions that must be met in order to take advantage of the provision (e.g., regarding the level of PM emissions, recommended control device maintenance procedures, type of monitoring, PM testing frequency).

Comment: One commenter (108) states that the EPA proposes an alternative for showing opacity monitoring compliance. This alternative plan proposes that one test per four similar systems. The proposal appears to state that the operator could conduct a Method 22 observation for up to 4 similar affected facilities, and agree to an inspection/maintenance program for the equipment. But observations would be required weekly for each source, and the facilities must still conduct a monthly formal observation for each piece of equipment. So the commenter is confused as to how this is any less than the initial proposal. Also, the proposed rule, at 60.255(d) appears to discuss five facilities (not four), so this is also confusing. This one for four proposals is getting closer to being acceptable, but is still excessive. The commenter suggests an alternative where the EPA should use the inspection program the EPA recently approved for subpart OOO facilities and which is similar to the program proposed in the proposed Subpart Y at section 60.258 of 74 FR 25326.

Response: The "one test per four similar systems" provision included in the supplemental proposal regards emissions testing (i.e., PM, SO_2, NO_X, CO), not opacity testing. Additionally, this provision allows a single performance test for up to four "other" similar, separate affected facilities, for a total of five simultaneous performance tests. The supplemental proposal also included a provision that allows simultaneous visible emission observations using Method 9 for up to three emission points. The final rule retains both of these provisions. However, the final rule includes revised opacity testing and monitoring requirements which are described in the responses to comments below.

Comment: Two commenters (099 and 119) stated that although the commenter agrees with EPA's proposal to reduce the number of initial performance tests required for identical facilities, there are concerns how some of the proposed criteria can be implemented. Their concerns include:

- How a facility would calculate the "design controlled potential PM emission rate" of a control device in terms of Mg per year. Although the design efficiency of the control device and design flow rate may be known, the resulting theoretical annual emissions cannot be calculated without knowing the annual uncontrolled emissions (or how much dust will be vented to the control device in a year).

- The term "design emissions limit" of the "affected facility" in proposed section 60.255(d)(1) is not defined and must be different from the "design controlled potential PM emissions rate" of the control device, which is defined in terms of Mg per year and not in the terms of the applicable PM limit (gr/dscf). The commenter requests clarification regarding this term. The commenter also does not understand how an owner/operator would establish that the performance test results for "each individual affected facility" is 90 percent or less of the standard, if each individual affected facility or control device is not being tested.

- Commenters 099 and 109 do not understand why EPA would condition the provision on compliance with use of the alternative opacity monitoring in proposed section 60.255(e) or (f), given that the facilities already would be subject to periodic opacity performance testing under proposed section 60.255(b)(2), and could use the alternatives under subsections (e) and (f), if applicable. Imposition of this condition has the effect of unnecessarily limiting the facilities' options for monitoring of opacity. If by imposing the alternative opacity monitoring EPA intends to require the facilities to either maintain opacity less than 3 percent based on Method 9 to qualify for use of the Method 22 alternative, or to install COMS, the commenter objects. The commenter does not believe that Method 9 has been adequately demonstrated for determining opacity at 5 percent, let alone "less than 3 percent," and installing COMS on each stack would impose expense that is inconsistent with EPA's goals of reducing the cost of determining compliance at identical facilities.

Response: The supplemental proposal required initial emissions performance testing for all affected facilities. The provision that allows, under certain conditions, simultaneous emissions testing of five similar, separate affected facilities using identical control equipment regards subsequent performance testing. As previously noted, the final rule includes this provision.

The final rule does not contain any provisions that require "design emissions limit" to be determined or that require the alternative monitoring the commenter refers to (i.e., digital opacity monitoring system or COMS). The final rule does continue to base one of its provisions regarding the frequency of subsequent emissions performance testing on "design controlled potential PM emissions rate" (Mg/year). The final rule includes a definition of the term "design controlled potential PM emissions rate.

3.5.2 Visible Emissions Testing

3.5.2.1 Need for Method 9 Performance Tests

Comment: One commenter (114) stated that for affected facilities subject to both an opacity limit and a PM limit, requiring testing for both limits. This is excessive in both cost and effort, especially considering the total contribution of these sources to the emissions at a given operation. Testing for both PM and opacity should not be required.

Response: We disagree with the commenter on two counts. The facility owner must be able to certify compliance with all applicable limits initially and periodically. Because Subpart Y establishes both PM and opacity standards for certain sources, testing for both PM and opacity is necessary to determine an affected source's compliance with those standards. Direct measurement of compliance, including compliance with opacity limits, is critical to a valid certification. Second, conducting opacity emissions testing is a small incremental additional cost to the cost of the initial and periodic PM emissions testing.

Testing for both PM and opacity is important. It is not necessary to show that the PM standard is being violated to support enforcement of the opacity standard. Further, the PM standard is established at a level which will result in the design, installation and operation of BDT; the opacity standard is established at a level which will require proper continuous O&M of such control systems on a day-to-day basis, but not require a more efficient or more expensive control system. In addition, opacity is established as an independent enforceable standard rather than only an indicator of O&M because O&M procedures are particular to each facility (and are impractical to enforce). Opacity standards are a necessary supplement to the PM standards because stack tests are expensive, take a long time to schedule, cannot be performed frequently, and are not indicative of continued O&M.

3.5.2.2 Method 9 Accuracy and Limitations

Comment: Many commenters (085, 088, 095, 099, 107, 109, 112, 115, 116, 117, 119, and 120) restated concerns raised in comments on the original Subpart Y amendment proposal about the accuracy and limitations of the Method 9 test method at levels below 10 percent opacity that would be used to determine compliance with the proposed Subpart Y opacity standards. As long as EPA continues to propose a Subpart Y opacity limit of less than 10 percent, EPA must present compelling proof that an opacity standard below 10 percent can be accurately and reliably enforced by Method 9 observations. Detailed explanations summarizing the basis for the commenters' concerns about Method 9 are presented by two of the commenters (085 and 099).

Response: We disagree with the implication that measurements made with Method 9 for opacity levels less than 10 percent are inaccurate or not suitable for compliance determinations. Foremost, the data used to establish the applicable opacity limit for the rule were collected using Method 9 in a manner consistent with the directions in the method. It is also worth noting that the method provides no restrictions on the use of the method for applicable limits less than 10 percent opacity. The introduction to the method acknowledges the potential for measurement error in applying Method 9 and, in particular, the greater potential for negative bias than for positive bias if ambient contrasts between background and the emissions plume are less than ideal. In addition, we applied substantial allowance for measurement imprecision in establishing the limits. Thus, we believe that the relevant opacity limits established in the rule are reasonable and that Method 9 measurements may be used to determine compliance with those limits.

3.5.2.3 Method 9 Observation Period

Comment: Several commenters (095, 099, 119 and 109) support-EPA's proposal to allow the owner/operator of an affected facility to decrease the observation period for a Method 9 performance test from 3 hours to 60 minutes, but suggest EPA consider a 30-minute test, consistent with what EPA has implemented under subpart OOO. EPA has provided no rationale for requiring a longer observation period in this NSPS than it is requiring under the subpart OOO NSPS. Commenter 109 questions EPA's proposed provision that would allow the performance test observation time reduction only if all 6-minute average opacity readings are less than or equal to 3 percent and all the individual 15-second opacity observations are less than 20 percent during the initial 60 minutes. Commenter 109 notes that the accuracy of Method 9 readings below 5 percent is very questionable. First, allowing an owner/operator to decrease the observation period for Method 9 from 3 hours to 60 minutes under certain circumstances, we believe that a 60 minute test is still unnecessarily long, given the number of emission points and the low expected variability. When EPA finalized its NSPS for subpart OOO, it required only 30 minutes of Method 9 testing for compliance with the fugitive emissions standard in all cases (section 60.675(b)(3), 74 FR 19313, column 3). EPA has provided no rationale for requiring a longer observation period in this NSPS than required under subpart OOO.

Response: EPA continues to believe that a 60-minute observation period is reasonable and has decided that Method 9 opacity testing for a duration of 60 minutes should be required for all affected sources. However, an owner/operator may decrease the observation period for a Method 9 performance test from 60 minutes to 30 minutes if, during the initial 30 minutes of the performance test, all 6-minute averages are less than or equal to half the applicable opacity limit. This is a significant reduction from the standard 3-hour observation period for Method 9 performance tests. We disagree with the commenters apparent assumption that subpart Y and subpart OOO are comparable and that the observation period should be the same in both rules. EPA believes that the Method 9 opacity testing observation period required by subpart Y is appropriate for coal preparation and processing operations.

3.5.2.4 Method 9 Repeat Performance Test Frequency

Comment: One commenter (126) stated that EPA has proposed incentives for sources to operate with minimal visible emissions to qualify for reduced monitoring frequency. The WDEQ's experience is that for any of the BDT technologies to meet the no greater than 5

percent opacity, the control equipment has to be properly operated and maintained. Based on the WDEQ's experience, the trigger levels in proposed section 60.255(b)(2)(i-iii) are not necessary because the proposed opacity limit already requires the control equipment to be properly operated and maintained. If the affected source passes the performance tests, alternative monitoring should be allowed.

Response: The alternative monitoring frequency is intended to be an incentive to improve control measures and operations beyond the minimum necessary and expected to meet the standard. We believe it is appropriate to offer an incentive to facility owners whose equipment and processes perform better than the practices and equipment necessary to meet the minimum requirements and achieve additional emissions reductions.

Comment: Many commenters (085, 087, 088, 095, 099,107, 108, 110 112, 114, 115, 117, 119, and 120) stated concerns about the need for and requirements for EPA's proposal to determine the frequency of repeat Method 9 performance testing for an affected source according to a schedule based on the "maximum 15-second opacity reading" during the most recent Method 9 performance test. This proposal would be incredibly burdensome and unnecessarily stringent for no discernible reason. EPA provided insufficient justification for significantly increasing the frequency of proposed monitoring. Specific reasons cited by commenters include:

- Although it is certainly possible for a Method 9 reader to calculate opacities below 5 percent by averaging observations recorded at zero with those recorded at higher opacities (like 5 and 10 percent), the accuracy and precision of Method 9 readings at levels below 5 (even below 10 percent) are questionable at best. Under EPA's proposal, even a small bias in a single observation could make a facility ineligible for use of Method 22, or result in a requirement to repeat a performance test in 7 days, rather than 30 days. As a result, commenter 099 believes that for facilities with generally low visible emissions, eligibility under EPA's proposal for reduced Method 9 testing and for use of the Method 22 alternative would largely be a matter of chance. Although basing testing frequency and eligibility for alternatives on a source's margin of compliance may be a generally sound concept, EPA has not provided any basis for applying that concept to such small differences in opacity readings (e.g., 3 versus 4 or 5 percent opacity), or to such low opacity levels. The precision and accuracy of full 6-minutes Method 9 averages likely are not sufficient to make those distinctions meaningful, let alone the individual 15-second observations.
- EPA's proposed scheme for determining the frequency of Method 9 testing would require extensive tracking, scheduling, and paperwork. Owners/operators would be required to track for each emission point (1) the alternative being used and the basis for eligibility, (2) the results of the required observation, and (3) the deadline for the next test. For each point, the method and deadline could and probably would change over time.
- For each new Method 9 performance test, the owner/operator would need to provide 30 days notice to the state or local regulatory authority and, for Method 9 tests that cannot be conducted on time due to weather conditions, provide notice of rescheduling and report a deviation from applicable testing requirements (potentially subjecting the facility to enforcement).

- Commenter 108 believes there are no cost savings by using consultants to come out and read Method 9 or Method 22 results. Because of mining regulations, a consultant would need to be accompanied by a certified coal miner, eliminating any cost reduction.
- The administrative burden and costs imposed, to implement the proposal cannot be justified considering the availability of simpler and more effective options. As with repeat PM performance testing, if the goal is to ensure that controls are maintained and that sources are identified and take action promptly to investigate and correct the cause of any visible emissions, then the same result could be accomplished with a combination of equipment inspection and Method 22 readings. EPA adopted this alternative approach in the recent revisions to Subpart OOO by requiring monthly equipment inspections (section 60.674(a)(2)) and EPA has provided no rationale for rejecting the same, or a similar, approach under this rule.
- EPA proposes to provide exemption from the repeat Method 9 performance testing for thermal dryers that continuously monitor scrubber parameters under proposed section 60.256, but only if Method 9 performance tests are conducted concurrently with each PM performance test. Commenter 099 supports this exemption, but questions why Method 9 performance tests should be required. If the facility demonstrates compliance with its PM limit by virtue of proper operation of the scrubber, and monitors to ensure continued proper operation of that scrubber, testing for opacity (which is used only as a surrogate for PM) is unnecessary.

Response: The commenters are correct that the incentives to monitor less frequently provided to very well performing facilities will be predicated on demonstrations of very near zero visible emissions. Such conditions are consistent with findings made during the rule development that indicated that some facilities consistently reported no visible emissions. First, as previously explained, the final rule includes an opacity limit of less than 10 percent for coal handling facilities. The final rule includes a number of changes from the supplemental proposal's opacity testing and monitoring requirements. The final rule bases subsequent Method 9 opacity testing frequency on 6-minute average opacity readings from the most recent performance test. As an alternative to subsequent Method 9 opacity testing, the final rule provides an option that includes daily walkthrough observations consisting of a single 15-second observation (visible emissions or no visible emissions) of each affected facility and requires that corrective actions be conducted when any visible emissions are observed. If visible emissions are still observed after corrective actions have been conducted, a Method 9 performance test is required within 45 operating days.

EPA agrees that the monitoring provisions of the final rule will increase the recordkeeping and reporting burden to implement the rule. EPA rules require documentation of any measurements and the associated process operating conditions and regulatory compliance requirements; however, we disagree that this rule imposes any additional record keeping or reporting burden specifically in order to provide for the reduced monitoring frequency allowances. The subject provisions do not change those generic requirements. It is also worth noting that the PM and opacity limits are two distinct and separate applicable requirements of this rule. Opacity is an independent applicable requirement that is not necessarily a surrogate of the PM emissions limit or vice versa. Further, there is no potential for enforcement action for a test delayed by weather or other unforeseen conditions (see section 60.8(d)).

Comment: One commenter (089) suggests that EPA further simplify monitoring requirements for plants that have little or no opacity. Requiring weekly, 10-minute observations at numerous emission points will necessitate that plants keep 3 or more certified observers at the plant at all times. Because recertification is required at 6-month intervals, the plants would lose the services of 2 to 3 staff members for a day or two at a time. Small plants could be greatly encumbered by losing this much staff at one time. Specifically, EPA could:

- Increase the duration of time between monitoring intervals. Although a requirement of annual Method 9 readings would be most appropriate, commenters 089 and 124 believes that the demands of monitoring necessitate that such readings should not be required any more frequently than quarterly. In between scheduled readings, daily walkthrough observations could be required, which would consist of a single recordable observation of either visible or no visible emissions. If any opacity is observed, corrective action would be triggered and the problem would be corrected.
- The supplemental proposal does not seem to appreciate that numerous new coal-handling systems, including many of those operated by commenter 089's members, do not have observable opacity absent a problem with the facility. The final rule should incentivize design of systems with no observable opacity and recognize that clean facilities should not have to spend inordinate amounts of time reading zero opacity.
- The requirement for a stack test on a baghouse every two years for facilities operating at 50 percent or less of the applicable limit should be removed altogether or modified to require no more than a onetime initial test. The baghouses used for coal-handling emission control are off-the-shelf items that should perform adequately for such applications. The vents on these baghouses are so short that facilities at which they are used would have to add an extension onto the ducts to adhere to the sitting requirements for PM testing. The only compliance-related question is whether these baghouses are operated and maintained according to the manufacturer's specifications. Between opacity observations and pressure drop readings, operators of facilities using small filters can adequately assess whether the filter is functioning properly. A stack test will not disclose anything that is not apparent from a visible observation. In short, stack testing of such small filters is not cost effective and does not provide data not otherwise obtainable through more accessible means.

Response: As described in the previous comment response, the final rule includes a number of revisions to the testing and monitoring requirements. Under certain conditions, the final rule provides for an increase in the duration of time between monitoring intervals and an alternative to subsequent opacity testing that consists of daily 15-second visible emissions/no visible emissions observations of each affected facility. For affected facilities complying with this option and that consistently observe no visible emissions, Method 9 performance testing is required at least once every five years. Also, as previously explained, the final rule includes provisions that under certain conditions result in reduced PM emissions testing requirements, beyond the two years referenced by the commenter, for baghouse-controlled coal-handling facilities such as those described by the commenter.

3.5.2.5 Method 9 Application to Affected Sources in Enclosures

Comment: Two commenters (099 and 119) requested that EPA clarify in the final rule that visible emission testing on sources of fugitive emissions that are enclosed such that the criteria in proposed section 60.257(a)(2) (e.g., distance from the source and sun angle) cannot be met should be performed on the enclosure, and not on the equipment inside the enclosure. Commenter 089 states that EPA should clarify that not every opening in a coal-handling system requires observations because there may dozens of openings along a conveyor system where coal moving along a belt is the only activity which would not require opacity observations. Not all of these openings are considered transfer points where dust is potentially generated and would typically be aspirated to a dust collector or other equivalent controls would be provided. Additionally, it may not be feasible to read opacity on all openings while the system is in operation especially given the number of these non-emitting openings and the fact that many plants only load coal for a short time at the outset of a given day.

Commenter 089 also notes that most new plants will be designed to operate with no opacity, and minimizing the labor necessary to operate the plant should be one of the benefits of designing a clean coal-handling operation. These plants will have no observable opacity from their coal-handling operation. If the number of emission points requiring observation cannot be minimized, even conducting weekly 10-minute readings could be tremendously burdensome. One alternative would be to allow for daily observations consisting of a single reading while the system is operating. If any opacity is observed, corrective action would be triggered and the problem would be corrected.

Response: As explained in the response to comment 3.4.6.5, EPA has determined that if a building in which affected coal processing and conveying equipment (e.g., breakers, crushers, screens, conveying systems), coal storage systems, and coal transfer system operations are enclosed is found to be in compliance with Subpart Y limits then the affected facilities enclosed in that building also are in compliance.

Emission control and monitoring requirements under Subpart Y apply to all openings in an enclosed conveyor system where fugitive coal dust emissions potentially can be released to the atmosphere. However, it is common for sources to monitor emissions only at transfer or drop points on conveyer belts. We agree that the visible emissions limits apply to emissions releases from the affected unit or operation to the atmosphere. Releases from a process inside an enclosure such as the conveyor system described by the commenter where the dust generated is collected and routed to a control device, are not subject to the opacity or other visible emissions limits in this rule. Finally, as previously explained, the final rule includes revisions to the opacity testing and monitoring requirements.

3.5.3 <u>Periodic Visible Emissions Compliance Monitoring</u>

3.5.3.1 Visible Emissions Monitoring Procedure

Comment: One commenter (113) agrees with the proposal to require daily opacity monitoring for all affected facilities. In the proposed rule, it is not clear whether this frequency would apply only to facilities where Method 9 observations have resulted in readings of less than 3 percent, or

if it would apply to all facilities. The commenter supports EPA's logic for requiring more frequent opacity observations. It makes the most sense to require at least daily opacity observations - not only for the facilities with better performance but for facilities where opacity is at or exceeding 5 percent. Commenter 113 recommends that EPA clarify that the daily opacity monitoring schedule applies to all Subpart Y affected facilities.

Response: As described in the responses to previous comments, the final rule includes revisions to the opacity testing and monitoring requirements. The final rule requires that all affected facilities conduct initial Method 9 opacity testing. The frequency of subsequent opacity testing is predicated on each affected facility's performance during their initial compliance test. The final rule includes an option to conduct daily visual observations of each affected facility in lieu of subsequent Method 9 opacity testing.

Comment: Many commenters (086, 087, 089, 093, 099, 103, 107, 108, 109, 115, 117, and 119) objected to the proposed visible monitoring procedure as being unreasonable, burdensome, too complex, and confusing. Reasons cited by individual commenters for opposing the proposed procedure include the following.

- Proposed procedure would significantly expand the number of visual emission evaluations that an affected owner or operator will be required to perform using Method 9 and Method 22 for each affected source.
- Proposed schedule sequencing for determining repeat Method 9 tests is unnecessarily complex and confusing and has provided no basis for the frequency at which these tests need to be conducted (see Section 3.5.2.4 of this document).
- Proposed requirement that all 6-minute averages in the initial 60 minutes be less than or equal to the greater of 3 percent opacity or "half the applicable limit" is not reasonable or warranted. Method 9's precision and accuracy at the 3 percent level is questionable at best and EPA has provided no rationale for requiring a facility that does not achieve 3 percent to test for a longer period. Specifically, EPA has provided no data to suggest that PM emissions are significantly more variable over time when opacity is at the proposed limit of 5 percent than when opacity is at 3 percent.
- EPA should standardize the criteria for Method 9 testing of fugitive emission sources between proposed Subpart Y and subpart OOO. The minor differences between the two rules do not appear to be justified on any technical basis and could lead to confusion. Because subpart OOO has been finalized, the Subpart Y provisions should be made consistent with subpart OOO. Section 60.675(c)(1)(i)-(iii).
- Required schedules for Method 9 and Method 22 readings do not reflect the intermittent activities that take place at a typical coal mine. Because most coal mines do not run all the facilities handling systems at the same time, the observer would have to set up to do the Method 22's or Method 9 observations for those locations that are operating, then take a break and come back later during the week to do the remaining points. So the time to do the observations will be much more time demanding than is envisioned by the regulators. It is difficult now for remotely located Wyoming coal mining operations to schedule a qualified and certified individual to do semi-annual readings throughout portions of our remotely located facilities. Trains rarely run on schedule, so some or all of the processes are unable to

be tested when the consultant is scheduled to be at the mine. The commenter does not see how the mines can comply with a requirement for daily Method 22 readings, with a qualified individual, without missing some readings. This will be a difficult standard for nearly any mine to comply with.

- All affected facilities are required to perform daily Method 22 for 10 minutes or weekly three hour Method 9's for any source which has a single 15 second reading which exceeds 5 percent opacity, where the frequency and duration of inspections may be appropriate for title V facilities, which are staffed for this type of detailed program, but it appears well beyond what Congress intended for non-Title V facilities. EPA has not adequately distinguished between the requirements between title V and non-title V facilities. The sheer cost and staffing difficulties required by this method is a major issue.
- Proposed procedure requires that opacity be less than 5 percent for all 15-second interval readings in order to extend opacity observations from weekly to monthly and zero opacity for all 15-second intervals to extend the Method 9 frequency to 120 days. Single 15-second interval readings, particularly at levels as low as 5 percent, are poor indications of proper operation and is an unreasonable basis for reducing monitoring obligations. Commenter 103 stated that a more reasonable threshold for reduced monitoring would be 50 percent of the required 6-minute Method 9 observations.

One commenter (117) provided an alternative monitoring protocol which included (1) Initial performance tests for each affected facility pursuant to Method 9; (2) thereafter, quarterly 10-minute Method 22 observations for each unit; (3) the facility must conduct monthly inspections of the applicable pollution control equipment. This inspection shall include observations of the physical appearance of the equipment; and (4) The facility must conduct a Method 9 performance test at least once every five years.

Response: As explained in the responses to previous comments, the final rule includes revisions to the opacity testing and monitoring requirements. EPA believes that these revisions reduce the complexity and burden associated with the monitoring frequency and incentives thresholds and, thus, address the concerns described by the commenters. Further, some of the commenters' suggestions have been incorporated into the revised opacity testing and monitoring requirements.

3.5.3.2 Coal Truck Dump Monitoring

Comment: Two commenters (095 and 126) stated that EPA is requesting comment on whether requiring an annual average instantaneous opacity from 10 dumps is appropriate as an alternate to the Method 22 for other affected facilities. The commenter clarified that the control effectiveness is not an annual average and WDEQ uses this 10 truck dump approach to evaluate whether BACT is being continuously maintained at any given truck dump. The 10-truck evaluation currently in use in Wyoming is not a compliance determination. If WDEQ finds the 10-truck opacity greater than 20 percent, corrective action is required to return the dump to BACT requirements. The commenter does not support the rule mandating how a permitting authority determines the control effectiveness of truck dumps nor the trigger levels (section 60.255(b)(2)) proposed for other coal-handling equipment. Rather, the commenter supports including truck dumps as part of the fugitive emissions control plan. This would allow the permitting agency to tailor the alternate monitoring to fit their source and type of controls employed. One option for alternative monitoring would be the control effectiveness test using

the 20 percent opacity limit as determined by taking the maximum instantaneous opacity of fugitive emissions observed from each truck dump activity, averaged for ten trucks or less as determined by the permitting authority. Truck dumps are intermittent sources and typically will always show compliance using Method 9. Absent of any other EPA methods for evaluating intermittent sources, the commenter supports an opacity limit of no greater than 5 percent opacity.

Comment: Four commenters (095, 117, 122, and 124) stated that EPA misinterpreted the WDEQ method for monitoring truck-dump facilities and expressed concerns with applying the WDEQ method for the purpose of determining compliance with some, as yet unknown, opacity standard.

- The method is neither a Reference Method, nor an Equivalent Method, as defined by the Wyoming Air Quality Standards and Regulations. Furthermore, the existing opacity certification training protocol does not address the observation technique the State of Wyoming is using. The WMA Regulatory Affairs Air Quality Subcommittee and the WDEQ agreed to initiate a study of an alternative opacity monitoring protocol for truck dump systems just over a year ago in May. This protocol defines a process to designate an appropriate averaging time for 15-second opacity readings taken during the part of the operation in which the largest amount of emissions are expected to occur. A preliminary summary of the results of the study, which just ended on June 30, 2009, show that approximately 96 percent of the average opacity readings fell at 15 percent or lower (117).
- An opacity limit based solely on the small amount of time that the truck is dumping should not be comparable to a opacity limit on a continuous point source such as a stack. Opacity read only while the truck is dumping, inappropriately skews the results to read the worse-case scenario and don't take into account the time when the emissions are non-existent due to the non-continuous nature of this particular source (124).
- Commenters recommended as a better and more reasonable approach to monitoring truck-dump facilities would be: (1) An initial compliance test using the visual observation protocol provided in Reference Method 9. Compliance with the 15 percent opacity standard would be determined by averaging the 15-second opacity readings made during the duration of three separate truck dump events. Each test would commence when the truck bed begins to elevate and conclude when the truck bed returns to a horizontal position. This would provide a reasonable evaluation of opacity during the actual dumping event, as opposed to Method 9 protocol that would allow for observations long after the dumping event terminates. (2) Thereafter, an owner/operator would conduct quarterly Method 9 compliance test consistent with the above described truck-dump protocol. (3) Owners and operators would supplement their quarterly Method 9 compliance testing with monthly visual observations of the physical appearance of the equipment and the requirement to repair any deficiencies found.

Comment: One commenter (122) stated that when utilizing a new methodology for opacity compliance standards will take time to develop the proper protocols. The current standard utilized in Wyoming is for the 6-minute Method 9 has been criticized in the past, but it may be the most representative approach for non-continuous or sporadic emissions sources. Typically, the 6-minute Method 9 readings have been taken quarterly. The time between truck dumps are

times of zero potential emissions from the truck dump control system. In some ways the 6-minute Method 9 reading is very appropriate because it reflects most activities: the dumping, the coal passing through the hopper, and the periods of time when no activity is occurring. Opacities read only when trucks are dumping skew the results to read worse than they really are because they do not take into account the time when emissions are non-existence due to the non-continuous nature of truck dumping. It is important to adopt an opacity standard that is associated with the methodology as required by Method 9 procedures. If EPA wants to modify the existing requirement on truck dumps for Wyoming, an appropriate requirement would be to utilize the 6-minute Method 9 and set the opacity standard at greater than 10 percent. This standard would likely be appropriate for a variety of truck types (i.e. rear and belly dump) and control systems (i.e. stilling sheds, baghouses, and water spray bars). Commenters 112 and 115 stated that until the necessary foundation for possible NSPS regulation can be established for coal unloading, any revision to Subpart Y must expressly withdraw the Agency's interpretation of the late-1990s that Subpart Y applies to coal unloading at coal preparation plants.

Response: As explained in the response to comment 3.4.6.4, EPA continues to believe it is appropriate to require coal truck dump operations to be subject to the same opacity limit as other coal-handling facilities. Data indicate that the various control measures currently used on truck dump operations are capable of meeting the final rule's opacity limit of less than 10 percent. However, due to the intermittent frequency of coal dumping, EPA has determined that it is inappropriate to require the same testing and monitoring of opacity emissions from coal truck dumps as are required for other affected coal-handling facilities subject to opacity limits. The variability in the number of coal trucks during any given period is likely to render Method 9 opacity testing over a 60-minute period meaningless. EPA disagrees with commenters who believe that opacity read only while the truck is dumping, inappropriately skews the results to read the worse-case scenario because it doesn't take into account the time when the emissions are non-existent due to the non-continuous nature of this truck dump operations. In fact, EPA believes that opacity measurements taken during truck dumping is the appropriate time to conduct Method 9 opacity testing. We agree with other commenters who believe that this approach would provide a reasonable evaluation of opacity during the actual dumping event, as opposed to Method 9 protocol that would allow for observations long after the dumping event terminates.

In the supplemental proposal, EPA requested comment on whether requiring an annual average instantaneous opacity from 10 truck dumps is appropriate as an alternate to monitoring required for other affected facilities. After considering the public comments, we have decided to include in the final rule an approach to monitoring truck dump operations that was suggested by a commenter. Owners/operators of all affected facilities would be required to conduct an initial compliance test using Method 9. Compliance with the less than 10 percent opacity standard will be determined by averaging the 15-second opacity readings made during the duration of three separate truck dump events. A truck dump event begins when the truck bed begins to elevate and concludes when the truck bed returns to a horizontal position. The final rule also requires monthly visual observations of the equipment and expeditious maintenance if any deficiencies are observed. Finally, subsequent Method 9 opacity testing using the three-truck dump procedure is required every 90 days.

3.5.4 CEMS

Comment: One commenter (096) stated that EPA must require use of CEMS for all pollutants subject to Subpart Y emissions limits to assure compliance with the limits. In comments on the original Subpart Y proposal the commenter provided a detailed justification for requiring CEMS to monitor stack PM emissions and hereby incorporate by reference those arguments. In addition, the commenter presented the following reasons to support their statement.

- Reliance on periodic stack tests supplemented with intermittent visual assessments violates the CAA, which requires standards of performance to reflect "application of the best system of continuous emissions reduction" (42 U.S.C. §7411(g)(4)(B) (emphasis added)). The proposed testing schedule for coal dryer PM stack tests (annual or biannual, depending on test results) provides only a snapshot of the affected source's compliance status. Commenter referenced their comments submitted to EPA on the original subpart Y amendment proposal for a detailed justification to require CEMS to monitor stack PM emissions.
- EPA itself has recognized that "for rules that establish PM emission limits, we believe that PM CEMS are the appropriate technology for compliance monitoring" (69 FR 1786, 1791, dated January 12, 2004). Similarly, in a recent enforcement case, EPA argued that periodic stack tests provide no certainty as to whether a source is in compliance with its PM limit on the vast majority of days when no test is performed. U.S. v. Cinergy Corp., No. 1:99-cv-01693-LJM-JMS (S.D. Ind. Feb. 6, 2009) Trial Tr., Vol. 5-1050:17-1051:4 (Cross Exam of Richard McRanie). Reliance on irregular stack testing only invites problems when prep plants apply for operating permits. EPA's title V regulations provide that "[a]ll . . . permits shall contain . . . monitoring . . . requirements sufficient to ensure compliance with the terms and conditions of the permit" (§70.6(c)(1)). In failing to adopt adequate monitoring requirements into the NSPS, EPA is setting up a scenario in which activists will have to object to individual operating permits to ensure that those permits contain monitoring requirements sufficient to assure compliance. EPA could avoid the laborious process of responding to objections to multiple operating permits by simply codifying into the NSPS monitoring requirements that satisfy the mandate to assure compliance with the underlying limits.
- BACT emission limits must be met on a continual basis at all levels of operation and must be federally enforceable, which requires practical enforceability (see §52.21(b)(17); EPA, NSR Workshop Manual at B.56 (Draft 1990)). Practical enforceability means the source must be able to show continuous compliance with each limitation or requirement. That is why EPA's own NSR Manual states that "[e]mission limits should reflect operation of the control equipment, be short-term, and, where feasible, the permit should require a continuous emissions monitor."
- Although use of COMS to supplement periodic stack tests yields a more accurate picture of compliance than visual opacity monitoring methods, as EPA itself has recognized, there are serious problems with the assumption that opacity is an accurate surrogate for PM emissions. EPA has explained that the relationship between opacity and PM levels "is particularly uncertain for short term and site-specific analyses" (72 FR 18,428, 18,431, dated April 12, 2007) such as the brief periods of visual opacity monitoring that EPA has proposed for affected facilities at coal preparation plants. EPA has also observed that "opacity is directly

related to particle size, with particles of an aerodynamic diameter of approximately 1.0 micrometer having the greatest potential for impairment of visibility, or increased opacity. As particles increase in size, their impact on opacity diminishes, despite the fact that their mass may increase" (72 FR 18,432).

Another commenter (093) agreed with EPA's decision to list a PM CEMS in the April 28, 2008, proposal as an option for compliance monitoring. This commenter questions EPA's decision to eliminate the PM CEMS language from the supplemental proposal. The use of PM CEMS may become more widespread in the future and may be used by companies that are subject to more than one type of PM limitation at a site also subject to the subpart Y NSPS.

Response: EPA supports the use of CEMS whenever possible. However, we continue to believe that it is not "feasible" at this time to install and operate PM CEMS on Subpart Y affected facilities. Installing and operating a PM CEMS is not a trivial cost ranging from $100,000 to $150,000 or more to install, and then $50,000 per year to operate. Further, we do understand that there are relationships between opacity, PM mass emissions, and the type of control measure applied. We have established limits and monitoring that reflect that understanding and are representative of the data we collected from the best operating units in this category. Also, for clarity, we note that the NSR workshop manual cited by the commenter discusses BACT, not NSPS standards. EPA has also determined that CEMS for SO_2, NO_X, and CO will not be required by the final rule at this time. EPA will continue to assess the development of CEMS, including their costs.

3.5.5 COMS Alternative

Comment: One commenter (113) supports the proposal to allow a COMS as an alternative, granted that the 5 percent opacity limitation is maintained for those facilities and that the COMS is used to ensure compliance with the 5 percent limit. Commenter 093 proposes that EPA should conclude that COMS can substitute for other kinds of continuous monitoring, such as BLDS for all mechanical vents with baghouses and pressure drop and water-supply-pressure monitoring for all mechanical vents with wet scrubbers.

Several other commenters (087, 099, and 119) stated that EPA's proposal allowing the use of COMS in lieu of Method 9 performance testing must be limited to those facilities willing to accept the potential measurement errors. EPA should make clear that States should not rely on EPA's addition of the COMS option as a rationale for attempting to require use of COMS at Subpart Y facilities. There are many sources of COMS measurement error, and measurements at levels below 10 percent opacity are fundamentally more difficult. Many of the important specifications in EPA's current performance specification for COMS (PS 1), which EPA proposes to rely on in this rule (proposed section 60.255(f)(1)) have not been revised since 1975. And EPA has never promulgated ongoing QA requirements. In 2008, ASTM issued a revised Standard Practice for Opacity Monitor Manufacturers to Certify Conformance with Design and Performance Specifications, D6216-07. To disclose the measurement uncertainty for low level opacity measurements by COMS, the ASTM standard includes an "error budget" for COMS (D6216-07, Appendix X1). The ASTM budget is 5.7 percent opacity for existing monitors, and 1.8 percent opacity for monitors certified under the revised standard. If the ASTM budget is correct, a monitor meeting PS 1 could exceed EPA's proposed standard based on measurement

error alone. However, even the error budget for COMS meeting the revised standard is significant relative to a 5 percent opacity standard. Finally, EPA has provided no COMS data to support achievability of the proposed opacity standard using COMS.

Response: EPA does not agree that COMS should be a substitute for continuous monitoring as suggested by the commenter, but does agree that the use of COMS is an appropriate alternative to conducting Method 9 opacity testing. EPA made significant changes to PS1 in 2000, including most of the calibration procedures and, therefore, we disagree with the commenters' assertion on this point.

3.5.6 Digital Opacity Compliance System Alternative

3.5.6.1 Digital Opacity Compliance System in Subpart Y Rulemaking

Comment: Several commenters (087, 099, and 119) objected to the use of a digital opacity compliance system based on a site-specific plan as an alternative to Method 9 performance testing. One commenter (099) presented detailed reasons in their comments for opposing the use of a digital opacity compliance system for Subpart Y on the basis of technical considerations and legal procedural requirements for establishing such an alternative method. If EPA believes that a digital opacity compliance system is a viable new technology for determining the presence of visible emissions in lieu of Method 22, or establishing the opacity of a visible plume in lieu of Method 9, EPA must develop a proposal with sufficient detail and supporting data to allow for meaningful comment on the new method, just as EPA would do before approving a new technology to measure SO_2, PM, or NO_X. EPA cannot use a provision that purports to provide authority for approval of an option that is limited to determining the presence of visible emissions at levels less than 3 percent opacity, as a back door to approve a system for determining actual percent opacity over a range from zero to 60 percent (as EPA's reference to draft PRE-008 suggests). If EPA intends to use the Subpart Y amendment rulemaking to approve a system to determine percent opacity in lieu of Method 9, EPA must re-propose the rule to make that intent clear and solicit formal comment on the numerous regulatory issues such an approval would raise.

Response: The proposed approach to approving the use of the digital opacity measurement method mirrors the alternative method approval process allowed for any alternative test method. That is, we are not proposing a blanket approval of this or any other technology by circumventing the public review and comment process. Instead we are alerting the affected community to one tool that may be approvable on a site-specific basis in a manner consistent with the general provisions of 40 CFR 60 (section 60.8(b)), and the Agency's delegations manual 7-119 and 7-121 (see http://www.epa.gov/ttn/emc/guidlnd/gd-022r3.pdf).

3.5.6.2 Digital Opacity Compliance System Implementation

Comment: One commenter (108) states that EPA offers cameras as an alternative to the Method 9/Method 22 inspection regime. Camera methodology is available for stack sources, but is not an approved method for fugitive sources. What happens if cameras are not operating? How long are we supposed to keep picture data? Can we invalidate photos taken during a high wind dust storm event? Can we invalidate photos taken when interference from fugitive dust sources in the

area interferes with the photo? Additional concerns are the high cost of operating cameras, and data recovery if the camera or series of cameras goes offline? Is the missed data a violation? Will backup cameras with backup data recovery systems be needed in order to avoid a violation? If so, all costs above are doubled.

Response: We agree that the commenter raises several concerns that the source owner should consider and address in developing a proposal to apply this or any other alternative method. The issues raised are in most cases the same ones the source owner would address in developing a monitoring plan based on a Method 9 or Method 22 observer (e.g., back-up observer, training and certification, data storage and retrieval, missing data). It is worth noting that potential for interferences and adverse weather conditions are issues addressed in Method 9 and would in almost every case also apply to an alternative visible emissions measurement method. In such cases, the Method 9 applicability criteria could serve as guidance when applied to alternative technology.

3.5.7 Process and Control Device Operation Monitoring

3.5.7.1 Fabric Filter Bag Leak Detection Systems (BLDS)

Comment: A broad range of comments were received on the proposed requirement to use BLDS for fabric filters with a controlled potential PM emissions rate of 28 tons per year or more.

- One commenter (103) supports EPA's proposed to require BLDS only for those fabric filters used to comply with Subpart Y that have designed controlled potential emission rates exceeding 28 tons per year. The commenter concurs with EPA's conclusion that such systems are cost prohibitive for small, intermittently operated units.
- One commenter (096) stated that because there is a high potential for significant emissions from fabric filters of any size, EPA must require installation and use of a BLDS at each affected facility using a fabric filter to comply with Subpart Y. EPA's analysis to support the decision to exempt small fabric filters from the requirement to use a BLDS is flawed for two reasons: (1) a failure to provide support for the cost estimate or to account for cost differentials in BLDS used for large and small fabric filters; and (2) a failure to consider the potential for high emissions from "smaller" fabric filters. The commenter provides additional details to support the cited reasons. EPA must base its decision on whether to require BLDS for all fabric filters on the absolute potential for significant emissions from fabric filters of all sizes, rather than a proportional comparison of emissions between larger and smaller fabric filters.
- Two commenters (114 and 119) requested that no fabric filters be required to use a BLDS and each fabric filter be monitored for visible emissions on an ongoing basis The commenter has concluded that these visual observations should detect significant problems such as holes and tears in the filter medium or if the filter becomes unseated. These concepts are true for sources with potential emissions greater than 28 ton/day as well. The use of a BLDS is too expensive considering for what fabric filter operating problems they might alert the operator that would not be detected by visible emissions checks.

Response: EPA continues to believe that the requirement for BLDS for larger baghouses but not for smaller ones is justified as discussed in the supplemental proposal (74 FR 25315). The costs

are considered unjustifiably high for smaller fabric filters with low potential emissions at Subpart Y affected facilities. Because potential emissions from a bag leak are more significant for larger fabric filters and because the cost of BLDS would not be significantly different for small or large fabric filters, the final rule requires a BLDS only for those fabric filters with a design controlled potentialPM emissions rate of 25 Mg (28 tons) or more. For smaller fabric filters, the opacity monitoring requirements provide ample assurance that smaller fabric filters are operating properly, while for larger fabric filters, the BLDS requirements provide an added degree of assurance that the more significant sources of PM emissions are well-controlled on a continuous basis.

3.5.7.2 Wet Scrubber Operating Parameters

Comment: One commenter (085) stated that although pH and water flow are important surrogate parameters for monitoring SO_2, the appropriate pH and flow rate is unit specific and a blanket "one size fits all" approach is inappropriate. The pH and flow rate will vary depending upon which alkaline solution is used and the characteristics of the thermal dryer itself. Approximately 19 of the remaining 20 bituminous thermal coal dryers in the eastern United States are 'once through' fluidized bed thermal coal dryers designed and built by FMC, ENI, McNally, or Heyl & Patterson. A McNally design is different from the Heyl & Patterson design which is different from the FMC design. Because one McNally design could operate effectively at a given pH and flow rate does not necessarily mean the Heyl & Paterson would also. A unit utilizing magnesium hydroxide will have different pH and flow rate characteristics and requirements than a unit using sodium hydroxide.

Response: EPA has concluded that, pH and water flow rate are appropriate parameters to be monitored for thermal dryers using wet scrubbers. We determined that water flow rate, which is a measure of volume of water delivered in a period of time, is the more relevant parameter to monitor. Water supply pressure, which is a measure of the force of the water, is a parameter that is related to measurement of flow rate. The final rule includes these parameters as continuous monitoring requirements. Because the parameter values for each affected thermal dryer will be based on site-specific performance testing, the commenter's concern regarding a "one size fits all" approach is unfounded.

3.5.7.3 Coal Dryer Temperature Monitoring

Comment: One commenter (103) stated that the existing Subpart Y requires an owner/operator of a thermal dryer to continuously monitor the temperature of the gas stream at the exit of the thermal dryer. However, some coal drying systems operate at relative low temperatures, especially at the coal mixture interface. Due to relatively low temperature designs of pulverized coal injection system dryers, the basis, benefit, or purpose served by such temperature monitoring is not clear, especially for thermal dryers that have high temperature interlocking (automatic burner shutoff) safeguards. Furthermore, the temperatures of the drying gas stream are well below the ignition temperature of the media (coal) and there is no risk of ignition (or the potential for increased emissions) when performing the drying operation. We do not believe removal of this obligation from the proposed rule will pose any risk of increased emissions. The commenter requested that EPA eliminate this unnecessary compliance burden.

Response: EPA has determined that the requirement to continuously monitor the temperature of the gas stream at the exit of the thermal dryer is not necessary. This requirement is not included in the final rule.

3.5.8 Recordkeeping and Reporting

3.5.8.1 General

Comment: One commenter (121) stated that because all coal-handling equipment, transfer points, etc. have undergone initial visible emissions compliance testing prior to final approval of State Air Emissions permits, subsequent formal visible emissions testing has not been required. Records are kept of emission control facilities to ensure compliance with opacity requirements. To transition to the proposed opacity monitoring requirements on modified coal-handling equipment seems overly extreme and burdensome and very confusing, especially in light of the fact that a particular transfer point may be surrounded by many other existing sources not subject to the revised Rules. We do not see in the rules any demonstrable benefit from increasing the monitoring to the extreme as proposed by EPA. The increased burden of monitoring, recordkeeping, and reporting appear to be a solution in search of a problem.

Several commenters (087, 099, and 119) stated that for recordkeeping and reporting, EPA has essentially republished its original proposal to require affected owners and operators to maintain in on-site logbook records of: (1) periodic visual observations; (2) the amount of coal processed in a month; (3) the amount of chemical stabilizer or water purchased for use; and (4) a monthly certification of operation of any dust suppressant system in compliance with manufacturers recommendations. One commenter (009) referenced and reiterated comments made by the commenter on the original proposal that only the records of the periodic observations and corrective action have any usefulness. The other records specified in EPA;s proposal should not be required.

Response: EPA does not agree that the proposed monitoring, recordkeeping, and reporting requirements are overly burdensome. Similar information is required by other rules. We need direct compliance information as often as reasonable, and monitoring provides useful information that is reflective of the facility's compliance status. The rule provides for decreased testing in specific cases. In addition, reporting and recordkeeping requirements are important tools in helping to ensure compliance with standards.

Comment: T wo commenters (114 and 119) stated that 60.258(a)(5) establishes the requirement to keep a logbook that includes a monthly certification that the dust suppressant systems were operational when any coal was processed and that manufacturer recommendations were followed for all control systems. 40 CFR 60.258(a)(6) requires a monthly certification that the fugitive dust emissions control plan was implemented as described. Both of these requirements are unnecessary. Semi-annual deviations reporting and annual compliance certification are already required under Part 70.6(a)(3)(iii). This makes the requirement for certifications in Part 60.258 redundant.

Response: The monthly certifications required in section 60.258 are to be documented in the logbook maintained by the coal preparation and processing plant. The monthly certifications,

along with notations regarding any variances from the requirements, would provide information necessary to comply with the section 70.6(a)(3)(iii) requirement to submit reports of any required monitoring, including identification of all instances of deviations from permit requirements, at least every 6 months. EPA does not consider the monthly certifications redundant and is retaining the monthly certification requirements in section 60.258.

Comment: One commenter (108) stated that the monthly documentation of dust suppression systems required in section 60.258 demonstration is acceptable, and should be utilized in lieu of the complicated and confusing opacity monitoring protocol that the EPA proposes at 60.255. This monthly documentation and certification that the dust suppressant systems were operating properly is similar to the procedures the State has implemented. We suggest the EPA adopt the maintenance program supplemented with 1-hour Method 9 readings taken each one to five years. This frequency of inspection and certification is feasible with existing staff, is not overly burdensome, and is realistic for us to achieve. That would seem to be more than adequate given the minor emissions that these sources generate. It is also consistent with what EPA is requiring of subpart OOO sources, which are similar in nature. Implementing a system to document work practices each month, instead of a convoluted methodology that could entail daily 10 minute Method 22 readings or weekly Method 9 readings is consistent with how the State of Wyoming has managed these systems. It is economical, logical, and practical, while also providing the proof that the systems are operating properly.

Response: As explained in previous responses to comments, the final rule includes revised opacity testing and monitoring requirements that are less complicated and burdensome than those included in the supplemental proposal. EPA believes that monitoring of opacity, along with monthly certification that the dust suppressant systems were operational and that control system manufacturer's recommendations were followed, are not unreasonable or overly burdensome requirements and, thus, they are included in the final rule.

3.5.8.2 Electronic Compliance Data Reporting to EPA Data Base

Comment: Two commenters (109 and 117) stated they did not object to the proposed reporting requirement for affected owners/operators to be able to enter data from their performance evaluations conducted at their plants to demonstrate compliance with the applicable Subpart Y standards electronically into an EPA database (identified as WebFIRE). These commenters requested that once the data base is operational the reporting to WebFire on an annual or quarterly basis should be optional for affected owners/operators and more guidance provided by EPA regarding whether electronic reporting applies to all tests, including Method 22 tests, or just PM performance tests. Several other commenters (087, 092, 099, 119, 130 and 108) specifically object to this specific reporting requirement. Commenter reasons for opposing the proposal are collectively summarized below.

- Electronically reporting Method 22 test results, including daily observations, would be unnecessarily burdensome for affected owners or operators.
- EPA's recently amended subpart OOO regulations do not require submission of test results to WebFIRE.

- EPA must comply with the ICR requirements of the Paperwork Reduction Act (PRA). Yet, EPA has certified that the proposed amendments, including this new reporting requirement that is intended to reduce EPA's burden, "result in no changes" to the information collection requirements of the existing standards of performance and therefore have no impact on the existing estimates.
- EPA must address whether the proposed reporting meets the requirements of the Cross-Media Electronic Reporting Rule (CROMERR), which is codified at 40 CFR Part 3.
- EPA has not provided sufficient justification for requiring that all of these data be reported electronically, rather than merely standardizing where results are sent and in what form.
- EPA has not provided any information on the proposed electronic reporting format to understand what sort of burden this requirement would impose and whether the requirement is more or less burdensome than other forms of reporting.
- EPA has not provided any mechanism for sources to confirm the authenticity of data submitted to this website for their facility by a stack testing company.
- EPA does not expect WebFIRE and the ERT to be operational until early 2011, and that EPA "expects" the ERT also to be CROMERR compliant before 2011 (EPA-HQ-OAR-2005-0031-0284, p. 9). Finalizing a regulatory requirement based on an "expectation" of what will have occurred two years from now is not appropriate.
- EPA should proceed with its plans for development of WebFIRE/ERT and allow sources the option to report electronically with those tools when it becomes available. If WebFIRE does become available in the future, and EPA still believes that mandatory electronic reporting through WebFIRE is appropriate, EPA can re-propose the requirement with the required detail and accompanying ICR. In the meantime, EPA must provide sources the option of continuing to submit reports by mail after 2011, just as EPA did in Subpart Da (section 60.49Da(v)(4), 74 FR 5072 and 5083, dated January 28, 2009).
- The ERT does not currently accept opacity data or CMS data. So there appears to be no ability to utilize the collected monthly Method 9s, or daily Method 22 data. Additionally, Method 22 does not actually generate opacity data. The method specifies that it is a determination of the period of time emissions are generated.
- EPA stated in the preamble that entry required access to the internet and is expected to be completed by the stack testing company as part of the work they are contracted to perform; however, §3.10(b) requires that the person submitting an electronic document must be a responsible official or delegated responsible official to sign the compliance reports. By this definition, a contractor does not qualify as a delegated responsible official and thus the expectation by EPA that the contractor enter data is WebFire is a serious judgment error.
- Under 42 USC 7411(b)(1)(B), the EPA is required to conduct 8-year reviews. It is irrational and burdensome for EPA to expect affected facilities to maintain 8 years of data when the CAA requires companies to keep data for a minimum of 5 years especially because the EPA waited 30 years to do a review of Subpart Y. It is also irrational for the EPA to believe that mandating on the industry the redundant reporting of "data already collected for other purposes" save industry time and money. Therefore, requiring mandatory electronic reporting should be considered arbitrary and capricious because the EPA has failed to

provide a rational connection between the basis of fact presented in the preamble and the decision to promulgate the electronic reporting rule on industry only.

- EPA's decision to promulgate the electronic reporting requirement for NSPS by the authority under 42 USC 7401 is arbitrary and therefore must be completely removed from this rulemaking. EPA would best utilize it resources for the next two years developing an electronic data exchange with the state/local/tribal agencies to get the performance test data you desire. This would truly be the most cost effective method, remain consistent with the spirit and intent the Congress has for the CAA, and keep EPA and industry in line with the regulations.
- When the title V was promulgated, it was Congress's clear intent that title V permits contain monitoring, recordkeeping, and reporting requirements and be a one, central document that lists all applicable requirements from all air programs from Federal and States regulations. That program was delegated to most state/local/tribal agencies with intention simplifying compliance activities for both the regulators and regulated communities. EPA has failed to consider that a large majority of entities subject to Subpart Y are also subject to multiple NSPS's. Without modifying the title V program and the underlying state implementation plans (SIPs), as required by proper rule making, confusion about which performance tests to submit to EPA is to be expected.
- EPA is using CAA Section 111 authority to collect data when in the past the EPA has always used CAA section 114. This makes section 114 unnecessary and section 111 is overstepping its authority to require the collection of this data.

Response: The commenters are correct that the Agency does not intend to store visible emissions or continuous parametric (CMS) operating data used for compliance on WebFIRE. Source owners and testers need not submit visible emissions or CMS data to WebFIRE or any other national database. The source owners must address only those data reporting and record keeping requirements relevant to compliance determinations and certifications (e.g., operating permitting requirements). In this rule, we intend that source owners submit to WebFIRE pollutant emissions data particularly those data from performance tests for PM or other pollutants. The purpose of WebFIRE is to be the vehicle for making such data available for use in establishing the most representative emissions factors for use in developing effective national and regional emissions inventories and other purposes. With this provision, the Agency is exercising the authority provided under CAA section 114(a)(1) to have sources collect and submit environmental data needed to implement the Act.

3.6 Petroleum Coke

3.6.1 Applicability of Subpart Y to Petroleum Coke Producers

Comment: Many commenters (087, 089, 090, 098, 099, 104, 105, 111, 117, 118, 119, 130, and 127) objected to EPA extending the applicability of Subpart Y to facilities producing petroleum coke by adding petroleum coke to the subpart Y definition of "coal". The emission standards in the proposed rule appear to have been developed primarily for coal processing plants, and do not seem to reflect the differences between coal and petroleum coke, or contemplate the emissions associated with petroleum coke handling operations. Without more information on these emissions, it is inappropriate for EPA to broaden the definition of coal to include petroleum coke

at this time. Commenters recommend that EPA not expand the definition of coal to include petroleum coke in this rulemaking. If petroleum coke is included, several commenters recommended specific petroleum coke operations to be specifically exempted from being subject to subpart Y. Reasons stated by commenters are summarized below.

- Petroleum coke is a petroleum product that should not be subject to a rule (i.e., NSPS subpart Y) intended to pertain to standards of performance for coal preparation and processing plants. Facilities that are co-located or adjacent to a refinery and manufactures, treats, stores, consumes as a feedstock, or loads petroleum coke should be exempt. The definition in section 60.251 should be changed to specifically exclude petroleum refineries and co-located or adjacent cogeneration, gasification and calcining operations.
- Petroleum refining operations that include petroleum coke production have already been reviewed by EPA, and numerous NSPS rules have been promulgated to ensure protection of public health and the environment. The petroleum refining industry is regulated by two separate MACT rules specific to air emissions from process units, including petroleum coke production, and in both rules EPA found that the handling, transport, treatment and storage activities of petroleum coke production processes are fully protective of public health and the environment. Refinery petroleum coke operations are also regulated through the new source review (NSR) permitting process to ensure compliance with NAAQS for PM. NSR construction permits outline numerous BACT operating practices and limitations designed to control PM emissions, including requirements such as applying dust suppression to petroleum coke storage piles, limiting overall size of storage piles, ensuring conveyor systems are covered, etc. New and modified coke handling operations are required to employ BACT controls to limit PM emissions from the same emission sources EPA intends to regulate under the proposed Subpart Y amendments (see EPA RACT/BACT/LAER Clearinghouse). Consequently, further regulation of these refinery sources under this proposed NSPS amendment is unnecessary and will not reduce emissions based on the control options contained in the proposed rule. Several states already regulate PM from petroleum coke calcining and terminal facilities, making further regulation unnecessary.
- EPA did not provide adequate notice that petroleum coke manufacturing equipment (e.g., refinery coker units) was being considered for new standards.
- EPA neither gathered or requested data to determine if petroleum coke manufacturing equipment should be included in the affected sources subject to Subpart Y. Petroleum coke calcining and terminal facilities, where petroleum coke is neither processed alongside coal, nor used as industrial or utility boiler fuel in their list of processes are not supported in EPA's rationale. No data was gathered to determine if a standard is warranted for these sources and if a standard can meet the cost-effectiveness criteria required under the CAA provisions.
- Standards for coal processing, conveying equipment and storage systems and transfer system operations are not suitable for petroleum coke. Preparing and processing petroleum coke at calcining and terminal facilities is different from preparing and processing coal. Transfer facilities at petroleum refineries and terminals that screen, crush and transfer petroleum coke, could by the proposed amendment to Subpart Y be classified as a "coal preparation and processing plant" and subject to Subpart Y. Equipment used in the manufacture of petroleum coke as a by-product of coker operations should be specifically excluded from Subpart Y. This equipment includes coke drums, cutting equipment and pit/pads/railcar dumping at

delayed coker units and fluid coking units. These production processes are essentially the corollary of the "mining operation" for coal.

Response: Based on a review of the comments received and because of the limited amount of currently available data, EPA has decided not to include "petroleum coke" in the subpart Y definition of "coal" at this time. EPA plans on obtaining additional data on petroleum coking activities at petroleum refineries through current actions on the refinery NSPS review (40 CFR 60 subpart J). In addition, additional data will also be obtained on petroleum coke activities at end-user locations (e.g., coal-fired power plants).

3.6.2 Applicability of Subpart Y to Petroleum Coke Users

Comment: Two commenters (105 and 118) suggested that EPA change the approach to include end-user petroleum coke processing in the existing NSPS for "Coal Preparation and Processing Plants" by retaining the existing definition of coal and adding petroleum coke as a separate material with associated provisions. If EPA expands the source category by including facilities that handle only petroleum coke (and not coal), it should do so only for end-users of petroleum coke used as fuel. This should be accomplished by changing the source category name to include petroleum coke in the title (i.e., Coal and Petroleum Coke Preparation and Processing Plants). Commenter 98 also suggested that EPA include in the preamble to the final Subpart Y rule a clarification to the effect that Subpart Y does not apply to any of the "affected facilities" set forth in Subpart Y that are located at petroleum coke calcining and terminal facilities, or any other facilities where petroleum coke is not used interchangeably with coal as a boiler fuel.

Response: See response to comment 3.6.1.

3.6.3 Petroleum Coke Calciners are not Coal Thermal Dryers

Comment: Many commenters (090, 098, 104, 105, 111, 118, and 127) presented arguments that petroleum coke calciners are not same as a coal thermal dryers, and therefore it is inappropriate to apply the Subpart Y thermal dryer standards to coke calciner. The purpose and function of a petroleum coke calciner is to fundamentally change the material by rearranging carbon molecules. Thus, it acts as a reactor, not a "dryer". Calciners in the petroleum industry operate at much higher temperatures than typical coal dryers would and intuitively would have different emission profiles. Petroleum coke calciners use different methods than coal thermal dryers to control PM emissions. For example, many petroleum coke calciners use thermal oxidizers for PM control at high temperatures (~2,200 °F) and cannot use filter fabric filters. The NSPS for Calciners and Dryers in Mineral Industries under 40 CFR 60 subpart UUU makes the distinction between dryers and calciners. EPA should clarify that the manufacturing of petroleum coke is not included in NSPS Subpart Y and that petroleum coke manufacturing equipment (e.g., refinery coker units) is not considered an affected facility for purposes of Subpart Y. EPA should categorically exclude these operations from the applicability of this NSPS.

Response: EPA does not intend for coke calciners to be Subpart Y affected facilities. The Subpart Y definition of "thermal dryer" only covers equipment that reduces the moisture content through contact with a heated gas stream and not equipment that produces a chemical change in the material. However, as noted in the response to comment 3.6.1, petroleum coke will not be included in Subpart Y at this time.

3.6.4 Definition of Fugitive Emissions

Comment: One commenter (111) stated that there is no definition of "fugitive emissions." In petroleum refineries, that typically means emissions of volatile organic compounds from non-point source leakage. However, in this case, it appears to relate to entrained coal dust. However, to avoid confusion, a definition should be added to make it clear that the term refers to "coal" dust whenever the term is used in this rule.

Response: EPA will clarify that the term "fugitive emissions," as it is used in Subpart Y, refers to fugitive PM emissions rather than fugitive VOC emissions.

3.7 Subpart Y Amendments Impact Analyses

3.7.1 Cost and Economic Analyses

Comment: One commenter (093) stated that the supplemental proposal continues the same inadequate approach to consideration of the costs and environmental, energy, and economic impacts of amendments to the Subpart Y NSPS. Even though the supplemental proposal greatly expands the coverage of the Subpart Y NSPS, both in terms of operations covered and in terms of pollutant regulated, EPA asserts that it will not increase control costs or recordkeeping and reporting costs above those of the April 2008 proposal. That simply is not credible, and the two short paragraphs in the supplemental proposal do not satisfy EPA's obligations under CAA section 111 nor under the Regulatory Flexibility Act and Executive Order 12866. EPA should evaluate the costs and emission reduction benefits of the proposed standards, rather than just incorrectly assuming the costs away. The commenter stated that their July 14, 2008 comments took issue with EPA's assumption that the proposed amendments to the Subpart Y would have little economic impact because "the controls presently required by State permitting authorities are equivalent to what would be required by the proposed amendments; therefore, the primary impact resulting from the proposed amendments to Subpart Y for coal preparation facilities is a slight increase in recordkeeping costs for new units subject to subpart Y" (73 FR 22907). Because of the definitions of "modification" and "reconstruction" as applied to NSPS, a coal preparation plant at a cement manufacturing facility may be considered "modified" or "reconstructed," and therefore subject to the amended Subpart Y, even when the activity that constitutes a "modification" or "reconstruction" results in little or no increase in actual emissions. Under these circumstances, State regulations may not impose any particular control technology requirement (such as Best Available Control Technology), and State permitting authorities may not require (and may not even have authority to require) emission limitations that would be equivalent to the proposed amended Subpart Y limitations.

Response: EPA has assessed the costs, economic, environmental, and energy impacts associated with the requirements of the final rule. Control costs and recordkeeping and reporting costs have been estimated for each coal preparation and processing operation and each pollutant regulated for each operation. As previously explained in this document, in-line coal mills at Portland cement manufacturing plants are not regulated by Subpart Y. Impacts for coal handling operations that would be regulated by Subpart Y and are located at a Portland cement manufacturing plant have been estimated.

Comment: Two commenters (100 and 101) stated that the NSPS must reflect "the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated" (Section 111(a)(1), 42 U.S. § 7411(a)(1)). Yet, EPA has failed to adequately analyze the costs associated with the implementation of various control technologies, and has failed to explain why existing and adequately demonstrated technologies that EPA itself acknowledges achieve greater emission reductions have not led to the adoption of more stringent NSPS in the proposed rule. In several instances, the proposed rule cites certain costs; however, the proposed rule fails to analyze why costs are too high and how the costs of control technologies compare to environmental costs resulting from increased pollutants. An example is that existing plant layouts and equipment make it more expensive to reduce emissions than from new units or new plant layouts. EPA relies on this statement to justify lower emissions rates for modified or reconstructed units. Another example is the EPA concluded that costs of scrubbing units were too high for smaller plants to utilize to reduce emissions and without further analysis stated that they do not constitute BDT for this source category. This commenter gives other examples as part of their comment including the cost of environmental harm versus the cost of available emission reduction technologies. Because Section 111(a)(1) specifically requires EPA to perform a cost analysis and to consider any "health and environmental impact" of its actions, EPA's failure to conduct this analysis (and adjust its NSPS accordingly) violates the requirements of the CAA.

Response: As noted in the previous comment response, EPA has assessed the costs, economic, environmental, and energy impacts associated with the requirements of the final rule. The case law requires EPA to consider economic costs. However, the Court has rejected arguments that the Administrator is required "to prepare a quantified cost-benefit analysis, showing the benefit to ambient air conditions as measured against the cost of the pollution devices." Portland Cement v. Ruckelshaus, 486 F.2d 375, 387 (1973).

3.7.2 Environmental Impacts of Chemical Dust Suppressant Use

Comment: Two commenters (095 and 096) stated that EPA must evaluate the full range of environmental impacts posed by the use of chemical dust suppressants before requiring or allowing their use for dust suppression at coal preparation plants, and should provide guidance on the most effective use of wet suppression. EPA's own internal report on the environmental impacts of dust suppressants identifies several potential impacts, including: "surface and groundwater quality deterioration; soil contamination; toxicity to soil and water biota; toxicity to humans during and after application; air pollution from volatile dust suppressant components; accumulation in soils; changes in hydrologic characteristics of the soils; and impacts on native flora and fauna populations." Not all chemical dust suppressants operate in the same way – or pose the same threat to the environment. EPA report lists several major categories of dust suppressants, including "hygroscopic salts, organic petroleum-based, organic nonpetroleum-based, synthetic polymer emulsions, electrochemical products, mulches of wood fiber or recycled newspaper, and blends that combine components from the major categories." EPA report concludes that "[a]pplication of all types of chemical dust suppressants should not be ruled out or permitted under all conditions." By including the generic use of unspecified chemical dust suppressants as an acceptable "work practice standard," however, the supplemental proposal

violates the report's recommendation and adopts exactly the sort of broad brush approach warned against. Instead, EPA must provide more detailed guidelines on the acceptable uses of chemical suppressants, and should incorporate the report's instructions that "[a]pplication of chemical dust suppressants should be avoided near sensitive environments, near water bodies and fractured rock, in areas with a shallow groundwater table, and other areas where water could quickly reach the saturation zone," and that "[s]ite specific characteristics should be considered when approving the use of dust suppressants." At the very least, EPA's work practice standards must identify those categories of dust suppressants and application methods least likely to cause environmental impacts at coal preparation plant facilities. The commenter recommends that only suppressants with OSHA compliant Material Safety Data Sheets (MSDS) be allowed, and that the MSDS be included in the fugitive dust plan. The amendment to the NSPS must also require state permitting authorities to consider non-air quality environmental impacts when reviewing fugitive dust plans that call for the use of chemical suppressants.

Response: EPA considers the commenter's recommendations that where chemical dust suppressants are to be used as a control measure to minimize fugitive coal dust emissions, (1) only chemical dust suppressants with OSHA-compliant MSDS be allowed; (2) that the MSDS be included in the fugitive coal dust emissions control plan; and (3) that the permitting authority should, on a case-by-case basis, consider site-specific impacts (e.g., water run-off, water quality concerns) associated with use of chemical dust suppressants when reviewing each plan to be valid and has modified the regulatory language accordingly. EPA notes, however, that we are not requiring the use of chemical dust suppressants. Instead, section 60.254 includes "chemical dust suppression agents" in a list of possible measures to control fugitive emissions from open storage piles. Section 60.254 also provides that "the fugitive emissions control plan must describe the control measures the owner or operator shall use to minimize fugitive emissions from each affected facility addressed in the plan, and explain *how the measures are applicable and appropriate for the site conditions.*" It is possible that some of the measures included in the list of control measures for open storage piles may not be appropriate for some site conditions. For this reason, commenters' statement that the supplemental proposal adopts a "broad brush approach" is incorrect. Although the regulatory text identifies chemical dust suppressants as a possible control option, it also requires the owner/operator to explain how the measures selected are applicable and appropriate for the site conditions. The rule thus explicitly provides for the consideration of site specific characteristics. EPA believes that it is inappropriate to prescribe more detailed guidance on the use of suppressants. Rather, EPA believes that the Subpart Y requirement is sufficiently detailed as written.

3.7.3 Information Collection Request (ICR) Burden Analysis

Comment: Several commenters (084, 086, 093, and 095) were received regarding EPA's approach to analyzing the ICR burdens of affected owners and operators that would result from the implementation of Subpart Y amendments proposed in the supplemental proposal notice. The supplemental proposal preamble stated that EPA did not prepared a new ICR because the supplemental proposal does not result in additional recordkeeping and reporting requirements beyond those that existed in the April 2008 proposed rule (74 FR 25319). To the contrary, commenters state that EPA has grossly underestimated the annual monitoring, reporting, and recordkeeping burden for the effort of the increased monitoring and opacity performance testing for specified affected facilities because it will significantly expand the number of visual emission

evaluations that operators will be required to perform using Methods 22 in addition to the more complex sequence of required Method 9 tests. These existing ICR estimates do not take into account significant additional monitoring requirements contained in the proposed new amendments. Commenters believe that EPA's approach to analyzing the ICR burdens associated with that rulemaking is inconsistent with the directives of the Paperwork Reduction Act, and fails to address the actual burdens that will result from the amendments proposed in the supplemental action. Commenters request that EPA to prepare a new ICR for the May 2009 supplemental proposal that accurately projects the burdens associated with the most recently proposed requirements for monitoring, recordkeeping and reporting.

Response: EPA submitted a revised ICR to the Office of Management and Budget along with the promulgation package for the final rule. The revised ICR addresses all revisions to the Subpart Y NSPS made in the final rule – both those proposed in the April 2008 proposal and those proposed in the May 2009 supplemental proposal

3.8 Regulatory Text Clarifications

3.8.1 Subpart Y Title

Comment: Many commenters (085, 088, 095, 107, 112, 115, and 120) stated that EPA proposed to add "processing" to the title of subpart Y. Although EPA indicated in the preamble that it did not intend to change the applicability of Subpart Y, the commenters are concerned that EPA has not adequately justified the need to make the change. Subpart Y already defines "processing equipment" as "machinery used to reduce the size of coal or to separate coal from refuse." Despite EPA's stated intentions, the risk exists that EPA, in future applicability interpretations, will determine that additional, non-preparation operations meet the meaning of processing, and will thereby bring them under Subpart Y purview. To avoid confusion, EPA should remove "processing" from the title.

Response: In the preamble to the supplemental proposal, EPA indicated that the proposed title change was for clarification purposes (i.e., to more accurately reflect the affected facilities subject to subpart Y). The affected facilities covered by Subpart Y since its 1976 promulgation have included both preparation and processing units. We do not intend the title change to have any impact on the extent of EPA's authority to regulate specific affected facilities now or in the future. The final action promulgates the proposed title change "Standards of Performance for Coal Preparation and Processing Plants."

3.8.2 Use of Term "Coal Handling"

Comment: Many commenters (085, 088, 095, 107, 112, 115, and 120) stated that EPA uses the term "coal handling" repeatedly in the preamble to the supplemental proposal. The term, however, is not defined. In previous submissions to EPA on this rulemaking, commenters have used the term "coal handling" to describe coal processing equipment, coal storage systems, and coal transfer and loading systems. We are concerned, however, that EPA's use of the term in the proposal is not necessarily limited to these designated facilities, and that the meaning of the term could be expanded in future applicability interpretations to include activities beyond the currently designated affected Subpart Y facilities. In developing NSPS, EPA should specifically

name each type of affected facility in the subpart that is subject to promulgated standards. EPA's use of the term "coal handling" in the preamble negates the specificity required for establishing NSPS.

Response: EPA has clarified the "coal handling" as appropriate in the final action's text.

3.8.3 Subpart Y Rule Citation Errors

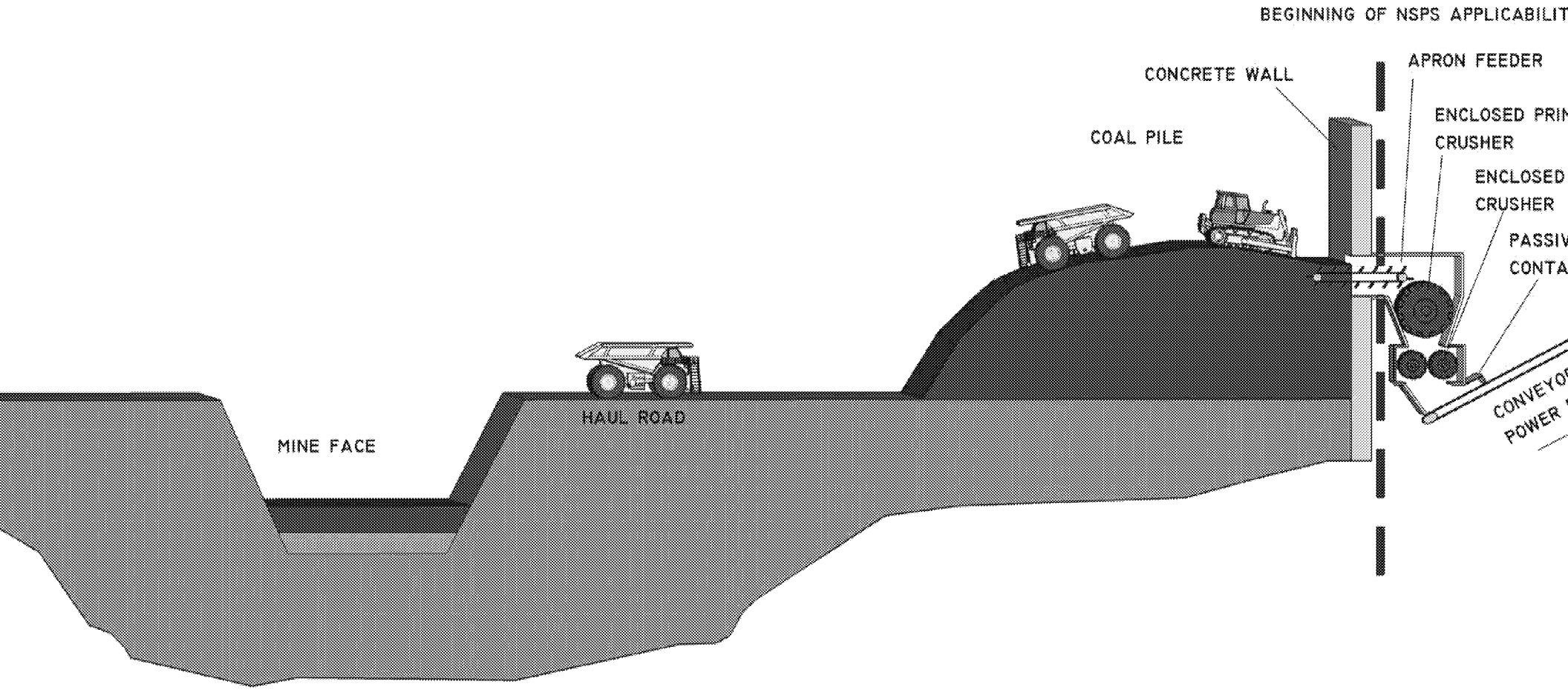
Comment: One commenter (114) stated that section 60.255(c) discusses paragraphs (c)(1) through (4). There is no paragraph (c)(4).

Response: EPA appreciates the commenter pointing out the citation error. The error has been corrected in the final regulatory text.

3.9 Other Comments

Comment: One commenter (099) in reference to their comment on the Subpart Y proposed amendments presented in Section 3.5.1.3 of this document stated that they previously submitted the same comment to EPA on a similar provision in the proposed amendments to the Electric Utility Steam Generating Unit NSPS under 40 CFR 60 subpart Da, section 60.48Da(o)(1) (73 FR 33642 and 33650; June 12, 2008). When EPA finalized the provision in Subpart Da, EPA stated only that it had "concluded" that it is appropriate for owners/operators to be required to submit case-by-case requests in those instances (EPA-HQ-OAR-2005-0031-0284, p. 11). If EPA reaches the same conclusion for the provision in Subpart y that was made by EPA for subpart Da, then the commenter requests that EPA explain the reasons for that conclusion. The commenter can think of no reason why a delay of testing would be any less justified, or the consequences of delaying testing any greater, for a facility that experienced an unexpected outage, or that operated for just a few days, than for a facility that did not operate at all for 60 days before the testing deadline.

Response: As explained in the response to comment 3.5.1.3, EPA continues to conclude that it is appropriate to require owners/operators of units that are shutdown and not operating on the due date of the performance test, with the exception of units that have not operated for the 60 calendar days prior to the performance test due date, to submit waiver requests. EPA believes it is inappropriate to allow a delay in PM performance testing for "any unit that is shutdown and not operating on the due date of the performance test." Because there can be various reasons for a unit to be shutdown and not operating at the time a performance test is required, EPA considers it imprudent to provide a general waiver allowing a delay in testing for these units. In order to consider the merits of each situation, EPA believes it is appropriate to require case-by-case waiver requests for situations where an affected facility is shutdown and not operating on the due date of the performance test, with the exception of affected facilities that have not operated for the 60 calendar days prior to the performance test due date.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CONTA
HAUL ROAD
MINE FACE
CONVEYOR
POWER

MEMORANDUM

From: Christian Fellner

To: Coal Preparation NSPS Docket (EPA-HQ-OAR-2008-0260)

Date: May 2009

Subject: Technical Support Document for Particulate Matter and Opacity Standards for Coal-Handling Equipment

Introduction

In the April 28, 2008 proposal (73 FR 22901), we concluded that a fabric filter (baghouse) was the best demonstrated technology (BDT) for controlling particulate matter (PM) emissions from coal-handling equipment processing subbituminous and lignite coals. That determination provided the basis for the proposed PM and opacity standards, and also for our proposal requiring that coal-handling equipment processing subbituminous and lignite coals be vented (i.e., connected to a duct or stack) such that a PM performance test could be conducted on the contained exhaust gas stream. Multiple commenters disagreed with our BDT determination for several reasons. First, they noted that the use of baghouses to collect subbituminous coal dust presents potential safety concerns, citing numerous injuries and deaths that have occurred from explosions and fires at facilities using such controls. For this reason alone, the commenters argued that EPA should not use a baghouse as the basis for the emissions rate. Second, their comments noted that although the use of baghouses frequently results in low stack grain loadings, the practice of returning the collected dust to the conveyor belt may cause potential problems with fine coal dust emissions later in the coal handling process, decreasing their overall effectiveness. Finally, commenters identified multiple State best available control technology (BACT) determinations that allow sources to remove existing baghouses and replace them with passive enclosure containment systems (PECS), fogging systems, or wet extraction scrubbers. Neither PECS nor fogging systems can be vented, so the requirement to conduct a PM performance test conflicts with such State BACT determinations.

Based on our review of public comments and subsequent analysis, we have concluded that a baghouse is not the only technology that is BDT for coal-handling equipment used on subbituminous and lignite coals. Depending on the plant-specific circumstances, all four of these technologies – fabric filters, PECS, fogging systems, and wet extraction scrubbers – can control PM emissions equally well. They all provide equivalent levels of emissions reductions; in addition, fogging systems, PECS, and the wet extraction systems often have lower costs than baghouses. For this reason, and as explained further below, we are no longer proposing to require that all emissions from such facilities be vented and are proposing PM and opacity limits for coal-handling operating based on the level of reduction achievable by these four technologies.

In the April 2008 proposal, we also determined that the use of chemical suppressants was BDT for coal-handling equipment processing bituminous coal. This determination also provided a basis for the proposed PM and opacity limits. Multiple commenters disagreed with that determination, stating that wet suppression is often used to control fugitive PM from coal-handling operations processing bituminous coal and that this control approach results in limited visible emissions from the operation.

Based on our review of public comments and subsequent analysis, we have reaffirmed our determination that BDT for coal-handling equipment processing bituminous coal is the use of chemical

suppressants. The proposed opacity limit is based on that BDT determination. However, it is important to note that although our BDT analysis identifies a specific technology as BDT, the actual requirement in the rule is an opacity limit, and an owner/operator can use any combination of controls at a particular site as long as it demonstrates compliance with the opacity limit. The owner/operator is not obligated to use the specific technology identified as BDT.

Since the original proposal, we have performed an extensive data-gathering effort for both PM performance test data and opacity observations (both Method 9 and Method 22) on recently installed coal-handling equipment. We used both the 2005 and 2008 preparation plant surveys published in Coal Age magazine in combination with the Department of Energy mine survey to identify new coal preparation plants. We also reviewed recent coal boiler installations to determine if new coal-handling equipment was installed as part of the projects. After identifying candidate plants, we contacted the appropriate State environmental agencies in an effort to obtain copies of both the permit requirements and performance test data. States varied significantly in the resources available to respond to our requests. In addition, most State requirements are based on the use of Method 22 observations to detect the presence of visible emissions, and actual Method 9 performance test data are not required on a regular basis. In most cases, if visible emissions are detected, the owner/operator is required to fix the control equipment and/or adjust operations to eliminate the visible emissions. Finally, many of the new coal boilers identified were located at facilities that already had other coal boilers and were able to use the existing coal-handling equipment.

Affected Facilities

Open storage piles and coal dust associated with roadways are potentially significant sources of fugitive PM emissions. These sources are integral parts of coal preparation plants, located on contiguous or adjacent property, and under common control. As such, they are contained within the coal preparation (subpart Y) source category; however, they are not presently listed as affected facilities and are not presently regulated. In the April 2008 proposal, we requested comment on including requirements for open storage piles. We received comments both in support of and opposed to including requirements for open storage piles. In addition, we received comments in support of including requirements for the coal dust disturbed by, or released from, vehicle tires as vehicles move within the coal preparation plant. Based on our review of public comments and subsequent analysis, we have concluded that both open storage piles and vehicle tires are significant sources of potential fugitive PM emissions; however, neither operation lends itself to an emissions standard. Therefore, in this supplemental proposal we are proposing to establish work practice standards instead of an opacity or PM limit for these types of affected facilities.

Clean Air Act section 111(h) provides that if, in the judgment of the Administrator, it is not feasible to prescribe or enforce a standard of performance, EPA may among other things, promulgate work practice, design, or equipment standards. A determination that the emissions from the sources cannot be measured due to technological or economic limitations may be used to support a determination that it is not feasible to establish standards of performance. It is difficult and prohibitively expensive to measure actual PM emissions from individual open storage piles or roadways. Further, the size of open storage piles and the mobile nature of coal dust from vehicle tires on roadways make the use of Method 9 opacity observations unreasonable in many situations. For these reasons, the Administrator is proposing to determine that it is not feasible to establish an emissions standard for open storage piles or the coal dust associated with roadways. This determination would support the proposed work practice standards outlined below.

Based on this proposed determination, we are proposing to establish the following work practice standards for open storage piles and coal dust from roadways. We propose to require owners/operators of open storage piles and roadways associated with coal preparation plants to develop and comply with a fugitive dust emissions plan to control fugitive PM emissions. These fugitive dust plans must contain the following elements:

1. For open storage piles, we are proposing to require the fugitive dust plan to prescribe the use of a partial enclosure, chemical suppressants (including encrusting agents), wet suppression, a wind barrier, or a vegetative cover to control emissions.

2. All types of "coal processing and conveying equipment" at a coal preparation plant are part of the source belonging to the source category for coal preparation plants. However, since open storage piles were not previously affected facilities, unloading and conveying operations to an open storage pile were not considered "coal processing and conveying equipment." Only unloading operations that were directly loaded into receiving equipment are considered "coal processing and conveying equipment" and subject to an opacity limit. Because we are proposing to include open storage piles as an affected facility, the loading, unloading, and conveying operations of open storage piles would also be covered under the fugitive dust emissions control plan, but not subject to an opacity limit.

Open storage piles also include piles of coal that have been loaded into trucks, railcars, and/or ships. At this time, however, we are not proposing to require that the fugitive dust emissions control plan address emissions from these piles. We identified two potential control options for these piles: covers and chemical encrusting agents. However, we have determined it is not practical to require these controls. First, the majority of fugitive emissions occur while the coal is in transit outside the physical boundaries of the coal preparation plant. The emissions from the piles while they are at the coal preparation plant have not been shown to be significant. Second, it would not be economically feasible to require end users to cover the coal or spray chemical suppressants as the coal arrived on the property of the owner/operator and then proceed to unload the coal.

For roadways, we are proposing to require that the fugitive dust plan require the owner/operator to pave the roads, wet the road surface, sweep up excess coal dust, or install tire washes to remove entrained dust to control PM emissions.

Opacity Standard

In the April 2008 proposal, we proposed to amend the opacity limit for coal-handling equipment from the existing limit of less than 20 percent to less than 5 percent. Multiple commenters opposed that proposal for several reasons. First, the data used for the proposal were largely based on data collected from the nonmetallic minerals processing industry. In addition, commenters noted that because individual Method 9 opacity observations are made in increments of 5 percent, a less than 5 percent opacity limit would mean that the presence of any visible emissions would result in a violation. Commenters asserted that it would be difficult to guarantee that each affected facility will operate with no visible emissions at all times. Also, because the proposed standard is based on a 6-minute reading, there would be no opportunity for an owner/operator to fix a problem prior to being in violation of the standard. Further, because opacity from fugitive sources is more difficult to measure than from point sources, they argued that the less than 5 percent limit was unreasonable.

It is important to note that the April 2008 proposed limit of less than 5 percent opacity is not the same as a no visible emissions limit. A Method 9 performance test is one or more sets of 24 observations

taken at 15-second intervals over a 6-minute period. Because each observation is reported in 5 percent increments, a 6-minute average can includes both 0 and 5 percent opacity readings (or higher), as long as the average is less than 5 percent. In contrast, a "no visible emissions" limit for a Method 9 performance test would require all opacity readings to be 0 percent.

Nonetheless, based on our review of public comments and subsequent analysis, in this supplemental proposal we are proposing to change the opacity limit for all subpart Y coal-handling facilities to 5 percent. We gathered data on coal-handling operations at 25 coal preparation plants and the reported highest 6-minute average opacity reading was 5 percent for a recently installed facility. Therefore, we have concluded that this is an appropriate opacity limit for new sources.

We are also specifically requesting comment on whether an opacity limit of less than 10 percent is more appropriate than a limit of 5 percent. The data we collected were primarily from initial compliance tests, and we are requesting comment on whether the 5 percent limit is achievable on a long-term basis for all subpart Y coal-handling facilities under all operating conditions, including windy dry periods, and whether the limit provides an adequate compliance margin. We are also considering establishing different opacity limits for each coal-handling operation.

Finally, we are proposing to require periodic Method 9 performance tests to assure compliance with the 5 percent standard. However, to create an incentive for sources to operate with minimal visible emissions (visible emissions readings less than 5 percent of the time using Method 22) whenever possible, we are proposing to allow owner/operators of facilities with the most recent Method 9 performance test of 3 percent or less opacity to qualify for reduced monitoring requirements. Owners/operators of affected facilities operating with minimal visible emissions would be able to elect to perform periodic short opacity observations using Method 22 as an alternative to Method 9 performance tests. Facilities with visible emissions would have to perform periodic Method 9 performance tests and, therefore, would have an incentive to operate without visible emissions. We believe it is important to provide these incentives because the data we have gathered suggest that many affected facilities should be able to operate without visible much of the time if they are being properly operated and maintained.

PM Standard

In the April 2008 proposal, we proposed to establish a PM limit of 0.011 grams per dry standard cubic meter (g/dscm) (0.0050 grains per dry standard cubic foot (gr/dscf)) for coal-handling equipment processing subbituminous and lignite coals. We also proposed to require that all such equipment vent emissions such that mass PM emissions from the facility could be measured. Multiple commenters disagreed with the PM limit, saying that it is technically difficult to achieve at some locations and is more stringent than the BACT determinations from multiple State permitting authorities. In addition, commenters suggested we collect more PM emissions data specific to coal handling operations.

As described earlier, we have reconsidered our prior BDT determination and are now proposing to determine that four technologies – fabric filters, PECS, fogging systems, and wet extraction scrubbers – may be BDT, and we are establishing PM and opacity limits consistent with that determination. Only the fabric filter and wet extraction scrubber technologies are typically vented to a stack. PECS and fogging systems technologies rely on reduced air flow and as such could not be used if emissions are vented. Both PECS and fogging systems are designed around the concept of lower air velocities and sufficient residence time to allow the suspended coal dust to agglomerate and fall out of the air. Requiring venting of either PECS or fogging systems would conflict with the design criteria of both

approaches. In this proposal, we are proposing to establish both PM and opacity limits that would apply to all emissions that are mechanically vented, and an opacity limit that would apply to all emissions that are not mechanically vented.

Based on our review of public comments and subsequent analysis, we are proposing to change the proposed PM limit from 0.11 g/dscm (0.0050 gr/dscf) to 0.023 g/dscm (0.010 gr/dscf). The PM performance test data specific to coal-handling equipment ranged from 0.001 gr/dscf to 0.011 gr/dscf. Based on the performance test data, we have concluded that although 0.011 g/dscm (0.0050 gr/dscf) is achievable at some locations, it might not be achievable on a long-term basis for all affected facilities across the country. However, we have concluded that 0.023 g/dscm (0.010 gr/dscf) is achievable for all sizes of affected facilities and provides an adequate compliance margin to be consistently achievable on a long-term basis for control technologies that are vented through a stack. As shown in docket entries 3 and 35, this standard is also consistent with the majority of recently issued permits.

We continue to be interested in additional performance test data from recently installed fabric filters and wet extraction scrubbers and are considering a PM standard of between 0.020 g/dscm to 0.025 g/dscm (0.0090 gr/dscf to 0.011 gr/dscf) for the final rule. All the PM performance test data collected for this supplemental proposal is equal to or less than 0.025 g/dscm (0.011 gr/dscf). However, the source with the highest PM emissions concentration (the Wisconsin Public Service Corporation Weston 4 power plant in Wisconsin) has permit requirements in lb/hr of PM emissions and the design emissions rate of those fabric filters is unclear. All of the other PM performance test data, including the individual tests runs, are below the 0.020 g/dscm (0.0090 gr/dscf) limit.

VOC emissions

Water-based cleaning utilizes the difference in specific gravity to remove coal from ash and other non-combustable material. The process can use either water or a media (or suspension) of water combined with a heavy mineral, usually magnetite. A heavy mineral gives the suspension properties similar to a true heavy liquid, which improves the performance of the coal-cleaning separation process. The majority of coal-cleaning operations in the U.S. use water-based technologies; however, VOC emissions are minimal with either water-based process. In true heavy media separation techniques where organic liquids, slat and sugar solutions, and other liquids are used, VOC emissions could occur, depending on the properties of the media.

Surface-based separations must be used to clean smaller particles; water-based cleaning is impractical in these situation. Surface-based cleaning takes advantage of the differences in hydrophobocity between coal and minerals. In general, coals are hydrophobic (repelled by water molecules) and oleophilic (attracted to oil molecules). Minerals are hydrophilic (attracted to water molecules) and oleophobic (repelled by oil molecules). Froth flotation processes use a frother, typically an alcohol-based compound, and then bubble air through the system. Because they are oleophilic, coals tend to attach to air bubbles or oil droplets while minerals stay in the water solution or away from the oil. The coal-bubble aggregate floats to the surface and the minerals remain in the water and eventually sink to the bottom of the vessel to exit the cell through a tailings discharge. To increase the hydrophobicity of the coal, oil is added to coat the coal and enhance the coal-bubble attachment. In addition, a hydrocarbon solution, such as heptane, could be used to improve the separation process.

Some VOC emissions would be expected from surface-based coal cleaning techniques, the use of a true heavy liquid for separation, and other chemical cleaning approaches. However, the overwhelming majority of operations use water-based separation in the U.S. We have not included standards for

VOC emissions in this proposal because, at this time, we do not believe that we have adequate actual emissions data to support numerical standards. For this reason, we believe that any VOC emission limits would need to take the form of work practice standards. However, we currently do not believe that we have adequate information or data to develop work practice standards for VOC emissions from coal preparation plants. Two potential control technologies include a regenerative thermal oxidizer and VOC vapor phase adsorption equipment. However, because we do not have any data on the VOC emissions, we cannot calculate the cost-effectiveness or determine what level of control would be appropriate.

Table 1: Opacity Observations

Facility Name	Facility Type	State	Coal Processing or Handling Operation	Air Pollutant Control Equipment	Permit Opacity Limit	Observation Data Available for Facility	Year Data Collected	Method 9 Opacity Average Observed	Method 9 Highest 6-min Avg. Observed	Method 22 Visible Emissions (VE) Observed
Bowie # 2 Mine	Coal mine	CO	Wash plant bin	None identified	20%	Method 9	1994	0%	0%	
Willow Lake Mine	Coal mine	IL	Coal breaker	Enclosure	20%	Method 9	2002	0%	0%	
			Coal screen	Water sprays	20%	Method 9	2002	0%	0%	
			Coal conveyors	Enclosure with water sprays	20%	Method 9	2002, 2004	0%	0%	
			Coal/synfuel stacker conveyors	none identified	20%	Method 9	2002, 2004	0 to 3%	<20%	
			Trucking loading	Water sprays	20%	Method 9	2002	0%	0%	
Cannelburg Preparation Plant	Coal Mine	IN	Stoker raw coal hopper	None identified	20%	Method 9	1998	avg. not reported	0%	
			Dump into stoker plant	None identified	20%	Method 9	1998	avg. not reported	0%	
			Hopper outlet	None identified	20%	Method 9	1998	avg. not reported	<1%	
			Belt dump to second hopper	None identified	20%	Method 9	1998	avg. not reported	3.0%	
			Truck loading	None identified	20%	Method 9	1998	avg. not reported	11.2%	
Farmersburg Mine	Coal mine	IN	Main feed to preparation plant drop on screen to crusher (A1)	None identified	20%	Method 9	1997	11.0%	15.0%	
			Main feed to preparation plant drop on screen to crusher (A2)	None identified	20%	Method 9	1997	14.0%	17.0%	
			Main feed to preparation plant drop on screen to crusher (A3)	None identified	20%	Method 9	1997	1.3%	4.0%	
			Clean coal belt exit from prep plant belt to belt transfer 1 (B1)	None identified	20%	Method 9	1997	0%	0%	
			Clean coal belt exit from prep plant belt to belt transfer 2 (B2)	None identified	20%	Method 9	1997	0%	0%	
Franciso Mine	Coal mine	IN	Chute exit	None identified	20%	Method 9	1997	<1%	<1%	
			Belt transfer at top of rail load out	None identified	20%	Method 9	1997	0%	0%	
			Belt drop onto crusher	None identified	20%	Method 9	1997	0%	0%	
			Crusher exit	None identified	20%	Method 9	1997	0%	0%	
			Transfer point to clean coal conveyor	None identified	20%	Method 9	1997	0%	0%	
			Raw coal crusher (screen drop to crusher)	None identified	20%	Method 9	1998	1.0%	2.0%	
			Crusher transfer to belt	None identified	20%	Method 9	1998	0%	0%	
			Belt transfer point	None identified	20%	Method 9	1998	<1%	<1%	
Lyons Mine	Coal mine	IN	Raw Coal Crusher (screen drop to crusher)	None identified	20%	Method 9	1998	<1%	2.0%	
			Crusher transfer to belt	None identified	20%	Method 9	1998	<1%	2.0%	
			Belt transfer point	None identified	20%	Method 9	1998	4.0%	5.0%	
Monroe City Preparation Plant	Coal mine	IN	Raw coal transfer top	None identified	20%	Method 9	1997	0%	0%	
			Raw coal transfer bottom	None identified	20%	Method 9	1997	0%	0%	

			Clean coal loadout top	None identified	20%	Method 9	1997	0%	0%	
			Clean coal loadout bottom	None identified	20%	Method 9	1997	<1%	<1%	
			Truck Loadout	None identified	20%	Method 9	1998	avg. not reported	<1%	
Somerville Mine	Coal mine	IN	Drop onto screen to crusher	None identified	20%	Method 9	1998	<1%	<1%	
			Crusher exit to belt	None identified	20%	Method 9	1998	1.5%	4.0%	
			Surge Bin	None identified	20%	Method 9	1998	2.5%	5.0%	
			Exit to Belt	None identified	20%	Method 9	1998	0%	0%	
			Clean Belt Transfer	None identified	20%	Method 9	1998	0%	0%	
			Drop Point	None identified	20%	Method 9	1998	0%	0%	
			Drop onto screen	None identified	20%	Method 9	1998	<1%	<1%	
			Drop onto Belt	None identified	20%	Method 9	1998	0%	0%	
			Transfer point	None identified	20%	Method 9	1998	<1%	<1%	
Century Mine	Coal mine	OH	Coal conveyors towers (F001)	None identified	10%	Method 9	2006	0%	0%	
			Railcars (F001)	None identified	10%	Method 9	2006	2.9%	3.8%	
			Coal storage piles (F002)	None identified	No VE's Except for 1 min per 60 min	Method 22	2006, 2008	N.A.	N.A.	Observed no VE's
			Unpaved roadways (F003)	None identified	No VE's Except for 3 min per 60 min	Method 22	2006, 2008	N.A.	N.A.	Observed no VE's
			Coal crushing and cleaning operations (F004)	None identified	20%	Method 9	2006	0%	0%	
Mettiki Coal Mine	Coal Mine	MD	1500 TPH Double-bay Truck Dump	Enclosure		None reported				
			Rotary Breaker & Screening	Enclosure, water sprays		Method 9	2007	<1%		
Logansport Mine	Coal Mine	PA	Main Overland Belt from Mine Face			Inspection report	2006, 2007, 2008	No or "little" dust emissions were reported by state inspector from facility sources during site visits in 2006, 2007, and 2007. No Method 9 or Method 22 tests performed by inspector.		
			Coal Storage Piles			Inspection report				
			Short Radial Stacker to 50 ton Surge Bin			Inspection report				
			Con Weld Vibratory Screen			Inspection report				
Shade Creek Coal Mine	Coal mine	PA	Raw coal handling transfer			Inspection report	2005, 2006, 2008	No visible emissions were reported by state inspector from facility sources during site visits in 2005, 2006, and 2008. No Method 9 or Method 22 tests performed by inspector.		
			Dry screens			Inspection report				
			Product coal handling transfer			Inspection report				
			Raw plant coal breaker			Inspection report				
			Raw plant coal screen			Inspection report				
			Coal refuse are manipulation			Inspection report				
			Product coal storage			Inspection report				
			Coal sizer			Inspection report				

Buchanan Mine	Coal mine	VA	Coal preparation plant operations			Facility logs	2007	Facility logs for monthly periods in 2006, 2007, and 2008 completed by plant personnel recording visible emissions observed for a specific list of coal processing and handling operations emission points. Observations by plant personnel conducted once per week. No observations greater than 10% recorded in logs. Majority of 10% readings were consistently for the same emission point, a truck loading operation. For other emissions points, recorded observations generally were less than 5%. with an occasional reading between 5 and 10% for some emission points.		
McElroy Coal Mine	Coal mine	WV	Conveyors Drop Points	Wind covers	20%	Method 9	2003	0%	0%	
			Conveyor System	Weather covers	20%	Method 9	2003	0%	0%	
South Hollow Preparation Plant Facility	Coal mine	WV	Stoker Belt	Full enclosure	20%	Method 9	2004	0%	0%	
			Stoker Bin	Fixed Chute	20%	Method 9	2004	0%	0%	
			Load Out Belt	Full enclosure	20%	Method 9	2004	0%	0%	
			Load Out	Fixed-chute	20%	Method 9	2004	0%	0%	
			RC Belt	Full enclosure	20%	Method 9	2004	0%	0%	
			RC Belt	Full enclosure	20%	Method 9	2004	0%	0%	
			Silo Feed (RC)	Full enclosure	20%	Method 9	2004	0%	0%	
			Silo Feed (RC)	Full enclosure	20%	Method 9	2004	0%	0%	
			RC Silo	Full enclosure	20%	Method 9	2004	0%	0%	
			CC Silo Feed	Full enclosure	20%	Method 9	2004	0%	0%	
			CC Silo	Full enclosure	20%	Method 9	2004	0%	0%	
			Dump Bins	Full enclosure	20%	Method 9	2004	0%	0%	
			Truck Dumps	3-sided roofed enclosure	20%	Method 9	2004	avg. not reported	1.3%	
Winifrede Preparation Plant	Coal mine	WV	Bin (TP-03)	Full enclosure with water spray	20%	Method 9	2001	0%	0%	
			Unloading (TP-04)	Full enclosure with water spray	20%	Method 9	2001	0%	0%	
			Bin (TP-06)	Full enclosure with water spray	20%	Method 9	2001	0%	0%	
			Storage (TP-33)	Full enclosure	20%	Method 9	2001	0%	0%	
			CC Silo (TP-35)	Full enclosure	20%	Method 9	2001	0%	0%	
			Belt (TP-36)	Full enclosure	20%	Method 9	2001	0%	0%	
			Belt (TP-40)	Full enclosure	20%	Method 9	2001	0%	0%	
			Stoker Loadout (TP-41)	Fixed-height chute	20%	Method 9	2001	0%	0%	
			RC Silo #2(BS4) (TP-18)	Full enclosure	20%	Method 9	2001	<1%	<1%	
			Loadout (TP-37)	Telescopic chute	20%	Method 9	2001	<1%	<1%	
			Belt(BS3) (TP-14)		20%	Method 9	2001	0%	0%	
ABC Coke	Coke Plant	AL	Conveyor Belt Number 25A			Method 9	2004	0%	0%	
			Conveyor Belt Number 25B			Method 9	2004	0%	0%	
			Conveyor Belt Number 101			Method 9	2004	0%	0%	
			Conveyor Belt Number 102			Method 9	2004	0%	0%	
			Conveyor Belt Number 103			Method 9	2004	0%	0%	

			Conveyor Belt Number 104			Method 9	2004	0%	0%	
			Conveyor Belt Number 105			Method 9	2004	0%	0%	
Council Bluff Energy Center	Power Plant	IA	East coal silo coal conveying (ID# 014)	Fabric filter	40%	Method 9	2007	0%	0%	
			Coal transfer house #4 (ID #013)	Fabric filter	No VE's	Method 9	2008	0%	0%	
Red Hills Generation Facility	Power Plant	MS	Primary crusher and conveyors (AA-007)	Reverse air fabric filter	20%	Method 9	1998	0%	0%	
			Secondary crusher and conveyors (AA-008)	Reverse air fabric filter	20%	Method 9	1998	0%	0%	
			Coal bunker conveyors (AA-010)	Reverse air fabric filter	20%	Method 9	1998	0%	0%	
Hardin Generating Station	Power Plant	MT	Coal unloading	Fabric filter		Inspection report	2008	"No excess visible emissions" were reported by state inspector from facility sources during site visit in 2008. No Method 9 or Method 22 tests performed by inspector.		
			Coal silo	Fabric filter		Inspection report	2008			
			Coal storage bunkers	Fabric filter		Inspection report	2008			
TS Power Plant	Power Plant	NV	Rail car unloading	Fogging + Enclosure	20%	Method 9	2008	1%	not reported	
			Coal reclaim operations	Fogging + Enclosure	20%	Method 9	2008	7-9%	not reported	
			Coal crusher	Fabric filter	20%	Method 9	2008	0%	not reported	
			Coal deck tripper	Fabric filter	20%	None reported				
Seward Station	Power Plant	PA	Coal handling operations			Inspection report	2007	No Method 9 or Method 22 test performed by inspector. (rain reported at site day of inspection)		
Santee Cooper Cross Generating Station	Power Plant	SC	Coal bunkers (P19a-f)	Fabric filter	20%	Method 9	2007	0%	0%	
Springerville 3	Power Plant	AZ	Coal train unloading (BH1 – BH3)	Fabric filter	15%	Method 9	2007	0%	0%	
				Fabric filter	15%	Method 9	2007	0%	0%	
				Fabric filter	15%	Method 9	2007	0%	0%	
Neil Simpson II	Power Plant	WY	Coal silo top	Fabric filter		Facility logs	2008	Daily observation log records for 2008 completed by plant personnel whether or not visible emissions were observed. Visible emissions observed from source on 6 days in 2008 due to control device bag leaks. Corrective action returned operations to no visible emissions.		
			Coal silo bottom	Passive enclosure containment system (PECS)		Facility logs	2008	Daily observation log records for 2008 completed by plant personnel whether or not visible emissions were observed. No visible emissions observed from source in 2008..		
			Boiler building conveyors	Fabric filter		Facility logs	2008	Daily observation log records for 2008 completed by plant personnel whether or not visible emissions were observed. No visible emissions observed from source in 2008..		
DTE Utah Synfuels LLC	Synthetic fuel plant	UT	Coal screens	Water sprays	10%	Inspection report	2006, 2007	No visible emissions were reported by state inspector from facility sources during site visits in 2006 and 2007. No Method 9 or Method 22 tests performed by inspector.		
			Conveyor transfer points	Water sprays	10%	Inspection report	2006, 2007			
			Coarse coal crusher	Fabric filter	10%	Inspection report	2006, 2007			
			Thermal drying ovens (operation discontinued in 2004)	Fabric filter	10%	Inspection report	2006, 2007			
			Conveyor drop points	None identified	20%	Inspection report	2006, 2007			

Table 2: PM Performance Test Data

Company Name	Facility Name	Facility Type	State	Coal Processing or Handling Operation	Air Pollutant Control Equipment	Year Data Collected	Method 5 PM Test Average (gr/dscf)
Amax Coal Company	Belle Ayr	Mine	WY	Cooler Stacker	Fabric filter	1990	0.0064
Amax Coal Company	Belle Ayr	Mine	WY	Cooler Stacker	Fabric filter	1991	0.0078
Amax Coal Company	Belle Ayr	Mine	WY	Cooler Stacker	Fabric filter	1991	0.0089
Amax Coal Company	Belle Ayr	Mine	WY	Silo # 1	Fabric filter	1990	0.0034
Amax Coal Company	Belle Ayr	Mine	WY	Screen/Crusher	Fabric filter	1990	0.0052
Amax Coal Company	Belle Ayr	Mine	WY	Blender	Fabric filter	1990	0.0050
Amax Coal Company	Belle Ayr	Mine	WY	Blender	Fabric filter	1991	0.0042
Amax Coal Company	Belle Ayr	Mine	WY	Sample/transfer	Fabric filter	1990	0.0013
Amax Coal Company	Belle Ayr	Mine	WY	Load Out Silo	Fabric filter	1990	0.0061
Amax Coal Company	Belle Ayr	Mine	WY	Load Out Silo	Fabric filter	1991	0.0028
Kaiser Cement Corp.	Permanente Plant	Cement Plant	CA	Coal mill #1	not identified	1991	0.006
				Coal mill #2	not identified	1992	0.005
Haverhill North Coke Co.	Haverhill North Coke Co.	Coke Plant	OH	Coke screening	Fabric filter	2006	0.0014
Tucson Electric Power Company	Springerville 3	Power Plant	AZ	Coal train unloading (BH1)	Fabric filter	2007	0.0026
				Coal train unloading (BH2	Fabric filter	2007	0.0011
				Coal train unloading (BH3	Fabric filter	2007	0.0009
MidAmerica Energy Company	Council Bluffs Energy Center	Power Plant	IA	Rotary car dump (ID#006)	Fabric filter	2004	0.001
				East coal silo coal conveying (ID# 014)	Fabric filter	2007	0.001
				Coal transfer house #4 (ID #013)	Fabric filter	2008	<0.0010
Newmont Nevada Energy	TS Power Plant	Power Plant	NV	Coal crusher	Fabric filter	2008	0.0007
				Coal deck tripper	Fabric filter	2008	0.0010
Wisconsin Public Service Corp.	Weston 4 - North Side	Power Plant	WI	System 1 - New Reclaim Tunnel (P30)	Fabric filter	2008	0.0098
				System 2 - New Junction House (P41)	Fabric filter	2008	0.0085
				System 3 - New Junction House (P42)	Fabric filter	2008	0.0059
				System 4 - Unit Fill Silo System (P43)	Fabric filter	2008	0.0110